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THE INTERNATIONAL PROTECTION OF FUNDAMENTAL HUMAN RIGHTS:  
AN EXAMINATION OF THE ROLE AND EFFECTIVENESS OF  
INTERNATIONAL LAW IN THE ELIMINATION OF TORTURE

submitted by

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for the degree of  
Doctor of Philosophy (Ph.D.)

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## ABSTRACT

This study is primarily an examination of the role and effectiveness of international law in the protection of fundamental human rights, with specific reference to the prevention of torture. The basic theme of the study is that fundamental human rights involve the relationship between the state and the individuals over whom it has jurisdiction, so that the protection of such rights is essentially dependent on the restraint of national governments, but that international law is seriously restricted in ensuring the effective protection of human rights because the international legal system is founded on a concept of national sovereignty which rejects any direct intervention by the international community in the domestic affairs of independent states. Accordingly, it is only within the context of national legal systems that the imposition of restraints on governmental action in internal matters can be achieved, with the result that in practice the protection of human rights is ultimately dependent upon the existence and efficient operation of safeguards within the constitutional and legal framework of each sovereign state. The problem is, however, that as a result of a widespread rejection of the liberal view of human rights as inherent rights of the individual and the related notion of limitation of government, many national systems do not have democratic institutions and legal procedures which can ensure control over governmental action, while in other countries the use of emergency measures seriously undermines formal safeguards, and it is precisely this absence or erosion of guarantees which permits the systematic violation of human rights, including the employment of torture. On this basis, it is argued that the protection of human rights should not be dependent on the operation of

measures within individual states, but must be secured at the international level. It is recognised, however, that although international procedures have some value, the doctrine of national sovereignty deprives them of any real effectiveness when confronted by systematic violations of human rights, and it is the conclusion of this study that the effective protection of human rights by means of international law can only be achieved through a fundamental reappraisal of international legal concepts and a radical transformation of the international political order which will permit the genuine supervision of national governments by international agencies enjoying guaranteed constitutional status and authority in each sovereign state.

Chapter One relates the recent development of international concern over torture in response to an increase in its use, especially by governments for political purposes, and the disparity between the public condemnation of torture by governments and the clandestine authorisation of its use is explained by reference to the ideological rejection of the western liberal view of human rights, leading to diverse conceptions of human rights which do not, however, prevent a superficial consensus. It is argued that any international action must be based on an acceptance that certain rights are universal, and humanitarian rights are identified as the most suitable candidates, but the conclusion is reached that the different attitudes to human rights involve a rejection of the notion of limitation of government, with the result that even if humanitarian rights are recognised many systems lack the institutions necessary to uphold respect for them.

Chapter Two is a discussion of the historical development of torture, with particular emphasis on Roman law and its influence in

Europe from the 12th and 13th centuries, when judicial torture became institutionalised in the legal systems of continental Europe. The 18th century abolition of torture is also dealt with, and the conclusion reached is that while judicial torture has remained exceptional, the unlawful employment of torture has probably never been eliminated, and on a global scale has certainly increased dramatically in the last few decades. The chapter also contains a brief consideration of the definition of torture.

Chapter Three deals with the question of the possible justifiability of torture, firstly in relation to its use in obtaining confessions, secondly in relation to a few minor uses of purely historic interest, and thirdly in relation to the extortion of information. It is concluded that while torture cannot be justified for the purpose of obtaining confessions, since verification is not possible, there are circumstances in which a plausible argument in favour of the use of torture for the purpose of eliciting information can be made on utilitarian grounds. It is then argued, however, that the principal objection to torture is its inhumanity, and this is presented as a conclusive argument against any use of torture. The effects of torture are considered in support of this proposition.

In Chapter Four, there is an examination of the circumstances in which governments justify the use of torture in practice, and the assertion is made that the most common situation in which governments resort to such extreme measures is when there arises a serious threat to national security. It is noted that security forces require torture in these circumstances because of the difficulty in obtaining information about subversive activities, and that the rationale employed is that the end justifies the means, and it is pointed out

that essentially what is involved is the subordination of humanity to national security. The role of security forces in the practice of torture is considered, and the remainder of the chapter deals with the relationship between the breakdown of safeguards and the facilitation of torture. The effect of states of emergency in undermining normal legal guarantees is examined, especially in relation to detainees, and it is pointed out that in many countries the absence of safeguards is a permanent feature of the political system.

Chapter Five is a case study of events in the recent history of Uruguay, where a complete collapse of democracy occurred in the early 1970's, when emergency measures were introduced and a repressive regime embarked on the systematic violation of human rights, including the extensive use of torture. The case is presented as an illustration of the relationship between the effective protection of human rights and the existence of legal safeguards, and the subject is considered from the following angles: the background and the emergence of terrorist activity, the response of the authorities and eventual intervention of the armed forces, the effect of the emergency measures and the introduction of torture. A clear link between the erosion of safeguards and the introduction of torture is established.

In Chapter Six, existing international procedures for the protection of human rights are discussed, and the limitations on international measures are identified. It is recognised that international procedures do have some value, but it is made clear that the dependence of such procedures on prior acceptance by states and the lack of any real power on the part of international agencies prevent international law from playing an effective role in those situations where serious violations are perpetrated by regimes which

refuse to undertake obligations and co-operate with the agencies. The procedures established under the International Covenant on Civil and Political Rights and its Optional Protocol and pursuant to resolution 1503 of the UN Economic and Social Council are examined, with particular regard to their effect in relation to Uruguay, but in each case the conclusion is reached that although the procedures have some relevance, they are of very limited value and had little impact on the situation in Uruguay. The chapter ends with a brief discussion of the regional systems operating in Europe and the Americas.

In Chapter Seven, the three recently adopted international conventions dealing specifically with torture are discussed. The terms of the instruments are examined in some detail, and the opinion is expressed that since the procedures they create are broadly similar to existing ones and subject to the same limitations, they are unlikely to have any greater impact. It is recognised that certain novel measures are introduced, especially the application of universal jurisdiction to torture and the establishment of commissions of inquiry to visit places of detention, but the view is put forward that these measures do not overcome the fundamental problems. Attention is also drawn to the emphasis which the UN and OAS conventions place on the adoption of internal measures, and it is suggested that this reflects an acceptance of the limitations on international procedures.

In Chapter Eight, there is a discussion of the type of measures required at national level to ensure the prevention of torture, based on a detailed examination of the UN Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, which aims to specify the measures which must be adopted to prevent violations of human rights. Independent supervision of detention is

identified as a particularly important factor, but the point is made that the draft does not attempt to propose constitutional changes, which may in fact be necessary to ensure that the principles are upheld.

Chapter Nine consists of an examination of Codes of Conduct for different professions which may become involved in the practice of torture. It is accepted that such codes have a role in the overall international strategy to eliminate torture by promoting individual respect for humanity, but doubt is expressed as to whether they can have any significant impact. The professions specifically dealt with are law enforcement officials, the legal profession and medical personnel, and the subject of medical ethics is discussed at some length.

In Chapter Ten, the necessity of safeguards and the restraint of government is reiterated, and there is discussion of the limitations on international law created by the doctrine of national sovereignty, which prevents the imposition of mandatory obligations on states and the enforcement of conventional obligations when these relate to internal affairs. It is conceded that international law does have a role to play in the protection of human rights, but reaffirmed that it is ultimately powerless to secure effective protection in the absence of co-operation because no real sanctions are available. There is discussion of potential sanctions, but it is concluded that none of these are really viable under present conditions, and it is therefore asserted that if international law is to have any genuine effectiveness in relation to human rights it must concentrate on core rights on which some consensus can be attained, and a new concept of international involvement in national affairs

must be developed. In the final analysis, this involves the radical re-structuring of the international politico-legal system.



## CHAPTER ONE: INTRODUCTION

Since the Second World War, and at least partly in response to the atrocities which were perpetrated during that conflict, concern for human rights has flourished in the international arena, and numerous declarations and conventions relating to the subject of human rights have been promulgated, both under the auspices of the United Nations Organisation and at a regional level. One aspect of human rights which has attracted particular attention, especially in the last fifteen years or so, is the prevention of torture: all the major human rights instruments of general scope incorporate a prohibition on the use of torture, and recently the practice has been the object of more specific consideration.

Following the Second World War, torture was initially prohibited by article 5 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948.<sup>1</sup> The Declaration was intended to be only a statement of general principles rather than a legally binding instrument, and article 5 was consequently framed in fairly broad terms:

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

The formulation of more specific and clearly defined obligations, binding on states, was the function of the International Covenant on Civil and Political Rights, which was adopted in 1966 and came into force in 1976.<sup>2</sup> The provisions of this convention were intended to be somewhat more precise than those of the Universal Declaration, but article 7 of the Covenant in fact merely reiterated the wording of the

Declaration's prohibition of torture, although it did append one example of forbidden practices:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Prohibitions of torture appear also in the two major regional human rights conventions, the European Convention on Human Rights<sup>3</sup> and the (Inter-)American Convention on Human Rights.<sup>4</sup> Article 3 of the European Convention states:

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

The corresponding provision in the American Convention is article 5, paragraph 2, which states:

"No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

Moreover, although both these conventions and the International Covenant on Civil and Political Rights permit derogation from many of their provisions in time of war or other public emergency, the prohibition on torture is in each instance categorically excepted and is, therefore, absolute.<sup>5</sup> Regional conventions have not yet been fully developed in the other areas of the world, but attention should be drawn to the African Charter on Human Rights and Peoples' Rights,<sup>6</sup> article 5 of which provides:

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

The United Nations began to focus special attention on the whole issue of torture in the mid-1970's: the General Assembly condemned the practice in a number of resolutions<sup>7</sup> and requested the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to consider the question of torture. As a result of this, the General Assembly in December 1975 adopted resolution 3452(XXX), a Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. While this is not a legally binding resolution, its adoption does mark the commencement within the United Nations framework of an intensive programme aimed at the prevention and elimination of torture. A number of further developments subsequently took place: a Code of Conduct for Law Enforcement Officials was adopted in 1979<sup>8</sup> and a Code of Medical Ethics in 1982,<sup>9</sup> while draft principles for the protection of detained and imprisoned persons are currently under consideration.<sup>10</sup> These developments culminated in the adoption of a Convention against Torture in 1984,<sup>11</sup> and the appointment by the United Nations Commission on Human Rights of a Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment the following year.<sup>12</sup> Developments have also taken place within the regional systems: an Inter-American Convention to Prevent and Punish Torture was adopted in 1985, and a European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was adopted in 1987.<sup>13</sup>

The consistent prohibition of torture in absolute terms in such international declarations, resolutions and conventions, and the continuing efforts which are being made to develop measures for its effective prevention, might appear to indicate that there exists a

universal abhorrence of torture, on the basis of which the international community is engaged in a concerted endeavour to eradicate any last vestiges of an anachronistic practice which largely died out in the 18th century with the increasing enlightenment of modern man. One might therefore conclude that the re-emergence of torture during the Second World War produced a worldwide resolve which has ensured that the practice now occurs only in primitive cultural conditions and under-developed legal systems, or perhaps as isolated aberrations within civilised societies. Such a conclusion would, however, be quite erroneous. The fact is that the practice of torture is widespread in the world today: in 1973, Amnesty International's Report on Torture<sup>14</sup> identified over sixty countries and territories in which torture had allegedly been employed, and although important political developments have taken place in a number of the countries mentioned since the report was updated in 1975, a more recent survey indicates that there has in fact been an increase in the incidence of torture on a global scale.<sup>15</sup> Allegations continue to be made with regularity in the media, in human rights publications and in other related literature.

It is true that torture is not normally employed today in the same manner as it was in times past, that is as an integral and legally sanctioned feature of the judicial process, its purpose being to secure evidence admissible in criminal trial proceedings. On the contrary, not only is torture prohibited in international law, but it is also specifically or impliedly forbidden by the constitutions of many states, and in no country is its application expressly recognised by law as permissible.<sup>16</sup> No government asserts the right to inflict torture, and indeed virtually all governments publicly condemn the

practice of torture and at the diplomatic level express support for the international prohibition. The fact is, however, that a considerable number of governments authorise or condone the clandestine use of torture by their security forces, often in direct violation of national law as well as in contravention of international norms. The purpose of such torture is normally to elicit confessions or information, especially in circumstances where there is some difficulty in procuring evidence by conventional means. The security forces may require information purely to assist their own investigations, but they may also present evidence to the courts as having been lawfully obtained, thus circumventing the laws of evidence which establish the inadmissibility of statements elicited by coercion. The use of torture has frequently been regarded by security forces as particularly valuable in counter-subversive operations and, indeed, in some countries torture is employed routinely by the security forces as an integral component of systematic political repression. The international campaign against torture has to a great extent been a response to the increasing reliance by governments on the use of torture in this manner for the purpose of maintaining their political control. Many regimes makes use of torture, then, but none ever publicly admits to having authorised it.

Whilst at the diplomatic level there appears to exist a powerful international consensus against the practice of torture, then, a relatively high number of governments which ostensibly support the prohibition and claim to respect it at the same time wilfully violate it in practice by authorising or at least tolerating the clandestine and unlawful employment of torture by their security forces. This disparity between profession and practice is in fact applicable to

human rights on a more general level: many regimes pay only lip service to the ideals of fundamental human rights. Ostensible concern for human rights is projected through endorsement of non-binding resolutions and declarations, by criticism of the selected violations of other governments and even by ratification of legally binding conventions provided this does not involve submission to any measures which might prove a threat to the international image of respectability which every government wishes to portray. The basic problem is, then, that many regimes, whilst nominally supporting the concept and principles of human rights, persistently display a total disregard for them in practice, and it is important to examine this phenomenon within the wider context of general human rights in order to appreciate the effect on the specific problem of torture.

The explanation for this paradoxical state of affairs lies largely in the fact that the high level of diplomatic support for the principles of human rights<sup>17</sup> does not reflect the political realities, but in fact actually obscures profound differences in philosophical, ideological and cultural attitudes to the very concept of human rights which effectively determine the political conditions within which the protection of human rights must take place. The idea of fundamental human rights espoused by the United Nations at its inception<sup>18</sup> and subsequently elaborated upon in the Universal Declaration of Human Rights<sup>19</sup> was proposed and promoted primarily by the western liberal parliamentary democracies, and was in fact a product of western thought and political theory, reflecting attitudes and values shaped by factors peculiar to the development of western civilisation. In so far as these nations were instrumental in bringing the issue of human rights within the scope of the United Nations' field of competence,

then, the world organisation's concern with human rights had its roots in a uniquely western view of the individual and society. The Universal Declaration in fact reveals its western origins quite clearly in certain areas.<sup>20</sup> It is obvious, however, that the historical and socio-political conditions which contributed to the formation of western society will not necessarily be of relevance to the needs and aspirations of other cultures, and indeed several states did abstain in the vote on the Universal Declaration precisely because they perceived that it expressed a particular cultural viewpoint.<sup>21</sup> Moreover, it is important to bear in mind that the Universal Declaration was adopted at a time when the membership of the United Nations was only around one third of what it is today: many of the present day members were at that time still under colonial control, and the western powers enjoyed a political dominance in international affairs. This enabled the liberal states to introduce their own concept of human rights as one of the constitutional principles of the United Nations, but clearly this concept was by no means a universally accepted one in 1948.<sup>22</sup>

The concept of fundamental human rights has, of course, been widely adopted and embraced as a valid one in the supervening years, but there has never been a universal acceptance of the philosophical foundations upon which the western liberal view was evolved, and while the traditional western approach remains influential within the United Nations as a result of the continuing diplomatic influence of the western powers, it has been challenged and opposed by alternative attitudes and interpretations, so that there cannot be said to exist a common understanding either of the basis of human rights or of their meaning. There is consequently no unified United Nations approach to

the issues involved in the international protection of human rights, and it is this lack of unanimity which underlies many of the problems encountered by the various efforts to secure effective protection at the international level.

The western liberal view of human rights in which the United Nations concern has its origins asserts that there are "natural, inalienable, rights pre-existent to and higher than the positive law of the State"<sup>23</sup>, that is that there exists a universal morality (usually based on reason or conscience<sup>24</sup>), the precepts of which confer certain inherent rights on every individual human being and impose corresponding limitations on the actions of governments in their dealings with the individual.<sup>25</sup> It is claimed that, in so far as the laws or practices of a society fail to conform to these universally valid moral norms, human rights are, at least potentially, violated. Human rights are thus seen primarily in terms of the political relationship between the individual and the state, and are perceived as particular standards of liberty, security and justice to which every person is inherently entitled by reason of his humanity, and which it is the moral responsibility of every government to both respect and ensure. The substance of natural rights, according to Hersch Lauterpacht, "has been the denial of the absoluteness of the State and of its unconditional right to exact obedience; the assertion of the value and of the freedom of the individual against the State; the view that the power of the State and of its rulers is derived ultimately from the assent of those who compose the political community; and the insistence that there are limits to the power of the State to interfere with man's right to do what he conceives to be his duty."<sup>26</sup>



The idea of human rights as a series of ethical propositions deriving from an objective morality superior to the laws of any particular state has its roots in theories of natural law which can be traced back as far as the Ancient Greeks.<sup>27</sup> Indeed, the idea of natural law has appeared in a variety of forms in a wide range of historical situations and cultural conditions: individuals and groups demanding rights or rebelling against existing social or political values and institutions have often appealed to principles of justice and morality external to, and allegedly superior to, the laws of the land in order to support and justify their claims or actions. However, such assertions were always of very limited scope or applied only to specific grievances, and there was never any real attempt to formulate a comprehensive theory of 'natural rights', and in particular to found social and political organisation on such a theory through the limitation of government, until the advent of the Age of Reason in Europe in the 17th and 18th centuries. Indeed, both historically and culturally the norm has rather been for the rights of the individual to depend upon his status in society:

"Traditional cultures did not view the individual as autonomous and possessed of rights above and prior to society. Whatever the specific social relations, the individual was conceived of as an integral part of a greater whole, of a "group" within which one had a defined role and status."<sup>28</sup>

Objections have been raised to the concept of natural law or, more accurately, natural rights, on the grounds that it takes no account of the so-called 'diversity of morals', but the principle of the universal applicability of fundamental human rights remains the essential foundation of the western liberal view.

While the theory of natural law explains the source and rationale of human rights, the precise formulation of the actual content of particular rights is a more recent development, and the modern western concept of human rights is more directly a product of the political theories of the rights of man which were propounded by various philosophers of the Enlightenment.<sup>29</sup> This notion of the rights of man gained in influence in western thought, particularly with the promulgation of the American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen in the latter half of the 18th century, and the principle of limited government with the consent of the governed came to be accepted in an increasing number of countries. The development of the concept of the rights of man was, however, rather haphazard and not always entirely consistent, and the pious pronouncements of constitutional instruments were rarely realised in practice. In particular, there was a failure to grasp the full implications of the assertion of a theory of the rights of man, so that rights of a universal nature were not envisaged: thus, although the American Declaration of Independence stated: "We hold these truths to be self-evident: That all men are created equal...", this affirmation did not prevent the suppression of the indigenous population or the acceptance of the institution of slavery. The Declaration's real purpose was in fact to give credence to the claims of a group of educated men of European descent in their desire for self-government, and there was no intention at that time to promote an idea of universal equality. While the origins of many civil and political rights are certainly to be found in the social and political upheavals of the 17th and 18th centuries, then, the western concept of universal human rights in its present day form really dates

only from the period between the two world wars,<sup>30</sup> and indeed the experience of war produced a keener appreciation of the issues involved.<sup>31</sup> Even in the post-war era the concept has undergone continual refinement: new areas of concern have been identified, sometimes as a result of non-western influence, so that the modern liberal idea of fundamental human rights actually comprises several distinct categories of rights which have been developed in response to different social, economic and political situations.<sup>32</sup> The history of human rights has not involved the derivation of specific principles from a general theory of natural and universal rights, but has evolved rather from a fusion of diverse rights asserted by different groups at different times in response to different injustices, and although reference may have been made to the idea of natural law to support these claims, the modern liberal theory of human rights has in fact been arrived at in an inductive manner. Thus, particular aspects of the concept of human rights as it exists today have their origins in a variety of social and political conditions and conflicts. The major factor in the development of civil liberties and participation in government was the 16th-19th century synthesis of "an idealistic humanism of Greek origin and the Hebrew-Christian prophetic tradition",<sup>33</sup> and the assertion of the right of political participation as against the divine right of kings and political autocracy. Recognition of other types of rights, however, such as economic rights and even humanitarian rights, resulted from different experiences:

"It is commonplace to assume that human rights are nearly synonymous with natural rights, individual rights, social rights, or community rights. Although all are philosophically related concepts, each has a discrete linguistic and historical tradition."<sup>34</sup>

A comprehensive view of human rights embraces all these divisions, but it should always be borne in mind that their origins may be different. Perhaps the most significant development in the post-war period has been the recognition that human rights are truly universal in a global sense.

The issue of human rights was elevated to the international plane for the first time in 1945; prior to then, the question of how a government treated its own nationals was not considered a valid matter for the attention of the international community, and the League of Nations did not concern itself <sup>greatly</sup> with human rights. The final impetus for the internationalisation of human rights came, of course, from the reaction within the victorious western liberal democracies to the atrocities which had been committed by the Nazis and the Japanese during the Second World War. This is indicated, for example, in the Preamble to the Universal Declaration of Human Rights, which states that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind".

As we have seen, the idea of human rights has since been adopted in virtually all nations, but this has been accompanied by the radical re-interpretation of the concept by different governments to suit existing ideological standpoints or cultural predilections. The contributions of a broader spectrum of cultural perspectives as a result of de-colonisation have inevitably had an impact on the development of the concept of human rights within the United Nations, and the subject matter has been expanded to embrace a wider range of issues than was originally envisaged, especially with regard to socio-economic, cultural and collective rights, but there has never been any attempt to reconcile opposing attitudes, to clarify the theoretical

foundations of human rights or to create a common conceptual framework within which the action of the United Nations in the field of human rights protection might be evolved. The United Nations idea of human rights, in so far as one can be said to exist at all, consists of an amalgam of disparate conceptions, lacking any unified philosophical basis and consequently understood in different terms by different governments.

The suggestion that the idea of fundamental human rights has its origins in western liberal thought alone has been criticised,<sup>35</sup> and it is true that conceptions of human rights are to be found in most cultures, civilisations, religions and philosophies.<sup>36</sup> In other words, certain ideas resembling or analogous to aspects of the liberal concept or expressing the same broad principles can be identified in the precepts and practices of other societies, past and present. Of course, to say that specific features of the western view are paralleled in particular values and beliefs of other societies is quite different from asserting that the United Nations concern with human rights was actually derived from those values and beliefs, or that reference was made to them when the matter of human rights was adopted by the United Nations: although the subsequent development of human rights has been influenced to a considerable degree by non-western attitudes, the fact remains that the initial internationalisation was achieved by the western democracies on the basis of a theory of fundamental human rights which was evolved in western thought alone. However, the contention that the origins of human rights do not lie exclusively in one particular philosophy is normally intended to mean rather that, while the United Nations adoption of the human rights issue was historically secured by the

western democracies, many of the principles formulated were not exclusive to western thought, but in fact expressed or reflected ideas and beliefs which are recognised and respected in a wide variety of cultural contexts. Of course, such a proposition would seem to be supported by the western view, which itself is premised not only on the universal applicability of fundamental human rights, but on the fact that they are cognisable through the faculty of reason which is innate in every human being. Nevertheless, although the existence within different cultural outlooks of conceptions resembling particular aspects of the liberal paradigm may be an indication of the validity of this proposition, it must be stressed that such similarities are often superficial or apply only at a very general level, and the underlying rationale is usually quite distinct from that of western liberalism:

"The demand for humanity, justice and equity is as old as man and woman and as new as tomorrow. Some elements of the instinct for decent and humane treatment appear in every religion, but these yearnings have little to do with the contemporary concept of human rights that individuals have claims against the state."<sup>37</sup>

In particular, the liberal emphasis on the individual is rarely present in other perspectives, so that even when common principles of justice, equality and humanity can be identified, they are seldom regarded in terms of inherent entitlements, and are thus mistakenly interpreted as conceptions of human rights. Certain rights may attract a genuine cross-cultural support because they are founded on basic principles of justice which are in fact recognised more or less universally by contemporary civilised nations,<sup>38</sup> but even when the same broad values are accepted in this way by different societies, they may be subject to extensive qualification and their precise

implications may well differ, as a result of which their implementation will not have identical effects in different states. The fact is that the meaning and import of any right cannot be divorced from the conceptual framework within which it is understood and applied. In each society the entire relationship between the individual and the state is comprehended in terms of a value-system determined by peculiar historical, cultural and political conditions, and this leads to wide divergences in the theoretical approach to the very concept of human rights, which inevitably have a profound effect on the interpretation and application of specific rights. Thus, even where there is a general consensus in respect of certain broad principles and rights which particularise these principles, their precise scope and significance will vary according to the ideological and cultural thought-framework within which they are interpreted.

The rejection of the western liberal view by other ideologies and cultures has not involved the denial of the idea of human rights as such, but rather has meant the fundamental re-definition and adaptation of the concept so that it corresponds to pre-existing philosophical conceptions about man and society in these ideologies and cultures. In this dissension lie the roots of many of the problems facing international protection of human rights:

"...the development of a global conception of human rights suffers from the lack of agreement on sources of human rights including the very foundation of international law. The uncertainty about the content of the doctrines of human rights, including the lack of a philosophical common core, poses additional obstacles. In fact, the very conception of the organization of society differs from one culture to another."<sup>39</sup>

In order to illustrate the difficulties involved, we shall consider briefly some of the more important alternative

interpretations of human rights: one ideological (Marxist-Leninist), one political/cultural (Black African) and one religious (Islamic).<sup>40</sup> Each of these constitutes a major study in itself, so that it is necessary for us to limit ourselves here to an examination of some of the more salient features of these attitudes in order to indicate how fundamentally opposed they are to the western liberal concept of human rights.

Marxist philosophy not only rejects the liberal emphasis on individualism, favouring socialist collectivism, but also denies the basic tenet of the liberal theory, the idea that there exists a universal morality, that is that there are objective norms with which positive law ought to accord:

"It is common knowledge that the socialist concept is sharply opposed to any kind of natural law. Maybe I should say that in doing so it has detached itself not so much from "nature" as from the concept of "law". For instance in the case of human rights it does not dispute their being natural - more accurately human - phenomena, but it denies them the character of *rights*. The phenomenon commonly called natural law is obviously loaded with a moral content expressing a determined standpoint."<sup>41</sup>

Marxism thus rejects the assertion that there can exist rights which are not embodied in the form of positive law. This is not simply a matter of denying the legal nature of human rights whilst upholding a belief in their ethical validity: even the liberal position accepts that human rights are essentially moral norms which only assume the character of legal rights when adopted as such in national or international law. The Marxist attack is, however, much more fundamental, rejecting the very idea of an absolute morality applicable to every social and cultural situation, and thus denying the contention that there are universally valid moral standards from



which the principles of human rights can be derived and which accordingly dictate the content of positive law. In the Marxist view, morality is a phenomenon which arises out of specific socio-economic, cultural and historical circumstances in order to support the political order within a particular society, and the nature and interpretation of rights are thus relative to the moral predilections of that society, which are not static but are constantly evolving with changing conditions and attitudes:

"For the bourgeois liberal, the belief in human rights is premised upon a moral absolute, the inviolacy of the individual, which transcends all national, cultural, and class characteristics. The individual qua human being possesses certain inalienable rights which may not be abrogated. It is the duty of governments to respect these rights and to pass legislation which guarantees their protection. For a Marxist-Leninist, human rights grow out of a system of moral relations which reflect the moral consciousness and material living conditions of a particular society in a specific historical context."<sup>42</sup>

The appeal to natural law by liberals is regarded by the Marxist as nothing more than an attempt to confer legitimacy on a socio-economic system which is otherwise invalid and morally insupportable, in order to perpetuate capitalism as a particular form of social organisation:

"The object of Marx's criticism is not human rights as such but the use of the alleged 'rights of man' as prefabricated rationalisations of the prevailing structures of inequality and domination."<sup>43</sup>

In other words, Marxism asserts that, because human rights depend upon the circumstances within any given society, it is not possible to impose one set of values on different historical or cultural situations. Of course, Marxism recognises its own moral precepts and norms, and indeed the socialist ideal is itself founded on a

particular view of social justice and economic equality which is considered to be universally valid. However, in socialist thought the rights of the individual are not understood as claims to liberty and security which the state may not violate, as they are in western liberalism: rights are conferred by the state, and their enjoyment is dependent upon the continuing fulfilment of one's obligations to the state, which in this context means the socialist system.<sup>44</sup> Marxism thus stresses the duties and responsibilities of the individual to society rather than his rights and freedoms within society or his claims against the state. The Marxist emphasis is consequently on equality rather than liberty, and this is reflected in the interpretation of human rights as referring primarily to social and economic equality: the Marxist attitude is characterised by its concern with social and economic rights, such as the right to work, the right to health care, the right to housing and so on, as opposed to the civil-political rights and freedoms considered so important by western liberalism.<sup>45</sup> Moreover, it is affirmed that the true enjoyment of the latter is actually dependent on the basic social and economic equality which the socialist system alone is capable of providing, and that since capitalism by its very nature violates this prerequisite it can never ensure respect for even civil and political rights. The exercise of civil and political rights as these are understood in western liberalism is, then, decried as meaningless and illusory in a class system which is unjust by definition and the very essence of which is seen as the perpetuation of privilege and exploitation. In other words, it is asserted that capitalism creates only an illusion of freedom, because wealth and power remain vested in a privileged few in whose interests alone the system operates:

"Bourgeois theories which abstractly champion the 'rights of man' are inherently suspect because they also champion the rights of universal alienability and exclusive possession, and thus they necessarily contradict and effectively nullify the selfsame 'rights of man' which they claim to establish."<sup>46</sup>

Marxism accordingly maintains that the genuine exercise of civil and political rights is possible only within the socialist structure, where the absence of class distinctions and private enterprise permits the meaningful participation of the people in political affairs. This does not mean, of course, that these rights are comprehended in the same way as they are in the West: they are not viewed as inalienable rights which the state must respect, but as rights which the state confers, and as such they exist only to the extent the state permits, that is in so far as their exercise does not conflict with Marxist ideology. For example, freedom of speech is recognised by the Constitution of the Soviet Union, but it does not refer to political pluralism, and does not imply a right to criticise the socialist system itself,<sup>47</sup> which is regarded as the indispensable foundation of all human rights because it secures the socio-economic equality prerequisite to their full and true enjoyment.

It can be seen from the foregoing observations that the Marxist concept of human rights differs fundamentally from the western liberal notion of inherent and inalienable rights of the individual. Marxism does recognise socio-economic rights, which it claims to satisfy, but it accepts the idea of civil-political rights only within the parameters of socialist legality, that is only in so far as the exercise of a particular right is not incompatible with the doctrines and goals of Marxist theory as interpreted and applied by the state authorities.

The attitude of many Black African states to human rights is representative of the approach adopted by developing nations in general, though there are certain features which are particularly relevant to Africa. The Third World countries, lagging behind the industrialised states of the northern hemisphere in scientific achievement, technological capability, social welfare and material wealth, not unnaturally emphasise the supreme importance of economic development and modernisation: the paramount task of the governments of the developing nations must be to tackle the massive economic and social problems which beset them - the poverty, famine, disease, illiteracy, over-population and so on. On this basis, it is claimed that in the conditions which prevail in the Third World it is unrealistic to expect or demand full enjoyment not only of those rights which are essentially dependent on economic prosperity, but also of civil and political rights. The argument is that the implementation of civil and political rights in fact requires a certain level of socio-economic stability and administrative organisation and that, while due respect for these rights will follow once the necessary infra-structure has been established, in the meantime the governments of under-developed states cannot be expected to secure respect for human rights to the same extent as those of the industrialised liberal democracies, and they should not, therefore, be subject to the same strictures or judged by the same criteria.

Of course, the exercise of many civil and political rights and freedoms may be virtually meaningless to the poverty-stricken and illiterate masses of the Third World, who have little interest in or use for freedom of speech, freedom of information, the right to participate in government and so on, at least in the full sense in

which these terms are normally understood in the West, but who are concerned primarily with physical survival. Political liberties may indeed be of little consequence in conditions of social and economic deprivation. However, this in itself is not a justification for the deliberate suppression of civil and political rights by governments or for the denial of basic standards of justice and humanity: even the poorest and simplest peasant has a right to practise his religion, form and express his own humble opinions, associate with others of his choice and otherwise organise his life free from arbitrary or unjustified governmental interference. Thus, although the existence of a right may not have the same implications as in the West, this does not mean that it has no application at all, or that it should not be guaranteed by law. Indeed, the peasant's only hope of improvement may lie in the opportunity to exercise political rights. Moreover, it should also be recognised that there will always be some educated persons to whom the entire range of rights is not without substance. In view of the genuine problems of administration, communication and governmental control in developing nations, some allowances must certainly be made with regard to the implementation of civil and political rights, but this is a result of the practical difficulties and not a reason or excuse for failure to recognise them in law. In particular, the conditions in developing nations do not constitute a justification for the wholesale and indiscriminate repression of all opposition to the regime in power.

Governments of developing countries do, however, perceive an incompatibility between economic progress and the recognition of civil and political rights, and as a result they maintain not only that respect for such rights cannot always be guaranteed, but also that

their suspension is often necessary in the struggle to improve the material conditions of the people. The argument is that the paramount goal of achieving economic growth and development demands strong and united rule, so that opposition, criticism and even open discussion are regarded as disruptive and divisive impediments to progress: the task of nation-building upon which the governments are engaged necessitates powerful leadership which will ensure both national unity and single-mindedness of purpose, unencumbered by political fragmentation, alternative policies or dissent in the ranks of the educated elite. It is essential for all opposition to be silenced so that the government can operate with undisputed authority and the minimum of restriction. However, opponents of the government are unlikely to acquiesce in this, and the ever-present threat posed by dissentient elements creates an atmosphere of distrust and political instability, and it is for this reason that governments deem it necessary to sacrifice civil and political rights.<sup>48</sup>

In accordance with this theory, the concept of democracy has been adapted by many African regimes to support the idea of the one-party state which, it is claimed, constitutes true African democracy.<sup>49</sup> The multi-party systems of the liberal parliamentary democracies are rejected because they are viewed as the product of social conflicts which have no relevance to the African situation, and they are in any case considered to be ineffectual and thus a hindrance to the strong and unified government which the developing African nations require. It is essential for the government to exercise sufficient control to implement long-term solutions to the problems which exist, untrammelled by political opposition, and for the diverse elements within society - in particular the heterogeneous tribal groups - to be welded together

in a common purpose rather than be permitted to confront each other in the political arena and through polarisation thwart all attempts to secure national unity. It is believed that this unity can be best achieved by the creation of a single party which in theory represents the will of the people and the national interest. Accordingly, no opposition to this party can be tolerated and no alternative philosophies may be entertained.

The attitude of the Black African and other developing states resembles that of the socialist states, in that the rights of the individual are not regarded as fundamental and inalienable, but are subordinate to the requirements of the state as interpreted by the authorities in accordance with the socio-political ideals embraced by the ruling party: the individual has rights and freedoms only within the context and limitations of a particular ideological position. Thus, in one-party states, whether of the left or of the right, there cannot be full enjoyment of civil and political rights as these are understood in liberal thought, because within a totalitarian system rights are conferred by and dependent on the state rather than superior to it. In Black African nations, the emphasis is again on the collectivity, and this is reflected in the regional convention, the African Charter on Human Rights and Peoples' Rights.

The Islamic view of human rights, too, possesses characteristics in common with the two approaches already discussed, in so far as it rejects the primacy of the individual and stresses the importance of a particular form of social organisation premised on immutable precepts with which each individual is required to conform. The Islamic approach is of significance because a considerable number of states can be described as Islamic states, although it should be recognised

that the religious principles of Islam are not always the deciding factor in the policy decisions of the governments, just as the governments of states within 'Christendom' are not guided necessarily by the doctrines of Christian theology.<sup>50</sup> Nevertheless, the precepts of Islam do have a powerful influence at the political as well as at the cultural and personal level, and examination of the Islamic interpretation of human rights is relevant to the extent that the attitudes and policies of a significant number of regimes have been formed within the cultural context and against the religious background of Islam, and in some instances have been directly controlled by Islamic teaching.

There are undoubtedly contained in the teachings of the Quran concepts and values which appear to correspond to particular principles recognised by the liberal idea of human rights.<sup>51</sup> It is important to appreciate, however, that there exist fundamental differences between the conceptual frameworks of the respective philosophies which yield quite distinct interpretations of rights. In the Islamic view, human rights "constitute obligations connected with the Divine and derive their force from this connection."<sup>52</sup> Thus, freedom of the person "cannot be realized through liberation from external sources of restraint".<sup>53</sup> Freedom of the individual is thought of rather as an inner fulfilment related to obedience to divine command, that is, the internal moral perfection of the mind and soul:

"The free man of the Quran is a man of virtue and generosity, and one who has liberated himself from the coils of evil."<sup>54</sup>

Freedom is thus seen in terms of the individual's role in society, and not as the individualistic pursuit of goals which do not



contribute to the welfare of the community and the benefit of others.<sup>55</sup> The premises on which this attitude rests clearly differ completely from those of western liberalism:

"The West places more emphasis on rights while Islam values obligations. The Western tradition posits freedom in order to avoid the outcome of a despotic system, while Islam emphasizes virtue as a goal to perpetuate traditions of society which often support a coercive system. The West emphasizes individual interests while Islam values collective good."<sup>56</sup>

The same writer concludes:

"The Western liberal emphasis upon freedom from restraint is alien to Islam."<sup>57</sup>

From a brief survey of these different approaches to human rights, then, it becomes apparent that the western liberal concept, which stresses the inherent and inalienable rights of every human being as an individual, is one which finds little support in alternative cultural conceptions of the relationship between the individual and the community of which he forms part. It is much more usual for pre-eminence to be accorded to the interests of society as a whole, and for individualism to be regarded as incompatible with the common good. In this connection, it is interesting to note that there is no individual character in Chinese signifying "person":

"From the pre-Ching philosophies, the goal of self-realization was not the obtaining of personal advantage but a rational and moral concern for the welfare of other members of a family or a community....In other words, the general view of life, for a Chinese person, is to submerge his ego, to disappear, and to be absorbed into the universal harmony."<sup>58</sup>

In most cultures, then, the individual is seen as an integral part of the group, and not as an autonomous entity having rights separate from the interests of society as a whole, and where the rights of the individual are recognised at all, they are conferred by

society and consequently depend upon the fulfilment of obligations to society and exist only within the strict limitations imposed by society.<sup>59</sup> This has two important consequences: firstly, a rejection of the need for limitation and control of government, and secondly, a refusal to recognise any role for the individual in international law.

In view of the diversity of attitudes which we have outlined, the question arises as to why international human rights instruments attract such a broad support. The answer to this appears to lie in the moral and political cogency with which the concept of human rights is invested: the actual idea of human rights is not easily or lightly denied:

"There can be no doubt about the rhetorical value of the idea of human rights. In contemporary politics it ranks alongside such ideas as liberty and democracy. A regime which protects human rights is good. One which fails to protect them, or worse still does not acknowledge their existence, is bad."<sup>60</sup>

No matter how ruthless a regime may be, no matter how little respect for human rights it displays in practice, no attempt is ever made to claim the right to govern without any regard for fundamental human rights: to propose a philosophy or ideology which expressly rejected any idea of human rights would be to invite international condemnation and political isolation. Governments, which are always sensitive to international opinion, appreciate the political disadvantage and loss of credibility involved in the denial of the concept of human rights, and it is in order to escape the criticism of the international community that even the most brutally repressive regimes endeavour to present an image of respectability by endorsing the principles of human rights at the diplomatic level.

The political potency of the idea of human rights rests upon the existence of an empirical, though superficial, international moral consensus, in terms of which most of the specific rights postulated are, as general statements, endowed with a validity which is self-apparent and irrefutable. To a certain extent this international moral consensus is an artificial creation arising out of the disproportionate influence which western thought and values have enjoyed in international affairs, with the result that other states, particularly newly independent ones, have felt pressurised into adopting social, political and legal norms which do not in fact have any real basis in their own historical and cultural experiences. Nevertheless, there does exist a superficial consensus in the sense that many human rights, in so far as they remain general and undefined propositions, do attract a virtually unanimous cross-cultural support, because they express principles which are universally recognised at some level, that is they can find some foundation in the cultural attitudes and values of all contemporary civilised societies. In other words, there is a general recognition that human beings ought to be treated in accordance with certain principles, though the basis of this recognition may not lie in the idea of natural rights. This consensus is probably genuine in relation to certain broad principles of justice and equality, but with the majority of specific rights it is superficial and illusory: the idea of human rights, like the concepts of liberty and democracy, is open to a range of interpretations and emphases in accordance with diverse socio-cultural conditions and ideological perspectives, so that while particular human rights maxims may well express sentiments which can be endorsed by different philosophical approaches, the precise meaning and effect

of each right is interpreted within a specific cultural and political context. In other words, the wide divergence in theoretical conceptions of human rights which we have identified does not prevent agreement at a superficial level, but the underlying differences in the philosophical foundations do inevitably produce entirely distinct interpretations of the precise nature, scope and content of each particular right. The problem is, then, that human rights are often expressed in terms sufficiently general and undefined to permit governments of diverse persuasions to formally express support for them while maintaining their own subjective understanding of the essence of the rights. This situation is in fact exacerbated at the diplomatic level by the fact that international human rights instruments tend to be somewhat eclectic amalgams arrived at on the basis of compromise, with the result that precise definition is avoided.<sup>61</sup>

The consensus is, then, more apparent than real, and a more accurate picture of the dissension which exists necessitates penetrating the facade presented by international instruments: the absence of true agreement can be seen more clearly in such matters as voting on specific rights, attitudes towards the implementation of international conventions, and especially the whole issue of the role of the individual in international law. On the whole, the western liberal democracies are far more amenable to international procedures for the protection of human rights than are other states, and this applies *a fortiori* to those procedures whereby individual victims of human rights violations may petition international authorities in order to bring their allegations before the international community. The socialist states, in particular, consistently deny that the

individual has any place in international law, and it is only in recent years that the non-aligned states have shown signs of tending towards the western view on this question. The inevitable result of a rejection of the notion of the inherent rights of the individual vis-a-vis the state is a denial of the role of the individual in international law, and especially in bringing complaints against his government to an international arbiter. Moreover, if there is no recognition of the individual's rights against the state, no question of conflict arises, and in theory there is no need for international involvement in the relationship between the individual and the state.

There is, in fact, a nucleus of western and western-type democracies which in general both respect human rights at the domestic level and promote their protection at the international level. Indeed, it is ironic that those states which show the greatest degree of respect for human rights can be equated with those which submit to international supervision. The European system of human rights protection, which is the longest established of the major systems and in many ways has proved the most successful, to a great extent owes this success to the fact that the Council of Europe is, for the most part, composed of such states, parliamentary democracies in which the principle of the rule of law is upheld and whose governments have (with some notable exceptions) been willing to co-operate with the agencies charged with supervising the implementation of the European Convention. The Convention recognises in its Preamble that the states parties are "like minded and have a common heritage of political traditions, ideals, freedom and the rule of law", and although these sentiments are perhaps over-optimistic with regard to the present membership of the Council of Europe,<sup>62</sup> it is in the political

homogeneity that the success of the European system of human rights protection lies:

"Whatever power and moral authority the Convention possesses is a function of the democratic values it embodies and state acceptance of those values. When, for example, one compares the European Convention with the United Nations human rights system one compares a regional system well established and flourishing with an international system tentatively functioning in a highly politicized environment that is more hostile, less democratic, and much more protective of the perquisites of sovereign statehood.

The United Nations possesses a more than adequate legal basis for an effective international human rights system. What is missing is a positive commitment to the protection of human rights and an institutional structure reflecting that commitment...

The sincerity and depth of the commitment appears to be one highly important distinction between the human rights system of the United Nations and that of Europe. The states party to the Convention are almost all functioning democracies with many shared historical and cultural traditions including devotion to the rule of law. They have demonstrated their willingness to accept restraints upon their actions and to be subject to supranational controls.

The United Nations on the other hand is basically a political grouping comprising the entire international community of states, exceedingly protective of their sovereignty, and divided on the true substance of human rights as well as on their importance.

That the European system is as successful as it is is in great part due to Europe's libertarian and democratic tradition as well as to its overall economic and political stability. Other areas are usually lacking in these fortunate conditions and have a different historical precedent and experience upon which to rely. In Europe the success of the present system is to be found in its past."<sup>63</sup>

In general, the most consistent supporters of international protection of human rights are the Scandinavian states, along with other western liberal democracies such as the Netherlands and the Federal Republic of Germany, and it may be noted in passing that these

states have had a largely Protestant heritage, suggesting that the Reformation may have had an important influence on concepts of human rights. The countries of southern Europe do not in fact share such a strong historical commitment to the idea of inalienable rights, and while the political institutions of liberal democracy have been adopted in these countries, the underlying emphasis on individualism has not been fully accepted, so that rights are perceived as emanating from the state, which retains a separate and pre-eminent position.<sup>64</sup>

The states of western Europe, then, along with a number of non-European (but westernised) nations such as Canada, Costa Rica and Senegal, are often the strongest (and sometimes the only) supporters of international procedures proposed within the United Nations, as can be seen, for example, from an examination of those states which have accepted the jurisdiction of the Human Rights Committee under article 41 of the International Covenant on Civil and Political Rights and under the Optional Protocol.<sup>65</sup> This is a clear indication of the importance of the philosophical foundations of the liberal view to the establishment of effective measures for the protection of human rights at international level, and in particular to the creation of procedures which involve supervision of national governments by international authorities.

As we have noted, western states have been criticised for attempting to impose their own values and morality on other cultures without taking into account the very different conditions and attitudes which prevail in these cultures. Nevertheless, the idea of the universal applicability of human rights is, as we have also seen, an essential tenet of the western liberal view: fundamental human rights are so described because they are regarded as inherent and

inalienable, the rights to which every human being is entitled by virtue of his or her very humanity:

"If there are human rights, they must be universal moral rights. They must be universal because they are the rights which people have simply as human beings irrespective of nationality, religion, citizenship, marital status, occupation, income or any other social or cultural characteristic, and also irrespective of sex."<sup>66</sup>

In the liberal view, then, fundamental human rights do not depend upon the particular cultural context or socio-political system, but are universally relevant because they are based on a common humanity. This view is founded on the concept of human rights as a series of ethical propositions derived from a universal morality, the precepts of which are cognisable by every person through innate reason and conscience. Reason and conscience may both be suppressed by cultural tradition, social prejudices and repression, and political indoctrination, so that any given society may fail to recognise basic human rights, but the concept of universally valid morality is not invalidated by an empirical diversity of attitudes, as its principles remain perceptible to "every man who will but seriously consult his innate moral sense."<sup>67</sup>

Acceptance of the proposition that there exist fundamental human rights which are universally valid is also the indispensable prerequisite to the effective protection of human rights on an international level: there can only be any real substance to the international supervision of governments if there can be identified a legitimate basis in terms of which genuinely universal human rights may be defined. The question to which we must now address ourselves, then, is whether any area can be identified which does attract universal assent and may therefore be the basis of united action: in



other words, is there any way in which the diverse concepts of human rights can be sufficiently reconciled to make international protection meaningful?

The foundation of any concept of universal human rights must be the principle of the essential equality of every human being, that is the fact that every human life and personality has the same intrinsic moral value and worth. It is on this premise that the assertion is made that each human being ought to enjoy the same standards of security and liberty. This means that there must be no arbitrary distinctions or ungrounded discrimination in the enjoyment and exercise of fundamental human rights, a principle which is recognised as underlying the concept in article 2 of the Universal Declaration of Human Rights and also in article 2 of the International Covenant on Civil and Political Rights, which states:

"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>68</sup>

Furthermore, it is provided in article 4, paragraph 1, of the Covenant, which permits derogation from many of its terms in exceptional circumstances, that such derogation may not involve measures which are discriminatory, although it does omit several of the categories which appear in article 2.<sup>69</sup>

The idea of essential human equality and its concomitant of non-discrimination do, in fact, receive a very wide degree of support in the international arena (though not universally at a cultural level), particularly in the area of racial discrimination, and while in

practice there is widespread repression of minority groups, the concept of equality may be regarded as a philosophical axiom which virtually all governments would support in theory. Certain specific rights derived from this principle also attract a broad philosophical support: thus, everyone should be recognised as a person before the law,<sup>70</sup> and everyone should be treated as equal before the law.<sup>71</sup> In other words, whatever the laws of a particular state may be, they must be applied consistently, without unwarranted distinctions, so that everyone enjoys on equal terms the same basic standards of justice, the same consideration of his interests, and the same fundamental rights.

With these observations in mind, we may endeavour to identify the criteria in accordance with which a theory of universal human rights might be defined. There are, as we noted earlier, several distinct branches within the modern idea of human rights, the major division being between socio-economic rights and civil-political rights. The criticism has been levelled at western liberals that they are over-concerned with the latter to the detriment of any concern for basic human needs: the socialist states claim credit for the promotion of social and economic rights both in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and it is true that they support this category of rights and have contributed to its development. However, criticism of liberals for lack of concern with these issues is not wholly justified: liberalism does not deny that the satisfaction of basic human needs is of the utmost importance and that real efforts must be made to tackle the problems which exist, although it does not accept that there is any necessary incompatibility between the pursuit of

socio-economic development and the enjoyment of civil and political rights which justifies the suppression of these rights. Moreover, a distinction is drawn between socio-economic rights, which are not susceptible of immediate implementation but are dependent on material conditions and are thus long-term goals for progressive implementation, and civil-political rights, which can be secured simply through government action and legal application. It is on the basis of this distinction that the two International Covenants were promulgated as separate instruments in 1966, and the Covenant on Civil and Political Rights alone provided for international procedures whereby implementation of the provisions by states parties could be monitored. A similar division occurs within the European system, with the European Convention on Human Rights covering civil and political rights, while the European Social Charter deals with socio-economic rights.<sup>72</sup> The liberal stress on civil and political rights is thus no more than a recognition of the fact that such rights can be guaranteed in a way in which social and economic rights cannot.

It is, then, in the political relationship between the individual and the state, and the regulation by the state of relationships between individuals and groups within society, that fundamental human rights capable of being protected by international law must be sought. In the liberal view, governments exist primarily to secure effectively the equal rights of individuals, and the area of the individual's autonomy and exercise of his rights and freedoms should thus be as wide as possible, with the authority of the state being correspondingly limited. The aim of liberalism is to maximise the security and liberty of the individual in society by imposing limitations on governmental interference in the life of the individual

and by maintaining that individual liberty should be subject to restriction only in so far as it would infringe upon the rights, freedoms and interests of others, or would be incompatible with the legitimate claims of the state as guardian of the welfare of the community as a whole. This idea is recognised in the Universal Declaration of Human Rights:

"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."<sup>73</sup>

It is obvious that in a society based on egalitarian principles the freedom of the individual cannot be absolute or infinite, but must be subject to such limitations as are necessary for the protection of the equal and corresponding rights of others and also of the interests of society in general, such as national security, public order, public health, conservation and so on. Thus, for example, freedom of speech - the right to say whatever one wishes - must be balanced against the right of others not to be gratuitously slandered, the interests of national security, public order and morality and so on, and it may be legitimately curtailed in so far as its exercise would violate these other valid considerations. Moreover, the same principle applies in a positive as well as a negative sense, so that society may not only impose restrictions on the individual, but may also make positive demands of him for the benefit of the community, although the nature of such demands means that there are probably far fewer justifiable instances than there are legitimate limitations on freedom. In other words, there is less likelihood of infringing other people's rights by failing to do something than by actually exercising freedom. It is

clear, then, that the question of the rights of the individual is a complex matter of striking an appropriate balance not only between the competing claims of individuals *inter se*, but also between the rights of the individual and the interests of society as a whole. It is really one particular aspect of a much wider balancing of interests by governments, which may not involve the rights of the individual at all: for instance, a conflict may arise between an important economic enterprise and the protection of the environment.

Governments have an obvious role in establishing and regulating the relative priorities within a state: indeed, this is one of the primary functions of law. It is clear, however, that wide ideological and political differences of opinion will arise regarding the optimum resolution of the conflicting interests in society, and that there will be little agreement concerning the precise role of the state, the limits of the law, and the legitimate extent of the claims of the community upon the individual. Furthermore, while the faculty of reason may yield general guidelines as to the principles upon which society should be organised, it does not always provide definitive solutions to the detailed problems of assessing the weight of different considerations: many of the issues which arise require a value-judgement to be made, and in any case the relative merits of the various factors may vary with the circumstances, so that governments must be afforded a degree of discretion in their evaluation of the force of competing claims. There is, therefore, a function for diverse political ideas and emphases, for pressure groups and political activists, and for public opinion, and there is scope for changing conditions and shifting perceptions of moral values within

society: all these can have an influence on the identification of priorities by governments. Nevertheless, the liberal view asserts that while governments may be permitted a certain 'margin of appreciation', such discretion is exercisable only within finite limits, so that the balancing of rights must always take place in accordance with certain immutable principles, irrespective of the social attitudes within the state. In particular, there are limitations on governments in matters affecting individual liberty and security: there are rights of liberty and security which cannot be violated with any justification, but must take priority even when some legitimate conflicting interest exists. It is in this notion that western liberalism identifies and defines fundamental human rights.

The actions of state authorities must, then, comply with certain standards and principles. Firstly, the infringement of the security or liberty of the individual must not be arbitrary, but must be duly authorised by law: in other words, the state authorities must themselves be subject to the laws of the land and must act strictly in accordance with those laws. Secondly, as we have already suggested, the law must not be applied in a discriminatory manner, that is on the basis of irrelevant distinctions such as race, colour and other innate characteristics or opinions rather than behaviour, but must recognise and respect the essential equality of all persons and give equal consideration to the interests of each individual in the determination of his rights.<sup>74</sup> Thirdly, the law itself must not merely purport to confer legitimacy on arbitrary action by the state authorities, but must conform to the demands of basic standards of justice. This raises again the spectre of natural law, but in general terms it means that in the balancing of rights the infringement of personal security

and liberty must have a rational basis, and must not be vexatious, excessive or otherwise unreasonable: essentially, it must not be disproportionate to the benefits which accrue to others or to society.

Human rights can, in fact, be viewed largely in terms of these three principles, that is the majority of rights are not absolute in the sense of being categorically exceptionless, but apply only in so far as one of the principles is contravened. To illustrate this, we may take as an example the right not to be deprived of one's liberty, which does not mean that no one should ever be detained or imprisoned, but rather that no one should be detained arbitrarily or on irrelevant grounds (such as race or religion), or without reasonable cause, without a fair opportunity to present a defence, or for a period or in conditions disproportionate to the purpose for which detention is justified. The notion of proportionality is, of course, a relative one, and it is in this area that the greatest divergences of opinion are liable to occur. Indeed, even within liberal states there are different attitudes regarding the precise extent of the liberty of the individual and the corresponding limits on governmental power, and these differences sometimes appear to be more than minor variations within the boundaries of the margin of appreciation.<sup>75</sup> This makes it difficult to deny the validity of restrictions imposed within other societies on the basis of their peculiar cultural values and beliefs, but liberalism nevertheless in theory accepts only minimal governmental intrusion into the life of the individual and, while there are certain differences of opinion within the liberal camp, they are often differences of degree only, and there is in fact broad agreement on most of the major issues, particularly matters of civil and political liberty. Liberalism does support the maximisation of

the security and liberty of the individual by denying governments any right to impinge upon these rights except where there is some rational and compelling justification for doing so.<sup>76</sup>

It should be noted that the requirements of the state may fluctuate according to the particular social, economic and political conditions within a country. There may arise exceptional circumstances which present a serious threat to the stability of the community, and in such a situation the normal balance of rights may be upset, with the result that certain rights of the individual decrease in importance and no longer take automatic priority. Liberalism accepts that the curtailment or suspension of particular rights may become necessary in emergency situations, although this idea introduces a further element of governmental discretion and seems to reduce the concept of fundamental human rights to a general formula of proportionality to the national interest. Certainly the principle of proportionality continues to apply in exceptional circumstances, so that only those measures which are strictly required to deal with the situation are justified, and neither a wholesale suspension nor a total or even excessive curtailment of specific rights is envisaged. More importantly, however, there remain certain finite limitations on governments, and a number of rights may be regarded as inviolable in an absolute sense, that is violation of these rights is never justified, even in an emergency situation.<sup>77</sup>

Of course, it is perfectly valid for western political philosophers to assert that the entire range of civil and political rights enjoyed in liberal democracies should be available to every human being in every country, and that their denial cannot be justified. In effect, this would amount to a claim that liberal



democracy is the most just form of political organisation and that its adoption universally is the prerequisite to the full enjoyment and exercise of fundamental human rights by all people. It has actually been suggested that the Universal Declaration of Human Rights can be interpreted as implying this.<sup>78</sup> However, while it is no less acceptable to preach liberal values than it is to propagate the doctrines of socialism or any other ideology, it is obviously unrealistic, in view of the diversity of attitudes which we have outlined, to expect universal support for liberal ideals or the liberal interpretation of human rights. Without abandoning their personal belief in the rationality and justice of the precepts of liberalism and the importance of individual liberties, therefore, many western jurists have come to realise that the adoption of a dogmatic stance on the human rights issue is not consistent with the political realities and is consequently unproductive in terms of the promotion of international measures for the protection of human rights. This has led to a re-assessment of the concept of fundamental human rights, the aim of which has been to "achieve sufficient universality of tone and content to engender respect and legitimacy in all parts of the world, regardless of cultural heritage or ideological orientation".<sup>79</sup> In other words, it has been appreciated that if any progress is to be made in the field of international protection of human rights and effective machinery is to be acceptable to all governments, the cultural and ideological divergences have to be taken into account, the absence of consensus on the maximum liberty of the individual must be acknowledged, and ethnocentric rights must be eliminated in order that there may be identified a central core of genuinely fundamental rights which may be regarded as susceptible of more or less universal

endorsement and implementation. The idea is that not all rights do depend on cultural or political interpretation, but that there exists a definable minimum standard which is truly universal in application:

"Human rights, that is universal moral rights, are 'a *minimum* common standard of achievement for all peoples and all nations'. Nations whose values and institutions are incompatible with the achievement of even this minimum standard can then fairly be criticised."<sup>80</sup>

If such a core of genuinely fundamental human rights could be defined, international law could concentrate on the prevention of violations of these rights with some expectation of success, since there would in theory be no cultural impediments to their universal recognition and the unanimous support of the international community.

On what basis, then, could such 'core rights' be identified and classified? The elaboration of criteria may be tackled from several different angles, and in fact a number of writers have attempted to detail the kinds of rights which they consider relevant. A.J.M. Milne, for instance, suggests that the first eleven articles of the Universal Declaration of Human Rights might have been more appropriate than the whole instrument.<sup>81</sup> Others have arrived at different, if often similar conclusions.<sup>82</sup> Many actually make specific mention of the right not to be tortured:

"...torture, cruel punishment, prolonged imprisonment without trial and violations generally of the life, liberty and security of the person. These are sometimes identified as violations of "basic" or "fundamental" or "core" human rights to distinguish them from the other civil and political rights."<sup>83</sup>

What appears to be involved is a re-definition of the term "fundamental" to refer specifically to those rights which are essentially *human* rather than civil or political or even economic or social. Such rights are universally valid because they are based on

the humanity of the individual: the violation of these rights involves the infliction of unjustified human suffering. The principle of humanity is, moreover, an inviolable one, so that rights founded upon it may be regarded as absolute. In the idea of the dignity and worth of the human person, then, can be found a criterion which serves to provide a suitable basis for the definition of truly fundamental and universal human rights. Core rights may thus be viewed in terms of the protection of the individual against governmental violations of basic human decencies.

It is important, of course, not to project western sensibilities on to others: it is one thing to argue from a liberal standpoint that the right not to be tortured is one which cannot be justifiably violated, but it is quite another to show that there exists a genuine cross-cultural consensus on this. There is a danger of approaching the analysis of core rights from a liberal perspective and identifying the most important rights in terms of western values, rather than making a purely empirical examination of cultural attitudes to the question. In particular, the idea of basic human decencies continues to display a pre-occupation with the rights of the individual and, as we have seen, the individual is not always given priority by other societies. Nevertheless, there does seem to be some kind of intuitive or emotive rejection of inhumanity, possibly arising out of a common experience of pain and the ability to empathise, and there is some foundation to the suggestion that the concept of humanity is a valid criterion for classifying core human rights. This is further supported by the fact that certain rights which have been recognised as non-derogable under international law appear to hold that status by reason of their humanitarian basis.

Only four non-derogable rights appear in all three of the major conventions: the right to life; the prohibition of torture and other ill-treatment; the prohibition of slavery; and the prohibition of *ex post facto* laws. The European Convention limits itself to those four,<sup>84</sup> while the International Covenant on Civil and Political Rights adds the following: recognition as a person before the law; freedom of thought, conscience and religion; and the prohibition of imprisonment for failure to fulfil a contractual obligation.<sup>85</sup> The American Convention includes the first two of these, and also adds a number of others.<sup>86</sup> A single criterion by which non-derogable rights might be categorised does not clearly emerge,<sup>87</sup> and indeed the conventions display certain inconsistencies, but the concept of humanity undoubtedly underlies the prohibitions of torture and ill-treatment and of slavery, which appear in each of the conventions, and arguably also freedom of thought. Indeed, in a sense these humanitarian rights may be regarded as unique in that their violation is not justified in any circumstances whatsoever:

"There is therefore no objection in principle to the idea of human rights that are absolute in the sense of being categorically exceptionless. The most plausible candidates, like the right not to be tortured, will be passive negative rights, that is, rights not to be done to by others in certain ways."<sup>88</sup>

On the basis of the absolute prohibition of torture in international law, it might not seem unreasonable to suggest that there exists a genuine consensus against inhumanity sufficient to support demands for much stronger measures for the protection of those rights founded on this principle at the international level. Many writers apparently believe that such a consensus does indeed exist at a cultural level,<sup>89</sup> and while there may be arguments about the

precise definition of torture, most of its manifestations can be clearly recognised as acts of torture, so that the diplomatic consensus can hardly be explained in terms of varying interpretations as to the meaning of the right: differences of interpretation arise only in peripheral areas, and it is normally a straightforward matter to identify an act of torture. While in some societies corporal punishment is endemic, there does exist a clear consensus at the diplomatic level which indicates at least some degree of cross-cultural support for action against torture, and this may be relied upon to secure more effective international measures for the prevention of torture.

It is crucial, however, to realise that the protection of core human rights cannot be separated from the political environment and legal framework within which that protection must be effected. The fact is that the prevention of torture requires more than a philosophical condemnation of the practice: it depends upon the existence of legal machinery and procedural safeguards which will give effect to the prohibition, within an appropriate constitutional framework which can ensure that the legal guarantees are respected and operate efficiently. The prevention of torture is, in other words, dependent upon the existence within the internal legal and political structure of the state of effective guarantees and safeguards, and it is when these are absent, curtailed or eroded that the employment of torture becomes possible.

It is in this area that ideological differences are of profound significance as far as the prevention of torture is concerned. The rejection of the western liberal paradigm is much more fundamental than a simple rejection of some rights and an acceptance of others:

it involves entirely different conceptions of the whole relationship between the individual and the state, and of the socio-political organisation of the state, including the limits of government. The western liberal heritage, with its emphasis on individual liberty, has developed institutions which are designed specifically to protect the individual by means of the limitation and control of government, but where there is a rejection of liberal political values and of this idea of the limitation of government, there arises a totalitarian system of government within which the effective protection of human rights cannot be secured, even although there may be cultural and philosophical recognition of these rights. Totalitarian systems are geared to the implementation and preservation of a clearly defined and rigidly adhered to ideology, social philosophy or national cause, which is regarded as the essential foundation of the state and from which no deviation may be permitted. This national ideology is regarded as the basis of legality, and since the function of government is simply to interpret and apply the principles of the ideology, there is a rejection of the concept of independent restraints on governmental action. Exclusive and virtually unfettered power is thus concentrated in the hands of the ruling party, which maintains control of all branches of power in order that the will of the government may be imposed in every area of public life. Every position of responsibility is occupied by someone known to be loyal to the party, with the result that no independent authorities exist in practice or even in theory to challenge or oppose the actions of the government. Of course, the extent to which any government is unrestrained varies greatly, and the foregoing observations are intended only as a general comment, but the fact is that the fewer the

constitutional limitations on government, the less secure is the protection of fundamental rights.

The result of such a system is that whether or not the government's diplomatic support for the prohibition of torture arises out of a genuine concern, the political system itself lacks the means to ensure that the prohibition is respected. The fact is that the protection of human rights depends not so much on cultural or philosophical acknowledgement of human rights as on the development of effective machinery within the constitutional and legal structures of the state on the basis of such an acknowledgement. This is not to say that torture is an inevitable feature of a totalitarian system: the use of torture is, in fact, normally resorted to under particular conditions, especially when there arises some threat to national security, which is of paramount importance to every government, and which in this context refers not so much to the territorial integrity of the state as to the preservation of the existing political system and its social and cultural infra-structure. In this respect, an intolerant system is certainly open to a wider range of threats than a pluralistic society in which legitimate political dissension may operate to a far greater degree. Indeed, it might be said that subversion is a product of intolerance. However, exactly what constitutes a serious threat to national security will depend upon a number of factors, including the stability of the regime and the extent and nature of the threat. Some governments may only consider special measures necessary if violence erupts and innocent lives are endangered, whereas less stable regimes which cling tenuously to power without any popular support might regard the discovery of even a few dissentient elements as meriting ruthless counter-subversive measures.

Indeed, the insecurity of such regimes is liable to create a paranoia which results in them perceiving threats where none actually exist.

When a threat to national security arises in a totalitarian system, there are few internal restraints and controls on the government to prevent it authorising its security forces to employ repressive methods, including the use of torture if this should be deemed necessary for the protection of the state, and it is this absence of governmental limitation that is the crucial factor in explaining the prevalence of torture in spite of the apparent consensus. In parliamentary democracies, on the other hand, there are certain features of the constitutional organisation of the state which are generally effective in the prevention of torture, and it is important to identify the relevant principles at this point. Sean MacBride presents the following analysis:

"At national level, the most effective mechanisms are:

1. A watchful parliament with an effective and courageous opposition.

2. A free press which will not hesitate to expose injustice.

3. A constitution which spells out the rights guaranteed and delimits clearly the powers of the executive, the legislature and the judiciary.

4. An independent judiciary, not subject to direct or indirect pressures by the Executive or by parliament, charged with the function of upholding the constitution and enforcing its provisions.

5. An "ombudsman" directly responsible to parliament and/or administrative tribunals with full power of investigation of complaints of maladministration.

These are, broadly speaking, the desirable institutions which are necessary to safeguard human rights. They may vary in particular functions, jurisdiction and emphasis in different countries; but in our increasingly complex society it is the combination of these institutions that will most effectively safeguard democratic rule and personal liberty."<sup>90</sup>



The protection of any right which is to be regarded as fundamental requires firstly its recognition in law in such a way that it cannot be lawfully circumvented, but is given force as part of the constitutional foundation of the state: in other words, if rights are to be genuinely fundamental, they must be secured against arbitrary governmental erosion or suspension by being embodied in the constitution of the state or some equally authoritative instrument such as a constitutional bill of rights. Ideally, fundamental human rights should be so expressed that they cannot be overturned by any process of law, but exist as the immutable foundation upon which the state itself is built. However, in practice few states possess such inflexible constitutional provisions, and it is usually possible for even the fundamental law of the state to be altered, albeit through special procedures somewhat more rigid than those applying to legislation generally.<sup>21</sup> Nonetheless, in so far as it is possible for rights to be suspended or abolished within the provisions of the legal system itself, these rights cannot be regarded as absolutely guaranteed by law.

It is imperative also for there to exist legal procedures and other mechanisms whereby fundamental rights can be enforced:

"Of course, the very best safeguard for the protection and respect of personal liberty is an enlightened government, and democracy. A representative, democratically elected parliament, public discussion, free press, fair operation of the mass media and an educated public opinion are the very best guarantees for the protection of human rights.

But, even in the most enlightened democracy, abuse of power by the executive, by the administration or even by parliament, may and does occur. Such abuses may be incidental; they may not have been contemplated when a particular law was enacted. They may have been anticipated but disregarded because they only affected a small number of people. They may have been motivated by a good, but mistaken view

of what was for the "common good". On the other hand, even in a well regulated democracy, abuses of power, for political or other improper purposes, do occur and have to be guarded against.

Accordingly, we have to recognise that, no matter how well intentioned or democratic a State may be, it is nevertheless necessary to provide effective machinery for the protection of the rights of the public or of individual members of the public.

In parts of the world, where democracy is new or is not solidly entrenched, the same problems exist, but to a much greater extent. They are much more difficult to resolve because there is no tradition for the protection of human rights under the law, and usually no informed public opinion capable of making itself felt."<sup>92</sup>

As far as torture is concerned, the provision of safeguards in the legal system is relevant primarily in relation to the procedures of arrest, detention, interrogation, trial, complaints and so on. The prevention of torture is, in fact, almost entirely dependent upon the recognition and enforcement of a range of other rights, and it is when these are rendered ineffective that the use of torture is facilitated, even if not directly authorised by the government. It is thus impossible to separate the protection of core rights from the enjoyment of other legal, civil and political rights. Problems can arise in this area, however, because even in democratic systems there may appear a threat to national security to which the only response is the declaration of a state of emergency involving special measures restricting the rights and remedies which are normally available and which are essential to the effective protection of core rights, and involving also the removal of the usual limitations on the executive branch of government, sometimes resulting in the creation of an almost quasi-totalitarian system. There is, therefore, a real problem in reconciling the doctrine of derogation with the protection of core rights.

The formal recognition of rights and remedies in law must be given substance by respect for the rule of law: this means that all the branches of power and every state authority must act in accordance with the constitution and the law, and may not take any arbitrary action which has no foundation in law. As long as the rule of law is respected in this manner, rights which are expressed in legal terms will in general be secure; when the rule of law is ignored, or the concept of legality is linked to some criterion external to the law, such as the precepts of a particular ideology, the formal recognition of rights is merely spurious and without substance. Furthermore, where the law itself sanctions the violation of fundamental human rights or fails to provide adequate protection, the rule of law becomes irrelevant.

The rule of law requires the respect of every branch of authority:

"In the absence of the rule of law, not only universal moral rights but all rights are at risk. A government can violate them and treat many of its citizens as expendable with impunity. Not that the rule of law can provide perfect protection. It cannot do so when judges and the police are corrupt. Moreover the law itself may violate human rights."<sup>23</sup>

The rule of law depends ultimately on voluntary respect, especially by the executive, which controls the armed forces, and possibly even more importantly by the armed forces themselves. If the politicians retain sufficient control over the military, they should be able to ensure respect for the rule of law, but in some circumstances the armed forces are subject to inadequate supervision and virtually able to take independent action. As far as the executive itself is concerned, the ultimate sanction in a democratic system is the loss of power at the next election, though of course

this does not prevent the assumption of power by force and the termination of democracy.

In liberal democracies, the rule of law is complementary to the constitutional limitation of government, that is the existence of authorities independent of the executive which have equal constitutional authority coupled with effective powers to restrain the executive and its various subsidiary organs, particularly the security forces. It is crucial that no single entity should have control of all branches of power within the state: human rights as we have defined them involve the protection of the individual from governmental abuses, and the effective protection of human rights thus requires the control of government by means of independent restraints. In a totalitarian system, the absence of such restraints leaves the protection of human rights dependent upon the goodwill of the authorities, whereas in liberal democracies the limitation of government has conventionally been achieved by means of a classic separation of powers, namely the vesting of legislative, executive and judicial functions in separate and independent organs, each having in theory equal constitutional status, yet subject to the authority of the others. This balancing of powers is intended to prevent any one branch from exceeding its constitutional mandate and violating the rule of law.

The adoption of liberal democracy *in toto*, or even of this particular form of separation of powers, is not necessarily the sole method of securing effective protection of fundamental human rights, but the principle of independent control and limitation of government is a prerequisite to the prevention of abuses of power, and the liberal system has proved the most successful in practice, although

there are many other relevant factors. There may be a wide range of variations more suited to other societies, but the significant point is the necessity of restraining influences of an official nature within the structure of the state. Where such influences are not operating, it is all too easy for the authorities simply to ignore constitutional provisions and legal procedures and to embark on a policy of repression.

In liberal theory, the executive must remain firmly under the supervision of a democratically elected parliamentary body responsible to the electorate. Parliament ought to be free of pressure from the executive branch, and in this connection the existence of a genuine opposition is of great importance. The judiciary must also retain effective control over the actions of both the legislature and the executive in order to ensure that the rule of law is respected and that neither the legislature nor the executive attempts to circumvent the law. While in some countries the judiciary does not exercise the function of constitutional review of legislation, the protection of the individual from executive and administrative abuses has in most liberal democracies been entrusted to an independent judiciary:

"What is most important of all is the independence of the Judiciary vis-a-vis the Executive....This has undoubtedly been a bulwark for preserving the liberty of the subject against the excessive exercise of power by the Executive."<sup>94</sup>

Although the judiciary has assumed this role in the past in many countries, it would be possible for some alternative independent authority to carry out the specific function of protecting human rights, and in some states the office of ombudsman complements the judicial role. It might be possible to create special commissions for the protection of fundamental human rights, although initially the

judiciary would probably have to retain a concurrent jurisdiction in so far as it has built up a certain dignity and prestige which newer agencies might not command. The important factor in any event is always the effectiveness of the authority in restraining the executive and administrative organs of power:

"A constitution, in itself, is only one element and may be valueless unless it can be invoked and enforced. Many high sounding constitutions are valueless because they are ignored, misinterpreted, or because the constitutional safeguards are not judicially enforceable by an independent judiciary. Hence, the importance of a fearless independent judiciary charged with the task of enforcing compliance with the constitutional provisions. Not infrequently, high sounding constitutional guarantees become illusory unless there is adequate machinery to constrain the executive, and even the legislature to conform with the provisions of the constitution."<sup>95</sup>

The principle of independent control is of particular importance in liberal democracies when there is an erosion of the normal safeguards as a result of the introduction of emergency measures. Often the effect of such measures is firstly to confer wider powers on security forces, secondly to curtail political rights and thirdly to free the executive from the usual parliamentary and judicial supervision. This facilitates the use of torture by the security forces, either with or without the knowledge and approval of the government, in the former case as a result of the absence of the normal legal safeguards. It is of the utmost importance, therefore, that the proclamation of a state of emergency should be accompanied by alternative guarantees which will ensure that core rights are not violated as a result of the suspension of the other rights which help to ensure that torture is not employed.

It should also be noted that less formal pressures and influences on governments, such as a free press and general freedom of expression, have a very significant part to play in the restraint of state authorities. Indeed, the entire range of civil and political rights provides a secondary level of limitations. The prevention of torture is dependent on the effectiveness of the way in which all such factors, official and unofficial, combine to restrain the authorities.

To sum up, then, the problem of core rights, including freedom from torture, essentially involves the protection of the individual from government abuses, and the prevention of torture is consequently dependent upon the existence within the legal system of the state of effective controls over the government and its executive organs. We have identified the principal institutions of liberal democracy and suggested that they constitute the crucial factor in the effective protection of core rights because they establish independent restraint of government; conversely, it may be concluded that the rejection of the principle of limitation of government creates conditions in which the violation of human rights is liable to occur. While western liberalism accepts the need for control of government in order to protect the individual, other philosophies and ideologies do not perceive any requirement for such control, regarding the function of government as the implementation of ideological goals rather than the promotion of individual liberty, with the result that violations of fundamental human rights cannot be prevented. This accounts for the discrepancy between the apparent consensus against torture and the fact that the practice of torture is regularly employed by governments.

When safeguards are absent, either because the constitutional system itself rejects limitation of government or as a result of emergency measures, international law assumes responsibility for the protection of human rights, but unfortunately the same difficulties arise at the international level. There are extensive limitations on the value and effectiveness of international law in relation to human rights: firstly, international law usually requires acceptance by governments before it becomes operative in relation to particular states, and the fact is that the imposition of international supervision is strongly resisted by those regimes which reject the concept of limitation of government; secondly, even when governments do become bound by international procedures, they are able simply to refuse to co-operate or comply with the directions of the competent authorities, even when these are legally binding, because the structure of international relations lacks effective sanctions by which the decisions of international authorities can be enforced. At both national and international levels, then, the problem of the rejection of the concept of limitation of government is the central obstacle, and it is to these matters that we shall be turning our attention in this study.



## Notes

1. For text, see Ian Brownlie, *Basic Documents on Human Rights* (Oxford University Press, 1971), at pp. 106-112. The Geneva Conventions of 1949, relating to armed conflicts, also contain a number of relevant provisions: see G.I.A.D. Draper, *The Juridical Aspects of Torture*, 1976 *Acta Juridica* (Cape Town) (1978) 221-32, at pp. 222 and 224-26; Barry M. Klayman, *The Definition of Torture in International Law*, 51 *Temple Law Quarterly* (1978) 449-517, at p. 450; Matthew Lippman, *The Protection of Universal Human Rights: The Problem of Torture*, *Universal Human Rights*, Vol. 1, No. 4, Oct-Dec 1979, 25-55, at p. 26. The laws of war, however, have different origins from those of human rights and, although to some extent based on the same conceptions of humanity, they do not fall within the scope of this study. Parts of the United Nations Standard Minimum Rules for the Treatment of Prisoners, in particular Rule 31, are also of relevance to the question of torture. These Rules were adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and were approved by the UN Economic and Social Council in 1957: see Klayman, *op.cit.*, at p. 475, note 140. They are reproduced in the Review of the International Commission of Jurists, No. 4, Dec 1969, at pp. 48-59.

2. The International Covenant on Civil and Political Rights (UN General Assembly resolution 2200A(XXI)) was adopted along with an Optional Protocol, and both instruments came into force on 23 March 1976. Also adopted at the same time was an International Covenant on Economic, Social and Cultural Rights, which came into force on 3 January 1976. For the texts of these instruments, see Brownlie, *op.cit.*, at pp. 211-31, 232-36 and 199-210 respectively. Each of the instruments is binding only on states parties. For the numbers of states parties to the International Covenant on Civil and Political Rights and the Optional Protocol, see notes 17 and 65, *infra*.

3. The European Convention on Human Rights was signed in 1950 and came into force on 3 September 1953. For text, see Brownlie, *op.cit.*, at pp. 338-65.

4. The American Convention on Human Rights was signed in 1969 and came into force on 11 July 1978. For text, see Brownlie, *op.cit.*, at pp. 399-427.

5. See International Covenant on Civil and Political Rights, article 4; European Convention on Human Rights, article 15; American Convention on Human Rights, article 27. It has been suggested that the prohibition of torture is *jus cogens*, a peremptory norm of international law: see Michael O'Boyle, *Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. the United Kingdom*, 71 *American Journal of International Law* (1977) 674-706.

6. The African Charter on Human Rights and Peoples' Rights was adopted in July 1981 by the Heads of State of the Organisation of African Unity. For text, see 21 *International Legal Materials* (1982), at pp. 58-68. The Charter is now in force.

7. See especially resolutions 3059(XXVIII), 3218(XXIX) and 3219(XXIX) in 1973 and 1974. For a general background study, see Klayman, op.cit., especially at pp. 475-88.

8. General Assembly resolution 34/169. The provisions of the Code are discussed in Chapter Nine, *infra*.

9. General Assembly resolution 37/194. The Annex contains the Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture, and other cruel, inhuman or degrading treatment or punishment. For the background and development of the code of medical ethics, see General Assembly resolution 3453(XXX) and UN documents A/35/372 and Add.1-4, A/36/140 and Add.1-4. The Principles are discussed in Chapter Nine, *infra*.

10. Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment. For text, see UN document A/35/401, Annex. See also UN documents A/35/401 and Add.1-2, and A/38/388 and Add.1-3. The draft body of principles is discussed in Chapter Eight, *infra*.

11. General Assembly resolution 39/46. The Convention came into force on 26 June 1987, and as at 31 July 1987 the following 22 states had ratified or acceded to it: Afghanistan, Argentina, Austria, Belize, Bulgaria, Byelorussian SSR, Cameroon, Canada, Denmark, Egypt, France, Hungary, Mexico, Norway, Philippines, Senegal, Sweden, Switzerland, Uganda, Ukrainian SSR, USSR, Uruguay: see UN document A/42/451 of 10 August 1987. The Convention is discussed in Chapter Seven, *infra*.

12. See Commission on Human Rights resolution 1985/33 of 13 March 1985. Professor P. Kooijmans was appointed as Special Rapporteur on 22 May 1985 and submitted his first report in 1986: see UN document E/CN.4/1986/15.

13. The text of the OAS Convention is reproduced in 25 International Legal Materials (1986), at pp. 519-26. The text of the European Convention is reproduced in Review of the International Commission of Jurists, No. 39, Dec 1987, at pp. 51-56. It has been ratified by Ireland, Malta and Turkey. Both instruments are discussed in Chapter Seven, *infra*.

14. See Amnesty International Report on Torture (Gerald Duckworth & Co., updated 2nd edition, 1975).

15. See Torture in the Eighties: An Amnesty International Report (Martin Robertson & Amnesty International, 1984). Ninety eight countries are mentioned in the report.

16. See *ibid.*, at p. 8: "No state legalizes torture in its constitution or penal code (although an increasing number of penal codes do allow for such judicial punishments as flogging and amputation)." The Report refers at p. 28 to a 1978 survey of 136

constitutions and other legal instruments which cites legal provisions of 112 nations that "either explicitly forbid torture or can reasonably be interpreted as doing so."

17. The Universal Declaration of Human Rights was adopted in 1948 by 48 votes to none, with 8 abstentions. Its principles were reaffirmed by 84 states and other entities in the Proclamation of Tehran in 1968, and again the same year by the General Assembly of the United Nations in resolution 2442(XXIII) by 115 votes to none, with only one abstention. For the text of the Proclamation of Tehran, see Brownlie, *op.cit.*, at pp. 253-56. Support for legally binding conventions is, however, less enthusiastic: as at 24 July 1987, only 86 states had ratified or acceded to the International Covenant on Civil and Political Rights. This number represents a little more than half of the United Nations membership. For a list of states parties, see Report of the Human Rights Committee 1987 (UN document A/42/40), Annex I.

18. The Charter of the United Nations recognises that the purposes of the organisation include the development of friendly relations among nations "based on respect for the principle of equal rights and self-determination of peoples" and the achievement of "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion": see article 1(2) and 1(3). For relevant provisions of the UN Charter, see Brownlie, *op.cit.*, at pp. 93-105.

19. The Universal Declaration was adopted three years later to reaffirm the United Nations' "faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women" and to promote "universal respect for and observance of human rights and fundamental freedoms": see the Preamble.

20. For example, the reference to the rule of law in the Preamble, the right to own property in article 17, and the implied reference to democratic parliamentary elections in article 21(3).

21. For a discussion of the reasons behind the abstentions, particularly of the Soviet Union and Saudi Arabia, see Marnia Lazreg, *Human Rights, State and Ideology: An Historical Perspective*, in *Human Rights: Cultural and Ideological Perspectives*, edited by Adamantia Pollis and Peter Schwab (Praeger Publishers, 1979), pp. 32-43. The other states which abstained were Byelorussian SSR, Czechoslovakia, Poland, Ukrainian SSR, Union of South Africa, and Yugoslavia. It is interesting to note that the Preamble to the Universal Declaration of Human Rights stresses that "a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge".

22. For an alternative view, see Philip Alston, *The Universal Declaration at 35: Western and Passé or Alive and Universal*, in *Review of the International Commission of Jurists*, No. 31, Dec 1983, pp. 60-70.

23. Hersch Lauterpacht, *An International Bill of the Rights of Man* (Columbia University Press, 1945), at p. 16.

24. One writer suggests that "the idea of human rights is indeed an emanation from within every man who will but seriously consult his innate moral sense": see F.E. Dowrick, Introduction, in *Human Rights: Problems, Perspectives and Texts*, edited by F.E. Dowrick (Saxon House, 1979), pp. 1-22, at p. 7. Cf. article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

25. For further discussion of this idea, see pp. 35-40, *infra*. It should be noted that limitations are also imposed on individuals themselves, but as far as international law is concerned it is the role and responsibility of governments which are relevant, though this does include the protection of the individual's rights from encroachment by other individuals or groups as well as by state authorities.

26. Lauterpacht, *op.cit.*, at p. 17.

27. For discussions of the idea of natural law in ancient times, see Frede Castberg, *Natural law and human rights: An idea-historical survey*, in 7th Nobel Symposium, edited by Asbjörn Eide and August Schou (Almqvist & Wiksell, 1968), pp. 13-34; Lauterpacht, *op.cit.*, especially Chapters 2 and 3; P.J. Rhodes, A Graeco-Roman perspective, in *Human Rights: Problems, Perspectives and Texts*, pp. 62-77; Elaine Pagels, *The Roots and Origins of Human Rights*, in *Human Dignity: The Internationalization of Human Rights*, edited by Alice H. Henkin (Co-published by Aspen Institute for Humanistic Studies, Oceana Publications and Sijthoff & Noordhoff, 1979), pp. 1-8; and Alan S. Rosenbaum, Introduction, in *The Philosophy of Human Rights: International Perspectives*, edited by Alan S. Rosenbaum (Aldwych Press Ltd., 1981), pp. 3-41, at pp. 8-24, especially pp. 8-11.

28. Adamantia Pollis and Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in *Human Rights: Cultural and Ideological Perspectives*, pp. 1-18, at p. 8. See also Adda Bozeman, *The Future of Law in a Multicultural World* (Princeton University Press, 1971), at pp. 162-64 on the emphasis on the group in Africa and Asia. It is suggested in Pollis and Schwab, *op.cit.*, at pp. 9-13, that the state has taken over from the traditional family, tribal or ethnic group.

29. See Dowrick, *op.cit.*, at p. 7; Norman Hampson, *The Enlightenment* (Penguin, 1968); Francis Schaeffer, *How Should We Then Live? The Rise and Decline of Western Thought and Culture* (Fleming H. Revell Company, New Jersey, 1976); and Rosenbaum, *op.cit.*, at pp. 11-15, and also at pp. 15-22 on 19th century developments. The most influential philosophers in the development of the concept of the rights of man were Locke and Rousseau, though many others also made significant contributions to the thought of the Age of Enlightenment.

30. See Rosenbaum, *op.cit.*, at p. 22, where it is suggested that the international peace movement was an influence from 1899 onwards. Cf. also Michael Howard, *War and the Liberal Conscience* (Maurice Temple

Smith Ltd., 1978). Developments between the wars included the publication of an International Declaration of the Rights of Man by the Institute of International Law in 1929: see Dowrick, *op.cit.*, at p. 7 and also Appendix F to the same volume for the text of the Declaration.

31. President Roosevelt of the United States of America listed Four Freedoms in 1941, and various other individuals and organisations formulated international declarations of the rights of man in the period to the end of the Second World War in 1945: see Dowrick, *op.cit.*, at pp. 5-7. One of the best known of these was Lauterpacht's International Bill of the Rights of Man, produced in 1945: see note 23, *supra*.

32. For one analysis of different types of rights, see Rosenbaum, *op.cit.*, at pp. 29-31.

33. José Míguez Bonino, Religious Commitment and Human Rights: a Christian Perspective, in *Understanding Human Rights: An Interdisciplinary and Interfaith Study*, edited by Alan D. Falconer (Irish School of Ecumenics, 1980), pp. 21-33, at p. 24.

34. Rosenbaum, *op.cit.*, at p. 4.

35. See, for example, Latif O. Adegbite, African attitudes to the international protection of human rights, in 7th Nobel Symposium, pp. 69-81; and Rashid Ahmed Jullundhri, Human Rights and Islam, in *Understanding Human Rights: An Interdisciplinary and Interfaith Study*, pp. 34-46.

36. On pre-colonial Africa, see Adegbite, *op.cit.*, and also Dunstan M. Wai, Human Rights in Sub-Saharan Africa, in *Human Rights: Cultural and Ideological Perspectives*, pp. 115-44. On ideas of human rights in Islamic thought, see Abdul Aziz Said, Precept and Practice of Human Rights in Islam, *Universal Human Rights*, Vol. 1, No. 1, Jan-Mar 1979, 63-79, especially at pp. 65-68; Seyyed Hossein Nasr, The Concept and Reality of Freedom in Islam and Islamic Civilization, in *The Philosophy of Human Rights: International Perspectives*, pp. 95-101; and Jullundhri, *op.cit.*, especially at pp. 36-42. Cf. comments in Pagels, *op.cit.*, at p. 6. On pre-Second World War Japan, see Lawrence W. Beer and C.G. Weeramantry, Human Rights in Japan: Some Protections and Problems, *Universal Human Rights*, Vol. 1, No. 3, July-Sept 1979, 1-33, at pp. 1-4. On ideas of human rights in Jewish thought, see Abraham Kaplan, Human Relations and Human Rights in Judaism, in *The Philosophy of Human Rights: International Perspectives*, pp. 53-85. On Chinese views, see Peter K.Y. Woo, A Metaphysical Approach to Human Rights from a Chinese Point of View, in *The Philosophy of Human Rights: International Perspectives*, pp. 113-24; and Mab Huang, Human Rights in a Revolutionary Society: The Case of the People's Republic of China, in *Human Rights: Cultural and Ideological Perspectives*, pp. 60-85.

37. Robert B. McKay, What Next?, in *Human Dignity: The Internationalization of Human Rights*, pp. 65-81, at p. 65.

38. Principles which attract broad support, at least in theoretical terms, would include self-determination, racial equality, prohibition

of genocide, equality before the law, and probably a number of more detailed rules relating to the administration of justice. It may be noted that group rights tend to attract more widespread support than the rights of the individual.

39. Said, *op.cit.*, at p. 77.

40. Rosenbaum, *op.cit.*, at p. 6, identifies three general approaches to human rights: "From a political perspective, the conception of human rights has at least three matrices, each corresponding to one of three major political camps: Western liberalism, Marxist socialism, and Third World 'self-determinationism'."

41. Imre Szabó, The theoretical foundations of human rights, in 7th Nobel Symposium, pp. 35-45, at p. 36.

42. Mary Hawkesworth, Ideological Immunity: The Soviet Response to Human Rights Criticism, *Universal Human Rights*, Vol. 2, No. 1, Jan-Mar 1980, 67-84, at pp. 69-70.

43. István Mészáros, Marxism and Human Rights, in *Understanding Human Rights: An Interdisciplinary and Interfaith Study*, pp. 47-61, at p. 51.

44. See, for example, the Constitution (Fundamental Law) of the Union of Soviet Socialist Republics 1977, articles 59-69.

45. See *ibid.*, articles 40-46. The socio-economic rights are significantly placed before the civil and political rights.

46. Mészáros, *op.cit.*, at p. 48.

47. See the Constitution of the USSR, article 50.

48. The proposition that repression is necessary for economic development is not undisputed. See, for example, Robert E. Goodin, The Development-Rights Trade-Off: Some Unwarranted Economic and Political Assumptions, *Universal Human Rights*, Vol. 1, No. 2, Apr-June 1979, 31-42; cf. Han S. Park, Human Rights and Modernization: A Dialectical Relationship?, *Universal Human Rights*, Vol. 2, No. 1, Jan-Mar 1980, 85-92. Certainly the attainment of a sound economic basis does not appear to be a guarantee of respect for civil and political rights. See also Richard Falk, Comparative Protection of Human Rights in Capitalist and Socialist Third World Countries, *Universal Human Rights*, Vol. 1, No. 2, Apr-June 1979, 3-29.

49. See Pollis and Schwab, *op.cit.*, at pp. 8-14.

50. In the words of one writer, "responsibility for the denial of human rights in a Muslim country lies with the ruling class and not with Islam." See Jullundhri, *op.cit.*, at p. 42.

51. See relevant references at note 36, *supra*. Note that the articles mentioned adopt a theological approach to the subject.

52. Said, *op.cit.*, at p. 63.

53. Ibid., at p. 73.

54. Jullundhri, op.cit., at p. 36. See also Nasr, op.cit., especially at p. 96.

55. The notion of freedom as obedience to the will of God or liberation from the human passions rather than the absence of limitations and the opportunity for self-expression is not unique to Islam, but is found also in the Christian faith, in which freedom is perceived to be a release from the power of sin into a life of obedience to the will of God. However, while individual freedom may legitimately be seen in terms of moral responsibilities and the spiritual ability to fulfil obligations to others, this idea is not incompatible with the concept of claims against the state, and it does not imply that governmental violation of human rights in this sense is justified. The fact that a person is spiritually aware and has a highly developed moral consciousness in no way deprives him of the right to protection from violation of his basic rights, whether or not he himself considers these important. It is essential, therefore, not to confuse the moral duties of the individual with the protection of his fundamental human rights.

56. Said, op.cit., at p. 77.

57. Ibid., at p. 73.

58. Woo, op.cit., at p. 119.

59. For a general discussion of various cultural approaches, see Bozeman, op.cit.

60. A.J.M. Milne, The idea of human rights: a critical inquiry, in Human Rights: Problems, Perspectives and Texts, pp. 23-40, at p. 23.

61. See as an example of this the Proclamation of Tehran, and the discussion in Moses Moskowitz, International Concern with Human Rights (Sijthoff Leiden, Oceana Publications Inc., Dobbs Ferry, New York, 1974), Chapter II.

62. The member states of the Council of Europe, all of which have ratified the European Convention on Human Rights, are Austria, Belgium, Cyprus, Denmark, Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. Only Cyprus has not accepted the right of individuals to submit communications alleging violations of the Convention.

63. John T. Wright, Human Rights in the West: Political Liberties and the Rule of Law, in Human Rights: Cultural and Ideological Perspectives, pp. 19-31, at p. 29.

64. See Pollis and Schwab, op.cit., at p. 13.

65. The Optional Protocol to the International Covenant on Civil and Political Rights provides for the consideration by the Human Rights

Committee of communications from victims of human rights violations. Its provisions are discussed in Chapter Six, *infra*. As at 24 July 1987, the following 38 states had ratified or acceded to the Optional Protocol: Argentina, Barbados, Bolivia, Cameroon, Canada, Central African Republic, Colombia, Congo, Costa Rica, Denmark, Dominican Republic, Ecuador, Finland, France, Iceland, Italy, Jamaica, Luxembourg, Madagascar, Mauritius, Netherlands, Nicaragua, Niger, Norway, Panama, Peru, Portugal, St Vincent and the Grenadines, San Marino, Senegal, Spain, Suriname, Sweden, Trinidad and Tobago, Uruguay, Venezuela, Zaire, and Zambia: see Report of the Human Rights Committee 1987 (UN document A/42/40), Annex Ib. The list includes most of the states one would have expected, though some notable exceptions are the Federal Republic of Germany and the United Kingdom. Of the 38 states, all but 9 are European or American, and it is interesting to recall that these are the two areas which have regional conventions in operation, although the record of Latin American states has been far from consistent with their diplomatic support for international law. It is significant nonetheless that Latin America shares many historical roots with western Europe, particularly in political and legal institutions, and this helps to explain the degree of American as well as European support for the Optional Protocol. Only 9 African states have ratified or acceded to the Protocol, and no Asian states have done so. This gives a clear indication of the divisions between the various philosophical outlooks.

Articles 41-43 of the International Covenant on Civil and Political Rights establish an inter-state procedure regarding violations of the Covenant, but the application of this procedure requires separate acceptance by governments and, as at 24 July 1987, only 21 states had accepted the procedure: Argentina, Austria, Belgium, Canada, Denmark, Ecuador, Finland, Federal Republic of Germany, Iceland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Peru, Philippines, Senegal, Spain, Sri Lanka, Sweden, and the United Kingdom: see Report of the Human Rights Committee 1987, Annex Ic. Again the main support comes from western European states. The provisions of articles 41-43 came into force on 28 March 1979.

It may be noted that support for the American Convention on Human rights has not been particularly strong: as at 10 July 1986, only 19 of the 32 member states of the Organization of American States had ratified the Convention: Argentina, Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Uruguay, and Venezuela. Only 8 states had accepted the optional inter-state complaint procedure: Argentina, Colombia, Costa Rica, Ecuador, Jamaica, Peru, Uruguay, and Venezuela. See UN document A/41/274/Add.1. Acceptance of the right of individual petition is mandatory. Cf. the position under the European Convention: see note 62, *supra*. For the members of the OAS, see Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System (OEA/Ser.L/V/II.65, Doc.6, of 1 July 1985).

For states parties to the UN Convention against Torture, see note 11, *supra*.

66. Milne, *op.cit.*, at p. 23.

67. Dowrick, *op.cit.*, at p. 7. The author supports this proposition by referring to the existence within Nazi Germany of individuals who retained a belief in human rights and who indeed developed this belief



in spite of the vigorous propaganda with which they were confronted during their formative years: see *ibid.*, at p. 6 and Appendix E of the same volume.

68. Article 2(1). Cf. article 2(2) of the International Covenant on Economic, Social and Cultural Rights, and see also article 3 in each Covenant.

69. Article 4(1) of the International Covenant on Civil and Political Rights refers to measures of derogation which "do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." Cf. American Convention on Human Rights, article 27(1). On the problems involved in distinguishing relevant from irrelevant discrimination, see Morris Ginsberg, *On Justice in Society* (Penguin, 1965).

70. See Universal Declaration of Human Rights, article 6; International Covenant on Civil and Political Rights, article 16. No derogation is permitted from this principle: see International Covenant on Civil and Political Rights, article 4(2). Cf. American Convention on Human Rights, articles 3 and 27(2).

71. See Universal Declaration of Human Rights, article 7; International Covenant on Civil and Political Rights, article 26, and also article 14(1): neither of these articles are included in the list of non-derogable rights in article 4(2). Cf. American Convention on Human Rights, articles 24 and 27(2), especially the last phrase of the latter: "not authorize any suspension of...the *judicial guarantees essential for the protection of such rights.*" (Emphasis added)

72. The European Social Charter was signed in October 1961. For text, see Brownlie, *op.cit.*, at pp. 366-86.

73. Universal Declaration, article 29(2). Cf. International Covenant on Economic, Social and Cultural Rights, article 4. The principle appeared much earlier in article 4 of the French Declaration of the Rights of Man and of the Citizen: "*La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui; ainsi, l'existence des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la loi.*" The principle is also expressed, though with perhaps a slightly different emphasis, in a number of articles in the International Covenant on Civil and Political Rights: see articles 12(3), 14(1), 18(3), 19(3), 21, and 22(2). Cf. also European Convention on Human Rights, articles 8(2), 9(2), 10(2), and 11(2); and American Convention on Human Rights, article 32(2).

74. See Ginsberg, *op.cit.*, at pp. 56-57, 63-64, 66-67, 75, *passim*.

75. This applies particularly where restrictions are imposed on individual behaviour or activities which do not directly harm or interfere with the rights of others or the interests of society, but are prohibited on the basis of social *mores*. This involves the realm of private morality, in which it is often difficult to determine the effect of a libertarian approach on society in general.

76. For the underlying theory of individualism, see Gerald F. Gaus, *The Modern Liberal Theory of Man* (Croom Helm, 1983)
77. See p. 44, *infra*.
78. See Milne, *op.cit.*, at pp. 33-34.
79. Falk, *op.cit.*, at p. 15.
80. Milne, *op.cit.*, at p. 36. The reference is to the Universal Declaration's claim to represent a "common standard of achievement".
81. See Milne, *op.cit.*, at p. 36.
82. See the various writers discussed in Falk, *op.cit.*; and the contributors to *Human Dignity: The Internationalization of Human Rights*. In the former, Falk refers to Peter Berger's book, *Are Human Rights Universal?*, commenting that Berger "restricts the scope of human rights as international claims to those 'grossest cases' of abuse that infringe the minimal views of decency embodied in every major world cultural tradition." Cf. Thomas Buergenthal, *Codification and Implementation of International Human Rights*, in *Human Dignity: The Internationalization of Human Rights*, pp. 15-21, at p. 17.
83. Abraham Sirkin, *Elements of a United States Human Rights Strategy*, in *Human Dignity: The Internationalization of Human Rights*, pp. 23-41, at p. 27.
84. See European Convention on Human Rights, article 15(2).
85. See International Covenant on Civil and Political Rights, article 4(2).
86. See American Convention on Human Rights, article 27(2). The other rights mentioned are the rights of the family, the right to a name, the rights of the child, the right to a nationality, and the right to participate in government.
87. The non-derogable rights do not, in fact, appear to have been formulated on the basis of a single criterion. As we have seen, the principles of non-discrimination, proportionality and so on are absolute, and this is recognised to a certain extent in the conventions: thus, the right to life is protected absolutely against arbitrary violation, and it would also be understood to be protected against violation without a fair trial or for a trivial offence. However, the conventions do not regard the right to life as absolute in the sense that the taking of human life is not justified in any circumstances: capital punishment is permitted by article 6 of the International Covenant on Civil and Political Rights, article 2 of the European Convention on Human Rights, and article 4 of the American Convention on Human Rights. Under article 6 of the Covenant, arbitrary deprivation of life is prohibited (para. 1), and the death penalty is permitted for only the most serious crimes (para. 2), and certain other rules apply (paras. 4 and 5), while the normal procedural safeguards must also be observed (see articles 9 and 14-16). It might be argued, of course, that the right to life ought to

be absolute, and the conventions do encourage the abolition of the death sentence (see article 6(6) of the Covenant), but as they stand at present they do not consider the right to life to be inviolable.

The same principles which apply to the right to life ought to apply also to other rights: thus, the right not to be detained must mean that arbitrary detention is absolutely prohibited. However, the conventions do not take this approach, so that arbitrary detention may in fact be permissible in certain circumstances. This implies that freedom from arbitrary detention is not as important as the right to life, and derogation may take place if the interests of the state so require. While short-term detention of this nature may be justified in emergency situations, however, it is difficult to see how prolonged detention without trial could be viewed as a legitimate practice, and to this extent the conventions seem to be a little inconsistent in classifying non-derogable rights. Indeed, the classification of such rights appears to have been an intuitive rather than a deductive process.

The prohibitions of torture and of slavery are special cases, as these practices are forbidden in all circumstances: they are rights which do not depend on violation being arbitrary or unreasonable, but are protected absolutely because their violation is always unjustified.

88. Joel Feinberg, *Social Philosophy*, quoted in Lippman, *op.cit.*, at p. 27, note 12.

89. See note 82, *supra*.

90. Sean MacBride, *The Universal Declaration - 30 Years After*, in *Understanding Human Rights: An Interdisciplinary and Interfaith Study*, pp. 7-20, at p. 18.

91. On the absence of a written constitution in the United Kingdom, see *ibid*, at pp. 18-19.

92. *Ibid.*, at pp. 16-17.

93. Milne, *op.cit.*, at p. 35.

94. D.D. Raphael, *Problems of Political Philosophy* (Macmillan & Co., 1970), at p. 154.

95. MacBride, *op.cit.*, at p. 18.

## CHAPTER TWO: HISTORICAL INTRODUCTION

Before proceeding to an examination of the circumstances in which torture occurs and the relevance of limitations on government in such circumstances, it is important to put the contemporary use of torture into perspective by examining the historical development of the practice and by considering the issue of the possible justifiability of torture, and we shall direct our attention to these matters in this and the following chapter.

In 'La tortura giudiziaria nel diritto comune', Piero Fiorelli makes the following statement:

"Dreadful or not, compelling a person through violence to admit or disclose something against his will is a method of procedure so humanly obvious that it proves difficult to imagine an age in which it could not have been known."<sup>1</sup>

In fact, although inhuman punishments seem to have been endemic to the ancient world, judicial torture (that is, the official use of coercion for the purpose of judicial investigation) was not a feature of all early legal systems:

"Although many ancient societies experienced the transition from primitive and domestic to sophisticated and public systems of law, not all of them came to use torture as distinctively as did the Egyptians, the Persians, the Greeks and the Romans. Some societies, notably those of the Babylonians, the Hindus and the Hebrews, seem to have developed a system of ordeals that never permitted torture to be introduced."<sup>2</sup>

Our knowledge of early civilisations is, of course, far from comprehensive, and it is quite probable that torture was practised extra-legally in many societies. Certainly, the absence of documentary records cannot be taken as conclusive evidence that torture was not used, or as an indication that there existed

philosophical or humanitarian objections to the employment of torture: slavery, cruel punishments and numerous other practices which the civilised world today regards as inhumane and barbaric were accepted as the norm in early societies, and although doubtless there were individuals who from time to time raised objections to such practices, the use of violence against human beings was generally considered acceptable in a wide range of circumstances. Nevertheless, as an instrument of public authority, or at least as a judicial mechanism, torture has a fairly well defined history.

There are references to the coercive use of torture in Egyptian records, and more detailed descriptions have survived from the civilisation of Ancient Greece, in which slaves, prisoners of war and foreigners could be subjected to torture but citizens, the only class with full legal rights, were largely protected.<sup>3</sup> However, the legal system of greatest historical importance was that of the Romans, principally because the Reception of Roman law into the legal systems of medieval Europe was partly responsible for the revival and institutionalisation of the practice of torture in Europe. Different factors were, of course, applicable to the development of torture in other areas of the world, and while the historical information on civilisations such as those of China, Japan and India makes little reference to torture, it does seem clear that torture was employed in these societies, at least in practice if not as an officially recognised judicial procedure. However, the European experience is of particular interest and significance because of the subsequent influence of European legal thought in many parts of the world as a result of trade and colonial expansion, and it is pertinent to examine the development of torture from Roman times.

The Romans accorded full rights only to citizens: slaves and foreigners remained outwith the political community, so that there were no reservations about denying them any rights and treating them as less than human and therefore expendable. Originally, slaves could only be tortured when accused of a crime, but later they could also be tortured as witnesses: in fact, a slave's evidence was only considered acceptable if it had been extorted under torture, and even then it had no great value. At first, freemen could not be subjected to torture in any circumstances, but in the early Empire this restriction began to be eroded, and the first step in this process related significantly to the political crime of high treason (*crimen majestatis*). Throughout subsequent history, the employment of torture has been associated with the investigation of crimes of a political nature and the exposure of plots against the state. The Roman Emperors themselves often tortured those whom they suspected of planning to overthrow them, and such men as Tiberius, Caligula, Nero and Domitian are renowned for their cruelty, whilst even the milder Claudius excepted conspirators from his oath never to torture a free man. Some of the later Emperors prohibited the torture of free men, but by the end of the 3rd century such torture was permitted in cases of high treason, forming part of the Emperor's prerogative. With the development of Roman law under the Emperors, then, a new division arose between *honestiores* and *humiliores*, the latter of whom could be tortured.<sup>4</sup> Initially, the incipient Christian religion provided many victims, but with the adoption of Christianity as the official religion of the Empire during the reign of Constantine the use of torture diminished greatly. Ironically, the Roman Catholic Church was

to be responsible for the revival of torture on an unprecedented scale several centuries later.

After the fall of Rome in the 6th century, the disintegration of the sophisticated Roman legal system led to a general deterioration in the quality of the administration of justice, and it is unclear what the status of torture was within the different societies which grew up, although it was certainly employed by the Germanic tribes, and it is probable that torture was a widespread if not a common practice throughout the Dark Ages. However, its use as a judicial process appears to have died out. The use of physical ordeals to determine the guilt or innocence of a person suspected of a crime seems to have been the norm in many parts of Europe, and "the fact of the accusatory process and the undeveloped rules of evidence worked against the practical survival of torture until the process of working Roman law into the legal culture of northern Europe began in earnest during the twelfth century."<sup>5</sup> It was not until the 13th century, then, that the systematic employment of judicial torture re-appeared. From then until the 18th century, however, torture formed an integral part of the legal systems of most of continental Europe.

Before the Reception of Roman law and the consequent influence of Roman law upon the legal systems of Europe, problems had arisen with the existing accusatory process when guilt was denied. Originally, innocence of a crime could be established by producing the requisite number of 'oath-helpers', men of good repute who would vouch for the accused: this was based upon the belief that God would take immediate and direct retribution in the event of the oath-helpers committing perjury. In secular - as opposed to ecclesiastical - law, this procedure was replaced by trial by ordeal, either bilateral (such

as duelling) or unilateral. Unilateral trial by ordeal involved the accused undergoing some physical ordeal, the purpose being to invoke the judgement of God, who was relied upon to inflict injury upon the guilty whilst protecting the innocent. This was commonly done by plunging the accused's bandaged arm into fire or boiling water in order to retrieve an object placed therein; if, when the bandages were removed, the arm was unhurt, the accused's innocence was proved, but any sign of injury was interpreted as an indication of guilt. On occasions this procedure seems to have been used for the purpose of extorting confessions.

Pope Innocent III abolished trial by ordeal in 1215, replacing God's judgement with that of man: '*quasi arbitrium Dei*'. Criminal offences were from that time onward to be tried by human judges as God's representatives in the administration of justice and, perhaps understandably, the socio-religious attitudes of the time, rooted as they were in superstition and fear, were not prepared for such uncertain standards: to the people of the 13th century, the direct intervention of a just, trustworthy and omniscient God was far more acceptable than the uninformed decision of an unreliable and fallible mortal. For this reason, the innovation required a system of proof which would eliminate judicial discretion and reduce the role of the judge to one of simply ensuring that the standard of proof had been met; in other words, if one man was to be the judge of another, there would have to be absolute and objective certainty of guilt. The judge's function was not, therefore, to weigh up the evidence and reach a decision as to whether or not the accused was guilty, but was rather to ensure that the evidentiary requirements had been satisfied. Consequently, circumstantial evidence, no matter how persuasive, was



insufficient in itself; the level of proof had to be so high that there could be no doubts about the guilt of the accused. Lesser standards were acceptable for minor offences, but for serious crimes meriting blood sanctions the standards had to be very strict, and such standards were identified by medieval jurists in Roman law.

The rediscovery of the works of the Emperor Justinian in the 11th century had kindled a great interest in Roman law in the universities of Europe, initially and principally in Italy, and this academic interest was soon superseded by a more practical approach, so that relevant principles were extracted from Roman law and applied to contemporary legal problems. This borrowing from Roman law - the Reception - coincided with the difficulties which had arisen as a result of the abolition of the ordeals, and so it was to Roman law that the medieval scholars turned for the strict standards of proof required by the new system of human judgement.

The basic rule was that a judge could only convict the accused when there existed full proof, namely two eyewitnesses or a confession. However, this standard of proof is so rigid that few criminals would ever be convicted, and it was to overcome this problem that the medieval jurists turned to torture, even though this was a departure from the Roman law's rules on the use of torture. The approach adopted by the jurists was that, although circumstantial evidence was always insufficient to secure a conviction, it was relevant, so that where only one eyewitness existed or where there was a certain amount of circumstantial evidence (*indicia*) constituting a 'half-proof', the use of torture was permitted for the purpose of obtaining the confession which would confirm guilt by providing full proof. Torture was, in fact, virtually essential in view of the

severe limitations imposed by the requirement of full proof, although as we shall see in the following chapter it actually adds nothing to the certainty of guilt, and the better course would have been the adoption of less strict standards of proof. The step from voluntary to coerced confessions occurred very early on in the legal development, however, and indeed may have been a mere continuation of the ordeals. It may be noted also that to endure torture did not establish innocence, and an accused could be convicted at a later date if new evidence came to light.

The rise of heresy soon paved the way for the institutionalisation of torture, which came to be regarded as the best proof of all (*probatio probatissimi*). Heretical ideas spread in France from the 12th century, and the Roman Catholic Church was alarmed into violent reaction and the repression of heterodoxy. Heresy constituted a 'thought-crime' which was "virtually unprovable without confession",<sup>6</sup> and torture presented itself as a most useful method of countering subversive threats of this nature. Numerous heretical groups, and also the Jews, suffered at the hands of the zealots of the Inquisition, and because denunciation of others was required as proof of the sincerity of repentance, the system of interrogation and terror spread inexorably. Torture was also employed in ordinary criminal cases, but the Church's reaction to the growth of heresy undoubtedly acted as a catalyst in the establishment of judicial torture in Europe. Some areas such as Sweden, Aragon, England and, to a lesser extent, Scotland, escaped the introduction of judicial torture, but even in these places torture was used extra-legally. Across the remainder of Europe, it formed part of the normal judicial process, and as such was an aspect of the inquisitory

character of the criminal procedure, in which the judge functioned also as prosecutor.

Historically, torture has always been resorted to particularly in response to subversive threats. Heresy is one example of this, and in later years witchcraft became the Church's new obsession. In 1484, Pope Innocent VIII's bull '*Summis desiderantes affectibus*' signalled the severe intensification of persecution of witches, and over the following two centuries a vast number of suspects were tortured and put to death throughout Europe. As with heresy, the secrecy of the activities supposedly indulged in led to a belief that there existed an organised conspiracy, and desperate efforts to expose and eliminate witches resulted in witch-hunting epidemics in many parts of Europe.<sup>7</sup>

The use of torture was gradually abolished in most parts of Europe during the 18th century, although the practice had in fact been declining for some time before then. Torture had been abolished in England as early as 1640, although the main reason for this seems to have been the fact that the criminal process in England did not require torture because it did not rely on the strict standards of proof demanded by European systems based on Roman law. The practice of *peine forte et dure*<sup>8</sup> and extreme forms of corporal punishment did continue in England long after the abolition of judicial torture in the strict sense, and indeed in most places the infliction of intense pain for the purpose of punishment continued for some time after the cessation of coercive torture. The abolition of judicial torture in continental Europe was made possible by certain developments which took place in legal theory and practice, with the result that the practice of torture was no longer required to the same extent as it previously had been. John Langbein argues that, due to a gradual

alteration in the law of proof, judges were able to convict and punish criminals on the basis of circumstantial evidence, and no longer had to rely on torture to obtain confessions.<sup>9</sup> In effect, it was recognised that the standards of proof were too rigid and that the requirement of full proof was unworkable, and accordingly a certain degree of judicial discretion was introduced, so that torture was no longer essential to obtain a conviction. The manner in which this development took place will be examined in more detail in the following chapter.

Although the necessity for torture was waning, the 18th century abolition also owed much to the advent of the Age of Enlightenment. Not only did this mean a much greater degree of tolerance of ideas and beliefs, but it also produced a desire amongst the educated classes to raise society from the superstition and barbarity of the primitive past to new heights of sophistication and enlightenment founded on scientific progress and faith in the power of reason. Existing practices were no longer merely accepted without question, but were assessed critically and retained only if useful and rational. There was thus a rejection of many of the practices associated with the past, and this included a positive rejection of the use of torture in the judicial process. The 18th century abolitionists, a group of men who attacked the institution of torture, recognised that torture did not increase the certainty of guilt, as the medieval scholars had failed to do, but their arguments were by no means innovative: torture has been criticised from very early times.<sup>10</sup> The circumstances, however, were new: not only was there a general climate of enlightened thought and acceptance of human judges, but the abolitionists were often in positions in society where they were able

to directly influence the rulers of Europe, the so-called enlightened despots. The importance of the arguments put forward, then, lay not in their persuasiveness or rationality, but rather in the fact that they were embraced by those who were willing and able to take steps to abolish torture. Moreover, the recognition that torture was no longer essential to the judicial process meant that there were no procedural obstacles to overcome.

At the beginning of the 18th century, Thomasius and Montesquieu had pointed to the absence of torture in England and Sweden to support their contention that a legal system could function satisfactorily without it. The main assault subsequently came from the Verri brothers in Milan, Sonnenfels (Councillor to the Empress Maria Theresa in Vienna), Voltaire and, most important of all, Cesare, Marchese Bonesana Beccaria who, in 1763, published his classic denunciation of torture in his book '*Dei delitti e della pene*' (Of Crimes and Punishments).<sup>11</sup> The book formed a treatise on criminal law and penal systems, and it introduced a number of concepts which were very influential in the development of juridical principles. Beccaria also attacked the practice of torture and, although his arguments were not conclusive in every instance, as we shall see in the following chapter, they did persuade certain European monarchs to abolish the use of torture. Frederick the Great of Prussia had declared a complete abolition in 1754 (having ordered a partial abolition in 1740), and torture was subsequently abolished throughout virtually the whole of Europe by the middle of the 19th century.<sup>12</sup>

The abolition of torture in Europe was the result of a combination of factors which were peculiar to that period of history, rather than the novelty or even the validity of the arguments against

torture. Essentially, the general climate of enlightened attitudes meant that there was a greater willingness, in particular on the part of political leaders, to accept that the judicial use of torture was neither necessary nor desirable. The abolition in fact related exclusively to judicial torture, that is the employment of torture as part of the process of securing evidence for criminal trial proceedings, and to that extent the abolition of torture has been a more or less permanent development: it is generally accepted that torture is not a justifiable method of obtaining evidence, not only in Europe, but also within the legal systems of all contemporary civilised societies. However, there are other circumstances in which many people consider the use of torture to be justified, and while the official use of torture in the judicial process has remained exceptional since the 18th century, the unofficial and extra-legal use of torture has frequently been resorted to, particularly under conditions of political instability and unrest when there exists a subversive threat to the security of the state.

In western Europe, torture has remained exceptional, due in large part to the relatively high level of political stability, and also to the influence of liberal thought on the political philosophies and institutions of western European states. This is not to say that there are not those who would justify the use of torture in certain situations, and certainly there are instances of systematic torture having been employed, but in general the need for torture does not arise, and even when it does, it is possible for more enlightened elements to enforce the legal prohibition through democratic institutions.

Outwith western Europe, torture can be linked to the emergence of the totalitarian state: the practice emerged in revolutionary Russia from 1917, and thereafter in the fascist systems of Italy, Spain and Germany, and this can be seen as a result of the elimination of a law/politics distinction within these systems, as a result of which no controls over government action existed.<sup>13</sup> Moreover, the nature of totalitarian systems is such that opposition is repressed and therefore clandestine, so that torture will be required to procure information about subversive activities. Torture has been on the increase since the Second World War and the subsequent decolonisation and granting of self-government to Third World nations, and almost invariably it has been employed as a weapon of counter-subversion, although its use in ordinary criminal cases is not unknown. By 1960, it was a regular, if unpublicised practice in a considerable number of countries, and since then a growing number of governments have resorted to it.

It appears, then, that the factors which brought about the 18th century abolition of judicial torture in Europe may not be relevant to the 20th century use of torture. In fact, the modern use of torture can be distinguished from the historical practice of judicial torture: it is not simply a revival of a medieval institution, but is a much more sinister and insidious phenomenon involving the abuse of governmental power. Modern torture is not a process operated within the bounds of the law, but is actually a clandestine instrument of government involving violation of the law by national governments, which regard the employment of torture as justified in the defence of national security. As far as the justification issue is concerned, the 18th century arguments were aimed primarily at judicial torture,

and the question which arises is whether the use of torture in a political context might in fact be regarded as an entirely different case and accordingly might be considered justifiable. This question will be discussed in the following chapter.

#### Note on definition

It is important before we proceed further to ask what kinds of acts and practices fall within the scope of the term 'torture'. This question is of particular significance in the drafting and interpretation of international conventions, and many difficulties have in fact been encountered in this area. In this study, however, it will suffice to indicate the problems which may arise, and to suggest a working definition of torture for the purposes of our discussion.

There are certain practices which few people would have any hesitation in classifying as acts of torture, but there are also less obvious cases in which certain of the features commonly associated with torture are not present, and the question which then arises is what the criteria are for identifying an act of torture. In other words, which of the factors characteristic of an act of torture actually constitute torture?

The etymology of the word 'torture' is of little assistance: the Latin noun *tortura* was derived from the verb *tortquere*, meaning to twist or torment, and while this suggests the broad idea of torment or suffering, it is too vague for further inference to be drawn. An alternative word, *quaestio*, referred specifically to the use of violence for the purpose of eliciting confessions or other evidence,



and it is this aspect which is normally recognised as forming the central idea of torture. At the very least, torture includes "the infliction of excruciating pain....for the purpose of forcing an accused or suspected person to confess, or an unwilling witness to give evidence or information".<sup>14</sup> The classic notion of torture is thus one of judicial torture, the employment of systematic violence in order to obtain evidence for the purpose of criminal proceedings. The two essential elements to be identified here are (1) the infliction of intense pain, and (2) the purpose of compulsion: any act which satisfies these two criteria may be recognised as an act of torture. It is less clear, however, whether an act which does not have compulsion as its purpose can be regarded as torture. John Langbein, in his treatise on judicial torture, is adamant that this type of torture at least is characterised by its purpose of coercion:

"When we speak of "judicial torture", we are referring to the use of physical coercion by officers of the state in order to gather evidence for judicial proceedings....No punishment, no matter how gruesome, should be called torture."<sup>15</sup>

Other writers have expressed the view that all torture is distinguished by its coercive purpose: the legal philosopher, Jeremy Bentham, understood torture in the following terms:

"Torture, as I understand it, is where a person is made to suffer any violent pain of body in order to compel him to do something or to desist from doing something which done or desisted from the penal application is immediately made to cease."<sup>16</sup>

More recently, Malise Ruthven has adopted a similar approach:

"Although some definitions, both traditional and modern, include the concept of punishment in the word 'torture', I have generally followed Bentham in drawing a distinction between compulsive violence (torture) and retributive violence (punishment). The essence of the distinction is that in the former case the

victim may have it in his power to stop the pain by complying with the wishes of his torturers."<sup>17</sup>

It is quite valid to define torture in terms of purpose, and in particular to distinguish coercive violence from punishment: coercion is related to the victim's response (although he may not always be in a position to respond), while punitive violence is related to a prior act of the victim and will take place or continue irrespective of the victim's response. The distinction between torture and punishment can, moreover, be maintained in the historical context: historically, torture was a normal and integral feature of the judicial process, and its use in eliciting evidence prior to conviction could be clearly differentiated from retributive violence, which followed conviction and in fact often involved different methods. In the past, then, the principal form of torture, judicial torture, was essentially coercive in its aim, and could readily be distinguished from other manifestations of official violence. As we have seen, however, since the 18th century abolition of torture in Europe, the practice of judicial torture has not been revived, but the use of torture has re-emerged as a clandestine and unlawful activity, often taking place outwith the context of a trial altogether. Although it remains possible to distinguish torture from punishment in purely semantic terms, the distinction is no longer a clear-cut one, particularly as the same techniques may be utilised for a variety of purposes, and from a pragmatic point of view it may not be advisable to regard compulsion as an essential criterion in defining torture.

The dual concepts of compulsion and retribution do not, in fact, exhaust all the possible uses of violence, and in particular they do not cover preventive or, more accurately, deterrent violence. Bentham

did perceive this problem, and drew a distinction between prevention and compulsion in the following terms:

"When Prevention is the end, the object is obscure and remote and distant but permanent and general: it is the putting a stop to such actions of the like kind with the action punished, as either the delinquent himself or others might be disposed to commit on (any) future occasions that might arise. When Compulsion is the end the object is at hand: but temporary: it is the giving birth to an individual act of the individual party only, and that upon the individual occasion that is in hand. In the first case it is not the individual pain itself that does the business, but the terror produced by the expectation of experiencing the like pain in the like cases. In the latter case, it is the very individual pain itself that does the business."<sup>18</sup>

In accordance with this, Bentham restricted his concept of torture to the infliction of pain with the immediate aim of compulsion for a limited purpose, while he regarded deterrence as a longer term goal and thus an aspect of punishment. However, this analysis does not take account of violence which is employed solely for the purpose of deterrence, and not for punishment which has an incidental deterrent effect. The deterrent use of violence is, in fact, a feature of modern torture:

"[Torture's] function is not only to generate confessions and information from citizens believed to oppose the government: it is used to deter others from expressing opposition. For those who govern without the consent of the governed this has proved to be an effective method of maintaining power. To set torture as the price of dissent is to be assured that only a small minority will act. With the majority neutralised by fear, the well-equipped forces of repression can concentrate on an isolated minority."<sup>19</sup>

In many cases, the deterrence and intimidation of the victim and of the public is secondary to the aim of extorting confessions and information, just as deterrence is often a subsidiary purpose of

punishment. In some instances, however, the infliction of extreme pain is purely for the purpose of deterrence or intimidation, and the compulsion/retribution dichotomy is not applicable. Bentham himself would probably have considered this use of violence as a separate category, as the absence of immediacy of result would have excluded it from his concept of torture, whereas the lack of retributive purpose would have prevented its inclusion in the category of punishment.

It is legitimate to restrict the concept of torture to acts of coercion, especially as international law prohibits cruel, inhuman and degrading treatment and punishment equally with torture. The major difficulty in doing so, however, is that the same techniques may in fact be employed for different purposes, so that the distinctions become nominal and rather artificial, and the determination of whether an act of torture has taken place becomes dependent on purely semantic criteria. For this reason, it would seem preferable from a human rights perspective to define torture on the basis of the character of the act rather than on the purposes for which the act is perpetrated. In practice, the infliction of extreme pain will often be for the purpose of coercion, simply because it is particularly suited to that purpose, but from the victim's point of view it seems somewhat arbitrary to differentiate the application of electric shock for the purpose of punishment from the application of electric shock for the purpose of compulsion or deterrence. The fact is that the inhumanity of the act is precisely the same, and there therefore seems to be no valid reason for distinguishing two identical acts on the grounds that they have different purposes:

"Is not the key to torture simply the physical or mental suffering deliberately inflicted upon a human being by any other human being? In many respects the meaning of the term in the common usage of most western languages might well

support such a question. From the seventeenth century on, the purely legal definition of torture was slowly displaced by a moral definition; from the nineteenth century, the moral definition of torture has been supplanted largely by a sentimental definition, until 'torture' may finally mean whatever one wishes it to mean, a moral-sentimental term designating the infliction of suffering, however defined, upon anyone for any purpose - or for no purpose."<sup>20</sup>

As far as the protection of human rights is concerned, it would appear that the only criterion for identifying an act of torture should be the infliction of intense suffering. Moreover, although both Langbein and Bentham mention only physical pain, the concept of torture must include also mental, emotional and psychological suffering which is deliberately inflicted. Historically, torture usually (though not always) involved physical pain, but in modern times there has been a very significant increase in the use of psychological suffering and manipulation of the mind.

Torture involves at least two parties, so that there is intentional infliction of intense suffering upon an unwilling victim by one or more persons. Self-inflicted, accidental or voluntarily undergone suffering does not normally constitute torture: while it may seem strange to suggest that anyone would voluntarily submit to intense pain or suffering, this situation may arise in certain circumstances, the classic example being where an emergency operation or amputation without anaesthetic is necessary. In some cases, even the infliction of intense suffering without consent might be justified, for instance in the treatment of mental illness or drug addiction: such cases are, however, exceptional, and would only be justified if essential for the welfare of the individual.

As far as the international protection of human rights is concerned, the aim is the prevention of torture as employed by state authorities, particularly security forces acting with the consent or at least indifference of governments. Torture may in some circumstances be employed by private individuals such as criminals and terrorists, but governments do not normally condone this and indeed endeavour to suppress such practices. It is, therefore, when governments themselves are responsible for the use of torture that the question of human rights arises and international law becomes relevant, and for this reason the definition of torture for the purposes of international protection of human rights must be restricted to acts perpetrated by those for whom a national government has responsibility.<sup>21</sup>

There need be no malice or cruelty on the part of a torturer, nor need there be a motive, but the act must be deliberate, or possibly negligent, and any person who willingly participates in or contributes to the infliction of torture may be regarded as equally guilty as the torturer who actually inflicts the suffering. Thus, for example, anyone who supplies instruments of torture or assists in covering up an act of torture is just as responsible as the torturer himself.

Torture need not involve prolonged or systematic techniques, nor need the methods employed be refined or sophisticated, although all these factors may be relevant in establishing whether the requisite degree of suffering has been occasioned. Thus, in normal circumstances one momentary experience of acute pain would not be regarded as sufficient to constitute torture, whereas the prolongation, repetition and variation of the pain might exacerbate the suffering to such an extent that its application would constitute

torture. It is possible, nevertheless, for a single act to produce a sufficient level of pain to amount to torture.

The great difficulty in defining torture in terms of the level of suffering involved is that pain and suffering are subjective phenomena which are extremely difficult to measure or monitor with any degree of accuracy. This matter will be examined in the following chapter. The important point to note here is that the identification of an act of torture is essentially a matter of assessing the intensity or severity of suffering experienced by a particular individual subjected to a specific treatment, thus emphasising the humanitarian aspect of the prevention of torture.

In conclusion, then, torture may be defined as the deliberate infliction of an intense degree of suffering for any purpose, although in practice the purpose will often be compulsion. For the purposes of this study, an adequate working definition of torture is provided in article 1 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

"...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."<sup>22</sup>

## Notes

1. Quoted in John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (University of Chicago Press, 1977), at p. 2.
2. Edward Peters, *Torture* (Basil Blackwell, 1985), at p. 5.
3. The reasons for this are discussed in Peters, *op.cit.*, at pp. 11-18.
4. This process is analysed in *ibid.*, at pp. 18-33.
5. *Ibid.*, at p. 39.
6. Malise Ruthven, *Torture: The Grand Conspiracy* (Weidenfeld & Nicolson, 1978), at p. 51.
7. See Peters, *op.cit.*, and Ruthven, *op.cit.*, for discussions of the use of torture against heresy and witchcraft generally.
8. This was the practice of forcing an accused person to plead, necessitated by a rule of English law relating to the succession to the estate of a person who failed to plead to a charge.
9. See Langbein, *op.cit.*, generally.
10. Cicero and Seneca were among those who criticised the use of torture, and Ulpian also penned words which might have come from any 18th century abolitionist: "torture is not always to be trusted, nor is it always to be disbelieved: it is a delicate, dangerous and deceptive thing. For many persons have such strength of body and soul that they heed pain very little so that there is no means of obtaining the truth from them; while others are so susceptible to pain that they will tell any lie rather than suffer it." Quoted in Ruthven, *op.cit.*, at p. 31.
11. Cesare Beccaria, *Of Crimes and Punishments*, Preface to Alessandro Manzoni, *The Column of Infamy* (translated by Kenelm Foster and Jane Grigson, Oxford University Press, 1964).
12. Torture was abolished in Scotland in 1708, Sweden in 1734 (1772), Sicily in 1738 (1789), Prussia in 1740 (1754), the Duchy of Baden in 1767 (1831), Mecklenburg in 1769, Austria-Bohemia in 1769 (1776), the Austrian Netherlands in 1769 (1794), Brunswick, Saxony and Denmark in 1770, Poland in 1776, France in 1780 (1788), Tuscany in 1786, Belgium in 1787, Venice in 1787 (1800), Lombardy in 1789, the Netherlands and Switzerland (where it was subsequently re-introduced) in 1798, Russia in 1801, Bavaria in 1806, Napoleonic Spain in 1808, Wurttemberg in 1809, Norway in 1819, Hanover in 1822, Portugal in 1826, Greece in 1827, Gotha in 1828, and Naples in 1859. (Where two dates are given, the first refers to a partial abolition, the second to complete abolition).
13. See Peters, *op.cit.*, especially at p. 121ff.



14. The Shorter Oxford English Dictionary (Revised and edited by C.T. Onions, Oxford University Press, 1965).

15. Langbein, *op.cit.*, at p. 3. He reaffirms his position at p. 77.

16. Jeremy Bentham, *Of Torture*, manuscript reproduced in W.L. and P.E. Twining, *Bentham on Torture*, 24 Northern Ireland Legal Quarterly (1973) 305-56, at pp. 308-20, quotation at p. 309.

17. Ruthven, *op.cit.*, at p. 282. The essence of the distinction would seem to lie in the attitude of the torturer rather than on the willingness of the victim to respond, as it may well not be in the power of the victim to do so.

18. Jeremy Bentham, *Of Compulsion and herein of Torture*, manuscript reproduced in Twining, *op.cit.*, at pp. 320-37, quotation at p. 321.

19. Amnesty International Report on Torture, at pp. 21-22.

20. Peters, *op.cit.*, at p. 2. It should be noted that Peters himself argues that judicial torture is the only species of torture: see p. 7, *passim*.

21. See *ibid.*, at p. 3.

22. The definition given in article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is in similar terms, with a few minor alterations: "the term 'torture' means 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."

### CHAPTER THREE: THE JUSTIFICATION ISSUE

The arguments put forward by the 18th century critics of torture were essentially to the effect that torture is unjust, irrational and unnecessary: in particular, it was recognised that coercive torture is a test of sensitivity to pain rather than of the veracity of any statement which may be elicited from the victim. The question raised by the widespread revival of torture in the 20th century is whether these arguments were invalid or at least inconclusive, so that while they persuaded the 18th century monarchs of Europe to abolish torture, they are in fact open to challenge. Moreover, even if the arguments can be shown to be conclusive in relation to historical judicial torture, at which the 18th century abolition was aimed, there may be other circumstances in which the use of torture can be regarded as legitimate. In this chapter, we shall look at the various arguments against the employment of torture and consider whether they have any validity, and we shall also identify the circumstances in which the use of torture is in fact regarded as justified by governments.

#### (a) Confessions - Torture in Judicial Proof

The function of torture in obtaining confessions is essentially to supply conclusive proof where there are strong indications that the suspect is guilty but insufficient evidence in law to procure a conviction. In pre-abolition times, this was one of the principal purposes of torture, and it was normal for legal systems to provide for the extortion of a confession in these circumstances. Nowadays, however, few legal systems regard a confession obtained by coercion as

admissible evidence, although this does not prevent security forces from resorting to torture in practice and presenting to the courts as voluntary confessions which have actually been obtained by the use of torture, particularly when the security forces are convinced of the guilt of the suspect in spite of the absence of admissible evidence. Sometimes this may be an error of fact, when there is a genuine belief that the employment of torture will elicit the truth, but more often the security forces prejudge the case, decide the suspect is guilty, and set about securing the confession which will both vindicate their suspicions and provide evidence which can be produced to the court as a voluntary statement. While the success of these tactics will depend upon the extent to which the judge is prepared to accept confessions without further investigation, the issues involved are essentially the same as those which arose with historical judicial torture, and the arguments of the abolitionists are therefore relevant. In order to clarify the issues which are involved, it will be of some value to consider the thesis proposed by John Langbein, which was mentioned briefly in the previous chapter.

Langbein asserts that the abolition of torture was made possible as a result of the development within the legal systems of Europe of an alternative to the existing 'strict' standards of proof; essentially, he argues that this alternative involved the acceptance of circumstantial evidence as a sufficient basis for conviction. Before considering Langbein's thesis, however, it will be useful to reiterate and expand upon the salient features of judicial torture as practised in pre-abolition Europe. In the case of serious crimes, conviction depended on full proof, that is two eyewitnesses or a voluntary confession; rigid adherence to this rule would have been

virtually unworkable and few criminals would have been brought to justice, but rather than relaxing the standard of proof by permitting conviction on the basis of circumstantial evidence, the medieval jurists turned to torture as the most appropriate method of confirming guilt. Thus, when full proof was lacking but there existed certain indications of guilt (*indicia*), torture was permitted in order to establish whether suspicion was justified or not; *indicia* were accorded different values, such as a 'quarter-proof', and torture could be resorted to when the requisite amount had been accumulated. The use of torture thus constituted a confirmatory step whereby mere suspicion could be transformed into full proof by means of a confession. An accused person was never actually proved innocent by his failure to confess under torture: to incur a degree of suspicion in itself came to be regarded almost as a crime, so that technically it could be said that no innocent person was ever subjected to torture; to resist torture was only to 'purge the *indicia*', not to prove one's innocence, and it was consequently possible to be found guilty at a later date. In some circumstances, it was possible to repeat torture, and even when this was not permitted, the practice arose of 'continuing' torture for several days.

Langbein suggests that certain developments occurred, at first especially in France and Italy, which had the unintended and unappreciated effect of permitting the gradual abandonment of the use of torture. One important development was the introduction of torture 'under reservation of proofs' (*torture avec réserve des preuves en leur entier*), involving a rejection of the doctrine that failure to obtain a confession necessitated the release of the suspect as having purged the *indicia*. A suspect who endured torture without confessing

could no longer be confident of being released, at least until such time as fresh evidence became available: instead, judges began to assume a right to impose a discretionary punishment - *poena extraordinaria* - even in the absence of full proof. In effect, this meant the application of sanctions on the basis of a consideration of the *indicia*:

"A new system of proof, which was in fact free judicial evaluation of the evidence although not described as such, was developed in the legal science and the legal practice of the sixteenth and seventeenth centuries, and confirmed in the legislation of the seventeenth and eighteenth centuries.

This new system of proof developed alongside the Roman-canon system. The Roman-canon law of proof survived in form, but in the seventeenth century it lost its monopoly. Thereafter the standards of the Roman-canon law continued to be complied with for easy cases where there was a voluntary confession or where there were two eyewitnesses. But for cases where there was neither, the Roman-canon standards no longer had to be complied with. That is to say, in just those cases where it had previously been necessary to use torture, it now became possible to punish the accused without meeting the evidentiary standards that had led to torture.

What happened was no less than a revolution in the law of proof. Concealed under various misleading labels, a system of free judicial evaluation of the evidence achieved subsidiary validity. This development liberated the law of Europe from its dependence on torture. Torture could be abolished in the eighteenth century because the law of proof no longer required it."

This revolution in the law of proof was a result of the displacement of blood sanctions as exclusive punishments for serious crimes. Where the blood sanctions continued to be applied, the strict Roman law requirement of full proof was adhered to, but in the absence of full proof, judges began to pronounce a discretionary penalty, less severe than blood sanctions, when they were persuaded of the guilt of the accused on the basis of the available evidence, the

rationale being that the less severe punishment did not require as great certainty of guilt. Once this development had taken place, the practice of judicial torture was effectively redundant, because it was far less trouble for a judge simply to impose a lesser punishment. In practice, however, torture continued to be employed for some time.

The original error had been made by the medieval jurists who supposed that a confession made under torture confirmed the guilt of the suspect. They had assumed that the use of torture provided the certainty which the replacement of the ordeals by human judges necessitated, and this assumption persisted for centuries thereafter. In modern times, there is widespread acceptance of the doctrine of free judicial evaluation of all the evidence, and if that idea had been adopted by the medieval scholars it is possible that the practice of judicial torture would never have emerged on a large scale. In those days, however, there was little faith in human judgement, and to that extent the legal revolution was dependent on the development of a professional and impartial judiciary which could command popular respect and acceptance.

The fundamental objection to the employment of torture in eliciting confessions is that an admission obtained by coercion is of no evidentiary value because it cannot prove the guilt of the person making the admission. Essentially, the use of coercion is irrelevant to the question of guilt, as it is based on an erroneous rationale which assumes that a person will confess under torture only if guilty, whereas confession (or, more accurately, self-incrimination) under torture depends on tolerance to pain and strength of will rather than on the efficacy of coercion in procuring truth. Cesare Beccaria appreciated this in his condemnation of the use of torture for the purpose of compulsion:

"This is no new dilemma: the crime is either certain, or uncertain: if certain, no other punishment is appropriate than the one established by law, torture being pointless, just as a guilty man's confession would be pointless; if uncertain, it is wrong to torture an innocent man, since by law a man is innocent until proved guilty."<sup>2</sup>

It should be noted that although this observation is valid with regard to the operation of the judicial process in most modern legal systems, the problem with pre-abolition torture was that certainty of guilt depended upon standards of proof which were too inflexible, and few criminals would have been convicted without torture. Unfortunately, the use of torture creates the opposite problem, however, and many innocent people who 'confess' under duress are convicted of criminal offences. In fact, Beccaria assumed that certainty of guilt could be established on the basis of circumstantial evidence:

"The proofs of a crime can be distinguished as perfect and imperfect. We call perfect those proofs which exclude all possibility of a man's innocence: we call imperfect those by which it is not excluded. Only one perfect proof is required for a condemnation. Of imperfect proofs as many are required as will form one perfect proof; in other words, although each proof of this second kind taken by itself does not establish a man's guilt, agreement between such proofs on the same matter makes his innocence impossible."<sup>3</sup>

Bentham also rejected the use of torture for the purpose of obtaining confessions, and did so on the same grounds as Beccaria:

"Either there is sufficient reason to conclude the party accused to be guilty, or there is not: if there is, the torture is superfluous; if there is not, it is unwarrantable."<sup>4</sup>

No matter what the evidentiary requirements of a legal system may be, the fact is that torture does not add to the certainty of guilt. Torture is a test of endurance to pain and suffering, not a means of

discovering the truth, and if a confession is made by a victim of torture, it can never be certain whether it was made because the person was actually guilty or whether, even though innocent, he was unable to endure the extreme agonies of torture and made an admission simply to escape further pain:

"The impression made by pain can therefore increase to such a degree that it entirely possesses a man under torture and leaves him no liberty but to choose the shortest way out of his present situation and so escape the pain....Thus the innocent man who is sensitive to pain will declare himself guilty because he believes this will put an end to his torment. So the very means which, it is claimed, will distinguish between innocence and guilt, in fact destroys all difference between them.

...Of two men equally innocent or equally guilty, the one who is robust and physically brave will be acquitted, the one who is feeble and fearful will be condemned...

The outcome of torture, then, is a matter of temperament and of calculation; it varies with each man according to his physical strength and response to pain. By this method a mathematician could solve the following problem better than a judge: 'Given the strength of muscles and the sensibility of nerves of an innocent man, find the amount of pain required to make him confess that he has committed a given crime.'"<sup>5</sup>

Of the four possible permutations, only one leads to a just result:

- (1) an innocent person may be tortured and found to be innocent, not because of his innocence in fact, but because he has the fortitude to endure torture without 'confessing';
- (2) an innocent person may be tortured and found guilty because he cannot endure the pain and makes a 'confession';
- (3) a guilty person may be tortured and endure, with the result that he is declared innocent;



(4) a guilty person may be tortured and confess: this is supposedly the purpose of coercive torture, but although it leads to a just result, it is clear that the means are arbitrary, relying on the victim's reaction to pain rather than on the fact of his guilt.

One question which might be raised is whether it is any more just for an accused person to be convicted on less strict standards of proof. Bentham, for instance, makes the following observation:

"There are few if any cases in which a man can be put to the torture under the Roman Law, upon less evidence than would be sufficient to convict him by the English. The direct evidence of one unexceptionable witness, which would be sufficient to warrant the convicting him by the English Law, by the Roman Law would only warrant the putting him to the Torture."<sup>6</sup>

It could be argued that conviction on lesser evidence is just as objectionable as employing torture, because it merely means that the accused will be punished on uncertain evidence without having the opportunity, albeit arbitrary, of resisting torture and being released. The innocent will in effect be convicted summarily without being able to show their innocence. However, we have already seen that torture is not a valid means of distinguishing the guilty from the innocent and that the use of torture is therefore irrelevant to the question of sufficiency of evidence. Clearly the excessively rigid requirements of Roman law are not viable in practice, and the only realistic alternative is to permit conviction on the basis of a reasonable degree of certainty after free judicial evaluation of all the available evidence. This involves some relaxation of the requirement of absolute certainty of guilt, but for the criminal law to function efficiently some kind of compromise has to be accepted, and this has generally meant permitting conviction on less than absolute certainty, for example when guilt is 'beyond a reasonable

doubt'. Whatever the shortcomings of this system may be, the important point is that the use of torture does not add to certainty of guilt.

In conclusion, then, it is apparent that there can be no justification for the use of torture for the purpose of obtaining confessions. This does not mean that torture is not regarded as valuable for this purpose: in situations where investigation or prosecution agencies are encountering difficulties in securing evidence of criminal offences they may find it expedient to resort to the employment of coercion in order to obtain confessions which will facilitate conviction. The problem is that the torturers are usually already convinced of the victim's guilt, and their aim is to procure a confession to supply the evidence which is lacking rather than to elicit the truth. They may well believe that the confession represents the truth, but often they are not concerned about innocent people being convicted, being interested only in securing a conviction, even if this means presenting evidence which is actually inadmissible in law. In practical terms, this is the basic problem with coercive torture, and judges clearly have an onerous responsibility to ensure that the circumstances in which confessions have been obtained are thoroughly investigated.

#### (b) Some Minor Uses of Torture

Apart from the extortion of confessions, there are four other uses of torture which Beccaria condemned, and Bentham agreed with him on three of these, all of which are of mainly historical interest and may be dealt with briefly at this point.

Beccaria states:

"The second motive of torture is to resolve contradictions in the evidence of a supposedly guilty man - as if the fear of punishment, the uncertainty of the verdict, the pomp and majesty of the judge, and the ignorant state of guilty and innocent alike, were not enough to make it probable that innocent as well as guilty would fall into contradiction - the innocent man out of fear, the guilty man from an endeavour to shield himself; as if, too, self-contradictions, common among men in tranquillity, were not multiplied in the turbulent mind of a man all absorbed in the thought of saving himself from imminent peril!"<sup>7</sup>

Minor contradictions in the evidence of an accused may well indicate a lack of honesty and undermine his credibility accordingly, but the use of torture is hardly justified for the purpose of resolving such prevarication. Major contradictions will nullify the value of the evidence of the accused, and this will be taken into account in the evaluation of the evidence, but even in such cases the use of torture is not justified. The same objections raised in relation to confessions apply here, though perhaps not to the same extent, as it could be argued that where major contradictions emerge it is certain that the accused has lied and the presumption of innocence may be rebutted. On the other hand, Beccaria does point out that an accused person may be expected to contradict himself in an effort to escape his predicament, and this can apply to the innocent as well as to the guilty. Incidentally, Bentham considered that contradictions in the evidence of the accused should result in his conviction.<sup>8</sup> It might also be noted that the International Covenant on Civil and Political Rights provides that an accused person should not be compelled to testify against himself.<sup>9</sup>

The third use of torture mentioned by Beccaria is the following:

"Torture, too, is employed to discover whether a man is guilty of other crimes than the one he is charged with. The reasoning goes like this:

'You are guilty of one crime, so perhaps you are guilty of a hundred more...'"<sup>10</sup>

Bentham suggests that a distinction may be drawn in this case between those not yet convicted of the crime and those who have already been found guilty, and he suggests that torture might be justified in the latter case. This is, however, neither just nor logical: it assumes that every person convicted of a crime must have committed other crimes, and while in many instances this will be so, it is clearly a logical impossibility for it to apply in all cases, as some criminals must be first-time offenders. The implication is that someone who is convicted of a crime forfeits his legal right to future protection, with the result that there is no presumption of innocence in relation to other crimes of which he is suspected, and indeed there is a presumption that he has committed other offences.

If there is evidence that a person has committed other crimes, the proper course is for a separate prosecution to be initiated on the basis of that evidence, but each charge must be considered on its own merits, and guilt of one crime should never be taken into account as evidence in a trial for a different crime. The provisions in many legal systems prohibiting disclosure of previous convictions until after an accused has been found guilty of the current offence is aimed at overcoming the dangers of prejudicing the defence in this manner. On this use of torture, Ruthven comments that it "barely merits argument".<sup>11</sup>

The final use of torture which we may refer to here is of no relevance today. It involved the torture of a person to "purge him in some metaphysical and incomprehensible way of infamy".<sup>12</sup> Beccaria considered that being subjected to torture itself constituted the

greatest infamy, and both Bentham<sup>13</sup> and Ruthven<sup>14</sup> fully concur with his criticism.

(c) Eliciting Vital Information - A Putative Justification

While torture as such is rarely defended or justified openly, from time to time there does appear in print, particularly in training manuals on counter-subversion, a defence of the use of torture in certain circumstances. The purpose for which the use of torture is usually considered justified is the extortion of information which is essential to the forces of order, especially in their task of protecting innocent citizens. Such apologias, which do not normally mention the rather emotive word 'torture', characterise the protection of society as paramount, and assert that the use of coercion against the enemies of the state must be seen as the lesser of two evils. In other words, they rely on the contention that the end justifies the means, a reasoning which is particularly persuasive when expressed in terms of the protection of innocent by-standers from the ruthless and barbaric methods of terrorism. In combatting terrorism, security forces encounter considerable difficulties in obtaining information about the activities of their adversaries, and the argument is that if the use of torture is necessary to elicit vital information, then the validity of the ultimate purpose is sufficient justification.

Beccaria discusses the employment of torture "to make a criminal reveal the accomplices of his crime",<sup>15</sup> but this notion may be extended to include torture which is aimed at procuring any kind of information, as opposed to straightforward confession. Beccaria's condemnation of the use of torture for the purpose of discovering the identity of the victim's accomplices was based on the following logic:

"But if we have proved that torture is a bad method of discovering the truth, how can it be employed to find out who the accomplices were, which is one of the truths to be discovered? As well suppose that a man who accuses himself is not even more likely to accuse others!"<sup>16</sup>

Beccaria's reasoning seems persuasive, but it is at this juncture that Bentham takes issue with him, mentioning four difficulties:<sup>17</sup>

(1) Bentham rejects Beccaria's assertion that this use of torture involves the punishment of one man for the offence of another; he asserts rather that it is for the man's own offence of withholding vital information.

(2) Beccaria had thought that the information would be available from other sources, but Bentham points out that if this were so it would not be necessary to resort to torture anyway.

(3) Beccaria believed that accomplices "generally flee the moment their companion has been apprehended",<sup>18</sup> so that torture would be pointless; Bentham's response, to the effect that they only flee because they fear betrayal under torture, is scarcely sufficient criticism, the point being that it is the existence of torture and the threat it poses that impel the accomplices to flee. The point is not critical, however, and in any event it does not apply to all types of information.

(4) Although the foregoing points are of interest, they are not sufficiently important in themselves to be decisive in this issue. The crucial point lies in Bentham's rejection of Beccaria's assertion that "we have proved that torture is a bad method of discovering the truth". Unfortunately, Bentham's counter-argument has never been identified, and it is consequently necessary to speculate, but it is

possible to infer from Bentham's writings what his attitude must have been.

Beccaria concluded from his argument against the use of torture in extorting confessions that the same criticisms applied to eliciting information. However, he had shown only that torture is a bad method of discovering the veracity of confessions, not that torture is necessarily a bad method of discovering the truth in all situations. In fact, there are two important factors which distinguish the use of torture for the purpose of obtaining information. Firstly, it is possible to be certain, or at least reasonably sure, that a person is in possession of specific information, whereas in the case of confession torture is employed precisely because it is not certain whether the suspect is innocent or guilty, or in other words whether he has the relevant knowledge or information. Secondly, a confession in itself is not verifiable,<sup>19</sup> whereas certain types of information are. Accordingly, when these two distinguishing features are present, it may be suggested that torture is a reliable method of discovering the truth: that is, when it is known that a person has particular information and it is possible to verify the accuracy of any information which he divulges, torture may be an effective method of obtaining that information.

Beccaria made the point that a person under torture is even more likely to accuse others than he is to make a self-incriminating statement, and this criticism is valid in so far as it relates to information which is inspecific and unverifiable, because the victim may then provide fabricated information in order to escape further torture. However, when the information required is specific and verifiable, this is not possible: for example, the question 'who were

your accomplices?' would permit the victim to give the names of innocent people whom the security forces might then arrest and torture in order to obtain confessions, but a question such as 'where is the bomb concealed?' would ensure that the victim could not supply false information, as the accuracy of any statement can easily be ascertained:

"...torture is, unfortunately, not always an inefficient weapon or, which is perhaps more important, it is often considered efficient by those who use it or condone it....it should be remembered that some kinds of information (such as the whereabouts of caches of arms or gelignite) are susceptible of independent verification, and torture may sometimes be an effective way of obtaining such information."<sup>20</sup>

Bentham in fact drew a distinction between the use of torture to discover if there were any accomplices and the use of torture to discover the identity of accomplices, the difference being that in the second case there is certainty that the victim is in possession of the required information. However, in both these instances, the employment of torture may be condemned on Beccaria's ground that a person is even more likely to implicate others than to incriminate himself, because even if names are divulged it is not possible to verify the accuracy of the information.

It might be argued that it is virtually impossible to be absolutely certain that a person does have information, just as it is impossible to know if a confession is genuine. Bentham's utilitarian approach is of interest in this connection, because although he justified the use of torture only in very limited circumstances and formulated rules to govern the administration of torture, he did not always demand absolute certainty that the prospective victim possessed the required information. The first case in which Bentham justified



the employment of torture did require certainty, and applied in the following conditions:

"...where the thing which a Man is required to do being a thing which the public has an interest in his doing, is a thing which for a certainty is in his power to do; and which therefore so long as he continues to suffer for not doing he is sure not to be innocent."<sup>21</sup>

Bentham thus considered torture to be justifiable in situations where the victim definitely possessed information (or, indeed, had some other knowledge or ability) and the public had a sufficient interest in him being compelled to divulge that information or otherwise co-operate with the authorities. Certainty to Bentham meant proof "as strong as that which is required to subject him to a punishment equal to the greatest degree of suffering to which he can in this way be exposed"<sup>22</sup> or "the same strength of evidence....as is requisite to convict a man of a crime for which punishment of that kind and degree would be inflicted for the ordinary purpose of prevention."<sup>23</sup> In other words, if it is reasonable to punish a man on less than absolute certainty of guilt, then it is reasonable to inflict torture even if there is some doubt that the victim has the information. On this basis, Bentham was able to affirm that the victim was not in fact to be regarded as innocent if deliberately refusing to co-operate, although he added that it might be proper to utilise torture only in the case of persons already convicted of a crime for which the penalty was greater than the pain of torture. In fact, Bentham formulated a number of rules in relation to this justification of torture, such as that it should only apply in urgent situations when any delay would nullify the effectiveness of coercion, and that the benefits of using torture must warrant the resort to such

extreme measures. Nevertheless, the fact remains that Bentham considered torture to be justifiable in certain circumstances.

In Bentham's second case, there is a relaxation of the requirement of certainty, and the utilitarian logic which he introduces indicates the potential dangers of justifying the use of torture. Although Bentham affirmed that instances of his second case would be "very few",<sup>24</sup> the rationale which he invokes forms the basis of the attitude of those who justify torture today, although their reasoning is usually much cruder. Bentham suggested in his second case that torture might be justified in the following circumstances:

"...where a man is required what probably though not certainly it is in his power to do; and for the not doing of which it is possible that he may suffer, although he be innocent; but which the public has so great an interest in his doing that the danger of what may ensue from his not doing it is a greater danger than even that of an innocent person's suffering the greatest degree of pain that can be suffered by Torture, of the kind and in the quantity permitted to be employed."<sup>25</sup>

Here we have the utilitarian justification of torture: as the public interest increases in importance, so the requirement for certainty that the victim has the desired information decreases in importance. If this logic were extended to an extreme degree, it might be proposed that desperate situations justify the torture of even tentative suspects in the hope of finding someone who actually has information which is relevant, and in practice this is not uncommon. The Benthamite justification is, however, rather more restricted in scope.

Bentham demanded that in his second case torture should only be employed in the case of persons already convicted of first-rate crimes unless the exigencies of the situation would not "wait for a less

penal method of compulsion".<sup>26</sup> He also required that the safety of the whole state had to be endangered, and added that the "power of employing it ought not to be vested in any hands but such as from the business of their office are best qualified to judge of that necessity: and from the dignity of it perfectly responsible in case of their making an ill use of so terrible a power."<sup>27</sup> Furthermore, "as many and as efficacious checks ought to be applied to the exercise of it as can be made consistent with the purpose for which it is conferred."<sup>28</sup> Although these rules were intended to minimise the occasions on which the resort to torture could be justified, they are rather vague, and they indicate a faith in the discretion of governments which in practice has often proved misplaced. However, one further proviso added by Bentham is of considerable significance in this connection, namely the distinction which he drew between offences against individuals and offences against the state, and his prohibition on the use of torture in relation to the latter. It is on this basis that Bentham concluded that instances of his second case would be rare.

Clearly governments are the most appropriate agencies to assess when, if ever, the use of torture is justified and necessary, but in order to ensure that this authority was not abused Bentham proposed that torture should only be employed when the community, rather than the state, was threatened, founding his argument on the willingness of witnesses to come forward. The public, he suggested, will be reliable witnesses only in the case of ordinary (that is, apolitical) crimes, because in the case of political offences the public may actually be sympathetic towards the offenders: ordinary criminals are "under every government....the standing enemies of the people",<sup>29</sup> whereas

political offenders "may in fact be the best friends and defenders of the people".<sup>30</sup> The conclusion reached by Bentham was that torture could not be considered appropriate in dealing with political problems:

"The danger will always be great, that torture if allowed in these cases, may be made subservient to the establishment of usurpation, or which comes to the same thing of a government repugnant to the interests and affections of the great body of the people."<sup>31</sup>

In practice, of course, torture is commonly employed by governments for political purposes, and in such circumstances governments are not "perfectly responsible". It was in recognition of the dangers of such abuses that Bentham excluded the use of torture in political cases. Difficulties arise, however, when criminal offences are perpetrated against the general public in order to promote political goals. This applies particularly to politically motivated violence such as terrorism, because it is in response to such threats that governments often resort to torture. In such circumstances, it can be argued that the crimes are essentially aimed at the public and that the motives are irrelevant, so that the use of torture may be regarded as justifiable even though it is directed against opponents of the government. If this contention is valid, governments may be justified in employing torture in counter-terrorism and counter-subversion on the basis of Benthamite principles. A strict utilitarian position would impose further limitations, but the fact is that the principles on which Bentham developed his utilitarian justification can essentially be applied to the very situations in which governments most commonly wish to authorise the employment of torture, and the exclusion of torture in the case of political offences only partially precludes such an application.

The classic scenario invoked in support of the assertion that torture can be justified posits a situation in which a nuclear device has been concealed and timed to destroy a large city; the only person who can prevent destruction of the city and of millions of innocent citizens is in custody but is unwilling to co-operate.<sup>32</sup> The importance and urgency of preventing the catastrophe are obvious, and many people would no doubt condone the use of coercion without further question, although a strict utilitarian position would have to impose further qualifications, such as reasonable certainty that the prospective victim is in a position to co-operate. The more safeguards there are, and the more effective the rules which govern the application of torture, the more convincing appears the argument in favour of the use of torture in this type of situation. It is important, however, not to rely too heavily on hypothetical examples in which all the details are clear and unequivocal:

"Notice how unlike the circumstances of an actual choice about torture the philosopher's example is. The proposed victim of our torture is not someone we suspect of planting the device: he *is* the perpetrator. He is not some pitiful psychotic making one last play for attention: he *did* plant the device. The wiring is not backwards, the mechanism is not jammed: the device *will* destroy the city if not deactivated."<sup>33</sup>

It is not that the hypothetical example could never occur; the point is that in reality the circumstances are seldom as clearly defined as the philosopher might desire. In particular, it is rarely certain that the victim is in possession of the required information, and the question then is what level of certainty is necessary before torture is permissible: is the level of certainty actually in inverse proportion to the seriousness of the threat, so that in the example given the victim might be subjected to torture on the basis of fairly

tenuous suspicions? It is often the case, moreover, that there is no direct relationship between the information sought and a specific threat against which definite action can be taken by the authorities, so that the employment of torture can only be justified on the basis of the general usefulness of the information obtained in responding to an inspecific threat. Finally, there is no clear criterion by which governments can decide when a threat is of sufficient gravity to warrant the resort to torture. Bentham suggested that torture ought to be employed only when the safety of the whole state was at risk, but the essence of the utilitarian theory is simply that the benefits of using torture substantially outweigh the negative factors, and in the example given only one section of the community is in fact endangered. The torture of one man to save the lives of a million others might seem sufficient justification, but what if only a hundred or ten lives are at risk? On purely arithmetical grounds, it could be argued that the torture of one man to save the lives of two others is justified, but this does not take into account the degree of certainty required in establishing whether the victim has the information, and it ignores the relevance of value-judgements regarding the relative worth of the victim and the innocent citizens: thus, it could be suggested that the torture of one convicted terrorist, or even of several terrorists, to save the life of one innocent person might be justified.

There are problems, then, in identifying criteria by which it can be determined in practice when the use of torture is genuinely justified on utilitarian grounds. In strict utilitarian theory, the employment of torture would only be permitted in limited and exceptional circumstances: in particular, there would have to be

reasonable certainty that the prospective victim had specific and verifiable information, the divulgence of which would enable the authorities to take definite action to avert a major catastrophe involving the lives or personal security of a significant number of people. In practice, the conditions imposed by the philosopher are rarely satisfied, but governments are nevertheless prepared to authorise the use of torture on the basis of a general utilitarian rationale which justifies the employment of any necessary means in the defence of national security. The inevitable consequence of this unrefined approach is that torture is utilised to obtain non-specific intelligence about the activities of subversives from a wide range of suspects, with little concern about whether or not it is probable the victims actually possess any vital information. The result is that it develops into a routine and systematic practice, and under certain conditions degenerates into an instrument of repression.

The fact is that torture is frequently resorted to in total disregard of the conditions and limitations which strict utilitarian theory requires, and those who justify it do so on the basis of a simplistic rationale which places supreme importance on the defence of national security and considers any means as acceptable in pursuit of this goal. Torture as it is actually practised, then, cannot be regarded as falling within the Benthamite justification. The fact remains, however, that there are circumstances in which it is possible to justify the use of torture on utilitarian grounds, and it is important to consider whether there are any other arguments against torture in such circumstances.

The justification of an act is not the justification of a practice, but there is in fact a strong tendency for the use of

torture to spread and become institutionalised once the principle of justifiability has been accepted:

"History shows that torture is never limited to 'just once': 'just once' becomes once again - becomes a practice and finally an institution. As soon as its use is permitted once, as for example in one of the extreme circumstances like a bomb, it is logical to use it on people who might plant bombs, or on people who might think of planting bombs, or on people who defend the kind of person who might think of planting bombs."<sup>34</sup>

This characteristic of torture lends weight to the argument against the justification of torture on utilitarian grounds, because the potential consequences of permitting the use of torture may in fact be more serious than the existing threat. The implications for society in general may be far-reaching:

"From the point of view of society, the argument of torturing 'just once' does not hold. Once justified and allowed for the narrower purpose of combating political violence, torture will almost inevitably be used for a wider range of purposes against an increasing proportion of the population. Those who torture once will go on using it, encouraged by its 'efficiency' in obtaining the confession or information they seek, whatever the quality of those statements....What was to be done 'just once' will become an institutionalized practice and will erode the moral and legal principles that stand against a form of violence that could affect all of society."<sup>35</sup>

The fact is that the suppression of subversive threats is of such importance to governments that they frequently resort to the use of torture on grounds of simple expediency and on the basis of general utility rather than in specific situations in which the utilitarian requirements are met, and the result is that the use of torture becomes routine rather than exceptional, even though "such incidents do not continue to happen":<sup>36</sup>

"There are not so many people with grievances against this government that the torture is



becoming necessary more often, and in the smaller cities, and for slightly lesser threats, and with a little less care, and so on....There is considerable evidence of all torture's metastatic tendency."<sup>37</sup>

The dangers of the use of torture becoming accepted and established practice after an initial justification in a specific instance are identified by Professor Twining, who concludes that this constitutes the most persuasive argument against the introduction of torture:

"The circumstances are so extreme in which most of us would be prepared to justify resort to torture, if at all, the conditions we would impose would be so stringent, the practical problems of devising and enforcing adequate safeguards so difficult and the risks of abuse so great that it would be unwise and dangerous to entrust any government, however enlightened, with such a power. Even an out-and-out utilitarian can support an absolute prohibition against institutionalised torture on the ground that no government in the world can be trusted not to abuse the power and to satisfy in practice the conditions he would impose."<sup>38</sup>

In view of the rarity of situations in which the use of torture is genuinely justifiable in utilitarian terms, it is not unreasonable to demand an absolute prohibition:

"An act of torture ought to remain illegal so that anyone who sincerely believes such an act to be the least available evil is placed in the position of needing to justify his or her act morally in order to defend himself or herself legally. The torturer should be in roughly the same position as someone who commits civil disobedience. Anyone who thinks an act of torture is justified should have no alternative but to convince a group of peers in a public trial that all necessary conditions for a morally permissible act were indeed satisfied. If it is reasonable to put someone through torture, it is reasonable to put someone else through a careful explanation of why. If the situation approximates those in the imaginary examples in which torture seems possible to justify, a judge can surely be expected to suspend the sentence."<sup>39</sup>

It is possible, then, to support an absolute prohibition of torture even from a utilitarian perspective. It is clear, however, that arguments in support of such a prohibition are not conclusive, and that it is possible to put forward a strong case in favour of the use of torture in certain limited circumstances. It must be conceded, too, that the suppression of political violence falls within the parameters of a utilitarian justification in so far as there is reasonable certainty that the victim has verifiable information which will enable the security forces to avert a specific threat to the public. The use of torture is seldom justified openly by governments, but their private reasoning is founded on general utilitarian principles, and while the strict requirements of utilitarian theory may not be met, the fact remains that a plausible case in favour of the employment of torture against political violence can be sustained. Arguments against the use of torture may be presented to governments, but in philosophical terms the question of justifiability is debatable, and governments are quite entitled to reject these arguments. Indeed, there is no reason why governments should accept the limitations of a strict utilitarian approach at all: why can they not maintain that the use of torture is warranted even in situations which are not clear-cut, for example when there is considerable doubt whether the victim has the information or when there is no direct relationship between the information and a specific threat? It is clear that other considerations must be relied upon in demanding the elimination of torture, and in the following section we shall examine the most important of these.

#### (d) The Inhumanity of Torture

In the preceding section, we concluded that while it is possible to support an absolute prohibition of torture on purely utilitarian grounds, it is also possible to put forward a powerful argument in favour of the employment of torture in particular circumstances, also on utilitarian grounds. In other words, rational arguments can be put forward in support of both positions, and in view of this any demand for an absolute prohibition of torture cannot rely on utilitarian criteria alone. It is essential, therefore, to recognise that factors other than the utility value of torture in achieving a given end are relevant to the issue of justification. In fact, the most potent argument against the use of torture in any circumstances is the inhumanity of the act itself:

"Even if torture could be shown to be efficient in some cases, it could simply never be permissible. From the point of view of the individual, torture, for whatever purpose, is a calculated assault on human dignity and for that reason alone is to be condemned absolutely."<sup>40</sup>

Essentially, this is an emotional rather than a philosophical rejection, and the inhuman character of torture is not necessarily a philosophically valid objection in utilitarian terms. Nevertheless, it is on this basis that the majority of people condemn torture and object to its use, and indeed any philosophical framework which takes no account of human dignity and the value of the human person ignores a crucial factor which is entitled to full recognition, at least in the contemporary civilised world where the principle of humanity ostensibly attracts universal support. The international prohibition of torture is, of course, founded on the principle of humanity.

It has been suggested that "under certain extreme conditions a case can be made for resort to physical coercion, *provided* it is done professionally without undue violations of human rights and without degradation."<sup>41</sup> Similarly, Henry Shue, in his discussion of situations in which the use of torture may be justified, visualises its infliction in clinical conditions:

"The torture will not be conducted in the basement of a small-town jail in the provinces by local thugs popping pills; the prime minister and chief justice are being kept informed; and a priest and a doctor are present. The victim will not be raped or forced to eat excrement and will not collapse with a heart attack or become deranged before talking; while avoiding irreparable damage, the antiseptic pain will carefully be increased only up to the point at which the necessary information is divulged, and the doctor will then administer an antibiotic and a tranquilizer. The torture is purely interrogational."<sup>42</sup>

Shue admits that his scenario is somewhat unrealistic, and indeed it is little short of fanciful. It is naive to suppose that torture can be inflicted in such a disinterested and clinical manner; to imagine torture being applied in well-furnished and comfortable conditions by apologetic and sympathetic torturers is to misconceive the function of coercive torture. The purpose of such torture is to overcome the mental resistance of the victim, and this frequently requires more than the application of "antiseptic" pain; it requires the terrorisation and demoralisation of the victim in order to intensify his perception of pain and so create the maximum degree of psychological pressure. In order to appreciate the function of coercive torture more fully, it will be of value to examine the relationship between compulsion and the infliction of pain. Compulsion, of course, involves forcing a person to act against his will and comply with the wishes of others, and pain is utilised as a

means to this end on the basis that a human being will elect to act against his will rather than suffer the experience of intense pain. In effect, the victim is placed in the position of having to choose between mental capitulation and physical pain, and the rationale of torture is that the psychological resistance of the victim can be overcome by the infliction of pain beyond the maximum intensity which he is able to endure. Pain has been described in the following terms:

"...a sensory experience commanding a response which, even when not expressed verbally, may be reflected in one's behaviour and often in other physical signs. It has long been known moreover, that pain has a dual nature, a cognitive and an affective component, and that sensation and reaction to pain are closely interlinked. All of these factors undoubtedly play some part in how we physicians judge the presence, severity and significance of pain in our patients. Nevertheless, in practice, as well as in our research, we rely chiefly on the patients' verbal expressions of their feelings and only perhaps to a lesser degree on their behaviour and associated physical signs."<sup>43</sup>

It is extremely difficult to measure or assess levels of pain experienced by an individual; pain can to a limited extent be objectively measured and monitored by means of respiratory or hormonal levels, but only when there is a relationship between the measure and the relief of pain. Essentially, pain is a subjective phenomenon, and individuals subjected to the same treatment may not experience the same 'feeling' or, even if they do, may not respond to it in the same way: thus, one person might consider the treatment extremely painful, while another might regard it merely as an uncomfortable experience. Although an individual may be able to make a comparison between different levels of pain which he himself has suffered, then, there is no way of ascertaining with any accuracy whether two people receiving the same stimulus either experience the same sensation or have the

same perception of it. Much may depend on the individual's previous exposure to pain, with which the present experience can be compared; thus, someone who has had to suffer a chronic illness may react differently to a new pain from someone who has enjoyed a relatively pain-free existence.

In most cases of physical trauma, it appears that there is some objective relationship, so that most people exposed to a specific treatment may be expected to exhibit a similar physiological reaction:

"The physiology of the human nervous system is the same for all human beings regardless of race, climate or culture. In general the effect of physical torture such as beating, electro-shock, near-drowning, sleep deprivation and drugs will be the same on any human system. Although cultural conditioning can have remarkable effects on resistance to pain, as for example in the case of religious firewalkers, the result of the infliction of pain against the victim's will would seem to be universal at the physiological level."<sup>44</sup>

On the other hand, there do occur exceptional instances of both hypersensitivity and pain asymbolia (absence of any experience of pain) and, even allowing for such aberrant cases, there does appear to be a wide variation in individual responses to pain: in one experiment, electric shocks were administered to a number of volunteers, and although two described the maximum intensity as intolerable, one had no convincing experience of pain at all, while those in between the extremes reported pain of varying degrees.<sup>45</sup> It seems clear, therefore, that while the infliction of physical pain on two individuals may produce virtually identical biological effects in their bodies, their perception of the pain may well differ to a significant extent. This diversity of responses to pain-inducing stimuli of a physical nature gives an indication of the core of the problem: the fact is that pain is not just a physiological reaction:

"...experience of pain is an extremely complex phenomenon in which anxiety, conditioning, suggestion and other variables play an important part."<sup>46</sup>

Thus, even if the physiological effects of a specific type of treatment are invariable, the individual's actual perception of the pain will vary according to his mental condition and attitude, which will have been formed partly by his cultural background, partly by his own personality, and partly by his knowledge of the circumstances in which he is to suffer pain:

"...in higher species at least, there is much evidence that pain is not simply a function of the amount of bodily damage alone. Rather, the amount and quality of pain we feel are also determined by our previous experiences and how well we remember them, by our ability to understand the cause of the pain and to grasp its consequences. Even the significance pain has in the culture in which we have been brought up plays an essential role in how we feel and respond to it."<sup>47</sup>

The phenomenon of physical pain cannot be separated, then, from the mental state of the individual, because the experience of physical pain involves an awareness of the whole circumstances which plays a significant role in determining the perception of pain. One factor which has a crucial bearing on the subjective perception of pain is the atmosphere in which pain is experienced:

"There are many studies to show that our state of mind - anxious, tense, frightened, depressed, the environment in which we experience pain - is it anticipated or not? - can condition our reaction to pain."<sup>48</sup>

Clearly, the infliction of pain in a torture-chamber will heighten the stress and anxiety of the victim to a much greater degree than the incidental infliction of pain by hospital staff in the course of medical treatment, and it is in fact for this reason that the torturer cannot rely on "antiseptic" pain: coercion requires

intensification of pain beyond what the victim is able to tolerate in order to overcome his mental resistance, and to achieve this it is necessary for the torturer to create conditions in which the victim will be anxious and insecure, thus maximising the effectiveness of the pain. Tolerance to pain is also related to the state of mind of the victim, and it is in fact possible to develop an increased tolerance to pain by means of psychological conditioning. Thus, cultural influences may produce a stoical attitude to pain and may even emphasise endurance of pain as an indication of manhood, and military training can also strengthen resistance to physical hardship, while at a different level the dedicated sportsman will undergo pain for the sake of victory or personal satisfaction, and many people will voluntarily submit to painful remedies in the course of treatment for serious ailments. Attitude of mind is, then, of crucial importance to the endurance of pain, and this applies equally when pain is inflicted for the purpose of coercion: even in the torture-chamber, the victim may be able to endure the pain because his will and resolve are fortified by pride, self-respect, hatred, loyalty to comrades or to a particular cause, and so on, and torture may thus be conquered psychologically if the victim's strength of character and will enable him to endure pain even to the point of death rather than yield to his torturers. The torturer must endeavour to undermine these mental supports by inducing a state of anxiety and insecurity, and this can be achieved most effectively by means of disorientation, debilitation and degradation. In practice, torture does not consist of a single act performed in a detached manner by disinterested torturers, but rather involves the creation of an entire atmosphere of insecurity and fear in which the infliction of physical pain is combined with adverse



conditions to produce a psychological pressure aimed at overcoming the will of the victim. To apply torture in any other manner would be counter-productive, since it would permit the victim to maintain a higher level of mental resistance. Indeed, failure to induce stress and anxiety may allow the victim to strengthen his resolve and morale.

The function of torture is, then, to overcome the mental resistance of the victim: the will of the victim has to be broken, and this requires the erosion of the mind's defences in order to bring about a transition from sub-acute stress (in which the victim remains defiant) to chronic stress (in which the victim's morale crumbles and he no longer has the will to resist). This involves inducing a traumatised state in which physical torture is only one aspect of the attack on the mind: torture normally consists of a combination of physical assault, debilitation and demoralisation:

"When physical-torture techniques are dominant they are almost always combined with such stressors as isolation, sleep deprivation, squalid conditions, violation of legal rights and lack of knowledge of where one is. When psychological or physiological stressors are the main component, physical brutality normally exists as a sub-component."<sup>49</sup>

In some circumstances, psychological techniques alone are employed, but usually the effects of physical torture are utilised to assist in the process:

"This debilitation procedure is to introduce the corollary of the principle, 'a healthy mind in a healthy body'. Damaging the anatomical and physiological components of body function progressively impairs the working of the brain and hastens the collapse of will and morale."<sup>50</sup>

It is apparent, then, that the application of "antiseptic" pain will not be an efficient method of securing compliance. To effectively overcome the resistance of the victim, the torturer must

attack the victim's mind, and this requires the creation of conditions which will maximise the anxiety and apprehension of the victim, a situation which can best be achieved by a combination of physical hardship, emotional trauma and mental stress. No doubt it would be possible to differentiate between acceptable "antiseptic" techniques and unacceptable practices of a more obviously objectionable nature, and impose restrictions on the type and/or level of pain which might legitimately be inflicted, but this would both limit the value and effectiveness of torture and be unworkable in practice, as a dilemma would inevitably arise if the required information was not forthcoming: if the end is sufficiently important to justify the use of torture in the first place, but the use of torture within the permitted guidelines fails to elicit the essential information, it is somewhat arbitrary to reject intensification of the torture. The justification of torture is based on the proposition that the end justifies the means, and once that principle is accepted it is difficult to maintain a distinction between different means. Accordingly, if the use of "antiseptic" pain proves ineffective, there will be a powerful temptation to resort to other means, including rape, the forced eating of excrement and any other technique which may assist in overcoming the victim's resistance.

In modern times, the use of sensory deprivation - the prevention of stimuli from reaching the senses - has become increasingly favoured as a means of disorientating victims. A simple form of this is isolation or solitary confinement of varying types and degrees; a very extreme form would be immersion in a tepid, darkened and sound-proofed bath, a technique which volunteers in one experiment were able to endure for an average of only four hours.<sup>51</sup> Techniques employed

more commonly in practice include blind-folding or hooding (to prevent seeing), continuous loud noise (to prevent hearing), enforced standing spreadeagled against a wall (to prevent touch), and also exposure to extreme degrees of temperature. Deprivation of sleep and of food and water are other variants. During sensory and sleep deprivation, hallucinations and disorders in the thought processes occur, increasing the victim's anxiety and stress to such an extent that a psychotic state may be induced within a few days if the techniques are effectively administered.<sup>52</sup> The purpose of all such methods, and also of emotional and psychological pressures, humiliation and threats, is to persuade the victim that the price of resistance is greater than that of co-operation by pushing him to the edge of his endurance and undermining his will to resist. It should be pointed out, however, that while torturers often assure prospective victims that everyone does break in the end, this appears to be no more than further psychological pressure, as there is in fact no evidence that everyone has a breaking point, at least if the will to resist is sufficiently powerful. There are many victims who have died under torture rather than renounce beliefs or betray friends, and many have also been released without succumbing to torture, although in such cases it could be argued that insufficient pressure was brought to bear.

Torture includes mental suffering alone, when there is no physical pain or only a minimal amount. Such suffering may take the form of threats to the victim's family, threats of physical assault or execution, mock executions, enforced witnessing of the torture of others (especially family and friends), and all forms of deceit and humiliation which cause extreme mental anguish. In such cases, the victim's system of values may actually render him particularly susceptible to certain attacks:

"To make a Moslem fall to his knees and kiss the cross can be a humiliation and torture for him, while the same act for a Christian would not be."<sup>53</sup>

Similarly, prisoners in North-west India were at one time forced to touch a pig, and their belief that this would result in harsh penalties in the after-life caused greater torment than any physical assault. In cases such as this physical force will often be employed, and such violence may itself constitute torture, but where the victim actually elects to perform a humiliating act under only the threat of violence, this probably constitutes degrading treatment rather than torture, unless the intensity of mental or emotional suffering is of an extreme degree. Depending on the circumstances, cases of physical assault which do not necessarily involve intense bodily pain but do occasion severe mental suffering may be regarded as torture: for example, rape might not involve significant physical pain, and castration carried out under anaesthetic might not cause any physical pain at all, but in both instances the victim would undoubtedly suffer considerable anguish.

In addition to the pain, suffering and stress which a victim of torture experiences throughout the period of his detention, there are also numerous after-effects which must be taken into account in depicting the reality of torture. There may, of course, be physical signs and symptoms as a direct result of physical assault, though in most instances broken bones will heal and burns and bruises will disappear in time. In some cases, the damage may be more permanent, for example where a limb has been lost, and other sequelae such as pain in joints may become chronic. The most serious category of after-effects, however, concerns the neuro-psychiatric problems which

many torture victims suffer. Torture is aimed at the mind, and it is inevitable that the mind will suffer long-term damage as a result.

Investigations carried out by Amnesty International's Danish Medical Group on sixty seven Greek and Chilean victims of torture revealed the following symptoms, which were displayed from between two weeks and two years after the torture had taken place:<sup>54</sup>

- mental disturbance (40)
- memory and concentration loss (30)
- sleep disturbance (25)
- headaches (23)
- pain in joints (16)
- impaired hearing (15)
- impaired gait (15)
- abdominal pain (14)
- alcohol intolerance (13)
- cardio-pulmonary symptoms (11)
- sexual disturbances (8)
- visual disturbances (7)
- other symptoms (29)

Sixty per cent of the subjects examined exhibited mental disturbance, including neurosis, character change and psychosomatic symptoms.<sup>55</sup> This figure rises to seventy eight per cent if sleep disturbance, headaches, loss of memory and concentration, and sexual problems are also included.<sup>56</sup> Some relationship was established between psychological after-effects and solitary confinement.<sup>57</sup>

The Medical Group suggested that a number of the symptoms they discovered were the result of direct cranial trauma, namely loss of memory, difficulty in concentration, headaches, impaired hearing and

sexual disturbance (which also resulted from genital trauma).<sup>58</sup> Damage to brain cells as a result of physical violence can, then, cause mental problems, but the majority of psychological and emotional difficulties such as anxiety and neurosis are more directly related to the effects of torture as an assault on the mind.

Frantz Fanon recorded a number of after-effects which he linked to specific types of torture, and many of these relate to psychiatric disorders:<sup>59</sup>

(1) after general physical torture: agitated nervous depressions; loss of appetite and phobia of physical contact; motor instability;

(2) after electric shock: localised or generalised cinesthopathies; apathy, aboulia and lack of interest; electricity phobia;

(3) after truth serum: verbal stereotype and anxiety; intellectual or sensory perception clouded; phobia of all private discussions; inhibition;

(4) after brainwashing: phobia of all collective discussions; inability to explain or defend any given position.

In addition, Fanon discovered numerous psychosomatic problems: stomach ulcers, nephritic cholic, amenorrhoea, intense sleeplessness due to idiopathic tremors, hair turning white, sexual impotence, paroxysmal tachycardia, and generalised contraction with muscle stiffness.

It is clear, then, that the assault on the mind which coercive torture by its very nature involves has serious implications as far as the victim is concerned. More research is needed, and in fact Amnesty International Medical Groups continue to be engaged in work in this

field: at a seminar held by Amnesty International in 1978, there were several reports referring to work then in progress, including research into the after-effects of *falanga* (beating the soles of the feet) and the effect of torture on gonadal and sexual functions.<sup>60</sup> Such research is an essential aspect of the international campaign against torture, particularly in view of the conclusions reached by the Danish Medical Group after six years of intensive study involving over eight hundred victims of torture:

"...the psychiatric and psychological after-effects of torture may be more damaging to the victim than the physical effects of the original attack."<sup>61</sup>

It is apparent that the reality of torture is far removed from the clinical application of "antiseptic" pain envisaged by Shue. The effective administration of torture - and the justification of torture is based on its effectiveness - requires humiliation, degradation and demoralisation in addition to the infliction of intense pain, and subjection to torture will inevitably have very serious effects on the victim. It is the essential inhumanity of torture, the unavoidable violation of human dignity and decency, which in the final analysis characterises torture as an entirely unacceptable practice, and indeed Professor Twining identifies this as torture's "most objectionable feature":

"Again and again in accounts by victims and by others who speak with intimate knowledge of the problem, the intensity of the pain, and the seriousness of the after-effects are treated as secondary to the denial of humanity (of torturer and tortured), and the loss of self-respect, which are so often involved in the process."<sup>62</sup>

In the foregoing discussion, we have concentrated on coercive torture, but the purpose is actually irrelevant. The inhumanity of torture lies in the deliberate infliction of unlimited pain and

suffering on a defenceless human being rather than in the purpose for which this is done. The humanitarian view thus emphasises the effect of torture on the victim, and insists that no human being should ever be subjected to such treatment. Torture does not always have the aim of breaking the will of the victim, but the infliction of intense pain or suffering on a human being against his will in itself violates the principle of humanity because it involves treating people as a means to an end. Referring to the use of torture as a deterrent, Shue states:

"Terroristic torture is a pure case - the purest possible case - of the violation of the Kantian principle that no person may be used *only* as a means. The victim is simply a site at which great pain occurs so that others may know about it and be frightened by the prospect."<sup>63</sup>

Torture is by definition the infliction of limitless pain and suffering, and every form of torture dehumanises the victim by violating his fundamental human dignity. The dangers of such a denial of humanity were recognised by Beccaria:

"Liberty vanishes whenever the law, in certain cases, allows a man to cease to be a person, and to become a *thing*; then one sees the powerful devoting their whole efforts to discovering which of all the possible combinations of civil life are legally to their own advantage. This discovery is the magic secret which changes citizens into beasts of burden, and in the hands of the strong it is the chain that binds the actions of the heedless and the weak."<sup>64</sup>

Shue suggests that torture is objectionable because it violates what he calls "the primitive moral prohibition against assault upon the defenseless",<sup>65</sup> and in support of this proposition he refers to the distinction found in the laws of war between combatants and non-combatants and the prohibition of attacks upon the latter:

"The principle of warfare is an instance of a more general moral principle which prohibits assaults upon the defenseless."<sup>66</sup>



Torture constitutes a particularly aggravated assault on the defenceless because the victim is totally within the power of the torturer, and Shue's assessment certainly has some substance. Indeed, the humanitarian attitude is probably rooted in the ability to identify with the plight of the torture victim.

It has been argued that the defencelessness of the victim is in itself not a valid criticism of torture, in view of the fact that other types of assault on the defenceless can be justified:

"It is deceitful to permit artillery or aviation to bomb villages and slaughter women and children, while the real enemy usually escapes, and to refuse interrogation specialists the right to seize the truly guilty terrorist and spare the innocent."<sup>67</sup>

The suggestion is that if it is justifiable to bomb innocent non-combatants in this manner, then it can hardly be claimed that torture is unjustified simply because it constitutes an assault on a defenceless victim. The logic is valid, but the deduction that torture is justified is not the only possible conclusion: it might equally be maintained that mass killing of innocent people is morally objectionable and cannot be justified. It may be presumed that anyone adhering to the humanitarian position would take this view.

The justification of torture requires the rejection of the principle of humanity as the decisive criterion for action. Torture is in fact often utilised in suppression of certain classes or groups within society, and clearly the justification of torture is facilitated if the members of such groups can be categorised as sub-human:

"Regretably, normal people may be brainwashed and if our education systems, newspapers, and politics teach us from earliest days that members of one race, or religion, or political belief are not to be regarded as humans like

ourselves, then it will be normal if we treat them inhumanly."<sup>68</sup>

This aspect of torture will be examined in more depth in the following chapter.

There are, of course, a number of other practices which are characterised by their inhumanity, for example slavery and extreme forms of racism. Such practices attract condemnation on humanitarian grounds equally with torture, but torture does evoke a particular abhorrence, partly as a result of the extent to which it is used and partly because it involves extreme degrees of suffering by its very nature. Slavery and other forms of inhumanity do not necessarily involve intense pain and suffering for the victim (although in practice they often do); torture, however, by definition involves the infliction of limitless suffering, and there is no way in which it can be inflicted in a humane manner. Torture, especially coercive torture, is inhuman in essence:

"The purpose of torture is not only to make a person talk, but to make him betray others. The victim must turn himself by his screams and by his submission into a lower animal, in the eyes of all and in his own eyes. His betrayal must destroy him and take away his human dignity. He who gives way under questioning is not only constrained from talking again, but is given a new status, that of a sub-man."<sup>69</sup>

We have discussed the effects of torture upon the victim at some length in order to indicate the basis on which the humanitarian prohibition has been established. It is the desire to protect every person from being subjected to extreme suffering which has inspired humanitarian concern within those who advocate a total prohibition of the practice of torture, and an examination of the effects of torture gives some insight into what is actually involved for the victim. Those who justify the use of torture focus rather on the motives of

the torturer and the purpose for which it is employed, and in this way relegate the humanity of the victim to a secondary position. Indeed, they may even assert that torture can be utilised without being inhuman or degrading: for instance, during French operations in Algeria, General Massu not only defended the use of torture, but claimed that it did not degrade the victim, and in order to prove his point allowed himself to be subjected to electric shock.<sup>70</sup>

It should be noted that while the inhumanity of torture lies essentially in its effects on the victim, the role of the torturer can also be regarded as a dehumanising one. In other words, while it is true that no human being should be subjected to intense pain and suffering, it is also true that no human being should inflict such pain or suffering on another human being. From this perspective, even an act which did not actually cause human suffering could be considered inhuman, and it is important to look briefly at this issue.

The question is whether acts or practices which do not involve extreme suffering might still be considered inhuman and classified as torture purely on the basis of the character of the act. This applies particularly to those scientific techniques which overcome the will of the victim without causing significant pain or suffering: can they qualify as acts of torture? In fact, such techniques are to a large extent dependent upon the attitude of mind of the victim. Hypnosis, for example, does not enjoy a high success rate, being effective in a limited number of people, and even with them it is not a reliable means of obtaining the truth. The polygraph or lie-detector works on the principle that an increase in anxiety when telling a lie will induce physiological (autonomic) changes in the body, so that blood pressure, respiratory rate and galvanic skin response can be monitored

throughout interrogation and any sharp fluctuations detected by the polygraph can be interpreted as indicating an attempt to deceive. However, the variety of individual responses and lack of real certainty render the process largely ineffective, especially if the subject has been trained to resist the technique. The so-called 'truth drugs', the best known of which is Pentothal, are in fact employed regularly in general anaesthetics and also in psychiatry, because the administration of precise dosages can induce a state of extreme drowsiness in which the patient will talk freely of matters which are worrying him. This effect may be of some value in interrogation, but there is certainly no wonder drug which is efficacious in eliciting truth, and the procedure is by no means infallible. The effectiveness of such techniques is, then, almost entirely dependent on the mental state of the victim: if a person believes that he has been injected with a drug which will compel him to reveal the truth, there is a significant probability that he will respond accordingly, even if a totally inert substance has been administered. This is known as the placebo effect,<sup>71</sup> and it clearly relies on psychology rather than the physiological effects of the drug. A similar effect could, in fact, be achieved in different cultural conditions by the use of black magic, provided the victim was convinced in his own mind of the potency of magic.

The enforced application of these techniques may well be regarded as objectionable, and in many cases the very awareness that one's mind is being interfered with will cause mental anguish which may constitute torture even though no physical pain is experienced. It remains unclear, however, whether a technique which does not cause either pain or intense suffering can be regarded as torture or as

inhuman treatment. Even when the victim is unaware that his mind and will are being tampered with, such practices may be considered at least degrading, but they cannot be classified as torture as long as the concept of inhumanity remains linked to the experience of the victim rather than to the character of the act.

In conclusion, then, the principal factor in support of an absolute prohibition of torture is the inhumanity of subjecting a human being to intense pain or suffering. Torture by its very nature violates human dignity, and if respect for humanity is to be regarded as a fundamental and inviolable principle, the use of torture cannot be tolerated in any circumstances. The problem is that while the humanitarian position is based on the premise that the principle of humanity is inviolable, there is in fact no reason why this should be accepted universally. Certainly, there is strong support for such an approach in international law, but the fact is that in practice there are often other interests contending for priority, so that even when the concept of humanity is recognised as an important consideration, it will not necessarily be given automatic priority by governments: if some conflicting interest is identified as being of greater importance, respect for humanity may be sacrificed, and once this step has been taken it becomes easier to justify the use of torture on utilitarian or quasi-utilitarian grounds.

## Notes

1. Langbein, op.cit., at pp. 11-12.
2. Beccaria, op.cit., at p. 31.
3. Ibid., at pp. 22-23.
4. Bentham, Of Compulsion and herein of Torture, in Twining, op.cit., at p. 329.
5. Beccaria, op.cit., at pp. 32-33.
6. Bentham, Of Compulsion and herein of Torture, in Twining, op.cit., at p. 333.
7. Beccaria, op.cit., at p. 34.
8. See Bentham, Of Compulsion and herein of Torture, in Twining, op.cit., at p. 329.
9. See International Covenant on Civil and Political Rights, article 14(3)(g).
10. Beccaria, op.cit., at p. 35.
11. Ruthven, op.cit., at p. 11.
12. Beccaria, op.cit., at p. 31.
13. See Bentham, Of Compulsion and herein of Torture, in Twining, op.cit., at p. 332.
14. See Ruthven, op.cit., at p. 11.
15. See Beccaria, op.cit., at p. 35.
16. Ibid.
17. See Bentham, Of Compulsion and herein of Torture, in Twining, op.cit., at pp. 329-32.
18. Beccaria, op.cit., at p. 35.
19. A confession may be verifiable to the extent that it involves divulgence of additional information which only a guilty person could possess, but this is really separate from the actual confession, which is simply an admission of guilt. Where, for example, an accused person provides his torturers with details which corroborate his confession, such as information about where they can find a murder weapon, the confession is in a sense verifiable. In the previous section, however, we were dealing purely with unqualified admissions of guilt.
20. Twining, op.cit., at pp. 350-51.

21. Bentham, Of Torture, in Twining, op.cit., at p. 312.
22. See ibid., at p. 313.
23. See Bentham, Of Compulsion and herein of Torture, in Twining, op.cit., at p. 322.
24. Bentham, Of Torture, in Twining, op.cit., at p. 313.
25. Ibid., at pp. 312-13.
26. Ibid., at p. 314.
27. Ibid., at p. 315.
28. Ibid.
29. Bentham, Of Compulsion and herein of Torture, in Twining, op.cit., at p. 337.
30. Ibid.
31. Ibid.
32. Bentham thought that in most instances only convicted criminals should be tortured since, in his view, other threats would suffice to persuade anyone other than a person already facing the maximum penalty permitted by law. However, he did add that this rule might not apply when the situation could "not wait for a less penal method of compulsion". His arguments suggest, moreover, that a person ceases to be innocent whenever he withholds information or otherwise refuses to co-operate in circumstances where the public has a great interest in securing his co-operation. This might lead to a situation in which someone not even directly involved could be subjected to torture purely on the basis that his co-operation is in the public interest, even though he himself is entirely innocent of any offence. It might be argued that failure to act in the public interest in itself constitutes a moral offence justifying the resort to torture, but such a proposition would open the way to all sorts of abuses.
33. Henry Shue, Torture, 7 Philosophy and Public Affairs (1978) 124-43, at p. 142.
34. Amnesty International Report on Torture, at p. 26.
35. Torture in the Eighties, at p. 7.
36. Shue, op.cit., at p. 142.
37. Ibid., at pp. 142-43.
38. Twining, op.cit., at pp. 348-49.
39. Shue, op.cit., at p. 143.
40. Torture in the Eighties, at p. 7.

41. Kurt Glaser and Stefan T. Possony, *Victims of Politics: The State of Human Rights* (Columbia University Press, 1979), at p. 486.
42. Shue, *op.cit.*, at p. 142.
43. *Pain: New Perspectives in Measurement and Management*, edited by A.W. Marcus, R. Smith and B. Whittle (Churchill Livingstone, 1977), at p. 5.
44. Amnesty International Report on Torture, at p. 36.
45. See *Evidence of Torture: Studies by the Amnesty International Danish Medical Group* (Amnesty International, 1977), at p. 29. Volunteers were asked to compare the pain of electric shock with a standard pain (ischaemia), and although the quality of pain differed (the former being sharp and local, the latter dull and diffuse), the subjects were able to make a comparison, and the results indicated a variety of subjective experiences: the volunteers described their pain in different terms to such a degree that it was in fact suggested that they actually experienced distinguishable intensities of pain. In other experiments, on sensory perception, a wide range of responses was also revealed: see Amnesty International Report on Torture, at p. 47, and also Jack Vernon, *Inside the Black Room* (Pelican, 1966) on sensory deprivation experiments generally.
46. *Evidence of Torture*, at p. 27.
47. Ronald Melzack, *The Perception of Pain*, in *Frontiers of Psychological Research, Readings from Scientific American* selected by Stanley Coopersmith (W.H. Freeman & Co.), at p. 193.
48. "How the Brain Can Ease Your Pain", (Glasgow) *Sunday Standard*, 23 August 1981.
49. Carol Ackroyd, Karen Margolis, Jonathan Rosenhead and Tim Shallice, *The Technology of Political Control* (Pluto Press, 2nd edition, 1980), at p. 235.
50. Amnesty International Report on Torture, at p. 45.
51. See Ackroyd et al., *op.cit.*, at pp. 237-38.
52. See Vernon, *op.cit.*
53. Amnesty International Report on Torture, at p. 36.
54. See *Evidence of Torture*, especially at p. 18.
55. See *ibid.*, at pp. 10 and 19.
56. See *ibid.*, at p. 10.
57. See *ibid.*, at pp. 10 and 16.
58. See *ibid.*, at pp. 12 and 17.



59. See Frantz Fanon, *The Wretched of the Earth* (translated by Constance Farrington, Penguin, 1967), at pp. 225-36.
60. See Report of an Amnesty International Medical Seminar: "Violations of Human Rights: Torture and the Medical Profession" (Amnesty International, 1978), especially at pp. 11-12.
61. "After-effects of torture 'more damaging' than original attack", *British Amnesty*, No. 41, Dec 1980/Jan 1981, at p. 2.
62. Twining, *op.cit.*, at p. 354.
63. Shue, *op.cit.*, at p. 132.
64. Beccaria, *op.cit.*, at p. 67.
65. Shue, *op.cit.*, at p. 125.
66. *Ibid.*, at pp. 128-29.
67. Roger Trinquier, *Modern Warfare* (translated by Daniel Lee, Pall Mall Press, 1964), at p. 23.
68. Amnesty International Report on Torture, at p. 64.
69. Jean-Paul Sartre, *A Victory*, prefacing Henri Alleg, *The Question* (translated by John Calder, John Calder, 1958), at p. 24.
70. See Eric Baker, *Public Policy and the Use of Torture* (Quaker Peace and Service in association with Amnesty International, 1980), at p. 13.
71. See Amnesty International Report on Torture, at p. 44.

#### CHAPTER FOUR: NATIONAL SECURITY VERSUS HUMAN RIGHTS

While it is possible to support an absolute prohibition on the use of torture on humanitarian grounds, the validity of such a position obviously depends upon an acceptance of the fundamental nature of the principle of humanity, and the fact that torture is regularly employed by state authorities in many countries indicates that there is actually a widespread rejection of this perspective and that there are many people in positions of power who, privately if not publicly, are willing to justify the use of torture when they regard some other consideration or interest as more compelling than the protection of human dignity. Such a rejection of humanity as the determining criterion of political action usually relies on utilitarian logic, although in practice the rules and safeguards which a philosopher might wish to impose are invariably ignored. In this chapter, we shall examine the circumstances in which torture is most frequently resorted to, indicating in particular the grounds on which it is regarded as justified, and we shall thereafter examine the manner in which the erosion and circumvention of constitutional and legal safeguards permits the unlawful introduction of torture by state authorities.

An empirical examination of situations in which torture has been utilised in the recent past shows that its purpose is primarily political. Although in some circumstances the use of torture arises as a result of corruption, inadequate control of the police or armed forces, or even inefficient criminal investigation techniques, it is clear that in the modern world torture is employed principally in the suppression of political opposition. Amnesty International's World

Survey' indicates that torture was directed against political subversion in sixty two of the sixty four countries mentioned, and the same pattern emerges from an examination of more recent information,<sup>2</sup> so that it may be concluded that the use of torture is most commonly regarded as justifiable when there exists some threat to the security of the state.

One of the major responsibilities of every government is the protection of national security, and this refers not only to the defence of sovereign territory against external aggression, but also to the preservation or, in some cases, the imposition of those social values and political ideals which the government (supported by 'the Establishment') considers fundamental to the organisation of society. In this latter sense, national security involves the essential character of the existing socio-political system: thus, in a democratic and pluralistic society, national security is concerned with the preservation of democratic institutions and individual liberty, whereas in a totalitarian system the concept of national security is much narrower, referring to a strictly defined form of socio-political organisation. In every sovereign state, national security is regarded as paramount, because the form of society which the government wishes to perpetuate is equated with the very spirit and existence of the nation, and consequently if any threat to the framework of that society emerges, a conflict may arise between the protection of national security and respect for human dignity, and the principle of humanity may come under serious challenge as a determining factor in political decisions and actions. The same applies, of course, when national security is threatened by external

aggression, but in practice torture is more commonly resorted to in response to internal subversion.

The most serious form of internal threat to national security in any state is the emergence of violent opposition to the government, often in the shape of terrorism, and there does seem to be a connection between the increase in the use of torture and the development of political violence over the past few decades: Amnesty International's World Survey, for example, reveals that in half the cases referred to torture was directed against subversion which manifested itself in guerrilla or terrorist activity.<sup>3</sup> While guerrilla-type tactics have been employed throughout history, it is only in relatively recent times that guerrilla warfare has assumed the nature of a recognised theoretical strategy of insurgent groups. The description "guerrilla", which means "little war", originated in the Peninsular War (1807-14), and referred initially to the activities of partisans in enemy-occupied territory, but earlier this century the concept was adapted by Mao Tse-tung to apply to revolutionary conditions:

"With Mao came the real division between partisan guerrilla warfare and revolutionary/insurgency guerrilla warfare....He expanded the ultimate in civil-military relations: the people became the guerrilla army, the army the people, still with strict overall political control....Mao's success glorified revolutionary guerrilla warfare and the post-Second World War years witnessed a widespread scattering of such insurgencies."<sup>4</sup>

Mao's ideas were adopted and refined by numerous theorists and practitioners of political violence, such as Giap (Vietnam), Nasution (Indonesia), Grivas (Cyprus) and Guevara (Latin America), and the failure of Guevara's theories of basing forces in the countryside subsequently led to the widespread adoption of Carlos Marighella's

urban guerrilla warfare in appropriate conditions. In the last twenty years or so there has been a dramatic increase in the number of terrorist organisations, whose motives range from world revolution and anarchy through nationalism and religious fundamentalism to counter-terrorism, and such groups, along with more orthodox guerrilla movements, often have a world-wide impact through the international mass media, to the extent that they constitute a major factor in global politics. Political violence in the context of national politics is, then, a universal phenomenon, and it is unlikely that the problems it creates will disappear while injustice and oppression are perceived to exist in society. The sensitivity of governments to violent subversion must be seen in this context.

The growth in the use of violence for political ends within the national sphere has been paralleled by an increase in the use of torture, and it is clear that there is a relationship between the eruption of political violence and the emergence of torture. Political violence on any scale represents a serious threat to national security, and there can be little doubt that strong counter-measures will usually be required to protect the public (and the state) from guerrilla and terrorist activity. Often this will involve the curtailment of civil liberties and the assumption of special powers by the government to enable it to deal more effectively with the threat:

"For the best defence against terrorism is undoubtedly to set up a police state....where anybody can be declared an enemy of the state and incarcerated without any process of law.... it must be obvious that some freedom must be sacrificed in order to protect citizens from death and intimidation by terror and the very fabric of the state from disintegration."<sup>5</sup>

It may be possible to defeat terrorism without resorting to the use of torture, or even without introducing emergency measures, but historically governments have generally found it expedient to invoke special powers in order to deal with such a serious threat to national security. The rationale is that the long-term survival of the state (that is, the existing system) is of such critical importance that the imposition of temporary restrictions on the rights and liberties of individuals is justified, although in fact governments often retain emergency powers even after any immediate threat has been eradicated, with the result that repressive practices become institutionalised. In a sense, the terrorists themselves are responsible for this situation, because initially it is they who compel governments to take extreme action. Indeed, it is ironic that the aim of certain revolutionary groups has been to provoke such a response:

"It is one of the beliefs of terrorists that if they succeed in provoking a right-wing coup or the enforcement of extreme repressive measures, then there must inevitably be a counter-movement which will destroy the government and bring about the revolution. But in both Uruguay and the Argentine exactly the opposite has happened. The right-wing governments brought to power because of revolutionary terrorism have crippled the terrorist movements in both countries."<sup>6</sup>

Governments will, then, take extreme measures to ensure the protection of national security against a violent threat, and in most cases they may be regarded as justified in doing so, at least within certain limits, principally the requirement of respect for core human rights. However, if security forces should consider torture a necessary weapon in counter-subversive operations, a conflict arises between their duty to protect national security and their responsibility to respect human rights, and it is in such situations that the priority given by governments to national security becomes

apparent. Moreover, although the use of torture is not normally authorised by emergency legislation, such legislation by removing the usual restraints often has the effect of facilitating the clandestine use of torture by the security forces, a process which will be examined in greater depth at a later stage.

Torture is required by security forces in responding to political violence primarily because guerrilla and terrorist strategy relies upon secrecy and anonymity, creating for security forces particular difficulties in obtaining information as to the enemy's activities and in procuring evidence for convictions. The conditions of modern combat - the sophistication of equipment available to governments and the distribution of weaponry and resources - have virtually ruled out the pitched battle of bygone eras, at least in so far as the majority of civil conflicts are concerned. Governments regard the provision of the most advanced and efficient military arms and technology for their forces as a top priority, particularly in the area of counter-insurgency, and while guerrilla and terrorist groups are often supplied with arms of excellent quality by their ideological supporters, the state's forces are generally better equipped as well as more numerous. Consequently, insurgents are compelled to avoid full-scale or open confrontation and rely on specialised tactics. In some conditions, guerrilla forces may match the state's military in strength and may even control large areas of territory, but conflict on this scale is verging on civil war, when the government's *de facto* authority may be in doubt; more often, revolutionary forces must operate within 'enemy' territory, not holding any territorial base themselves, but carrying out clandestine activities while living within the community. Accordingly, the basic principle of

revolutionary guerrilla warfare, at least in its initial stages, is that the entire body of repressed classes should form an underground organisation which can support and shelter the active forces of the revolution:

"Nasution, and initially Giap and Chinh, agreed with Mao Tse-tung that a guerrilla war should pass through three broad stages: first, the clandestine underground structure should be created, including the cell network; second, these groups should emerge to conduct guerrilla hostilities; third, the guerrillas should shift to regular operations for the final stage. During the first phase the insurgency movement is most vulnerable, but presents a minimal target since it remains hidden; a larger target is offered during the second stage, but by acting in guerrilla fashion the insurgents can be elusive; by the time the third phase is reached the guerrillas should be strong enough to absorb any counter-offensive."<sup>7</sup>

It is essential for the insurgents to be able to live ostensibly as normal members of society while conducting their business under a cloak of secrecy, and this requires the co-operation and support of the community in which they live: in some circumstances, the guerrillas may receive sympathy and assistance from the population in general, particularly when an unpopular regime is in power, and the whole community may become a vast underground network along the lines of classical revolutionary theory; in other circumstances, the guerrillas may have to ensure the silence of the people through terror and intimidation:

"We know that the sine qua non of victory in modern warfare is the unconditional support of a population....Such support may be spontaneous, although that is quite rare and probably a temporary condition. If it doesn't exist, it must be secured by every possible means, the most effective of which is *terrorism*."<sup>8</sup>

Guerrilla warfare, then, relies heavily on secrecy, and the same is true of urban terrorism:



"The maxim by Mao Tse-tung that the guerrilla should be like the fish in the sea, indistinguishable from others and hence hard to identify, assumes even greater relevance since the urban sea is far more teeming."<sup>9</sup>

Against an adversary of this nature, conventional military responses are of little value:

"We still persist in studying a type of warfare that no longer exists and that we shall never fight again....Since the end of World War II, a new form of warfare has been born. Called at times either *subversive warfare* or *revolutionary warfare*, it differs fundamentally from the wars of the past in that victory is not expected from the clash of two armies on a field of battle. This confrontation, which in times past saw the annihilation of an enemy army in one or more battles, no longer occurs."<sup>10</sup>

For security forces dealing with revolutionary warfare, then, the problems are very different from those faced during more conventional conflicts. In fact, the most serious problem is obtaining accurate information about the activities and intentions of the enemy, particularly when the security forces themselves do not enjoy popular support:

"It is we, in spite of ourselves, who have imposed this type of war - terrorism in the towns and ambushes in the country. With the disequilibrium in the forces, the F.L.N. has no other means of action. The ratio between our forces and theirs gives them no option but to attack us by surprise: invisible, ungraspable, unexpected, they must strike and disappear, or be exterminated. The elusiveness of the enemy is the reason for our disquiet; a bomb is thrown in the street: a soldier wounded by a random shot: people rush up and then disperse: later, Moslems nearby claim they saw nothing. All this fits into the pattern of a popular war of the poor against the rich, with the rebel units depending on local support. That is why the regular Army and civilian powers have come to regard the destitute swarm as their uncountable and constant enemy. The occupying troops are baffled by the silence they themselves created: the rich feel hunted down by the uncommunicative poor. The 'forces of order', hindered by their own might, have no

defence against guerrillas except punitive expeditions and reprisals, and no defence against terrorism but terror. Everybody, everywhere, is hiding something: they must be made to talk."<sup>11</sup>

In such conditions, coercion may be the only means of obtaining information, and torture presents itself as a potential solution, not only in extorting confessions and denunciations and in eliciting otherwise elusive information, but also in discouraging those who may be tempted to give assistance to the subversives: just as terrorism can dissuade people from co-operating with the security forces, so torture can function as a general deterrent to those who might consider supporting subversive organisations. This is why it is in counter-insurgency situations that security forces most often regard the use of torture as necessary and justifiable, and in fact most printed apologies of torture appear in military manuals dealing with counter-insurgency techniques. Occasionally, the use of torture as such is openly defended,<sup>12</sup> but more commonly euphemisms such as 'interrogation in depth' are employed, rendering the proposition a little more palatable to the sensitive.

The argument justifying the use of torture in counter-insurgency operations is essentially utilitarian in nature, asserting that the protection of society - or national security - is of such importance that the interests of individuals and even the principle of humanity must, if necessary, be sacrificed so that the threat presented by subversion can be resisted: if the use of torture is necessary to combat such a threat, then torture must be seen as the lesser of two evils. The importance of maintaining law and order and the ultimate morality of preserving the existing socio-political system are thus emphasised, and the essential validity of the end is invoked to

justify any necessary means. This line of reasoning is particularly persuasive when framed in terms of the protection of innocent lives, thus placing the rights of individuals in direct conflict:

"Voilà pourquoi la torture a continué à être autorisée par une cruelle nécessité....pour l'indispensable nécessité du renseignement visant à éviter des drames cent fois plus atroces dont seraient victimes les innocents."<sup>13</sup>

The motives of those who employ torture are contrasted with the motives of the terrorists, whose very purpose is to murder and maim with a view to overthrowing the existing socio-political order, and the legitimacy of the torturers' goal of protecting the innocent is identified as the justifying factor. In other words, the potential consequences of not employing torture are considered more undesirable than the effects of permitting its use, an argument which is most effective when there is a direct relationship between the use of torture and the protection of innocent lives, as illustrated in the following account of an incident which occurred during the Algerian conflict:

"The civil Inspector-General [super-prefect] on special duty in Oran was visited by a member of the Commission for the Safeguarding of Individual Rights. He asked him into his office, sat down at his desk, and said, 'We have just captured a terrorist, bomb in hand. We are convinced that he knows, but will not tell us, the names of thirty other terrorists, each of whom is preparing to throw a bomb. We can either put him through an unpleasant quarter of an hour or risk the lives of some 300 innocent human beings. Which shall we do? Put yourself in my place and decide.' The visitor stammered, 'Well....I think....it might be better...' The Inspector-General cut him short. 'You need not worry, the decision was taken three months ago. The citizens of Oran were able to sleep in peace.'<sup>14</sup>

Many people might feel inclined to agree with the sentiments of the Inspector-General, or at least might not feel free to condemn him

for a decision made in an invidious position, and there is no doubt that the argument which he presents, albeit in emotive language, has a strong *prima facie* appeal. However, it should be stressed that the reasoning involves an over-simplification of the issues, and a number of question marks must be placed over it. For instance, how could the Inspector-General be "convinced" that the suspect possessed the relevant information? How could he be certain that his men did not arrest thirty innocent members of the public purely on the unverifiable evidence of that one suspect, given under duress? What constituted "an unpleasant quarter of an hour", and what further action would have been taken (or was taken) if the required information had not been forthcoming at the end of that period? It is clear that there is a danger of reducing the whole question of torture to a general equation in which the end result is the only relevant factor:

"When all is said and done, if it ends in saving someone's life, a crack on the head of a man caught throwing bombs is not so awful as people like to make out."<sup>15</sup>

Clearly the argument is by no means unassailable even on utilitarian grounds, and a number of other considerations have to be taken into account, some of which were identified in the previous chapter. Nevertheless, it is easy to understand why those responsible for security find torture an attractive proposition, especially if they are convinced of its effectiveness, and the fact is that many people would regard the use of torture as justifiable even in the absence of satisfactory answers to the questions posed above. Indeed, even if they recognise that torture is not always efficient or reliable in eliciting the truth, they may still regard it as useful and justify its employment on the basis of a sufficiently high success

rate. Moreover, it should be recognised that while it is useful for the security forces to be able to point to specific cases in which innocent lives are threatened, their principal concern is national security, and their justification of torture is not limited to such cases, but in fact extends to the routine employment of torture for the purpose of procuring general intelligence about the activities of subversives. The protection of national security is rarely dependent upon a single incident, but involves an ongoing struggle between the security forces and the subversives, in the course of which the security forces constantly require information which can only be obtained by coercion. While individual acts of torture may have little bearing on national security, therefore, information which will be of value in the protection of national security can be obtained by the systematic employment of torture. The danger of such an approach is that it often leads to the institutionalisation of torture:

"Since most people faced with torture will confess to whatever is demanded of them (with the possible exception of the tested militants belonging to real underground organizations), the system becomes self-fulfilling and self-extending to the point where the initial aim of interrogation gives way to intimidation and ultimately to mass terror."<sup>16</sup>

The logic relied upon by those who justify the use of torture in response to a threat to national security sets the 'good' of the existing system against the 'evil' of subversion, and the paramount goal of protecting national security is invoked to justify the violation of fundamental human rights. National security is presented as the supreme value, in the defence of which any means are legitimate, so that if undesirable or morally objectionable methods become necessary, they must be accepted as 'lesser evils'. It was on

the basis of this rationale that General Massu, a French officer involved in the Algerian conflict, was able to conclude:

"A sine qua non of our action in Algeria is that we should accept these methods heart and soul as necessary and morally justifiable."<sup>17</sup>

In the case of Algeria, even some of the clergy supported this reasoning, likening the use of torture to disciplining a child or to painful but necessary surgery. It is apparent, therefore, that those who justify torture do so on the basis of the moral validity of the end which they have in view. The necessary and crucial implication of this approach is the displacement of humanity as a peremptory principle of behaviour, and while we have identified national security as the ideal which is most often given priority over the demands of humanity, it should be recognised that many people have no real humanitarian concern at all and would justify torture for far less compelling reasons than the protection of national security.

Another French officer who took part in the campaign in Algeria was Colonel Roger Trinquier, whose book '*La Guerre Moderne*' has often come in for criticism on the grounds that it attempts to justify the use of torture in certain circumstances. In fact, Trinquier's principal theme is a call for a strategy which would obviate the need for the violent suppression of political opposition; he advocates the creation of an organisation to ensure political control of the people in order to counteract the aims of revolutionary guerrilla warfare, and his book contains a number of warnings against the unnecessary use of violence and injury to physical and moral integrity. His proposal is to secure the support of the community even before the outbreak of hostilities, thus depriving potential revolutionaries of their essential infrastructure, and he believes that it is failure to adopt this course which necessitates violence:

"And very often, because we have not prepared anything, we will be tempted to obtain by violence information that a well-organized service would have given us without difficulty."<sup>18</sup>

Trinquier accepts that when his initial strategy has not been implemented, the use of coercion may prove necessary:

"If the prisoner gives the information requested, the examination is quickly terminated; if not, specialists must force his secret from him. Then, as a soldier, he must face the suffering, and perhaps the death, he has heretofore managed to avoid."<sup>19</sup>

Moreover, while he envisages that the specialists will often be able to procure the information without any violation of the prisoner's physical or moral integrity, Trinquier adds that "we must not trifle with our responsibilities."<sup>20</sup> The implication of this statement is that he would, in fact, justify the use of torture if necessary.

We have seen, then, that torture is commonly resorted to in response to political violence which threatens the security of the state, and that the explanation for this lies in the difficulty of obtaining information about subversive activities coupled with the importance which governments attach to national security. In some circumstances, however, torture is employed even when no violent opposition to the government exists. Torture arises, says Malise Ruthven, "wherever governments believe themselves, or choose to believe themselves, to be beset by conspiracies and subversion",<sup>21</sup> and he expands on this assessment as follows:

"The conspiracy scenario to which this attitude gives rise is often the reaction of a regime with a weak moral or social base. In such cases the varied and disparate manifestations of dissent born of evolutionary changes or contradictions in the social structure are perceived as the result of machinations by a

'hidden' enemy. The inquisitorial machinery with torture at its centre is established to 'root' the enemy out."<sup>22</sup>

While terrorist action and other forms of political violence constitute an obvious threat to national security, governments can also regard non-violent dissent or opposition as a threat sufficiently serious to merit the imposition of harsh repressive measures and the introduction of torture. This occurs most commonly in unstable totalitarian systems, particularly if the government enjoys little popular support. In a totalitarian system, all opposition to the government is characterised as a challenge to the very fabric of society and *ipso facto* as a threat to national security, and activities which would be normal and acceptable within a pluralistic system are considered unacceptable and unlawful. No dissent is tolerated, and as a result any opposition to the government must be clandestine by nature. Governments are acutely aware that their opponents can only operate on this basis, and this creates a perpetual paranoia, as a result of which insecure governments are liable to exaggerate the threat of subversion, especially if there is any prospect of it developing into political violence. Of course, totalitarian regimes may enjoy stability and a considerable degree of popular support, and each government's response to non-violent opposition will depend upon the particular conditions, but in general the less opportunity there is for legitimate opposition, the more reason there is to be apprehensive of clandestine opposition. Consequently, in an intolerant and insecure system the appearance of a few dissenters may be interpreted as indicative of a major conspiracy against national security and provoke a harsh repressive reaction,



whereas in a democratic system it may require a major outbreak of terrorist activity before the security forces become involved at all.

When non-violent subversive activity is regarded as a serious threat by a government, the use of torture may be considered justifiable for the same reasons as in the case of a violent threat: subversion involves secrecy, and the same problems arise for the security forces. In fact, secrecy creates fear, and the greater the secrecy, the more intense will be the fear. The relationship between secrecy, fear and torture can be seen in the historical use of torture against heresy and witchcraft, but today it is apprehension of political subversion which lies behind the institution of torture:

"Under [the Latin American 'Reds-under-the-bed' syndrome] a wide range of events and activities are seen (often most improbably) as fuelled by the 'International Marxist Conspiracy', and the Red Menace is used to justify any violation of human decency, not excluding the torture of small children....There are revolutionaries, idealistic and otherwise; there are terrorists. But how real is the Red Menace? How much of the activity characterised as 'Marxist' is merely that which would be normal in a 'free' country?....The scale of the Red Menace may be debatable; the scale of the fear of a supposed Red Menace is beyond question....I am suggesting that the organised threat to established regimes from the left is commonly very small, but that it is used as an excuse for widespread repression of activity which might well be applauded."<sup>23</sup>

It is perhaps inevitable that repressed and exploited peoples will eventually organise some form of resistance, at least in the present day political climate in which international revolution is fomented around the globe; the down-trodden of the earth are increasingly exposed to political education and are able to turn to Marxism (or some variant thereof) as a unifying force to support their struggle for liberation by means of the violent overthrow of the class

system.<sup>24</sup> Moreover, Marxist regimes and organisations are more than willing to provide arms and assistance for those engaged in promoting the revolution. As political awareness is awakened among the oppressed, then, the resolve to demand justice crystalises, and as the means of revolution become available the eruption of violence follows inexorably. According to Frantz Fanon, violence is not only inevitable and justifiable, but is actually essential as a "cleansing force":<sup>25</sup>

"The rebel's weapon is the proof of his humanity."<sup>26</sup>

It is against this background of revolutionary propaganda and activity that the position of unstable regimes must be viewed. Insurrection may erupt anywhere at any time, and this produces an acute fear of subversion which leads to intense repression of even the most innocuous dissent.

The relationship between the defence of national security and the principle of humanity can be seen most clearly when the concept of national security is equated with the preservation of a particular social order in which the role of the government is to suppress certain sectors of society in order to protect the status and privileges of the ruling class, often an elite minority. Where wide social divisions exist, the preservation of privilege is naturally the highest priority of those who enjoy it, and it is understandable for them to support the repression of the exploited classes in order to ensure that their position and status is maintained. Often the justification of such repression is facilitated by the general attitude of the ruling classes towards the lower classes, who may be regarded as inferior or even as sub-human. The most extreme example of this is racism, which involves the dehumanisation of particular

racial or ethnic groups, an attitude which can be identified in the Nazi treatment of Jews and non-Aryans and also in the colonialist mentality of the former imperial powers, as well as in countless situations throughout history. The essence of such an attitude is that a supposed racial superiority confers a right to enjoy privilege, so that distinctions based on race must be maintained. Thus, Jean-Paul Sartre, referring to racial oppression in Algeria, states:

"It is a bitter and tragic fact that, for the Europeans in Algeria, being a man means first and foremost superiority to the Moslems. But what if the Moslem finds in his turn that his manhood depends on equality with the settler? It is then that the European begins to feel his very existence diminished and cheapened."<sup>27</sup>

Such dehumanisation, of course, also facilitates the justification of torture, since if the victim is not seen as a human being, the infliction of torture appears less objectionable. Certainly the racist attitudes of the French during the Algerian conflict played a significant part in the justification of torture:

"...although....an Algerian was legally a citizen of France, he was not a Frenchman, and....in the eyes of many Frenchmen, including many of those responsible for forming French public opinion, he was not even a human being."<sup>28</sup>

An attitude of racial discrimination is, of course, particularly valuable in rationalising the use of torture, in that there are obvious physical features by which the members of one race may be readily distinguished from those of other races, so that a certain basis does exist on which a proposed differentiation in treatment might be maintained. In fact, prior to the Algerian conflict scientific writings had been published in which the view was expressed that Arabs were essentially sub-human in a medical and psychiatric sense, that is it was suggested that Arabs were driven by animal

instincts and did not have the capacity for thought processes enjoyed by Europeans.<sup>29</sup> When such a belief is held, it is clear that humanitarian considerations will be of little concern to those intent on preserving the socio-political system, and will present no impediment to the use of torture.

Historically, torture has often been inflicted primarily (and sometimes exclusively) on members of the lower classes in society, in particular those with few rights, such as foreigners and slaves. However, although racism and similar dehumanising attitudes facilitate the rationalisation of torture, the justification of torture is not dependent on a denial of the victim's humanity in a scientific sense, that is it is not necessary to actually believe the victim is sub-human. The justification of torture is in fact often based on a more subtle form of dehumanisation, in which the humanity of the victim is not denied but is simply subordinated to some other principle which is considered to be of greater importance. This is borne out by the words of one torturer:

"Do you know why we have been in power for six years? It is because we relegate the human factor to second place."<sup>30</sup>

This statement pinpoints the crux of the matter: if the principle of humanity is given absolute priority, the use of torture can never be justified, but if it is relegated to second place, there is no impediment to the use of torture. We have already identified national security as the ideal to which the principle of humanity is most often sacrificed, and it is obvious that the dehumanisation process can be applied to the enemies of the state, that is to those who threaten the existing socio-political order, particularly when they employ violent means against innocent people. The reasoning is

that those who resort to terrorism and political violence are themselves the worst violators of human rights, and by their atrocities renounce any claim to respect for their own humanity:

"The usual justification posits a situation where the 'good' people and the 'good' values are being threatened by persons who do not respect 'the rules of the game', but use ruthless, barbaric, and illegal means to achieve their 'evil' ends."<sup>31</sup>

In some circumstances, the introduction of torture can be prevented, even when there is an erosion of legal safeguards, either because the members of the government have personal reservations about the use of torture or because there remains adequate democratic control over the executive. However, torture is often authorised - and therefore justified - at the highest levels of government, and in many cases this is made possible by the removal or curtailment of legal safeguards as a result of the proclamation of a state of emergency. Indeed, even if the government does not authorise the use of torture, the climate produced by the absence of normal safeguards often allows the security forces to resort to the clandestine use of torture.

When torture is authorised at the highest level, the government's justification of torture will clearly be based on the premise that national security is paramount, but it will also be necessary to persuade all those whose co-operation is required that the interests of national security justify the employment of torture. In some situations, especially in totalitarian systems, the government may already enjoy the full support of the various branches of power, but in other circumstances it will have to secure the co-operation of a number of different sectors:

"Policemen, soldiers, doctors, scientists, judges, civil servants, politicians are involved in torture, whether in direct beating, examining victims, inventing new devices and techniques, sentencing prisoners on extorted false confessions, officially denying the existence of torture, or using torture as a means of maintaining their power."<sup>32</sup>

The co-operation of the security forces is generally essential, but the support of other groups may not be necessary, provided they do not actively expose and challenge the use of torture. In totalitarian systems, this will not usually present any problem, since effective control over the different branches of power is already established within the political structure. Where democratic institutions remain functional within the system, however, the government may find it necessary to ensure that the other branches of power are kept ignorant of its involvement in the practice of torture. This is often possible during a state of emergency because parliamentary supervision of the executive is considerably curtailed, while other measures such as censorship of the media ensure that any independent agencies will encounter difficulties in attempting to confirm suspicions of torture.

Problems may arise with the judiciary, which in many countries has a specific responsibility for protecting the individual from governmental abuses, although even when the judiciary is independent, its members (and, indeed, senior civil servants in other fields) will normally tend to be sympathetic towards the government in its defence of national security, and consequently may exhibit inherent prejudices against those suspected of being enemies of the state. This does not mean that judges will necessarily be corrupt or consciously biased, but simply that the attitudes which they display towards law and order will be strongly influenced by their conservative (that is, pro-Establishment) leanings. Judges are usually appointed on the basis of

their standing as respected figures in society, and their natural tendency will be to support the system in which they have risen to positions of authority. As a result, they may fail to pursue allegations of torture in the belief that terrorists are liable to make false accusations against the security forces as a matter of course, or because they simply do not believe the claims, or even because they consider a degree of compulsion to be justifiable in emergency situations. On the other hand, judges may be conscientious in their efforts to protect the individual from governmental abuses, and although they may find it exceptionally difficult to carry out effective investigations into the activities of the security forces, their attempts to do so may create embarrassment for the government. In such circumstances, the government may find it necessary to circumvent judicial interference by assuming direct control of the judiciary, either by replacing judges with its own nominees or by transferring jurisdiction in political cases to military tribunals.

Governments are normally dependent upon the security forces, either the civil police or, more frequently, the armed forces, for the actual administration of torture, and indeed the power of the government lies ultimately in its control of the security forces. The role of the armed forces has traditionally been one not only of defending the territory of the state against external aggression, but also of protecting the regime in power from internal subversion, and the armed forces have thus had a definite function in the suppression of unconstitutional political opposition, particularly when this function is beyond the capabilities of the police. Both the police and the military can, then, be utilised in the defence of the existing socio-political system, and it is essential for the government to

ensure their loyalty to that system by persuading them that the defence of the system is the defence of the nation. In other words, the members of the security forces must be convinced that national security in its broad sense represents the supreme value.

The support of senior military personnel for the existing system can normally be secured by the simple expedient of ensuring that only those who are politically acceptable and whose loyalty is beyond question are elevated to the senior ranks, a fairly straightforward process since government approval for appointments will invariably be required. In class-based societies, senior officers can be drawn principally from the upper or privileged strata, and in this way advantage may be taken of their predisposition towards the system. Thus, in Greece during the 1960's, most of the officer cadets were drawn from established conservative and nationalist families, and their inherent tendencies were reinforced by making them feel that they had been called to purify the nation from undesirable elements.<sup>33</sup> It is, then, a definite policy of governments to ensure that in officer selection only those of unimpeachable character and qualifications gain access to influential positions. Moreover, in industrialised capitalist countries the most senior officers in the armed forces often have a further vested interest in the preservation of the system, because they themselves are deeply involved in business activities, particularly arms production and sales. This obviously makes them reliable supporters of free enterprise and enemies of socialism:

"Through their economic links with big business, and because of their social and ideological identification with the status quo, the high-ranking officers who control the armed forces, conceive their role and that of the officers and men under them as that of defenders of the system."<sup>34</sup>



The commitment of such men to a particular way of life may be so strong that they will stage a military coup in order to preserve the existing order rather than permit a democratically elected government to implement radical or reformist policies.

In socialist countries, too, the selection process is utilised to ensure that only the politically reliable are appointed to promoted posts, and in general senior officers will be loyal socialists who have displayed a clear grasp of Marxist principles and a strong commitment to the socialist system. Any indication of reactionary tendencies will result in a static career, if not in dismissal from the forces. In responding to a threat to national security, then, governments can normally (though not invariably) rely upon the support of senior military personnel, and any dissenters can be summarily removed or transferred to other posts.

Selection is also an important factor in securing the support of the officer corps below the most senior ranks, although it must be complemented by political indoctrination; for the lower ranks, a combination of indoctrination and discipline is required. The aim of political indoctrination is to persuade members of the forces whose natural inclination may not be to defend the existing socio-political order that the defence of the nation includes the defence of the system. It must be stressed to military personnel that the security of the state is paramount, and that any means are justified in its protection. In this process, an element of dehumanisation may be introduced:

"It wasn't like they were humans. We were conditioned to believe this was for the good of the nation, the good of our country and anything we did was okay. And when you shot someone you didn't think you were shooting at a human. They were a Gook or a Commie and it was okay."<sup>35</sup>

The very nature of armed forces suggests the idea of violence, and in general the members of armed forces will not question the justifiability of violence and killing. They are not concerned with the hypothetical niceties of philosophical argument, but must be prepared to deal with the harsh realities of war, suffering and death. This is not to say that they necessarily enjoy the use of violence or have any particular predisposition to warfare: war may be justified without being glorified. However, in the sphere of military training the aim is to prepare troops for action, and the concept of humanity is not one which instructors will regard as useful in achieving this. Humanitarian considerations will therefore be suppressed, as a result of which the members of the armed forces will be more likely to accept the use of torture as justifiable in the defence of national security:

"The reason why the officers and N.C.O.'s, who have been before military courts in the last year, all come from these formations [ie. elite units] is that they were all at some time ordered to collect intelligence and to do so "by all means available". Mr President, in military language the phrase is "to gather intelligence", in polite language it is "to push an interrogation", in French it is "to torture" ....I do not know what sort of mental turmoil someone who gives an order like this must go through; but I do know the sense of shock and revulsion suffered by those who have to carry it out. All the fine ideas and the illusions of the young St Cyr cadet crumble into nothing when he comes face to face with this stranger out of whom he is ordered to drag information....But you will say: "Then why did not the young St Cyr cadet refuse to carry out the order?" Because the ultimate end had been so described to him that it appeared to justify the means. It had been proved to him that the outcome of the battle depended on the information he obtained, that the victory of France was at stake. He was caught in the toils of a monster whose ethics prescribed that "the end justifies the means". It was a crusade and in every age crusades have had the same characteristics."<sup>36</sup>

The potency of military training in inculcating a belief in national security as the supreme value, in the defence of which even the use of torture is justifiable, is indicated by the statements of numerous former torturers.<sup>37</sup> Often young conscripts have been involved, and their impressionability has facilitated the task of their instructors, especially in certain Third World countries where peasant boys with a limited education and a restricted experience of the world have been conscripted and taken away from village life. Of course, not everyone is suitable material, and in some instances only 'elite' units have been employed as torturers, but the fact remains that indoctrination techniques can be extremely powerful, and when combined with a strict disciplinary regime they may prove difficult to resist.<sup>38</sup>

The principle of unquestioning obedience to the orders of a superior is the cornerstone of military organisation. Great emphasis is placed on the absolute necessity of obedience and respect within the military hierarchy, and severe disciplinary measures are taken whenever the regulations are violated. Political indoctrination in itself may not be sufficient to secure the loyalty of the lower ranks, and it is therefore necessary to ensure control over those ranks through a strict system of military discipline. It is interesting to note that in Greece in the 1960's, while officers were exposed to extensive indoctrination and also to some physical violence aimed at ensuring future obedience to orders, the lower ranks received only a little indoctrination but were subjected to systematic physical abuse in order to reinforce their obedience.<sup>39</sup> In effect, there was an attempt to ensure loyalty by means of terror, and when a soldier has been conditioned in this way he will find it very difficult to

disobey, even if ordered to torture. One Greek soldier made the following statement at his trial:

"I think that in this hurricane of terrorism, violence and fear, I tried to participate as little as possible. I would rather not have participated at all, but it was impossible....I was caught up in a machine and became a tool without any will of my own to resist. I remember Spanos threatening a soldier that he would ruin his family. The next day the boy began to beat prisoners..."<sup>40</sup>

The whole direction of military training, then, is to emphasise national security and play down humanitarian considerations, and this is clearly conducive to the justification of torture. It is undeniable that the effects of political indoctrination, combined with the pressures of military discipline, have been to blame for the actions of many soldiers. The father of one Greek conscript referred to the change in his son's attitudes in the following terms:

"We are a poor but decent family, and now I see him in the dock as a torturer. I want to ask the court to examine how a boy who everyone said was 'a diamond' became a torturer. Who morally destroyed my family and my home?"<sup>41</sup>

The same point was echoed by one of the prosecutors in the Greek torture trials:

"It is certain....that those morally responsible are not in this court....They are those who, for many years, have given thousands of hours instruction on the fighting of communism without sparing even one hour to the defence of democracy."<sup>42</sup>

It should be pointed out that in spite of political indoctrination and the enforcement of military discipline, there has in recent years been a certain disintegration in the composition of the officer corps in some non-socialist states: the breakdown of the selection process within class systems has resulted in the officer corps no longer being composed exclusively of those from conservative

backgrounds. Moreover, both officers and the lower ranks are increasingly exposed to external political influences, including radical theories, with the result that the armed forces cannot always be relied upon by the government. There may be limitations on the extent to which the armed forces will support the policies of the government, and under certain conditions there may arise serious dissent leading ultimately to a revolt, a situation which tends to occur with greater frequency in volatile situations in the Third World rather than in established democracies. The armed forces, or even a particular section, may seize power and oust the civilian government (or the incumbent military regime), and having done so may undertake to radically alter the structure of society rather than perpetuate the existing system. Revolutionary coups of this nature have, in fact, become more common, although it remains the norm for the armed forces to support the government against subversion. In conditions of political instability, the military may actually be a powerful political force, and may become increasingly involved in government on the grounds that the armed forces alone are capable of governing effectively:

"To the upper echelons of the Army, politicians often seem incompetent at managing affairs of state, especially where military matters are concerned. The 'mismanagement' of government results in the Army being presented with unwanted tasks, or being subject to unwelcome 'political constraints' in the execution of its tasks. The more the government comes to lean on the support of the Army, for example at times of severe economic and political crisis, the more likely is the Army to consider itself better able to carry out the technical business of running the country."<sup>43</sup>

This pattern emerges from a number of classic situations, and in the following chapter we shall see its application in the developments which took place in Uruguay in the early 1970's.

The matter of military training and discipline raises the question of the responsibility of the torturer. While it might be asserted that indoctrination amounts to brainwashing which would permit a plea of insanity (temporary or permanent), it is unlikely that such a plea would be accepted, although it might be taken into account in mitigation. The defence of having acted under orders is perhaps less straightforward, but the clear principle which emerged at the end of the Second World War was that such a plea cannot exculpate, unless possibly the torturer was himself subjected to an irresistible degree of duress. Article 4 of the Nürnberg Principles gives unequivocal guidance on this point:

"The fact that a person charged with an offence defined in this code acted pursuant to an order of his government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order."<sup>44</sup>

It may be asserted, then, that where an order to violate fundamental human rights is given, it should be disobeyed, and any suggestion that some other interest ought to take priority must be rejected.

It is sometimes suggested that the demands of public morality are less exacting than those of private morality, so that someone who takes a decision in the public interest must be permitted greater latitude than would be acceptable if he were acting for personal reasons. In other words, those in positions of authority who exercise power on behalf of others cannot be made to bear responsibility for

the decisions they make. Thus, for example, the authorisation of the use of nuclear weapons or biological warfare would not imply moral guilt on the part of the individual giving the order:

"The exercise of public power is to be liberated from certain constraints by the imposition of others, which are primarily personal. Because the office is supposedly shielded from the personal interests of the one who fills it, what he does in his official capacity seems also to be depersonalized. This nourishes the illusion that personal morality does not apply to it with any force, and that it cannot be strictly assigned to his moral account. The office he occupies gets between him and his depersonalized acts."<sup>45</sup>

If the end result is the only criterion by which the morality of an act is to be judged, and national security can be characterised as the supreme value, it is clear that a person authorising the use of torture in the interest of national security will bear no moral responsibility for the violation of humanity. However, morality is not concerned only with results, but also with the manner in which results are obtained, that is the means, and the position of the humanitarian is that the principle of humanity is paramount and must take priority over other considerations, even if these are legitimate:

"If results were the only basis for public morality then it would be possible to justify anything, including torture and massacre, in the service of sufficiently large interests."<sup>46</sup>

Those in positions of power who authorise the use of torture are normally acting in an official capacity and in the public interest, but article 3 of the Nürnberg Principles makes it clear that the demands of public morality are no less stringent than those of private morality, so that such people cannot escape responsibility for their actions:

"The fact that a person acted as Head of State or as responsible government official does not

relieve him of responsibility for committing any of the offences defined in this code."<sup>47</sup>

So far in this chapter, we have been examining the basis on which the use of torture is regarded as justifiable by governments, and we may conclude that governments consider the use of torture to be justified when they perceive a threat to national security which is sufficiently serious to outweigh humanitarian considerations. Precisely when this point is reached will depend on the strength of the government's commitment to human rights as well as on its assessment of the vulnerability of the state. The more sensitive a government is to threats to national security, the more readily it will resort to extreme measures to protect it, especially if its ideological perspective does not emphasise the rights of the individual. The fact remains, however, that the practice of torture is unlawful in the majority of states, and the question to which we must now turn is how the legal prohibition is overcome.

In extreme totalitarian systems, of course, the government will face only minor obstacles in introducing torture, as there will be no independent authorities which can restrain its actions. In most states, however, there do exist certain constitutional institutions and legal safeguards which permit the restraint of those in positions of power who wish to authorise the use of torture. In fact, the prevention of torture is dependent upon the effectiveness of the legal and procedural machinery which protects the rights of the individual, particularly in relation to arrest, detention and trial, and also the constitutional limitation of government which must ensure the efficient operation of that machinery, and it is when the constitutional balance of power is upset and there is an erosion of safeguards that the use of torture becomes possible. Such a situation



most commonly arises when a state of emergency is declared in response to a threat to national security. This involves the introduction of extraordinary security measures, and while these do not normally legalise the use of torture, their effect in practice is often to facilitate the clandestine employment of torture by the security forces. An examination of this process will give some indication of the relationship between the operation of effective safeguards and the protection of fundamental human rights.

The concept of the state of emergency (otherwise referred to as 'state of siege' or 'state of exception') is one which is fully recognised in international law:<sup>40</sup> the major human rights conventions all permit derogation from most of their provisions in times of public emergency. Article 4, paragraph 1, of the International Covenant on Civil and Political Rights states:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

The use of torture is, of course, absolutely prohibited under international law, but the fact is that the erosion of the normal legal and procedural safeguards which a state of emergency involves often enables the security forces to resort to the clandestine and unlawful employment of torture. The immediate danger lies in the suspension of the rights of detainees, but the restriction of constitutional and political controls over the executive is also a

crucial factor. One of the principal effects of a state of emergency is that extraordinary powers are conferred upon the executive, and although in parliamentary democracies overall responsibility remains with the legislature, the effectiveness of this supervisory role may be seriously undermined, so that the executive and its subordinate agencies may be liberated from the usual constitutional constraints. This may be accompanied by interference with judicial independence:

"Without any over-generalization, it may be said that the institutions of most of the countries in question are frequently characterized by the subordination not only of the legislative and judicial powers to the executive power, but even of the executive power itself to the military power."<sup>49</sup>

The greatest threat to fundamental human rights lies in the concentration of power in the hands of a single authority which is able to exercise complete control over every sector of public life, but which is itself not subject to any external or independent supervision. It is critical in the prevention of violations of fundamental human rights that the actions of the executive should be open to challenge by independent authorities which have real power to impose and enforce restraints, in the first place constitutionally appointed authorities specifically charged with the task of upholding the rule of law, but also non-governmental agencies which can apply moral or political pressure. The broader the range of influences and the more effective they are, the greater will be the degree of protection for fundamental human rights; conversely, when such influences are absent or ineffectual, the executive will have correspondingly greater freedom of action.

In a totalitarian system, the various organs of the state are not intended to function as restraints on the government, but are

subordinate to the government and form an integral part of the constitutional infrastructure which is under the direct control of the government. In such a system, the actions of the government are virtually beyond challenge: the government is essentially above the law, because it controls the making of law and consequently determines the very concept of legality. The only parameters within which it must operate are those imposed by the state ideology, which the government itself interprets and applies. Every public authority is required to act in accordance with the principles established by the government, and as a result no constitutional authority exists which can challenge the legality of the government's actions. Moreover, in a totalitarian system there will be few alternative sources of criticism or opposition to the government's policies, since dissent in other sectors will not be tolerated. In such conditions, it may be unnecessary for the government to invoke special measures to deal with a threat to national security, but if such measures are required they can be introduced without difficulty.

In liberal democracies, the executive is normally subject to parliamentary control, but in a state of emergency this control may be significantly curtailed. The introduction of a state of emergency usually requires the authorisation or approval of the elected legislature,<sup>50</sup> and although wide powers may be conferred upon the executive to enable it to deal with the particular emergency situation, parliamentary control is normally maintained, at least in theory. In practice, however, the supervisory role of parliament often becomes little more than a formality, and the executive is able to operate without any real constraints. In such circumstances, the executive will often appropriate additional powers and may attempt to

nullify any remaining parliamentary supervision and curtail the independence of the judiciary:

"With regard to the legislative power, it frequently happens that parliament is suspended or even dissolved, either as a result of a *coup d'état*....or through a broad interpretation of the laws....The *judicial power* is placed under control. Two methods are generally used to secure the co-operation of the judicial power. One consists in appointing "reliable" judges, the other in reducing the powers of ordinary courts in favour of those of emergency courts....Similarly, the criteria of competence may be modified in two ways: either specific enactments gradually remove matters from the competence of the ordinary courts, transferring them to that of emergency courts, or the judicial power declares itself incompetent of its own accord."<sup>51</sup>

Often the executive will perpetuate the state of emergency, and ultimately it may abolish any remaining democratic institutions, with the result that the emergency measures actually become an integral part of the constitutional framework.<sup>52</sup>

In effect, when a state of emergency is introduced in a democratic system, a quasi-totalitarian state may be created, at least in a limited sphere, and the resulting atmosphere of confusion and secrecy permits the government to engage in or authorise unlawful activities. In such conditions, other restraining influences will be important, for example a free press, a strong trade union movement, an active ecclesiastical sector and a politically concerned public, but in fact emergency measures invariably impose extensive restrictions on civil liberties and permit the wholesale suppression of criticism of the government, with the result that these potential influences are seldom able to function effectively. The erosion of constitutional safeguards is normally accompanied, then, by the curtailment or suspension of civil and political rights, and it is this combination

"...circumstances resulting from temporary factors of a generally political character which in varying degrees involve extreme and imminent danger, threatening the organized existence of a nation, that is to say, the political and social system that it comprises as a State, and which may be defined as follows: "a crisis situation affecting the population as a whole and constituting a threat to the organized existence of the community which forms the basis of that State".<sup>56</sup>

It is possible that other types of threat might fall within the scope of the concept, such as a serious natural disaster,<sup>57</sup> massive pollution, an epidemic, or even a purely criminal problem, but in practice governments declare states of emergency almost exclusively in response to political threats, usually of a domestic nature, and it is of course in such situations that human rights issues arise.

It is unclear how serious a threat must be before it qualifies as an emergency, but the use of the term "war" in the regional conventions indicates that the threat must be on a major scale, presenting a high degree of risk to the community, and it might even be suggested that only a violent threat to national security is sufficient to warrant emergency measures. The United Nations study mentioned above identifies four categories of political crisis: international armed conflicts; wars of national liberation; non-international armed conflicts; and situations of internal disorder or internal tension.<sup>58</sup> Whether or not the fourth category could be limited to armed threats and violent activities under the principle of *ejusdem generis* is unclear, but it must be at least doubtful if non-violent and non-disruptive opposition to a government can justify the introduction of emergency measures under international law. The study itself is, in fact, concerned mainly with the fourth category,<sup>59</sup> and in practice states of emergency are resorted to primarily in response

to the threat of internal subversion, whether of a violent or non-violent nature.

The European Court of Human Rights has declared that the natural and customary meaning of the words "other public emergency threatening the life of the nation", as expressed in the European Convention, is "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed,"<sup>60</sup> and this statement has clearly influenced the definition formulated for the purposes of the United Nations study. The study identifies the following prerequisites:

- "1. The crisis situation must be taking place or at least imminent. The possibility of invoking the derogation clause is subject to a time-limit so as to persuade States not to make use of it solely for the purpose of prevention without a crisis having been declared or for purposes other than a return to normal (principle of provisional status).

2. The situation of danger must be such that the normal measures and restrictions authorized by the instruments in normal times manifestly no longer suffice to maintain public order.

3. The situation of danger must affect, on the one hand, the whole of the population and, on the other, either the whole of the territory (this being a *fortiori* the case in a situation of external war as provided for, for instance, under the Inter-American and European Conventions) or certain parts thereof.

4. Lastly, there must be a threat to the very existence of the nation, that is to say, to the organized life of the community constituting the basis of the State, whether this means to the physical integrity of the population, to territorial integrity or to the functioning of the organs of the State (the test applied by the European Court since the Lawless Case)."<sup>61</sup>

This analysis does not seem to take into account situations in which the threat affects only particular sections of the community or particular territorial areas, with the result that the principle of

derogation might be excluded where the problem involved, for example, nationalist demands for independence, and for this reason the definition may be too narrow. The idea of disruption of the ordinary functioning of society does appear to be a crucial factor, however, and certainly a state of emergency should only be introduced in exceptional circumstances involving a major threat and for the specific purpose of averting that threat. There is no doubt that governments commonly invoke the principle of derogation for political purposes when there is in fact no genuine threat to national security, but it is clear nevertheless that the situations which we have identified as being those in which governments are liable to justify the use of torture will often fall within the legal concept of the state of emergency, so that the suspension of safeguards which facilitates the employment of torture will be entirely lawful.

(b) "officially proclaimed": this requirement is, interestingly, unique to the International Covenant, its purpose being simply "to avert situations of *de facto* emergency by imposing a rule concerning publicity under municipal law."<sup>62</sup> It may be noted, however, that each of the conventions provides that the state should notify the appropriate international authority that it has declared a state of emergency.<sup>63</sup> Notification should include the reasons for the emergency measures, the nature of these measures, and the provisions of the relative convention from which derogation has been made,<sup>64</sup> and there should also be notification of the termination of a state of emergency. These provisions are aimed at establishing some form of international supervision over states of emergency, although where a *de facto* state of emergency exists, failure to officially proclaim it or to notify the relevant international authority probably does not

preclude that authority from exercising a degree of supervision.<sup>65</sup> However, the powers of the international authorities are actually very limited.<sup>66</sup>

(c) "measures derogating from their obligations": the effect of a state of emergency is to release the government from its duty to observe the stringent requirements of human rights in order to allow it to deal effectively with the particular emergency, the rationale being that the increased demands of the public interest justify the temporary curtailment of the rights of the individual in a manner which would not be acceptable under normal conditions. However, derogation does not mean that the application of the relevant convention is suspended for the duration of the state of emergency; a wholesale denial of fundamental human rights is not envisaged, and there remain certain limitations, as we shall see below.<sup>67</sup> Furthermore, there are a number of rights from which no derogation is permitted, and these of course include the right not to be subjected to torture.<sup>68</sup>

(d) "to the extent strictly required by the exigencies of the situation": a state of emergency is justified only when the normal legal machinery has proved incapable of dealing with a serious threat, or at least there are reasonable grounds for believing that it would be inadequate, so that extraordinary measures are necessary. The concept of derogation has its basis in the theory of self-defence,<sup>69</sup> and although governments may be permitted a certain freedom in their assessment of what measures are required, the fundamental principle is that measures derogating from the international standards are justified only in so far as they can be shown to be absolutely necessary in countering the particular threat. Moreover, this



principle applies to each specific measure, so that derogation from any single conventional provision is permissible only to the extent that it is "strictly required". Essentially, the necessity of any particular measure can only be judged on the basis of its effectiveness, and although this will not always be a straightforward matter, the ultimate test is whether the threat is actually eliminated. It is obvious, however, that governments are unlikely to terminate a state of emergency on the grounds that the measures have failed to eliminate the threat; on the contrary, in such circumstances they are liable to become more desperate and impose even more severe repressive measures. As a result, a situation may arise in which the government is unable to eliminate the threat, but requires permanent emergency powers in order to keep it under control. Such a situation is not envisaged by the human rights conventions, which assume a temporary state of emergency leading to the swift elimination of the threat and followed by an immediate return to normality:

"The measures involved are provisional by nature, so that the constant, specific and immediate objective of the authorities is a return to normal."<sup>70</sup>

The possibility of a chronic situation is not foreseen in the conventions, and although the American Convention permits derogation only "to the extent and for the period of time strictly required",<sup>71</sup> this does not actually impose a finite limit on the duration of a state of emergency. There are, in fact, many situations around the world involving protracted political conflict in which the governments are unable to eliminate the threat, but regard emergency measures as strictly required to contain it. There is a tendency for governments to renew or prolong states of emergency for as long as they perceive a

threat to exist, and if there is a constant threat to national security it is quite possible that the state of emergency will become institutionalised. Indeed, in some circumstances governments retain emergency powers even after the immediate threat has been eliminated, so that they will be in a position to deal swiftly with any new threat.

(e) "not inconsistent with other obligations under international law": this is a normal provision in international treaties of this nature, and requires no further comment.

(f) "not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin": a similar proviso appears in the American Convention, but there is no equivalent provision in the European Convention, possibly on the basis that this is a general principle of human rights and requires no separate specification. The word "solely" might be interpreted to mean that it is not necessarily unacceptable for emergency measures to apply only to particular groups in society, provided there is some legitimate reason for maintaining such a distinction. Discriminatory measures might be appropriate, for example, where the threat to national security comes from a specific section of the community:

"It may well happen that, within the scope of the clause of derogation, the measures strictly required by the situation involve action directed against - or specifically affecting - a group belonging, for instance, to a particular race or religion (for example, the quelling of a riot).

In so far as such action may be described as discriminatory, it would not constitute discrimination "solely" on the grounds of race or religion....since it was rendered necessary to the extent strictly required by the situation. Such, at least, is the prevailing interpretation given by doctrine."<sup>72</sup>

Thus, if a particular racial group is responsible for a campaign of terror against the general public, special measures which affect only or primarily that group may be considered legitimate because they do not involve discrimination *solely* on the ground of race; the measures strike at one section of the community not because of the inherent characteristics of its members, but rather because members of that particular group alone are responsible for acts of political violence. On this basis, a government would be justified, for example, in imposing a curfew which affected only members of a specific racial group.

It may be noted that the list given in article 4 of the International Covenant does not correspond precisely with the list in article 2, paragraph 1, thus apparently sanctioning derogation which is discriminatory solely on grounds of political or other opinion, national origin, property, birth or other status.<sup>73</sup> The reason for these omissions is not entirely clear, especially in view of the fact that concepts such as race, colour, national origin and birth overlap. Certainly as far as political opinion is concerned, measures to protect national security might be expected to affect those holding dissenting political views, and similarly restrictions on foreign nationals during a time of war would normally be considered perfectly legitimate. Nevertheless, it remains unclear whether there is any significant distinction between the terms of article 4 and discrimination on other grounds.

These, then, are the somewhat nebulous criteria upon which the validity of a state of emergency depends. The principles of international law are generally paralleled in municipal or domestic legal systems, although the actual provisions vary greatly from state

to state.<sup>74</sup> Four types of legislation, which may be employed cumulatively, can be identified:<sup>75</sup> (i) conventional emergency regimes, in which the introduction of a state of emergency is predetermined by law and brought into effect by the executive, subject to the control of parliament; civil power is transferred to the military, and emergency courts are set up; (ii) vesting with legislative power: legislative powers are conferred upon the executive by parliament, which sets limits on their content, purpose and duration; (iii) submission of emergency powers to legislative ratification: as (ii), except that parliament ratifies rather than authorises; (iv) emergency powers self-assumed by the executive: special powers are appropriated by the executive without any parliamentary control. It can be seen from this analysis that the essential feature of states of emergency is the erosion of independent supervision of the executive branch of government.

In practice, states of emergency are regularly invoked in circumstances which fail to satisfy the criteria laid down in international conventions or even the requirements of national law. Thus, there may be no official proclamation or notification to the international authorities, and even if this latter obligation is complied with, governments rarely accept any attempts by the authorities to supervise states of emergency. The precise role of the international authorities is in any event unclear, and often they are unable to do more than comment on whether the prerequisites have been met. In this connection, it may be noted that the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, by resolution 1983/30, decided to include on its agenda an item entitled 'Implementation of the right of derogation provided for

under article 4 of the International Covenant on Civil and Political Rights and violation of human rights', and it now draws up an annual list of those countries which proclaim or terminate a state of emergency and submits an annual report on compliance with the international requirements to the Commission on Human Rights.<sup>76</sup> The Human Rights Committee established under the International Covenant on Civil and Political Rights has also endeavoured to exercise a degree of supervision over states of emergency, especially in its role under the reporting procedure, and it has on several occasions criticised governments in respect of their abuse of the derogation provisions. States of emergency have frequently been abused for the purpose of political repression when no significant threat to national security has existed, or when the only threat has been legitimate opposition to the government, and have often involved the wholesale suspension of human rights.

As we have indicated, the transfer of power to the executive often creates conditions in which the clandestine use of torture can take place, because the removal of the normal constitutional safeguards and consequent erosion of the limitation of government make it extremely difficult for parliament to exercise effective supervision over the executive and control the state of emergency. The implementation of emergency measures is normally under the direct control of the executive, and for reasons of security parliament may be kept in ignorance of counter-subversive operations, as a result of which it may be impossible for the elected body to verify suspicions of torture. Moreover, this state of affairs may be exacerbated by interference with judicial independence and extensive suspension of civil liberties, which suppress potential sources of opposition to the

government. Thus, a ban may be imposed on public gatherings, the media may be proscribed or subjected to censorship, trade union activities may be restricted, academics and other politically unreliable public figures may be summarily dismissed, and so on. In the most extreme cases, parliament itself will eventually be suspended and full political control will be assumed by the executive.

While the erosion of potential restraints on governmental freedom of action produces the conditions within which the security forces are able to employ torture, the immediate threat to human dignity lies in the suspension or curtailment of the legal rights of those detained under the emergency provisions.<sup>77</sup> Indeed, if these rights are not respected, the use of torture may actually emerge even when the conditions described do not exist, although in such circumstances there remain independent agencies and authorities which can expose violations of human rights and ensure that the practice of torture is stopped, and it is therefore normally necessary for at least a partial erosion of constitutional safeguards to take place. In order to identify the rights which are of particular importance in the prevention of torture, we shall examine the measures which are commonly utilised in states of emergency and relate them to the emergence of torture.<sup>78</sup>

When a subversive threat arises, emergency measures often include legislation which defines 'subversion' in very broad terms, so that legitimate political activity as well as unconstitutional opposition is regarded as unlawful, and other sources of potential dissent, such as trade union, civil rights and religious movements are suppressed. The notion of complicity is also extended so that, for example, not only membership of a proscribed organisation but also public support

for its aims can be considered illegal.<sup>79</sup> Moreover, in some instances retroactive legislation is introduced which permits the detention and prosecution of political suspects on the basis of activities engaged in prior to the proclamation of the state of emergency, although this is a violation of the absolute prohibition on *ex post facto* laws which is recognised in international law.<sup>80</sup> The grounds on which political suspects may be arrested are often made less stringent than in normal criminal cases, and there is almost invariably an extension of the minimum period for which a detainee may be held without being charged or brought before a magistrate.

It is during the period of initial detention that torture is most likely to occur, since it is at this time that the security forces are conducting their interrogation and endeavouring to obtain evidence against the suspect to substantiate their suspicions. The situation is exacerbated when, as is usually the case, the detainee is held incommunicado. This may take different forms: firstly, the victim may be abducted by the security forces, who do not even acknowledge that they are holding him - 'disappearances'; secondly, the detention may be acknowledged, but the victim is prevented from having contact with his family, his lawyer or a magistrate; thirdly, it may be that the detainee is permitted to communicate with the outside world, but has no access to a judge.<sup>81</sup> The effect of such detention is that the detainee cannot bring allegations of ill-treatment before an independent authority capable of controlling the security forces. Of course, access to a judge is relevant only in so far as the judicial authority retains a degree of independence: even if a detainee or, as in the third case, his family or lawyer, are able to bring a complaint before the courts, the authority of the judiciary may have been eroded

to such an extent that the judge is powerless to take any action. It is in such circumstances that the opportunity to communicate with the outside world is especially important: even if it is not possible for the detainee's family, friends or lawyer to initiate proceedings through the domestic courts, they can at least publicise his case and invoke the assistance of human rights groups, and they may also be able to bring the matter to the attention of international authorities. It is for this reason that detainees are often prevented from having contact with the outside world during the initial stages of detention. The overall effect of incommunicado detention, then, is that the detainee is denied access to any potentially sympathetic party who might be able to take action to secure his release or the termination of ill-treatment, and this not only facilitates but actually encourages the use of torture. It also creates problems in obtaining evidence of torture.

The practice of holding suspects incommunicado is probably the single most important factor in the facilitation of torture during an emergency situation: a detainee held incommunicado for several days or even weeks is entirely at the mercy of his interrogators, and the temptation to resort to coercion in order to secure a confession or other information is obviously considerable, particularly when the security forces otherwise face great difficulty in obtaining evidence. This is not to say that torture only occurs when the detainee is held incommunicado: the security forces may be free to employ torture during initial detention as a result of ineffective supervision due to lack of judicial independence, connivance or even overwork of judges, and torture may also occur at a later stage in the criminal process. However, it is during pre-trial detention that the security forces are



most likely to employ torture, because by the time a detainee is committed for trial, the evidence has been obtained and the security forces have had every opportunity to extort information. After the initial interrogation, the purpose of torture is more likely to be punitive or disciplinary rather than coercive.<sup>82</sup> It may be noted that the practice of incommunicado detention has attracted strong criticism from the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities over the last few years.<sup>83</sup> The Sub-Commission and its working group on detention have, in fact, identified a number of problems with the suspension of legal and procedural safeguards, most of which will be covered in this discussion.

In certain situations, it is possible for detention without trial to be continued indefinitely, so that the detainee is never actually charged with an offence and consequently is never brought to trial. Preventive detention is a variant of this which is commonly utilised by governments for the purpose of neutralising political opposition. Prolonged detention, often on tenuous grounds is, of course, entirely unsatisfactory,<sup>84</sup> yet many regimes find it expedient to ensure the permanent suppression of their critics in this manner. In such situations, there is no court appearance at which the detainee can make a complaint of ill-treatment, and often judicial supervision is otherwise inadequate, so that there is little to prevent the security forces from torturing detainees.

A further salient feature of states of emergency is the erosion of the independence of the judiciary,<sup>85</sup> which we have already mentioned. The effect of such a development is that even if there is a judicial appearance it is futile for a detainee to complain of

torture to the magistrate. Where there is independent judicial supervision of the security forces throughout detention, or even opportunity for judicial review on termination of incommunicado detention, a victim of torture or ill-treatment has an opportunity of making a complaint to the judge so that, while there will be difficulties in carrying out an investigation, some form of protection does exist, and this may at least function as a deterrent to the security forces. The effectiveness of the protection is, of course, dependent upon the impartiality and conscientiousness of the judge, as well as upon the extent to which he can enforce his decisions. Where the courts are placed under the direct control of the executive and judicial independence is compromised, however, a victim of torture cannot rely on being given an impartial hearing, and even if he succeeds in bringing his allegations to the attention of a judge, the judge will be unable or unwilling to take any action.

In totalitarian systems, judicial independence is not fully recognised, and the executive is in fact able to exercise control over the judiciary, at least indirectly, so that if the executive wishes to authorise the use of torture by its security forces, it can ensure that there is no interference on the part of the courts. Within a parliamentary democracy, on the other hand, the civilian judiciary often retains its independence during a state of emergency, and indeed the courts may represent a vital safeguard against executive abuses, especially when parliamentary supervision has been neutralised. If the executive finds it necessary to circumvent the restrictions imposed upon it by an independent judiciary, it must either remove troublesome judges or transfer jurisdiction in political matters from the civilian courts to special tribunals, in particular military

courts. The civilian courts may well be powerless to resist such a move, because the transfer of jurisdiction to special courts is often perfectly lawful in terms of emergency legislation, and if this is the case the civilian courts have no real grounds for refusing to relinquish jurisdiction. Even if they attempt to do so, for example by ordering the release of a political detainee, the security forces may simply refuse to comply, on the grounds that the judge has exceeded his authority.

There is an obvious danger of prejudice when political offences fall within the jurisdiction of emergency courts which are directly or indirectly subject to the executive, because this means that there is no longer supervision and review of the activities of the executive by an independent judicial authority. As far as the use of military courts is concerned, we have already examined the role of the armed forces in the defence of national security, and it is clear that the impartiality of such courts in dealing with suspected enemies of the state must be in serious doubt. The same applies, however, to every type of special court which is not independent of the executive. Essentially, the absence of judicial independence deprives detainees of the opportunity of invoking the protection of an authority which is sympathetic and in a position to restrain the security forces. The security forces are aware of this when interrogating detainees, and this knowledge increases the temptation to resort to the use of torture.

Transfer of jurisdiction often involves the application of summary procedures which deny the accused the normal procedural rights,<sup>86</sup> and if military procedures are to be applied, martial law may be imposed on civilians, further prejudicing the position of the

accused. Special rules may be introduced whereby the trial takes place *in camera*, the accused is not permitted to speak in his own defence or allowed to choose his own lawyer but must accept a military appointee, the defence is denied access to material evidence, and confessions and other inadmissible evidence are accepted by the court. Although the procedural rights of accused persons are not recognised as non-derogable in the international human rights conventions, it is clear that it was not the intention of the conventions to allow the denial of basic standards of justice, and many of the practices resorted to during states of emergency must be rejected as unnecessary and unjustifiable. In particular, the practice of holding detainees incommunicado and the circumvention of independent judicial supervision of detention procedures may be identified as unacceptable, and there is no doubt that if these practices can be eliminated security forces will be more reluctant to utilise torture.

The result of all these emergency measures which we have mentioned is as follows: a suspect may be arrested on the basis of tenuous connections with political activity which is regarded as unlawful, may be subjected to torture during a prolonged period of detention (part or all of which is likely to be incommunicado) which may in fact continue indefinitely without trial, and may be unable to complain to a judicial authority either because he never appears before one or because when he does the judge is under the control of the government and consequently unable or unwilling to take any action. Even when there does exist effective judicial supervision of detention, the practice of incommunicado detention may make it virtually impossible for a victim of torture to produce proof at a later date, as there will be no witnesses to support his allegations

and he may be denied access to any medical records which have been kept, while the security forces can ensure that the marks of torture have disappeared before they allow him to appear before a judge.

It is in this way, then, that the legitimate curtailment of legal and procedural rights in response to an emergency situation can have the effect of permitting the practice of torture to arise even though it is never sanctioned by law. The authorisation of incommunicado detention may even enable the security forces to employ torture without the consent or knowledge of the government, although if the executive has sufficient control over the security forces it should be able to prevent such a situation arising. More often, however, the entire judicial process applying to political offences comes under the control of the executive through the security forces, and the government itself is responsible for authorising or wilfully permitting the use of torture.

In the following chapter, the problems which we have identified will be examined in relation to the situation which arose in Uruguay during the 1970's, when the practice of torture emerged following the introduction of a state of emergency in response to a subversive threat. Many other situations might have been chosen for the purpose of illustrating the same points,<sup>27</sup> but as we shall see there are a number of factors which make Uruguay an especially interesting case study. In some countries, of course, the absence of effective safeguards and constitutional limitations on the power of the executive is a permanent and integral feature of the political system, and in such conditions the same problems occur, but an examination of the breakdown of democratic institutions as the result of the introduction of emergency measures gives a more striking and dramatic

illustration of the relationship between the absence of safeguards and the emergence of torture.

It may be concluded that even though the use of torture is categorically excluded from the right of derogation contained in the international conventions, the prevention of torture becomes increasingly difficult as derogation from other conventional provisions takes place. The problem is how to resolve this dilemma, as it is obvious that, although states of emergency are frequently abused, there are situations in which extraordinary measures are necessary. Essentially, it would appear to be a matter of ensuring that emergency measures are accompanied by adequate safeguards to ensure the prevention of violations of core rights without substantially prejudicing the position of the security forces. This might be partly achieved by an extension of the principle of the inviolability of certain rights, by adding to the list of non-derogable rights<sup>28</sup> and by applying minimum levels in relation to those rights which can be curtailed or suspended.<sup>29</sup> For example, the provisions relating to derogation at present appear to permit arbitrary detention, but such detention could be subject to certain limits, such as that detainees must be charged and brought to trial or released within a minimum period.

As far as the prevention of torture is concerned, it is essential that there should be effective safeguards for detainees. The type of protection which must be provided will be discussed in greater depth in Chapter Eight.<sup>30</sup> At this point, we may merely reiterate the most important factors. Primarily, the practice of incommunicado detention must be severely restricted: it has been said that "nothing could justify such detention, and even if there were exceptional cases in

which a justification could be found, such detention should in no circumstances exceed 24 hours."<sup>21</sup> Furthermore, incommunicado detention, if permissible, should not mean the exclusion of judicial supervision or intervention: detainees ought to have access at all times to a judge (and also to a doctor), so that communication would only be restricted in relation to the outside world. The effective supervision of detention by an independent authority (normally the judiciary) is absolutely imperative, whether detention is incommunicado or not, and if the independence or impartiality of the supervising authority is compromised to any degree, for example when military tribunals are utilised, then some other independent agency must be given specific responsibility for ensuring the protection of detainees throughout detention. Moreover, the supervising authority must have genuine powers to ensure enforcement of its orders, and should also have the right to inspect places of detention and interview detainees without prior notice. The effectiveness of such safeguards in practice will often depend on the retention of parliamentary control over the executive during a state of emergency, because otherwise the executive may simply violate the law, ignore the constitution and disregard any attempts by the other branches of power to impose restraints. It is crucial, therefore, for parliament to retain ultimate control over the executive and to have real power to terminate the state of emergency should any difficulties arise.

At the present time, there is very little international control over the introduction or implementation of states of emergency within sovereign states. The Human Rights Committee, as we have noted, has made certain observations in connection with the reporting procedure under the International Covenant on Civil and Political Rights, but it

has no real power or authority to supervise states of emergency.<sup>92</sup> In view of the conflict between the protection of human rights and the defence of national security, it is clear that governments are not best qualified to assess what emergency measures are really necessary, and the ideal situation would be for international machinery to be created or extended in order to establish effective supervision and control over the introduction and implementation of states of emergency. However, there is little willingness on the part of governments to support such a role for international agencies, even in general terms, far less in situations involving a threat to national security, and all that international agencies can do is express concern and disapproval when abuse of states of emergency becomes apparent.

In this chapter, we have seen that governments justify the use of torture when they deem it necessary in the defence of national security, and that the introduction of emergency measures for this same purpose facilitates the employment of torture. In some countries, emergency measures are unnecessary because the system itself allows the government full freedom of action, but in most countries there exist constitutional and legal safeguards which have to be overcome before the use of torture can be resorted to. The crucial factor is the absence to a greater or lesser degree of independent controls over the executive and its security forces, and it is when such a situation exists that international law becomes relevant in providing a secondary level of safeguards.



## Notes

1. See Amnesty International Report on Torture.
2. See the Global Survey in Torture in the Eighties.
3. See Amnesty International Report on Torture.
4. Roger Parkinson, *Encyclopaedia of Modern War* (Routledge and Regan Paul, 1977), under 'Guerrilla Warfare'.
5. Christopher Dobson and Ronald Payne, *The Weapons of Terror: International Terrorism at Work* (Macmillan Press, 1979), at p. 136.
6. *Ibid.*, at pp. 172-73. Cf, also the comments at pp. 175-76.
7. Parkinson, *op.cit.*, under 'Guerrilla Warfare'.
8. Trinquier, *op.cit.*, at p. 8.
9. Parkinson, *op.cit.*, under 'Urban Guerrilla Warfare'.
10. Trinquier, *op.cit.*, at pp. 3 and 6.
11. Sartre, *op.cit.*, at pp. 22-23.
12. Baker, *op.cit.*, at p. 12, quotes one French officer, General Massu, who justified the use of torture in Algeria, as stating: "Je n'ai pas peur du mot."
13. *Ibid.*, at p. 14.
14. Pierre Vidal-Naquet, *Torture: Cancer of Democracy - France and Algeria 1954-62* (translated by Barry Richard, Penguin, 1963), at pp. 145-46.
15. Professor Richet, a member of the Safeguards Commission, quoted in *ibid.*, at p. 85.
16. Ruthven, *op.cit.*, at p. 292.
17. Quoted in Vidal-Naquet, *op.cit.*, at p. 51.
18. Trinquier, *op.cit.*, at p. 36.
19. *Ibid.*, at pp. 21-22.
20. *Ibid.*, at p. 23.
21. Ruthven, *op.cit.*, at p. 292.
22. *Ibid.*
23. Janet G. Townsend, A Latin American perspective, in *Human Rights: Problems, Perspectives and Texts*, 107-24, at pp. 107-9.

24. On the right of suppressed colonial peoples to rise against their oppressors, see Moskowitz, *op.cit.*, at Chapter 7, note 4.

25. Fanon, *op.cit.*, at p. 74.

26. Jean-Paul Sartre, Preface to Fanon, *op.cit.*, at p. 19.

27. Sartre, *A Victory*, at p. 25.

28. Vidal-Naquet, *op.cit.*, at p. 17.

29. See Fanon, *op.cit.*, at pp. 236-50.

30. Quoted in *Torture in Greece: The First Torturers' Trial 1975* (Amnesty International, 1977), at p. 44.

31. Amnesty International Report on Torture, at p. 23.

32. *Ibid.*, at p. 21.

33. See *Torture in Greece: The First Torturers' Trial*, at p. 29.

34. Jack Woddis, *Armies and Politics* (Lawrence & Wishart, 1977), at p. 54.

35. Quoted in Amnesty International Report on Torture, at p. 65.

36. Captain Estoup, quoted in Vidal-Naquet, *op.cit.*, at p. 153.

37. See *ibid.*, at pp. 132-33 and 137; *Torture in Greece: The First Torturers' Trial*, at pp. 41-42; the statement of Lieutenant Cooper, in *Political Imprisonment in Uruguay* (Amnesty International, 1979); and the statement of another former torturer, in *Guatemala: A government program of political murder* (Amnesty International, 1981), at pp. 20-24.

38. On the matter of selection of suitable candidates, it is interesting to note that of 2500 selected conscripts in Greece, only 0.5% were eventually employed as torturers: see Report of an Amnesty International Medical Seminar "Violations of Human Rights: Torture and the Medical Profession", at p. 24. On the other hand, it has been claimed that 90% of the officer corps in Uruguay were involved in torture during the 1970's.

39. See *Torture in Greece: The First Torturers' Trial*, at Chapters II and III.

40. *Ibid.*, at p. 42.

41. *Ibid.*, at p. 41.

42. *Ibid.*, at p. 21.

43. Ackroyd et al., *op.cit.*, at p. 58.

44. Quoted in *Torture in Greece: The First Torturers' Trial*, at p. 5.

45. Thomas Nagel, *Mortal Questions* (Cambridge University Press, 1979), at p. 77.

46. *Ibid.*, at p. 89.

47. Quoted in *Torture in Greece: The First Torturers' Trial*, at p. 5.

48. For an in-depth study of the doctrine of states of emergency, see 'Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency', prepared for the United Nations by a Special Rapporteur, Mrs N. Questiaux (UN document E/CN.4/Sub.2/1982/15), and also the earlier Progress Report (UN document E/CN.4/Sub.2/490 of 28 August 1981). Hereafter, these documents will be referred to as "UN Study" and "UN Progress Report" respectively. On the effects of states of emergency, see Chapter II of the Study, especially Part B (The effects of states of emergency on institutions and the rule of law) and Part C (The effects of states of emergency on detained persons).

49. UN Study, at para. 148.

50. Four types of legislation are identified in the UN Study: see p. 181, *infra*.

51. UN Study, at paras. 150, 153 and 155.

52. On the prolongation of states of emergency, see UN Study, at paras. 103-17.

53. Six principles are identified in the UN Study: proclamation (para. 43), notification (paras. 44-54), exceptional threat (paras. 55-59), proportionality (paras. 60-63), non-discrimination (paras. 64-66), and inalienability of certain fundamental rights (paras. 67-68). The UN Progress Report also mentioned the principle of compatibility with the obligations imposed by international law. All of these principles are dealt with in the following analysis.

54. European Convention on Human Rights, article 15(1).

55. American Convention on Human Rights, article 27(1).

56. UN Study, at para. 23.

57. See UN Study, at paras. 25-27, and also at paras. 70-72. Paragraph 27 states: "*Force majeure* (earthquakes, tidal waves, cyclones and other natural disasters) will be taken into consideration only in the cases, of which there are very few, expressly and specifically provided for in the international instruments in force, notably in ILO Conventions 29 and 105." It may also be noted that economic conditions cannot justify the declaration of a state of emergency: see UN Study, at paras. 25-26.

58. See *ibid.*, at para. 28.

59. See *ibid.*, at para. 31.

60. *Lawless v. Ireland* ('The Lawless Case'), European Court of Human Rights, Judgement of 1 July 1961, 4 Yearbook of the European Convention on Human Rights, 438-489, at pp. 472-74.

61. UN Study, at para. 55.

62. UN Progress Report, at para. 12. Cf. UN Study, at para. 99.

63. See International Covenant on Civil and Political Rights, article 4(3); European Convention on Human Rights, article 15(3); American Convention on Human Rights, article 27(3).

64. See UN Study, at paras. 44-54. The European Convention is, in fact, slightly wider in its terms: see UN Study, at paras. 46 and 48.

65. See UN Progress Report, at para. 13.

66. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities' working group on detention in its 1983 report made a number of recommendations relating to states of emergency, mostly based on the proposals contained in the UN Study, and these included certain measures aimed at increasing international supervision: see generally the Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Thirty Sixth Session (UN doc. E/CN.4/1984/3 (E/CN.4/Sub.2/1983/43)), at paras. 279-83, and also Sub-Commission resolution 1983/30.

67. See UN Study, at paras. 60-62. The Human Rights Committee has stated that there must not be an "overall assessment *in abstracto*": see *ibid.*, at para. 61.

68. See International Covenant on Civil and Political Rights, article 4(2); European Convention on Human Rights, article 15(2); American Convention on Human Rights, article 27(2).

69. See UN Study, at para. 60.

70. *Ibid.*, at para. 87.

71. American Convention on Human Rights, article 27(1) [emphasis added]. Note also that the obligation of notification in article 27(3) requires the state to indicate the date set for termination of the suspension.

72. UN Study, at paras. 65-66.

73. Cf. American Convention on Human Rights, articles 1(1) and 27(1).

74. See UN Study, Chapter I, Part B, for a comparative analysis.

75. See *ibid.*, at para. 75. The headings given in the text are those stated in the UN Progress Report, at paras. 30-38.

76. See note 66, *supra*. In 1985, a Special Rapporteur was appointed to prepare an annual report on respect for the rules governing the proclamation of states of emergency. He presented his first report in 1987, detailing information on states of emergency in 28 countries

since January 1985: see Review of the International Commission of Jurists, No. 39, Dec 1987, at p. 29.

77. The effect of states of emergency on detainees is examined in the UN Study, Chapter II, Part C.

78. See UN Study, Chapter II, Parts B and C. The problem of detention is constantly being monitored by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, which has had a working group on detention since 1981.

79. See UN Study, at paras. 173-80.

80. See International Covenant on Civil and Political Rights, articles 15 and 4(2); European Convention on Human Rights, articles 7 and 15(2); American Convention on Human Rights, articles 9 and 27(2). See also UN Study, at paras. 165-66.

81. See UN Study, at paras. 181-85, where five types of detention are identified: enforced or involuntary disappearance; incommunicado detention; administrative internment; detention under a warrant issued by an emergency court; and detention under a warrant issued by an ordinary court. The following comments are made in paragraphs 184 and 185: "It is therefore no exaggeration to speak of a total absence of guarantees in the first two cases (missing persons or persons held incommunicado) and an almost total absence in the case of persons placed at the disposal of the executive power....Another feature common to these categories, and particularly the first two, is that the inalienable rights referred to, for example, in article 4, paragraph 2, of the Covenant are almost always violated in such cases, because the arrangements made and the absence of communication are conducive to the practice of masked murder and torture."

82. The incidence of torture generally appears to decrease after conviction: see UN Study, at para. 197.

83. See, for example, the Reports of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Thirty Fourth, Thirty Fifth and Thirty Sixth Sessions (UN documents E/CN.4/1512 (E/CN.4/Sub.2/495), E/CN.4/1983/4 (E/CN.4/Sub.2/1982/43) and E/CN.4/1984/3 (E/CN.4/Sub.2/1983/43)), and also Sub-Commission resolutions 1982/10 and 1983/30. See also UN Study, at para. 188. Cf. Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN document E/CN.4/1986/15), at p. 35.

84. See UN Study, at para. 189.

85. See *ibid.*, at paras. 153-55.

86. See *ibid.*, at paras. 164-65 and 191-96 on the kind of rights involved.

87. See, for example, Report of an Amnesty International Mission to Spain, 3-28 October 1979 (Amnesty International, 1980).

88. See UN Study, at paras. 67-68, and also at p. 45 the measures proposed with a view to strengthening the substantive guarantees provided by the international law on human rights: "We suggest that the list of *rights of absolute inalienability* should be extended by reference to the instrument which specifically confers the most liberal guarantees." This refers to the American Convention on Human Rights.

89. See UN Study, at p. 45: "With regard to the *rights of relative inalienability*, the limits that may be accepted, particularly when a state of emergency is in force, should not fall below a certain minimum threshold."

90. For the detailed proposals of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, see its resolution 1982/10. See also the UN Study, at paras. 186-96.

91. See Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Thirty Fourth Session (UN document E/CN.4/1512 (E/CN.4/Sub.2/495)), at para. 175, quoting from paragraph 10 of the report of its working group on detention.

92. The European Court of Human Rights has also had occasion to consider the question of states of emergency in a number of cases: see, for example, The Lawless Case.

## CHAPTER FIVE: URUGUAY - A CASE STUDY

The events which took place in the recent history of Uruguay provide a fascinating illustration of the emergence of torture as a result of the breakdown of legal and constitutional safeguards during a state of emergency introduced in response to a threat to national security. Until the late 1960's, Uruguay had enjoyed a certain reputation as one of the few healthy liberal parliamentary democracies in Latin America: known as 'the Switzerland of the Americas', and boasting one of the first welfare services in that area of the world, Uruguay had to a large extent escaped the military intervention in political affairs which is almost endemic to the region. Apart from certain isolated incidents, the armed forces had displayed a consistent respect for democracy and the rule of law. Within the space of only a few years, however, this state of affairs came to an abrupt end and a repressive military regime seized power. This assumption of power by the armed forces was the culmination of a progressive erosion of constitutional control over the executive, combined with an increasing reliance upon the military in matters affecting the internal security of the state. In this chapter, we shall examine in some detail the events which led to the military takeover, indicating in particular the processes by which the introduction of emergency measures liberated the security forces from effective supervision by the appropriate democratic authorities, thus facilitating the employment of torture.

The case of Uruguay is also of particular interest because Uruguay held an almost unique position in relation to the Optional Protocol to the International Covenant on Civil and Political Rights

throughout a large part of the period when emergency measures were in force. Prior to the breakdown of democracy in Uruguay, the civilian government had actually ratified both the Covenant and the Optional Protocol, and indeed successive Uruguayan governments had been in the forefront of diplomatic efforts to develop more effective machinery for the protection of fundamental human rights. The fact that the military regime remained bound by the obligations undertaken by its predecessors had a number of important implications. Firstly, when the Covenant came into force in 1976, the government of Uruguay became obliged to submit to the Human Rights Committee within one year a report on the implementation of the Covenant's provisions in Uruguay: no report was in fact submitted until 1982.<sup>1</sup> Secondly, under article 4, paragraph 3, of the Covenant, the government should have informed the Secretary-General of the United Nations of the existence of a state of emergency in Uruguay and of the provisions of the Covenant from which derogation had been made: a somewhat inadequate notification was received in 1979.<sup>2</sup> Thirdly, the ratification of the Optional Protocol authorised the Human Rights Committee to deal with communications from individuals claiming to be victims of violations by the government of Uruguay of the rights guaranteed in the Covenant. It is in relation to this third aspect that Uruguay occupied a position of particular significance: the number of states which have accepted the procedure established under the Optional Protocol is not high,<sup>3</sup> and most of those which have are liberal democracies against which few significant allegations are made, but in the case of Uruguay a repressive regime was subject to the jurisdiction of the Human Rights Committee, which actually examined a considerable number of communications alleging violations of the Covenant by the government



of Uruguay, concluding in several cases that torture had taken place. These cases will be dealt with in the following chapter.

Democracy was restored in Uruguay in 1985, but the situation which existed during the period of military government remains a vivid illustration of the problems outlined in Chapter Four.

#### Uruguay - General Background

The state of Uruguay comprises territory covering some 72,000 square miles, making it the smallest Hispanic country in South America. The lack of gold and silver in the area resulted in its initial neglect by European explorers, and it was in fact the Portuguese who first established Colonia in the 17th century. The present capital, Montevideo, was also planned by the Portuguese, but was actually built by the Spanish in 1726. It changed hands several times before independence was declared in 1808, and Brazil and Argentina continued to dispute ownership of the territory until full independence was eventually recognised as a result of British mediation in 1828. The early history of the Republic of Uruguay was marred by ten years of civil war between two rival presidents and their supporters, and dictatorship, political intrigue and military intervention ensued until the emergence of José Batlle y Ordóñez as President in 1903. During his two terms in office, Uruguay was transformed into a modern parliamentary democracy on the Swiss model, and Latin America's first welfare state was created. Only for a brief period in the 1930's was democratic government interrupted.

The population of Uruguay - nearly three million in 1980<sup>4</sup> - is almost entirely of European origin, there being few indigenous

peoples, and almost half the population lives in Montevideo. There is a large middle class, about 95% literacy, and although real poverty does exist, *per capita* income is high for Latin America. In general, Uruguay may be regarded as one of the more advanced countries in Latin America in terms of economic, social and cultural conditions, and it has many characteristics in common with western European nations. The two traditional political parties are the Colorados (Reds), largely supported by the urban middle class, and the Blancos (Whites) or Partido Nacional (National Party), which draws its support mainly from the land-owners and the Catholic Church. In 1971, the elections were contested also by a third party, the Frente Amplio (Broad Front), a coalition of leftist and left-centre groups.

Economic decline commenced in Uruguay in the mid-1950's, when falling world market prices for its two most important export commodities, meat and wool, led to growing inflation, with consequent social unrest and strikes. In response to these difficulties, and the even more disturbing appearance of an urban guerrilla movement, the government in the late 1960's introduced certain emergency measures and, as the situation deteriorated, these were intensified. Although the guerrillas themselves were virtually annihilated as a result, the armed forces were not prepared to relinquish the powers which they had been granted, and subsequently seized control and extended counter-subversive measures. While the Constitution remained nominally in force, its effect was nullified by a series of decrees and Institutional Acts which gradually institutionalised military rule. In the hope of gaining popular approval for its policies, the military government in 1980 submitted its proposals for a new Constitution to referendum. These proposals, which would effectively have consolidated

the role of the armed forces in government, were rejected by the people, and after much argument and unrest elections were held in November 1984. The new civilian government rapidly re-instated the rights which had been suspended, and embarked on the restoration of the democratic institutions which had been in enforced abeyance for over a decade.

The following discussion examines the course of events outlined above from four different angles: the threat which arose, the response of the authorities, the type of measures employed, and the resultant emergence of torture. This will give some indication of the causal relationship between the absence of safeguards and the emergence of torture.

#### The Tupamaros

Fidel Castro's success in Cuba in 1959 saw communism gain its first foothold in the Americas, and the fear that agitation and infiltration might lead to further extensions of communist influence in the American continent caused considerable consternation throughout the hemisphere. The idea was put forward that, as one country fell under the yoke of communism, so neighbouring countries would become targets for Soviet expansionism and revolution would be fomented within them (the so-called 'domino theory'), and the paranoia which this notion produced was largely responsible for the ensuing epidemic of right-wing military coups in the 1960's. Guerrilla movements did spring up throughout the continent, with the Cubans providing both political education and military training, and although no doubt the threat which many of these groups posed to existing regimes was

exaggerated, it is against this background of persistent fear of communist subversion that the politics of Latin America must be viewed.

The failure of Che Guevara's theories and his subsequent capture and murder in Bolivia persuaded many later tacticians of revolutionary violence to abandon the countryside and operate within the cities, as we discovered in Chapter Four. In Uruguay, the Movimiento de Liberación Nacional (National Liberation Movement) or MLN appeared as one of the earliest of these groups, and to some extent became a blueprint for later urban guerrilla movements in other Latin American countries. Popularly known as the Tupamaros (after Tupac Amaru, an 18th century Peruvian Indian leader executed for rebelling against the Spanish), the movement was founded in 1963, principally by Raúl Sendic Antonaccio, a Marxist former law student who was later imprisoned but was released in 1985. The movement originated among the sugar-workers of northern Uruguay, but its later strength came from intellectuals and the middle classes - students, teachers, lawyers, journalists - and it did not attract much support from the lower class workers and farmers. Consisting of an estimated nucleus of 300-1,000 activists and up to 6,000 supporters, the Tupamaros were the most unified and best disciplined of Latin America's urban terrorist organisations, having as they did a virtual monopoly on terrorism in Uruguay. The movement based its structure on the FLN of Algeria, operating underground courts, jails and even hospitals. It was very vague about ideological aims, however, and little political philosophy featured in its proclamations and manifestos. There was certainly Marxist influence, at least in the initial stages, with tendencies towards Trotskyism and Castroism, but the immediate goal seems to have been

the creation of anarchy, the destruction of the existing system in order to permit the formation of a new society.

When the guerrillas first began to operate, their activities were confined to acts against property: in a series of daring and spectacular bank raids between October 1964 and the end of 1970, they amassed an estimated 2.5 thousand million pesos. Industrial and commercial enterprises and broadcasting installations were attacked, and a favourite device of the guerrillas was to raid the files of private companies in order to procure evidence of corruption, which was then forwarded to the courts. Towards the end of the 1960's, the Tupamaros began to resort to kidnapping and assassination, and a number of policemen were killed in clashes with the guerrillas. Acts of terrorism continued after the introduction of emergency measures, and although many Tupamaros were apprehended and imprisoned, guerrilla activity was apparently directed for a time from within the prisons with the connivance of guards, and a number of successful prison escapes also took place. However, the intensification of the emergency measures and the involvement of the armed forces in response to continuing terrorist activity resulted in the guerrilla movement being crushed by the end of 1972. Sporadic incidents continued to occur, but the Tupamaros' power had been broken, and most of their leaders were in prison. When these leaders were tried, often not until seven or eight years later, they were given extremely lengthy sentences (capital punishment being prohibited under Uruguayan law); Raúl Sendic himself was sentenced in July 1980 to thirty years' imprisonment, with a further fifteen years of special security measures. The conditions in which they were held attracted severe criticism from human rights organisations, and Sendic's case was in

fact considered by the Human Rights Committee, which decided *inter alia* that violations of articles 7 and 10 of the Covenant had occurred "because Raúl Sendic is held in solitary confinement in an underground cell, was subjected to torture for three months in 1978 and is being denied the medical treatment his condition requires."<sup>5</sup>

#### The Political Response and the Erosion of Democracy

The Uruguayan Constitution of 1967 provides for a separation of power between the legislature, the executive and the judiciary, and it contains numerous articles relating to the protection of civil and political rights. It also provides, however, for prompt security measures (*medidas prontas de seguridad* - MPS) in emergency situations.

Article 168(17) vests the following powers in the President:

"To take prompt measures of security in grave and unforeseen cases of foreign attack or internal disorder, giving an account within twenty four hours to a joint session of Congress, or during its recess, to the Permanent Commission, of the action taken and its motives, the decision of the latter bodies being final.

With respect to persons, the prompt measures of security authorise only their arrest or removal from one place in the territory of the country to another provided they do not elect to leave it. This measure, like the others, must be submitted within twenty four hours to a joint session of Congress or to the Permanent Commission, which will make the final decision;

The detention shall not be at a place intended for the incarceration of criminals."

Essentially this provision permits the executive to proclaim a state of emergency (through the President) in response to a serious and urgent threat, but also ensures that constitutional control is retained by the democratically elected legislature by conferring on that body ultimate authority to endorse or reject the measures

introduced. Under the terms of the Constitution, then, Congress is intended to have a crucial supervisory role when a state of emergency is proclaimed. However, as we shall see, when such a situation did arise, Congress consistently supported the use of emergency measures against subversion until eventually it no longer commanded sufficient authority to enforce a termination of the state of emergency.

President Jorge Pacheco Areco came to power in 1967, and in the face of an economic and political crisis he found it necessary to repeatedly impose certain restrictions and emergency provisions. As the security situation deteriorated, these measures became increasingly repressive, particularly after an outbreak of terrorist activity in 1970, when the President requested special legislation to allow the government to impose a curfew, suspend *habeas corpus* and other civil rights, and authorise the security forces to make arrests and searches without warrants and detain suspects without trial. Congress duly approved this request, and although there were subsequently relaxations of the security measures, the kidnapping of the British Ambassador in January 1971 provoked further reaction: the President sought approval for the re-imposition of a state of emergency, with a suspension of civil liberties for ninety days, and the Permanent Commission, representing Congress during the summer recess, gave its approval, although it restricted the duration of the state of emergency to forty days and in fact subsequently refused to sanction an extension. In both these instances, the proclamation of a state of emergency was a direct response to specific terrorist action, and in both instances constitutional control was retained by the appropriate authority, which was able to terminate the state of emergency when it deemed its continuation unnecessary. However, signs

of a constitutional crisis soon appeared: when the Chamber of Deputies<sup>e</sup> decided by a simple majority (including dissenting members of the ruling Colorado party) to lift the remaining security measures in order to create a favourable atmosphere for the impending elections, the government renewed them by decree the following day, and although the Chamber of Deputies voted by 54 votes to 2 that the President had acted unconstitutionally, no steps were taken to enforce this decision.

The 1971 general elections were contested for the first time by the Frente Amplio, under the name Partido Demócrata Cristiano, along with the two traditional parties. The Frente Amplio coalition included the communists and socialists as well as the Christian Democrats and various other groups. Voting was compulsory, and the result was a narrow victory for the ruling Colorados over the Blancos, with the Frente Amplio third. Juan María Bordaberry was elected President and took office in March 1972.<sup>7</sup> In that same month, Congress decided to lift the remaining security measures (apart from restrictions on media reporting about guerrilla activity) with effect from 1 May, and if all had gone smoothly this might have marked the end of a period of great instability in the history of Uruguay. However, terrorist activity resumed following an election truce, and in April 1972 this activity reached a peak with several murders and the eruption of street battles in Montevideo between the Tupamaros and the security forces. A state of internal war was proclaimed, and after twenty hours of debate Congress in joint session decided by 97 votes to 21 (only the Frente Amplio dissenting) to grant the President power to suspend individual liberties and declare martial law areas for the next thirty days. This brought the armed forces into action



and also had the effect of authorising the transfer of jurisdiction in political cases to military tribunals. The measures also permitted search without warrant, the extension of maximum periods of detention without charge, and restrictions on the dissemination of information about security operations.

Although the situation undoubtedly warranted exceptional measures, and the introduction of a state of emergency was validly ratified by the responsible constitutional authority, there in fact followed a whole series of prolongations of the state of emergency, approved by ever-decreasing congressional majorities. Gunfights between the guerrillas and the security forces continued, and strikes were called, as a result of which the government in May 1972 sought an indefinite extension of the state of internal war. After forty five hours of debate, Congress by a reduced majority of 68 votes to 56 approved an extension only until the end of June, but although human rights violations were by then coming to light and many politicians were beginning to realise the threat to democracy, Congress approved a further ninety day extension at the end of June. The subsequent adoption of a Law on National Security (No. 14,068) permitted the termination of the state of internal war on 11 July, but that law itself formed the basis of new security measures which regularised the involvement of military courts, creating certain new crimes against the security of the state (*de lesa nacional*) to be tried, along with many other offences, as military crimes. The round-up of the Tupamaros continued during the second half of 1972, and many other political suspects were also detained, but several hundred identified guerrillas and sympathisers remained at large, with the result that

Congress again renewed the state of emergency at the end of November. The vote was 62 to 59.

The real dilemma throughout this period lay in the fact that there did exist a serious political crisis which demanded an effective response, so that there was no question of the state of emergency being entirely unjustified. Congress clearly considered the risks involved in the prolongation of the state of emergency to be acceptable, and while the majority in the November vote was only three, the executive at that point still had congressional authority for the security measures upon which it was relying in its counter-subversive operations. Moreover, the legislative body had adopted the Law on National Security, which introduced military justice into the normal legal framework of the state. The subsequent political crisis might have been averted if the constitutional provisions relating to emergency measures had been stricter, for example in requiring a two thirds majority, but this does not really alter the principle: there did exist a serious threat to the organised life of the community, and as far as international law is concerned Congress does not appear to have been unjustified in approving a state of emergency. The problem was that adequate safeguards were not established, with the result that effective supervision became increasingly difficult. The ability of Congress to control the executive was gradually weakened, so that when eventually the executive and the armed forces began to act unconstitutionally Congress was unable to take any action.

In February 1973, the armed forces intervened. Although the Tupamaros had been defeated, the military had in the course of their security operations uncovered widespread corruption and maladministration, and they took it upon themselves to investigate

these and other forms of 'subversion'. This led to conflict with the civilian government, and on 8 February army units occupied all radio and television transmitters in the capital, demanding the dismissal of the Defence Minister and greater powers to combat corruption. Two days later, Army and Air Force leaders broadcast a 19-point political programme<sup>3</sup> which President Bordaberry was compelled to accept. The demands included the creation of a National Security Council (CONASED) as an organ of military supervision and control over the administration,<sup>3</sup> thus ensuring the permanent involvement of the military in the political affairs of the state.

A few days after these events, the state of emergency was extended for a further six weeks by the Permanent Commission, and although certain stipulations were made regarding the release of detainees, it is significant that in the midst of this constitutional crisis Congress was not recalled, and the crucial responsibility of approving a state of emergency was entrusted to the Permanent Commission. Perhaps it would have made no difference in any event, because when Congress did have the opportunity of terminating the state of emergency, it actually authorised a further two month extension, albeit after another lengthy debate and by only 65 votes to 63. At the same time, a proposal which would have abolished the requirement for congressional ratification of emergency measures was rejected, but by this stage it must have been increasingly obvious that the authority of the elected body was very fragile indeed. When, at the end of May, as a result of further defections from the government, Congress finally refused to sanction another extension, the President continued the state of emergency by decree, and although in theory Congress could have overturned this by a simple majority, it

lacked the courage and will to do so. A month later, the President dissolved Congress and replaced it with a Council of State, the functions of which were to carry out executive and legislative duties and also to draft a plan for constitutional reform to be submitted to referendum. The President ruled by decree until the Council of State was formed in December 1973.

The dissolution of Congress meant that there no longer existed even a nominal constitutional separation of powers between the legislature and the executive, and the situation deteriorated even further during the following months: municipal and local councils were also dissolved, to be replaced by honorary officials directly responsible to the executive, thus ending democratic government at all levels. Moreover, increasingly repressive measures were imposed in other areas of public life: the trade union confederation was banned, students were arrested and workers occupying state enterprises were forcibly dislodged by troops, while striking bank employees were enlisted in the forces, rendering them subject to military discipline, and the government authorised the dismissal of private sector employees on strike. Further factory occupations and street clashes led to a large number of arrests, and in this way the armed forces broke the popular resistance to the dissolution of Congress. The general strike ended on 11 July. In the following months, members of the Opposition and a large number of students attending the traditionally left-wing National University were detained, and many publications were forced to close temporarily or even permanently. In December, fourteen left-wing groups were proscribed, their assets seized and their leaders arrested.

The new Council of State was given responsibility for controlling "the action of the Executive with regard to the respect of the rights of individuals",<sup>10</sup> but in view of the fact that its members, though civilians, were appointed by the military authorities, it clearly lacked sufficient independence to enjoy any credibility in this role. In effect, the armed forces had assumed full political control of the country through the National Security Council, and this became apparent in the subsequent developments. Congressional supervision had been removed, and all other forms of restraint had been effectively suppressed by the emergency measures, but in 1976 the military authorities further consolidated their position by deposing President Bordaberry when he became unco-operative. His interim replacement, Dr Alberto Demichelli, suspended the planned elections before handing over to Dr Aparicio Méndez. Judicial independence had, of course, been largely circumvented by the transfer of jurisdiction in political cases to military courts, but the civilian judiciary retained its independence in other areas and thus represented a potential source of difficulty for the government. Accordingly, the judiciary was placed under the direct control of the executive by Institutional Act No. 8 in 1977, thus completing the elimination of independent limitation of government. These Acts, which were usually in direct conflict with the 1967 Constitution (which remained in force), were regarded as legitimate modifications of the Constitution, and by Act No. 8 the military authorities ensured complete control of every branch of power, in effect creating a totalitarian system.

Having completed the destruction of democracy in Uruguay, the authorities announced that the disruption which had necessitated emergency measures had been brought under control and that the anti-

subversive laws would be gradually relaxed. A three-stage plan for a return to democracy was proposed, involving the formulation of a new constitution, presidential elections in 1981, and further elections in 1986 in which the two traditional parties would participate in the normal manner. In the interim, however, the government was to continue to pursue its social and economic policies which would, it was asserted, bring about the "definitive institutionalization of the new Uruguay under the most favourable conditions."<sup>11</sup> Military control of the government also remained, and while there were signs of an increasingly moderate influence within the armed forces, the repression continued, and a number of suspect officers were removed.

In 1980, the Political Commission of the Armed Forces (COMASPO) submitted its draft proposals for a new constitution to the Council of State, which proceeded to frame a 239-article draft constitution. This attracted savage criticism, especially from Amnesty International, because of its failure to provide adequate guarantees for the protection of fundamental human rights,<sup>12</sup> and in fact, rather than effecting a genuine return to democracy, the draft institutionalised the role of the armed forces in the government of the country, legitimising practices which had resulted in the systematic violation of human rights since 1973. The draft constitution provided for the retention of the National Security Council, which was to be responsible for all security matters, including economic planning and education, and for the creation of a Political Control Commission, whose function would be to resolve conflicts between the various branches of power. This latter body would have had authority to dismiss any civilian official, including judges and even the President. In this way, then, the armed forces

sought to ensure overall control within a 'restricted democracy', in which the two traditional political parties would have had a limited role, left-wing groups being formally prohibited by the draft constitution. Military justice was to continue to apply in the case of serious offences against national security, and provision was made for three distinct types of state of emergency, which could only be terminated by a two thirds majority in Congress. These and similar provisions prompted Amnesty International to make the following observation:

"...the draft proposals for the new Uruguayan constitution do not satisfy minimum legal standards, for the protection of human rights....Furthermore, it will provide no legal guarantees or safeguards against future gross violations of human rights....similar to those that have occurred since the armed forces came to power in 1973."<sup>13</sup>

The proposed constitution was, in fact, rejected in a referendum held in November 1980 by 945,112 votes (57.2% of votes cast) to 707,182 (42.8%), with a turn-out of over 80% of the electorate.<sup>14</sup> President Méndez described the result as "a defeat for the people rather than for the Government",<sup>15</sup> and while the government accepted the decision of the people, it affirmed that the process of "democratic institutionalization" would continue and that every effort would be made to draw up a new plan. The government's attitude to a return to democracy at that stage must, however, be viewed in the light of the following statement made by the Navy's Commander-in-Chief prior to the referendum:

"If the citizens vote negatively in the plebiscite which will take place in November of this year, it would mean that they do not want the change in the constitution, so the 1967 constitution will remain in force with the modifications which have been introduced through the Institutional Acts....the negative vote of the citizens to the new constitution would mean

that there is a general consensus in support of the measures taken up to now, so that there is no need for a change of *Carta Magna*."<sup>16</sup>

By interpreting the rejection of the proposals as an endorsement of the *status quo* rather than as an indictment of their policies, the military authorities were able to claim popular support for their continued involvement in the government of the country. Of course, if the proposals had been accepted, the armed forces would have been in an even stronger position within the constitutional framework.

A wave of arrests followed the referendum, and tensions increased within the armed forces themselves, particularly after a financial scandal in April 1981 led to the enforced resignation of a number of high-ranking officers. Thereafter, a more moderate line of thought began to emerge within the military, and talks with the two major political parties and the smaller Civic Union were initiated. Left-wing parties and a large faction of the Blancos were excluded, but as a result of the discussions the government passed Institutional Act No. 11, which provided for the appointment of a transitional President on 1 September for three and a half years, the gradual normalisation of non-leftist party activity, and the addition of more members to the Council of State, with a broadening of its powers. There were signs of a liberalisation, and the moderate General Gregorio Alvarez was appointed President. He indicated that a new constitution would be submitted to referendum in November 1984, that elections would take place at the same time, and that power would be transferred back to civilian authorities in 1985. The independence of the judiciary was to be fully restored, but political groups opposed to democracy were to remain illegal.



The government embarked upon its programme of liberalisation (*apertura*) by lifting restrictions on political meetings and legalising the trade union movement, and in May 1983 there commenced a series of discussions between the Political Commission of the Armed Forces and leaders of the three lawful political parties.<sup>17</sup> It soon emerged, however, that there were fundamental differences of opinion, as the politicians wished to adopt the 1967 Constitution in its entirety, whereas the military authorities did not regard it as adequate to deal with subversion.<sup>18</sup> Essentially, the armed forces wished to retain overall political control and were reluctant to permit a full return to democracy, and when after seven sessions no agreement had been reached, the politicians eventually declined to play any further part in the dialogue until certain concessions were made. The government responded by announcing the suspension of all political activity for up to two years, but reaffirmed its intention to implement its programme of democratisation. This provoked a series of demonstrations and rallies, followed by strikes at the beginning of 1984, including a 24-hour general stoppage which attracted fairly substantial support and resulted in a decree prohibiting trade union activity.

In March 1984, the Minister for the Interior stated that the proposed elections were still conditional on agreement being reached between the politicians and the armed forces, and talks were in fact resumed in July. Although illegal, protests and demonstrations continued, and the following month restrictions on political activity were lifted to create a suitable atmosphere for the impending elections, which proceeded in November, resulting in victory for the Colorados (490,719 votes), with the Blancos second (415,600 votes) and

the Frente Amplio third (285,110 votes). The Civic Union also took a small percentage of the vote. Dr Julio María Sanguinetti Cairolo took office as President on 1 March 1985, when his Cabinet was also sworn in. Legal status was immediately restored to all proscribed groups, restrictions on the press were lifted, military jurisdiction over civilians was terminated, civil rights were restored and all political prisoners were released within two weeks.<sup>19</sup> The restoration of democracy has, then, been achieved in Uruguay, and although it remains to be seen to what extent the country's former liberalism can be regained, the period of intense repression has ended, and the civilian government's commitment to the protection of human rights became apparent early in its existence when it ratified the American Convention on Human Rights (accepting the inter-state procedure and the jurisdiction of the Court) and signed the United Nations Convention against Torture. However, in December 1986 the government also passed a Punto Final (full stop) law, the effect of which was to grant immunity to military and police officials in respect of human rights violations perpetrated before 1985. This provoked strong protest and condemnation within the country, and the political situation remains fragile. There has also been continuing unrest as a result of economic problems, and it may therefore be some time before stability returns to Uruguay.

These, then, are the developments which have taken place in Uruguay over the past twenty years. In summary, the erosion of restraints on the executive commenced with the declaration of a state of internal war in 1972, and after the military intervention the following year democratic institutions were gradually neutralised,

effectively creating a totalitarian system within which the protection of fundamental human rights could not be ensured.

#### The Security Measures in Practice

The security measures employed from 1967 onwards were of different types and fulfilled a variety of functions: some were intended to suppress political activities such as meetings, others dealt with potential opposition in specific spheres of public life, such as the trade unions, the media and the universities, and others related more directly to the procedures of arrest, detention and trial. While constitutional control of the executive was being nullified, then, a corresponding suppression of other possible sources of restraint also took place by means of censorship, the banning of unions and political parties, and the detention of suspected opponents of the government. Of particular relevance to the problem of torture, however, were the emergency measures relating to detention and trial procedures, especially those introduced at the time of the initial military involvement in counter-subversion. Although torture had been employed by the police on a number of occasions during the earlier states of emergency, the incidence of torture increased dramatically from April 1972, when the government called in the armed forces, and one of the principal factors in this was the transfer of jurisdiction to military tribunals. The entire procedure for dealing with political suspects was, in fact, placed under the control of the security forces, with the result that even while there remained a degree of congressional authority the clandestine employment of torture was possible. Of course, the situation deteriorated after the

dissolution of Congress, when there no longer remained even nominal independent constitutional control of the executive and the security forces.

A general pattern emerged in the practices followed by the security forces in their counter-subversive operations. Suspects arrested by the security forces were normally hooded or blindfolded and taken to a military barracks, and were not usually informed of the reasons for their arrest. In fact, the emergency provisions, especially after the promulgation of the Law on National Security, permitted arrest without a warrant on rather tenuous grounds, defining offences against the state in very broad terms: these included attacks on the Constitution, subversive association, assisting such an association, assisting members of a subversive organisation, association usurping public authorities, assisting associations usurping public authorities, and also lack of due respect for the flag, mere criticism of the armed forces, and failure to adhere to the republican democratic system.<sup>20</sup> In certain instances, the legislation actually had retroactive effect, contrary to article 15, paragraph 1, of the International Covenant on Civil and Political Rights.<sup>21</sup>

Arrest on suspicion of involvement in subversive activities was normally followed by a period of incommunicado detention, during which interrogation took place. In some circumstances, the detainee's family were not informed of his whereabouts, and sometimes the security forces even denied all knowledge of him. It was at this stage, while the detainee had no access to his family, his lawyer or a judge, that torture was most likely to occur and did, in fact, occur with the highest frequency. Article 192 of the Military Penal Procedure Code (which applied to cases before military tribunals)

provided that, except in exceptional cases, incommunicado detention should not exceed two days in duration and, moreover, must not prevent communication with a lawyer, attendance at the hearing of witnesses or communication in writing with the prison director or the judicial authorities.<sup>22</sup> Thus, even the military code recognised the importance of ensuring that detainees are not isolated from the outside world but have access to sympathetic parties, especially an independent judiciary capable of effectively supervising detention procedures. However, the provisions of the military code were commonly disregarded in practice, and the security forces frequently held detainees completely incommunicado for prolonged periods. In any event, even if detainees had been permitted access to a judge, the military tribunals lacked the independence and impartiality necessary to make them effective in the protection of human rights. The transfer of jurisdiction to military courts thus undermined the protection of detainees against ill-treatment by the security forces.

Interrogators are well aware that as long as they hold a suspect incommunicado there is nothing to inhibit them in the means they use to obtain a confession or information, and we have already seen that security forces generally regard torture as justifiable in counter-subversion. The event takes place in secret, and as long as the detainee remains incommunicado thereafter, the matter cannot be brought to the attention of an independent authority or the outside world: there are no witnesses present, and if there is any possibility of a judicial investigation, the detainee's court appearance can simply be postponed until the marks of torture have disappeared. Indeed, if the security forces have denied holding the person from the beginning, it does not even matter if death occurs

accidentally as a result of torture, since they can simply dispose of the body and deny all knowledge of the person. It can be extremely difficult, then, to prove that torture has taken place when detainees are held incommunicado and there is no effective judicial supervision of detention.

Incommunicado detention is undoubtedly a most serious threat to the protection of fundamental human rights, but any form of detention holds risks if there is no satisfactory judicial or equivalent supervision. The security forces may be free to employ torture because the courts are unable or unwilling to restrain them, and in such circumstances the fact that a detainee has access to his family or a lawyer may be irrelevant, because they will be unable to obtain an effective remedy through the courts. This situation arose in Uruguay with preventive detention, including the continued detention of those who had served their sentences or whose release had been ordered, because there simply did not exist effective judicial or other supervision of detention.

The remedy of *habeas corpus* is an extremely important procedure in the protection of human rights. Its purpose is to establish the lawfulness or otherwise of the detention of a specific person, and its ultimate aim is to secure the release of the person by judicial order on the basis that the detention is not in accordance with the relevant legal provisions. The success of an application for *habeas corpus* depends, of course, on the independence of the judge and his ability to enforce judicial orders. Article 17 of the Uruguayan Constitution of 1967 does provide for the remedy of *habeas corpus*, stating that the ruling of a judge granting *habeas corpus* shall be final, but this safeguard was also circumvented during the state of emergency.

Although the civilian judiciary retained authority to grant *habeas corpus* until 1977, the judges failed to utilise the procedure to restrain the security forces: firstly, they accepted the contention of the military authorities that *habeas corpus* did not apply to persons detained under the security measures, and secondly, they were satisfied if it was shown that the detainee was under the supervision of another judicial authority, including the military courts.

Detainees committed for trial were normally transferred from military barracks to a civilian or military prison, although as a result of over-crowding in the prisons many remained in barracks, where conditions were generally regarded as worse and where torture was used most regularly. Detainees undergoing trial were no longer held incommunicado, and might receive brief visits, but this was not a guarantee against being subjected to further torture, which at this stage was more likely to be punitive or vindictive rather than coercive. In some instances, detainees were not committed for trial at all, but after a short period of imprisonment were released without charge or were simply held without trial. In such cases, the military tribunals did not become involved.

The effect of the transfer of jurisdiction from civilian to military courts was to undermine judicial independence and impartiality, and this was apparent both in the military judges' refusal to investigate allegations of ill-treatment and in their acceptance of confessions and other evidence clearly obtained by means of torture. They thus failed in their duty to protect the rights of detainees, and by their refusal to take any action against the practice of torture they in effect encouraged the security forces to continue using unlawful methods. Moreover, the absence of judicial

independence seriously prejudiced the rights of the accused at the trial itself. The trial had four stages,<sup>23</sup> conducted almost exclusively by means of written proceedings which were slow and often tortuous: the *presumario* and the *sumario* took place before a *juez de instrucción*, the *plenario* before a *juez de primera instancia*, and appeal (or *segunda instancia*) before the *Supremo Tribunal Militar* (STM). Often a preliminary investigation was carried out by a *juez sumariante*, although this office was based on a provision of military law which was never intended to apply to civilians. In practice, this initial investigation could take up to a year, depending on the circumstances. Its main purpose was to obtain a confession, and while there is no evidence that the *jueces sumariantes* were directly involved in the practice of torture, it seems unlikely that they were unaware of its existence.

Once the evidence - often principally a confession - had been collected, the case was passed to a military *juez de instrucción*, whose initial function was to ascertain the validity of the confession. These judges, whose number was increased to six in 1972, were military officers or retired officers, and were not required to be legally qualified. They could order the release of the accused (but could not necessarily enforce such an order, so that the security forces might simply return him to the barracks for further torture), or could issue an indictment if there was a *prima facie* case. In the absence of sufficient evidence, however, a *juez de instrucción* could still prepare an indictment on the basis of his own "moral conviction" of the guilt of the accused, a practice which was in blatant violation of the most fundamental principles of justice, essentially permitting criminal proceedings to be instituted purely on the basis of a



subjective assessment. Thus, not only could the security forces employ torture in an attempt to obtain a confession, but even when they were unsuccessful the *juez de instrucción* could order prosecution on the basis of his personal prejudice. In such circumstances, it is highly probable that proceedings were instituted against many innocent people.

It was when the accused appeared before a *juez de instrucción* that he first had an opportunity of making a complaint about ill-treatment to a judicial authority, but the lack of independence again meant that it was unlikely any action would be taken. The judge might well refuse to instigate an investigation and simply accept the confession presented to him by the security forces, and even if he was inclined to believe the allegations he faced an almost impossible task, partly because of the difficulty of proving torture, and partly because the *jueces de instrucción* actually appear to have had little real power: being under the direct control of the military authorities, they could not function as an independent and impartial judiciary, and their duty was not to restrain the security forces (of which they were part). It may be noted that the civilian courts, prior to introduction of military tribunals, had actually found police officers guilty of torture, indicating that they were able and willing to fulfil their responsibility for the protection of human rights.

Once the indictment had been issued, the accused had to find a lawyer, although his freedom of choice was severely restricted as a result of the harassment, enforced exile and even imprisonment and torture of lawyers prepared to defend political suspects. In fact, accused persons were often obliged to accept an unqualified military officer as counsel. This led to a situation in which the

interrogator, the prosecutor, the judge and the counsel for the defence were all military officials under the direct control of the same authorities, and while there may have been individuals within each of these categories endeavouring to ensure that the principles of justice were respected, it is clear that the effect of the entire process was to undermine these same principles. All those involved were members of the armed forces engaged in the common purpose of fighting subversion, and if inherent bias against political suspects did not prejudice the case for the defence, then the constraints of military discipline would certainly do so.

At the *presumario* stage, it was possible to appeal against the indictment, but the three day limit which was imposed and the enforced reliance on military defence lawyers ensured that this procedure was seldom resorted to. At the next stage, the *sumario*, the accused was again asked by the *juez de instrucción* to "ratify or rectify" his previous statement, in the presence of his lawyer but before any consultation. It was possible for the accused to make allegations of ill-treatment, but again it was unlikely any action would be taken, and if he retracted his confession there was always the risk that he would be returned to the military barracks for further torture. Witness statements and other written evidence were presented at the *sumario* stage. Throughout the proceedings, the defence was at a serious disadvantage in a number of areas: for instance, there were restrictions on the defence lawyer's contact with the accused and on access to the evidence, making it difficult for the defence to prepare and state its case in full. Moreover, the judge often had a secret report, prepared by the security forces and giving additional information obtained by them. The defence was denied access to this

report, but the information contained in it often played a very significant part in influencing the decision of the *juez de instrucción*. The entire system was clearly at variance with the principles of justice and many of its features directly contravened international norms, including the right to a fair trial. A further problem lay in the practice adopted by the Ministry of Defence of referring cases regarded as important or sensitive to selected judges who could be relied on to take appropriate action.

The *plenario* or trial stage took place before one of the *jueces de primera instancia*. The prosecution and the defence presented their respective cases and proposed what they considered to be appropriate sentences, but the judges adopted the practice of passing sentences in excess of those requested by the prosecution (*ultrapetita*), another clear violation of the principles of justice which in fact led a number of prosecutors to resign in protest. About 80%-90% of cases of *primera instancia* were forwarded to the *Supremo Tribunal Militar* for review: both prosecution and defence could appeal, and appeal was in fact mandatory if the sentence was imprisonment for three years or more. This provision was originally intended to be a guarantee for the convicted person, but on some occasions the STM actually increased sentences even when only the defence had appealed. The Integrated Supreme Court of Justice was empowered to quash convictions by the STM, but never did so, and in 1977 was deprived of its power.

Such, then, was the system of military justice which operated in Uruguay, involving protracted procedures, denial of the rights of the accused, acceptance of evidence obtained unlawfully, and courts subject to the control of the military authorities. The entire process was, in fact, under the control of the armed forces, and no

independent authority was established to ensure the protection of human rights, with the result that even the few formal safeguards which did exist were simply ignored by the security forces. The erosion of the legal and procedural rights of detainees and accused persons which the emergency measures involved clearly created conditions in which the protection of human rights could not be ensured, and in particular the practice of incommunicado detention combined with the absence of effective independent supervision of the security forces facilitated and encouraged the use of torture.

### Torture

Isolated incidents of torture were not unknown in Uruguay prior to the proclamation of a state of internal war and the consequent involvement of the armed forces in counter-subversive operations, but the routine and systematic use of torture only commenced at that time and, as we have seen, a causal relationship can be identified between the introduction of special detention procedures (including reliance on military tribunals) and the emergence of torture. Initially, Congress closely monitored the situation, and in 1972 actually examined the case of one detainee who had died in detention, concluding that death had occurred as a result of torture. This was the first - and only - finding by Uruguayan authorities that torture had been employed, but it did not prevent the continuation of the state of emergency, and by the time the scale of human rights violations became known, Congress no longer possessed sufficient authority to remedy the situation.

When the International Commission of Jurists in its Review of June 1972 asserted that there was "reason to fear that political prisoners have often been subjected to inhuman treatment" in Uruguay,<sup>25</sup> the government responded by announcing that all measures introduced were constitutional, although it conceded that it was necessary "to give some articles of the Constitution an interpretation which was wide, but no wider than the gravity of the situation demanded...",<sup>26</sup> and added:

"The Government has not ordered the use of ill-treatment or torture, which would have been contrary to the Constitution."<sup>27</sup>

The International Commission of Jurists replied:

"Firstly, we did not suggest in any way that the lawful use of force by the authorities is to be equated with illegal violence. Secondly, we did not suggest that the Government of Uruguay have authorised the use of torture. However, we are not alone in suggesting that there has been illegal use of torture against suspects in Uruguay."<sup>28</sup>

In the secrecy and confusion created by the emergency measures at that early stage, it was difficult to ascertain precisely what the situation was, and initially it was assumed that the security forces were using torture on their own initiative without the authorisation of the government. The nature of the security measures certainly made this a distinct possibility, but it subsequently emerged that if the government was not actually responsible for ordering the employment of torture, it was at least condoning its use by the security forces. A United States Churchmen delegation which visited Uruguay in June 1972 reported that there was indeed "impressive evidence that....both physical and psychological torture is practised on political prisoners by the Joint Forces (military and police) as part of the current repression purportedly aimed at the Tupamaros, but in fact extended

widely to broad segments of the population for political reasons."<sup>29</sup> The delegation added that, in reply to frequent questioning, no one during its entire visit categorically denied that torture was being employed, and a senior government official actually defended the use of torture on the grounds of the necessity of protecting national security.<sup>30</sup>

Following the intervention of the armed forces, there were even fewer constitutional and political restraints on the security forces, and allegations of torture increased. In 1974, a joint mission by the International Commission of Jurists and Amnesty International visited Uruguay, and produced an eleven page report in which the conclusion was reached that "the widespread torture and ill-treatment of suspects is facilitated by defects in the system, by the failure of the authorities to follow the procedures prescribed by law, and by the lack of adequate judicial and other remedies to enforce these procedures."<sup>31</sup> The report criticised the delays in military justice, the lack of legally qualified magistrates, and the prolonged periods of detention, thus identifying the crucial problems. The report, which was updated in 1975 and 1976, made several specific references to torture:

"We have received many complaints of torture and other ill-treatment. The general view among defence lawyers is that almost all persons detained in military barracks and some of those detained in police stations are still being severely ill-treated either during or as a preliminary to interrogations. The most conservative estimate we received was that it occurred in about 50% of the cases....The Military Judges of Instruction said that hundreds of complaints of torture had been made to them, but they had not found a single case proved. The burden of proof lies in such cases on the complainant."<sup>32</sup>

The human rights organisations clearly recognised that the system of military justice imposed in Uruguay, combined with the counter-subversive measures, was largely responsible for the emergence of torture, and their criticism of the government continued until the restoration of democracy.<sup>33</sup>

The Inter-American Commission on Human Rights also began to show concern over the situation in Uruguay, and in 1978 produced a report which indicated *inter alia* that the right to life and to the "security and integrity of the person" had been violated, recommending that the government "adopt measures necessary to prevent and curb any abuses committed against detainees."<sup>34</sup> Moreover, as we shall see in the following chapter, the Human Rights Committee established under the International Covenant on Civil and Political Rights considered a number of communications relating to Uruguay, concluding in nineteen separate cases that article 7 of the Covenant had been violated by the government of Uruguay.<sup>35</sup> All of these concerned incidents occurring after the Covenant came into force in 1976. Specific mention of torture was made in eight cases.

In spite of the government's programme of liberalisation in the early 1980's, allegations of torture continued. In June 1980, for example, the International Commission of Jurists observed:

"According to recent information, torture continues to be used by military interrogators. Torture methods have been refined. It is applied today in a more selective and "scientific" manner. Army and police torturers are assisted by physicians whose task is to supervise the condition of the victim undergoing questioning. Not even prisoners who have stood trial and are serving a sentence are exempted from this aberrant practice. During 1979 there have been several reported cases of people withdrawn from their normal places of imprisonment to be questioned and tortured in military or police units to ascertain whether there was any form of political activity or

evasion plans in detention centres. This entails a permanent state of distress and anxiety among the population of prisons, aware of the risk of being tortured again at any time."<sup>36</sup>

A further Amnesty International Mission to Uruguay in April 1983 confirmed the continuing use of torture,<sup>37</sup> and in the section relating to Uruguay in its publication 'Torture in the Eighties', the human rights organisation stated:

"The systematic use of torture as a means of obtaining information and confessions leading to prosecution under Uruguayan security legislation has remained a major concern of Amnesty International during the period under review."<sup>38</sup>

There was a reported increase in the use of psychological torture in early 1984, but since the return to democracy a year later allegations have ceased, clear confirmation of the relationship between the emergency measures and the use of torture.

To sum up, then, torture was utilised regularly and routinely in Uruguay following the declaration of a state of internal war in 1972, and this was a direct result of the imposition of repressive emergency measures and the erosion of democracy. There is a clear relationship between the security measures and the emergence of torture, and there can be no doubt that it was the suspension of the normal constitutional and political restraints which permitted the security forces to resort to torture, which was usually inflicted for the purpose of interrogation, although one of its aims was probably to create a general apprehension and insecurity in the minds of potential subversives and dissidents. The victims of torture were those suspected of harbouring anti-government views or of having any connection with one of the many proscribed organisations. It has been estimated that at one stage Uruguay had the largest number of



political prisoners in relation to population in the world, and it was claimed that one in fifty citizens had been in prison, while one in every four hundred had been subjected to torture.<sup>39</sup> The incidence of deaths under torture was fairly high, although perhaps not disproportionate to the numbers tortured. When death did occur as a result of torture, the body was sometimes returned to the victim's family in a sealed coffin with strict instructions not to open it: those who dared to defy this order discovered the marks of torture on the body.<sup>40</sup>

Methods of torture reported include blindfolding and hooding, severe beatings, mock executions and death threats, as well as the standard Latin American techniques such as *el plantón* (enforced standing), *el submarino* (half-drowning in water, excrement, urine or a combination of these), the *picana eléctrica* (cattle prod - often applied to the most sensitive parts of the body), and the *pau de arara* (a combination of swaying from a bar - hence 'parrot's perch' - half-drowning and electric shock). Another practice developed was the *caballete*, which involved the victim being forced to straddle a wooden or iron bar.

### Conclusions

From even a cursory examination of the developments which took place in Uruguay during the 1970's, it becomes immediately apparent that the emergence of the practice of torture was a direct consequence of the introduction of emergency measures in response to a serious threat to the security of the state, namely civil unrest which was itself due to the disappointment of social aspirations as a result of

economic decline. While the proclamation of a state of emergency was a legitimate constitutional course for the government to adopt in the face of the disruption which took place, and was arguably a justifiable response to the problems, it is essential in such circumstances that adequate and efficient supervision of the implementation of the emergency measures should be established in order to prevent abuse of the special powers conferred upon the government and the security forces. In a state of emergency, the maintenance of effective democratic control over the executive and its subordinate agencies is crucial in ensuring the protection of fundamental human rights, but in Uruguay there was a failure to achieve this.

Following the initial introduction of special police powers of arrest and detention and the suspension of various civil liberties, the operation of democratic and political institutions within the Uruguayan constitutional system was not sufficient to prevent isolated incidents of torture, but the existence of safeguards undoubtedly functioned as a deterrent which dissuaded members of the security forces from resorting to unlawful methods of interrogation, and thus inhibited the development of torture into a systematic practice at that stage. Within any system, of course, individual officials are always capable of acting unlawfully, and the complete elimination of torture is thus dependent upon the willingness of individuals to uphold the rule of law, but the possibility of investigation by one's superiors or by a judicial or equivalent authority, resulting in exposure, censure and disciplinary action, constitutes a significant deterrent, thus helping to prevent torture. The importance of such deterrents and of effective safeguards is, of course, correspondingly

greater when there is a suspension or curtailment of the legal and procedural rights of detainees, because in such conditions the secrecy created permits the security forces a degree of licence by making supervision and investigation more difficult. The relevance of constitutional and political safeguards also increases when restrictions are imposed on civil liberties.

In Uruguay, the introduction of special powers of detention, combined with numerous restrictions on civil liberties, created an atmosphere in which the clandestine use of torture was made possible, but initially the continuing operation of democratic and constitutional restraints on the government effectively prevented large scale violations of human rights. As the safeguards were gradually eroded further, however, especially after the declaration of a state of internal war in 1972, the protection of human rights could no longer be guaranteed. The elimination of conventional safeguards was not accompanied by the creation of alternative measures sufficient to prevent governmental abuses, and the consequence of this failure was the erosion of the rule of law, the facilitation of human rights violations and the circumvention of the limitation of government which led ultimately to the collapse of democracy.

The basic lesson to be learned from Uruguay's experience is that whenever emergency measures are invoked, it is essential for effective control over the security forces to be maintained, and this requires the political will to ensure that the implementation of the emergency measures by the security forces takes place in accordance with the law. The responsibility for this lies in the first instance with the executive, which has usually been granted special powers to enable it to deal with the emergency situation, but executive supervision will

rarely provide satisfactory guarantees against abuses, because the executive itself will normally have requested the special powers and is likely to fully support the security forces. In Uruguay, as in many similar situations, the executive clearly lacked the political will to investigate allegations of torture, and indeed it permitted the armed forces an increasingly prominent role in counter-subversion until it eventually lost the political authority to enforce its will and exercise any control over the security forces. The subsequent seizure of power by the armed forces merely compounded this problem, as the military authorities made no attempt to impose restrictions on the application of the security measures, an indication that the use of unlawful methods was condoned at the highest levels.

When the executive lacks the political will to ensure the protection of fundamental human rights, the crucial factor is the existence and effectiveness of independent limitations on both the security forces and the executive itself. There are three main areas in which pressure may be brought to bear, namely public opinion, judicial review and parliamentary supervision, each of which was systematically suppressed during the crisis in Uruguay. The restrictions imposed upon the media, the unions, the academic world and the political parties ensured from an early date that there would be little public expression of criticism of the government's policies, although each of these sectors endeavoured to defy the security forces and continue political activity. As far as the constitutional separation of powers was concerned, parliamentary and judicial control over the emergency measures remained relatively effective until the proclamation of a state of internal war, when the judicial role was severely curtailed as a result of the transfer of jurisdiction to

military tribunals, a move which deprived the civilian courts of the opportunity of reviewing security procedures and monitoring the treatment of detainees, and in fact eliminated any independent judicial supervision of the security forces. The assumption of executive control over the civilian judiciary at a later date merely consolidated the position. With regard to parliamentary supervision, Congress initially retained control over the state of emergency, and exhibited a certain concern for human rights, but it nevertheless repeatedly supported the continuation of the state of emergency, even after the armed forces became involved, in spite of clear evidence that abuses were taking place. It might be argued that the state of internal war was not a situation envisaged in the 1967 Constitution, so that Congress ought not to have ratified the security measures which were introduced, but the fact is that there was substantial support for the government within the elected body, and it was only at a very late stage that Congress finally refused to sanction a further prolongation. Thus, while the fact that only a simple majority sufficed for the continuation of the state of emergency may be open to criticism, the question is not whether the emergency measures were constitutional, but rather why Congress failed to assert its political authority over the executive and subsequently lost the will and power to do so. The degree of political will within Congress was not strong, and gradually its constitutional authority waned to such an extent that it eventually proved incapable of resisting the government, and in due course even the formal role to which it had been reduced was terminated. By the time the armed forces took power in 1973, both judicial and parliamentary authority had been largely neutralised, and after the dissolution of all democratically elected

bodies there no longer existed an independent constitutional agency at any level capable of enforcing restraints on the government in order to ensure the security measures were applied in accordance with the law and with due respect for human rights. The result was a significant increase in the use of torture, directly attributable to the erosion of safeguards.

There are, then, two particular areas in which safeguards must be maintained during a state of emergency: firstly, there must be legal and procedural guarantees for detainees; secondly, there must exist adequate and effective constitutional constraints on government. No state can guarantee immunity against the wilful violation of the rule of law by the armed forces or the executive with the support of the armed forces, but strong democratic institutions and a tradition of respect for constitutional authority can constitute powerful moral influences which inhibit such action, and it is for this reason that the continuation of independent supervision of the executive and its agencies must be effectively established when emergency measures are introduced. One of the problems in Uruguay was that neither Congress nor the judiciary adopted a sufficiently strong stance in monitoring the state of emergency, as a result of which the executive enjoyed considerable freedom of action, recognised the fragility of constitutional restraints and ultimately succumbed to the intoxicating effects of power. Overall democratic control of emergency measures must always be retained, then, and should be clearly established legally and constitutionally. The independence of the judiciary must also be ensured, and this means that the use of military tribunals for civilian offenders should not be permitted. The authority of the judiciary to enforce judicial orders must be firmly established, and

if there are doubts about the impartiality of the judiciary, an alternative independent authority should be empowered to supervise detention and trial procedures and given specific responsibility for the protection of human rights. The supervising authority should have access to all detainees, even (indeed, especially) those held incommunicado, so that no one may be detained wholly at the mercy of the security forces but every detainee has an opportunity to complain to an independent authority with specific responsibility for the protection of his rights. The procedures of arrest and detention must not facilitate the employment of torture, but should provide the detainee with every opportunity to complain of ill-treatment to a judge and also to his lawyer and family, and should ensure that effective procedures are available whereby a satisfactory remedy can be obtained.

In conclusion, it is clear that the crucial factor in the effective protection of core rights is the existence of independent authorities with sufficient power to control the government and its administrative agencies. Often this power is essentially moral, and is consequently open to rejection or resistance, particularly by a government which has the support of the armed forces. In such circumstances, there may be little that democratic authorities can do to enforce the rule of law, as there has effectively been a breakdown of the fragile structures which underlie democracy, and it may be that only massive public opposition to the government can secure a return to democracy. In general, however, governments are reluctant to violate the rule of law blatantly, as they do not wish to alienate potential sources of support, and because democratic restraints can be effective in such circumstances it is imperative that the

constitutional provisions relating to states of emergency should firmly establish independent control of the emergency measures and limit the curtailment of the rights of detainees.

In this chapter, we have concentrated on the case of Uruguay in order to illustrate the relationship between the absence of safeguards and the emergence of torture, and we have used the situation to show how the erosion of safeguards opens the way for the introduction of torture even when this is prohibited by law. It is important to emphasise, however, that there are many countries in which few or no safeguards exist, so that torture can be resorted to freely, and in fact it is quite frequently the case that the regimes in such countries are afflicted by fear of subversion and consequently are liable to justify the use of torture. When such conditions prevail within a state, international law becomes relevant, and in the following chapters we shall examine the role of international law in the restraint of national governments, particularly when there is a breakdown or absence of safeguards at national level.



## Notes

1. See International Covenant on Civil and Political Rights, article 40. For Uruguay's belated report, see document CCPR/C/1/Add.57 of 3 February 1982. The report was dated 29 January 1982. The second report, due on 21 March 1983, has not yet been received, in spite of eight reminders: see Report of the Human Rights Committee 1987 (UN document A/42/40), Annex IV.
2. See document CCPR/C/2/Add.3 of 10 December 1979, at p. 4.
3. See Chapter One, note 65, *supra*.
4. See Financial Times Survey of Latin America, Financial Times, 29 June 1981. It has been estimated that around 500,000 Uruguayan citizens left the country after the beginning of the political problems in the early 1970's.
5. See Report of the Human Rights Committee 1982 (UN document A/37/40), Annex VIII.
6. Uruguay's Congress is composed of the Chamber of Deputies and the Senate. The terms of the 1967 Constitution require the approval of a joint session for emergency measures.
7. Each of the parties in the presidential election was permitted several candidates, but the candidate with most votes was accredited with all votes cast for that party's candidates. There were five Colorado candidates: Juan María Bordaberry, as the alternative to President Pacheco should a proposed constitutional amendment permitting the latter to stand for re-election be rejected by referendum (as it was); Dr Jorge Batlle y Ibáñez, a staunch opponent of Pacheco, proposed by the Unidad y Reforma-Lista 15 faction; Dr Amílcar Vasconcellos, proposed by the Tercer Frente Colorado, formed in August 1971; General Juan P. Ribas, a right-wing anti-communist; and the Uruguayan representative at the United Nations, Dr Augusto Legnani. Blanco factions proposed Senator Wilson Ferreira Aldunate and extreme right-wing former police chief, General Oscar Mario Aguerrondo. The Frente Amplio's sole candidate was General Líber Seregni Mosquera, who escaped two assassination attempts during his campaign. General Seregni had resigned from the army in 1969 in protest over the methods being employed to suppress the Tupamaros, and was a member of the Colorados until the formation of the Frente Amplio in 1971. He was detained by the government on a number of occasions.
8. The programme included the following proposals: decisive action against corruption in the state and private life; the establishment of special courts with military participation; a rapid reduction of the country's foreign debt; drastic savings in foreign currency expenditure; tax reforms; a comprehensive employment policy with preference for labour-intensive projects; support for small and medium-sized enterprises; the improved distribution of national revenue; stricter public control of the means of production; land reform; the creation of instruments for action against monopolies; encouragement of workers' participation in industry. The military also undertook not to intervene in student and trade union affairs

except in extreme cases, pledged to protect the nation from Marxism-Leninism, and confirmed its respect for international treaties, "except those forced upon the country": see Keesing's Contemporary Archives, 16-22 April 1973, at 25842.

9. Other features of the military's demands included the requirement for military approval for the appointment of Ministers of the Interior and of Defence, and the replacement of certain foreign service officials: see Keesing's Contemporary Archives, 16-22 April 1973, at 25842.

10. Decree 464/973 of 27 June 1973.

11. See Keesing's Contemporary Archives, 23 September 1977, at 28577A.

12. See especially Repression in Uruguay (Amnesty International, 1980).

13. See *ibid.*, at p. 1.

14. See Keesing's Contemporary Archives, 6 March 1981, at 30744A. It may be noted that a large number of people had been deprived of their political rights for subversive activity under the provisions of Institutional Act No. 4.

15. See *ibid.*

16. Vice-Admiral Márquez, quoted in Repression in Uruguay, at p. 3.

17. That is, the Colorados, the Blancos, and the Civic Union.

18. Amongst the demands of COMASPO were: (i) permission for the security forces to detain suspects for up to fifteen days prior to court appearance (the limit specified by the 1967 Constitution being 48 hours); (ii) a constitutional ban on organisations whose aim was to destroy the democratic republican system; (iii) the pre-eminence of military courts in security matters; (iv) keeping evidence against subversives secret; (v) extending executive powers under a state of siege; (vi) permission for the security forces to conduct nocturnal counter-insurgency operations. See Keesing's Contemporary Archives, January 1984, at 32618.

19. Law No. 15,737 of 9 March 1985 granted an amnesty to political prisoners, excluding persons involved in wilful acts of murder, whether guerrillas or members of the security forces, and also excluding members of the security forces who had participated in inhuman treatment or disappearances. The Appeal Court reviewed cases of murder and counted each day spent in prison as three days because of the ill-treatment, and as a result all political prisoners were in fact released on the basis of having served their full sentences.

20. See Political Imprisonment in Uruguay (Amnesty International, 1979), Chapter III, at pp. 5-6.

21. The prohibition on retroactive criminal laws is non-derogable in terms of article 4(2) of the Covenant.

22. See Political Imprisonment in Uruguay, Chapter III, at p. 8.
23. See *ibid.*, at pp. 8-16.
24. See Uruguay: Deaths Under Torture 1975-77 (Amnesty International, 1978), at p. 1.
25. Review of the International Commission of Jurists, No. 8, June 1972, at p. 16.
26. Reply of Uruguayan government, quoted in Review of the International Commission of Jurists, No. 9, Dec 1972, at p. 3.
27. *Ibid.*, at p. 4.
28. *Ibid.*, at p. 1.
29. Quoted in Review of the International Commission of Jurists, No. 10, June 1973, at p. 11.
30. See *ibid.*, at pp. 11-12.
31. Review of the International Commission of Jurists, No. 12, June 1974, at p. 2.
32. Report of Joint Mission, quoted in Review of the International Commission of Jurists, No. 16, June 1976, at pp. 37-38.
33. The number of deaths occurring as a result of torture was relatively high: see Uruguay: Deaths Under Torture; and also Political Imprisonment in Uruguay, Chapter I, at pp. 10-11.
34. Quoted in Amnesty (Journal of the British Section of Amnesty International), No. 1, Feb 1983, at p. 11.
35. These will be discussed more fully in the following chapter.
36. See Review of the International Commission of Jurists, No. 24, June 1980, at p. 23.
37. See Amnesty, No. 6, Jan 1984, at p. 3.
38. Torture in the Eighties, at p. 174.
39. See Political Imprisonment in Uruguay, Chapter I, at p. 4; and also Keesing's Contemporary Archives, 4 December 1981, at 31227A, referring to a report in La Vanguardia (Barcelona) of 1 September 1981.
40. In some instances, the body was never returned. 'Disappearances' were not as frequent as in certain other Latin American countries during the 1970's, although on some occasions the security forces did deny all knowledge of the victim or claimed that right-wing 'death squads' were responsible. Certainly such squads did exist in several countries, often consisting of off-duty members of the security forces, and they were tolerated, if not encouraged, by certain regimes. There were allegations of death squads in Uruguay in the

early 1970's, but disappearances never reached the proportions attained in, for example, Argentina, although many Uruguayan refugees did disappear in Brazil, Argentina and Paraguay, allegedly with the connivance of the local security forces.

## CHAPTER SIX: INTERNATIONAL PROCEDURES

In the foregoing chapters, we have examined the relationship between the protection of fundamental human rights and the existence of constitutional and legal safeguards within the internal political systems of sovereign states, and we have observed that the effective protection of human rights is dependent upon the efficient operation of such safeguards, particularly in ensuring restraint of governmental action by independent authorities. We have also seen, however, that the rejection of the doctrine of the inherent rights of the individual as the determining principle of political organisation leads to the creation of a totalitarian system of government within which there is a complete absence of restraining influences, and that even within democratic systems a serious threat to national security can provoke the introduction of emergency measures which undermine democratic institutions. Moreover, we have noted the importance which governments attach to the defence of national security, to the extent of justifying whatever means they deem necessary, including torture, in the elimination of any threat. When a government adopts this attitude and there are insufficient restraints within the political structure of the state, it is clear that protection of fundamental human rights cannot be guaranteed at national level, and it is in these circumstances that international law becomes relevant. In this and the succeeding chapters, we shall examine the role of international law in providing a secondary level of restraints when safeguards at national level are inadequate, and in particular we shall endeavour to assess the effectiveness of existing international procedures in establishing control over national governments before

going on to consider the prospects for proposed and prospective developments.

We have already seen that there are in existence numerous international instruments relating to the protection of human rights, many of which incorporate a prohibition on the use of torture. In this chapter, we shall examine the extent to which international law has proved capable of fulfilling its role in preventing serious violations of human rights by ensuring the protection of the individual from state authorities. Many international declarations and resolutions are not legally binding, and are intended only to provide guidelines for governments, but there are also international conventions which are binding on states which ratify them, and these conventions frequently include provisions for the creation of procedures whereby a degree of international supervision may be established over states parties in their observance of the obligations contained in the particular convention. These procedures, which are usually referred to as 'measures of implementation', have generally taken three principal forms: (1) periodic reporting by states on the steps which they have taken to give effect to the convention in national law, (2) inter-state complaints regarding violation of rights guaranteed by the convention, and (3) the right of individual victims (and, in some instances, other individuals or groups) to bring alleged violations of the terms of the convention to the attention of the relevant international authorities.

International supervision of states in their observance of human rights is potentially of crucial importance. Since governments themselves are normally responsible for the violation of human rights, it is obvious that the exercise of a supervisory function by an

international authority with universal jurisdiction would constitute a significant factor in the protection of human rights. Gross violations of human rights are often the result of an absence of effective limitations on governmental power, either within the constitutional framework of the political system itself or because of a state of emergency, and in such circumstances international supervision of national governments could provide the necessary restraints. However, there are major difficulties in establishing effective international supervision of national governments. The underlying problem is that in general international law, unlike national law, is applicable only in so far as each state accepts specific obligations, and unfortunately the vast majority of governments are strongly opposed to the very concept of international supervision in human rights matters, regarding these as internal affairs. This rejection of the idea that a government's treatment of its own nationals is a valid object of international law stems largely from the fundamental differences in attitude towards human rights which were identified in Chapter One: clearly if a government does not view human rights in terms of claims against the state, and consequently sees no need for limitation of government, it will be unlikely to submit voluntarily to international procedures which are intended to protect the individual by imposing restraints on national governments. The result of this is that the application of international procedures is dependent upon prior acceptance by each state, normally through ratification of the appropriate convention. Indeed, the procedures established by international conventions are often optional, so that the authority of international agencies to deal with particular human rights situations depends upon separate

acceptance of the procedure by the state in question. Many regimes are, of course, unwilling to submit to such measures, thus rendering international agencies powerless, because in practical terms human rights protection can only be made effective at national level and international agencies have no legal right to interfere without the consent of the state.

The perennial problem with the international protection of human rights, then, is that the governments which prove most willing to submit to international supervision are those which show greatest respect for human rights at national level, while the most brutal and repressive regimes generally refrain from accepting international procedures which would expose their violations and damage their public image. Indeed, it is often the case that there exist adequate safeguards within the internal systems of the states which submit to international measures, so that while international supervision is by no means superfluous there is less probability of the machinery having to be invoked. The paradox is, then, that while international restraints are all the more essential when internal safeguards are lacking, the governments which reject limitations at national level are even more vehemently opposed to the imposition of control by international agencies, particularly when matters of national security are involved.

International measures of implementation are not without value; they do provide an additional level of protection when they are accepted by governments. No government can guarantee absolute and comprehensive protection of human rights, and international supervision can fulfil a relevant role when domestic procedures prove ineffective or where isolated violations of less fundamental rights



are involved. In other words, when the violation of human rights is not an inevitable consequence of the socio-political system and is not essential to governmental policies, the government will often be willing to accept and implement the recommendations of international authorities, especially if it has a genuine desire to establish more efficient protective machinery at national level. Moreover, international law may be of value in providing a medium through which pressure may be brought to bear on regimes which prove unco-operative even although they are bound by international legal obligations, for example where there has been a change of government after the ratification of a human rights convention. Nevertheless, it must be recognised that the impact of international law in the field of human rights is seriously restricted. In particular, international obligations cannot be imposed upon governments, so that if the systematic violation of core human rights is essential to the retention of power by a regime, it can simply refuse to undertake any onerous legal obligations. Furthermore, even when a repressive regime is subject to the jurisdiction of an international authority, the measures of implementation may be rendered impotent by the regime's refusal to co-operate or comply with any decisions, the problem in this situation being that international law does not possess any genuinely effective sanctions and has no executive authority which can secure compliance with the decisions of international agencies, with the result that very little can be done if a government wilfully ignores such decisions.

The decisions and recommendations of international authorities do have some effect, but as far as human rights are concerned this is largely dependent on diplomatic pressure based on an apparent moral consensus about the validity of human rights:

"Compliance and noncompliance by states with their international obligations depend less on the formal status of a judgment and its abstract enforceability than on the impact of the opinion as a force capable of adding to or detracting from the legitimacy of specific governmental conduct. This latter factor has an important bearing on the perception that governments have about the political costs of noncompliance."

Governments always endeavour to give the impression in the international arena that they are concerned with the protection of human rights and that they fully respect human rights within their sphere of influence, and even the most repressive regimes will try to minimise the adverse publicity which their violations attract. International pressure may succeed in exploiting this sensitivity, although where governments consider national security issues to be involved even adverse publicity may not be sufficient to prevent gross violations of human rights. In such circumstances, international law is powerless.

In this chapter, then, we shall examine certain existing international procedures in order to assess their effectiveness, especially in relation to the prevention and elimination of torture. While international measures of implementation may be valuable in securing the amendment of national laws in relation to less fundamental rights, they are tested to their limits when confronted by the institutionalised violation of core rights. The following discussion is not, therefore, an indictment of international procedures generally, but is intended only to highlight the severe limitations which exist whenever fundamental human rights come into conflict with essential state interests. We shall concentrate on the measures of implementation established under the International Covenant on Civil and Political Rights and its Optional Protocol, and

also on the procedure set up pursuant to resolution 1503 of the United Nations Economic and Social Council (ECOSOC). Brief mention will also be made of the two major regional systems, but only for the purpose of indicating the principal features of the procedures which have been developed within these systems, as special considerations obviously apply to regional conditions. Particular reference will be made to the effect of the various procedures in relation to the situation in Uruguay, not only because the recent political and legal developments in that country have already been outlined, but also because Uruguay has been the subject of consideration under both the Optional Protocol and the resolution 1503 procedures specifically in connection with the practice of torture. It will in fact be useful as a preliminary to note certain facts regarding Uruguay's position in relation to the international procedures.

Prior to the military takeover, while parliamentary democracy still prevailed in Uruguay, international efforts to develop effective protection of human rights were supported by successive Uruguayan governments and, indeed, representatives of the Uruguayan authorities were actively involved in the preparation of the texts of the two International Covenants. Uruguayan governments consistently supported the inclusion of effective measures of implementation in the International Covenant on Civil and Political Rights and voted in favour of the right of individual petition encompassed within the Optional Protocol.<sup>2</sup> Uruguay subsequently ratified both Covenants and the Optional Protocol on 1 April 1970, and in spite of the collapse of democracy in 1973 when the military seized power and embarked on a policy of systematic repression, the Optional Protocol was never repudiated as it might have been under article 12 thereof, so that

throughout the period of military government, the authorities remained bound by the provisions of the Protocol as well as by the terms of the Covenant itself.

In June 1979, the government of Uruguay sent to the Secretary-General of the United Nations a notice of derogation<sup>3</sup> under article 4, paragraph 3, of the International Covenant on Civil and Political Rights, which states:

"Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary on the date on which it terminates such derogation."<sup>4</sup>

It should be noted that even if a notice fulfils the requirements of the article, it does not affect the prohibition of torture which is, of course, absolute by virtue of paragraph 2 of article 4. The Uruguayan notice is mentioned here to give some indication of the attitude of a regime to its international obligations at a time when it was intent on pursuing policies involving the violation of human rights, and also to illustrate some of the problems faced by international authorities seeking to protect human rights.

In several respects, the communication submitted by the Uruguayan government fell short of the requirements expressed in article 4, paragraph 1, of the Covenant, which we examined in Chapter Four. Indeed, there was a failure to "immediately inform" the other states parties: the notice of derogation was not sent until three years after the Covenant came into force,<sup>5</sup> although a state of emergency had been in existence for some years prior to that. The Human Rights Committee in fact referred to the notice of derogation in its

consideration of one communication received under the Optional Protocol,<sup>6</sup> but felt "unable to accept that the requirements set forth in article 4(1) of the Covenant have been met."<sup>7</sup> The Committee explained that in the notice "no attempt was made to indicate the nature and the scope of the derogation actually resorted to with regard to the rights guaranteed by the Covenant, or to show that such derogations were strictly necessary."<sup>8</sup>

In relating the reasons for the derogation, the notice stated:

"This emergency situation, the nature and consequences of which match the description given in article 4, namely that they threaten the life of the nation, is a matter of universal knowledge, and the present communication might thus appear superfluous in so far as the provision of substantive information is concerned."<sup>9</sup>

It continued:

"Nonetheless, my Government wishes both to comply formally with the above-mentioned requirement and to reiterate that the emergency measures which it has taken, and which comply strictly with the requirements of article 4(2), are designed precisely to achieve genuine, effective and lasting protection of human rights, the observance and promotion of which are the essence of our existence as an independent and sovereign nation."<sup>10</sup>

Finally, the notice intimated:

"Notwithstanding what has been stated above, the information referred to in article 4(3) concerning the nature and duration of the emergency measures will be provided in more detailed form when the report referred to in article 40 of the Covenant is submitted, so that the scope and evolution of these measures can be fully understood."<sup>11</sup>

It is clear from these statements that while the government was anxious to stress that its emergency measures were entirely in accordance with the requirements of the Covenant, it was not prepared to give details of those measures which might have negated its

unqualified assertions. Uruguay's report under article 40 of the Covenant, due in 1977, was not in fact received by the Human Rights Committee until 1982.<sup>12</sup> It is discussed below.

Leaving aside the vagueness and insufficiency of the notice of derogation, it might appear that the Uruguayan authorities were willing to honour their obligations under the Covenant in so far as they did intimate the position. However, it is essential to view the apparent co-operation of the government in context. The provisions relating to the right of derogation do not establish any enforcement machinery whereby compliance with the requirements of the Covenant can be ensured: the Covenant does not create any process by means of which implementation of emergency measures by national governments may be monitored by international agencies, but merely requires formal intimation of derogation. Indeed, the Covenant does not empower the Human Rights Committee to determine the legality of a state of emergency or even to verify the sufficiency of a notice of derogation, and there are no sanctions or penalties provided for when a government does not supply adequate information or simply fails to submit a formal notice. The Human Rights Committee certainly criticised the Uruguayan notice of derogation in the course of its proceedings under the Optional Protocol, and would no doubt be prepared to express an opinion as to the validity of particular emergency measures in specific situations if given the opportunity to do so, but the fact remains that there is no provision for international supervision of states of emergency in the Covenant, and this is a serious deficiency because it deprives the Human Rights Committee of clear power to make authoritative pronouncements regarding the legality of any particular state of emergency. The provisions relating to derogation are thus

without any real substance, and as far as Uruguay was concerned they had little impact on the human rights situation. In fact, the purpose of the notice of derogation in 1979 seems to have been to give the authorities some basis for contesting the Human Rights Committee's right to consider communications relating to Uruguay.

The International Covenant on Civil and Political Rights provides in article 40 for the submission of reports by states parties, while in articles 41 and 42 it makes provision for inter-state complaints, although the latter procedure requires separate acceptance, as does the procedure for individual petition established by the Optional Protocol. Accordingly, while all states parties to the Covenant are bound to submit reports under article 40, the application of the other two procedures depends upon separate recognition of the jurisdiction of the Human Rights Committee. The Committee consists of eighteen members, who are nationals of states parties to the Covenant (though not necessarily of states which have accepted the optional procedures) and who are "persons of high moral character and recognized competence in the field of human rights".<sup>13</sup> They are elected and serve in their capacities as individuals and not as representatives of their governments, unlike the members of the United Nations Commission on Human Rights. The Human Rights Committee is strictly speaking not an organ of the United Nations, but is financed by the world organisation and submits an annual report to the General Assembly.<sup>14</sup> Twelve members constitute a quorum, and decisions are taken by majority.<sup>15</sup> Initially, the Committee met twice yearly, but it now holds three sessions each year, although in 1987 only two sessions were held for financial reasons.

In spite of the fact that its members are not government representatives, and in spite of efforts to eliminate politicisation of issues, the Human Rights Committee has encountered the problem of ideological conflict, simply because its members are products of diverse cultural backgrounds and consequently have differing attitudes to human rights. The very fact that the Committee has a cross-cultural representation thus tends to create a disparate approach which weakens its authority. The East-West conflict has been a particular problem within the Committee, and while there has been a degree of willingness to compromise, this has only had the effect of further undermining the Committee's effectiveness:

"The early practice of the Committee reveals a body divided on many issues, including most of the important ones; the most contentious involve the permissibility of the particular restrictions and limitations justified under sections of the Covenant."<sup>16</sup>

A more united front is, however, presented in relation to those rights which might be considered 'core' rights:

"Although the Committee is divided on the interpretation of considerable portions of that standard [i.e. the minimum standard of the Covenant], on issues not implicating distinctly "political" freedoms, the division slackens somewhat.... Those sections of the Covenant dealing with equality and nondiscrimination (Articles 2(1), 3, 23(4), and 26) and with deprivation of liberty and guarantees for persons accused of crime (Articles 9, 10, 14, and 15) hold the most promise of becoming a real minimum standard within the theoretical one."<sup>17</sup>

With these points in mind, we shall turn now to an examination of the measures of implementation contained in the Covenant and Optional Protocol.



(a) Article 40 - The Reporting Procedure

Article 40, paragraph 1, of the International Covenant on Civil and Political Rights states:

"The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

(a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests."<sup>18</sup>

The purpose of this procedure is to keep the Human Rights Committee informed of the legislative and administrative steps taken by states parties to ensure protection of the rights specified in the Covenant, and it is obvious that the Committee was intended to have some supervisory function under article 40. It is not entirely clear, however, what the Committee's powers are, and there has in fact been a divergence of opinion amongst the members of the Committee as to the precise nature and scope of its duties. Certain ambiguities contained in article 40 have still to be resolved, in particular the role of the Committee under paragraph 4:

"The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant."

Some members of the Committee have asserted that the state's obligation terminates once it has submitted its report, and that the Committee's only function is to make general comments in its annual

report to the General Assembly, without referring to specific states parties, while other members argue that the Committee's role is to make a report of its own on each state report, commenting article by article on that state's implementation of the Covenant.<sup>19</sup> At the Committee's 11th session, in October 1980, a compromise was reached on this matter, and it was agreed that "general comments" may relate to the application and content of individual articles of the Covenant, to the implementation of the obligation to submit reports and guarantee rights, and to co-operation between states parties.<sup>20</sup> The possibility of further consideration of issuing a separate Committee report on each state's report was left open. In practice, the general comments incorporated in the Human Rights Committee's annual reports to the General Assembly have not referred to specific countries,<sup>21</sup> and this limitation on the Committee's powers, self-imposed as a result of compromise, represents a serious defect in the reporting procedure in its present form, because it deprives the Committee of any opportunity to express an opinion as to whether a particular state is giving effect to the Covenant or not, although the Committee does publicise the identity of states which fail to submit reports. It must be recognised, however, that the purpose of the procedure is to establish between the Human Rights Committee and each state party a 'constructive dialogue' within which the protection of human rights may be promoted and encouraged, rather than to create a machinery for the investigation and exposure of violations.<sup>22</sup> The aim is to assist and support governments in their efforts to establish more effective protection of human rights at national level, and the Committee has thus adopted an advisory rather than an accusatory role. It must be appreciated, too, that many governments will face genuine difficulties

in amending existing domestic legislation and practices to bring them into line with the requirements of the Covenant, and in such circumstances a censorious role for the Human Rights Committee is unlikely to promote confidence in its support. Nevertheless, there ought to be an effective enforcement procedure which could be invoked in situations where human rights are wilfully and systematically violated by the governments of states parties to the Covenant, and the absence of such a procedure undoubtedly weakens the position and authority of the Committee under article 40. While there are limitations on the effectiveness of a purely verbal condemnation, an authoritative statement by the Committee that a state has violated the Covenant could function as a valuable sanction, and the assumption of such a power would at least enable the Committee to take some action when wilful violations occur.

The Human Rights Committee formulated general guidelines for the form and content of state reports at its 2nd session in 1977.<sup>23</sup> Initial reports consist principally of a description of the legal and procedural provisions existing in or introduced into the constitutional and legal system of the state which give effect to the provisions of the Covenant at the domestic level.<sup>24</sup> The general procedure adopted by the Committee is as follows:<sup>25</sup> a representative of the state presents the report and is questioned on it by the members of the Committee; the representative normally replies orally, but may refer questions to his government to answer in writing at a later date. When such additional replies are presented by a representative, the Committee members generally ask questions on a topic-by-topic basis. Reports are not confidential, and the Committee has actually adopted the practice of publishing an account of its

questioning in its annual report. Matters which have attracted the attention of the members with some regularity include the status of the Covenant in the domestic law of the state and the issue of derogation.<sup>26</sup> It is at this stage of consideration of reports that the Human Rights Committee has the opportunity of conducting a fairly thorough investigation into the situation within each state party, and the members of the Committee have not only been willing to express an opinion as to whether reports indicate adequate protection of specific rights,<sup>27</sup> but have also repeatedly displayed an interest in the implementation of the Covenant in practice,<sup>28</sup> thus looking behind a purely formal compliance with the requirements of the Covenant. Moreover, members of the Committee have presented questions in the light of information emanating from sources other than the reports themselves.<sup>29</sup> The more progressive elements within the Committee have in this way been able to make use of the reporting procedure to carry out an exhaustive survey of each state and to assess each government's fulfilment of its international obligations, and have thus to some extent overcome the restrictions imposed by the compromise reached in 1980. Within its limitations, then, the system has functioned relatively successfully, particularly as the Committee's annual report incorporates a comprehensive resume of the process in relation to each state. This effectively achieves the same purpose as a separate Committee report on each state's report, although informal adverse comment is as far as the Committee can go, even if it is clear that the government is making no attempt to implement the Covenant.

The obligation to submit reports has been taken seriously by the majority of states parties to the Covenant and, although a considerable number of reports are not lodged timeously and in a few

instances no report has been submitted at all,<sup>30</sup> the reports which have been considered by the Human Rights Committee have on the whole been satisfactory in form and content. Indeed, the Committee has commended the thoroughness and clarity of reports in general. The reporting procedure thus appears to function reasonably well, at least in so far as the actual content and presentation of reports is concerned, and some members of the Committee have endeavoured to make the procedure as effective as possible in promoting the protection of human rights. It is possible that as a result of the positive supervisory role assumed by the Committee an important influence may be exercised over the governments of states parties, so that more effective protection of human rights can be secured within these states, and indeed a number of minor successes have been recorded.<sup>31</sup> Nevertheless, the absence of effective sanctions limits the Human Rights Committee's power and prevents it having any real impact on situations involving systematic violation of human rights, even when it is evident from a state's report that such a situation exists. Of course, the procedure under article 40 is not intended to deal with such problems, being geared rather to a 'constructive dialogue' with co-operative governments displaying the political will to make progress in the development of human rights protection, and within that context the Committee does not require extensive powers. The article 40 procedure is not equipped, then, to tackle serious problems, and indeed any increase in the powers of the Committee would merely act as a disincentive to regimes which have not yet ratified the Covenant: the relative success of the reporting procedure within its goals, both in attracting the support of more than half the membership of the United Nations and in the high degree of compliance

with the obligation to report, is undoubtedly due largely to the limited nature of the Committee's powers under article 40. The procedure has a valuable role in the promotion of human rights protection, but as far as the systematic violation of human rights by governments is concerned, the most that the Human Rights Committee can hope to achieve is to publicise non-compliance with the terms of the Covenant. The Committee's powers should certainly be clarified and extended to permit at least categorical censure, and the Committee itself should maximise its role under article 40, but because the procedure is essentially intended to encourage governments rather than expose and condemn violations it is important not to make the Committee's powers so extensive that governments will simply refrain from ratifying the Covenant. While it is desirable that the Committee should be able to deal with situations in which a state party is wilfully violating human rights, this is not the primary objective of the reporting procedure.

From the foregoing discussion, it can be seen that the reporting procedure is very restricted in its scope, and is aimed principally at the promotion of internal safeguards and guarantees rather than at the investigation and exposure of violations. The limitations of the procedure in relation to systematic violations can be illustrated by examining what effect, if any, it had upon the situation in Uruguay.

The government of Uruguay ratified the International Covenant on Civil and Political Rights in 1970, and the Covenant accordingly came into force for Uruguay in March 1976. In accordance with the provisions of article 40, paragraph 1, Uruguay's report became due on 22 March 1977, but in spite of repeated reminders,<sup>32</sup> the report was not submitted until 29 January 1982, almost five years after the

original deadline.<sup>33</sup> The report is a fairly comprehensive document, relating the Uruguayan legal provisions which give effect to the Covenant. By way of introduction, a general statement on Uruguayan law's conformity with the terms of the Covenant is made:

"All the principles and rights laid down in the Covenant already formed part of the Uruguayan legal order. It was therefore unnecessary to draw up rules to give effect to the provisions of the Covenant."<sup>34</sup>

The report proceeds to detail systematically the constitutional and legal provisions which secure protection of each of the rights guaranteed by the Covenant, and it does appear from the terms of the report that adequate legal machinery existed in Uruguay at that time to ensure effective protection of human rights. However, the report does not attempt to assess the efficiency of the formal safeguards in practice, and in particular does not comment fully on the effect of the state of emergency on human rights. Indeed, in the discussion relating to article 4 of the Covenant (derogation), the report merely refers to the constitutional authority for the utilisation of emergency powers without giving any indication that such powers had in fact been invoked.<sup>35</sup> On the other hand, reference is made to particular aspects of the emergency measures in relation to individual articles of the Covenant,<sup>36</sup> and the report generally draws attention to the rights from which derogation had been made. Thus, in the discussion of article 25, the following observation is made:

"The rights mentioned in this article had already been provided for in Uruguayan law when the Covenant was adopted. The Uruguayan Government, however, by virtue of the provisions of article 29(2) of the Universal Declaration of Human Rights, and in exercise of the prerogatives conferred on it by article 4 of the International Covenant on Civil and Political Rights, informed the other States parties of the exceptional situation which it is experiencing,

as expressly referred to in paragraph 1 of the latter article.

...With regard to political rights, the measures announced include restrictions of a political nature. It must be emphasized, however, that they are of an emergency character and of limited duration and that the aim of the Government is to regularize the political system on a permanent basis in order to arrive at new democratic institutions which will be both republican and representative."<sup>37</sup>

The report goes on to give a more detailed analysis of the emergency measures and, referring to the various provisions contained in international legal instruments which permit derogation,<sup>38</sup> states:

"The Uruguayan Government's actions have complied fully with these provisions. Uruguay has reacted to the systematic violation of human rights by terrorists by adopting measures to halt the resurgence of subversion. The restrictions which it has been obliged to adopt in certain cases, and which are described in this report, have been imposed in accordance with constitutional provisions long in force in the country, as mentioned earlier, namely:

(a) Article 168(17) of the Constitution, which authorizes the Executive "to take prompt security measures...";

(b) Article 31 of the Constitution: "individual security...".

The Government has also acted in accordance with rules laid down in laws such as the aforementioned State Security and Internal Order Act, No. 14,068 of 1972."<sup>39</sup>

This indicates the government's anxiety to convince the Human Rights Committee that the measures had been introduced justifiably and in accordance with both national and international legal requirements. The report continues:

"The most recent phase of legislative activity in Uruguay has taken place within the framework of a new concept of the right to security. This emerged as a result of the vicissitudes which the nation was having to endure in its struggle fully to maintain human rights and to repel the aggression to which it was being subjected by seditious elements.

This new concept of security, viewed as something more comprehensive and complex than had traditionally been the case, formed the



basis of Act No. 14,068, adopted by Parliament in July 1972, called the State Security and Internal Order Act. This Act, like the subsequent Institutional Act No. 5 of 20 October 1976 reflects the concept that internal security is an integral responsibility of the State that allows the enjoyment and free exercise of human rights. This integral protection should be extended to all areas in which such rights are to apply."<sup>40</sup>

The report did, then, acknowledge that a state of emergency existed in Uruguay, and specified in general terms the various rights from which derogation had been made, stressing the justification for such derogation in terms of security. The report dealt with the matter of derogation in purely legal terms, however, without attempting to assess the practical implications and effects, and it did not provide a detailed account of the circumstances which led to the resort to special measures or attempt to analyse the relationship between the exceptional situation and the powers invoked to deal with it.

The Human Rights Committee duly considered Uruguay's report, and an account of its questioning appears in the Committee's annual report for 1982.<sup>41</sup> The representative of the government, in introducing his country's report, drew attention to the existence of a state of emergency:

"He recognized that....his country had undergone a crisis, the effects of which were still being felt and which had had a negative impact on human rights in the country. It had been necessary to enact special legislation and to suspend some rights, on a strictly temporary basis, because of the grave situation menacing the life of the country. These measures entailed the dissolution of the national parliament, the General Assembly, as well as derogations from certain rights set forth in the Covenant. In particular, restrictions had been placed on the right of association and political meetings had been banned."<sup>42</sup>

The Committee conducted a thorough examination of the report, and expressed concern and disapproval in connection with a variety of matters. In particular, the Committee was critical of the fact that the report was based on the terms of the 1967 Constitution, even though many of its provisions had been eroded or circumvented for almost a decade by the emergency legislation and Institutional Acts. Indeed, the Committee showed a particular interest in the state of emergency, and requested further information regarding the specific rights suspended and the extent to which derogation was strictly required. The members of the Committee were unwilling, therefore, simply to accept the report before them as conclusive evidence of satisfactory protection of human rights in Uruguay, but clearly wished to obtain an accurate picture of the situation. They were, of course, fully aware that many allegations of violations had been made against the government, and their questioning was obviously influenced by the independent evidence available to them which suggested the existence in Uruguay of a consistent pattern of gross violations of human rights. In fact, reference was made to the Committee's own consideration of allegations received under the Optional Protocol procedure, which on more than one occasion had led the Committee to conclude that torture had taken place.<sup>43</sup> In spite of all this, however, the Committee was not especially censorious of the government, apparently considering that such an approach would be counter-productive given the limitations of the reporting procedure. In other words, it was felt that the procedure could be utilised most profitably to establish a constructive dialogue, and the Committee refrained from outright condemnation of the Uruguayan authorities in order to gain their confidence.

The Human Rights Committee seemed reasonably satisfied with the initial exchanges, and apparently believed that the Uruguayan government genuinely desired to continue discussions with a view to improving the protection of human rights in the country. The Committee clearly regarded the fact that the long overdue report had actually been submitted as a positive sign, and expressed optimism for the future:

"The Chairman expressed the Committee's satisfaction at the encouraging replies given by the representative of Uruguay and expressed the hope that the fruitful and constructive dialogue would continue. He informed the representative that, in accordance with the decision of the Committee on the periodicity of reports, the next report of Uruguay would be due in February 1983 and expressed the hope that this report would contain fuller information on all questions which had remained unanswered. He finally noted the undertaking that the Uruguayan authorities would respond fully to the requests of the Committee for information in connection with communications concerning Uruguay."<sup>44</sup>

Unfortunately, the Committee's hopes proved ill-founded: not only did the Uruguayan authorities fail to provide the information requested, but the report due in February 1983 had not been submitted by the middle of 1987, in spite of numerous reminders.<sup>45</sup> However, following the restoration of democracy, the Human Rights Committee received a message stating that the new government intended to observe the provisions of all international human rights instruments and expressing the appreciation of the Uruguayan people for the "many demonstrations of international solidarity at a time when their rights had been systematically ignored and violated, including, in particular, their appreciation for the close attention members of the Human Rights Committee had given to communications from Uruguay."<sup>46</sup> The Committee was subsequently informed by a note of 25 November 1985

that an interministerial working group had been established to prepare the second periodic report.<sup>47</sup> While it may be anticipated that the new civilian government will submit a full report in due course, then, it is clear that the Human Rights Committee was unable to precipitate any real improvement in the human rights situation in Uruguay through the reporting procedure.

In a sense, Uruguay is a bad example of the operation of the article 40 procedure, in view of the military regime's repressive policies and activities. The majority of states parties have submitted reports (although not always timeously) and entered into positive discussions with the Human Rights Committee. Of course, formal compliance with the obligation to submit a report is no guarantee that human rights are respected in practice; a state's report may point to a plethora of impressive safeguards which conceal the true position. It must be reiterated, therefore, that the purpose of the reporting procedure is not primarily to permit the exposure and condemnation of violations, but is to establish a constructive dialogue within which the Human Rights Committee can advise and assist governments in implementing the provisions of the Covenant. Such a process may well be fruitful provided the government in question is co-operative and displays the political will to fulfil its obligations in the spirit of the Covenant. Nevertheless, the ultimate aim of international measures of implementation is the prevention of violations of human rights, and their success must in the final analysis be judged on their efficacy in achieving this goal. From this perspective, the case of Uruguay illustrates the fragility of the structure of international law, as it exposes the limitations which exist and underlines how dependent the whole system is on the consent

and co-operation of governments. As far as the situation in Uruguay was concerned, the procedure under article 40 of the Covenant did not produce any discernible improvement in conditions, but failed to persuade the authorities to abandon their repressive policies or even to end the practice of torture. In conclusion, therefore, it may be said that while the reporting procedure is not without value, it is not equipped to deal with major human rights problems, even when the state involved is a party to the Covenant. The fact of the matter is that very little action can be taken when a government wilfully refuses to fulfil its international obligations. Certainly moral and diplomatic pressure can be applied by condemnation of repressive regimes, but where the violation of human rights is inherent in the socio-political policies of a government, it is unlikely that such pressure will have any significant result. The reporting procedure is, then, incapable of tackling the most serious human rights situations.

(b) Article 41 - Inter-State Complaints

Under article 41 of the Covenant, a state party may recognise the competence of the Human Rights Committee to consider communications alleging violation by that state of any of its obligations under the Covenant. The provision relates only to allegations made by other states parties which have accepted the procedure.<sup>48</sup> Briefly, articles 41 and 42 establish the following procedure: if the matter is not satisfactorily resolved between the two states involved, the Committee must seek firstly to secure a friendly solution "on the basis of respect for human rights and fundamental freedoms",<sup>49</sup> in which event

its report shall be confined to "a brief statement of the facts and of the solution reached".<sup>50</sup> If such a solution is not forthcoming, the report shall be confined to a "brief statement of the facts", with the written submissions and a record of the oral submissions of the parties appended thereto.<sup>51</sup> In either case, the report of the Committee is to be transmitted to the states parties concerned.<sup>52</sup> If the parties are not satisfied with this, the Committee may, with their consent, appoint an *ad hoc* Conciliation Commission, which shall make available its good offices with a view to obtaining an amicable solution.<sup>53</sup> If such a solution is reached, the Conciliation Commission is empowered to make a report with a brief statement of the facts and the solution reached;<sup>54</sup> failing this, the report may only state "its findings on all questions of fact" and "its views on the possibilities of an amicable solution."<sup>55</sup>

Unlike the procedure under article 40, this system is an accusatory one involving specific allegations of violations of the Covenant by states parties, and its ultimate purpose is to secure a remedy. The principal aim of the procedure is, however, to obtain a negotiated settlement rather than to publicise violations and censure governments, and the Committee's powers are therefore very limited. A brief statement of the facts of the case by the Committee might be effectively utilised to indict the government in question and thus increase international pressure on the government, but this appears to be as far as the Committee could go. Any further action requires the express consent of the state, and even if such consent is given and an *ad hoc* Conciliation Commission is appointed, its powers are not any greater than those of the Committee itself. The procedure is, then, dependent not only on initial acceptance by governments, but also on

their continuing co-operation in the conciliation process, and because of the limited aims of the procedure the powers conferred on the Human Rights Committee are not extensive. For this reason, the procedure is unlikely to have any significant impact on serious human rights situations.

It remains to be seen to what extent the Human Rights Committee will be prepared to utilise and develop the article 41 procedure to tackle serious violations of human rights and exert pressure on the governments of states which have accepted the procedure. Article 41 came into force on 28 March 1979, but although rules of procedure were adopted by the Committee that same year,<sup>56</sup> no case has yet been referred to the Committee, and it is impossible to pass judgement on the effectiveness of the procedure, even within its restricted goals. It does seem clear, however, that the limited scope of the procedure and the requirement of constant co-operation will render the process ineffectual in so far as the prevention of systematic violations is concerned, even when the particular regime is subject to the provisions of article 41. The problem is that if the Committee were to be granted wider powers, the effect would probably be to dissuade governments from accepting the procedure, and as it is only twenty one states had recognised the jurisdiction of the Committee under article 41 as at 24 July 1987,<sup>57</sup> a further indication of the reluctance of governments to expose themselves to potential criticism by an international agency. Uruguay has not yet accepted the procedure.

(c) The Optional Protocol - Individual Petition

The Optional Protocol to the International Covenant on Civil and Political Rights came into force along with the Covenant in 1976. It provides that states parties to the Covenant may recognise "the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."<sup>58</sup> There exist a number of specific rules relating to this procedure, both in the Optional Protocol itself and in the Provisional Rules of Procedure adopted by the Human Rights Committee,<sup>59</sup> and we shall look at these briefly.

If a communication is not *prima facie* inadmissible,<sup>60</sup> the accused state must be given an opportunity to comment on admissibility, and no decision declaring a communication admissible may be made until the state has been afforded this opportunity.<sup>61</sup> Either party - the individual or the state - may be requested to provide information relevant to the question of admissibility.<sup>62</sup> Once a communication has been declared admissible, the Human Rights Committee must bring it to the attention of the state, which within six months must submit "written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State."<sup>63</sup> This information is made available to the petitioner, who has six weeks in which to comment upon it.<sup>64</sup> Thereafter, the Committee considers the merits of the case "in the light of all written information made available to it by the individual and by the State Party concerned."<sup>65</sup> It subsequently forwards "its views", which are not legally binding,<sup>66</sup> to the individual and the state.<sup>67</sup> At any



time prior to the final adoption of its views, the Committee may also express an opinion on whether "interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation."<sup>68</sup>

The right of individual petition is potentially the most significant aspect of international measures of implementation. Inter-state procedures may be of value in certain circumstances, but they do leave the fate of the individual in the hands of governments, whereas the right of individual petition gives the victim himself direct access to international authorities which can seek to secure a remedy for him. The whole issue of human rights concerns the relationship between the individual and the state, and if the government itself is able to perpetrate violations because there are no effective safeguards available at the domestic level, it is essential for the individual to have some recourse at the international level without having to rely on the goodwill of foreign governments. Of course, it is necessary for the international authorities to have some influence over national governments in order for the right of petition to be effective, and we have already seen that such influence is usually very limited. This is true also of the Human Rights Committee, with the result that the general limitations which we have identified also affect the Optional Protocol procedure. The first problem is that the procedure is optional, and at present only thirty eight states have accepted it.<sup>69</sup> Secondly, the powers conferred on the Committee are far from comprehensive, and its views are not legally binding.<sup>70</sup> Thirdly, as few governments are prepared to accept direct international intervention in domestic affairs, the Optional Protocol does not provide any sanctions which the Committee could invoke to enforce its views even if they were binding. In spite

of these limitations, however, the Committee has shown a willingness to develop the petition procedure and utilise it to express an unequivocal view that specific articles of the Covenant have been violated by the governments of states parties to the Optional Protocol. This was apparent at an early stage in the Committee's existence:

"The Committee's "views" are not legally binding. However, the Human Rights Committee has asserted a rather wide discretion as to the scope and contents of its "views": in the one case concluded so far, relating to Uruguay, the Committee expressed far-reaching opinions on the substantive question whether the human rights set forth in the Covenant have been violated and on the duty of the state to take remedial action."<sup>71</sup>

This observation applies equally to subsequent cases, and it does appear that the Committee is willing to make as full use as possible of its powers under the Protocol to ensure the maximum effectiveness of the procedure. Thus, while the views of the Committee may not be legally binding, it has not been reluctant to state categorically that accused governments have indeed failed to ensure respect for particular rights, and in this way it has been able to put some pressure on the governments concerned. These governments may, of course, choose to ignore the views of the Committee with impunity, but at least the Committee is able to publicly censure regimes which violate human rights and in this way apply moral and political pressure. Only the most insensitive regimes can remain impervious to strong and consistent condemnation by an international agency of such eminence, although ultimately no action can be taken if governments do ignore the Committee's views, since the procedure depends on the co-operation of governments and their willingness to comply with the Committee's recommendations. As with the procedures already

discussed, the limitations of the petition system are exposed when political will on the part of the government is lacking.

The Human Rights Committee commenced its consideration of communications under the Optional Protocol at its 2nd session, in 1977, and in its annual report for 1987<sup>72</sup> the Committee stated that since that time a total of 236 communications had been submitted to it. Final views had been adopted in 77 cases,<sup>73</sup> in 68 of which the Committee had concluded that violations of the Covenant had taken place.<sup>74</sup> Article 6 of the Optional Protocol requires the Committee to "include in its annual report....a summary of its activities under the present Protocol", and although the actual consideration of communications must take place *in camera* in terms of article 5, paragraph 3, the Committee reproduces its final views in its annual report, and in this way has been able to publicise the violations of human rights by states parties.

Of the 68 cases in which the Committee concluded that violations had taken place up to the end of its 30th session in July 1987, 42 concerned alleged violations of the Covenant by the government of Uruguay, the other 26 relating to Suriname (8),<sup>75</sup> Zaire (5),<sup>76</sup> Madagascar (4),<sup>77</sup> Colombia (3),<sup>78</sup> Canada (2),<sup>79</sup> Netherlands (2),<sup>80</sup> Mauritius (1),<sup>81</sup> and Venezuela (1).<sup>82</sup> Apart from the cases involving Suriname, only 6 of these cases included allegations of violations of article 7 of the Covenant.<sup>83</sup> However, alleged violations of article 7 were involved in 34 of the 42 cases against the government of Uruguay,<sup>84</sup> and the Human Rights Committee concluded in 19 of these that violations had in fact occurred,<sup>85</sup> although torture was mentioned specifically in only 8.<sup>86</sup>

Of the 15 cases involving Uruguay in which allegations of violation of article 7 were not substantiated, three related to events which had occurred prior to the Covenant entering into force,<sup>87</sup> while in three others the allegations were considered too general.<sup>88</sup> In one case, the Committee concluded that article 6 (the right to life) had been violated, and considered it unnecessary in such circumstances to inquire whether any other articles had been violated.<sup>89</sup> In another case, the Committee was unable to find that no violation of article 7 had taken place,<sup>90</sup> and noted that the state had failed to show that it had ensured protection of the individual's rights in accordance with article 2 of the Covenant.<sup>91</sup> Indeed, six members of the Committee indicated that in their opinion a violation of article 7 had occurred.<sup>92</sup> In none of the cases did the Committee explicitly state that the allegations were unfounded,<sup>93</sup> and in fact in a number of the cases in which no violation of article 7 was established the Committee did conclude that there had been a violation of article 10, paragraph 1,<sup>94</sup> which relates to inhuman treatment,<sup>95</sup> but seems to require a lesser degree of severity than article 7, being applied in particular to unacceptable conditions of detention.

It is clear that the petition system succeeded in enabling victims of human rights violations in Uruguay to bring their plight to the attention of an international authority, and although a percentage of communications was rejected as inadmissible on technical grounds, the Human Rights Committee was able in a number of cases to reach the definite conclusion that article 7 of the Covenant had been violated. Moreover, the regular submission of communications containing allegations of ill-treatment and torture gave a clear indication of the situation within Uruguay, and the consistent findings of the

Committee confirmed the existence of a systematic practice of torture and ill-treatment in Uruguay. Indeed, in several cases, the Committee actually referred to earlier cases in which it had established that a practice of ill-treatment existed at Libertad prison.<sup>96</sup> The Committee has thus taken its role under the Optional Protocol seriously, and was not averse to stating categorically that the Uruguayan authorities had violated numerous articles of the Covenant, including article 7, and by expressing such an unequivocal condemnation of the military regime's activities it was able to apply some pressure in spite of the lack of co-operation.

The Committee's determination to make the procedure effective was indicated in its attitude towards the cases involving Uruguay. Firstly, the Committee refused to accept the government's attempts to challenge admissibility, either on the ground that domestic remedies had not been exhausted or because the particular matter was being examined by the Inter-American Commission on Human Rights. The Committee did not consider that the Uruguayan appeal system offered an effective remedy, and although in some instances it required withdrawal of petitions previously submitted to the Inter-American Commission before proceeding with its own consideration of communications, it did not regard communications submitted to the Inter-American Commission by unrelated third parties as constituting the same matter. Secondly, the Committee was quite prepared to formulate its views on the basis of the petitioner's allegations, particularly if witness statements were produced and torturers named,<sup>97</sup> when the government failed to supply satisfactory responses. The replies of the government, when provided at all, invariably failed to supply detailed information (other than details of arrest, charge

and sentence) and often were limited to attacks upon the Committee's powers and integrity or consisted of "denials of a general character offering no particular information or explanation".<sup>98</sup> The Committee rejected general refutations of specific allegations as insufficient, and in fact placed the burden of proof on the state to show that the allegations had been adequately investigated and appropriate action taken. This approach was adopted on the basis that where the government has access to information which the victim or his representatives may be unable to obtain, it would be unfair to place the onus of proof on the petitioner.<sup>99</sup> It was this attitude that enabled the Committee to reach definitive (though non-binding) decisions regarding the violation of the Covenant by Uruguay, since it accepted as fact those allegations which had not been specifically refuted. Indeed, the Committee went further, by asserting that the government was under an obligation to provide the victims with a remedy including, where appropriate, release from detention and compensation, and to ensure that similar violations did not occur in the future. It may also be noted that in a number of earlier cases, the Committee considered whether article 4 of the Covenant was applicable, thus permitting derogation, but concluded in each instance that there were no submissions which justified derogation.<sup>100</sup>

The decisions of the Human Rights Committee are undoubtedly of considerable significance in the development of international measures for the protection of human rights, and the Committee has certainly endeavoured to make the petition procedure more than a formality. The condemnation of a government by an authoritative international agency in a series of cases involving similar allegations constitutes an important moral and political influence, and its value should not be

under-estimated. However, optimism must be tempered by a recognition that severe limitations remain: the human rights situation in Uruguay showed no significant improvement in spite of the views expressed by the Committee over a number of years, and even in individual cases remedies were only forthcoming in a few instances involving less critical rights. Repression and torture continued, and the Committee remained powerless to enforce its decisions and secure effective protection of human rights. Of course, the Committee's views are not binding, and even if they were there is no enforcement machinery to ensure their implementation, and these are two of the ever-present problems in the protection of human rights by means of international law. The other major problem is that the great majority of repressive regimes are not parties to the Optional Protocol at all, and are therefore not subject to the attentions of the Human Rights Committee in this area. In a sense, the Uruguayan case is something of an anomaly, and is perhaps not a good illustration of the working of the petition procedure which, like the other procedures we have discussed, can be effective and valuable within its limitations, when the government concerned is willing to co-operate with the Committee and comply with its recommendations. This is more likely when non-fundamental rights are involved, and there have in fact been some successes in such cases, even in relation to Uruguay.<sup>101</sup> It is essential, then, that a petition system should exist, because even though it may be impotent in more extreme cases, it can fulfil an important role in a limited sphere. Moreover, while the procedure did not produce any discernible results in Uruguay, it did permit exposure and condemnation of the government in the international arena, which might not have been possible otherwise, and it may be that the

consistent criticism was a factor in the restoration of democracy in Uruguay. Nevertheless, the effect of the procedure in such situations is clearly very restricted, and while the Committee's views may have some influence, the Committee is not capable of direct intervention to protect the rights of the individual, even if the government is bound by the terms of the Optional Protocol.

The petition procedure is potentially a very important aspect of the international protection of human rights, but it can achieve genuine results only within the limitations imposed by the strictures of international relations and political attitudes which demand non-intervention in internal affairs and reject the idea of direct supervision of national governments by international authorities. The limitations are the same as those which we have already identified in relation to the two procedures mentioned above, and are indicative of the general limitations on international law.

(d) ECOSOC resolution 1503

The procedure established pursuant to resolution 1503(XLVIII) of the United Nations Economic and Social Council is of particular interest and significance because it does not rely upon the prior consent of the state, but can be invoked even in the case of the most repressive and brutal regimes which consistently refuse to accept any of the optional procedures established by international conventions and, indeed, often decline to ratify such conventions at all. In spite of the considerable potential of such a procedure, however, it has not been utilised to any great effect in practice and, in fact,



has probably been less successful and valuable than the more restricted Optional Protocol procedure.

In order to appreciate the implications of resolution 1503, it is necessary to trace briefly the historical developments which preceded its adoption.<sup>102</sup> In 1959, the Economic and Social Council adopted resolution 728F(XXVIII), in which it requested the Secretary-General of the United Nations to compile lists of communications concerning human rights, "however addressed", for the members of the Commission on Human Rights,<sup>103</sup> recognising, however, that the Commission had no power to take action in relation to such communications.<sup>104</sup> The purpose was simply to keep the Commission informed of the thousands of communications which were being received each year from people who mistakenly assumed that the Commission had authority to intervene in order to protect human rights, so that it could discharge its functions more intelligently.

In 1967, as a result of the increasing influence of the newly independent Asian and African members of the United Nations, the Economic and Social Council authorised the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities "to examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of *apartheid* as practised in the Republic of South Africa and in the Territory of South West Africa....and to racial discrimination as practised notably in Southern Rhodesia", as disclosed in communications received under resolution 728F.<sup>105</sup> The Commission was empowered, moreover, to "make a thorough study of situations which reveal a consistent pattern of violations of human rights....and report, with recommendations thereon, to the Economic and Social Council".<sup>106</sup>

Thus, although it had been recognised in resolution 728F itself that the Commission had no authority to act upon the communications received, the anti-apartheid lobby succeeded in persuading the international community that certain particularly objectionable violations of human rights, namely apartheid and racial discrimination, warranted extraordinary measures, and the Commission was accordingly authorised not only to examine relevant situations, but also to make recommendations to the Economic and Social Council on the basis of its investigations.

In 1968, there reported a working group set up by the Sub-Commission to "analyse the possibilities of an appropriate procedure for making a careful study of communications relating to the prevention of discrimination and protection of minorities".<sup>107</sup> The report concluded that, the existing procedures being unsatisfactory, new machinery ought to be created. It was this necessity which led to the eventual adoption by the Economic and Social Council of resolution 1503(XLVIII) on 27 May 1970.

Resolution 1503 authorised the Sub-Commission to appoint a working group of up to five of its members to meet once a year for up to ten days immediately prior to the Sub-Commission's session in order to "consider all communications, including replies of Governments thereon, received by the Secretary-General under Council resolution 728F(XXVIII) of 30 July 1959 with a view to bringing to the attention of the Sub-Commission those communications, together with replies of Governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission".<sup>108</sup> The Sub-Commission must thereafter consider these communications and any

replies "and other relevant information" in private session in order to decide whether to refer to the Commission "particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights".<sup>109</sup> The Sub-Commission may declare communications inadmissible under its own rules of procedure<sup>110</sup> or may request the working group to reconsider them.

The Commission on Human Rights may set up its own working group to make a preliminary study of a situation referred to it. The function of the full Commission is to examine the situation and ascertain whether it merits a "thorough study....and a report and recommendations thereon" to the Economic and Social Council<sup>111</sup> or, alternatively, whether an *ad hoc* committee should be established to carry out an investigation, although this requires the "express consent" and "constant co-operation" of the state concerned.<sup>112</sup> Consideration by the Commission under resolution 1503 is confidential,<sup>113</sup> and it is not possible to comment on the actual process, but it appears that the Commission invites an accused government to send a representative.<sup>114</sup>

Although the procedure under resolution 1503 does not provide for a binding decision, it is potentially an extremely important aspect of the international protection of human rights: a system whereby serious violations of human rights can be investigated and condemned by an international agency, irrespective of the country involved, clearly has a unique position among the various international procedures, in so far as it does not rely upon prior acceptance by the state. Moreover, in theory the Commission's recommendations could ultimately result in action by the Economic and Social Council by virtue of its general powers under the United Nations

Charter. The procedure was intended to invoke the threat of such action as its ultimate sanction, but the political constraints within the United Nations make it highly improbable that the Economic and Social Council would ever be able to proceed with effective action except in the case of weak and politically isolated regimes. Indeed, no situation has ever been referred to the Economic and Social Council by the Commission on Human Rights under resolution 1503,<sup>115</sup> with the result that no regime has yet been subjected to public censure under that procedure. The provision that action envisaged must "remain confidential until such time as the Commission may decide to make recommendations to the Economic and Social Council"<sup>116</sup> prevents any direct public condemnation prior to that stage, and by depriving the process of the only sanction available it obviously restricts the value and impact of the earlier stages of the procedure.

The potential of the resolution 1503 procedure has not been realised for a number of reasons. One of the major problems has been the confidentiality rule, which was initially interpreted as precluding any mention in public meetings of a state which was being considered under resolution 1503, thus preventing any public statement condemning the violation of human rights in such states, even under an entirely different procedure. Subsequently, this rule was relaxed to some extent, so that it now applies only to decisions taken under the resolution 1503 procedure and relative confidential material, but the consideration of situations under resolution 1503 remains strictly confidential, and it seems highly likely that this reduces the effectiveness of the system, although this view has been challenged:

"The main usefulness of the procedure is twofold:

a) confronting the human rights situation in a given country within the framework of the confidential procedure may facilitate the

Commission's eventual decision to deal with it in public session....most "country oriented" (public) procedures have been preceded by a decision of the Sub-Commission to forward communications to the Commission within the framework of the confidential procedure;

b) situations in countries neglected by world public opinion can be brought to the attention of the Sub-Commission - and eventually the Commission - within the framework of the confidential procedure, although it is highly unlikely that these organs would ever address themselves to these situations if there was no such procedure.

However, since the adoption of ECOSOC resolution 1503(XLVIII) of 27 May 1970, a tremendous development has taken place in the form of new public procedures. Particularly the "thematic" procedures, which grew out of the "country oriented" procedures - to which development the confidential procedure contributed substantially - could decrease somewhat the importance of the confidential procedure. The "thematic" working group and special rapporteurs can act much more swiftly than the organs involved in the confidential procedure. The confidential procedure probably suffers more from its inability to react immediately on urgent information and from the difficulty of breaking through the majority requirements of the Sub-Commission's Working Group on communications, than from its confidential nature."<sup>117</sup>

In spite of these observations, the fact remains that the confidentiality of the resolution 1503 procedure prevents publicisation of the gross violations which it uncovers and may even have the effect of sheltering governments from the sanction of public opinion. For this reason, the public procedures have often been preferred.

A further weakness of the resolution 1503 procedure results from the composition of the Commission on Human Rights. The fact that the members of the Commission are representatives of their respective governments means that there is a far greater sensitivity to political pressures than, for example, in the Human Rights Committee. The

Commission thus often appears to place political considerations above the protection of human rights, and indeed on occasions it seems to have little genuine concern with the promotion of effective protection of human rights. This was apparent in early 1982, when Theo van Boven, the Director of the United Nations Human Rights Division, resigned in protest over the attitude which the Commission was displaying. Mr van Boven had always been a staunch supporter of a more assertive role for the Commission, and had carried out his duties with "imagination, courage, frankness and a deep personal concern for the victims of human rights violations",<sup>118</sup> but many governments are opposed to such an approach, and the Commission did not respond to Mr van Boven's example, in spite of the efforts of some of its members. The fact is that the majority of governments are apprehensive of any increase in the powers of the Commission or the creation of more effective machinery which might lead to future embarrassment, and accordingly they instruct their representatives on the Commission to strongly resist any attempts to develop procedures of this type. These factors may help to explain the Commission's failure to utilise the resolution 1503 procedure effectively, and also its reluctance to refer situations to the Economic and Social Council. Thus, although the adoption of resolution 1503 was itself a significant breakthrough, the political constraints to which the Commission is subject have ensured that the procedure cannot function to its full potential. The fact that the members of the Commission cannot act independently means that political and ideological considerations impede progress in the development of its role.

The attitude of the Commission has also led it into conflict with the Sub-Commission, which is less susceptible to the vagaries of

political interests (its members not being government representatives) and has consequently been able to adopt a more objective and sincere approach to the protection of human rights. However, the Sub-Commission's functions under resolution 1503 are limited, and although it has endeavoured to carry out its duties conscientiously, the Commission's ineffectiveness has deprived the whole procedure of any real impact. Indeed, the Commission has been critical of the Sub-Commission's attitude and has censured it for exceeding its mandate. Of course, the Commission's own powers under resolution 1503 are not extensive, and it is fettered by the confidentiality rule, but it does seem that the Commission has not done as much as it might have done to ensure that the system made some contribution to human rights protection, and its failure to refer any situations to the Economic and Social Council does indicate an absence of will to deal firmly with serious human rights problems. It may be that in confidential exchanges with governments the Commission has had successes in securing respect for human rights, but this must be open to doubt, particularly in view of the fact that a number of situations have been examined by the Commission over several years without any apparent sign of improvement. Thus, while the intentions behind resolution 1503 were laudable, the restrictions imposed by the confidentiality rule and the absence of any real powers meant that the system was never likely to achieve much, and the lack of motivation on the part of the Commission has ensured that this has been the case. Even if a situation were referred to the Economic and Social Council, the political implications would probably prevent action being taken.

The resolution 1503 procedure was initially put into operation in 1972, and at first the Sub-Commission acted rather tentatively, referring back to its working group the communications which had been forwarded to it, on the grounds that they were not accompanied by government replies. This seemed to misinterpret the requirement for government replies "if any".<sup>119</sup> In 1973, the Sub-Commission did refer a number of situations to the Commission,<sup>120</sup> but the Commission failed to consider these, deciding instead to create a working group of its own to meet prior to the Commission's following session. The Sub-Commission referred several more situations to the Commission in 1974,<sup>121</sup> and added others the following year, at which time the imminent entry into force of the Optional Protocol led to some doubt about the future of the resolution 1503 procedure, which was to be reviewed "if any new organ entitled to deal with....communications should be established within the United Nations or by international agreement."<sup>122</sup> In 1976, the Sub-Commission adopted a resolution requesting the Commission to recommend that the Economic and Social Council review the resolution 1503 procedure, since the Optional Protocol had come into force.<sup>123</sup> Some sponsors suggested that the entire system might be abolished, indicating the opposition which existed to the non-optional procedure, but arguments were also put forward in favour of the continuation of the procedure as complementary to the Optional Protocol, and the resolution 1503 procedure has in fact been retained. It may be noted that the Human Rights Committee has stated that the two systems are distinguishable.<sup>124</sup>

In 1978, the President of the Commission on Human Rights announced that the Commission had decided in private session to take



action under resolution 1503 in connection with the situations in nine countries, including Uruguay, and this practice of naming states under consideration has been followed since 1978.<sup>125</sup> Uruguay remained under constant consideration between 1978 and 1984, but it appears that the only action taken by the Commission was to request the Secretary-General of the United Nations to use his good offices to try and influence the Uruguayan authorities. In violation of the confidentiality rule, the Uruguayan government welcomed the Commission's co-operative attitude in a declaration in the newspaper El Dia,<sup>126</sup> indicating the ineffectiveness of the procedure and its total failure to bring about a change of attitude in the government.

Certain interesting developments took place in 1979 in relation to the Commission's consideration of the situation in Equatorial Guinea, when confidential material was de-classified and the matter was opened up for public debate under resolution 1235. In June 1975, certain "individuals from Switzerland" had addressed a communication to the Secretary-General of the United Nations alleging violations of human rights by the government of Equatorial Guinea,<sup>127</sup> and further material had subsequently been forwarded. The initial communication, consisting of five chapters,<sup>128</sup> included references to the constitution and laws of the country, a list of persons allegedly assassinated, statements by individuals, copies of press articles and a report by a visiting French lawyer. It provoked a thirteen page response from the government, which claimed to know who had sent the communication and denounced it as politically motivated, contrary to the Sub-Commission's rules on admissibility.<sup>129</sup> However, the Sub-Commission referred the situation to the Commission, and the government again supplied observations, stressing its rejection of the

Commission's competence to take action. In 1977, the Commission apparently requested the government to allow a visit by a representative of the Secretary-General, and the following year it invited the government to send its representative to appear before it, but neither of these proposals was accepted by the government, and in 1979, as a result of the government's total failure to co-operate any further, the Commission decided to discontinue its consideration of the situation under resolution 1503 and deal with the matter in public debate.<sup>130</sup> The decision to de-classify the confidential material was endorsed by the Economic and Social Council,<sup>131</sup> and the Commission subsequently appointed a special rapporteur to carry out a thorough study of the situation.<sup>132</sup> The Commission made certain recommendations to the Economic and Social Council under resolution 1235, but by that time the regime against which the allegations had been made had been overthrown.

The Equatorial Guinea case provides a striking illustration of the limitations of the resolution 1503 procedure. Essentially, the confidentiality rule meant that the sanction of public condemnation could not be invoked throughout the period in which the situation was under consideration, yet no progress could be made relying on more diplomatic means, and in the end it proved necessary to resort to an alternative procedure so that pressure could be put on the government by means of adverse publicity. The problems created by the confidentiality rule have led to disillusionment over resolution 1503, and although the Commission has continued to utilise the system and publicly identify states under consideration,<sup>133</sup> it does not appear to have had much success in persuading governments to respect human rights. The Commission has not acted as envisaged in resolution 1503,

but has preferred to enter into a confidential dialogue with the government in question, relying on the "implied threat of an unfavourable report to the ECOSOC as a means of pressuring the government to improve the human rights situation in its country. Consequently, a government which 'co-operates' with the Commission, by continuing a discussion with it, avoids condemnation."<sup>134</sup> Clearly the threat of a report to the Economic and Social Council does not carry much weight, particularly in view of the Commission's reluctance to take this step: the procedure is thus regarded by some almost as a protection for repressive regimes, and it is for this reason that increasing use has been made of the public procedure and special rapporteurs. In fact, several non-governmental organisations have questioned the value of submitting communications under resolution 1503.

In the fifteen years during which the resolution 1503 procedure has been operational, it has achieved very little in preventing the continuation of gross violations of human rights, even in those situations which the Commission on Human Rights has endeavoured to deal with. Certainly as far as the situation in Uruguay was concerned, the Commission's consideration of the situation for several consecutive years did not result in any discernible improvement and, as with Argentina, it required a change of government to remove Uruguay from the Commission's agenda. The fact is that, given the present structure of international political relations, the impact of international human rights procedures relies heavily on public opinion and the resultant pressure which may be exploited at the diplomatic level, and for this reason public discussion under resolution 1235 has been of more value and effect than the Commission's activities under

resolution 1503, which the confidentiality rule has rendered virtually impotent. Of course, it should be stressed that the resolution 1235 procedure is also of limited value, largely because of the political composition of the Commission and the lack of effective enforcement machinery. Certain members of the Sub-Commission have actually voiced doubts as to the value of an inter-governmental agency such as the Commission in the field of human rights protection, in view of the conflict of interest which arises between the protection of human rights and loyalty to national governments. In spite of this, however, the Commission has discussed a number of situations in its public deliberations, and while its ability to take substantive action is curtailed by the usual limitations, it has been able to put pressure on governments through this process.

The Commission on Human Rights has also appointed several special rapporteurs to examine particular types of violation, including a special rapporteur on torture, who submitted his first report in 1986,<sup>135</sup> recommending that "governments should ratify the Convention against Torture and in the meantime should enact laws giving their judicial authorities jurisdiction to prosecute and punish persons who have committed torture."<sup>136</sup> He also recommended that:

- "- all judicial systems should contain provisions under which evidence extracted under torture cannot be admitted;
- incommunicado detention should be kept as short as possible and should not exceed seven days;
- habeas corpus or amparo procedures should be strictly respected and should never be suspended;
- interrogation of detainees should only take place at official interrogation centres, and
- all security and law enforcement personnel should be provided with the Code of Conduct for Law Enforcement Officials and receive instruction on its requirements."<sup>137</sup>

The report indicates that the rapporteur sent information on allegations of torture to thirty three governments (naming only those already on the Commission's agenda), and also made urgent appeals to eight governments.<sup>130</sup> The rapporteur's mandate was extended for a further year on 13 March 1986, and it remains to be seen whether this office will be able to achieve success where the longer-established procedures have failed.

To sum up, then, in spite of the potential of the resolution 1503 procedure, the system has proved virtually a complete failure, having had little discernible effect on the continuing violation of human rights by governments. In particular, it had no significant impact on the situation in Uruguay. Moreover, while the resolution 1235 procedure does not suffer from the limitation of confidentiality, it too has had only a limited success in preventing gross violations of human rights, and it has certainly not proved an efficient means of tackling such violations. Finally, the recent appointment of a special rapporteur on torture, while it is encouraging in indicating some genuine concern on the part of the Commission on Human Rights and will no doubt fulfil a useful role, seems unlikely to be the answer to the problems which we have detailed. While the rapporteur's mandate will not be restricted to states which have accepted his jurisdiction, he will have no real executive powers to support his recommendations, and in the final analysis he will be unable to ensure the protection of individuals from being subjected to torture.

(e) The Optional Protocol and Resolution 1503

In this section, our purpose is simply to point out the principal differences between the procedures discussed in the two preceding sections, in order to identify factors which have proved advantageous or disadvantageous to the effective protection of human rights. The overall objectives of the two systems are, of course, quite distinct, although ultimately both are concerned with securing full protection of human rights. The Optional Protocol procedure is first and foremost a petition system whereby an individual victim of a violation may seek a remedy through an international tribunal, namely the Human Rights Committee, whose function is to promote respect for human rights by advising the government in question that it considers there has been a violation of the terms of the International Covenant on Civil and Political Rights. While the finding of a violation implies that the government is under an obligation to ensure that similar incidents are not occurring and will not occur in the future, it is possible for the violation to be an isolated one, so that there is no question of an administrative practice or governmental policy, and in such a case the Committee's views that a violation has occurred will not necessarily constitute a general indictment of the government's attitude to human rights, particularly if a remedy is promptly supplied. Of course, where the Human Rights Committee concludes in a number of cases relating to the same state and involving the same rights that violations have taken place, it can clearly be inferred that a policy of systematic violation exists within that state.<sup>139</sup> Thus, even though the individual petitioners may fail to obtain satisfaction, the Committee's views may increase general pressure on

the government. This is not, however, the primary purpose of the petition system, and such a result is incidental to the aim of securing a remedy for the particular victim.

The resolution 1503 procedure, on the other hand, is not principally concerned with obtaining a remedy for individual victims who submit petitions to the United Nations, but is aimed rather at the underlying situation, the general socio-political climate which permits or causes serious violations of human rights to occur. The aim of the resolution 1503 procedure is to challenge the repressive policies of governments with a view to precipitating a change of attitude towards human rights, leading to a cessation of gross violations of human rights. Consequently, even if communications are received from individuals - and in practice virtually all are submitted by non-governmental organisations<sup>140</sup> - they will not be considered under resolution 1503 unless they reveal a consistent pattern of gross violations of human rights.<sup>141</sup> The procedure is not concerned with isolated incidents, but is intended to confront major human rights problems which require decisive and radical action by the international community. Of course, the ultimate beneficiaries of such action are individuals, but the process is restricted to the most serious situations, and to this extent it is not equipped to deal with certain areas which are covered by the Optional Protocol. In other ways, however, resolution 1503 is wider in scope than the Optional Protocol, and it is important to consider these differences.

Firstly, the Optional Protocol is more restricted with regard to the source of the communication: under the terms of the Protocol, communications must emanate from victims of human rights violations, or at least from someone acting on their behalf and having a

sufficient link,<sup>142</sup> whereas the Sub-Commission's rules of procedure under resolution 1503 permit communications from "a person or group of persons who, it can be reasonably presumed, are victims..., any person or group of persons who have direct and reliable knowledge of those violations, or non-governmental organizations acting in good faith in accordance with recognized principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the United Nations and having direct and reliable knowledge of such violations."<sup>143</sup> Knowledge may even be second-hand.<sup>144</sup> Moreover, there need be no relationship between the person submitting the communication and the state against which the allegation is made, whereas under the Optional Protocol communications may only relate to persons over whom the state in question has "jurisdiction".<sup>145</sup> These distinctions reflect the different aims of the two procedures: resolution 1503 is concerned with serious situations in which more than the fate of an individual is at stake, and is consequently less strict about the source of information. In fact, a person or group submitting a communication plays no further part in the proceedings, and does not even have a right to be informed of the outcome.

Secondly, resolution 1503 is wider with regard to the range of rights covered: the Optional Protocol refers specifically to the rights detailed in the International Covenant on Civil and Political Rights,<sup>146</sup> but resolution 1503 does not contain any limitation other than its requirement for there to be a consistent pattern of gross violations. It is not entirely clear whether this was intended to refer to the scale on which the violations occur or to the type of right involved, although the reference to apartheid and racial discrimination indicates that the problem must attain a certain level



in terms of geographical or numerical extent. On the other hand, the appointment by the Commission on Human Rights of special rapporteurs to examine particular types of violation suggests that the type of right may also be relevant. It is possible that only the most serious violations of human dignity were intended to fall within the scope of resolution 1503, thus excluding purely civil and political rights, and this would of course severely limit the application of the procedure. Such an interpretation seems unwarranted, however, and it would be more appropriate to regard large-scale violations of any right as gross violations. As we have seen, the Commission on Human Rights has adopted a dual approach, examining individual states as well as studying particular rights.

Thirdly, and most importantly, the procedure under resolution 1503 may be invoked against any state whatsoever, apparently even one which is not a member of the United Nations.<sup>147</sup> The Optional Protocol is, of course, applicable only to those states which have recognised the competence of the Human Rights Committee to consider communications relating to them. This is the most serious limitation on the procedure established under the Protocol, and although an increasing number of governments has accepted the Committee's jurisdiction, a large majority has as yet failed to do so, and many of the world's most repressive regimes are not subject to the supervision of the Committee, which is powerless to take any action against them. It is clear, then, that an optional procedure is not capable of securing comprehensive protection of fundamental human rights.

There is a fourth area in which resolution 1503 appears to be superior, at least in theory: the powers conferred by resolution 1503 are broader than those of the Human Rights Committee under the

Optional Protocol. The Committee's views, which are its ultimate authority, are not legally binding, and their function is really to put moral pressure on the government in question, whereas the resolution 1503 procedure can theoretically result in action being taken by the Economic and Social Council or the General Assembly. However, even if this stage in the process should be reached, it is highly improbable that such action would ever be taken, because of the political implications. Moreover, the confidentiality rule means that there can be no public criticism of a government prior to this stage, and the Commission on Human Rights in any event appears to lack any real will to utilise the procedure to full effect. In practice, therefore, the broader powers of the Commission have proved to be of little value. The Human Rights Committee, on the other hand, has shown itself prepared to make full use of its limited powers under the Protocol, and has not been reluctant to censure governments in respect of their human rights violations. In this way it has been able to publicise violations and embarrass governments, although the actual effects have been negligible, and it must always be borne in mind that the Committee has been able to achieve this only in the case of a few states. It remains to be seen what course the Committee would take if dealing with one of the world's political powers. Nevertheless, the attitude of the Human Rights Committee has been much more positive than that of the Commission on Human Rights, which has effectively enervated the resolution 1503 system, and there can be little doubt that the explanation for this difference lies in the composition of the two bodies. The major problem with the resolution 1503 process is that it is open to the dictates of political expediency and the pressures of governmental interference: the

activities of the Commission are ultimately determined by governments which, as we have seen, are extremely defensive of their sovereignty and on the whole strongly opposed to any increase in international involvement in internal human rights matters. For this reason, any proposal to strengthen international machinery is doomed to failure in the Commission's debates. It is true that some confidential decisions have been taken under resolution 1503 and that public examination of states is possible under resolution 1235, but the fact remains that the nature of the United Nations has prevented the development of these systems into effective mechanisms.

It is clear that both the procedures discussed in this section suffer from severe limitations, and that both could be significantly improved. In particular, the Optional Protocol system would have a much greater impact if it were mandatory, while the resolution 1503 procedure would benefit from the elimination of excessive confidentiality and the transfer of responsibility to a non-governmental agency. The powers of the respective bodies could also be extended to advantage. In fact, the optimum solution might be the creation of a single independent authority with extensive powers of investigation, which could examine isolated incidents or general situations in any state and pronounce authoritatively whether any violation of human rights has taken place or whether a consistent pattern of gross violations exists. Of course, there is a complete absence of political will to create such an agency, and in particular there is opposition to the establishment of any process which is mandatory, so that it is of the utmost importance that existing procedures should be developed to their full potential, yet even this aspiration is frequently frustrated by political considerations. The

existing measures are not without value, in spite of their restricted application, and they do fulfil a role in the protection of human rights, each covering a specific aspect of protection, and it may be that at present the best that can be hoped for is a range of measures of varying degrees of potency, so that strong optional procedures can be applied to states which accept them, while less co-operative regimes can be monitored through less onerous (and therefore less objectionable) machinery. In the final analysis, however, this entails resignation to the fact that it is not possible to ensure effective protection of human rights by means of international law.

#### (f) Regional Systems

A comprehensive consideration of the procedures and practices of the two major regional systems of human rights protection, namely the European and Inter-American systems, is outwith the scope of this study, but it is nonetheless essential to mention them briefly at this point in order to indicate the measures provided for in the relevant conventions and to inquire whether these have proved any more successful than the United Nations procedures.

The European Convention on Human Rights has been in force for many years now, and numerous important developments have taken place within the framework created by it. The Convention establishes a system of inter-state complaint,<sup>148</sup> and also provides for the consideration of petitions "from any person, non-governmental organization or group of individuals claiming to be the victim of a violation".<sup>149</sup> However, a petition may only be considered by the European Commission on Human Rights if it relates to a state which has

recognised the competence of the Commission to deal with such petitions.<sup>150</sup> If the Commission fails to secure a "friendly settlement" of the matter, it makes a report stating whether it considers a violation has taken place.<sup>151</sup> The case may be referred to the European Court of Human Rights<sup>152</sup> by the Commission itself or by states parties under certain conditions.<sup>153</sup> The decision of the Court is final and binding.<sup>154</sup>

The European system has in general functioned satisfactorily, and this is largely due to the "common heritage of political traditions, ideals, freedom and the rule of law"<sup>155</sup> which has produced similar constitutional institutions and political structures within the states of western Europe: a high proportion of the member states of the Council of Europe are parliamentary democracies in which the rule of law is respected and in which there exists a genuine desire to defend the liberty of the individual and to promote the effective protection of fundamental human rights. The recognition of many of the rights enshrined in the European Convention was often an integral feature of the political evolution of western European nations, and concern for civil and political rights has been a principal aspect of the political heritage of these nations, so that the governments of western Europe are by nature defenders of the democratic institutions and the rule of law which support these rights. There is, therefore, a more uniform conception of human rights and the manner in which they ought to be secured than can be achieved within the more cosmopolitan and eclectic atmosphere of the United Nations. This is not to say that violations of human rights do not occur in liberal democracies; however, violations are often isolated incidents or at least do not occur as systematic patterns involving core rights, and for this

reason governments are usually not averse to modifying their laws and practices in order to bring them into line with international standards as established in the Convention and interpreted and applied by the Commission and Court. Where democratic processes and institutions are permitted to function properly, then, it is unlikely that any violations of the Convention which do occur will have resulted from policies which the government considers critical, so that the problem may be rectified without major revision of ideological goals or political strategies. Furthermore, the attitude of western European governments makes them more amenable to supervision by international agencies, and the high level of compliance with the decisions of such agencies has been the foundation of the success of the European system.

While democratic institutions inhibit governments from pursuing repressive policies involving serious violations of human rights, so that consistent patterns of gross violations do not normally occur in western liberal democracies, there are circumstances in which a breakdown of democracy can take place and constitutionally elected authorities can be replaced by a repressive authoritarian regime. When this happens, the ultimate dependence of the European system on voluntary respect for the rule of law becomes apparent. The most striking example of this in recent years was the military takeover in Greece in the late 1960's.

The junta which seized power in Greece embarked upon a course of repression which involved the violation of numerous provisions of the European Convention, and certain states brought the situation to the attention of the European Commission on Human Rights under the inter-state procedure. The Commission found *inter alia* that torture had

been employed systematically.<sup>156</sup> The problem in this instance, then, was not the reluctance of the international authority to condemn a government, but rather the lack of effective sanctions by which its decision could be enforced. Certainly, Greece could have been expelled from the Council of Europe, and this option was considered, but it is unclear what positive results this could have achieved. In fact, the junta pre-empted such action in any event by withdrawing from the Council of Europe, effectively producing the same result: the Greek government was no longer bound by the terms of the Convention, and apart from a degree of political embarrassment was more or less free to pursue its repressive policies. Thus, although the European system certainly permitted a clear condemnation of the violations perpetrated by the Greek authorities, the lack of co-operation exposed the limitations which exist even within what is probably the most advanced and successful system in the world. When a government adopts policies which involve the violation of human rights, and is consequently unwilling to comply with the recommendations of an international authority, the European system has to contend with the problems familiar to other international procedures.

The question of torture also arose in relation to Northern Ireland, and although the European Court disagreed with the Commission over the definition of torture and decided that the practices involved amounted only to inhuman treatment,<sup>157</sup> there was a condemnation of the government of the United Kingdom in respect of its violation of article 3 of the Convention. However, the practices in question had been stopped by the government some years prior to the Court's decision and, while that decision is important in so far as it

provides guidelines as to the meaning of article 3, it was not instrumental in ensuring prevention of ill-treatment. On the other hand, the initial international concern over the practices does appear to have influenced the government in its decision to terminate the use of the 'five techniques'.

The European system is significant and successful, then, but only within certain limits and under particular conditions. Essentially, it is the high degree of willingness to comply with the findings of the supranational authorities which makes the system effective, and in view of the fact that violations of core rights often result from governments pursuing policies they regard as essential, there must be some doubt about the ability of the system to produce results when such a situation arises.

The American Convention on Human Rights came into force in 1978,<sup>158</sup> and the Inter-American Court of Human Rights which it established has so far not dealt with any contentious cases, so that it is too early yet to make any valid assessment of the effectiveness of the system.<sup>159</sup> The American Convention actually takes the converse approach to that adopted in the European Convention, making the right of individual petition mandatory and the right of inter-state complaint optional.<sup>160</sup> Separate acceptance of the compulsory jurisdiction of the Court is also required.<sup>161</sup> The Inter-American Commission on Human Rights has, however, been functioning for some time: in 1960, the Council of the Organization of American States adopted the Statute of the Commission, which was established as "an autonomous entity of the Organization of American States",<sup>162</sup> but when the amended OAS Charter came into force in 1970, article 51 designated the Commission an organ of the Organization. Prior to the



entry into force of the American Convention on Human Rights, the Commission's responsibilities in relation to the protection of human rights were based on the American Declaration of the Rights and Duties of Man 1948,<sup>163</sup> but it was subsequently empowered to consider communications from individuals,<sup>164</sup> and now operates under the Convention and a new Statute, although it retains its original jurisdiction over all OAS members.

The Inter-American Commission's procedures are somewhat more flexible than those of its European counterpart. In addition to its duties under the Convention, the Commission may adopt a more direct approach to the protection of human rights, and may in fact take action on its own initiative. It may send emergency telegrams or otherwise approach governments when matters of some urgency arise, and it may also seek authority to conduct an on-site investigation, on which it may issue a report even without the consent of the government concerned. The Commission is thus able to deal with a wide range of issues and problems outwith the scope of the American Convention on Human Rights.

There are differences between the political composition of the OAS and that of the Council of Europe, and the observations which we made in relation to Europe are not relevant to the Americas, where governments are not so willing to comply with the findings of the Inter-American Commission, especially when it operates outwith the terms of the Convention. Nevertheless, in spite of the difficulties in securing the co-operation of regimes which are often extremely repressive and hostile, the Inter-American Commission has played a very important part in the development of human rights protection in the hemisphere, and has addressed itself to a large number of

situations. In some cases, it has been able to secure protection, while in others it has been powerless, impeded like the European Commission and other agencies by the lack of effective sanctions to enforce its decisions.

The Inter-American Commission did, of course, show concern over the situation in Uruguay, and attempted to pressurise the government on several occasions. In 1977, the Commission, having examined information relating to the case of a Uruguayan allegedly tortured to death, passed a resolution declaring that there were strong indications that the victim had died as a result of violence and recommending that the government investigate these allegations and inform the Commission of the measures taken to prevent a recurrence.<sup>165</sup> The Uruguayan authorities rejected the competence of the Commission to deal with the matter, and refused to provide the requested information regarding the death in custody on grounds of national security. As a result, the Commission included the resolution in its annual report to the OAS General Assembly,<sup>166</sup> which called on the government to comply with the recommendations of the report.

One of the main themes of the 9th General Assembly of the OAS, in October 1979, was the violation of human rights, and a report was presented noting some improvements but concluding that no real breakthrough had been achieved. A resolution condemning violations in Chile, Paraguay and Uruguay was approved by 19 votes to 2 (with 5 abstentions). The resolution urged the government of Uruguay to consider inviting the Inter-American Commission on Human Rights to visit the country and, in the meantime, to "implement comprehensively the measures recommended by the Commission in its previous report."<sup>167</sup>

Despite these efforts, the situation in Uruguay remained unchanged, although the consistent pressure from the OAS no doubt contributed to the restoration of democracy.

Criticism from within the context of a regional organisation is probably more effective and useful than criticism in international systems where the application of universal standards often means the imposition of foreign ideas. Of course, it is not so much the geographical proximity which is relevant as the homogeneity, the similarity in political and social outlook, but even when this affinity exists, regional systems are still dependent upon the willingness of governments to fulfil their international obligations and co-operate fully with the appropriate authorities: even in regional systems states retain their essential sovereignty and cannot be compelled to take any action against their will.

#### (g) Conclusions

The conclusions which can be drawn from the discussions in this chapter are fairly obvious: international procedures as they presently exist suffer from limitations of an extensive nature, and rarely fulfil their primary function of restraining national governments and preventing the violation of human rights unless these governments happen to be willing to implement the recommendations and decisions of international agencies. When there is a refusal to comply with the directions of such agencies, they are powerless to ensure the protection of human rights, and this situation is exacerbated by the limited scope of their mandate as well as by the optional nature of most procedures. As far as the situation in

Uruguay was concerned, none of the international measures which we have mentioned produced any discernible modification of the policies of the government, although most of them were applicable. They may have been of some influence in the eventual restoration of democracy, but they patently failed to protect the fundamental rights of thousands of individuals throughout the 1970's, and ultimately this is the criterion by which international procedures for the protection of human rights must be judged.

## Notes

1. Thomas Buergenthal, The Inter-American Court of Human Rights, 76 American Journal of International Law (1982) 231-45, at pp. 244-45.

2. See GAOR, 21st Session, Annexes, Agenda item 62, document A/6546, at para. 569.

3. See CCPR/C/2/Add.3, at p. 4.

4. See also paragraphs 1 and 2 of article 4.

5. As the government of Uruguay had ratified both the Covenant and the Optional Protocol on 1 April 1970, Uruguay became bound by both instruments as soon as they came into force on 23 March 1976. The notice of derogation was dated 28 June 1979.

6. See Communication No. R.8/34. (Cases in which the Human Rights Committee has adopted final views will be referred to in these notes by the communication number only. Full references for the Committee's final views are given in the Appendix.)

7. See Communication No. R.8/34, at para. 8.1. The Committee considered in a number of cases involving Uruguay whether article 4 applied, but in each instance decided that no submissions had been made to justify such a conclusion: see, for example, Communications Nos. R.2/8, R.1/4, R.1/6, R.2/11, R.7/28, R.7/32, R.8/33, R.8/34, R.9/37, R.10/44 and R.12/52.

8. See Communication No. R.8/34, at para. 8.2. Cf. Communication No. 66/1980. A state of emergency was also considered in two cases involving Colombia: see Communications Nos. R.11/45 and R.15/64.

9. CCPR/C/2/Add.3, at p. 4.

10. Ibid.

11. Ibid.

12. See CCPR/C/1/Add.57. The report, dated 29 January 1982, is also reproduced in the Report of the Human Rights Committee 1982 (UN document A/37/40), Annex III. For a discussion of its contents, particularly in relation to derogation, see pp. 263-69, *infra*. Uruguay's second report, due on 21 March 1983, had not been received by the middle of 1987: see p. 268, *infra*.

13. See International Covenant on Civil and Political Rights, article 28.

14. See *ibid.*, article 45.

15. See *ibid.*, article 39(2).

16. Dana D. Fischer, Reporting Under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee, 76 American Journal of International Law (1982) 142-53, at p. 143.

17. Ibid., at p. 150.

18. In 1981, the Human Rights Committee formulated guidelines on the periodicity of reports, which should now be submitted every five years, but without prejudice to the right of the Committee to request a report at any time: see Report of the Human Rights Committee 1981 (UN document A/36/40), Annex V, and Report of the Human Rights Committee 1982, Annex IV.

19. See Fischer, *op.cit.*, at pp. 147-48, and also Review of the International Commission of Jurists, No. 20, June 1978, at p. 25.

20. See Report of the Human Rights Committee 1981, Annex IV.

21. General comments have referred to the obligation to report generally, and to specific articles of the Covenant, viz. 1, 2, 3, 4, 6, 7, 9, 10, 14, 19 and 20, and also the position of aliens: see Report of the Human Rights Committee 1981, Annex VII; Report of the Human Rights Committee 1982, Annex V; Report of the Human Rights Committee 1983 (UN document A/38/40), Annex VI; Report of the Human Rights Committee 1984 (UN document A/39/40), Annex VI; Report of the Human Rights Committee 1985 (UN document A/40/40), Annex VI; Report of the Human Rights Committee 1986 (UN document A/41/40), Annex VI; and also Report of the Human Rights Committee 1987 (UN document A/42/40), Chapter IV. The information in this chapter takes account of developments up to the Committee's 30th session (July 1987). When framing its first set of general comments, the Committee stated: "The purpose of these general comments is to make [the Committee's] experience available for the benefit of all States Parties in order to promote their further implementation of the Covenant; to draw their attention to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure and to stimulate the activities of these States and international organizations in the promotion and protection of human rights."

22. See Report of the Human Rights Committee 1981, Annex IV.

23. See Report of the Human Rights Committee 1977 (UN document A/32/44), Annex IV. These guidelines apply to initial reports. The Committee adopted guidelines for subsequent reports in 1981: see Report of the Human Rights Committee 1981, Annex VI.

24. It should be noted that some governments have made reservations regarding particular articles of the Covenant.

25. See Fischer, *op.cit.*, at p. 145, and also Review of the International Commission of Jurists, No. 20, June 1978, at p. 25.

26. The Committee has regularly requested information relating to the following matters: (i) the steps taken to publicise the Covenant; (ii) the status of the Covenant in national law; (iii) data available to show progress in the enjoyment of human rights; (iv) sex equality, treatment of minorities and indigenous populations; (v) types of punishment and prison conditions; (vi) detention of non-criminals, such as the mentally ill; (vii) freedom of expression; (viii) freedom of association; (ix) self-determination; (x) administration of justice; (xi) prohibition of war propaganda and advocacy of

racial/religious hatred; (xii) emergency powers: see Review of the International Commission of Jurists, No. 31, Dec 1983, at pp. 43-44.

27. See Fischer, *op.cit.*, at p. 151.

28. See *ibid.*, at p. 144.

29. See *ibid.*, at p. 146.

30. For the most up-to-date list, see Report of the Human Rights Committee 1987, Annex IV.

31. See Fischer, *op.cit.*, at p. 152.

32. Reminders were sent on 30 September 1977, 22 February 1978, 29 August 1978, 17 April 1980 and 29 August 1980: see Report of the Human Rights Committee 1981, Annex III.

33. For the report, see CCPR/C/1/Add.57.

34. *Ibid.*, at p. 1.

35. See *ibid.*, at p. 11.

36. With regard to article 7, the following statement is made at p. 12 of the report: "In Uruguay, physical coercion is specifically prohibited by article 26 of the Constitution and by article 7 of the Act No. 14,068....In general, the right to physical integrity is fully and satisfactorily assured by the provisions and guarantees of Uruguayan legislation and by the normal functioning of the competent national bodies." The report goes on to indicate that torture had been abolished in 1829, and makes reference to various articles of the Penal Code under which prosecution of torturers could take place.

37. *Ibid.*, at p. 25.

38. The report refers at p. 26 to article 29 of the Universal Declaration of Human Rights, article 4(1) of the Covenant, and article XXVIII of the American Declaration of the Rights and Duties of Man. Uruguay had not at that stage ratified the American Convention on Human Rights.

39. CCPR/C/1/Add.57, at p. 27.

40. *Ibid.*

41. See Report of the Human Rights Committee 1982, Annex III, at paras. 269-97.

42. *Ibid.*, at para. 266.

43. See pp. 275-78, *infra*.

44. Report of the Human Rights Committee 1982, Annex III, at para. 297.

45. See Report of the Human Rights Committee 1987, Annex IV. Reminders were sent on 10 May 1984, 17 May 1985, 14 August 1985, 20 November 1985, 6 May 1986, 8 August 1986, 1 May 1987 and 24 July 1987.
46. See Report of the Human Rights Committee 1985, at p. 4.
47. See Report of the Human Rights Committee 1987, Annex IV.
48. See International Covenant on Civil and Political Rights, article 41(1).
49. Ibid., article 41(1)(e). See also sub-paragraphs (a), (b), (c), (f) and (g).
50. Ibid., article 41(1)(h)(i).
51. See ibid., article 41(1)(h)(ii).
52. See ibid., article 41(1)(h).
53. See ibid., article 42(1)(a). See sub-paragraph (b) and paragraphs (2)-(10) for the composition of the Commission and its procedure.
54. See ibid., article 42(7)(b).
55. Ibid., article 42(7)(c). The report will also contain the written submissions and a record of oral submissions. See also sub-paragraph (d): "If the Commission's report is submitted under sub-paragraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission."
56. See Report of the Human Rights Committee 1979 (UN document A/34/40), Annex III.
57. See Chapter One, note 65, supra.
58. Optional Protocol to the International Covenant on Civil and Political Rights, article 1. The same article states: "No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol." It may be noted that some European states have made reservations to exclude the application of the Protocol where the matter is covered by the system established under the European Convention. Those states are Denmark, France, Iceland, Italy, Luxembourg, Norway, Spain and Sweden.
59. Provisional Rules of Procedure were adopted at the Committee's 1st session, in 1977: see Report of the Human Rights Committee 1977, Annex II. Although the Optional Protocol itself permits communications only from alleged victims, Rule 90(b) of the Rules of Procedure provides that a communication may be submitted on behalf of a victim by someone having a sufficient link where the victim is for some reason unable to communicate with the Human Rights Committee. On procedure generally, see M.E. Tardu, Human Rights: The International



Petition System (Oceana Publications, Dobbs Ferry, New York, 1979), in which the Rules of Procedure are reproduced in Binder II, Annex IV.

60. The grounds for rejection of a communication as inadmissible are specified in article 3 of the Optional Protocol: they are that the communication is anonymous, or is an abuse of the right of petition, or is incompatible with the provisions of the Covenant. The Committee will also reject a communication if it emerges that all available domestic remedies have not been exhausted (articles 2 and 5(2)(b)) or if the matter is being examined under another international procedure (article 5(2)(a)), although these facts may not be apparent from the communication itself.

61. See Rule 91(2) of the Provisional Rules of Procedure.

62. See Rule 91(1) of the Provisional Rules of Procedure.

63. Optional Protocol, article 4.

64. See Rule 93(3) of the Provisional Rules of Procedure.

65. Optional Protocol, article 5(1).

66. The General Assembly in fact specifically preferred "views" to "recommendations" or even "suggestions".

67. See Optional Protocol, article 5(4).

68. Rule 86 of the Provisional Rules of Procedure.

69. See Chapter One, note 65, supra. The majority of decided cases relate to Uruguay.

70. A further drawback is the length of time which usually elapses between submission of the communication and the adoption of final views by the Committee. This may be several years.

71. Tardu, op.cit., Binder II, Part I, Chapter I, at pp. 11-12.

72. See Report of the Human Rights Committee 1987, Chapter V.

73. See *ibid.*

74. The nine cases in which no violation was found related to Communications Nos. R.9/40 (v. Finland), R.13/58 (v. Sweden), R.12/50 (v. Canada), R.14/61 (v. Finland), 55/1979 (v. Canada), 75/1980 (v. Italy), 89/1981 (v. Finland), 180/1984 (v. Netherlands) and 198/1985 (v. Uruguay).

75. See Communications Nos. 146/1983 and 148-154/1983.

76. See Communications Nos. 16/1977, 90/1981, 124/1982, 138/1983 and 157/1983.

77. See Communications Nos. 49/1979, 115/1982, 132/1982 and 155/1983.

78. See Communications Nos. R.11/45, R.15/64 and R.11/46.

79. See Communications Nos. R.6/24 and R.7/27.

80. See Communication Nos. 172/1984 and 182/1984.

81. See Communication No. R.9/35.

82. See Communication No. 156/1983.

83. See Communications Nos. R.11/45 (v. Colombia), 49/1979 (v. Madagascar), 124/1982 (v. Zaire), 115/1982 (v. Madagascar), 138/1983 (v. Zaire) and 156/1983 (v. Venezuela). Article 7 was found to have been violated in Nos. 49/1979, 124/1982 and 115/1982, and torture was mentioned in No. 124/1982. As far as Communication No. R.11/45 is concerned, the Human Rights Committee stated: "It is not necessary to consider further alleged violations, arising from the same facts, of other articles of the Covenant. Any such violations are subsumed by the even more serious violations of article 6." Article 6 concerns the right to life. The same view was expressed in the cases relating to Suriname.

84. See Communications Nos. R.1/5, R.2/9, R.2/8, R.1/4, R.1/6, R.2/11, R.7/28, R.7/32, R.8/33, R.9/37, R.10/44, R.12/52, R.14/63, R.2/10, R.7/30, R.17/70, R.18/73, R.6/25, 66/1980, 84/1981, 74/1980, 80/1980, 88/1981, 43/1979, 92/1981, 105/1981, 107/1981, 83/1981, 103/1981, 85/1981, 110/1981, 123/1982, 139/1983, 147/1983. The other cases involving Uruguay were Communications Nos. R.7/31, R.8/34, R.13/56, R.13/57, 77/1980, 106/1981, 108/1981 and 109/1981. Communications Nos. R.7/31, R.13/57, 77/1980, 106/1981 and 108/1981 involved the right to a passport, and the first was in fact discontinued after a passport was issued. The Human Rights Committee concluded in relation to Communications Nos. R.13/56 and 109/1981 that there had been a violation of article 10 of the Covenant, which relates to humane treatment.

85. See Communications Nos. R.1/5, R.2/8, R.1/4, R.2/11, R.7/28, R.8/33, R.9/37, R.12/52, R.14/63, R.7/30, R.18/73, R.6/25, 74/1980, 80/1980, 88/1981, 107/1981, 110/1981, 139/1983 and 147/1983.

86. See Communications Nos. R.1/5, R.2/11, R.12/52, R.14/63, 74/1980, 107/1981, 139/1983 and 147/1983. In No. 139/1983, torture is actually mentioned in connection with violation of article 14 rather than article 7.

87. See Communications Nos. R.1/6, 105/1981 and 103/1981. Certain of the allegations in Communication No. 66/1980 also fell into this category, and indeed in a number of cases much of the alleged ill-treatment had taken place before the Covenant came into force and thus could not be taken into account by the Human Rights Committee unless the effects of the ill-treatment continued thereafter. In Nos. 105/1981 and 103/1981, it was alleged that because the victims remained imprisoned on the basis of confessions obtained by torture prior to the Covenant entering into force, article 7 continued to be violated, but this was not accepted by the Committee. The same argument was put forward in Communication No. 80/1980, which also involved subsequent violations. In a number of cases in which the Committee found that there had been violations of article 7, it did not specifically mention torture, apparently because torture (as

opposed to ill-treatment) had taken place prior to the Covenant entering into force: see, for example, Communications Nos. R.1/4, R.8/33, R.6/25 and 110/1981.

88. See Communications Nos. R.7/32, R.2/10 and 66/1980. In No. R.2/10, the author failed to supply further information or produce witnesses to substantiate the allegations.

89. See Communication No. 84/1981.

90. See Communication No. R.2/9.

91. Article 2(1) of the International Covenant on Civil and Political Rights states: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

92. See the Appendix to Communication No. R.2/9. One member gave a separate opinion with which five others associated themselves.

93. The other cases relate to Communications Nos. R.10/44, R.17/70, 43/1979, 92/1981, 83/1981, 85/1981 and 123/1982.

94. See Communications Nos. R.10/44, R.2/10, R.17/70, 66/1980, 43/1979, 92/1981, 105/1981, 83/1981, 85/1981 and 123/1982.

95. Article 10(1) of the International Covenant on Civil and Political Rights states: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

96. See, for example, Communications Nos. 92/1981 and 105/1981, in which reference is made to the Committee's views in relation to the earlier Communications Nos. 66/1980 and 74/1980, the information from which enabled the Committee to conclude that "a practice of inhuman treatment existed at Libertad prison during the period to which the present communication relates."

97. See, for example, Communications Nos. R.2/9, R.1/4, R.1/6, R.2/11, R.12/52 and 110/1981.

98. This wording, or variations of it, were regularly employed by the Committee in its views on cases relating to Uruguay.

99. In Communication No. R.7/30, the Human Rights Committee stated at para. 13.3: "With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information....In cases where the author has submitted to the Committee allegations supported by substantial witness testimony....and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of

satisfactory evidence and explanations to the contrary submitted by the State party." Cf. the Committee's final views on Communication No. 107/1981.

100. See Communications Nos. R.2/8, R.1/4, R.1/6, R.2/11, R.7/28, R.7/32, R.8/33, R.9/37, R.10/44 and R.12/52.

101. For example, consideration of Communication No. R.7/31 was discontinued following the issue of a passport to the petitioner.

102. See generally Louis B. Sohn and Thomas Buergenthal, *International Protection of Human Rights* (Bobbs-Merrill, 1973), at pp. 771-855.

103. See ECOSOC resolution 728F(XXVIII), para. 2(a) and (b). The text of the resolution is reproduced in Sohn and Buergenthal, *op.cit.*, at pp. 771-72.

104. See ECOSOC resolution 728F(XXVIII), para. 1.

105. ECOSOC resolution 1235(XLII), para. 2. The text of the resolution is reproduced in Sohn and Buergenthal, *op.cit.*, at pp. 774-75.

106. ECOSOC resolution 1235(XLII), para. 3.

107. Sub-Commission resolution 10(XX).

108. ECOSOC resolution 1503(XLVIII), para. 1. The text of the resolution is reproduced in Sohn and Buergenthal, *op.cit.*, at pp. 841-44. With regard to the limitation to the terms of reference of the Sub-Commission, while it is apparent that the whole system relating to gross violations was motivated by the concern over apartheid and racialism, the jurisdiction of the Sub-Commission does seem to have been extended to cover other gross violations, and it now appears to be generally accepted that its competence extends beyond the two specific areas mentioned. Sub-Commission resolution 1(XXIV), which governs its procedure under resolution 1503, states in para. 1(b) that communications are admissible when "there are reasonable grounds to believe that they may reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of *apartheid*..." The word "including" would seem to indicate that the practices mentioned do not constitute an exhaustive list.

109. ECOSOC resolution 1503(XLVIII), para. 5.

110. See Sub-Commission resolution 1(XXIV). The text of the resolution is reproduced in Sohn and Buergenthal, *op.cit.*, at pp. 852-53.

111. ECOSOC resolution 1503(XLVIII), para. 6(a).

112. See *ibid.*, para. 6(b).

113. See *ibid.*, para. 8.

114. This appears from the Equatorial Guinea case, in which confidential material was subsequently de-classified. For a discussion, see pp. 290-91, *infra*. See also Tardu, *op.cit.*, Binder II, Part I, Chapter II, at pp. 26-36.

115. The situation in Equatorial Guinea was eventually referred to the Economic and Social Council under resolution 1235: see Commission on Human Rights resolution 15(XXXV) of 13 March 1979. In 1985, the situations in Argentina and Uruguay were also made public, but this was at the specific request of the respective governments.

116. ECOSOC resolution 1503(XLVIII), para. 8.

117. Marc J. Bossuyt, The Development of Special Procedures of the United Nations Commission on Human Rights, *Human Rights Law Journal*, Vol. 6 (1985), 179-210, at pp. 184-85. See also pp. 183-84.

118. See Review of the International Commission of Jurists, No. 28, June 1982, at p. 33.

119. See Sub-Commission resolution 1(XXIV), para. 1(b). The New York Times of 21 September 1972 reported that three countries were involved: see Review of the International Commission of Jurists, No. 9, Dec 1972, at p. 6.

120. According to the London Times of 24 September 1973, the countries involved were the United Kingdom (regarding Northern Ireland), Portugal (regarding its overseas territories), Iran, Indonesia, Burundi, Tanzania, Brazil and Guyana: see Review of the International Commission of Jurists, No. 11, Dec 1973, and also Tardu, *op.cit.*, Binder II, Part I, Chapter II, at p. 22.

121. According to Reuters, Chile, Israel and Uganda were added to the list, and there was also supplementary material relating to Brazil and Indonesia. No action was taken in the case of Cuba, and there was uncertainty as to the legal position in relation to South Vietnam, which was not a member of the United Nations: see Review of the International Commission of Jurists, No. 13, Dec 1974, at p. 29.

122. ECOSOC resolution 1503(XLVIII), para. 10.

123. See Review of the International Commission of Jurists, No. 17, Dec 1976, at p. 27.

124. See Report of the Human Rights Committee 1978 (A/33/40), Ch. IV, at para. 582.

125. The situations in the following states have been considered by the Commission on Human Rights between 1978 and 1986:

1978 Bolivia, Equatorial Guinea, Ethiopia, Indonesia, Malawi, Paraguay, Republic of Korea, Uganda, Uruguay

1979 Bolivia, Burma, Ethiopia, Indonesia, Malawi, Paraguay, Republic of Korea, Uganda, Uruguay

1980 Argentina, Bolivia, Central African Republic, Ethiopia, Indonesia, Republic of Korea, Uganda, Paraguay, Uruguay

1981 Afghanistan, Argentina, Bolivia, Central African Republic, Chile, German Democratic Republic, El Salvador, Ethiopia, Guatemala, Haiti, Indonesia, Japan, Mozambique, Uganda, Paraguay, Uruguay, Republic of Korea

1982 Afghanistan, Argentina, German Democratic Republic, Haiti, Paraguay, Uruguay, Venezuela, Republic of Korea

1983 Afghanistan, Argentina, German Democratic Republic, Haiti, Paraguay, Uruguay, Indonesia (concerning East Timor), Iran, Turkey

1984 Albania, Benin, Haiti, Indonesia (East Timor), Paraguay, Philippines, Turkey, Uruguay (It was announced that Afghanistan, Argentina, Malaysia and Pakistan were no longer under consideration.)

1985 Albania, Haiti, Paraguay, Philippines, Turkey, Zaire (It was announced that Benin, Indonesia, Pakistan and Uruguay were no longer under consideration.)

1986 Albania, Haiti, Paraguay, Zaire (It was announced that Gabon, the Philippines and Turkey were no longer under consideration.)

For the foregoing information, see Bossuyt, *op.cit.*, at p. 182, and Review of the International Commission of Jurists, No. 36, June 1986, at pp. 25-26.

126. El Dia of 7 March 1980, referred to in Review of the International Commission of Jurists, No. 24, June 1980, at pp. 34-35.

127. For a discussion of this case, see Tardu, *op.cit.*, Binder II, Part I, Chapter II, at pp. 26-36.

128. The five chapters were (1) General Features; (2) Political Development; (3) the Institution of the Dictatorship; (4) Deliberate Violations of Human Rights; (5) Conclusions and Action Requested.

129. See Sub-Commission resolution 1(XXIV), para. 3(c). The government's reply also reviewed the country's history and dealt with the current situation and certain of the specific allegations: see the discussion in Tardu, *op.cit.*, Binder II, Part I, Chapter II, at p. 28.

130. A further communication had by that time been submitted by the International University Exchange Fund consisting of an 80 page report by a visiting anthropologist.

131. See Tardu, *op.cit.*, Binder II, Part I, Chapter II, at p. 35.

132. See *ibid.*, at p. 25, and Commission resolution 15(XXXV).

133. See note 125, *supra*.

134. Review of the International Commission of Jurists, No. 28, June 1982, at p. 35.

135. See UN document E/CN.4/1986/15, and also Commission resolution 1985/33.

136. See Review of the International Commission of Jurists, No. 36, June 1986, at p. 23.

137. Quoted in *ibid.*, at p. 23.

138. See David Weissbrodt, The Three "Theme" Special Rapporteurs of the UN Commission on Human Rights, 80 American Journal of International Law (1986) 685-99, at p. 693.

139. The Human Rights Committee has no remit to draw conclusions where several cases relate to the same situation, but it has in its consideration of certain communications referred to previous cases and taken account of its findings in these: see note 96, *supra*.

140. See Review of the International Commission of Jurists, No. 28, June 1980, at p. 35.

141. It is not clear whether this restricts the procedure to communications which actually contain information revealing a consistent pattern, or whether a pattern may be revealed as a result of a number of communications emanating from unrelated sources and relating to separate incidents which together indicate that a consistent pattern of violations exists. In practice, the former situation is invariably the case.

142. See Optional Protocol, articles 1 and 2, and Rule 90(b) of the Human Rights Committee's Rules of Procedure.

143. Sub-Commission resolution 1(XXIV), para. 2(a).

144. See *ibid.*, para. 2(c).

145. See Optional Protocol, article 1.

146. See *ibid.*

147. See Sub-Commission resolution 1(XXIV), para. 1(b).

148. See European Convention on Human Rights, article 24.

149. *Ibid.*, article 25(1).

150. See *ibid.* For the procedure, see articles 25-32. Of the member states of the Council of Europe, only Cyprus has not accepted the procedure. For the member states, see Chapter One, note 62, *supra*.

151. See European Convention on Human Rights, article 31.

152. See European Convention on Human Rights, article 46, on the jurisdiction of the Court. If a case is not submitted to the Court,

the Committee of Ministers decides whether a breach has occurred: see article 32.

153. See European Convention on Human Rights, article 48. See also article 44.

154. See *ibid.*, articles 52 and 53.

155. Preamble to the European Convention on Human Rights.

156. See Denmark, Norway and Sweden v. Greece ('The Greek Case'), 12 Yearbook of the European Convention on Human Rights 1969, Part II.

157. See Ireland v. United Kingdom, Report of the European Commission on Human Rights, 19 Yearbook of the European Convention on Human Rights 1976, 512-949; and Ireland v. United Kingdom, Judgement of the European Court of Human Rights, Series A: Judgements and Decisions, Vol. 25, Judgement of 18 January 1978.

158. See generally on the OAS system: Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System (OAS document OEA/Ser.L/V/II.65, Doc.6, updated 1 July 1985).

159. See Buerghenthal, *op.cit.*, on the Inter-American Court of Human Rights generally. The Court is currently dealing with three cases of alleged 'disappearances' in Honduras. For the members of the OAS and those which have accepted the jurisdiction of the Court, see Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System.

160. See American Convention on Human Rights, articles 44 and 45. Only eight states have accepted the inter-state procedure: see Chapter One, note 65, *supra*.

161. See American Convention on Human Rights, article 62. Only eight states have accepted the jurisdiction of the Court, which has fairly wide powers in terms of article 63.

162. Statute of the Inter-American Commission on Human Rights, article 1.

163. For text, see Brownlie, *op.cit.*, at pp. 389-95.

164. On these developments, see Sohn and Buerghenthal, *op.cit.*, at pp. 1284-93. The Inter-American Commission on Human Rights was empowered to consider communications by the incorporation of several new articles into its Statute in 1966, and the procedures were governed by its revised Regulations.

165. See Uruguay - Deaths Under Torture 1975-77 (Amnesty International, 1978), at pp. 10-11.

166. See *ibid.* In January 1978, the OAS voted against accepting an invitation by the government of Uruguay to hold the General Assembly there.

167. See Keesings Contemporary Archives, 14 March 1980, at 30139B.



## CHAPTER SEVEN: INTERNATIONAL CONVENTIONS AGAINST TORTURE

In December 1984, the General Assembly of the United Nations adopted in resolution 39/46 a Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and one year later the Organization of American States adopted a similar instrument, an Inter-American Convention to Prevent and Punish Torture, to be followed by the adoption of a Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment by the Council of Europe in 1987. These were the first conventions to be promulgated at the international level dealing specifically with the problem of torture, and in this chapter we shall examine the provisions of the three instruments, identifying their goals and the difficulties which they are likely to face in achieving those goals. We have seen that there are significant limitations on the effectiveness of existing international procedures, and that the protection of fundamental human rights in practice depends largely on the safeguards which operate within the internal legal and political system of each state, so that it is of great importance to consider how these more recently developed instruments propose to tackle the problem of preventing torture by international means, and in particular whether they introduce any new measures of implementation. Before we turn to these questions, however, we shall trace the development of the three instruments in their respective spheres.

At its 32nd session, in 1976, the UN Commission on Human Rights had before it a written statement submitted by Amnesty International calling upon the Commission to study the possibility of drafting a convention which would, *inter alia*, declare torture to be a crime in

international law. The General Assembly of the United Nations subsequently requested the Commission to draw up a draft convention against torture and other cruel, inhuman or degrading treatment or punishment, and to submit a progress report to the General Assembly at its 33rd session.<sup>1</sup> The Commission commenced its consideration of the matter in 1978 on the basis of two alternative proposals, one submitted by the government of Sweden, the other by the International Commission of Jurists on behalf of the International Association of Penal Law, and requested the Secretary-General of the United Nations to transmit all relevant documents to the governments of member states and to the specialised agencies for their observations.<sup>2</sup>

On the recommendation of the Commission, the Economic and Social Council authorised the establishment of a working group to meet immediately prior to the Commission's 35th session, in 1979, for the purpose of preparing concrete drafting proposals. The working group duly considered the Swedish draft in the light of comments received and approved, with certain reservations, four articles. The Economic and Social Council authorised the working group to meet again prior to the Commission's 36th session in order to complete its consideration of the draft convention,<sup>3</sup> but although several more articles were adopted, there remained substantial areas of disagreement, particularly in relation to the concept of universal jurisdiction over torturers and the question of implementation,<sup>4</sup> and the working group was accordingly authorised to meet again the following year, prior to the Commission's 37th session.<sup>5</sup> The General Assembly requested the Commission to complete the drafting of the convention as a matter of urgency, with a view to submitting it together with proposals for effective implementation to the Assembly at its 36th session,<sup>6</sup> but

the Commission thought it advisable to continue consideration of the draft, as there remained some dissension within the working group on the question of implementation, and no further consensus was forthcoming on the issues which were causing difficulty. The Economic and Social Council, on the Commission's recommendation, accordingly authorised further meetings of the working group in 1982,<sup>7</sup> 1983,<sup>8</sup> and 1984,<sup>9</sup> when the final text of the convention was adopted by the General Assembly. It came into force on 26 June 1987.

Parallel developments within the Organization of American States commenced in 1978 when the General Assembly of the Organization requested the Inter-American Juridical Committee to prepare a draft convention defining torture as an international crime in co-operation with the Inter-American Commission on Human Rights.<sup>10</sup> The Juridical Committee duly appointed a rapporteur, whose preliminary report formed the basis of subsequent discussions, and member states were invited to forward copies of their domestic laws prohibiting torture, together with their suggestions as to the matters which should be included in a convention. However, only a handful of governments responded.

At its regular meeting in July-August 1979, the Juridical Committee had before it two alternative drafts, in addition to the documents mentioned above. A working group was set up to study these, and a draft convention was prepared, although there was insufficient time at that meeting for the full Committee to discuss the proposals. In accordance with the request that the Inter-American Commission on Human Rights should be consulted, that body in December 1979 approved a Draft American Convention for the Prevention and Suppression of Torture. This was transmitted to the Juridical Committee, whose Preparatory Commission studied the draft article by article, using

firstly the replies to a questionnaire distributed amongst members of the Committee, and secondly a study prepared by the Office of Development and Codification of the Bureau of Legal Affairs of the General Secretariat, which compared the IACHR draft and the working group's preliminary draft, as well as the proposals submitted to the United Nations by Sweden.

The Inter-American Juridical Committee approved a Draft Convention Defining Torture as an International Crime on 6 February 1980, and presented it along with a Statement of Reasons to the General Assembly,<sup>11</sup> which decided by AG/RES 509 of 27 November 1980 to forward the draft and Statement of Reasons to member states for their observations and comments. Only six governments replied, however, and the General Assembly subsequently extended the mandate of its Permanent Council in order to enable it to continue its study of the text.<sup>12</sup> By AG/RES 644(XIII-0/83), the General Assembly requested the Permanent Council to submit the draft convention to the Assembly at its 14th regular session in 1984, but the convention was not adopted until the following session in 1985.<sup>13</sup>

The European Convention had its origins in proposals made by the President of the Swiss Committee Against Torture in 1976, which were subsequently adopted by the International Commission of Jurists and the Swiss Committee in the form of a draft Optional Protocol to the UN Convention against Torture (which had not been adopted at that time).<sup>14</sup> The government of Costa Rica in fact submitted this draft to the UN Commission on Human Rights in 1980, and it appears to have had some influence on the final text of the UN Convention. In Europe, the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe requested the International Commission of Jurists and the

Swiss Committee to draft a European Convention against Torture based on the draft Optional Protocol, and the Parliamentary Assembly forwarded the proposals to the Committee of Ministers on 28 September 1983. The convention was finally adopted in 1987.<sup>15</sup> The aims of the European Convention are somewhat different from those of the UN and OAS Conventions, its principal purpose being to enable international authorities to visit places of detention in order to detect and prevent torture, a method based upon the activities of the International Committee of the Red Cross. This aim is rather more limited than the aims of the other instruments, and the European Convention will to a certain extent require to be dealt with separately in the following discussion.

There are, then, three recent international conventions dealing specifically with the problem of torture, and there is no doubt that this represents a major advance in the evolution of international measures for the protection of fundamental human rights. The conventions deal with one of the most basic and essential of all human rights, an absolute right which is not dependent on political or cultural factors, and the credibility of international law in the field of human rights will to a considerable degree be tested by the success or otherwise of these instruments. It is with this in mind that we shall turn to an examination of the texts of the three conventions.

The UN and OAS Conventions are not, in fact, particularly ambitious, but to a large extent accept the limitations on international law which we have already identified. They do not attempt to overcome the difficulties which face existing international human rights conventions in a radical manner, but rather endeavour to

achieve full effectiveness within accepted limits, although they do also introduce certain novel features aimed at ensuring a wider degree of protection. All the conventions will, of course, apply only to those states which become parties to them, so that one of the principal obstacles to the effective international protection of human rights, namely the inability of international law to impose obligations on unconsenting governments, remains, with the result that regimes which employ torture can simply refrain from ratifying the conventions, or at least from accepting any optional measures of implementation. International supervision cannot be imposed upon such governments, and the conventions offer no solution to this problem, but rather aim to promote the prevention and suppression of torture primarily through those states which will become parties, in the first place by encouraging them to adopt internal safeguards and in the second place by establishing international supervision over them. The paradox is, of course, that most governments which authorise or tolerate the use of torture will not ratify the conventions, and to this extent it does not appear that the new conventions can expect any greater success than that enjoyed by existing human rights instruments. The conventions do, however, attempt to tackle the problem of torture in non-contracting states in one indirect way, and this may prove to be their most significant contribution to the elimination of torture: both the UN and OAS Conventions employ the technique of classifying torture as an international crime, so that torturers can be apprehended, prosecuted and punished by states parties even if the offence took place in the territory of a non-contracting state and involved nationals of non-contracting states. This approach is similar to that adopted in the conventions relating

to terrorism, and although it is an important and necessary step in tackling torture in states which are not bound directly by international agreements, it must be recognised that it does have limited value in practice.

The UN and OAS Conventions recognise that in view of the limitations on international law torture can be most effectively prevented at national level, and one of the principal aims of both instruments is to promote the adoption of safeguards in domestic legislation and practice by those states which become parties. The imposition of an international obligation to adopt domestic measures might be regarded as superfluous, since any government which is prepared to ratify an international convention against torture and submit to international supervision is likely to have a genuine desire to prevent torture, so that even if adequate safeguards do not already exist within the national legal system, the government could easily introduce them without undertaking international obligations to do so. Indeed, the probability is that only states which have adequate domestic safeguards will ratify the conventions, while regimes which require supervision will refrain from doing so. Nevertheless, the conventions have some value, even apart from their recognition of torture as an international crime: they not only establish international guidelines and definitive standards against which the conduct of all governments can be measured, but also create legally binding obligations which cannot be ignored lightly, and thus fortify domestic law. Moreover, these obligations are backed up by implementation machinery which provides for the constant monitoring of states parties in the fulfilment of their responsibilities and there is, therefore, an additional level of independent supervision of

governments which would not be possible if they were simply left to deal with torture unilaterally. No national system is perfect, and no government can provide absolute guarantees against future violations, so that the supervision of states by international authorities is important in permitting not only encouragement and assistance but also criticism and censure on the basis of norms established by the conventions. Furthermore, both the UN and OAS Conventions create procedures whereby allegations of torture can be investigated with a view to obtaining a satisfactory remedy, and although these apply only in the case of states which have accepted them, they do represent a level of protection over and above the safeguards established at the national level. Such procedures can come into operation when domestic measures have failed to ensure proper protection against torture, and although ultimately international law possesses no enforcement machinery to secure the compliance of governments, the measures of implementation are essential to give substance to the obligation of governments to prevent torture through domestic means. We shall examine the various measures of implementation in due course.

One question which arises in relation to measures of implementation is whether they should be mandatory or optional. The problem is that the inclusion of mandatory measures in international conventions is liable to dissuade a considerable number of governments from ratifying them, whereas if measures are optional, conventions will attract a greater degree of support, although only a minority of governments will accept the optional provisions. In the latter case, however, the danger is that governments may be able to create a facade of respectability by ratifying conventions without submitting to the implementation machinery, and this has to be balanced against the



value of such regimes being parties to international conventions. Certainly, it does seem an unacceptable compromise to exclude measures of implementation altogether in the hope that a larger number of government will ratify the convention: it is just as futile to have an ineffectual instrument accepted by a large number of states as it is to have an effective one supported by only a handful of states which in any event do not permit the use of torture. The optimum solution appears to lie in the adoption of a selection of measures, incorporating both mandatory provisions which will prove acceptable to as wide a range of governments as possible without being totally ineffective, and also more far-reaching measures of an optional character which will permit the creation of effective procedures without discouraging governments from ratifying the convention itself. This course was adopted in the International Covenant on Civil and Political Rights, and has been followed in the UN Convention, although in both instruments the optional procedures are actually fairly limited in scope and the powers of the supervisory agencies are not extensive.

The procedures established by the UN and OAS Conventions will apply only to those states which have accepted them, either by ratifying the relevant convention itself in the case of mandatory measures or by separate acceptance in the case of optional measures, and their value is accordingly restricted to their effect in relation to those states. While these limitations must be recognised, there are some situations in which the procedures might be invoked to some effect: firstly, the use of torture may arise in a state with a liberal government which has ratified the convention; secondly, a liberal government of a state party may be overthrown by a repressive

regime which nevertheless remains bound by the terms of the convention; thirdly, even governments which in fact authorise the clandestine use of torture may find it expedient to ratify international conventions, as the humanitarian basis of the prohibition of torture creates a considerable degree of moral pressure, and failure to ratify might be seen as an indication that the government condones the use of torture or at least is unconcerned about the problem - this applies more forcibly to the torture conventions than to human rights instruments generally. While the conventions may not have a direct impact on the problem of torture, then, the imposition of an obligation to prevent and punish torture at the domestic level, supported by international measures of implementation does have some value within the same limits that apply to existing human rights instruments. It is essential, therefore, for the procedures to be utilised effectively and for adequate powers to be conferred on the responsible authorities so that they can make unequivocal decisions and, if possible, take enforcement action or at least exert moral and political pressure on offending governments.

Although the UN and OAS Conventions both create machinery for monitoring states parties, they recognise that, given the realities of the international political system and the consequent rejection of international control of national governments, the prevention of torture must be achieved primarily at the domestic level by means of internal legal and constitutional safeguards, because it is only at that level that the requisite restraints can function effectively and political limitation of government can be secured. For this reason, states parties are required to adopt appropriate measures to ensure that the employment of torture is made illegal and punishable, and

that there exist adequate procedures for investigation and the provision of satisfactory remedies. The basic obligation undertaken by states parties is to ensure the prevention and elimination of torture.<sup>16</sup> The UN Convention provides that each state party shall take "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."<sup>17</sup> The OAS Convention provides for states to "prevent and punish torture" in accordance with the terms of the convention:<sup>18</sup> states parties undertake to "take effective measures to prevent and punish torture within their jurisdiction."<sup>19</sup> The effect of both instruments is similar, then, and may be compared also with the provisions of articles 3 and 4 of the 1975 UN Declaration.<sup>20</sup> The principal aim of the instruments is to impose a formal obligation to introduce domestic measures which will prevent or at least impede the employment of torture and will ensure the effective investigation of allegations with a view to the prosecution of torturers and the provision of a remedy for victims. As the conventions are aimed essentially at governmental torture, it is clear that such an obligation will only be undertaken (or at least implemented) by governments which possess the political will to eliminate torture and which it may be supposed are not involved in the clandestine use of torture. Thus, the purpose of the measures is principally to prevent the future introduction of torture.

The UN and OAS Conventions give only general guidelines as to the type of measures which governments ought to introduce, and do not specify the precise manner in which these measures should be applied. Although certain principles will be of universal validity, there is clearly some scope for the influence of social, cultural and

historical factors within different legal systems. Moreover, the conventions appear to envisage the adoption of measures only within existing political structures, assuming that the constitutional framework of the state itself will not require modification but will ensure the effective functioning of any measures introduced. However, as we saw in an earlier chapter, if there is insufficient limitation of government in constitutional terms, legal and administrative provisions can be circumvented with relative ease, and it is therefore imperative that the adoption of measures aimed at preventing torture should take place within a political system which secures effective limitation of government. In view of the widespread philosophical rejection of this concept, however, it is highly unlikely that any government will accept constitutional reconstruction as being an appropriate matter for international law or conventional obligations.

Torture is most likely to occur during detention, and it is in this area that legal and judicial safeguards are most important, both to prevent torture arising and to provide machinery for investigation, complaint and remedial action whenever the preventive measures fail. The UN Convention deals with the question of detention in one general provision:

"Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture."<sup>21</sup>

There is no corresponding provision in the OAS Convention to this article, which is based on article 6 of the 1975 UN Declaration. The UN Convention does not give any specific indication of the measures which would be appropriate in preventing the use of torture during

detention, but leaves each state party free to decide on the precise measures which it will adopt in order to give effect to these provisions. Guidelines have been laid down in a non-binding instrument, the Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, which will be discussed in Chapter Eight, but this instrument has not yet been adopted. It would have been preferable in view of the importance of safeguards in the area of detention if more specific obligations had been incorporated in the convention itself, or at least if reference had been made to these Principles, but the convention restricts itself to imposing a general obligation regarding the adoption of effective measures, and this is a significant defect in the convention.

One provision which is aimed at the prevention of torture concerns the instruction of those who may be faced with the choice of whether or not to employ coercion. It is important that those who are liable to find themselves in such a position should be fully aware of the prohibition on the use of torture, and the UN Convention deals with this point in the following manner:

"Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment."<sup>22</sup>

A second paragraph adds:

"Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons."<sup>23</sup>

The OAS Convention contains a similar provision.<sup>24</sup> The subject of the training and instruction of those who may be involved in law

enforcement and detention procedures has attracted a considerable degree of attention, particularly within the United Nations, and it is widely felt that the promulgation of codes of conduct can make a significant contribution to the elimination of torture. This matter will be discussed in more depth in Chapter Nine. The provision relating to the training of officials has two aspects: firstly, it is important for those involved in detention to be aware of the prohibition on torture so that they are unable to plead ignorance or rely on a putative defence of justification, and secondly, there is educational value, in that humanitarian attitudes may be encouraged as a result of the influence on the individual's moral consciousness. As far as the training of military personnel is concerned, of course, influences of this kind are likely to be resisted by the military hierarchy as being inconsistent with the aims of military training and indoctrination which we discussed in Chapter Four. In theory, however, there should be no objection to instruction in humanitarian ideals in the course of military training, in view of the absolute nature of the prohibition on torture.

The draft convention prepared by the Inter-American Commission on Human Rights included an interesting proposal which was not retained in later OAS drafts and has no parallel in the UN Convention:

"In the education programs and through the mass media the States Parties bind themselves to carry on campaigns on the necessity of preventing and suppressing torture."<sup>25</sup>

This involves much wider goals than the training of public officials. It refers to influencing public attitudes by means of government propaganda, the promotion of humanitarian ideals in an active manner, not only in the normal educational sphere, but also in more generalised public education programmes aimed at inculcating an

awareness of human rights principles. Such a project would, of course, be highly ambitious and would require the full support and commitment of the government, and the prospects for such government-sponsored human rights campaigns are limited, but there is no doubt that the role of education in the elimination of torture is of great significance.

Preventive measures are not infallible, and when they fail there must be effective procedures for the thorough and impartial investigation of allegations, resulting in the prosecution of torturers and others responsible for torture and in the provision of satisfactory remedies for victims. The UN and OAS Conventions in fact put more emphasis on this aspect than on prevention, although of course the existence of efficient machinery of this nature can function as a deterrent to potential torturers. Both instruments oblige states to create machinery which will deal effectively with incidents of torture which arise, but again the provisions are expressed in fairly general terms. The basic and most clearly defined provision is aimed at ensuring that acts of torture are actually recognised as criminal offences in the domestic law of each state,<sup>26</sup> and that suitable penalties are imposed when the offence has been committed.<sup>27</sup> This is essential in order to avoid the problems experienced in Greece in the 1970's, when the absence of a specific crime of torture resulted in alleged torturers having to be charged with a range of alternative offences such as "insults", "abuse of authority" and "bodily injury".<sup>28</sup> In this connection, it is important for the precise scope of the offence to be made clear, and the UN Convention thus provides that the offence should include "an attempt to commit torture and....an act by any person which constitutes

complicity or participation in torture."<sup>29</sup> Attention should also be drawn to article 3 of the OAS Convention, which defines those "guilty of torture" 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 commits it or who, being able to prevent it, fails to do so.

b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto."

This provision is similar to the corresponding one in the UN Convention, which is, of course, limited to acts "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."<sup>30</sup> Both provisions extend to the acts of those who are not public officials, but only where there has been some involvement of a public official. An alternative OAS proposal was in fact in even wider terms. The point at issue here is whether or not only the acts and omissions of public officials should be regarded as offences for the purpose of the convention. While it is important for the crime of torture to be defined as broadly as possible in domestic legislation in order for the state authorities to be able to ensure effective and comprehensive protection, international law is concerned only with acts for which the state bears some responsibility, and international procedures are intended to come into operation only in such cases.

Another major provision which appears in both instruments concerns the absolute nature of the prohibition of torture. This involves two separate issues. Firstly, it implies that the use of



torture cannot be justified in any circumstances: in practice, torture is often resorted to in response to exceptional conditions, particularly when there is a threat to national security, but the use of torture in such situations is contrary to established principles of international law. Derogation from the prohibition of torture is not permitted by the general human rights instruments, and the same principle is re-affirmed in the UN Convention:

"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."<sup>31</sup>

The OAS Convention contains a similar provision:

"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 the crime of torture."<sup>32</sup>

The commentary on the original OAS draft made the following observation:

"Codified public international law, both worldwide and at the inter-American level, *limits*, by treaties or conventions on human rights, the actions of the State in cases or situations such as those described, because experience has proven that in such instances there is a marked tendency by the authorities of the State to violate basic human rights."

It is clear, then, that torture must remain a criminal offence even during a state of emergency, and that the existence of exceptional circumstances cannot justify the employment of torture.

The second aspect of the justification issue relates to the defence of having acted under orders from a superior. In this connection, the UN Convention states in unequivocal terms:

"An order from a superior officer or a public authority may not be invoked as a justification of torture."<sup>33</sup>

Again the OAS Convention has a similar provision,<sup>34</sup> and again the original commentary on the article makes a pertinent observation:

"This principle has been fully recognized by the most accepted theories of penal international law and was defined, at world level, as a principle of international law when the Nuremberg Statutes were promulgated."

The defence of having acted in pursuance of orders cannot, then, exculpate a person accused of torturing.

A further provision aimed at discouraging the use of coercion by interrogators concerns the inadmissibility of evidence which has been obtained under duress:

"Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."<sup>35</sup>

The corresponding provision of the OAS Convention is article 10, which states:

"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 only as evidence that the accused obtained such statement by such means."

Once torture has been recognised as a criminal offence and appropriate penalties have been established, it is essential to ensure that investigations are carried out whenever there is any indication that the offence has been committed, and the UN Convention accordingly provides:

"Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of

torture has been committed in any territory under its jurisdiction."<sup>36</sup>

This article precedes the corresponding provision on complaints by victims because it was felt that the state rather than the individual should bear the primary responsibility for the prevention of torture.<sup>37</sup> While the order of the articles is merely symbolic, it is important that the state should have a legal obligation to investigate suspected incidents of torture even when no formal allegation has been made,<sup>38</sup> since it is always possible that victims will be unable to bring their plight to the attention of the relevant authorities, either through fear or because death occurs during torture. The OAS Convention deals with the matter in the second paragraph of article 8:

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

While the state has a responsibility to initiate investigations whenever there is reason to suspect torture has taken place, it is also essential that a victim of torture should have "the right to complain to, and to have his case promptly and impartially examined by" the competent authorities,<sup>39</sup> and indeed that other individuals and groups having knowledge of torture should be able to bring this to the attention of the appropriate authorities. The relevant provision of the UN Convention is actually restricted to the consideration of allegations made by victims themselves, although the same limitation does not appear in the Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment. It may be,

however, that article 12 of the Convention is intended to cover complaints emanating from sources other than the victims of violations.

It is, of course, imperative that victims should be allowed to bring their complaints before the competent authorities without impediment, and for this reason the UN Convention contains a provision intended to encourage those having knowledge of torture to come forward:

"Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."<sup>40</sup>

Of course, the effectiveness of investigation procedures will depend largely on the will, integrity and authority of those entrusted with the task, and if torture has in fact been approved at the highest levels of government there may be attempts to influence or frustrate the investigators or to stage a cover-up. For this reason, it is crucial that the agency responsible for the protection of human rights and the conduct of investigations should be entirely independent of the government so that it can carry out its duties impartially and conscientiously. Moreover, it must have full access to information and constitutional authority to take appropriate action. Indeed, it should be empowered to undertake investigations on its own initiative, without government approval.

The right of a victim to have his case examined refers in the first instance to domestic procedures, but if these prove ineffective or inadequate, or are exhausted without a satisfactory remedy being obtained, the question of international procedures arises. This aspect is mentioned in the third paragraph of article 8 of the OAS Convention, which states:

"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."

In a sense, this provision is superfluous, as it merely states that international procedures may be invoked when they are applicable.<sup>41</sup> The OAS Convention does not create any new complaints procedures relating specifically to torture. The UN Convention, on the other hand, establishes several new procedures, including a petition system whereby a Committee against Torture will be empowered to consider communications from or on behalf of individuals claiming to be victims of torture.<sup>42</sup> However, this procedure requires separate acceptance, and will not always be available to victims even when the state concerned is a party to the convention. In such circumstances, it may be that a petition can be submitted to the Human Rights Committee under the provisions of the Optional Protocol to the International Covenant on Civil and Political Rights or, alternatively, that regional procedures will be applicable. There will, however, be situations under both the United Nations and the Inter-American systems in which it is not possible for the victim to invoke international procedures.

The purpose of such procedures, whether national or international, is to procure a satisfactory remedy for the victim, firstly by ensuring that the torture does not continue or recur, and secondly by providing compensation, at least in cases which involve public officials. The effects of torture can be extremely damaging, and justice demands that reparation should be made. Accordingly, the UN Convention provides:

"Each State Party shall ensure in its legal system that the victim of an act of torture

obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation."<sup>43</sup>

The UN Convention is, as we have seen, restricted by the terms of the definition of torture in article 1 to acts of torture committed or permitted by public officials, and the definition in the OAS Convention has the same effect.<sup>44</sup> In practice, torture is usually perpetrated by officials of the state, and the intention is that the state should bear vicarious liability for such acts.

The victim's right to bring a complaint and to receive compensation and relief is one aspect of the matter. The other concerns the torturer. It is imperative that whenever it is established that an act of torture has taken place, criminal proceedings should be instituted against those persons alleged to be responsible, always assuming there exists sufficient evidence in law to merit a prosecution. This principle is stated in article 10 of the 1975 UN Declaration:

"If an investigation....establishes that an act of torture appears to have been committed, criminal proceedings shall be instituted against the alleged offender or offenders in accordance with national law..."

Article 8 of the OAS Convention has the same effect,<sup>45</sup> and although the UN Convention does not have a provision of this precise nature, it does define torture as a criminal offence which states parties undertake to punish as well as to prevent.<sup>46</sup> It is in this connection that the question of jurisdiction arises. The primary responsibility of states parties is to ensure that their courts have jurisdiction over acts of torture on normal grounds so that

prosecution can take place, and the relevant provision of the UN Convention states:

"Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction 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 if that State considers it appropriate."<sup>47</sup>

The normal situation envisaged by the convention involves acts of torture which have taken place within the territory of a state party, which institutes criminal proceedings against the alleged torturers. However, one of the principal objects of both the UN Convention and the OAS Convention is to define or classify torture as an international crime, and this essentially involves an extension of criminal jurisdiction, in accordance with which the authorities of states parties are empowered to prosecute and punish torturers even when the act took place in the territory of another state and involved nationals of another state.<sup>48</sup> In other words, the conventions aim to establish universal jurisdiction. This is effected by article 5, paragraph 2, of the UN Convention:

"Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article."<sup>49</sup>

The concept of universal jurisdiction is linked to the principle of extradition: where possible, the state should extradite an alleged torturer to any other state which has a preferable claim to jurisdiction, namely a claim based on one of the grounds listed in

article 5, paragraph 1, and it is only where there is no extradition arrangement or for some reason extradition is not requested or granted that a right to exercise jurisdiction on the basis of the alleged torturer's physical presence in its territory is conferred on the state. The state in fact has a responsibility to prosecute if it does not extradite: states parties to the convention must, therefore, either extradite an alleged torturer for trial or alternatively institute criminal proceedings themselves, exercising jurisdiction on the basis of the convention, an approach which has been employed in a number of other international treaties, notably those relating to terrorism and hi-jacking. This principle - *aut dedere aut judicare* - is expressed in article 7, paragraph 1, of the UN Convention in the following terms:

"The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."<sup>50</sup>

The UN Convention also lays down a number of rules governing the apprehension of suspected torturers, providing in article 6, paragraph 1, for example:

"Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted."

There must, then, be an immediate inquiry into the facts,<sup>51</sup> and the suspect must be assisted in "communicating immediately with the



nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides."<sup>52</sup> States with a claim to jurisdiction under article 5, paragraph 1, should be notified that the person is in custody, and should be advised of the circumstances which warrant detention, and they should subsequently be informed of the findings of the preliminary inquiry, and also whether the detaining state intends to exercise jurisdiction.<sup>53</sup> This procedure provides an opportunity for those states to request extradition, failing which the detaining state will be obliged to exercise its residuary jurisdiction and bring the accused torturer to trial.

The initial duty imposed by the principle of *aut dedere aut judicare* is, as we have stated, to extradite an alleged torturer to another state so that he may be tried under the most appropriate legal system, and we shall therefore examine this aspect before turning to the question of the prosecution of torturers on the basis of universal jurisdiction. In this connection, it will be useful to mention some of the principles relating to the law of extradition. Extradition is in most cases granted only when a treaty of extradition is in force between the two states concerned, although in some cases states grant extradition on the basis of their internal laws, even when no treaty exists. Extradition treaties often exclude "political offences" from the scope of their terms, so that a fugitive whose offence can be considered political may be able to escape extradition. There is, however, no general right of asylum under international law at present, though in some situations expulsion may be contrary to international law, with the result that a constructive right of asylum may be constituted.

With a view to facilitating the apprehension and extradition of suspected torturers, the UN Convention makes the following provision:

"The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them."<sup>54</sup>

The effect of this provision is to ensure that, as far as states parties are concerned, alleged torturers should always be extradited to the state which has the closest connection with the offence (and thus the most valid claim to jurisdiction), provided there is an extradition treaty in existence. Moreover, it is further provided:

"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 consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State."<sup>55</sup>

Thus, even when no formal treaty is in force, states parties may rely on the convention as an implied extradition agreement between them on the basis of their mutual acceptance of its provisions. States parties are empowered,<sup>56</sup> therefore, even in the absence of an extradition treaty, to extradite an alleged torturer to another state party which has a preferable claim to jurisdiction, and the scope of the provision is further extended by a third paragraph, which adds:

"States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State."<sup>57</sup>

On the basis of the foregoing provisions, it should always be possible for one state party to extradite to another, thus

facilitating the prosecution of torturers. The importance of these provisions lies in the fact that evidence of torture will in general be more readily available in the state in which the offence was committed rather than in a state in whose territory the torturer happens to be, perhaps quite fortuitously; and which may otherwise have very little connection with the matter. It is clearly preferable that the trial should be held in the state where the torture took place, but if this is not possible, for example if it is a non-contracting state with which the state party has no extradition arrangement, the jurisdiction of another state party having some alternative connection (namely, the nationality of the torturer or victim) should be preferred. Accordingly, it is provided in the UN Convention:

"Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1."<sup>58</sup>

The overall effect of article 8 of the UN Convention is to permit (and, except under paragraph 2, require) extradition from a state party in whose territory a suspected torturer is apprehended to another state party which has a better claim to jurisdiction. Of course, if there is an extradition treaty with a non-contracting state, this will prevail if that state's claim to jurisdiction is preferable to the competing claim of a state party. The convention does not actually require extradition in every instance, but if a request for extradition is for any reason refused, the requested state immediately comes under an obligation to institute criminal proceedings against the alleged torturer in terms of article 5,

paragraph 2, and article 7, paragraph 1, of the convention. The same applies if no request is made.

The purpose of the principle of *aut dedere aut judicare* is to ensure that no 'safe haven' is available within the territory of any state party,<sup>59</sup> and the provision is primarily obligatory rather than permissive. In general, however, states parties will be obliged to extradite, either in terms of article 8 of the convention, which covers the question of extradition between states parties fairly comprehensively, or under separate extradition arrangements with non-contracting states, and they may be expected to comply with these obligations. The main significance of the principle of *aut dedere aut judicare* lies, then, in the relationship between contracting and non-contracting states which have no extradition arrangements (assuming it is not possible to extradite to another state party under the terms of the convention): in such circumstances, a state party which apprehends a suspected torturer will be obliged to institute criminal proceedings against him on the basis of universal jurisdiction. The same applies, of course, if extradition is for any reason refused in spite of an obligation to extradite.

While the principle of *aut dedere aut judicare* is essentially obligatory in nature, the concept of universal jurisdiction is also permissive: the right to exercise jurisdiction purely on the basis of physical custody of the accused is in fact the essential factor in categorising torture as an international crime. Again, the significance of universal jurisdiction lies largely in the relationship between contracting and non-contracting states which have no extradition agreement, as states parties will normally wish to extradite to other states which have a preferable claim to

jurisdiction. When extradition is not possible, universal jurisdiction enables states parties to institute proceedings even though the offence was committed in the territory of another state and involved nationals of another state.

We have assumed that extradition will normally be preferable to the exercise of universal jurisdiction, but in fact this may not be the case: since torture is usually authorised by governments, it may actually be undesirable to return an alleged torturer to his own country, because this may have the effect of allowing him to escape punishment. In other words, a repressive regime may seek extradition of one of its officials, not for the purpose of punishing him, but rather to prevent his prosecution in the other state. In these circumstances, which may arise even between states parties to the convention, the requested state may prefer to refuse to grant extradition and institute criminal proceedings itself on the basis of universal jurisdiction. It is in such cases, whether or not there is an extradition treaty, that the principle of universal jurisdiction is of greatest significance, and it is in this somewhat limited sphere that the use of torture by regimes which refuse to ratify international conventions can be tackled through international law.

It should be noted that the terms of the UN Convention are unclear on the question of universal jurisdiction: article 7, paragraph 1, imposes an obligation to prosecute "in the cases contemplated in article 5", and article 5, paragraph 2, establishes jurisdiction where the state party "does not extradite....pursuant to article 8", but article 8 applies exclusively to extradition arrangements between states parties, and it might be inferred that universal jurisdiction can only be assumed by a state party when

extradition is not granted to another state party which has a claim to jurisdiction, and not when only a non-contracting has such a claim; in other words, universal jurisdiction may apply only if at least one state party has a claim to jurisdiction and extradition to that state is not granted. On the other hand, it can be argued that if no other state party has a claim to jurisdiction, extradition cannot take place "pursuant to article 8", so that universal jurisdiction can be exercised, and article 6 seems to indicate that any suspected torturer may be apprehended with a view to being either extradited or prosecuted. It is clear in any event that the effect of the convention would be seriously compromised if the principle of universal jurisdiction were to be limited to cases involving only states parties: in general, it may be anticipated that those states which ratify the convention will be prepared to extradite to other states parties, with the result that prosecution on the basis of universal jurisdiction would be virtually non-existent. A restrictive interpretation of the convention would actually prevent states parties from exercising jurisdiction in situations where extradition to a non-contracting state is not granted, and would in effect create safe havens within the territory of states parties for torturers from those very states which are otherwise beyond the scope of the provisions. It would, however, be possible for a state party to prosecute on the basis of universal jurisdiction in some circumstances where a non-contracting state has a claim to jurisdiction but no extradition agreement is in force: for example, if torture takes place in a non-contracting state and is perpetrated by a national of that state, but the victim is a national of a state party, a second state party which apprehends the torturer can establish jurisdiction if it does not

extradite to the first state party, since it has "not extradited pursuant to article 8". It seems unreasonable, therefore, to assert that jurisdiction cannot be exercised simply because the victim is not a national of a state party, that is where there is no connection with any state party. To accept this would limit the application of universal jurisdiction to cases involving at least one state party with a claim to jurisdiction. It must be assumed, then, that the true intention of the convention is to establish universal jurisdiction over all torturers, so that states parties which apprehend torturers and cannot or do not wish to extradite may proceed with prosecution, irrespective of where the crime was committed and also irrespective of the nationality of the torturer and the victim. The value of the convention in fact depends largely on the recognition of torture as an international crime in this sense.

There are certain practical difficulties in classifying torture as an international crime, and it has been suggested that this is not an appropriate course in relation to a crime which is not international by nature.<sup>60</sup> Certainly, there are potential problems in the area of evidence,<sup>61</sup> and in view of the fact that it is difficult to prove torture at the best of times, the establishment of universal jurisdiction might be considered of limited value. The dangers are recognised in paragraphs 2 and 3 of article 7 of the UN Convention, which are intended to ensure that the normal standards of justice are maintained.<sup>62</sup> Article 9, paragraph 1, also acknowledges the problems, and encourages co-operation and assistance between states parties in the prosecution of alleged torturers, "including the supply of all evidence at their disposal necessary for the proceedings."

In practical terms, no proceedings can be brought under the principle of universal jurisdiction unless and until a suspected torturer actually enters the territory of one of the states parties to the convention. Thus, while states parties are obliged to prevent torture and to ensure that acts of torture are punished when they do occur, the practice of torture in non-contracting states, where it is more likely to be a result of government policies, is unaffected by the convention except in so far as the concept of universal jurisdiction permits states parties to take action against torturers from non-contracting states. This system is entirely dependent on such torturers visiting the territory of a state party to the convention. The problems which arise are obvious: firstly, a sensible torturer can easily avoid travelling to the territories of states parties to the convention; secondly, a torturer may visit the territory of a state party without divulging his true identity; and thirdly, even if a suspected torturer can be identified and apprehended, there are substantial difficulties in obtaining sufficient proof to ensure a conviction: it is often difficult to obtain evidence in the country in which torture takes place, as there may be no witnesses or medical records to support the victim's allegations, but these problems are clearly compounded when trial takes place in a country which may have little connection with the incident. There are particular problems in identifying those indirectly responsible for torture, that is those who authorise it without physically participating: even if they can be identified, political considerations may inhibit a state party from taking action, and indeed a visiting dignitary may have diplomatic immunity.



There are, nevertheless, certain situations in which torturers could be apprehended and prosecuted by virtue of the application of universal jurisdiction,<sup>63</sup> for example where there has been a change of regime and former torturers are compelled to flee the country and enter the territory of a state party to the convention. Indeed, torturers may take the risk of travelling abroad in the belief that they will not be identified or, if they are, that no action will be taken. Such a situation arose in a case in the United States, in which a former Inspector-General of Police from Paraguay was sued in a civil action for damages while visiting the United States as a tourist,<sup>64</sup> the allegation being that he had tortured and murdered a named person in Paraguay. The decision of the district court, which was concerned solely with the question of jurisdiction and did not examine the facts, was that American courts lacked jurisdiction because torture of a foreign national by a national of the same country did not violate the statute in question. The Court of Appeals, however, reversed this decision, concluding that the district court did have jurisdiction (although it did not give an opinion on the question of whether the case should be dismissed on the grounds of *forum non conveniens*), and remanded the case for further proceedings. The Court of Appeals accepted that in the past a nation's treatment of its own nationals had been outwith the scope of international law, but asserted that "today a nation has an obligation under international law to respect the right of its citizens to be free of official torture."<sup>65</sup> In the opinion of the Court, "certain fundamental human rights are now guaranteed to individuals as a matter of customary international law."<sup>66</sup> In support of this, the Court referred to the fact that torture is prohibited in international treaties, and noted

that no government claims the right to torture its own nationals, concluding on that basis that torture is to be considered contrary to international law, even in the case of states which are not parties to human rights conventions, especially when no dissent or reservation has been expressed.<sup>67</sup> The fact that the law of Paraguay itself prohibited torture and recognised it as a tort was also taken into account by the Court.

It is significant that the Court of Appeals was prepared to allow jurisdiction to be exercised on these grounds, even though there was no convention against torture then in force. Had the United States been party to such a convention, of course, criminal jurisdiction over the alleged torturer could have been established. It must be borne in mind that this was a civil action for damages, and that the alleged torturer had clearly failed to anticipate any difficulty in visiting the United States, but the case does give an indication of the potential benefits of universal jurisdiction. The final outcome of the action was somewhat disappointing: although a substantial sum in respect of damages was awarded in 1983, the torturer had by then returned to his own country, and it is unlikely that he will risk venturing into American territory in the foreseeable future.<sup>68</sup>

Another illustration of circumstances in which a torturer might be apprehended can be seen in the capture of Captain Astiz of the Argentinian armed forces on the island of South Georgia by British troops during the Falklands conflict in 1982. Various human rights groups had previously identified Astiz as having been involved in torture during the 1970's, and he was in fact wanted by several governments for questioning in connection with the disappearance of their nationals in Argentina. However, the situation was covered by

the Geneva Convention on prisoners of war, which effectively protected Astiz, and he was subsequently repatriated. It is unclear what the position would have been if the convention against torture had been in force and applicable, particularly as the alleged offences had occurred several years earlier and did not relate to the Falklands conflict.

There is a further aspect of extradition which involves not the torturer but rather potential victims of torture: there is a principle, first enunciated in article 3, paragraph 2, of the Convention Relating to the International Status of Refugees 1933, which forbids extradition or return of persons to any country where they would be in danger of persecution.<sup>69</sup> Some authorities on international law suggest that this principle (*non-refoulement*) has in fact become a principle of customary international law, but although the UN Declaration on Territorial Asylum 1967 supports this proposition,<sup>70</sup> most authorities accept that the right is moral rather than legal. The UN Convention against Torture, however, expresses the principle as a legal obligation in relation to torture:

"No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>71</sup>

*Refoulement* is not only prohibited in the case of extradition, but in any situation in which a person - not necessarily someone who has committed an offence - is in the territory of a state party and is liable to be forcibly returned to another country, possibly even when he is not lawfully in that territory but is merely seeking asylum. Article 3 of the UN Declaration on Territorial Asylum states that no one who is seeking asylum "shall be subjected to measures such as

rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution." This virtually confers a right to asylum, although the Declaration is not legally binding, and it is extremely doubtful if a legal right to be granted asylum exists in international law. As far as the UN Convention is concerned, however, states parties are legally bound not to return a person to a country where he is in danger of being tortured.

*Refoulement* is prohibited by the UN Convention where there are "substantial grounds" for believing that the person in question would be in danger of being tortured, and it would therefore appear insufficient simply to show that torture is practised in the state concerned. The word "would" was actually substituted for the original "may",<sup>72</sup> indicating that the particular individual must himself be in real and direct danger.<sup>73</sup> However, it is further provided in article 3 of the UN Convention:

"For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."<sup>74</sup>

This seems to indicate that the existence of a systematic practice of torture within a state could be regarded as sufficient grounds for invoking the principle of *non-refoulement*.

The working group which drafted the UN Convention at one stage proposed that when a request for extradition is refused on the ground of *non-refoulement*, the refusing state should itself institute criminal proceedings against the fugitive in respect of the crimes for which extradition is sought.<sup>75</sup> However, although a number of

alternative suggestions were put forward, no agreement was reached on this matter, and there is no provision in the convention which requires states to prosecute in these circumstances. There are obvious difficulties in following such a course, although if the offence itself is torture the state would actually be obliged to institute criminal proceedings in accordance with the maxim *aut dedere aut judicare*.

The final paragraph of article 13 of the OAS Convention deals with *non-refoulement* as follows:

"Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, 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."

This provision seems to be limited to cases involving the extradition of alleged torturers, and if extradition were to be refused in such circumstances, the state would of course have to prosecute under the principle of *aut dedere aut judicare*. Otherwise, the article is wider than the corresponding provision in the UN Convention, as it is not restricted to the threat of torture. Article 15 of the OAS Convention, which was in fact a new provision in the final text, should also be noted:

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

In this connection, attention should be drawn to article 22, paragraphs 7 and 8, of the American Convention on Human Rights, which creates a legal obligation to grant asylum:

"Every person has the right to seek and be granted asylum in a foreign territory, in

accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."

In the European sphere, it has been suggested that either extradition or expulsion to a country where torture is known to be practised might in itself be considered a violation of article 3 of the European Convention on Human Rights (prohibition of torture), at least if there was cause to believe that the particular individual was in immediate danger of being subjected to torture on his return.<sup>76</sup> It has been suggested in the past that extradition treaties between states members of the Council of Europe and states in which torture occurs should be revised in order to take these factors into account, and the Committee of Ministers was recommended to establish this principle in a European Convention on Extradition. Moreover, in 1967, the Council of Europe actually adopted a non-binding Resolution on Asylum to Persons in Danger of Persecution, the terms of which do not differ materially from those of articles 2 and 3 of the UN Declaration on Territorial Asylum.

These, then, are the principal substantive provisions of the UN Convention against Torture and the Inter-American Convention to Prevent and Punish Torture. Both adopt a similar approach, laying down international guidelines so that states parties can introduce appropriate domestic measures for the prevention and suppression of torture and establishing universal jurisdiction in order to tackle torture on a broader front than has previously been possible. Both instruments are fairly general in expressing the measures which should

be taken by government, but both endeavour to establish a degree of international control over states parties by providing for a system of monitoring governments in the implementation of their obligations, and in the case of the UN Convention there are also created certain procedures for dealing with incidents of torture which do arise.

We have already identified the serious limitations which afflict international measures of implementation: firstly, in that regimes which most require supervision seldom submit to it; secondly, in that international authorities are rarely equipped to carry out genuinely effective investigation and pronounce binding decisions; and thirdly, in that no effective enforcement machinery exists. We have further indicated that in view of these limitations the prevention of torture must be achieved primarily at national level by means of internal safeguards. However, the fact that the effect of existing procedures is severely curtailed by the present realities of international politics does not necessarily mean that international measures of implementation have no value at all; rather, it means that a more radical approach is needed in the creation and enforcement of international procedures for the protection of human rights. Indeed, it is only because of the limitations resulting from international political conditions that domestic safeguards assume such significance: ideally, the protection of human rights should be secured at international level, so that objective standards can be applied universally. Such a situation is not possible, however, as long as the concept of the sovereign state does not permit international authorities to exercise effective restraint of national governments in the field of human rights. It would be a revolutionary breakthrough if procedures could be established which applied

universally and did not depend upon the consent of each state, but in view of the fact that such a development is highly improbable, the most that can realistically be achieved is the fortification and full utilisation of the existing range of procedures, so that they will have real value in confronting human rights problems as they are gradually accepted by an increasing number of states. At the same time, however, it is essential for steps to be taken with a view to discouraging the use of torture by governments which reject international supervision. The question which now concerns us, then, is whether the UN and OAS Conventions introduce any novel measures of implementation or develop the existing range of procedures into a more effective and comprehensive system for the specific purpose of preventing torture.

The basic procedure established by both instruments is a reporting system whereby states parties keep the relevant authorities informed of the measures which they have introduced in implementation of their obligation to prevent and punish torture. The OAS Convention thus provides in article 17 for states parties to "inform the Inter-American Commission on Human Rights of any legislative, judicial, administrative, or other measures they adopt in application of this Convention."<sup>77</sup> The UN Convention requires states to report to the newly created Committee against Torture.<sup>78</sup> The relevant provisions are contained in article 19:

"1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.



2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article."

This article creates a reporting system which is clearly based on the similar procedure existing under the International Covenant on Civil and Political Rights.<sup>79</sup> The reporting process is, in fact, the convention's principal method of ensuring that international supervision over states parties is established, and the aim is clearly to encourage a constructive dialogue whereby the Committee against Torture can support and advise governments in their efforts to prevent torture, rather than to expose acts of torture and condemn governments for their failure to fulfil their obligations. Ultimately, of course, the purpose of reporting is to ensure that states parties are taking steps to eliminate torture, and there is some opportunity for censure, both in the general comments transmitted to the state and in the annual report, but the scope is somewhat limited, and the main value of the system lies in the dialogue between the Committee and each government. The effect of the procedure is likely to be very similar to that of the reporting system operating under the International Covenant on Civil and Political Rights, and it is therefore unlikely to have any significant impact on the problem of systematic governmental torture.

The OAS Convention does not specifically create any other measures of implementation, but simply refers in general terms to the procedures already functioning within the Inter-American sphere.<sup>80</sup> The UN Convention, on the other hand, creates three further procedures, all of which are intended to come into operation when torture has actually taken place. These include inter-state complaint and individual petition procedures similar to those established under the International Covenant on Civil and Political Rights and its Optional Protocol and, as with these instruments, separate acceptance of the procedures is required.

Article 21, paragraph 1, of the UN Convention permits states parties to declare that they recognise "the competence of the 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 convention, but restricts the application of the provision to the consideration of communications from states parties which have made such a declaration.<sup>81</sup> Procedural rules are laid down in sub-paragraphs (a) to (h), the effect of which is broadly comparable to the effect of the equivalent procedure created in articles 41 and 42 of the International Covenant on Civil and Political Rights which, of course, has not yet been utilised.<sup>82</sup> It is clear from the small number of governments which have accepted the Covenant's inter-state complaint system that governments generally do not favour this type of procedure, and in view of the fact that the provision in the Convention also requires separate acceptance there can be little optimism about its effect on regimes which actually utilise torture. The fact that only limited action can be taken in any event merely serves to underline this.

Article 22 of the UN Convention deals with the right of individual petition, and again the procedure is similar to the equivalent system already existing under the Optional Protocol.

Paragraph 1 of article 22 states:

"A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration."⁂

Paragraphs 2 to 7 contain procedural rules which are essentially the same as those applying to the Optional Protocol procedure, and it may be expected that the Committee against Torture will act as responsibly and to the same effect as the Human Rights Committee has done.

The relationship between the procedures created by the UN Convention and existing procedures is unclear. It is possible that in the future an individual subjected to torture may have the option of addressing his complaint to the Human Rights Committee or the Committee against Torture, and while it would probably be preferable for the specialist agency to deal with the matter, it remains to be seen whether the Committee against Torture will in fact be able to establish itself as an effective and authoritative body. Its initial success will, of course, depend on the states which accept its jurisdiction.

The UN Convention does make use, then, of the type of measures which are already functioning in international law, applying them to the specific issue of torture. It is clear, however, that such measures are unlikely to have a significant impact on the critical

problems, in view of the limited success of the international procedures presently operating. Certainly, the powers of the Committee against Torture are no more extensive than those of the Human Rights Committee in so far as the inter-state and individual petition systems are concerned. However, the UN Convention does establish a new procedure of considerable significance in article 20:

"1. If the Committee 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, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.

3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.

4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Committee shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24."

This provision clearly constitutes a major innovation in the development of measures for the prevention and suppression of torture by international law, as it establishes a general procedure whereby an international authority will be empowered to conduct a thorough investigation into suspected systematic torture on the basis of "reliable information" from any source. Moreover, while the provision stresses the importance of securing the co-operation of the government involved, and the effectiveness of the system will undoubtedly be enhanced when such co-operation is forthcoming, the application of the procedure is not dependent on separate acceptance by states parties (although article 28 does permit states to opt out), nor does the conduct of an inquiry actually require the co-operation of the state. It was clearly felt that, in view of the gravity of the problem of systematic torture, there had to be a process by which the Committee could take action on its own initiative whenever such a situation came to its attention. Such a provision is far-reaching, and as such would have been liable to discourage governments from ratifying the convention had it not been for the escape clause in article 28. Unlike the various optional procedures, however, this provision puts the onus on governments to specifically reject it, thus increasing the moral pressure to accept the procedure.<sup>34</sup> It is easier for governments to refrain from accepting optional measures than it is for them to positively reject a procedure clearly intended to promote the elimination of torture, and it might have been of value to employ the same formula in the case of the optional procedures.

Article 20 requires the Committee to seek the co-operation of the state in the examination of the information it has received and during an inquiry, and indeed "at all stages of the proceedings", but it does

not appear to prevent the Committee carrying out an inquiry if the state refuses to co-operate, although a visit to the territory of the state does depend on agreement, for obvious reasons.<sup>85</sup> The initial aim of the procedure is, of course, to achieve a solution through dialogue, and co-operation is encouraged by the confidentiality rule, but while confidentiality may be important during an inquiry, it is essential in view of the adverse effect of confidentiality on the ECOSOC resolution 1503 procedure that if torture has occurred the Committee should have the right to make its findings public at the conclusion of the inquiry, especially if the government fails to take appropriate action. It is not clear what steps could be taken if a government simply ignored the findings of the Committee, although paragraph 5 requires only consultation, not approval for inclusion of a summary account in the annual report, and the Committee could presumably express public condemnation in this way. Indeed, as such public criticism is the only real sanction available to the Committee, this course may be the only viable one when a government is found to have authorised systematic torture and shows no signs of terminating the practice. The Committee should, however, have been specifically empowered to censure governments when a violation has been established. It would also be valuable for there to be a presumption that a government which fails to co-operate has condoned the use of torture, and ideally a similar presumption should be extended to a failure to ratify the convention, or at least to a refusal to accept the procedure, but this is obviously an unrealistic aspiration. In fact, while the Committee may be able to utilise the article 20 process to condemn governments and expose violations, the purpose really seems to be the institution of amicable discussions, and it is

perhaps unlikely that the Committee will utilise the procedure without the full co-operation of the government concerned.

The procedure established by article 20 is clearly of great significance, as it allows investigation of systematic torture on a broad basis, but it remains to be seen how effectively the Committee against Torture can apply it.

One of the most interesting aspects of the inquiry procedure created by article 20 of the UN Convention is the provision relating to visits to the territories of states parties. The opportunity to investigate allegations of torture by this means is a crucial factor in the detection and prevention of torture by international agencies:

"Experience has shown that on the rare occasions when humanitarian bodies have had free access to places where people were being held by the authorities, the number of allegations of torture and ill-treatment has diminished significantly."<sup>66</sup>

In 1979, the International Commission of Jurists suggested a draft Optional Protocol to the UN Convention which would have provided for the creation of a committee of experts with authority to send delegates both on a regular and on an *ad hoc* basis to any place of detention in the territory of any state party to the Protocol.<sup>67</sup> The committee would have had wide powers of investigation, and would have prepared confidential reports which would only have been made public if some unresolved dispute had arisen with the government involved. This proposal was based on the success of the methods employed by the International Committee of the Red Cross, and the idea was adopted, although in a rather modified form, in article 20 of the UN Convention. In that article, visits do require the agreement of the state, since in practice it would normally be impossible to arrange a

visit without the co-operation of the authorities. It might have been useful if the provision had been supported by a presumption that if access was refused the government has failed to ensure the prevention of torture.

The fundamental aim of the European Convention is to ensure the prevention of torture and ill-treatment by establishing a system of access to places of detention. The convention proposes to strengthen the protection of detainees by creating a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment empowered to make visits to places of detention within the territories of states parties in order to examine the treatment of detainees.<sup>88</sup> States parties agree to permit such visits by the Committee's representatives,<sup>89</sup> including experts and interpreters,<sup>90</sup> and the Committee may organise both periodic visits and "such other visits as appear to it to be required in the circumstances."<sup>91</sup> The Committee is obliged to co-operate with the national authorities,<sup>92</sup> and must notify the government of its intention to carry out a visit, but thereafter its delegates may visit any place of detention without further intimation.<sup>93</sup> The reason for this flexibility is to ensure there is no opportunity for a 'clean-up' operation at any particular location, and while it is obviously still possible for security forces to take steps to eradicate signs of ill-treatment as soon as they become aware of the possibility of a visit, the existence of the procedure itself constitutes a disincentive to ill-treatment. For this reason, the state is required to provide the following facilities to the Committee:

- "a. access to its territory and the right to travel without restriction;
- b. full information on the places where persons deprived of their liberty are being held;



- c. unlimited access to any place where persons are deprived of their liberty, including the right to move inside such places without restriction;
- d. other information available to the Party which is necessary for the Committee to carry out its task."<sup>94</sup>

In order to ensure that the Committee is able to procure the fullest information, it is provided that it may "interview in private persons deprived of their liberty"<sup>95</sup> and "communicate freely with any person whom it believes can supply relevant information."<sup>96</sup> Direct interviews with and examinations of detainees are clearly an essential feature of the procedure, since they are the principal source of evidence of ill-treatment.

The system depends, of course, upon the co-operation of the government concerned, since access to its territory and to places of detention remain under its control, and it is not difficult for the authorities to place sufficient obstacles in the way of the Committee to frustrate its activities. In fact, article 9 of the convention provides that in exceptional circumstances the authorities may make representations against a visit "at the time or to the particular place proposed" 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." While paragraph 2 of the same article makes it clear that it is intended agreement should be reached to "enable the Committee to exercise its functions expeditiously", the provision does seem to give governments something of an escape clause. However, within the European sphere there is probably sufficient respect for the rule of law to ensure a fairly high degree of compliance with the requirements of the

convention, and if the provision of access can be secured the procedure will undoubtedly have a significant effect in preventing torture. The value of the system lies in the fact that if free access is permitted, there is little possibility of torture and ill-treatment remaining undetected, and the threat of exposure will act as a deterrent to the security forces.

Having completed its visit, the Committee will prepare a report of the facts, "taking account of any observations which may have been submitted by the Party concerned."<sup>97</sup> This report will be transmitted to the state party with any recommendations and suggestions for improvements considered necessary by the Committee.<sup>98</sup> This procedure is based on that employed by the International Committee of the Red Cross,<sup>99</sup> and rather than seeking confrontation it is intended to procure a constructive role for the UN Committee based on confidence in its impartiality and integrity. For this reason, information gathered by the Committee, its report and consultations with the state party remain confidential,<sup>100</sup> and it is only if the state fails to co-operate or refuses to improve the situation that the Committee may decide to make a public statement on the matter,<sup>101</sup> although it will also publish its report if requested by the state.<sup>102</sup> The aim of the procedure is not, then, primarily to condemn governments and publicise the use of torture, and publicity is actually avoided in the first instance on the grounds that such an approach puts governments on the defensive and is likely to discourage co-operation by antagonising them. Ultimately, however, if the procedure fails to ensure the protection of detainees, it is essential for there to be some form of sanction, and the provision for a public statement fulfils this function.

The provisions of the European Convention are much wider than those of the UN Convention in the matter of access to places of detention, but in view of the high level of compliance with international obligations within the European sphere, it is unlikely that the more extensive nature of the provisions will have an adverse effect on support for the European agreement. On that basis, the provision is of great significance, because it permits more direct monitoring of states than is otherwise possible, and it also allows publicisation of torture. The provision of access to places of detention is a new development which could potentially revolutionise the protection of detainees from torture. However, the process still requires initial acceptance by governments, and outwith the European sphere there is little prospect of similar procedures being widely supported. Moreover, the effectiveness of the procedure does depend on continuing free and immediate access to every place of detention in order to ensure that detainees cannot be transferred elsewhere prior to a visit and torture equipment cannot be concealed. If such access is possible and detainees can be interviewed and examined, a commission of inquiry should be able to establish if torture is being employed. However, national governments can obviously restrict access quite easily, or can at least cause delays which will invalidate the whole point of the process, and since it is probable that governments which condone torture will employ such tactics, the system needs a provision that if any obstacles are placed in the way of the commission it may be presumed that torture is being used. Such a provision would allow for the establishment of a commission whose activities did not depend entirely on the co-operation of governments. In the final analysis, however, it must be conceded that a system of

visits to places of detention in practice will often be unworkable and will generally be of limited value, particularly in view of the fact that many governments will refuse to submit to such a procedure.

These, then, are the provisions of the three international instruments which address the specific issue of torture. The European Convention attempts to tackle the problem in one particular area, while the UN and OAS Conventions adopt a much broader approach. Their principal contribution to the prevention of torture lies in the recognition of torture as an international crime, although this deals with only a relatively minor aspect of the issue. Both instruments utilise existing types of measures, and the UN Convention does introduce a new inquiry procedure, but essentially they contain no radical new approach to the problems of governmental torture, and in effect they recognise the limitations of international law by emphasising the importance of domestic safeguards. In conclusion, none of the instruments solves the fundamental problems which face international efforts to prevent and suppress the practice of torture, in particular the problem of imposing on repressive regimes an obligation to submit to international supervision and ensuring that effective action can be taken when the prohibition of torture is wilfully violated.

## Notes

1. See General Assembly resolution 32/62. By resolution 32/63, the General Assembly also requested the Secretary-General to draw up and circulate among member states a questionnaire regarding the steps which should be taken to put the 1975 Declaration into practice, and to submit information supplied in response to this questionnaire to the Assembly at its 33rd session. For the information, see UN document A/33/196 and Add.1-3. The General Assembly further called upon all member states to make unilateral declarations against torture, and requested the Secretary-General to advise it of these in an annual report: see resolution 32/64 and also UN documents A/33/197, A/35/370, A/36/426 and A/37/263 with their respective Addenda. For a summary of the developments within the United Nations prior to the adoption of the Convention against Torture, see generally UN documents A/34/100, A/36/100, A/37/100 and A/38/100.

2. See Commission on Human Rights resolution 18(XXXIV).

3. See ECOSOC resolution 1979/35, adopted on the recommendation of Commission on Human Rights resolution 18(XXXV). See also General Assembly resolution 34/167.

4. For the 1980 Report of the Working Group, see UN document E/CN.4/1367 of 5 March 1980.

5. See ECOSOC resolution 1980/32, adopted on the recommendation of Commission on Human Rights resolution 34(XXXVI).

6. See General Assembly resolution 35/178.

7. See Commission on Human Rights resolution 25(XXXVII), ECOSOC resolution 1981/37 and General Assembly resolution 36/60. For the 1982 Report of the Working Group, see UN document E/1982/12/Add.1 (E/CN.4/1982/30/Add.1).

8. See Commission on Human Rights resolution 1982/44, ECOSOC resolution 1982/38 and General Assembly resolution 37/193. For the 1983 Report of the Working Group, see UN document E/CN.4/1983/63.

9. See Commission on Human Rights resolution 1983/48, ECOSOC resolution 1983/38 and General Assembly resolution 38/119. See also Commission on Human Rights resolution 1984/21.

10. See AG/RES 368(VII-0/78). For a summary of the developments, see '25 Years of Struggle for Human Rights in the Americas' (produced by the Inter-American Commission on Human Rights), at pp. 21-22.

11. The Statement of Reasons also recorded the progress of the draft convention.

12. See AG/RES 547(XI-0/81), AG/RES 624(XII-0/82) and AG/RES 644(XII-0/83).

13. See '25 Years of Struggle in the Americas', at p. 21, and also OAS document AG/doc.1962/85 of 7 November 1985. The convention was

signed on 9 December 1985: see AG/RES 783(XV-0/85). The text is reproduced in 25 International Legal Materials 1986, at 519-26.

14. See Review of the International Commission of Jurists, No. 31, Dec 1983, at p. 51.

15. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is reproduced in Review of the International Commission of Jurists, No. 37, Dec 1987, at pp. 51-56..

16. It should be noted that both the UN and OAS Conventions define torture. Article 1 of the UN Convention defines torture as "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." The OAS Convention defines torture in article 2 as follows: "...any act intentionally performed whereby 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. 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."

17. UN Convention, article 2(1). Article 16(1) extends this obligation and certain other provisions to other forms of ill-treatment.

18. OAS Convention, article 1.

19. OAS Convention, article 6. The type of measures is not specified, but article 2(1) of the draft prepared by the Inter-American Commission on Human Rights, which formed one of the sources for the convention, contained a provision similar to that in article 2(1) of the UN Convention. See also article 17 of the OAS Convention. Article 6 also extends to other ill-treatment.

20. These state: "No state may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment....Each State shall, in accordance with the provisions of this Declaration, take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practised within its jurisdiction."

21. UN Convention, article 11. Cf. article 6 of the 1975 Declaration.

22. UN Convention, article 10(1). Cf. article 5 of the 1975 Declaration.
23. UN Convention, article 10(2).
24. See OAS Convention, article 7: "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. The States Parties likewise shall take similar measures to prevent other cruel, inhuman, or degrading treatment or punishment."
25. IACHR Draft Convention for the Prevention and Suppression of Torture, article 2(6).
26. See UN Convention, article 4(1), and OAS Convention, article 6.
27. See UN Convention, article 4(2), and OAS Convention, article 6. Penalties should be appropriate to the "grave" or "serious" nature of the crime.
28. See Torture in Greece: The First Torturers' Trial, at p. 58.
29. UN Convention, article 4(1). Cf. article 7 of the 1975 Declaration, and see also OAS Convention, article 6.
30. UN Convention, article 1(1).
31. UN Convention, article 2(2). Cf. article 3 of the 1975 Declaration.
32. OAS Convention, article 5.
33. UN Convention, article 2(3). The original text added a second sentence, which was subsequently omitted: "However, this may be considered in mitigation of punishment if justice so requires."
34. See OAS Convention, article 4, which states: "The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability."
35. UN Convention, article 15. Cf. article 12 of the 1975 Declaration.
36. UN Convention, article 12. Cf. article 9 of the 1975 Declaration.
37. See the 1980 Report of the Working Group, at para. 70.
38. It should be noted, however, that the words "even if there has been no formal complaint", which are used in the 1975 Declaration, have been omitted from the final text of the Convention: see the 1980 Report of the Working Group, at para. 70.

39. UN Convention, article 13. Cf. article 8 of the 1975 Declaration, and also the first paragraph of article 8 of the OAS Convention.

40. UN Convention, article 13. See also the 1980 Report of the Working Group, at para. 71.

41. For states parties to the American Convention on Human Rights, the individual petition system would apply, while the inter-state procedure would also apply to those states which have accepted it. Otherwise, the only procedure which could be utilised would be that established under the Statute of the Inter-American Commission on Human Rights.

42. See UN Convention, article 22. The procedures are discussed at p. 364, *infra*.

43. UN Convention, article 14(1). Cf. article 11 of the 1975 Declaration. It is unclear whether the compensation provisions also apply to cases of ill-treatment which do not constitute torture: see article 16(1) of the UN Convention.

44. Article 9 of the OAS Convention states: "The States Parties undertake to incorporate into their national laws regulations guaranteeing suitable 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."

45. Cf. articles 1 and 6.

46. See UN Convention, article 4. Cf. articles 5(2) and 7(1).

47. UN Convention, article 5(1). Articles 6 and 8 of the OAS Convention appear to apply only to torture committed within the territory of the particular state, but article 12 is in similar terms to article 5(1) of the UN Convention.

48. Articles 12 and 13 of the UN Convention refer only to acts of torture which take place within territory under the jurisdiction of the state concerned, but articles 6(1) and 5(2) extend the scope of the convention to acts which take place outwith the territory of the state.

49. Cf. the second paragraph of article 12 of the OAS Convention, which states: "Every State Party shall also 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." See also article 14.

50. See also paragraphs 2 and 3, quoted at note 62, *infra*. Cf. article 14 of the OAS Convention, which provides: "When a State Party does not grant 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 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 has requested the extradition."

51. See UN Convention, article 6(2).

52. See UN Convention, article 6(3).

53. See UN Convention, article 6(4).

54. UN Convention, article 8(1). The first paragraph of article 13 of the OAS Convention is in similar terms. See also OAS Convention, article 11.

55. UN Convention, article 8(2). The second paragraph of article 13 of the OAS Convention is in similar terms.

56. The word "may" was specifically preferred to the word "shall".

57. UN Convention, article 8(3). The third paragraph of article 13 of the OAS Convention is in similar terms.

58. UN Convention, article 8(4).

59. It may be noted that the IACHR draft provided in article 6 that torture is an ordinary criminal offence, so that political asylum cannot be granted to torturers.

60. See the 1982 Report of the Working Group, at para. 25.

61. See *ibid.*, at para. 24.

62. Paragraphs 2 and 3 of article 7 of the UN Convention state: "These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings."

63. See the 1982 Report of the Working Group, at para. 26.

64. *Filártiga v. Peña-Irala* [United States] Court of Appeals for the Second Circuit, decision reproduced in 19 International Legal Materials (1980), at pp. 585-611. See also *Torture in the Eighties*, at pp. 33-34.

65. See 19 International Legal Materials (1980), at p. 587.

66. *Ibid.*, at p. 589.

67. *Ibid.*, at pp. 596-97.

68. A Paraguayan Court of Appeal in fact acquitted him of the murder.

69. Cf. article 33, paragraph 1, of the Convention Relating to the Status of Refugees 1951, which states: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The convention is reproduced in Brownlie, *op.cit.*, at pp. 135-52. It is binding only on states parties, and is restricted to refugees as defined in article 1 and in a subsequent Protocol. Cf. also article 13 of the International Covenant on Civil and Political Rights, which gives only a procedural guarantee.

70. This Declaration was adopted by the General Assembly of the United Nations on 14 December 1967. The relevant provision is contained in article 3.

71. UN Convention, article 3(1).

72. See the 1980 Report of the Working Group, at para. 17.

73. See the 1983 Report of the Working Group, at para. 15.

74. UN Convention, article 3(2). Earlier drafts added "such as those resulting from a state policy of *apartheid*, racial discrimination or genocide, colonialism or neo-colonialism, the suppression of national liberation movements or the occupation of foreign territory." The political overtones in this are obvious, and one delegate suggested that a list of state policies which violate human rights would have to include "religious persecution, denial of free speech, suppression of political dissent and the free flow of information, and armed intervention in the affairs of a sovereign State." See the 1980 Report of the Working Group, at paras. 28-30. This view was reiterated in 1983: see the 1983 Report of the Working Group, at paras. 14-18.

75. See the 1980 Report of the Working Group, at paras. 19-25.

76. See Arthur Lewis, *La Torture dans le Monde*, *Jus Gentium, Diritto delle Relazione Internazionale*, Vol. X, Mar 1977, 1-10, at pp. 7-8.

77. The second paragraph of article 17 states: "In keeping with its duties and responsibilities, the Inter-American Commission on Human Rights will endeavor in its annual report to analyze the existing situation in the member states of the Organization of American States in regard to the prevention and elimination of torture."

78. See UN Convention, articles 17 and 18, for the provisions relating to the Committee, which will consist of ten experts of "high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity."

79. See article 40 of the International Covenant on Civil and Political Rights, which was discussed at pp. 258-70, *supra*. A number of ambiguities have been removed.

80. See OAS Convention, articles 8 and 16. For states parties to the American Convention on Human Rights, the individual petition procedure

would apply automatically, and the inter-state complaint procedure would apply if separately accepted. Otherwise, action could only be taken under the Statute of the Inter-American Commission on Human Rights, although of course the International Covenant on Civil and Political Rights might also be applicable.

81. The following states have made declarations under article 21 of the Convention against Torture: Argentina, Denmark, France, Norway, Sweden, Switzerland.

82. See articles 41 and 42 of the International Covenant on Civil and Political Rights, which were discussed at pp. 270-72, *supra*.

83. Cf. article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights, which was discussed at pp. 273-81, *supra*. The following states have made declarations under article 22 of the Convention against Torture: Argentina, Denmark, France, Norway, Sweden, Switzerland.

84. A few states have, in fact, excluded the application of article 20: Bulgaria, Byelorussian SSR, France, Hungary, Ukrainian SSR, USSR.

85. In fact, earlier proposals put the onus on the government to refuse.

86. Torture and Ill-Treatment of Prisoners: The Record Since 1975, submitted by Amnesty International to the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders 1980, at p. 4. Cf. Review of the International Commission of Jurists, No. 22, June 1979, at p. 31.

87. See Review of the International Commission of Jurists, No. 22, June 1979, at p. 31-36.

88. See European Convention, article 1. For the composition of the Committee, elections, etc, see articles 4-6.

89. See *ibid.*, article 2. Article 16 and the Annex confer various privileges and immunities on members of the Committee.

90. See *ibid.*, article 7(2). Article 14(3) provides that the state may object to particular experts.

91. *Ibid.*, article 7(1).

92. See *ibid.*, article 3.

93. See *ibid.*, article 8(1).

94. *Ibid.*, article 8(2). Sub-paragraph 5 of the same article states: "If necessary, the Committee may immediately communicate observations to the competent authorities of the Party concerned."

95. *Ibid.*, article 8(3).

96. *Ibid.*, article 8(4).

97. Ibid., article 10(1).
98. See *ibid.*
99. See *ibid.*, article 7(3), on duplication.
100. See *ibid.*, article 11(1).
101. See *ibid.*, article 10(2).
102. See *ibid.*, article 11(2).

## CHAPTER EIGHT: THE PROTECTION OF DETAINEES

In the last chapter, we concluded that while the recently adopted UN Convention and OAS Convention introduce certain novel measures, and in particular establish universal jurisdiction over the crime of torture, they do not overcome the fundamental difficulties which face efforts to deal with the problem of governmentally approved torture through international law. Indeed, it is implicitly recognised in both instruments that the nature of the international legal system seriously impedes the operation of international law in the field of human rights, so that in practice the existence of adequate legal safeguards at national level emerges as the critical factor in the protection of fundamental human rights. In other words, the instruments accept that in practical terms the control and restraint of state authorities can only be achieved within the context of national legal frameworks. Both instruments accordingly encourage the adoption of effective measures within the legal system of each state, and while they endeavour to establish international supervision over governments in their implementation of the obligations created, they recognise that it is in the domestic sphere that action must be taken if the practice of torture is to be eliminated without a radical restructuring of the existing international legal system based on state sovereignty. Apart from laying down a number of general principles, however, they do not give any indication of the measures which should be adopted, thus leaving each government free to decide on the appropriate form of safeguards. This is an unfortunate omission, because the inclusion of more definite guidelines would have been

beneficial. In this chapter we shall endeavour to identify some of the measures which might have been specified.

We have previously indicated that the elimination of torture by means of internal measures involves action on two levels, firstly on the constitutional plane, where there must be effective limitation of government, and secondly in the legal sphere, where there must exist adequate safeguards for the protection of detainees. The effectiveness of such safeguards is ultimately dependent on efficient constitutional restraint of government, but interference in constitutional arrangements is not currently a function enjoyed by international law, and in this chapter we shall assume a basic degree of limitation of government and concentrate on the question of legal and procedural safeguards for the protection of detainees. The use of torture occurs almost invariably during some form of detention, and it follows that a major factor in the elimination of the practice of torture is the creation and enforcement of effective safeguards in relation to the procedures of arrest, detention, trial and imprisonment. It is, therefore, primarily in these areas that governments must take "effective legislative, administrative, judicial or other measures to prevent acts of torture."<sup>1</sup> This was recognised by the United Nations in 1975 when the whole question of torture was first under serious consideration, and the Commission on Human Rights was requested by the General Assembly to formulate a Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment. This instrument, which has not yet been adopted,<sup>2</sup> lays down specific guidelines on the measures which promote the effective protection of persons deprived of their liberty. Although it is not intended to create legally binding obligations, its

provisions are highly significant, and the value of the UN Convention would have been enhanced by the incorporation of a reference to the principles. In fact, the principles may be read in conjunction with the convention, as they clearly express the type of measures envisaged by it, and while the principles will not be legally binding, they do establish standards for the guidance of governments in the implementation of their obligations under the convention, and it is likely that the Committee against Torture will take note of them when studying state reports. Ideally, the principles should also be binding, but we have seen that the value of an international obligation to adopt domestic measures depends ultimately on the political will of the national government concerned: where such a will exists, the government may be expected to refer to the principles voluntarily, whereas if no political will exists, it is unlikely that the imposition of a legal obligation would be of any real effect. Nevertheless, it is regrettable that the relationship between the Draft Body of Principles and the UN Convention has not been clearly stated.

Before we proceed to an examination of the Draft Body of Principles, attention should be drawn to the work of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, which has been involved in the preparation of most of the instruments which deal specifically with the problem of torture and indeed has spent considerable time and effort in examining an agenda item entitled 'Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment'. In 1981, the Sub-Commission set up a working group on detention to consider this matter in greater detail, and in its first report the working group highlighted a number

of areas of concern.<sup>3</sup> Subsequently, the Sub-Commission adopted in resolution 1982/10 certain principles in relation to detention, many of which echo the sentiments of the Draft Body of Principles. In 1983, moreover, the working group produced further recommendations, for the most part based on the study of states of emergency by Mrs Questiaux,<sup>4</sup> many of which were adopted in Sub-Commission resolution 1983/30. Reference will be made to these resolutions where appropriate.

There is some duplication in the various instruments which have been adopted or are still under consideration by the United Nations, and although this is inevitable to some extent, the co-ordination might have been better. The Swedish government made the following comment on the Draft Body of Principles:

"To a large extent, these draft principles reproduce, although often in an amended form, principles which can already be found in other human rights instruments."<sup>5</sup>

In fact, the principles are more specific and detailed than the existing instruments dealing with torture, and it is because they in a sense interpret and particularise the provisions of these instruments that the principles are of such significance. The Draft Body of Principles is not a code of conduct, and does not refer to any particular profession, although it does contain certain principles which appear, albeit with a different emphasis, in codes of conduct and other international instruments. The primary function of the Draft Body of Principles is to deal in a comprehensive manner with the whole question of safeguards in the field of detention, and while its purpose is not limited to the prevention of torture, this is clearly its principal objective. The adoption of the principles will be a notable step in the development of international measures against



torture, not because it will have any direct impact on governmental torture, but rather because it will provide a clear set of guidelines which will add a degree of precision and clarity to the somewhat vague terms of the UN Convention, and will establish norms against which the progress and sincerity of governments can be assessed. As we have indicated, it would have been preferable if the convention had made specific reference to the Draft Body of Principles, as this would have conferred greater authority on the principles.

Certain terms employed in the Draft Body of Principles are defined: "arrest" means "the act of apprehending a person under the authority of law or by any compulsion by any authority"; "detention" is "the period of deprivation of personal liberty from the moment of arrest up to the time when the person concerned is either imprisoned as a result of final conviction for a criminal offence, or released"; and "imprisonment" means "deprivation of personal liberty as a result of final conviction for a criminal offence". The term "judicial authority" is also effectively defined, in Principle 3, as an authority "under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence".

A number of basic principles of a fairly general nature are laid down in the Draft Body of Principles, and the fundamental axiom is stated in Principle 1:

"All persons under any form of detention or imprisonment shall be treated with humanity and with respect for the inherent dignity of the human person."

This principle, which is based on paragraph 1 of article 10 of the International Covenant on Civil and Political Rights, expresses the sentiments underlying the Draft Body of Principles, the overall

aim of which is to ensure respect for the doctrine of humanity. This is supplemented by Principle 4, which provides that the principles are to apply to all persons without distinction of any kind,<sup>6</sup> but does not preclude the special protection of certain vulnerable categories.<sup>7</sup> Provisions of this nature are generally incorporated in international human rights instruments.<sup>8</sup>

Principle 5 specifically prohibits torture and other cruel, inhuman or degrading treatment or punishment of detained or imprisoned persons, rejecting any putative justification of such practices:

"No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment."<sup>9</sup>

No definition of the terms employed is provided, but the word "torture" would appear to have the meaning attributed to it in the 1975 UN Declaration, reference to which is made in a footnote. The prohibition of torture is, of course, a general principle of human rights which is recognised and incorporated in all the major instruments. Principle 19, paragraph 3, is also relevant in this connection:

"No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health."<sup>10</sup>

Principle 2 provides that the fact that rights do not appear in the Draft Body of Principles, or are restricted therein, does not permit the curtailment or annulment of these rights if they are recognised in the domestic law of any state.<sup>11</sup> This is to ensure that the instrument is not invoked as a justification for limiting existing rights.

Principle 6, paragraph 1, states:

"States shall prohibit by law any act contrary to the rights and duties contained in these Principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints."

The purpose of this provision is to encourage governments to give legal substance and authority to the principles, which can only be fully effective in the prevention of human rights abuses if they are activated by adoption into the positive law of states. The principle is stated as an obligation, but it has been observed that the imposition of such an obligation is incompatible with the "informal and advisory nature of United Nations guidelines", and it has been suggested that the text should merely indicate that governments ought to take account of the principles in the formulation of their domestic laws.<sup>12</sup> However, while it is true that the Draft Body of Principles is intended to provide a non-binding code of safeguards, the principle of incorporating safeguards in national laws and practices is an essential aspect of human rights protection, and it is desirable that the importance of such action should be stressed. In fact, it is not unusual for non-binding instruments to express their provisions in imperative terms, and indeed most of the principles contained in the Draft Body of Principles are framed in a similar fashion. The effect of paragraph 1 of Principle 6 is, therefore, simply to emphasise that if states wish to ensure that the principles are respected, they must invest them with the force of positive law, so that appropriate action can be taken when they are violated.

Paragraph 2 of Principle 6 has also attracted criticism. It provides:

"A person who has reliable knowledge of any such violation shall report the matter to the superiors of the authorities or other persons

concerned with the arrest, detention or imprisonment and, where necessary, to appropriate authorities or organs vested with reviewing or remedial powers."

Article 8 of the Code of Conduct for Law Enforcement Officials is referred to, but the principle stated here is much wider than the corresponding provision in that Code, imposing upon every individual an obligation to report to appropriate authorities any violation of the principles contained in the Draft Body of Principles. A number of states have voiced objections to this provision, suggesting that the duty should be imposed only in the case of a public official,<sup>13</sup> or a "law enforcement officer or correctional officer".<sup>14</sup> Doubts have been expressed regarding the practicability of requiring private individuals to report on violations which have come to their attention,<sup>15</sup> and indeed it is questionable whether it would be competent to create such an obligation in a set of international guidelines for states, but on the other hand it has been suggested that the provision should be expressed in terms of a governmental obligation to penalise those who violate the principles and to require individuals to report any violation to the authorities.<sup>16</sup> It would also be possible to impose an obligation on states to permit individuals to report violations. Of course, whether the individual has a duty or a right to report, it is only relevant to the extent that the violation in question is recognised as a specific criminal offence in the law of the particular state. In other words, the principle which has been violated must be legally enforceable under domestic law so that the appropriate authorities are able to take action on the basis of the information which they have received.

The purpose of Principle 6 as a whole is to ensure that violations of the principles are brought to the attention of the

appropriate authorities and thereafter fully investigated so that effective remedial action can be taken. It is important that the authorities conduct a thorough and impartial investigation whenever there is reason to believe that a violation has taken place, and this is the effect of paragraph 1 of Principle 6, which may be compared with article 12 of the UN Convention. The obligation of the individual, whether legal or moral, is subsidiary to the responsibility of the state, which is required to take action when a violation is reported. The individual seems to have no further role after bringing the matter to the attention of the authorities, and there is no indication of what steps might be taken if no remedy were forthcoming or if the principle in question were not expressed as a legally enforceable right in the law of the state. It might, therefore, have been of value to confer on individuals a right, if not an obligation, to pursue the matter further in such circumstances. However, the right to petition an international authority would require enforcement machinery which is not appropriate in view of the non-binding nature of the Draft Body of Principles, which in fact assumes that both the state and the individual will fulfil their respective obligations.

The remainder of the principles contain more specific provisions regarding the creation of safeguards intended to ensure the fullest degree of protection for persons deprived of their liberty. We have associated the practice of torture with detention, especially prolonged incommunicado detention, and have identified the absence of legal rights and procedural remedies during the processes of arrest and detention, along with the erosion of adequate supervision by independent authorities, as critical defects which facilitate the

clandestine use of torture by security forces. The Draft Body of Principles tackles these problems from a number of angles, and it is to this aspect that we shall now turn, bearing in mind that most of the provisions apply equally to imprisonment after conviction.<sup>17</sup>

One of the fundamental principles in the protection of detainees is that the same authority should not be responsible for every aspect of criminal procedure - arrest, detention, interrogation, investigation, prosecution, judgement, implementation of sentence, investigation of complaints and so on. There must be a separation of functions in order to avoid a conflict of interests, and in particular the government must not be able to manipulate the entire process to its own ends. Several functions may be performed by a single agency without prejudicing the position of detainees, so that in practice there will often be overlapping of varying forms and degrees, but certain functions must be kept separate in the interests of justice, and Principle 8 deals with this point:

"The authorities responsible for arresting the suspect and keeping him in detention shall as far as possible be distinct from those entrusted with the investigation of the case. Both authorities shall be under the control of a judicial or other authority."

The first sentence raises certain difficulties, because in many countries the police are in fact responsible for the initial investigation as well as for arrest and detention,<sup>18</sup> and it may be that a complete distinction of these particular functions is not essential.<sup>19</sup> On the other hand, it has been proposed that the authorities involved should be independent as well as distinct,<sup>20</sup> and it has also been suggested that the staff of places of confinement should to the greatest extent possible be distinct from the authorities carrying out the investigation.<sup>21</sup> Essentially, the

purpose of Principle 8 is to ensure the welfare of detainees during the dangerous investigation stage, when interrogation takes place, and it aims to achieve this by keeping the investigating agency and the detaining authority separate. In effect, the detaining authority would be responsible for the protection of detainees and might be required to play an active role in the protection of human rights by monitoring interrogation procedures and intervening when necessary in order to prevent excesses and abuses. It can thus be seen that the separation of the two authorities could have a beneficial effect in the protection of detainees. The same goal might be achieved in other ways, for example by having independent observers present during interrogation, but the important point is that the detainee should never be left entirely at the mercy of the security forces or any other agency. In most legal systems, however, the protection of detainees is not ensured directly through such a separation of functions, and often the only remedy of the individual is to petition the courts. Overall supervision of detention by a judicial or other authority is essential at all times, and the second sentence of Principle 8 recognises this, but it is undoubtedly also important for the various functions relating to arrest, investigation and detention to be kept under the control of distinct agencies as far as is practicable.

An interesting proposal put forward by the United States delegate suggested that the distinction ought to be between the arresting/detaining authority and the prosecuting agency.<sup>22</sup> The idea is that the police would arrest and detain the suspect, and could carry out the initial investigation, but the decision to prosecute, the assimilation of evidence and the conduct of the trial would be the

responsibility of a different agency, the rationale being that this would counteract any temptation on the part of the security forces to attempt to extort evidence or a confession in order to make sure of a conviction. However, even if the roles were kept distinct, there might still be a tendency for the security forces to be over-zealous in procuring evidence for submission to the state prosecutor, and it would therefore still be valuable to retain some form of independent supervision of detention. Indeed, the optimum solution appears to lie in a separation of all three functions - detention, investigation and prosecution. Each of these, of course, involves the defence of law and order, and it is always possible for collusion to arise, but the more responsibility is diversified, the less probability there is of this occurring.

Fundamental to the effective protection of the individual during detention is the existence and effective operation of an independent authority specifically charged with the task of ensuring that the legal rights of detainees are not circumvented and that no one is subjected to any form of ill-treatment. This authority must carry out its duties conscientiously and must have real power to exercise supervision and secure compliance with its orders, supported by constitutional arrangements which prevent governmental interference. Effectively, this requires the operation of some form of constitutional limitation of government, but as we have seen this question is not dealt with in the Draft Body of Principles.

The protection of detainees has in many countries been entrusted to an independent judiciary, and Principle 3 reflects this:

"Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by or be under the effective control of a judicial or other authority under



the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence..."<sup>23</sup>

It should be stressed that the judicial supervision of detention does not refer only to an initial approval of the lawfulness of the detention, but requires a continuing and perpetual monitoring of both the lawfulness and the conditions of detention.<sup>24</sup> While the separation of functions can assist in the protection of detainees, there has to be an authority with ultimate responsibility for the protection of detainees, and it is for this reason that Principle 8 provides that both the arresting and the detaining agencies must be under the control of a judicial or other authority. This authority must have the capability of securing the release of any detainee who is being held unlawfully and of ensuring the protection of any detainee who has been or is likely to become a victim of a violation of human rights, whether the detention is lawful or not. It must, therefore, have constitutional status and genuine power to enforce compliance with its orders.

The independence of the authority from the government is a critical factor, as this avoids a conflict of interests and encourages impartiality. It would have been useful in this connection if the Draft Body of Principles had indicated that military tribunals and courts are unable to guarantee satisfactory protection for detainees under their jurisdiction because of their lack of real independence from the government, so that in all cases involving civilians the jurisdiction of civil authorities ought to be retained, even if martial law is to apply, at least when political offences are concerned. This matter is, in fact, dealt with in resolution 1982/10 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which recommends:

"...that the principle that military jurisdiction should be limited to military offences and personnel should not be waived even in states of emergency, that accused persons brought before military tribunals should have independent legal defenders and that there should be a right of appeal to a civilian court against severe sentences..."<sup>25</sup>

The effectiveness of supervision of detention depends on the independence of the supervising authority, and if for any reason that independence is neutralised or curtailed, serious doubts will be cast on the authority's ability and will to uphold the legal rights of detainees. On the other hand, if an authority which is specifically given the task of protecting human rights enjoys independence and genuine power and carries out its duties in a diligent and conscientious manner, effective protection can be achieved. A number of the principles rely for their effect on the idea of the independent authority capable of taking effective action, and the Sub-Commission on Prevention of Discrimination and Protection of Minorities has in fact made a special study of this matter.<sup>26</sup>

Detention should, of course, always be in accordance with the relevant laws,<sup>27</sup> and it is therefore imperative that the law itself should clearly recognise fundamental human rights and provide adequately for their protection. Judicial authorities, however independent and powerful, can only operate within the strictures of the laws which they are required to apply, and if the laws of the land sanction the violation of internationally recognised human rights, the judicial role will be nullified. For this reason, core rights must be guaranteed constitutionally in such a way that they cannot be suspended or annulled in any circumstances. If this is the case, then a strong independent judiciary will be in a position to ensure the

effective protection of detainees. If, however, the government is able to circumvent constitutional guarantees, the protection of human rights cannot be ensured. The effectiveness of the judiciary, then, depends ultimately on factors outwith the scope of the Draft Body of Principles, namely the establishment of constitutional arrangements which ensure the irrevocable recognition and legal protection of fundamental human rights. Nevertheless, the existence of an independent authority with specific responsibility for the supervision of detention and adequate powers to undertake this responsibility, is the single most important factor in the protection of detainees.

A number of principles relate to the safeguards which should apply to the process of arrest and detention. Principle 10, for example, states:

"Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him or the grounds for his detention."<sup>29</sup>

This is a precautionary measure against arbitrary arrest, freedom from which is a right recognised in article 9 of the International Covenant on Civil and Political Rights.<sup>29</sup> Principle 12 adds a further safeguard:

"A detained or imprisoned person shall immediately be provided, by the authority responsible for his arrest, detention or imprisonment, with information as to and an explanation of his rights and obligations relating to his arrest, detention or imprisonment and how to avail himself of his rights."<sup>30</sup>

The purpose of this provision is to ensure that detainees are made aware of their rights so that they are able to bring any procedural irregularities or ill-treatment to the attention of the appropriate authorities. It is obviously important that detainees

should have some knowledge of the rights and remedies available to them, since otherwise they may through simple ignorance fail to avail themselves of the procedures which are intended to secure their protection. In this connection, Principle 13 deals with the question of language difficulties:

"From the moment of his arrest or as soon as possible thereafter, a detained person who does not adequately understand or speak the language used in proceedings at which he is present is entitled to have the free assistance of an interpreter. If the furnishing of free assistance of an interpreter meets with insurmountable technical or financial difficulties in a given State, provision shall be made to enable a detained or imprisoned person to avail himself of the services of an interpreter."<sup>31</sup>

This provision conflicts with the terms of article 14, paragraph 3(f), of the International Covenant on Civil and Political Rights, and the second sentence of Principle 13 has in fact attracted some criticism.<sup>32</sup>

A further procedural safeguard is the practice of making every arrest and detention public, and the importance of this principle has been recognised on several occasions by the Sub-Commission on Prevention of Discrimination and Protection of Minorities: for example, it is provided in paragraph 2 of Sub-Commission resolution 1982/10 that "the names of detainees should be publicly announced."<sup>33</sup> Principle 14 of the Draft Body of Principles is in similar terms:

"Immediately after arrest and after each transfer from one place of detention to another, a detained or imprisoned person shall be entitled to notify or to require the authority concerned to notify members of his family of his arrest or detention or of the transfer and of the place where he is kept in custody. If a detained or imprisoned person is a foreigner or a refugee he shall be informed without delay of his right to notify or to require the authority concerned to notify a consular post or the

diplomatic mission of his country, or the office of the competent intergovernmental organization. Any such communication so addressed shall be forwarded by the said authorities without delay."<sup>34</sup>

Essentially, this provision is aimed at preventing the problem of 'disappearances', which have become a common occurrence in certain countries: the security forces simply abduct a suspect and then deny that he is being detained. Of course, the requirement to publicise arrests would not overcome this, but where the requirement had initially been complied with, it would deter the security forces from subsequently refusing to acknowledge the detention. Principle 14 does not permit unrestricted communication between the detainee and his family, but simply requires that he should be permitted to notify members of his family of the fact of his detention and the place of detention. The right to communicate with the outside world is, however, established in Principles 15, 16 and 17, which we shall examine in due course.

It is during the initial period of detention that the use of torture is most likely to occur, since interrogation usually takes place at this time, and Principle 33 accordingly provides that detainees should make a judicial appearance at the earliest opportunity:

"A detained person suspected or accused of a criminal offence shall be brought before a judicial or other authority promptly after his arrest. Such a person shall have the right to make a statement before such an authority concerning the treatment received by him while in custody. The authority before which the arrested person is brought shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of a judicial or other authority."<sup>35</sup>

The effect of this principle is that an arrested person may not be held indefinitely while the security forces make further investigations or until a confession can be obtained, but must be presented as soon as possible before a judge or equivalent independent officer, who must approve in writing any continuation of the detention in accordance with the law. If the detention is not lawful and necessary, the detainee must be released forthwith. Moreover, if the detainee has been subjected to ill-treatment since his arrest, the judicial examination gives him an opportunity of making a complaint, which should be fully investigated by the judge with a view to providing a remedy.<sup>36</sup> The role of the judiciary, already established in Principles 3 and 8, is thus confirmed in Principle 33.

The practice of incommunicado detention, that is denying detainees contact with the outside world and/or access to a judicial authority, especially in the immediate post-arrest period when interrogation takes place, has been strongly criticised by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, whose working group on detention indicated in its first report that "nothing could justify such detention, and even if there were exceptional cases in which a justification could be found, such detention should in no circumstances exceed 24 hours."<sup>37</sup> The Sub-Commission itself reaffirmed these sentiments in paragraph 5 of resolution 1982/10, which states that "the practice of holding persons incommunicado should be discouraged and should be forbidden for periods exceeding 24 hours from the moment of arrest."<sup>38</sup> However, by minimising the period between arrest and the judicial appearance, Principle 33 seems to preclude the use of incommunicado detention altogether as far as access to a judicial authority in the immediate

period after arrest is concerned, although it might be possible for a detainee to be held incommunicado after the initial appearance if judicial supervision procedures were ineffective.

Principle 9, paragraph 1, of the Draft Body of Principles provides:

"Before an order of detention is issued, the person concerned shall be given an opportunity to be heard. He shall have the right to defend himself or be assisted by counsel as prescribed by law."<sup>39</sup>

Several states have commented that this principle must refer to a formal detention order issued in writing by the judicial or other authority in terms of Principle 33 in respect of a person who has already been arrested, rather than to a warrant for arrest, in which case it would be strange and impractical to allow the suspect a hearing beforehand.<sup>40</sup> The effect of these two principles, then, is that there should be a judicial appearance or preliminary hearing as soon as practicable after arrest, as indicated in Principle 33, so that a judicial authority can determine the lawfulness and validity of the detention and decide whether to remand the suspected or accused person in custody or order his release. At the hearing, the detainee must be given an opportunity of challenging the lawfulness of his detention, although there need not be a full inquiry into the matter, and he may also complain of any ill-treatment, which should result in an immediate investigation.

In those cases in which the judge approves the detention, the appearance of the detainee establishes the judicial role at an early stage. Thereafter, of course, the judicial or other authority must exercise continuing supervision, and this is provided in paragraph 3 of Principle 9:

"There shall be a review of the lawfulness and necessity of the detention by a judicial or other authority *ex officio* at regular intervals."

This provision is designed to ensure that the lawfulness of the detention will be constantly monitored by the responsible judicial authority, but should be extended to specifically include the conditions of detention and the welfare of detainees. Furthermore, although the provision refers to review at regular intervals, it is essential that the supervising authority should be able to intervene at any time and that the detainee or, if he is unable, those who are prepared to espouse his cause, should have access to the supervising authority for the purpose of initiating proceedings to secure his release or to obtain a remedy in the event of his ill-treatment. These matters are dealt with in Principle 28, paragraph 1 of which relates to proceedings to challenge the lawfulness of the detention:

"A detained person, his counsel, or, if the detained person is unable to do it himself, a member of his family or any citizen who has a reliable knowledge of the case shall be entitled at any time to take proceedings before a judicial or other authority to challenge the lawfulness or necessity of his detention and to obtain his release without delay if it is unlawful."<sup>41</sup>

Paragraph 2, which is expressed in similar terms, relates to violations of the principles in general, and refers in particular to complaints of torture or ill-treatment:

"A detained or imprisoned person, his counsel, or, if the detained or imprisoned person is unable to do it himself, a member of his family or any citizen who has a reliable knowledge of the case shall be entitled at any time to take proceedings before a judicial or other authority to prove that he has been subjected to torture or other cruel, inhuman or degrading treatment, or that he has been denied any other right contained in these Principles, and to seek relief."<sup>42</sup>



These two provisions establish firstly the right of a detainee or his legal representative and secondly the right of his family to institute judicial proceedings with a view to obtaining a court order either procuring his release or ensuring protection of his rights. Principle 28 also introduces a third aspect, however, the right of any citizen having reliable knowledge of the situation to initiate proceedings. Such a provision could clearly have significant implications in the protection of detainees, as it would permit non-governmental human rights organisations to take direct action in the courts of the state concerned, but the concept conflicts with accepted principles regarding *locus standi*, and the provision may not be retained in the final text.<sup>43</sup> This would be rather unfortunate, because the protection of core human rights may be considered of such magnitude that the interest of the person initiating proceedings should be irrelevant, and if human rights groups were permitted to become involved in domestic legal processes on this level, the basis of protection of human rights would undoubtedly be strengthened.

It should be noted that paragraph 2 of Principle 28 provides that the petitioner has to prove that the detainee has been tortured or ill-treated. It would seem more appropriate, however, to require that a thorough investigation should be carried out when *prima facie* evidence of torture is presented to the judicial authority, since the difficulties in proving torture are obvious and the burden of proof is an onerous one. In this connection, it has been suggested that two additional paragraphs should be inserted in Principle 28, establishing the principle that "government authorities holding a person incommunicado assume the burden of justifying such treatment and of proving that all reasonable measures were taken to prevent that

person's illness, injury, disappearance, death, or other harmful experiences while detained or imprisoned."<sup>44</sup> Proceedings under Principle 28 should in any event be "simple, expeditious and at no cost", and the detaining authorities "must without delay produce the detained or imprisoned person before the reviewing authority."<sup>45</sup> It is essential that no impediment should be put in the way of judicial supervision, so that a remedy can be provided at the earliest possible opportunity.

Principle 29 is also pertinent to the question of complaints:

"1. A detained or imprisoned person, his counsel, or, if the detained or imprisoned person is unable to do it himself, a member of his family or any citizen who has a reliable knowledge of the case shall have the right to make directly and in confidence a request or complaint regarding his treatment to the authorities responsible for the administration of the place of detention and to higher authorities.

2. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected, or in case of inordinate delay, the complainant shall be entitled to seek redress from a judicial or other authority."<sup>46</sup>

This principle complements, and to some extent duplicates the terms of paragraph 2 of Principle 28. It refers to an initial complaint to the detaining authorities, but preserves the right of the detainee to take the matter further, again emphasising the crucial role of the judiciary or other independent supervising authority. Ideally, the initial complaint should be sufficient to obtain satisfaction, but if the situation is not resolved by the detaining authorities it is essential that the right of the detainee to appeal to an independent authority should not be prejudiced.

The provisions of Principles 28 and 29 give an indication of the importance of the right to communicate with the outside world.

Protection of detainees after a written detention order has been issued is the responsibility of the judicial authority, and provided effective supervision is established at that stage and detainees themselves have access to the supervising authority, it may be permissible to prevent communication with the outside world. However, such a practice should be strictly controlled because of the risk of a breakdown in judicial supervision, and access to the outside world should be maintained as a secondary safeguard, so that in the event of the detainee being unable to institute proceedings others can take action on his behalf. Communication with the outside world refers principally to the provision of access to a lawyer, and this right is contained in Principle 15:

"1. A detained person shall be entitled to have legal assistance as soon as possible after the moment of arrest.

2. If a detained person does not have legal assistance he shall be entitled to have a lawyer assigned to him by a judicial or other authority, without payment by him if he does not have sufficient means to pay.

3. A detained person shall be entitled to communicate with a lawyer of his own choice within the shortest possible period after arrest."<sup>47</sup>

Although the judicial examination should normally take place promptly after arrest, there will clearly be situations in which a time lapse is unavoidable, and it is essential that in this intervening period the detainee should have a right to consult with his lawyer. The importance of communication with a lawyer at an early stage is that the detainee can be informed of his rights by an independent party who also has specialist knowledge enabling him to activate the appropriate legal machinery if the detention is unlawful, if there is a delay in bringing the detainee before a judge, or if there has been ill-treatment of the detainee. The provision does not,

however, confer a right to communicate freely with the lawyer, so that the detainee might not be protected against torture which took place after the initial consultation. Principle 16 is relevant in this connection:

"1. A detained person shall be allowed ample opportunity for consultations with his counsel.

2. Written messages between a detained person and his counsel shall not be censored, nor shall the transmittal thereof be delayed.

3. Interviews between a detained person and his counsel may be within sight, but not within the hearing, of a police or other law enforcement official.

4. The right of a detained person to be visited by and to communicate with his counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law, when it is considered indispensable by the judicial or other authority in order to maintain security and good order in the place of detention.

5. The communications between a detained person and his counsel mentioned in this principle shall be deemed privileged."<sup>48</sup>

While this provision establishes the detainee's right to communicate with his lawyer, paragraph 4 contains a significant limitation on this right, effectively permitting the denial of access to a lawyer in certain circumstances, and although the circumstances must be exceptional, this term is sufficiently vague to allow wide interpretation. However, the suspension or restriction of the right must be authorised by the judicial or other authority, so that the prevention of communication would only be possible after the initial judicial appearance, when judicial supervision had been established. This is a critical proviso, and while Principle 16 in a sense permits judicially sanctioned incommunicado detention, the situation should not arise in which access to both the judicial authority and the outside world is denied. It is imperative, however, that the judicial

authority should closely monitor the situation throughout any such period.

Principle 17 refers to the complementary right of a detainee to communicate with members of his family:

"A detained or imprisoned person shall be given reasonable opportunity to communicate with the outside world, and in particular to be visited by and to correspond with members of his family, subject to conditions and restrictions to be specified by law for the purposes of detention and for the maintenance of security and good order in the place of detention."<sup>49</sup>

This right is also subject to limitation, and there is in this case no requirement that suspension of the right must be authorised by the judicial authority. It is thus left open to the security forces themselves to impose restrictions, both before and after the initial judicial hearing, and it would have been preferable if the provision had required judicial approval. Nonetheless, it is clear that the circumstances in which the right to communicate with the outside world can legitimately be restricted are exceptional, and the effect of Principles 15, 16 and 17 together is virtually to prohibit the practice of preventing contact with the outside world between arrest and the initial judicial hearing, and also after detention has been approved by a judge, except when it has been specifically authorised by him, in which event there should be regular judicial review of the situation, and strict monitoring should be established. It is especially important that the detainee should make frequent appearances before the supervising authority.

The right to communicate with the outside world is of particular relevance if judicial supervision is ineffective. It is clearly not practical for detainees to make frequent court appearances for the purposes of monitoring their condition, and unless arrangements can be

made for regular visits by judicial representatives or other independent agencies, it is possible for security forces to refuse detainees access to the courts, and it is in such circumstances that a detainee's lawyer or relatives may be able to take action. Even if they are unable to obtain a remedy through the courts, they may be in a position to bring the matter to the attention of human rights organisations or international authorities. The principle of communication with the outside world is very important, then, and has been recognised by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in paragraph 2 of resolution 1982/10, which provides that "every person who is arrested or detained should be entitled to be visited by members of his family and a lawyer of his choice, preferably within 24 hours after arrest and regularly thereafter."<sup>50</sup> In effect, this right of access creates independent monitoring of the health and well-being of the detainee, and while it is not by an official agency, it provides the opportunity to take the matter up with the appropriate authorities.

Principle 25 is of considerable significance:

"1. Places of detention shall be visited regularly by qualified and experienced persons appointed by a competent authority distinct from the authority responsible for the administration of the place of detention.

2. A detained or imprisoned person shall have the right to talk with the persons who visit the place of detention in accordance with paragraph 1 without the staff of the institution being present, subject to the conditions required for the maintenance of security and good order in the place of detention."<sup>51</sup>

We saw in the last chapter that this concept of visits to places of detention by independent agencies is regarded as one of the most valuable methods of ensuring the protection of detainees, and it is clear that such a system can create an important safeguard against

abuses, especially when the detainee is not otherwise permitted contact with the outside world. It should be noted that Principle 25 does not specifically confer responsibility for visits on the judicial authority, and in fact the intention seems to be that the responsible agency should be separate from the judicial authority as well as from the detaining authority, so that the system should be effective even when judicial supervision proves inadequate. Of course, the value of the system ultimately depends on the agency actually gaining access to places of detention on demand and possessing sufficient powers of enforcement, but in fact Principle 25 does not confer any real powers on the agency responsible for visits, so that it would appear any action would have to be taken through the courts. Nevertheless, the concept remains an important one, and the Sub-Commission on Prevention of Discrimination and Protection of Minorities has endorsed it.<sup>52</sup> Furthermore, while the detainee's right to communicate with his lawyer and his family may be suspended for security reasons, there can be no justification for the suspension of visits by an independent agency whose specific role is to ensure full respect for fundamental human rights, and whose activities cannot be regarded as in any way prejudicial to security or the administration of justice.

No specific guidance is given in the Draft Body of Principles as to the acceptable length of pre-trial detention, that is detention which has been approved by a judicial authority. Certainly, the accused should be "entitled to trial within a reasonable time or to release",<sup>53</sup> although this concept is somewhat vague and it has been suggested that "without undue delay" might be more appropriate.<sup>54</sup> As far as the prevention of torture is concerned, there does not appear to be any objection in principle to fairly lengthy periods of

detention, provided effective judicial supervision is maintained, but obviously it is desirable that trial should take place as soon as possible. When detention is ordered for the purpose of further investigation rather than to await trial (as Principle 33 permits), the same principles apply, and detention should be as brief as possible in order to minimise the period within which coercion may be employed for the purposes of interrogation.

Principle 35 provides for provisional release:

"A detained person suspected or accused of a criminal offence shall, except in serious cases provided for by law, be given an early opportunity to obtain his provisional release, with or without financial guarantee or subject to other reasonable conditions. No detained person shall be denied the possibility of obtaining provisional release solely on account of lack of financial guarantee."<sup>55</sup>

The terms of Principle 7 should also be noted in this connection:

"Persons convicted of a criminal offence shall, save in exceptional circumstances, be segregated from all other detained persons, who shall be subject to separate treatment appropriate to their status as unconvicted persons."<sup>56</sup>

When a detainee sustains injury as a result of ill-treatment, adverse conditions or the act or omission of a public employee, there should be an enforceable right to compensation.<sup>57</sup> If death occurs during detention or immediately after release, or if a person "disappears", an inquiry should be held by the judicial or other authority, "either of its own motion or at the instance of a member of the family of such a person or any citizen who has a reliable knowledge of the case."<sup>58</sup> Dependants of a person who dies as the result of a violation of the principles should also have a right to compensation,<sup>59</sup> and access to the relevant records should be made available for the purpose of a claim.<sup>60</sup>



The question of access to records brings us to another important matter covered by the Draft Body of Principles. It is of considerable value in the protection of detainees for official records to be kept throughout each stage of arrest, detention and imprisonment, because the information can be crucial at a later date. Principle 11, paragraph 1, thus provides:

"The reasons for and the time of the arrest and of taking an arrested person to a place of custody as well as that of his first appearance before a judicial or other authority, together with the names of the law enforcement officials concerned and the identification of the place of custody, shall be duly recorded in such form as may be prescribed by law."

While these records will provide an invaluable source of evidence for any judicial inquiry, it is also important that copies should be made available to the detainee and his legal representative.<sup>61</sup> Principle 11 covers the period between initial arrest and the appearance before a judicial authority, and an accurate record of events at this stage is valuable in a number of ways. Firstly, the records will disclose whether the detention has been lawfully made and whether the detainee's legal rights have been respected, in particular by indicating the period of time which has elapsed between arrest and the judicial hearing. Secondly, the records may constitute an essential aspect of evidence of ill-treatment, in particular by identifying the officials who were responsible for carrying out the arrest and conducting the investigation; indeed, an awareness of their identifiability may actually inhibit security officers from being over-zealous in interrogation. Thirdly, while the significance of records does depend on their being accurately and faithfully maintained, and it is possible for them to be falsified or even

destroyed, the existence of alterations or inconsistencies or the disappearance of the records could raise a presumption that violations of the detainee's rights have occurred, and a thorough inquiry could be ordered on that basis.

There may be some danger in revealing the identities of law enforcement personnel in records to which detainees are to have access, since this may create some risk of reprisal, and it has therefore been suggested that identification symbols such as numbers might be more acceptable.<sup>62</sup> It should also be noted that records of the type referred to in Principle 11 are not in fact kept in a number of states, whilst in others a copy is not provided to the detainee.<sup>63</sup>

Records of the investigation stage are of particular value, since the use of coercion is most likely to arise during this period, and in this connection it may be noted that the presumption of innocence is established in Principle 32:

"A detained person suspected or accused of a criminal offence shall have the right to be presumed innocent until finally proved guilty according to law and shall be treated as such by all concerned. The arrest and detention of such a person pending investigation and trial shall be used only for the necessities of the administration of justice on grounds and under conditions specified by law. The imposition of any restrictions upon a person so detained which are not strictly required for the purposes of the detention or for the maintenance of security and good order in the place of detention shall be forbidden."<sup>64</sup>

This provision indicates that a period of detention pending investigation should not be utilised for the purpose of trying to procure a confession from the detainee, and Principle 19, paragraph 2, specifically prohibits the use of coercion during interrogation:

"No detained person while being interrogated shall be subjected to violence, threats or methods of interrogation which impair his freedom of decision or his judgement."

It is further provided that no detainee "shall be compelled to testify against himself",<sup>65</sup> and that any evidence obtained in contravention of the principles (presumably Principles 5 and 19 in particular) shall not be admissible in any proceedings against the detainee.<sup>66</sup> It is clear from these provisions that the use of coercion is not permitted by the Draft Body of Principles.

Principle 20 refers to the keeping of records during interrogation. Paragraph 1 of Principle 20 states:

"The duration of any interrogation and of the intervals between interrogations as well as the names of the officials who conducted the interrogation and of other persons present, shall be duly recorded in such form as may be prescribed by law."

This provision complements Principle 11, and covers every interrogation, whether before or after the first judicial appearance. Again, the detainee should have access to the records,<sup>67</sup> which may be of particular value in substantiating his allegations of torture or ill-treatment. The records would, of course, not only give an account of the conduct of the interrogation, but would also assist in the identification of those involved, so that proceedings could be taken against them.

Medical records are also valuable in establishing whether a detainee has been subjected to ill-treatment, and the Draft Body of Principles covers this aspect. Medical attention must, of course, be provided promptly when required, in accordance with general humanitarian principles:

"The medical officer at the place of detention shall see and examine a detained or imprisoned person promptly after his admission and thereafter as often as necessary. The official responsible for supervising the detention of a person needing medical care shall take immediate

action to meet the needs of the person in custody for medical attention."<sup>68</sup>

In addition to providing medical attention when required, then, the authorities should ensure that a medical examination is made (or at least offered) at the commencement of detention, so that when the detainee is released or is given a subsequent check-up, any significant deterioration in his health or condition which might be attributable to torture or ill-treatment can be detected from a comparison of his present condition with the details disclosed in the records of the initial examination. Principle 21 refers to a mandatory examination of each detainee at the commencement of detention, and also to the provision of medical care whenever necessary, but it does not provide for regular check-ups, and does not confer upon detainees a right to demand an examination. In order to avoid the situation in which the security forces simply prolong the detention until any signs of ill-treatment have disappeared, then, it is important for regular examinations to be available, especially if access to the outside world is being denied. While such examinations could be carried out by medical officers employed by the authorities, it would obviously be preferable for detainees to be examined by a doctor of their choice, and Principle 22, paragraph 1, makes provision for this:

"A detained or imprisoned person shall also have the right to be examined by a physician of his own choice available under the existing general system of health care, at his request or at the request of his counsel or of a member of his family, subject only to reasonable conditions to ensure security and good order in the place of detention and to avoid undue delay in the investigation."<sup>69</sup>

Several states have indicated that they do not in fact permit detainees to choose their own doctor, so that examination is carried

out by an officially appointed medical officer, and this will normally be acceptable provided the doctor retains his independence and respects the principles of medical ethics<sup>70</sup> and does not merely abet the security forces in perpetrating violations of human rights. These dangers are recognised in Principle 22, which is designed to overcome them by providing for access to a doctor of one's choice as the most effective guarantee of impartiality, although the proviso does limit the right and could have the effect of preventing detainees from obtaining evidence to support allegations of ill-treatment. Of course, if effective judicial supervision is operating, access to an independent doctor may not be necessary, and indeed regular examinations under the control of the judicial authority may be the most effective method of ensuring protection. However, where the judicial supervision is not effective, free access to an independent medical practitioner provides an additional safeguard complementary to the right of access to a lawyer and to members of the detainee's family.

These, then, are the main provisions of the Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment. There are also a number of miscellaneous provisions relating to such matters as the provision of educational materials,<sup>71</sup> discipline,<sup>72</sup> and support for the dependants of detainees,<sup>73</sup> but the greater part of the draft instrument is concerned with the measures which must be put into effect in order to ensure the efficient protection of detained and imprisoned persons from violation of their fundamental human rights. This analysis has concentrated principally on the rights of detainees and the problems of their protection rather than on the rights of convicted persons

simply because the pre-trial period has been identified as the one in which there is the highest probability of torture occurring, but it should be borne in mind that those serving prison sentences are also vulnerable to ill-treatment and are entitled to the same degree of protection. Many of the principles do, in fact, apply to imprisoned persons.<sup>74</sup>

The Draft Body of Principles covers the problem areas which we identified in our discussion of states of emergency, and deals with the specific dangers which often facilitate the use of torture. The purpose of the principles, then, is to indicate the measures and safeguards which states must adopt if they wish to ensure the protection of detained and imprisoned persons. The implementation of these provisions will normally be effective in achieving this goal, provided each branch of authority is able to carry out its functions without interference from the government. The Draft Body of Principles is not intended to resolve questions of constitutional separation of powers and the limitation of government, but rather establishes certain principles of action which are prerequisite to the effective protection of detainees and encourages governments to adopt them into national law. In the final analysis, however, the principles cannot guarantee effective protection if they can be circumvented by totalitarian regimes, and this problem must be overcome in other ways. In other words, the Draft Body of Principles supplies only the machinery, and the efficient operation of the machinery must be ensured through other means.

## Notes

1. See UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 2(1).

2. The General Assembly initially requested the Commission on Human Rights to study the question of torture and the formulation of a draft body of principles for the protection of all persons under any form of detention or imprisonment in resolution 3453(XXX). The Commission by resolution 10(XXXII) requested the Sub-Commission on Prevention of Discrimination and Protection of Minorities to draw up a draft for consideration, and the Sub-Commission appointed a rapporteur for this purpose. Three years later, the Commission proposed in resolution 17(XXXV) that ECOSOC should request the Secretary-General to transmit a revised draft to all governments for their observations. This recommendation was accepted by ECOSOC in resolution 1979/34, and a working group of the Third Committee of the General Assembly was subsequently established to elaborate a final text. The General Assembly later referred the matter to its Sixth Committee by resolution 35/177, and a working group was set up at the 36th session of the General Assembly. However, little progress was made, and the consideration of the draft has in fact continued at subsequent sessions: see General Assembly resolutions 36/426, 37/427, 38/426, 39/418 and 40/420, and decision 41/418. The text used in this study is that contained in UN document A/35/401, Annex. See also UN documents A/35/401 and Addenda, A/38/388 and Addenda, and A/42/819.

3. See Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities 1981 (UN document E/CN.4/1512 (E/CN.4/Sub.2/495)), especially at paras. 150 and 175.

4. See Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities 1983 (UN document E/CN.4/1984/3 (E/CN.4/Sub.2/1983/43)), at para. 279.

5. UN document A/35/401, Reply of Sweden, at para. 1.

6. Principle 4(1) states: "These Principles shall be applied to all persons without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status."

7. Principle 4(2) states: "Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and young, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall be always subject to review by a judicial or other authority."

8. See Universal Declaration of Human Rights, article 2; International Covenant on Civil and Political Rights, article 2.

9. Cf. Universal Declaration of Human Rights, article 5; International Covenant on Civil and Political Rights, articles 4 and 7; and also Declaration on the Protection of All Persons from Being

Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3.

10. Cf. International Covenant on Civil and Political Rights, article 7.

11. Principle 2 states: "No restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment which are recognized or exist in any country under domestic law, regulations, customs or international conventions shall be allowed on the ground that such rights are not recognized, or are recognized to a lesser extent, in these Principles." Cf. International Covenant on Civil and Political Rights, article 5(2).

12. See UN document A/35/401, Reply of United Kingdom, at para. 4.

13. See UN document A/35/401, Replies of Sweden, at para. 6, and USSR, at para. 7.

14. See UN document A/35/401/Add.1, Reply of USA, at para. 7.

15. See UN document A/35/401, Reply of United Kingdom, at para. 5.

16. See UN document A/35/401, Reply of Ivory Coast, at para. 3.

17. See note 74, *infra*.

18. See UN document, A/35/401, Replies of Italy, at para. 1, Norway, at para. 1, and United Kingdom, at para. 7.

19. See UN document A/35/401, Reply of Sweden, at para. 8.

20. See UN document A/35/401, Reply of Austria, at para. 3.

21. See UN document A/35/401, Reply of Byelorussian SSR, at para. 9.

22. See UN document A/35/401/Add.1, Reply of USA, at para. 9.

23. Cf. Universal Declaration of Human Rights, article 10; International Covenant on Civil and Political Rights, article 14(1).

24. See Sub-Commission resolution 1982/10, para. 13.

25. This is not the effect of Principle 3, but see Principle 9(3). See also Sub-Commission resolution 1982/10, para. 9, in which the Sub-Commission states that it "considers it important that detained persons should have the right regularly to be produced before an independent magistrate at brief intervals and asked if they have any complaints". Cf. Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities 1982 (UN document E/CN.4/1983/4 (E/CN.4/Sub.2/1982/43)), at para. 230.

26. A special rapporteur, Mr Singhvi, was appointed to prepare a Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers by ECOSOC decision 1980/124, Commission on Human Rights resolution 16(XXXVI) and Sub-Commission resolution 16(XXXIII). He presented three progress



reports: see UN documents E/CN.4/Sub.2/481 and Add.1, E/CN.4/Sub.2/1982/23 and E/CN.4/Sub.2/1983/16. A final report was later submitted, and in 1987 Mr Singhvi presented to the Sub-Commission a Draft Universal Declaration on the Independence of Justice, which was remitted to governments for comments: see Review of the International Commission of Jurists, No. 39, Dec 1987, at p. 29.

27. See International Covenant on Civil and Political Rights, article 9(1), and also Principles 33 and 9(3).

28. Cf. International Covenant on Civil and Political Rights, articles 9(2) and 14(3)(a).

29. Article 9(1) of the Covenant states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Cf. Sub-Commission resolution 1982/10, para. 1.

30. The suggestion that detainees have obligations has provoked some comment: see UN document A/35/401, Reply of Barbados, at para. 3.

31. Cf. International Covenant on Civil and Political Rights, article 14(3)(f), and note also article 14(3)(a).

32. See UN document A/35/401, Replies of Sweden, at para. 12, and Ukrainian SSR, at para. 10. Cf. also Reply of United Kingdom, at para. 11, and note UN document A/35/401/Add.1, Reply of USA, at para. 14.

33. See also Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities 1981, at para. 158, where it is proposed that "every arrest must be made public". See also Sub-Commission resolution 1983/30, at para. 3(a): "Any arrest followed by remand in custody should be made public without delay or at least be entered in a register." With regard to registers of detainees, when one member of the working group on detention suggested that such a register should be kept in each prison, it was pointed out that such a provision already existed in Rule 7 of the UN Standard Minimum Rules for the Treatment of Prisoners, "and that it would be quite sufficient if such a rule were actually applied. It would be an improvement if the name of the police officer responsible for each arrest was also included in such a register." See paragraph 15 of the working group's 1981 report.

34. It has been suggested that the provision should be extended to include "other persons of his confidence": see UN document A/35/401, Reply of Austria, at para. 7.

35. Cf. International Covenant on Civil and Political Rights, article 9(3).

36. Cf. paragraph 13 of the 1981 report of the Sub-Commission's working group on detention: "Several speakers mentioned the problems that arose at the stage of arrest and interrogation by the police

before the person was charged. In those speakers' view, it was essential that an arrested person should have the possibility, from the moment of his arrest, of appealing to a legal authority which would reach a decision concerning the reasons for and duration of the detention." The remedy of *habeas corpus* and equivalent procedures are important in this connection: see Sub-Commission resolution 1983/30, at para. 3(a).

37. See paragraph 10 of the working group's 1981 report. One member of the Sub-Commission suggested that "no detained person must remain incommunicado for more than 48 hours." See Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities 1981, at para. 158.

38. A less definite provision appears in paragraph 3(a) of Sub-Commission resolution 1983/30, which relates to states of emergency: "the time during which a person is held incommunicado should not exceed a short period prescribed by the emergency law itself." It should be noted that the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment included in his first report a recommendation that "incommunicado detention should be kept as short as possible and should not exceed seven days": see UN document E/CN.4/1986/15, at p. 35. This is significantly longer than the periods previously considered acceptable.

39. Cf. International Covenant on Civil and Political Rights, articles 9(3) and (4), and 14(3)(b) and (d).

40. See UN document A/35/401, Replies of Austria, at para. 4, Sweden, at para. 9, and United Kingdom, at para. 8, and UN document A/35/401/Add.1, Reply of USA, at para. 10.

41. Cf. International Covenant on Civil and Political Rights, article 9(4).

42. Note that this provision applies to imprisoned persons, whereas paragraph 1 does not.

43. See UN document A/35/401, Reply of Niger, at para. 5. Cf. Principle 6(2) and the discussion thereof at pp. 387-88, *supra*.

44. See UN document A/35/401/Add.1, Reply of USA, at para. 31, and see also the discussion at pp. 388-89, *supra*.

45. See Principle 28(3).

46. Cf. UN Standard Minimum Rules for the Treatment of Prisoners, Rule 36.

47. Cf. International Covenant on Civil and Political Rights, article 14(3)(b) and (d). Note that in some states there is no right to legal aid, or it is available only in the case of serious offences.

48. Cf. International Covenant on Civil and Political Rights, article 14(3)(b).

49. The provisions of Principle 17 are supplemented by those of Principle 18, which states: "If a detained or imprisoned person so requests, he shall as far as possible be kept in a place of detention reasonably near his usual place of residence so as to facilitate visits from members of his family."

50. Cf. Sub-Commission resolution 1982/10, para. 6: "detained persons should always have access to their defence lawyers and....defence lawyers should be free from fear of arrest for defending their clients."

51. Cf. UN Standard Minimum Rules for the Treatment of Prisoners, Rule 36.

52. See Sub-Commission resolution 1982/10, para. 11, which states: "there should be independent inspections without prior notice, of places of detention, and interrogation centres."

53. See Principle 34. Cf. International Covenant on Civil and Political Rights, article 9(3), and also article 14(3)(c). See also Sub-Commission resolution 1982/10, paras. 3 and 4, in which the Sub-Commission recommended that "all Governments adopt legislation whereby every person who is arrested or detained should be tried, preferably within three months after arrest, or should be released from detention pending further proceedings" and that "as a minimum measure all Governments should adopt legislation whereby every person who is arrested or detained should be tried within a fixed period, established by law, after arrest, or should be released from detention pending further proceedings." Furthermore, one member of the working group on detention pointed out that "pre-trial detention was provided for in virtually all legislations; what must be secured from Governments was that such detention should be as short as possible, even in a state of emergency." See the working group's 1981 report, at para. 7.

54. See UN document A/35/401, Reply of Hungary, at para. 4.

55. Cf. International Covenant on Civil and Political Rights, article 9(3).

56. Cf. International Covenant on Civil and Political Rights, article 10(2)(a).

57. See Principle 31(1). Reference is made to article 9(5) of the International Covenant on Civil and Political Rights, which is in fact limited to compensation in cases of unlawful arrest or detention, and to the 1975 UN Declaration, which is concerned with compensation for ill-treatment. Principle 31 thus appears to cover both aspects, and states in paragraph 1: "A detained or imprisoned person or, in the event of death, the dependent members of the family of such person who suffer damage as the result of acts contrary to the rights contained in these Principles shall have an enforceable right to compensation." The provision is not specifically limited to acts involving public officials, but compensation is probably only due where the state has vicarious liability for the act: cf. the 1975 UN Declaration and the UN Convention against Torture, both of which restrict the definition of torture to acts involving public officials.

58. Principle 30. The provision in full states: "Whenever the death or disappearance of a detained or imprisoned person occurs during or shortly after the termination of his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either of its own motion or at the instance of a member of the family of such a person or any citizen who has a reliable knowledge of the case."

59. See Principle 31(1).

60. See Principle 31(2).

61. See Principle 11(2). See also Principle 9(2), which deals with the actual detention order.

62. See UN document A/35/401, Reply of Austria, at paras. 5 and 6.

63. See UN document A/35/401, Reply of United Kingdom, at para. 9, and UN document A/35/401/Add.1, Reply of USA, at para. 12: both suggest the insertion of the words "upon request".

64. Cf. Universal Declaration of Human Rights, article 11(1); International Covenant on Civil and Political Rights, article 14(2).

65. Principle 19(1). Cf. International Covenant on Civil and Political Rights, article 14(3)(g). Several states have proposed that the words "or against any other person" should be added: see UN document A/35/401, Replies of Byelorussian SSR, at para. 10, Ukrainian SSR, at para. 10, and USSR, at para. 17.

66. See Principle 23. Cf. UN Convention against Torture, article 15, and the OAS Convention, article 10. Note, however, that some states have objected to this principle on the grounds that the courts under their jurisdiction have freedom to evaluate evidence. Paragraph 10 of Sub-Commission resolution 1982/10 is relevant to this, stating that "confessions by detainees, in order to be authentically admissible, should be made only before an independent legal person such as a magistrate."

67. See Principle 20(2). It has been suggested that detainees should see and sign the records: see UN document A/35/401, Replies of Byelorussian SSR, at para. 11, Ukrainian SSR, at para. 14, and USSR, at para. 18.

68. Principle 21. Cf. UN Standard Minimum Rules for the Treatment of Prisoners, Rules 24 and 25, and also the Code of Conduct for Law Enforcement Officials, article 6.

69. Cf. Sub-Commission resolution 1982/10, para. 7, which states: "every detainee should be examined, preferably by a doctor of his own choice, within 48 hours after arrest and regularly thereafter." Paragraph 2 of Principle 22 provides for records of medical examinations to be kept and made available to the detainee or his representatives.

70. For a further discussion of this matter, see Chapter Nine, *infra*.

71. See Principle 24. Cf. Sub-Commission resolution 1982/10, para. 8.

72. See Principle 26.

73. See Principle 27.

74. See Principles 1, 2, 4, 5, 19(3) on general principles and prohibition of ill-treatment; 3, 6, 12, 25, 28(2), 28(3), 29 on independent supervision and complaint procedures; 14, 17, 18 on communication with the outside world; 21, 22 on medical treatment; and a number of others: 24, 26, 30, 31 and part of 13. It has also been suggested that Principles 16, 20 and 27 should be extended to cover imprisoned persons: see UN document A/35/401, Replies of Sweden and Ukrainian SSR, and UN document A/35/401/Add.1, Reply of USA.

## CHAPTER NINE: CODES OF CONDUCT AND ETHICS

In this chapter, we shall examine the role and significance of codes of professional conduct which have been developed with a view to tackling the problem of torture at a very basic level, namely by influencing the moral consciousness of individuals who may be required to carry out acts of torture. The role of the police in the protection of human rights was studied as early as 1963, and the involvement of other professions in torture was discussed on a wider basis both at the 1973 Conference for the Abolition of Torture and at the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The promulgation of codes of conduct, not only for law enforcement personnel but also for other professions which may come into contact with the practice of torture, was identified as an important factor in the elimination of torture, and several codes have been produced by various international organisations.

The aim of codes of conduct or codes of ethics is to promote the elimination of torture by means of a direct moral influence on the members of those professions which are likely to become embroiled in the practice of torture. Essentially, this involves an appeal to the conscience and to professional honour, although in certain circumstances the moral norms established by a code may be given substantive effect in disciplinary procedures operated by the appropriate professional association or even in positive law. Codes of conduct are in themselves no more likely to bring about the elimination of torture than are international conventions since they, too, are open to abuse and disregard, and even when a professional

association has power to impose disciplinary sanctions there are limits to the effectiveness of such codes, especially if the law does not support such associations and members are able to continue practising their profession even if formal recognition is withdrawn. Nevertheless, codes of conduct do constitute an important contribution to the development of a comprehensive set of measures aimed at preventing torture. It is clear from our examination of international measures that the elimination of torture must be tackled by a variety of means on as broad a front as possible, and while codes may not achieve spectacular or even discernible results, they do have a specialised role to play, particularly in providing clear and definitive standards for the members of professions which may be faced with moral dilemmas, and they are therefore necessary instruments in any strategy to eliminate the practice of torture.

One function of codes of conduct is to provide a reference point for any individual who may seek guidance as to his moral duties in a particular situation, especially when he has been asked or ordered to take part in the torture or ill-treatment of detainees. The solution to the moral decision he faces may not appear to him as straightforward as it does to a neutral and disinterested observer who is able to take an academic view of the dilemma, and for this reason it is important that the appropriate ethical principles should be unequivocally stated for and readily accessible to all members of his profession. Confronted with a moral dilemma, "the individual will look for concrete orientation points to guide his behaviour",<sup>1</sup> and it is therefore essential that in these circumstances there should exist strong humanitarian influences. The pressures from other quarters will often be powerful - the pressure to obey orders, fear of losing

one's employment, the influence of colleagues, and so on - and these must be countered by a clear objective standard which establishes the individual's duty and will support him in adopting a moral stand against prohibited practices. Indeed, the humanitarian principles embodied in codes of conduct ought to be stressed during the training and instruction of the individual so that they can have an educational value in preparing members of the relevant professions in advance for difficult situations by inculcating a strong respect for humanity.

The other important aspect of codes of conduct relates to the establishment of standards of professional behaviour. When individuals wilfully violate these standards, a formal code of conduct ensures that they cannot attempt to justify their actions or deny being aware of their moral and professional responsibilities: the existence of a code may thus inhibit members of a profession from becoming involved in the violation of human rights even though they do not personally have any respect for humanity, and in any event a code permits disciplinary action or at least moral condemnation. Where there exists a professional association which has power to withdraw recognition of an individual's membership of that profession or otherwise censure him in respect of a violation of professional ethics, a code provides a clear basis for such action. National associations often have sufficient control over their members to be in a position to take action of this nature, and if they are supported by the courts and the government the existence of a code can make an effective contribution to the elimination of torture. However, if governmental torture is involved, the powers of professional associations may be limited, especially if the authority of the judiciary has been compromised, and the individual may be able to



continue acting unlawfully with governmental protection even if official recognition as a member of the profession is withdrawn.

A number of associations have formulated guidelines on the functions and responsibilities of their members at national, regional and international level, and often the purpose of such codes has been to ensure the non-involvement of members in torture and ill-treatment. Within the United Nations sphere, two codes of particular relevance have been adopted, and before examining their provisions we shall relate their development prior to adoption.

The United Nations first became concerned with the question of torture in 1973 when a resolution proposed by Sweden was unanimously adopted by the General Assembly as resolution 3059(XXVIII). This rejected any form of torture and provided that the whole issue of torture and other inhuman or degrading treatment or punishment should be examined at a future session.<sup>2</sup> The following year, the General Assembly adopted, again unanimously, resolution 3218(XXIX), which aimed to strengthen safeguards for detainees and also referred the question of torture to the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. At the same time, the World Health Organization was asked to prepare an outline of the principles of medical ethics relevant to the protection of persons subjected to detention and imprisonment against torture.

The Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in September 1975, approached the problem of torture from two angles: firstly, the drafting of a declaration against torture, and secondly, the formulation of a draft Code of Police Ethics. The declaration was, of course, adopted by the General Assembly in December 1975 as resolution

3452(XXX), and the Convention against Torture was adopted in 1984. Progress on the draft Code of Police Ethics, however, was initially impeded, primarily because of an attempt to confer upon police officers a right to disobey orders and a duty to protest if a violation of human rights was involved. The General Assembly requested the Committee on Crime Prevention and Control to continue its work on the elaboration of the draft code,<sup>3</sup> and at its 31st session invited the World Health Organization to prepare a draft code of medical ethics relevant to the protection of persons subjected to any form of detention or imprisonment.<sup>4</sup> The Committee on Crime Prevention and Control duly produced a draft code of police ethics, which was adopted by the General Assembly in 1979 as the Code of Conduct for Law Enforcement Officials.<sup>5</sup> At the same session, the General Assembly requested the Secretary-General to circulate the draft code of medical ethics prepared by the World Health Organization and to submit a report,<sup>6</sup> and the following year it noted the report and requested the Secretary-General to renew his invitation for comments and suggestions and to submit a revised report to the Economic and Social Council.<sup>7</sup> This revised report was published in March 1981, and the Economic and Social Council recommended that the General Assembly should take measures to finalise the code.<sup>8</sup> At its 36th session, the General Assembly requested the Secretary-General to circulate the revised draft principles amongst member states for further observations, and postponed consideration of the matter until the following year,<sup>9</sup> when the code of medical ethics was finally adopted in resolution 37/194.<sup>10</sup>

We shall examine firstly the Code of Conduct for Law Enforcement Officials, the importance of which is indicated in the following observation:

"The police and other security forces are the most prone to find their profession and expertise perverted in the service of torture."''

It is in the field of security that torture is normally regarded as justifiable, and it is therefore the police and other security forces who are usually required to employ torture. Moreover, we have seen that members of the security forces are exposed to influences which may render them more susceptible to persuasion that the use of torture is justifiable and necessary in certain circumstances, and their sense of the dignity and worth of the human person may be suppressed by indoctrination. The members of the security forces are trained in violence, and as a result they may be more easily convinced of the necessity of torture than, for example, a doctor, whose training will have emphasised the well-being of the human person even if he is not already predisposed towards such an attitude.

The United Nations General Assembly clearly recognised the dangers which may arise in the training of security personnel when it adopted the Code, and recommended that governments should consider incorporating the Code in national legislation as a body of principles to be observed by law enforcement officials. The Code may thus be regarded as a method of implementing the provisions of article 10 of the UN Convention against Torture, which refers to the training of, *inter alia*, law enforcement personnel, without giving any specific indication of the manner in which instruction should be given.

The eight articles of the Code of Conduct for Law Enforcement Officials are fairly straightforward and, as they are accompanied by explanatory comments, it will not be necessary for us to add extensive observations. Article 1 provides simply that law enforcement

officials "shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession."<sup>12</sup> The basic obligation of the law enforcement officer is, then, to respect and uphold the law. Normally, this obligation will include a duty to ensure respect for fundamental human rights, as violations of such rights will be regarded as illegal acts, but the article does not take into account the possibility of the law itself failing to recognise and protect human rights. The over-riding duty of law enforcement officials in this connection is, however, expressed in article 2:

"In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons."

Although the commentary on article 2 refers to a number of the major human rights instruments, a problem may arise if certain rights are not in fact recognised in the positive law of a particular state, since there may then be a conflict between the requirements of national law and the principles of human rights expressed in international instruments. In these circumstances, the law enforcement official will not be sure whether he should or can invoke international instruments to support his refusal to assist in acts which national law permits but which violate international human rights standards. It is unfortunate that this area of doubt has been left, because although the code is not a binding instrument in itself, it would have been of value if it had specified or referred to particular core rights and stated that respect for these must always take precedence over national positive law and professional requirements in dictating the actions of law enforcement officials.

It is essential that the responsibilities of such officials in relation to the protection of fundamental human rights should be stated unequivocally, so that they are able to recognise when their orders are incompatible with internationally agreed minimum standards. This can only be achieved in the case of rights which are truly universal, but in such cases it may be contended that a law enforcement official is entitled to follow the international principle rather than the national law. In practice, it might prove extremely difficult to enforce this view in national courts.

There should be no doubt, however, in relation to torture and ill-treatment, which are dealt with in a separate article:

"No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment."<sup>13</sup>

Although this provision does not actually confer a right to disobey orders, it virtually imposes a moral obligation to refuse to participate in torture, even if national law should permit the use of torture, on the basis of internationally endorsed standards which prohibit the employment of torture in absolute terms. The duty of law enforcement officials is thus established clearly and uncompromisingly: their primary responsibility is to the principles of humanity rather than to national law or the orders of a superior. The principles expressed in the Code may thus be regarded as taking precedence over national law, at least in moral terms. The absoluteness of the prohibition of torture is, of course, a well-

established principle, and the provisions of the Code echo the terms of article 3 of the 1975 UN Declaration and article 2, paragraphs 2 and 3, of the UN Convention. While these instruments deal with the obligations of the state, however, the Code stresses the responsibility of the individual, and it establishes clearly that the duty of the law enforcement official is to respect fundamental human rights rather than accept putative justifications of torture or obey the orders of a superior which are at variance with the principles of human rights. The duty of the individual remains a moral one, however, and the Code could not be invoked in judicial proceedings to justify a failure to obey orders unless it had been incorporated into national legislation and given the force of positive law.

Article 3 of the Code at first glance appears to involve a potential incompatibility with the foregoing obligations, as it permits the use of force in certain circumstances:

"Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty."

This provision might conceivably conflict with the prohibition of torture and ill-treatment. However, article 5 makes it clear that no exceptional circumstances can ever justify the employment of torture or other cruel, inhuman or degrading treatment or punishment, and the provision is clearly not intended to constitute an exception to article 5. It is not, therefore, a vindication of the use of coercion in interrogation, and cannot be interpreted as sanctioning any act which would violate the prohibition of torture and ill-treatment. In fact, the provision applies only to the use of such force as is necessary for the prevention of crime or in the process of arrest and detention,<sup>14</sup> and the commentary on the article indicates that the

principle of proportionality is relevant in this connection. In view of the terms of article 5, then, it may be concluded that while article 3 permits the use of limited force for certain purposes when absolutely necessary, it cannot be relied upon to justify any use of force which would constitute a violation of the prohibition of torture and ill-treatment. In other words, any use of force must fall short of the levels of pain and suffering required to establish torture or ill-treatment.

Article 6 of the Code states:

"Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required."

This is a general principle, which is also recognised in Principle 21 of the Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment. Article 6 does not, however, indicate who may decide when medical attention is necessary, that is whether an examination ought to be granted at the request of the detainee or whether law enforcement officials should have discretion in deciding when medical attention is required. Law enforcement officials are not normally qualified in medicine, and the most appropriate course would appear to be to provide medical attention on request, at least if there are reasonable grounds for believing that such attention is genuinely required. A further difficulty is that lower-ranking officials may not have any authority to take appropriate action, and more specification of the duties of such officials in these circumstances is desirable.

These articles together express the fundamental duties of law enforcement officials with regard to the protection of human rights

and, in particular, the prevention of torture. The three remaining articles of the Code relate to respect for confidentiality,<sup>15</sup> acts of corruption,<sup>16</sup> and opposition to and reporting of violations of the Code or of national law.<sup>17</sup> Article 8 states:

"Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them.

Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power."

The commentary adds:

"This Code shall be observed whenever it has been incorporated into national legislation or practice. If legislation or practice contains stricter provisions than those of the present Code, those stricter provisions shall be observed."<sup>18</sup>

The major drawback with a Code of this nature is that while it can lay down guidelines and define the moral obligations of individuals, it cannot impose legal duties on them in respect of their relationship with the state. The purpose of the Code is to provide a clear statement of the ethical standards required of law enforcement officials, but its enforceability depends upon its being embodied in national law, with the result that the effectiveness of the Code is ultimately in the hands of governments. Moreover, the Code cannot confer rights on law enforcement officials, thus leaving them vulnerable if they invoke its provisions to justify a refusal to accept national laws or superior orders. It is obvious that without the backing of the law the individual's moral stance is likely to be futile, if not a risk to his personal security.



The Code of Conduct for Law Enforcement Officials is in essence a standard-setting instrument, and its importance lies in its assertion of the principles applying to the behaviour of law enforcement officials in the execution of their duties. While the Code is not legally binding, and may not have a direct effect in preventing torture, it represents a declaration of international standards of professional conduct, and thus permits the exposure and unequivocal condemnation of violations of human rights in so far as these are the result of a failure to fulfil the requirements of the Code. Moreover, the Code may both influence and support law enforcement officials in carrying out their duties.

It is appropriate at this juncture to mention Draft Principles for a Code of Ethics for Lawyers, Relevant to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which were presented to the United Nations by Amnesty International, and which have had some influence on subsequent developments.<sup>19</sup> The legal profession has a duty to uphold and protect human rights and to protest when these are violated, and the various branches of the legal profession have particular responsibilities. Legislators have a specialised role in the promulgation of laws which do not themselves promote or permit the violation of human rights and in the adoption of measures which will assist in the prevention of violations, but our principal concern here is with those who are involved in the application and practice of law, namely judges and lawyers, particularly in relation to detention.

The basic duty of judges is to interpret and apply the law of the land impartially and conscientiously, and this should normally mean that they must protect the individual from violation of his fundamental human rights. As we have seen in previous chapters, the

judiciary is often responsible for supervising detention procedures, and in this connection it is especially important for judges to be vigilant and diligent in carrying out their duties, so that effective control is maintained and violations of human rights are not permitted to occur as a result of insufficient judicial concern. When the judiciary has a responsibility for monitoring detention, judges must take an active role in ensuring the protection of detainees: they must investigate every allegation of ill-treatment and not simply rely on assurances by the security forces or the government. Furthermore, it follows that judges must never connive with the government or succumb to governmental pressure, particularly when national security is involved, but must fulfil their professional responsibilities in the administration of justice and ensure that the individual does not suffer as a result of the erosion of his legal rights. Of course, if the government introduces legislation which itself permits the violation of human rights, the courts may be rendered impotent, at least if constitutional review is not possible and international obligations are not directly enforceable through the courts, and a similar situation may arise when jurisdiction in political matters is transferred from independent civilian courts to military tribunals. In such circumstances, the only form of protest open to the judge of honour and integrity may be resignation.

Defence lawyers also have a role in the protection of human rights, since they are in a position to bring alleged violations to the attention of the courts on the basis of information which they receive from clients. Whenever they have reason to believe that a violation has taken place, defence lawyers should lodge an official complaint with the appropriate authorities and endeavour to ensure

that all necessary steps are taken to pursue the matter, whether or not they have been instructed by a client or will be paid for doing so. Generally speaking, defence lawyers will be sympathetic to the position of their clients and may be expected to initiate the appropriate remedial action. Prosecuting agents, on the other hand, may be less inclined to take action, but they also have a duty to report any irregularities which come to their attention, and in this connection it may be helpful for the prosecuting agency to be distinct from the authority responsible for investigation, as suggested in the previous chapter. Prosecutors should also reject evidence which they know or suspect has been obtained by unlawful means, and ensure that a thorough investigation is carried out.

The draft principles prepared by Amnesty International were intended to deal with these issues. Article 1 imposed on defence lawyers an obligation to bring any allegations of torture made by their clients to the attention of the competent authorities and to institute the appropriate proceedings with a view to obtaining a remedy. Article 2 referred to the obligation of prosecutors to reject evidence obtained by coercion, and article 3 imposed the same obligation on judges, requiring them to carry out a thorough investigation whenever allegations of torture were made. Article 4 suggested that lawyers in government service should do all they could to promote the adoption into national law of the UN Standard Minimum Rules for the Treatment of Prisoners, an idea which might now be extended to include the UN Convention and the Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment. Finally, article 5 provided for the support by professional associations of those defending the standards laid down

in the draft, and also provided for the reporting of violations of the 1975 UN Declaration.

The United Nations has not ignored the role of the legal profession: a Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers was commissioned by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and a final report was presented by the Special Rapporteur, Mr L.M. Singhvi, in 1985. The emphasis of this study was, as the title implies, on judicial independence and the prevention of governmental interference in the judicial process, and in 1987, Mr Singhvi presented a Draft Universal Declaration on the Independence of Justice.<sup>20</sup>

The other major area of concern dealt with by the United Nations is that of medical ethics. The use of torture and ill-treatment by members of the security forces is perhaps understandable, but the involvement of medical personnel in such activities seems to constitute a contradiction of the very philosophy of healing and relief of suffering and the pursuit of the general improvement of the physical and mental well-being of the human person which underlies the practice of medicine. In spite of this clear incompatibility, however, the well-documented involvement of medical personnel in the practice of torture and ill-treatment has caused concern within the United Nations since the inception of the world organisation in 1945. In particular, the 'experiments' carried out in Nazi concentration camps during the Second World War evoked both horror and outrage and produced a determination to ensure that such crimes would never be repeated, yet the fact is that it is not uncommon for doctors and other medical staff to become involved in the practice of torture.

For centuries there has been an insistence on the integrity and ethical conduct of medical practitioners:

"The doctor is in duty bound to restore bodily and mental health without distinction as to persons. He is expected to have the utmost respect for human life and human dignity."<sup>21</sup>

Many people enter the medical profession because of personal motivation to help and care for their fellow human beings, and indeed view their work as a vocation rather than as a career, and even those who do not have this attitude must consciously recognise that their essential responsibility is to promote health and alleviate suffering. The training of doctors and nurses is aimed entirely at imparting knowledge and instructing in techniques which will enable them to dispel pain, cure illness and restore health whenever possible, and the deliberate infliction of pain and suffering to the detriment of the patient's well-being is clearly incompatible with the duties of medical personnel. This being the case, it might be thought unlikely that doctors would ever condone the use of torture, but the fact is that there have been regular and consistent reports from many different parts of the world confirming that medically qualified people have been directly involved in the infliction of torture. Some, no doubt, have no desire to be involved, and are more or less compelled to co-operate or at least subjected to strong pressure, while others may take part in torture with grave misgivings or in the mistaken belief that the use of torture is justified in certain circumstances, but in many cases medical personnel have in various ways quite clearly assisted in the application of torture willingly and in full awareness of its moral, and sometimes legal, unacceptability.

The most obvious way in which doctors may be involved in torture is in the direct infliction of pain and suffering. Their knowledge of the human anatomy and psyche and of medical science puts them in a unique position, and doctors and scientists may find themselves of particular value to the security forces because of their ability to develop and apply sophisticated interrogation techniques. In some instances, such methods may not actually cause severe pain or suffering, for example where a 'truth drug' is administered forcibly, but even in such cases the doctor's actions must be regarded as a breach of medical ethics because the welfare of the 'patient' is not his paramount concern. In most cases, even refined techniques will cause some degree of pain or mental anguish, and involvement in the wilful infliction of pain or suffering is essentially inconsistent with the professional responsibilities of medical personnel.

One particularly sinister practice which may be mentioned is the abuse of psychiatry, which has been reported most frequently from the Soviet Union and other Eastern European states, although it does occur in other parts of the world, and indeed unrecorded incidents may be widespread.<sup>22</sup> In fact, the problem has reached such proportions that the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities has made a special study of detention on grounds of mental illness.<sup>23</sup> The principal form of abuse is the committal of political and religious dissidents to psychiatric institutions because of their beliefs rather than on genuinely medical grounds. This is not usually intended to achieve an immediate compulsion in the same way as torture employed for the purpose of interrogation, but rather represents a longer term exercise, certainly for the coercion of political dissidents, but often for a much more radical manipulation

of the mind. Abuse of psychiatric treatment is always a danger, of course, because the patient, classed as incapable of running his own affairs, loses many of the normal legal rights and becomes largely dependent upon the goodwill of the state authorities. If treatment is compulsory, and the patient is confined to a psychiatric institution, he may be unable to secure his release without external assistance, and will obviously be in a vulnerable position, especially if the authorities regard him as an enemy of the state. The detention of dissidents on psychiatric grounds is, then, a useful expedient for repressive regimes, because it ensures effective control over troublesome political opponents whilst depriving them of most of their rights.

In normal circumstances, confinement in a psychiatric institution requires the co-operation of doctors who are prepared to certify the patient as mentally ill. The very nature of mental illness creates difficulties in obtaining the patient's consent to treatment, and there are undoubtedly cases in which compulsory detention for psychiatric care is necessary,<sup>24</sup> but it is clear that there are serious risks involved in such detention and that strict safeguards are essential if abuses are not to occur. The basic problem lies in the determination of what constitutes psychiatric illness, which is largely dependent on notions of 'normal' behaviour: even psychiatrists cannot agree on the criteria which ought to be applied.<sup>25</sup> In such circumstances, it is not at all difficult to equate non-conformity or dissent with abnormality and mental aberration: in the Soviet Union, for example, the definition of mental illness allows even "seemingly normal" people who display no symptoms of mental illness to be regarded as schizophrenic and

confined to psychiatric institutions, and people may also be detained in this way for "religious delirium" or "reformist delusions". It is not illogical for an atheist to regard religious belief as a symptom of an underlying psychological imbalance, and an atheistic regime may consider it a duty to provide treatment for those suffering from such an 'illness'. There is, then, a fundamental difficulty in formulating a definition of mental illness and delineating the conditions in which a person may legitimately be detained on grounds of mental illness.

In every society there are those whose behaviour does not conform to social norms, and it may not always be easy to distinguish mere eccentricity from genuine mental derangement which might respond to psychiatric treatment. However, although it will be necessary to confine those who constitute a danger to society (or to themselves), the criterion must be social rather than political, and there can be no justification for the compulsory confinement of persons whose only deviation is to hold political views which differ from those of the authorities, even though the government may regard such dissent as a threat to the social fabric. The dividing line between sanity and insanity may be narrow, but in general no one should be compulsorily confined to a psychiatric institution unless he represents a threat to other people (primarily because of violent behaviour) or to himself, or is unable to take care of himself, and this clearly does not include political or religious dissidents.

The detention of political dissidents in psychiatric hospitals may be utilised as a simple expedient to remove opponents of the government from circulation, but often it is employed in a positive attempt to persuade the 'patient' to renounce his beliefs. The authorities equate a return to normality with a renunciation of



beliefs, so that 'recovery' is dependent on the denial of political or religious convictions and acceptance of the state ideology. It is obvious that such 'treatment' is essentially coercive rather than remedial, and in fact it is claimed that the conditions within Soviet psychiatric hospitals are often geared to the intimidation of political inmates: for example, there have been frequent reports of beatings, sometimes by criminals recruited from conveniently located corrective labour colonies. Even in the treatment of political patients, the aim seems to be to forcibly change the political views of the patient by means of the infliction of pain and suffering, and it is difficult to accept that the medical staff really consider these coercive techniques to be legitimate medical treatment.

The use of drugs is a common feature of psychiatric abuse, and indeed occurs outwith the context of psychiatric treatment as an interrogation technique.<sup>26</sup> In psychiatric abuse, drugs are employed primarily as a method of controlling the patient, and for this purpose powerful tranquilisers are particularly useful. Such drugs are utilised in many countries in the *bona fide* treatment of psychiatric disorders such as schizophrenia and other psychoses, but many of these drugs can also have serious side-effects which normally have to be controlled by the administration of other drugs and the careful avoidance of contra-indicated drugs. When these precautions are taken, the use of major tranquilisers may be acceptable, but it is alleged that in Soviet psychiatric institutions the tranquilisers are not only administered to patients who are not mentally ill, but are given without regulation of dosage and without the necessary medication to counter-act any possible side-effects. The result is that the patient (or, more accurately, the victim) often deteriorates

physically as well as mentally, and the use of drugs is thus valuable in the debilitation process for the purpose of interrogation or brainwashing. In this process, drugs such as apomorphine, which induces vomiting, and suxamethonium or tubocurarine, which induces paralysis, are particularly effective. The administration of such substances obviously causes a great deal of suffering and distress to the victim, and they can thus be used for punishment and deterrence as well as for coercion.

In the genuine treatment of psychiatric illness (or, indeed, any other kind of illness), the medical profession takes great care to cause as little suffering as possible. Thus, electro-convulsive therapy (ECT) is normally used only under anaesthetic, and its usefulness is under constant review. In some cases, of course, it will be necessary to occasion extreme discomfort and perhaps even pain in seeking to cure illness or at least alleviate future pain and suffering, and although in most instances consent must be given for such treatment, there are circumstances in which an individual may not be able to give his consent. In such situations, the responsibility of the medical profession is always to put the interests of the patient first and, while a real dilemma may arise, it will in most cases be clear what the doctor's duty is. In particular, it is obvious that the infliction of pain or suffering for the purpose of coercing political dissidents into renouncing their beliefs cannot be justified in any circumstances.<sup>27</sup> Members of the medical profession should never be directly involved, then, in the infliction of pain or suffering which is not purely in the interests of the patient.

The responsibility of medical personnel may not be as clear-cut when involvement in torture is less direct. For instance, doctors may

be required by the security forces to examine detainees for the purpose of confirming that they are fit to be tortured, or they may be required to attend torture sessions in order to intervene if there is any likelihood of the victim dying. Often, this will only involve army or police doctors, but it may apply on a wider level, and in these circumstances the doctor's duty is probably to refuse to take any part in the torture on the grounds that the interests of the victim cannot be regarded as paramount. Moreover, the doctor should use all his influence to oppose the use of torture, and it might even be suggested that he should take what action he can to certify as many detainees as possible unfit to be tortured. The optimum policy does seem, however, to be one of non-co-operation.

There is another level on which doctors may become involved in torture, and it is this aspect which perhaps presents the most acute moral dilemma. In this grey area, the doctor is required to treat victims of torture rather than merely examine them, the purpose of such treatment being, however, not the long-term recovery of the individual, but rather a temporary patching up to enable him to undergo further torture. In such a situation, refusal to render assistance might be interpreted as a failure to fulfil the essential role of the medical profession, namely the relief of suffering, yet the temporary alleviation of the victim's pain and suffering may simply result in long-term pain and suffering of an even more intense nature.

In many cases, the administration of medical aid would be for the benefit of the victim: for instance, treatment of an injury might ensure that torturers would not be able to exploit the injury by applying pain to a particularly sensitive area. Furthermore, a doctor

may have to take action in order to prevent any long-term or permanent damage to the victim, assuming the victim survives further torture. On the other hand, where the medical treatment effectively contributes to the suffering of the victim, for example by keeping him conscious for interrogation purposes, this really constitutes direct participation in torture, and clearly cannot be condoned. However, the problem with which we are concerned here is whether a doctor whose main concern is the welfare of the victim should administer treatment in the knowledge that his efforts to keep the person alive and achieve short-term relief will only result in him being subjected to further torture. The essence of the dilemma is whether short-term relief should be attempted when the immediate consequence will be the infliction of further pain and suffering or whether the doctor should refuse to treat the victim so that he cannot be subjected to further torture without considerable risk of death, even though the result may be that the victim dies or sustains permanent damage. It might be relevant that torture will continue even if the doctor does not render assistance, so that he should endeavour to alleviate the pain and suffering as much as possible, but it could be argued that this may simply prolong the victim's ordeal, and that he should be allowed to die quickly (at least if there is a probability that he will die under torture). This introduces the whole issue of euthanasia: does the medical practitioner have a right to permit a victim of torture to die on the grounds that it is preferable to allowing him to be subjected to further torture? No doubt many victims feel that they would rather die than endure more torture (and many have taken their own lives on that basis), but does this confer upon doctors the right to end life or even withhold medical assistance? In answering these questions,

doctors have to take into consideration the probability of the victim being released and rehabilitated in the long-term, and with this in view they might deem it preferable to treat a victim in spite of the prospect of further torture if in the long-term the prognosis for a return to normal life is favourable, whereas if death or very serious debilitation are inevitable they may consider it preferable to refuse any treatment and allow the victim to die from his initial injuries. In the final analysis, each doctor faced with such a dilemma has to make the decision in the light of his own experience and moral conscience, and it may be that there is no definitive solution. However, the purpose of professional codes of ethics is to provide some guidance on these issues, and there are in fact several codes relating to the responsibilities of the medical profession in at least some of these situations.

In August 1975, the Council of National Representatives of the International Council of Nurses (ICN) adopted a resolution on the Role of the Nurse in the Care of Detainees and Prisoners. This resolution referred to the ICN's Code for Nurses, which provides, *inter alia*:

"The fundamental responsibility of the nurse is fourfold: to promote health, to prevent illness, to restore health and to alleviate suffering."<sup>23</sup>

Reference was also made to the ICN's support for the Red Cross Rights and Duties of Nurses under the Geneva Conventions and for the Universal Declaration of Human Rights. The responsibilities of the nurse are, in general, similar to those of the doctor and, indeed, to those of the whole medical profession, and it is clear that these duties do not permit participation in the practice of torture and ill-treatment. The resolution adopted by the Council of National Representatives in 1975 confirms this:

"WHEREAS in relation to detainees and prisoners of conscience, interrogation procedures are increasingly being employed which result in ill effects, often permanent, on the person's mental and physical health;  
THEREFORE BE IT RESOLVED that ICN condemns the use of all such procedures harmful to the mental and physical health of prisoners and detainees; and  
FURTHER BE IT RESOLVED that nurses having knowledge of physical or mental ill-treatment of detainees and prisoners take appropriate action including reporting the matter to appropriate national and/or international bodies; and...  
FINALLY BE IT RESOLVED that the nurse's first responsibility is towards her patients, notwithstanding considerations of national security and interest."<sup>29</sup>

Also in 1975, the World Health Organization formulated a document entitled 'Health Aspects of Avoidable Maltreatment of Prisoners and Detainees',<sup>30</sup> at the request of the General Assembly of the United Nations. This document mentioned the moral dilemma discussed above, but did not attempt to resolve it; it did, however, suggest as one solution certain parts of the World Health Organization's Guidelines for Medical Doctors, which were subsequently adopted as the Declaration of Tokyo in October 1975 by the 29th World Medical Assembly.<sup>31</sup> The Declaration proclaims:

"It is the privilege of the medical doctor to practise medicine in the service of humanity, to preserve and restore bodily and mental health without distinction as to persons, to comfort and to ease the suffering of his or her patients. The utmost respect for human life is to be maintained even under threat, and no use made of any medical knowledge contrary to the laws of humanity."<sup>32</sup>

The Declaration contains six articles dealing with the duties of the doctor in relation to the problem of torture, which is defined as "the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any

authority, to force another person to yield information, to make a confession, or for any other reason."<sup>33</sup>

Article 1 of the Declaration of Tokyo states:

"The doctor shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offence of which the victim of such procedures is suspected, accused or guilty, and whatever the victim's beliefs or motives, and in all situations, including armed conflict and civil strife."

Article 2 further provides:

"The doctor shall not provide any premises, instruments, substances or knowledge to facilitate the practice of torture or other forms of cruel, inhuman or degrading treatment or to diminish the ability of the victim to resist such treatment."

Article 3 adds:

"The doctor shall not be present during any procedure during which torture or other forms of cruel, inhuman or degrading treatment is used or threatened."

These articles cover every situation in which a doctor might actively or passively contribute to the infliction of torture, and even forbid doctors from being present at an act of torture: this means that doctors should not attend torture sessions for the purpose of intervening when the victim has reached the limits of his endurance. The references to "treatment" might be seen as excluding the infliction of pain for the purposes of punishment, although the definition mentions "any other reason" and is not restricted to coercion. There are countries in which corporal punishment is employed, and the presence of a doctor is often required, but to the extent that corporal punishment violates the prohibition of torture and ill-treatment doctors should not attend, even if this creates a problem in depriving the victim of immediate medical attention.

Article 4 of the Declaration provides:

"A doctor must have complete clinical independence in deciding upon the care of a person for whom he or she is medically responsible. The doctor's fundamental role is to alleviate the distress of his or her fellow men, and no motive - whether personal, collective or political - shall prevail against this higher purpose."

This article establishes in unequivocal terms the primary duty of the doctor, and it spells out clearly the unacceptability of any putative justification of torture as the lesser of two evils. It does not, however, clarify the role of the doctor in circumstances where the administration of medical treatment may be followed by the infliction of further torture, and while there is no doubt that doctors are always under a duty to protest at the use of torture and do all they can to prevent it, the Declaration does not provide a solution to the dilemma identified above, namely whether short-term relief should be sought without taking into account the possibility that the victim may be subjected to further torture. The Preamble does seem to reject the idea of euthanasia when it states that the "utmost respect for human life is to be maintained even under threat", but this may be reading too much into the provision. The dilemma remains unresolved.

Article 5 is of some interest, as it deals with the problem of hunger-strikes, but this matter will be examined later in the chapter. Article 6, finally, is a general provision relating to doctors who stand by their responsibilities as expressed in the Declaration:

"The World Medical Association will support and should encourage the international community, the national medical associations and fellow doctors to support the doctor and his or her family in the face of threats or reprisals resulting from a refusal to condone the use of torture or other forms of cruel, inhuman or degrading treatment."



As we noted earlier in this chapter, the General Assembly of the United Nations has also adopted a code of medical ethics, which is contained in the Annex to resolution 37/194.<sup>34</sup> This code is concerned particularly with the role of health personnel in relation to detained and imprisoned persons, and Principle 1 accordingly defines the primary responsibility of health personnel in this field:

"Health personnel, particularly physicians, charged with the medical care of prisoners and detainees, have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained."<sup>35</sup>

The basic right to medical care and assistance is a generally recognised principle of human rights, which appears in a limited form in article 12 of the International Covenant on Economic, Social and Cultural Rights, and is applied specifically to prisoners by Rules 24 and 25 of the UN Standard Minimum Rules for the Treatment of Prisoners, article 6 of the Code of Conduct for Law Enforcement Officials, and Principle 21 of the Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment. The scope of the right is unclear, but essentially its purpose is to ensure that all persons deprived of their liberty are provided with medical treatment whenever necessary: if a detainee requires assistance or claims to be in need of medical attention, a preliminary examination should be carried out by a competent person and the appropriate treatment administered in exactly the same manner as it would be in the case of a free person.

Principle 2 of the code of medical ethics states:

"It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or

passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment."<sup>36</sup>

Reference is made to the definition of torture provided in the 1975 UN Declaration rather than to that in the Declaration of Tokyo,<sup>37</sup> indicating the inter-relationship between the various elements of the United Nations strategy for the elimination of torture. Article 7 of the 1975 UN Declaration is also referred to.<sup>38</sup> Principle 2 of the code is a specific application to the medical profession of the general prohibition on the use of torture, in the same way as the Code of Conduct for Law Enforcement Officials applies the prohibition to the police and security forces and prison staff.<sup>39</sup> It characterises torture as entirely incompatible with the duties and functions of the medical profession, and gives clear confirmation that the involvement of health personnel in the practice of torture cannot be condoned.

Principle 3 of the code of medical ethics provides:

"It is a contravention of medical ethics for health personnel, particularly physicians, to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health."

This provision not only emphasises the primary consideration of health personnel as being the patient's welfare, but also condemns any other role, presumably referring to involvement in interrogation and similar activities which would be incompatible with their essential responsibility or would not have the patient's interests as paramount. However, the provision appears to forbid even a *bona fide* relationship which is not in any way detrimental to the welfare of the detainee, and some clarification might be appropriate.<sup>40</sup>

Principle 4 of the code states:

"It is a contravention of medical ethics for health personnel, particularly physicians:

(a) To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments;

(b) To certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments."<sup>41</sup>

This principle deals with less direct areas of involvement in torture: it prohibits any contribution to the infliction of pain or suffering, and also deals uncompromisingly with the question of whether medical personnel should certify detainees as fit to be subjected to pain for the purpose of interrogation or punishment. The responsibility of medical personnel in relation to detainees is clearly spelt out in Principles 2 and 4, then, and in every case the welfare of the detainee emerges as the paramount consideration. Principle 4 may also cover the use of scientific techniques which do not actually cause pain or suffering, but which are objectionable because they interfere with the mind and will of the victim.

Principle 5 of the code provides:

"It is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoner or detainee himself, of his fellow prisoners or detainees, or of his guardians, and it presents no hazard to his physical or mental health."

Principle 6 expresses the general principle that there can be no derogation from the prohibition of torture and ill-treatment in any circumstances.<sup>42</sup>

These principles of medical ethics are significant in a number of areas. Firstly, their promulgation and publicisation ensures that members of the medical profession are made aware of the dangers which they may face if they become embroiled in security matters, and that they are not ignorant of their professional duties and moral responsibilities in such situations, namely to promote the health and well-being of the individual and to refrain from any involvement in the violation of fundamental human rights. Secondly, national and international professional associations may be able to impose disciplinary sanctions on the basis of the code, particularly when no action is taken by the state authorities against members of the medical profession who abuse their position. This aspect would, of course, be strengthened by the establishment of an international monitoring system which would permit censure of individuals found to have violated professional standards of conduct,<sup>43</sup> especially if recognition of the guilty party as a member of the profession could be revoked effectively. Indeed, even when formal disciplinary proceedings cannot take place, professional associations often have a certain influence which may enable them to bring pressure to bear on governments. Thirdly, the code of medical ethics represents the views of a prestigious profession, and even non-medical personnel involved in security operations may invoke it to justify their refusal to participate in the violation of human rights. In fact, individuals may be able to utilise the principles to influence their colleagues.<sup>44</sup> The code of medical ethics produced by the United Nations does not

deal with all the problem areas, and some ambiguities remain, but in general the principles give clear guidance regarding the duties and functions of the medical profession in relation to detainees.

The code of medical ethics is due to be supplemented by guidelines on the protection of persons detained on grounds of mental ill-health, proposals for which were prepared for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities by a special rapporteur.<sup>45</sup> The rapporteur indicated that abuses were taking place in several parts of the world, but also stated in the introductory comments to the draft principles that "not all of the principles, guidelines and guarantees are capable of immediate application in all countries at all times."<sup>46</sup> On the other hand, it is stated that the principles "represent, as a whole, minimum United Nations standards for the protection, in general, of the fundamental freedoms, human and legal rights of the mentally ill and of persons suffering from mental disorder."<sup>47</sup> We have seen that the abuse of psychiatric treatment is a matter of some concern, and for this reason these principles are an important step forward. There are 47 principles in all, covering such matters as the diagnosis of mental illness, the procedures for voluntary and involuntary admission to psychiatric hospitals, and review and appeal procedures. Involuntary detention is permitted only when the patient has been certified by a competent court or health tribunal as dangerous to himself or to others or to the community at large,<sup>48</sup> and most of the articles relate to the problem of ensuring that persons are not wrongly diagnosed as mentally ill and detained on that basis, rather than to the actual conditions or treatment. However, as well as establishing general rights and certain freedoms,<sup>49</sup> the principles also require

humane treatment,<sup>50</sup> and although torture is not specifically mentioned, it is provided that every patient shall "have the right to protection from exploitation, abuse and degrading treatment."<sup>51</sup> Article 7, paragraph 2, provides that every patient "shall have a legal right to receive whatever social and medical services and assistance are necessary to protect him from any harm, including chemical intrusions, abuse by other patients and staff or acts causing mental distress." Moreover, paragraph 3 of the same article states that these rights "shall be guaranteed by the national Constitution." This indicates that, unlike the code of medical ethics, these guidelines are intended principally for governments, and this is borne out by article 47, which provides:

"States should implement these principles and guidelines through appropriate legislative, judicial and administrative measures and means which shall be reviewed periodically."

Other provisions relevant to the question of treatment are article 9, paragraph 4, which prohibits the use of psychiatric knowledge and skills for non-medical purposes, and article 10, paragraph 1, which prohibits the use of medication for the purpose of punishment or restraint or the convenience of the medical or nursing staff. Article 25 provides for communication with the outside world. Finally, in this connection, attention should also be drawn to the Declaration of Hawaii, adopted by the General Assembly of the Sixth World Congress on Psychiatry in 1977, which delineated the role of the psychiatrist, in particular emphasising the best interests of the patient as crucial and prohibiting participation in compulsory psychiatric treatment in the absence of psychiatric illness.<sup>52</sup>

There remain two points which require special mention. Firstly, the issue of hunger-strikes, referred to above: this is not directly

a matter of torture, as the suffering involved is self-imposed,<sup>53</sup> although a distinction may be drawn where the hunger-strike is a legitimate protest against treatment which itself is in violation of fundamental human rights.<sup>54</sup> There is no mention of the issue in the United Nations code of medical ethics, but article 5 of the Declaration of Tokyo does make reference to the question of force-feeding persons on hunger-strike:

"Where a prisoner refuses nourishment and is considered by the doctor as capable of forming an unimpaired and rational judgement concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to form such a judgement should be confirmed by at least one other independent doctor. The consequences of the refusal of nourishment shall be explained by the doctor to the prisoner."

Thus, while there should never be a denial of food, the implication of the article is that a detainee on hunger-strike should be allowed to die if he takes a conscious decision to refuse nourishment. The provision is possibly too inflexible, and there may be other considerations which should be taken into account, such as the validity of the decision to refuse food, but the duty not to force-feed is stated categorically. The principle might even be extended by implication to the situation in which a detainee refuses medical treatment because he prefers to die rather than be subjected to torture, although it could be argued that in such circumstances the detainee is not capable of forming an "unimpaired and rational judgement". There is, however, no suggestion in article 5 of the Declaration of Tokyo that a doctor should ever hasten the death of a detainee by positive action.

Finally, we must consider the matter of medical or scientific experimentation, a subject which was discussed at some length by the Commission on Human Rights and by the Third Committee of the General Assembly during the preparation of article 7 of the International Covenant on Civil and Political Rights.<sup>55</sup> The second sentence of article 7 was finally adopted in the following terms:

"In particular, no one shall be subjected without his free consent to medical or scientific experimentation."<sup>56</sup>

The express purpose of this provision was to prevent any recurrence of "atrocities such as those committed in concentration camps during the Second World War."<sup>57</sup> It was felt that the general prohibition of torture and other ill-treatment, as encompassed in the first sentence of the article, was not sufficiently precise to cover such situations adequately.<sup>58</sup> It was clear that experiments involving risk should not, in principle, be carried out without the free consent of the person concerned, but it was recognised that there might be exceptions to this principle where the interests of the health of the individual or the community were involved.<sup>59</sup> Some delegations felt that it should be left to states to define the extent of such exceptions, although it was appreciated that it would be difficult to draw up a list of relevant criteria.<sup>60</sup> There was general agreement that failure to obtain consent of a sick or even unconscious person should not make any dangerous experimentation illegal where "such was required by his state of physical or mental health."<sup>61</sup> However, a proposal that compulsory measures might be taken "in the interests of community health" was not accepted, on the grounds that this could lead to abuses.<sup>62</sup>



The question of free consent is a difficult one, and applies to medical treatment as well as to experimentation. There are circumstances in which it may be impossible for the person to give consent, and while it is not possible to lay down rigid rules, the general principle must be that the welfare of the patient is paramount. This is indicated in Principle 19, paragraph 3, of the Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment:

"No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health."

This ensures that there is maximum protection for those who are at risk: the determining factor is the welfare of the detainee, even if consent is given. This is a safeguard against consent being elicited under pressure, which is likely to happen in circumstances where a person is deprived of his liberty, although the problem of who decides what is in the best interests of the person remains.

The United Nations code of medical ethics does not deal directly with the question of medical experimentation, and even the Declaration of Tokyo omits to mention the issue. However, the ICN resolution does contain a pertinent provision, asserting that nurses should "participate in clinical research carried out on prisoners, only if the freely given consent of the patient has been secured after a complete explanation and understanding by the patient of the nature and risk of the research."<sup>63</sup>

These, then, are the provisions of the various codes of conduct and ethics which have been developed for the purpose of providing guidance for members of different professions regarding their duties and responsibilities in relation to the protection of human rights.

The provisions are aimed essentially at individuals rather than at governments, although governments ought to promote the codes at national level and incorporate the relevant principles into domestic law. The codes cannot in themselves ensure the elimination of torture, but they can certainly contribute to that goal through their influence on individuals.

This concludes our consideration of the various measures which have been introduced in international law for the purpose of preventing the use of torture, and it is obvious that none of these measures can by itself or in conjunction with the others ensure the full and effective protection of individuals from being subjected to torture by security forces operating with the approval of national governments. In the following chapter, we shall examine the reasons for this failure and consider whether it is not in fact inevitable under existing conditions.

## Notes

1. Alfred Heijder and Herman van Geuns, Professional Codes of Ethics (Amnesty International, 1976), at p. 9.
2. At that stage, the discussion appears to have been restricted to "detention and imprisonment", to the exclusion of political prisoners: see Klayman, *op.cit.*, at p. 477. However, in view of subsequent developments it is clear that the protection of fundamental human rights cannot be limited by such an arbitrary distinction. See Klayman, *op.cit.*, at p. 475ff. for the background to the codes.
3. See General Assembly resolution 3453(XXX).
4. See General Assembly resolution 31/85.
5. See General Assembly resolution 34/169. The Code is reproduced in *Torture in the Eighties*, Appendix III.
6. See General Assembly resolution 34/168, and also UN documents A/35/372 and Add.1-3.
7. See General Assembly resolution 35/179, and also UN documents A/36/140 and Add.1-4, and A/36/685, Annex.
8. See ECOSOC resolution 1981/27.
9. See General Assembly resolution 36/61, and also UN document A/37/264 and Add.1-2.
10. See General Assembly resolution 37/194, Annex: 'Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture, and other cruel, inhuman or degrading treatment or punishment.' The principles are reproduced in *Torture in the Eighties*, Appendix V.
11. Heijder and van Geuns, *op.cit.*, at p. 12.
12. "Law enforcement officials" is defined to include "all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention"; and the term also includes, where applicable, military authorities: see the commentary on article 1.
13. Article 5.
14. See the commentary on article 3, at para. (a).
15. See Article 4.
16. See Article 7.
17. See Article 8.
18. Commentary on article 8, para. (a).

19. The draft is reproduced in Heijder and van Geuns, op.cit., Appendix D.

20. See Chapter Eight, note 26, supra.

21. Heijder and van Geuns, op.cit., at p. 11.

22. For the situation in the USSR, see Prisoners of Conscience in the USSR: Their Treatment and Conditions (Amnesty International, 2nd edition, 1980). It has been suggested that abuses occur in the USA and the United Kingdom: see Ackroyd et al., op.cit., at pp. 260-64.

23. See report by Mrs Erica-Irene Daes: 'Principles, guidelines and guarantees for the protection of persons detained on grounds of mental ill-health or suffering from mental disorder' (UN document E/CN.4/Sub.2/1983/17). See also the Preliminary and Progress Reports (UN documents E/CN.4/Sub.2/474(1981) and E/CN.4/Sub.2/1982/16). Government replies to the final report are contained in UN document E/CN.4/Sub.2/1983/17/Add.1. The Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1983 established a sessional working group on the question of persons detained on the grounds of mental ill-health or suffering from mental disorder, and a draft body of principles, guidelines and guarantees based on the annex to the report by Mrs Daes is under consideration: see pp. 454-55.

24. It has been suggested that involuntary detention on grounds of mental illness can never be justified: see Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities 1981, at paras. 194 and 196.

25. See *ibid.*, at para. 195: "The term "mental illness" is difficult to define. In the opinion of many psychiatrists, the term "mental illness" is not a descriptive term, but is merely an unproven theory used to "explain" behaviour. In the opinion of others, including psychiatrists, "mental illness" is either a physical disease or a disease of the psychological process which can be diagnosed and treated in much the same way as any other physical illness."

26. Drugs are increasingly employed by interrogators in the debilitation process. Typical drugs include chlorpromazine (Largactil, chloractil), haloperidol (Serenace, haldol), and trifluoperazine. Side-effects include "extra-pyramidal derangement", muscular rigidity, involuntary movement and motor restlessness. These are usually controlled by other drugs such as benhexol and orphenadrine in *bona fide* treatment.

27. See the Declaration of Hawaii adopted by the General Assembly of the Sixth World Congress of Psychiatry in 1977. Abuses of psychiatry were also among the major topics discussed at the Seventh Congress held in Vienna in 1983.

28. The resolution is reproduced in Heijder and van Geuns, op.cit., Appendix C.

29. See *ibid.*

30. See UN document A/Conf.56/9(1975).

31. The Declaration is reproduced in Heijder and van Geuns, op.cit., Appendix B.

32. World Medical Association's Declaration of Tokyo, Preamble.

33. Ibid.

34. See note 10, supra. It is interesting to note the reply of the Government of Uruguay to the Secretary-General's request for comments on the original draft: "The Government of Uruguay wishes to state that the principles proposed in the draft Code of Medical Ethics add nothing new to its national legislation and are not at variance with it, so that there is no reason for not endorsing them. Nevertheless, it is surprising that not a word is said in the draft about the flagrant breach of medical ethics involved when medical practitioners collaborate with subversive terrorists, this of course being contrary to the most elementary principles of human dignity embodied in the Universal Declaration of Human Rights." A new provision was proposed. While the question of involvement with terrorists raises particular issues which are not directly related to the prevention of torture, for example whether the treatment of a terrorist is consistent with the responsibilities of the medical profession or not, the point is important, as it covers an area not normally within the scope of international instruments. Obviously, doctors should not contribute to acts of terrorism in any way, and they may be condemned for doing so, but the question of treatment is not as straightforward, and there perhaps ought to be a provision dealing with this issue.

35. An earlier text of this article stated: "Prisoners and detainees have the same rights to the protection of physical or mental health and the treatment of disease as those who are not in prison or detained." See UN document A/36/140, Annex.

36. The wording was altered to include "health personnel" rather than simply physicians, as in the original draft. However, the particular responsibility of physicians is recognised in the specific reference to them.

37. For the definition in the Declaration of Tokyo, see pp. 447-48, supra.

38. Article 7 states: "Each State 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."

39. See Code of Conduct for Law Enforcement Officials, article 5. Cf. also article 4(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

40. On this point, see UN document A/36/140/Add.2, Reply of United Kingdom, and UN document A/37/264, Replies of Austria and Federal Republic of Germany.

41. In the previous draft, paragraph (a) simply prohibited assisting interrogation, while paragraph (b) referred only to certifying fitness for punishment.

42. Principle 6 states: "There may be no derogation from the foregoing principles on any ground whatsoever, including public emergency."

43. See UN document A/36/140/Add.1, Reply of Amnesty International, and UN document A/37/264, Reply of Ethiopia.

44. See Torture in the Eighties, at pp. 50-61.

45. See UN document E/CN.4/Sub.2/1983/17, Annex II: 'Draft Body of Principles, Guidelines and Guarantees for the Protection of the Mentally Ill or Persons Suffering from Mental Disorder'. The draft is still under consideration.

46. UN document E/CN.4/Sub.2/1983/17, at p. 1.

47. Ibid.

48. See Draft Body of Principles, Guidelines and Guarantees for the Protection of the Mentally Ill or Persons Suffering from Mental Disorder, article 16(1).

49. See *ibid.*, articles 26 and 27.

50. See *ibid.*, article 4(1).

51. *Ibid.*, article 4(3). See also article 32.

52. See UN document E/CN.4/Sub.2/1983/17, at pp. 35-36.

53. On the question of self-imposed suffering, see Thomas McFeeley et al. v. the United Kingdom (Application No. 8317/78), Decision on Admissibility by the European Commission on Human Rights (15 May 1980).

54. See *ibid.* The Commission felt that the purpose of the protest (which was not a hunger-strike) was invalid.

55. See GAOR, Session X, Annexes, Agenda item 28-II, document A/2929, chapt. VI, at paras. 11-16, and Session XIII, Annexes, Agenda item 32, document A/4045, at paras. 3-22.

56. This sentence was adopted by 39 votes to none, with 29 abstentions, whereas the first sentence of article 7 was adopted unanimously. Article 7 as a whole was adopted by 64 votes to none, with 4 abstentions.

57. See GAOR, Session X, Annexes, Agenda item 28-II, document A/2929, chapt. VI, at para. 14, and also see Session XIII, Annexes, Agenda item 32, document A/4045, at para. 16.

58. See GAOR, Session X, Annexes, Agenda item 28-II, document A/2929, chapt. VI, at para. 14.

59. See *ibid.*, at para. 15.

60. See *ibid.*

61. See *ibid.*

62. See *ibid.*

63. See ICN Resolution on the Role of the Nurse in the Care of Detainees and Prisoners.

## CHAPTER TEN: CONCLUSIONS

Although the practice of torture is prohibited by international law, it remains in widespread use, and many national governments authorise or permit the employment of torture by their security forces, often as a routine instrument of political repression against those who are regarded as representing a subversive threat to the security of the state. The problem of torture, then, essentially involves the internal political conditions within a state, arising out of a governmental response to particular circumstances which are perceived as constituting a serious threat to national security, that is to the existing socio-political system. Thus, although it has been argued that the issue of human rights has been internationalised, so that the way in which a government treats its own nationals can no longer be considered a purely domestic matter, the fact is that the whole question of fundamental human rights revolves around the relationship between the authorities of a sovereign state and the individuals over whom they have jurisdiction. Consequently, the protection of human rights is in the first instance dependent upon the effectiveness with which the government and its various subsidiary organs can be restrained within the national context and the extent to which it can be ensured that the authorities act in accordance with the principles of humanity and the rule of law.

Restraint of governmental action at national level is secured primarily by means of constitutional and legal safeguards, although the democratic process also constitutes a less formal but no less potent inhibition on governmental activity. Essentially, fundamental rights must be guaranteed constitutionally, and there must be



effective limitation of executive power by means of legal machinery operated by democratic institutions and upheld by a genuine commitment to the rule of law. It is especially important that in times of national difficulty emergency measures should only be resorted to when absolutely essential, and should remain under the strict and constant control of independent authorities, with special safeguards for the protection of core rights, which are liable to suffer as a result of the general climate created by an emergency situation. States of emergency may in certain circumstances be genuinely justifiable (although not as frequently as they are in fact invoked), and the curtailment of civil liberties may be legitimate under particular conditions, but it is crucial for such derogations to be accompanied by adequate safety measures which ensure that the special powers are not abused.

The extent to which the protection of human rights is secured within a particular state, then, is dependent on the degree to which such safeguards ensure the restraint of governmental action, while conversely the violation of fundamental human rights will be made possible by the absence or ineffectiveness of such safeguards: in particular, the use of torture is facilitated by the absence of sufficient safeguards, either as a result of the erosion of civil liberties and procedural rights during a state of emergency or because the constitutional framework of the state itself fails to provide adequate protective mechanisms. In such circumstances, it is the function of international law to supply a secondary level of protection for the individual. Unfortunately, however, existing international procedures have proved incapable of fully discharging this function, and have been largely ineffective in procuring the

elimination of the practice of torture, and the explanation for this failure lies in the fact that international authorities are unable to impose mandatory obligations on states or even ensure the enforcement of the obligations voluntarily undertaken by states, as a result of which they have no real control over the actions of national governments as far as internal matters are concerned.

The structure of the international political order is founded on the concepts of national sovereignty and self-determination: each state represents an autonomous political entity, and in general the only accepted limitations on the actions of a government within the territory subject to its exclusive jurisdiction are those determined by the constitutional provisions applying within the particular state. The authority of international agencies is correspondingly restricted by the principle of non-intervention in domestic affairs (encompassed in article 2, paragraph 7, of the UN Charter), which ensures that national governments are not (except with their consent) subject to the dictates of such agencies in matters of purely national interest and, while fundamental human rights can certainly be regarded as a matter of international concern, the violation of such rights essentially takes place within the domestic sphere and is therefore a problem relating to internal conditions and political relationships, so that in practical terms the principles of sovereignty and non-intervention do present a significant impediment to any effective action by the international community. In effect, then, the problem is that international authorities are unable to ensure the limitation and restraint of national governments because they have no compulsory jurisdiction over them and have no control over their implementation of domestic policies.

The only real power in international affairs lies in the hands of national governments, and the effectiveness of international law is largely dependent upon the political will of these governments. No international legislature with authority to promulgate universally applicable statutes exists: rather, international law is largely either conventional or customary, and as such it is essentially the creation of the states which are subject to it, its scope and content being effectively determined by national governments. Moreover, specific rules of international law generally apply only to those states which have accepted them, so that while legally binding obligations can be created, they cannot normally be imposed upon states without their consent. In this way, international law differs fundamentally from national legal systems. Civilised legal systems have evolved beyond a primitive form of society in which the extent of an individual's obligations depended purely on his status and physical ability to maintain his position into sophisticated frameworks in which duties can be imposed upon individuals and enforced by independent authorities representing the community, but international law has not developed in this way, and it therefore remains a very primitive form of legal order dependent on unilateral acceptance of obligations and voluntary compliance with its requirements.

It is impossible, then, to establish international protection of human rights on a universal basis, because many regimes will not accept international intervention of any kind in this sphere. Furthermore, even when governments voluntarily undertake obligations, there is no executive authority with the necessary power and resources to ensure compliance with these obligations. In other words, there is no international equivalent of a police force which can enforce

international obligations and impose effective sanctions when violations of international law occur. This is a crucial deficiency in the international legal system, but in view of the extreme reluctance of most governments to compromise their jealously defended sovereignty by submitting to any form of international supervision, it is unlikely that such an authority will ever be created, and in any event there are enormous practical problems in developing such a system in the international context. There are certain sanctions available, but these are largely diplomatic or economic, and because they are imposed by individual governments rather than by an independent agency the highly politicised nature of international affairs tends to militate against the success of such measures. Consequently, the protection of human rights by international law remains dependent not only on acceptance of obligations by governments but also on their continuing co-operation with the international authorities responsible for supervision. The problem is that regimes which engage in the systematic violation of human rights will seldom offer such co-operation, and indeed will rarely undertake legally binding obligations in the first place. In effect, therefore, the protection of fundamental human rights by international law is inhibited by the concept of sovereign nation-states on which international politics is based and which ensures that governments enjoy a virtually unrestrained freedom of action within their own territorial jurisdiction, as a result of which international authorities cannot exercise any control over them.

International human rights procedures do have some value, of course, when governments voluntarily undertake obligations and continue to give their full co-operation, accepting the

recommendations of international agencies and taking appropriate remedial action when required. However, for the reasons mentioned above, it is clear that international procedures cannot ensure the comprehensive protection of fundamental human rights, because the procedures are not universally applicable and, even if they were, there is no means of enforcing compliance with obligations. In situations outwith the scope of international law, therefore, the protection of human rights is clearly dependent entirely upon the adequacy of safeguards at the domestic level. The limitations of international law have been recognised within the international community, in particular by the United Nations, and this is reflected in the recent tendency to emphasise the adoption of internal safeguards as the most effective method of ensuring the protection of human rights. In other words, it has been realised that under current international political conditions the protection of fundamental human rights cannot be secured at the international level, but is ultimately determined by the sufficiency of safeguards, constitutional and legal, within the political framework of each state. However, such safeguards are in fact absent from many national legal systems, and it is obvious that repressive regimes are even less likely to undertake a revision of constitutional provisions with a view to restricting their own power than they are to accept international obligations involving submission to international jurisdiction in human rights matters. Indeed, the very concept of limitation of power is unlikely to appeal to such regimes, and is actually rejected by many on ideological grounds. Consequently, international conventions requiring parties to adopt internal reforms are unlikely to attract significant support from such regimes, rendering them just as futile

as conventions requiring submission to international monitoring. Essentially, a radical review of the constitutional system is necessary in such states, but often the violation of human rights is inherent in the perpetuation of the existing socio-political system, so that unilateral change is out of the question: in other words, where it is the policy of the government to perpetuate an undemocratic system which necessitates the violation of human rights, the government is neither going to ratify international human rights instruments nor effect constitutional re-structuring at national level. The promotion of internal measures by international law is, therefore, a rather futile gesture, depending ultimately on the political will of individual governments.

To state that the protection of human rights depends on the sufficiency of safeguards at national level is simply to recognise the limitations of international measures as they currently exist and the fact that at present it is only within the domestic context that restraint of government can be achieved. It does not imply that there is any more likelihood of repressive regimes adopting internal measures than there is of them accepting international supervision or indeed that the protection of human rights should be left to national governments. It is merely a recognition of the facts rather than a proposed solution to the problem; in fact, it would be preferable for the protection of human rights to be ensured through international law.

In spite of its limitations, international law does have a role to play in the protection of human rights, principally in relation to those states whose governments are willing to accept binding obligations by ratifying human rights conventions. Although support

for such instruments is often forthcoming only from the liberal democracies which do not normally have significant human rights problems, international procedures constitute an important additional level of protection. Abuses tend to involve less critical rights or violations of a non-systematic nature, but the governments concerned are generally prepared to comply with the decisions of the relevant authorities, and while this is essentially a voluntary submission to international limitation of government, the fact is that important reforms can be brought about. The success of the European system can be seen as an indication of the potential value of such procedures when the governments are prepared to accept a degree of international involvement in internal affairs. Furthermore, the machinery can be put into operation when more serious violations arise, thus permitting condemnation of the recalcitrant government even if it fails to rectify the situation. The value of international law within its limitations should not be underestimated, then, and the procedures could in fact be improved and strengthened by more extensive powers being conferred on the agencies responsible for supervision.

Firstly, international law can fulfil an important function in standard-setting even when the instruments adopted do not impose legally binding obligations. The affirmation of basic principles by authoritative international organisations establishes universally applicable guidelines against which the activities and policies of governments can be measured, and on the basis of such internationally recognised norms a degree of moral pressure can be exerted. The United Nations Declaration of Human Rights, the Standard Minimum Rules for the Treatment of Prisoners and the 1975 Declaration against

Torture are all examples of this, each being frequently invoked in the condemnation of unacceptable governmental actions.

Secondly, international law can promote the adoption of safeguards at the domestic level, not only by providing guidance and assistance for governments which wish to eliminate violations of human rights, but also by creating supervision over governments in their implementation of obligations to introduce appropriate measures into their national legal systems. To some extent this is the aim of the conventions against torture, although clarification is required in a number of areas: in particular, the powers of the international agency must be clearly defined, and should include the right to comment on the adequacy of measures, the power to censure governments in the event of a failure to comply with obligations and the opportunity to suggest improvements. It would also be of great value if international control could be established over the introduction of states of emergency, so that the decision as to whether a state of emergency is warranted could be taken out of the hands of governments and could only be made if sanctioned by an international authority on the basis of recognised criteria. Of course, support for stronger measures will often come only from states with liberal democratic governments, but monitoring procedures are still of value in relation to such states, and indeed their willingness to accept international supervision should be exploited by seeking wider powers for the relevant agencies. Although this might dissuade many regimes from submitting to the procedures, it would mean that the procedures could not be accepted by such regimes for the purpose of giving themselves credibility while not really exposing them to any risk of censure.



Thirdly, international law can create legally binding obligations backed up by investigation and complaint procedures which, if accepted by states, may contribute to the prevention of human rights violations. Various types of procedure exist, some of which apply to all states parties to conventions, others of which require separate acceptance. The purpose of all such procedures is to create a system whereby international authorities can receive information about alleged violations and institute a thorough investigation with a view to procuring a remedy for the particular victims and ensuring that there is no repetition of the violation. The most effective form of procedure would be one which permitted an international authority to take action on the basis of information emanating from any reputable source (individuals, human rights organisations or states) and which conferred on the authority constitutional status within each state to carry out a full investigation and ensure compliance with its ultimate directions. No such system has been developed, however, and in fact support for existing procedures is so weak that they normally have to be expressed as optional provisions within conventions so that their inclusion will not deter governments from ratifying the conventions themselves. International procedures are accordingly relevant only in respect of those states which have accepted them, and this often means liberal democracies against which few allegations are made, although in some circumstances repressive regimes may be subject to investigation. However, the reality of national sovereignty means that no enforcement action can be taken, so that the best that can be achieved is an investigation procedure which permits the categorical condemnation of any government found to have violated human rights. Verbal censure is really the only sanction available, yet some

existing procedures do not even provide clearly for this: it is imperative that international authorities should be permitted to express unequivocal criticism of recalcitrant regimes and should be empowered to utilise all the resources available to them in order to bring moral, political and diplomatic pressure to bear on governments responsible for violations of human rights. Of course, an in-depth investigation will normally require the co-operation of the state in question, but where this is not forthcoming there should be a presumption that violations have occurred, and a similar presumption should apply if representatives of the international authority are denied free access to places of detention within the territory of a state under investigation.

Conferring wider powers on international authorities under optional procedures is unlikely to have any significant detrimental effect on support for such procedures, or indeed on general support for conventions, and optional procedures should therefore be made as strong as possible. The optimum course is probably to establish various levels of supervision, so that while each government can decide on the extent to which it is prepared to compromise its freedom of action, at least a degree of control may be established over those governments which consistently refuse to accept any significant supervision. In a sense, this is the effect of existing human rights procedures, but a broader spectrum of measures is desirable to ensure the widest range of support possible.

International law does, then, have some relevance to the protection of human rights, and it could be made even more effective in certain respects, but the basic problems remain: firstly, the regimes responsible for the most serious violations of human rights

are not normally subject to any form of international supervision because they refuse to accept such supervision, and secondly the lack of sanctions effectively renders international authorities powerless when governments simply refuse to co-operate. The dependence of international law on the consent of individual governments and the need for continuing co-operation represent, then, the dual obstacles to the development of international protection of human rights.

The question with which we are faced is how international law can tackle the problem of human rights violations, and in particular the systematic use of torture, on a universal basis, that is including violations within those states whose governments refuse to accept any kind of international interference. Certainly, the problem can be tackled to a limited extent through those governments which do have a concern for human rights, for example in the establishment of universal jurisdiction, as has been done in the case of torture, but this is really only a peripheral solution, and the essential problem remains, namely that in effect nothing can be done to prevent governments acting as they wish within their own territorial jurisdiction. Of course, powerful states can influence weaker ones to a considerable degree, and may even intervene forcibly in some instances, but essentially there is a deeply entrenched respect for the principle of state sovereignty which is not lightly repudiated in legal terms. In the final analysis, the only way in which international law can ever be effective in the comprehensive protection of human rights is if there can be evolved some form of mandatory supervision supported by enforcement machinery: in other words, there cannot be genuine international protection of fundamental human rights on a universal basis until there takes place a radical

re-structuring of the existing international political system and a new humanitarian order is created within which effective restraint of national governments by international authorities can be established. This would require the principle of state sovereignty to be compromised, and it is clear that this constitutes a major impediment to such a development, although it would not be necessary for states to surrender their sovereignty to a world government: only the sphere of human rights (or at least 'core rights' on which some consensus could be reached) would be excluded from the scope of "domestic affairs" and placed under the jurisdiction of an independent and non-political international agency with automatic constitutional authority in each state to control the actions of governments in human rights matters. This would by no means be a straightforward process, since even if the agency could be made part of the constitutional framework of the state, its authority would depend on conditions within the state and in particular the loyalty of the executive organs of government, including the police and armed forces, and their willingness to comply with the orders of the agency rather than the government. In many cases, of course, it is the executive organs of government which are actually responsible for carrying out violations of human rights. It is highly improbable that even such a limited form of international supervision will ever gain support: the failure of the resolution 1503 procedure is an indication of the degree of opposition to international intervention in human rights affairs. This procedure, if operated to its full potential, could have a powerful impact by permitting condemnation of regimes on a virtually universal basis, but political considerations and constraints and the

fact that the process is under the ultimate control of governments have effectively enervated it.

In spite of the considerable difficulties, the international human rights movement must concentrate on the promotion of this idea if any real progress is to be made in the prevention of gross violations through international means. In effect, the fight against torture will remain based in complaints procedures, political pressure and moral persuasion unless a new humanitarian order can be established in which the concept of humanity is given precedence over political goals and national interests: a conceptual framework must be developed within the international arena in which the individual is central and his humanity is recognised as paramount. The diversity of social, cultural and political ideas of man and society, of course, creates massive obstacles, but it should be possible to identify or at least elicit a general consensus on the most essential humanitarian rights and in this way persuade governments to accept international supervision in a restricted field. Rights which are genuinely fundamental and universal should not be dependent on national conditions and attitudes, but should more properly be the subject of international control, and this can only be achieved if there is a global re-examination of the foundations of human rights and a re-definition of the content and direction of the concept with a view to identifying a true philosophical consensus on which such a system could be built. The ultimate aim must be the constitutional recognition within each state of the supreme status and authority of an international human rights agency in the protection of fundamental human rights.

The key to the problem lies in the unique nature of core rights: they are based purely on humanity and do not depend on cultural or political attitudes, so that they can be characterised as genuinely universal. The first step, then, must be multilateral discussions at a global level in order to reach a definitive identification of those fundamental rights on which there already exists an ostensible consensus: this would clearly include the prohibition on torture. On the basis of this consensus, it should be argued that such rights are truly international by nature and that no government can claim exemption from some form of international monitoring, so that mandatory measures should be created and an independent agency with effective powers of control established. The ostensible consensus would permit liberal governments to apply tremendous diplomatic pressure which might secure at least a compromise solution in the face of vehement resistance from less enlightened regimes. In realistic terms, however, there is little prospect of such a system being developed within the foreseeable future: the problem is not the logistics of establishing limitations on national governments, but rather the reluctance of governments, including those of liberal states, to compromise their sovereignty even when there is a compelling philosophical argument for doing so.

A possible alternative would be for liberal governments and non-governmental human rights organisations to set up an autonomous human rights agency, to whose jurisdiction the liberal governments would voluntarily submit, but which would also be empowered to investigate situations in other states and take whatever action it could to prevent violations of core rights. Limiting the jurisdiction of the agency to such rights would enhance its credibility by de-politicising

it to some degree, although ultimately its ability to take action (other than verbal censure) in respect of non-consenting states would be extremely limited. In a sense, the functions of such an agency would be a combination of the roles of existing international tribunals and non-governmental human rights organisations, depending on which states it was dealing with, and in the case of states which had not accepted its jurisdiction its powers would not really be any greater than those of a non-governmental organisation. However, if sufficient governmental support could be attracted and the agency operated purely on humanitarian criteria, it might earn sufficient respect to allow it to gain wider acceptance in much the same way as the International Committee of the Red Cross.

Even if a system of mandatory international supervision could be established, the lack of effective sanctions remains a critical problem. Ultimately, the doctrine of state sovereignty means that compliance with international obligations cannot be enforced directly, so that national governments cannot actually be compelled to change their domestic policies, but can only be encouraged to do so through the application of various forms of pressure. Normally, this is restricted to moral and political pressure applied through diplomatic channels, and the exploitation of government sensitivity by the public condemnation of violations, but there are also more direct methods of applying pressure, and it is important to consider whether these could be employed to more effect.

One obvious sanction which can be imposed for violation of obligations is expulsion from the organisation concerned, although this will not usually achieve any positive results unless some specific benefit of membership is forfeited. In general, therefore,

this course is avoided because it often simply means that any remaining influence over the government will be lost, and it would really only be appropriate when there was a complete and deliberate failure to comply with specific responsibilities, although less severe measures, such as the loss of voting rights, might be valuable.

Diplomatic sanctions might also be considered, involving the termination or suspension of diplomatic relations with any government found to have perpetrated gross violations of human rights. While individual governments may occasionally take this step in response to particularly serious incidents, however, the effectiveness of the sanction really depends on concerted action, and the political composition of the international community ensures that this will rarely be possible: only a few maverick states could ever be effectively isolated by diplomatic sanctions. Indeed, governments will not only be unwilling to offend or alienate their political allies, but may also be reluctant to break off relations with hostile regimes for various reasons. The sanction may have some value within the limited context of regional or economic communities, but in the final analysis the suspension of diplomatic relations is little more than a formal protest which usually has little impact. There are other methods of isolating regimes, such as suspension of communications, but in general these are impracticable as they cause considerable disruption to other states as well as to the citizens of the target state.

Joint military action under the auspices of the United Nations is the ultimate enforcement measure. There has in the past been military intervention by individual states on allegedly humanitarian grounds, but unilateral armed intervention by individual states is entirely



unacceptable, as it opens the door to all sorts of abuse, permitting governments to invoke humanitarian principles to justify action which is actually motivated by political self-interest. Any intervention of a military nature, then, must be under the control of an autonomous international agency. Such action by the United Nations would never be contemplated, however, primarily because the nature and political composition of the organisation prevents it operating in such a manner. The United Nations is practically a collection of states rather than a separate legal entity, its actions being determined by the will of governments, and political affiliations and considerations would ensure that there was never sufficient support behind the use of a military force. United Nations forces have, of course, been involved in numerous conflict situations, but the involvement of United Nations troops is never for the purpose of coercing national governments into complying with international obligations, and indeed the organisation has no mandate to intervene without the express consent of the government concerned. Military intervention for humanitarian reasons would be an entirely different proposition, and is in reality quite impracticable. If force was to be used against more than just a few isolated regimes, the decision to take action would require to be made by a majority vote, which would inevitably lead to political polarisation with a consequent escalation of world tensions. Ideally, then, the decision would have to be under the sole authority of an executive non-governmental agency outwith the influence of national governments. To confer such powers on an agency of this nature, of course, immediately creates a problem in persuading governments not just to accept its jurisdiction but actually to create it. Moreover, the forces available to such an agency would have to be

drawn from nationals of states, and the natural tendency of these troops will be to remain loyal in the first instance to their country, so that a potential conflict of loyalties could arise if governments ordered their nationals not to become involved in a particular situation. In other words, the national sovereignty mentality would remain, and political considerations might interfere with concerted action unless the agency had a force whose allegiance was entirely to it and its aims. The difficulty with this is that the force would either have to be drawn from those with a personal commitment to a new international humanitarian order (who would be unlikely to wish to fight) or from mercenaries, and since it would have to be a force of significant size with modern arms (so that it could take action even against world powers) neither of these solutions seems practicable. Even if these problems could be overcome, it would be extremely difficult to define the circumstances in which intervention would be justified, and indeed the acceptance of the principle of military intervention on humanitarian grounds could create a dangerous precedent in international affairs. In any case, it does seem rather incongruous that an organisation created to preserve peace and protect human rights should have a military force at its disposal, the use of which might lead to full-scale conflict with consequences worse than the original violations of human rights. War inevitably involves such violations, and military intervention cannot therefore be regarded as an acceptable means of securing protection of human rights. It might be effective against a relatively small and weak state, but it is difficult to imagine it being successful against the modern military might of major powers, and the credibility of the whole system would be undermined if it could not be applied universally. Thus, while

military action by the international community clearly constitutes the most potent form of enforcement of international law, the unpredictable and potentially drastic consequences of such intervention make it an unrealistic proposition.

Perhaps the most valuable and realistic sanction in international law is the economic one, although only within certain limitations. It is particularly relevant in the case of developing Third World nations which rely heavily on the industrialised countries of the northern hemisphere for economic assistance, but it can be useful even in the case of wealthier countries. Economic sanctions have been imposed under the auspices of the United Nations (as well as unilaterally) in the past, but only against politically isolated states such as South Africa, and in such cases they have been largely ineffective because an insufficient number of states has co-operated to ensure a comprehensive embargo. One reason for this is that political allies are always reluctant to alienate each other; the other is that governments rarely accord human rights issues priority over commercial considerations and economic interests, even in the domestic sphere, so that it is unlikely they will regard human rights violations in another part of the world as sufficient justification for severing trade ties and forfeiting foreign markets. The problem with economic sanctions is that export markets may be seriously affected, with adverse economic repercussions in the states imposing sanctions. In any event, economic sanctions will often result in hardship to the population as a whole, so that the poor and oppressed whose rights are being violated suffer deprivation while the government officials responsible may be scarcely affected. If the government is vulnerable to internal pressure, this may eventually force change, but in many

situations the government will simply remain intransigent. Consequently, a trade embargo may not only be damaging to the economy of states putting it into effect, but will often fail to achieve the desired result. The same problem arises when it is simply a case of withholding investment and loans, though the International Monetary Fund has used this threat as an incentive to governments to improve their human rights records, and certain western governments have also linked economic aid to human rights in recent years. It remains unclear, however, to what extent the protection of fundamental human rights is improved as a result of such action.

With regard to private enterprise, there is frequently a reluctance at executive level to allow humanitarian considerations to interfere with commercial goals. Multinational corporations, in particular, including banks and other financial institutions, often have a central role in the economies of Third World countries, and there is no doubt that they could exercise a powerful influence over the governments of these countries. However, human rights are rarely taken into account in the financial strategies of such corporations: economic criteria alone are regarded as relevant in executive decision-making, and the fact is that it is often in the interests of such organisations not only to invest in countries governed by right-wing authoritarian regimes, but also to actively support repression, as this creates a degree of operational stability and ensures that assets will not be expropriated by a revolutionary government, while the perpetuation of social inequalities ensures that there will always be a limitless pool of cheap labour. There are thus numerous compelling incentives for those motivated purely by financial gain to operate within repressive systems. Profit-making is the fundamental

philosophy of commercial enterprises, and as a result everyone involved, from director to shareholder and even employee, has an interest in the optimum operational conditions and the security of the market. Accordingly, while they may not wish to violate the law, moral considerations will rarely be allowed to interfere with decisions. There is little difficulty in turning a blind eye to repression and human rights violations where self-interest is involved, and while of course many people connected with commercial organisations do have a genuine concern for human rights, the general tendency is to take economic factors alone into account. Even small companies will be reluctant to give up export markets on humanitarian grounds, and may attempt to circumvent a legal prohibition. The imposition of economic sanctions is thus likely to face resistance from both governments and private enterprise, rendering them largely ineffecual.

The question of military aid is a quite different matter. While general economic sanctions may simply have an adverse effect on ordinary citizens within the target state, without having any significant impact on governmental policies, an embargo on the supply of arms and military equipment strikes directly at governments, which ultimately rely on the armed forces to maintain political power. An international prohibition on the sale of arms to repressive regimes could clearly have a serious effect on them, as it would strike at their very foundations, and it would therefore constitute a vital international sanction. However, the supply of arms is not regulated by international law, but is controlled by national governments (which either sell arms directly or control the sale of arms by private companies), and an effective embargo would require the support of all

those governments in a position to suspend the sale of military equipment. In fact, the arms market is dominated by a small number of states, so that if their concerted action could be secured and the supply of arms and repressive technology to regimes known to be responsible for gross violations could be terminated, an extremely potent international sanction would be available. It would not, of course, be possible to impose similar sanctions on arms-producing states, except in respect of specific types of arms to which they themselves did not have access, but while this would render the system rather arbitrary, it would still be effective in a wide range of situations. The familiar problems remain, however, namely that to governments political and economic considerations take precedence over humanitarian concern, as a result of which they will always be reluctant to withhold support for ideological allies or to forego lucrative financial benefits. In practice, therefore, political expediency and commercial self-interest combine to effectively prevent any united action by those states which currently have a monopoly on arms production and distribution.

Governments do, in fact, refrain from selling arms (or permitting the sale of arms) to foreign regimes in certain circumstances, primarily when those regimes can be regarded as potential enemies and there is some prospect of the weapons being used against the supplier in the future. While this obviously includes those states with which there is a particular dispute, it also applies more generally, so that governments will not normally permit the sale of weapons to regimes of the opposite ideological persuasion, because in the final analysis those regimes must be regarded as adversaries. The rationale has been explained succinctly by Julius Nyerere in the following way:

"For the selling of arms is something a country does only when it wants to support and strengthen the regime or the group to whom the sale is made. Whatever restrictions or limits are placed on that sale, the sale of any arms is a declaration of support - an implied alliance of a kind. You can trade with people you dislike; you can have diplomatic relations with governments you disapprove of; you can sit in conference with those nations whose policies you abhor. But you do not sell arms without saying, in effect: in the light of the receiving country's known policies, friends and enemies, we anticipate that, in the last resort, we will be on their side in the case of conflict. We shall want them to defeat their enemies."

Thus, for example, licensing laws in the United Kingdom are intended to prevent the sale of arms to communist regimes, on the basis that this would be self-defeating since any military conflict which arises is most likely to be with such states.<sup>2</sup> The same general attitude is held by the other major western arms exporters, such as France and the United States, particularly towards the Soviet Union and its allies, although some are more strict than others. The sale of arms to repressive anti-communist regimes is not affected, of course, except in the most extreme cases, and in the case of non-aligned repressive regimes the western powers will actually be more anxious to maintain supplies of arms in order to pre-empt any approach to communist governments for military assistance in return for the provision of bases and influence. Conversely, the Soviet Union, Czechoslovakia, Cuba and other socialist governments supply arms to established and incipient socialist regimes, as well as to revolutionary movements around the world. Our main concern here, however, is with the role of western liberal governments in indirectly supporting the violation of human rights by supplying arms and technology to repressive regimes. The problem is that western governments which claim to defend freedom and democracy find it

necessary to support undemocratic and often brutal regimes as the only alternative to a communist takeover: conditions in most Third World countries are such that decades of social and economic injustice would inevitably result in election of a communist government if free elections were held, and for ideological, economic and military reasons this is totally unacceptable to western states, which are consequently compelled to support the perpetuation of right-wing repression rather than promote democracy. Successive United States administrations, in particular, have consistently preferred authoritarian right-wing rule to democratically elected communist regimes, especially in Latin America and South-east Asia.<sup>3</sup> For these reasons, western governments have a vested interest in continuing the supply of arms to anti-communist regimes, even those which are known to violate human rights, since deprivation of armaments would effectively benefit potential enemies. The same applies to socialist governments supplying their political allies.

It is understandable that the western alliance should emphasise the military security of the 'free world' and support right-wing regimes in the Third World in order to ensure that communism does not spread, either by force or through the ballot-box, especially in strategic areas, but it is questionable whether this attitude is justifiable in moral terms, at least when it results in toleration of gross violations of fundamental human rights. In such circumstances, it is clearly hypocritical for liberal governments to continue to support the regime in question on the basis that communism violates human rights, and the denial of arms could be utilised to secure improvements without prejudicing the political position. This approach was adopted under the Carter administration in the United



States during the 1970's, and other governments have also supported an arms embargo in a few prominent instances, but such action is often dependent on the particular political party or even the individual in power at the time, and policies of this kind have not always attracted widespread support within liberal democracies. Certainly, in the United States Carter's endeavours contributed to his fall from power, partly due to right-wing influences in government, and partly due to the powerful business lobby. It is clear, then, that any aspirations to a unified arms embargo is unrealistic in view of the political constraints on the governments involved. It is to the economic aspect that we shall now turn.

Trade and commerce are an essential feature of international relations. The promotion of economic stability and material prosperity constitutes one of the primary responsibilities of every national government, and the existing international political system based on the concept of state sovereignty means that each government's aim is to protect the interests of its own economy, even at the expense of other economies. Governments are concerned only with conditions within their own territory, and cannot afford to adopt an altruistic view of world economics: self-interest is central to economic - and therefore also political - survival. Consequently, there is no desire to forego trade opportunities or commercial benefits, especially when competitors are always eager to take advantage. For this reason, even liberal governments are unwilling to refrain from selling arms and equipment to repressive regimes on humanitarian grounds. The attitude of many of these governments is that the paramount task of running the country successfully in economic terms makes it unrealistic to expect idealistic sentiments to

interfere with international trade and commerce. The following statement by Lord Strathcona and Mount Royal, former Conservative Minister responsible for arms sales in the United Kingdom, typifies this pragmatic approach:

"'We have an instinctive feeling that we would wish to sell unless there was a compelling reason not to. I think the Labour Government had an instinctive feeling that we should not sell unless there was a compelling reason.' Had Britain, in the past, lost lucrative arms contracts because she took a more high-minded attitude than some other countries such as France? 'We did lose out to France because we took a more moral point of view,' he said. 'But we think we are less venal than the French. But now,' he said, 'I hope we give the French more of a run for their money.'"<sup>4</sup>

Ironically, sentiments expressed by Denis Healey in 1966 while Labour Secretary of State for Defence reveal a not dissimilar attitude:

"While the Government attaches the highest importance to making progress in the field of arms control and disarmament, we must also take what practical steps we can to ensure that this country does not fail to secure its rightful share of this valuable commercial market."<sup>5</sup>

Such statements indicate that even within liberal parliamentary democracies many politicians are inclined to take a somewhat mercenary approach where commercial considerations are involved. Politicians are normally concerned with power, and since one of the major factors influencing the electorate is the economic climate, this is reflected in the emphasis which politicians put on commerce and trade, as a result of which they will be more amenable to selling arms to any country which is not an obvious military adversary without questioning the morality or legality of the regime. This is, of course, a generalisation, and many individual politicians would reject such venality, but it seems clear that within western governments there is

an overall reluctance to take concerted action against repressive regimes by halting the supply of arms, and this is one of the reasons.

The same observations apply, of course, to private companies engaged in the supply of weapons: their motive is profit, and sensitivity to human rights issues is hardly to be looked for in those who deal in arms. No moral responsibility is accepted by such people: if their activities fall within the legally prescribed limits (and often even if they do not), they will readily trade with repressive governments, and will supply without compunction equipment and technology which they know or suspect is to be employed directly in the violation of human rights, including the use of torture. This is illustrated by the following statement, made by Sir Ronald Ellis when Head of Defence Sales:

"I have no scruples about selling to any country with which the Government says I can deal....I lose no sleep whatever on the moral issue. The morality lies with the user."<sup>6</sup>

Amnesty International has argued strongly that controls on the sale of equipment which might be used for repressive purposes require to be tightened up, especially in the United Kingdom, but the British Government has consistently maintained that the introduction of a licensing system for export of such items would be fraught with difficulties in practical terms as well as being damaging to trade. Certainly, there are problems in defining those items which might be employed in repression: land-rovers, computers, cattle-prods, drugs and so on might be put to repressive uses, but they may also have acceptable uses and indeed be particularly important to developing countries. Nevertheless, it should be possible to work out some system which would at least limit the possible abuse of equipment and technology. Any form of action, however, requires the political will

of western governments, and at present this does not seem to exist. There is less than whole-hearted support for economic sanctions of any kind, and this raises the question whether there is really any concern for human rights within liberal governments when it involves some cost to themselves. Again, this depends ultimately upon the personal attitudes of individuals, but it is clear that many western politicians do not regard humanity and the dignity of the individual as fundamental, and this is reflected not only in a reluctance to allow the violations of other governments to interfere with political advantage, but also in the fact that many of them would actually justify the use of torture in their own country in certain circumstances. This is borne out by the words of the former Labour Minister, Roy Hattersley, which is remarkable in its similarity to the logic relied on by apologists of torture:

"Let's imagine 250 people in an aeroplane. Let's say we know some terrorists mean business because one bomb has gone off already. Let's assume we've got a man who we know to be the terrorist who planted the bomb and could save 200-odd lives by finding out where the second bomb is. If he wouldn't tell me I'd have to think very hard before I said don't bring any pressure to bear on that man that might cause him pain."<sup>7</sup>

This statement indicates that torture is not a product of primitive, unenlightened cultures, but may be justified by educated, intelligent and liberal men after careful consideration of the implications. No doubt cultural factors are important in certain respects, but it is clear that many people in the 'enlightened' West will quite unashamedly justify the use of torture in particular situations. We have, of course, already dealt with the issue of justification, and noted the dangers of hypothetical examples, but this does not alter the fact that fundamental human rights are not

regarded as the ultimate criterion of action by everyone. The protection of human rights is not a matter of any inherent moral superiority on the part of the western character, but rather is a question of the effectiveness of the legal mechanisms and constitutional institutions of the state which ensure that the more enlightened elements within society have an opportunity of restraining the government when its actions are dictated by those who do not have any respect for human rights.

In this study, we have been arguing that in practice the protection of fundamental human rights depends ultimately upon the adequacy of safeguards at the national level, because measures established at the international level are subject to limitations which prevent the effective protection of human rights by international authorities. We have suggested, however, that core rights at least should be protected at the international level, because such rights are by nature universal, and in many countries there are inadequate safeguards and insufficient restraints on the government. The problem is that in the present form of inter-state political relations international law cannot achieve this goal, because the principles of state sovereignty and non-intervention in domestic affairs effectively inhibit any direct international action in the field of human rights, and no significant progress can be made without a radical reformation of the international political order which will permit mandatory supervision and control of national governments by autonomous international authorities:

"As we examine the objective and subjective factors which inhibit the unfolding of the idea of international concern with human rights, we find the assertion of the right of nations to order their political, economic and social life in accordance with their own predilections without interference from abroad standing

astride all efforts toward the development of an authentic concern with the fate of man that transcends all national boundaries and all norms of traditional international law and relations. This right emerges as an inviolate concept far more potent than the traditional notion of national sovereignty to keep all attempts at broadening the area of international jurisdiction powerless in its spell. The right of nations to an internal order of their own choosing not only circumscribes the breadth and depth of application of international concern with human rights; it also excludes from the purview of the organized international community situations in which human rights and fundamental freedoms are engaged on a massive scale and which are permitted to drift towards their destined ends with the dismal rhythm of catastrophe."<sup>3</sup>

The international protection of human rights is, then, in direct conflict with the honoured principles of national sovereignty and non-intervention, and in the final analysis governments will never relinquish ultimate authority within their territories. International law has not emerged from the Dark Ages of inter-state relations, and until it does core human rights cannot be comprehensively protected on a universal basis. It is neither possible nor desirable that state boundaries should be removed to create a global political community, but the development of effective international protection of human rights does require the universal recognition of the principle of restraint of national governments in human rights matters by an autonomous international authority with guaranteed constitutional status in each state. The establishment of such a system depends on acceptance of the primacy of humanity, justice and equality over political interests, but there is no real political will to develop effective mechanisms at the international level, and indeed the basic problem is that human rights are not regarded as paramount:

"In the final analysis, the frustrations of all international effort to promote, defend and protect human rights and fundamental freedoms

have their root cause in the absence of a genuine international concern with human rights - a concern that is informed by a great idea and strong enough to confront and master the many obstacles which stand in the way of affirmative action....International concern with human rights will not be advanced by multiplying activities and by creating institutions and agencies in their support; however useful these may be in a limited context, they are plainly inadequate as a whole. All efforts are bound to remain more formal than effective until the nations of the world come to realise and accept that their own best interests coincide with the wider interests of the international community, whose unimpeachable claims upon humanity are embodied and expressed in the idea of international concern with human rights."<sup>9</sup>

It is clear, then, that for the effective protection of fundamental human rights to be ensured, time-honoured concepts must be directly challenged and a complete transformation of the international system must take place, the crucial factor being the acceptance by national governments of the contention that human rights are genuinely fundamental and must take precedence over the interests of individual states:

"The fact is that without a genuine international concern with human rights, international protection of human rights enforced by international institutions and procedures worthy of the name is not in the cards; the international community cannot at the present juncture of international relations successfully interpose itself between the citizen and his government. As has already been suggested, international intervention in defense of human rights against violations and for redress of wrongs has real meaning if it is part of an authentic international concern with the fate of the human person, transcending national boundaries and state institutions; it cannot be effective unless it is part of an interlocking international system of politics and jurisprudence, grounded in the universal acceptance of human rights and fundamental freedoms as the organizing principle of international co-operation."<sup>10</sup>

What are the prospects for such a development? The attitudes of governments at the present time give no cause for optimism, and in view of the diversity of cultural and ideological conceptions of human rights which we identified at the beginning of this study, it must be concluded that the outlook is bleak. Essentially, the protection of fundamental human rights must focus on the individual, and the fact is that the primacy of the individual is simply not accepted universally; rather, the less sublime concerns of national interest and the defence of existing socio-economic and political conditions are the main motivating force in governmental policies, with the result that individual rights are rarely a significant consideration. Certainly, international protection of human rights must continue to be promoted and encouraged, and procedures must be evolved and strengthened so as to operate at full capacity, but as far as the universal protection of human rights is concerned, international law will remain subject to incapacitating limitations unless radical reforms can be introduced on the basis of a philosophical consensus which will permit effective restraint of national governments by the international community. It is towards this goal that the human rights movement must strive, emphasising the humanitarian nature of truly fundamental rights.



## Notes

1. Quoted in The Repression Trade (Amnesty International, 1981), Introduction, at p. iii.
2. Of course, it will not always be possible to foresee conflict arising: it is ironic that the United Kingdom supplied weapons to Argentina prior to the Falklands conflict.
3. American agencies have been involved clandestinely and sometimes openly in attempts to overthrow left-wing regimes which have been elected democratically, for example in Chile and Nicaragua.
4. Quoted in The Repression Trade, Introduction, at p. v.
5. Quoted in *ibid.*, at para. 2.1.
6. Quoted in *ibid.*, Introduction, at p. v.
7. Quoted in Ackroyd et al., *op.cit.*, at pp. 230-31.
8. Moses Moskowitz, International Concern with Human Rights (Sijthoff Leiden, Oceana Publications Inc., Dobbs Ferry, N.Y., 1974), at p. 24.
9. *Ibid.*, at pp. 163-64.
10. *Ibid.*, at p. 167.

APPENDIX: COMMUNICATIONS ON WHICH THE HUMAN RIGHTS COMMITTEE HAS  
ADOPTED FINAL VIEWS IN TERMS OF THE OPTIONAL PROTOCOL

Report	Appendix	Number	Submitted by:
1979	VII	R.1/5 Uruguay	Moriana Hernández Valentini de Bazzano on her own behalf as well as on behalf of Luis María Bazzano Ambrosini, Martha Valentini de Massera and José Luis Massera
1980	V	R.2/9 Uruguay	Edgardo Dante Santullo Valcada
	VI	R.2/8 Uruguay	Ana María García Lanza de Netto on behalf of her aunt, Beatriz Weismann Lanza and her uncle, Alcides Lanza Perdomo, who later joined as submitting parties
	VII	R.7/31 Uruguay	Guillermo Waksman
	VIII	R.1/4 Uruguay	William Torres Ramírez
	IX	R.1/6 Uruguay	Miguel Angel Millán Sequeira
	X	R.2/11 Uruguay	Alberto Grille Motta on his own behalf as well as on behalf of other persons
1981	IX	R.7/28 Uruguay	Luciano Weinberger Weisz on behalf of his brother, Ismael Weinberger
	X	R.7/32 Uruguay	Lucía Sala de Tourón on behalf of her husband, Luis Tourón
	XI	R.8/33 Uruguay	Leopoldo Buffo Carballal
	XII	R.8/34 Uruguay	Jorge Landinelli Silva, Luis E. Echave Zas, Omar Patron Zaballos, Niurka Sala Fernandez and Rafael Guarga Ferro
	XIII	R.9/35 Mauritius	Shirin Aumeeruddy-Cziffra and 19 other Mauritian women

XIV	R.9/37 Uruguay	Esther Soriana de Bouton
XV	R.9/40 Finland	Erkki Juhani Hartikainen
XVI	R.10/44 Uruguay	Alba Pietroroia on behalf of her father, Rosario Pietroroia, also known as Rosario (or Roya) Zapala
XVII	R.13/58 Sweden	Anna Maroufidon
XVIII	R.6/24 Canada	Sandra Lovelace
XIX	R.12/52 Uruguay	Delia Saldías de López on behalf of her husband, Sergio Rubén López Burgos
XX	R.13/56 Uruguay	Lilian Celiberti de Casariego, represented by Francesco Cavallaro
1982 VII	R.7/27 Canada	Larry James Pinkney
VIII	R.14/63 Uruguay	Violeta Setelich on behalf of her husband, Raúl Sendic Antonaccio
IX	R.2/10 Uruguay	Alice Altesor and Victor Hugo Altesor on behalf of their father, Alberto Altesor
X	R.7/30 Uruguay	Irene Bleier Lewenhoff and Rosa Valiño de Bleier on behalf of Eduardo Bleier
XI	R.11/45 Colombia	Pedro Pablo Camargo on behalf of the husband of María Fanny Suárez de Guerrero
XII	R.12/50 Canada	Gordon C. Van Duzen
XIII	R.13/57 Uruguay	Sophie Vidal Martins
XIV	R.14/61 Finland	Leo R. Hertzberg, Ulf Mansson, Astrid Nikula and Marko and Tuovi Putkonen

	XV	R.15/64 Colombia	Consuelo Salgar de Montejo
	XVI	R.17/70 Uruguay	Elsa Cubas on behalf of her sister, Mirta Cubas Simones
	XVII	R.18/73 Uruguay	Ana Maria Teti Izquierdo on behalf of her brother, Mario Alberto Teti Izquierdo
	XVIII	R.6/25 Uruguay	Carmen Amendola Massioti on behalf of herself and on behalf of Graciela Baritussio, who later joined as submitting party
	XIX	R.11/46 Colombia	Orlando Fals Borda and María Cristina Salazar de Fals Borda, Justo German Bermúdez and Martha Isabel Valderrama Becerra
1983	VII	55/1979 Canada	Alexander MacIsaac
	VIII	66/1980 Uruguay	Olga Machado de Cámpora on behalf of her husband, David Alberto Cámpora Schweizer, who later joined as submitting party
	IX	84/1981 Uruguay	Hugo Gilmet on behalf of his cousins, Guillermo Ignacio Dermit Barbato and Hugo Haroldo Dermit Barbato
	X	16/1977 Zaire	Daniel Monguya Mbenge
	XI	49/1979 Madagascar	Mr and Mrs Dave Marais on behalf of their son, Dave Marais, Junior
	XII	74/1980 Uruguay	Miguel Angel Estrella
	XIII	75/1980 Italy	Duilio Fanali
	XIV	77/1980 Uruguay	Samuel Lichtensztejn

	XV	80/1980 Uruguay	Sergio Vasilskis on behalf of his sister, Elena Beatriz Vasilskis
	XVI	88/1981 Uruguay	Daniel Larrosa on behalf of his brother, Gustavo Raúl Larrosa Bequio
	XVII	106/1981 Uruguay	Mabel Pereira Montero
	XVIII	43/1979 Uruguay	Ivonne Ibarburu de Drescher on behalf of her husband, Adolfo Drescher Caldas
	XIX	90/1981 Zaire	Luyeye Magana ex-Philibert
	XX	92/1981 Uruguay	Laura Almirati García on behalf of her father, Juan Almirati Nieto
	XXI	105/1981 Uruguay	María A. Cabreira de Estradet on behalf of her son, Luis Alberto Estradet Cabreira
	XXII	107/1981 Uruguay	María del Carmen Almeida de Quinteras on behalf of her daughter, Elena Quinteros, and on her own behalf
	XXIII	108/1981 Uruguay	Carlos Varela Nuñez
1984	VII	83/1981 Uruguay	Victor Ernesto Martínez Machado on behalf of his brother, Raúl Noel Martínez Machado
	VIII	103/1981 Uruguay	Estela Oxandabarat on behalf of her father, Batlle Oxandabarat Scarrone
	IX	85/1981 Uruguay	Nelly Roverano de Romero on behalf of her husband, Hector Alfredo Romero
	X	109/1981 Uruguay	María Dolores Pérez de Gómez on behalf of her daughter, Teresa Gómez de Voituret
	XI	110/1981 Uruguay	Antonio Viana Acosta

	XII	123/1982 Uruguay	Gabriel Manera Johnson on behalf of his father, Jorge Manera Lluberas
	XIII	124/1982 Zaire	Tshitenge Muteba
1985	VII	89/1981 Finland	Paavo Muhonen
	VIII	115/1982 Madagascar	John Wight
	IX	132/1982 Madagascar	Monja Jaona
	X	146/1983 Suriname	Kanta Baboeram-Adhin on behalf of her deceased husband, John Khemraadi Baboeram
		148/1983 Suriname	Johnny Kamperveen on behalf of his deceased father, André Kamperveen
		149/1983 Suriname	Jenny Jamila Rehnuma Karamat Ali on behalf of her deceased husband, Cornelius Harold Riedewald
		150/1983 Suriname	Henry François Leckie on behalf of his deceased brother, Gerald Leckie
		151/1983 Suriname	Vidya Satyavati Oemrawsingh-Adhin on behalf of her deceased husband, Harry Sugrim Oemrawsingh
		152/1983 Suriname	Astrid Sila Bhamini-Devi Sohansingh- Kanhai on behalf of her deceased husband, Samradj Robby Sohansingh
		153/1983 Suriname	Rita Duki Imanuel-Rahman on behalf of her deceased brother, Lesley Paul Rahman
		154/1983 Suriname	Irma Soeinem Hoost-Boldwijn on behalf of her deceased husband, Edmund Alexander Hoost
	XI	139/1983 Uruguay	Ilda Thomas on behalf of her brother, Hiber Conteris

1986	VIIIA	138/1983	Ngalula Mpandanjila et al. Zaire
	VIIIB	147/1983	Felicia Gilboa de Reverdito on behalf of Uruguay her niece, Lucía Arzuaga Gilboa, who later joined as co-author
	IIIC	156/1983	Katy Solórzano de Peña on behalf of her Venezuela brother, Luis Alberto Solórzano, who later joined as co-author
	IIID	157/1983	André Alphonse Mpaka-Nsusu Zaire
1987	VIIIA	155/1983	Eric Hammel Madagascar
	VIIIB	172/1984	S.W.M. Broeks Netherlands
	IIIC	180/1984	L.G. Danning Netherlands
	IIID	182/1984	F.H. Zwaan-de Vries Netherlands
	IIIE	198/1985	R.D. Stalla Costa Uruguay

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