NO MORE BROKEN BODIES OR MINDS: THE DEFINITION AND CONTROL OF TORTURE IN THE LATE TWENTIETH CENTURY

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I. INTRODUCTION

Since the end of the Second World War a significant number of instruments has been adopted in which the practice of torture has been outlawed.[1] This has been accompanied by similar developments in the range and type of institutions created to supervise the maintenance of the prohibition and to award remedies to individuals in cases of violation.[2] In the wake of these developments there is general agreement among international lawyers that the practice of torture is unconditionally prohibited either in time of war or peace.[3] Indeed, it is arguable that the prohibition has even qualified for designation as a norm of *ius cogens*,[4] that is, a peremptory norm of international law from which no derogation is permitted under any circumstances and which may only be displaced by a subsequent norm bearing the same characteristics.[5] Furthermore, it has been argued that torture has joined that dubiously elite body of activities which finds classification as an international crime.[6]

Despite the breadth and pedigree of the prohibition, however, there is no doubt that the systematic use of officially sanctioned or tolerated torture continues in a large number of States.[7] Without becoming concerned at this stage with the definition of torture, it is apparent that it is used extensively

1 The majority of these instruments are considered in this article. They include, in chronological order, the Universal Declaration on Human Rights 1948, General Assembly Resolution 217A (III), GAOR, 3rd Session, Part I, Resolutions, p 71; the American Declaration on the Rights and Duties of Man 1948, Resolution XXX, Final Act of the Ninth International Conference of American States, Bogota, Colombia 30 March — 2 May, 1948, p 8; the Geneva Conventions 1949, 75 UNTS 31; the European Convention on Human Rights and Fundamental Freedoms 1950, 213 UNTS 221; the United Nations International Covenant on Civil and Political Rights 1966, 999 UNTS 171; the American Convention on Human Rights 1969, 9 ILM 673; the United Nations Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Resolution 3452, 30 UN GAOR Supp. No 34 at 91, UN Doc A/10034 (1975) the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, (1984) 23 ILM 1027 and (1985) 24 ILM 535; the Inter-American Convention to Prevent and Punish Torture, OASTS No 67.

2 The various international institutions having major competence in this area of activity which will be referred to in this article are the Economic and Social Council of the United Nations; the United Nations Commission on Human Rights and its Sub-Commission on the Prevention of Discrimination and Protection of Minorities; the United Nations Human Rights Committee; the United Nations Committee against Torture; the European Commission on Human Rights; the European Court of Human Rights; the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; the Inter-American Commission on Human Rights; the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights.

3 See *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report by the Special Rapporteur, Mr P Kooijmans appointed pursuant to Commission on Human Rights Resolution 1985/33*, (hereafter '*Report by the Special Rapporteur*') UN Doc. E/CN.4/1986/15, 19 February 1986, 1.

4 Ibid.

5 See Article 53 of the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

6 See below, pp 52-53.

7 For an indication of the extent of the use of torture see Amnesty International, *Annual Report 1994*, passim. See also H Cook, 'The Role of Amnesty International in the Fight Against Torture' in A Cassese (ed), *The International Fight Against Torture* (1991) 172.

with either the official or unofficial sanction of a number of governments in order to extract information from political opponents and dissidents or simply as a form of punishment to break the will of such persons and the organisations to which they belong. It is legitimate therefore to ask why the use of torture appears to continue unabated despite the manifold prohibitions directed against it.

There is no easy answer to this question. One might point to the weakness of the international supervisory mechanisms which are designed to keep watch over States in this field of human rights law, but that alone does not explain why governments and their agents are still prepared to resort to this most barbaric of practices. As Pieter Kooijmans, United Nations Commission on Human Rights' Special Rapporteur on Torture, pointed out in his 1986 report, nearly all States either explicitly or implicitly outlaw the practice of torture in their domestic law.[8] It is the hallmark of torture, however, that it generally occurs in periods of domestic stress or tension.[9] Some of the worst excesses in recent decades have been perpetrated by totalitarian regimes concerned with threats from their political opponents. Even democracies have been accused of resorting to torture to combat political terrorism. The United Kingdom, for example, was accused of torturing Provisional Irish Republican Army suspects in Northern Ireland during the 1970s and was sued by the Irish Government under Article 24 of the European Convention on Human Rights for its alleged violation of the Convention's prohibition on the use of torture in Article 3.[10] Thus, the answer to the question of why law and legal institutions are incapable of preventing torture cannot be discovered exclusively within that framework. The propensity of human beings to resort to torture is perhaps discoverable only in an analysis of their social and political institutions and, perhaps, of the human psyche itself.[11] Despite this observation, there is no doubt that both domestic and international law have a significant role to play in the control of torture. Domestic law properly enforced provides the immediate defensive bulwark against the practice, but in times of national or international stress or emergency, when domestic safeguards may be under threat or may have broken down altogether, international law and institutions can act as an appropriate surety.

While acknowledging that international law and institutions of themselves can never prevent torture, they can provide appropriate protective and remedial mechanisms. The extent to which they do so today will be

8 *Report by the Special Rapporteur*, p. 2.

9 Amnesty International, Report on Torture (1975), p 27. Catherine Mackinnon would employ the word 'domestic' in the broadest possible way to classify domestic violence, sexual abuse and rape as torture. She asks, somewhat rhetorically it would seem, 'Torture is regarded as politically motivated not personal; the state is involved in it. I want to ask why the torture of women by men is not seen as torture, why is it not seen as politically motivated, and what is the involvement of the state in it?' Catherine A Mackinnon, 'On Torture: A Feminist Perspective' in KE Mahoney and P Mahoney (eds), *Human Rights in the Twenty First Century: A Global Challenge* (1993), p 21 at p 25. To rise to the challenge of Mackinnon's questions would be beyond the scope of this paper, but two pragmatic responses suggest themselves: first, domestic violence is now becoming a matter of separate international concern (see the Declaration on the Elimination of Violence against Women, GA Resolution 48/104, 48 UN GAOR Supp (No 49) at 217, UN Doc. A/48/49 (1993) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (the Convention of Belem do Para 1994 (1994) 33 ILM 1534) and second, this article is primarily concerned with *lex lata* rather than *de lege ferenda.*

10 See below, pp38-39.

11 Amnesty International, op cit, above, note 9, pp 59-63.

the subject of this article, but an attempt will also be made to identify areas in which improvements might be made to the existing institutions and their mechanisms of protection.

II. Torture: The Instruments and Mechanisms of Control

The Universal Declaration of Human Rights

The Universal Declaration of Human Rights[12] was the first major international human rights instrument to be adopted after the Second World War. It was passed in 1948 as an ordinary resolution of the UN General Assembly and as such lacked legally binding force.[13] Nonetheless, in the words of the Declaration's own preamble it is declared to be 'a common standard of achievement for all peoples and all nations.' With the passage of time the Universal Declaration has become the cornerstone of what is commonly known as the International Bill of Rights.[14] During the last five decades its legal status has also changed from that of a non-binding declaration to an authoritative interpretation of the references to 'human rights' within the UN Charter and, possibly, an accurate statement of customary international law in this field of activity.[15] The Universal Declaration's prohibition on torture is contained in Article 5 of that instrument. It provides, 'no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment.' This peremptory prohibition in the Declaration raises a number of questions beyond a simple analysis of its legal status. It does not, for example, reveal what kinds of activities might be regarded as torture nor how the concept of torture should be interpreted. Should it be assessed from the subjective perspective of the victim of mistreatment or should it be defined according to objective criteria? Furthermore, the Declaration was not accompanied by any institutional arrangement which would allow it to be enforced in cases of breach. Subsequent developments have witnessed the creation of institutions which are capable of using the Declaration as a benchmark in assessing State compliance with the human rights standards of the UN Charter,[16] but taken in isolation it is both a useful register of state practice and a potent political statement.[17]

ECOSOC Resolution 1503 procedure and the thematic approach

Despite the absence of any formal structure within the UN Charter for dealing with human rights supervision and enforcement, two mechanisms have arisen which provide the UN with a means of monitoring the per-

12 Loc cit, above, note 1.

13 Article 10 of the UN Charter provides that such resolutions have only recommendatory capacity. See OY Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966).

14 The International Bill of Rights is commonly assumed to comprise three instruments: the Universal Declaration of Human Rights, the United Nations International Covenant on Civil and Political Rights and the United Nations International Covenant on Economic, Social and Cultural Rights.

15 See RB Lillich, 'Civil Rights', in T Meron (ed), *Human Rights in International Law* (1985), pp 116-19 and pp 126-30. See also N Rodley, *The Treatment of Prisoners under International Law* (1987), 63-4.

16 See below, p28.

17 JP Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Juridical Character' in BG Ramcharan (ed), *Human Rights: Thirty Years After the Universal Declaration of Human Rights* (1979), p 21 at p 28.

formance of its Member States.[18] By Resolution 1503(XLVIII) the 54 member Economic and Social Council of the UN empowered its subsidiary body, the Commission on Human Rights to deal with any incoming individual petitions which appear to reveal a consistent pattern of gross and reliably attested violations of human rights. Following receipt of such petitions the Commission may carry out an investigation and make a report. This function is entirely confidential and gives States the opportunity to respond to any allegations made against them. Once the Commission has concluded its study, it is forwarded to ECOSOC and thence to the General Assembly for consideration. The only sanction which may follow this is adverse publicity. In the case of torture the 1503 procedure is not particularly effective. The main problem is that the procedure works in arrears, that is, ECOSOC's competence is not engaged until it has received a large number of individual petitions. Thus, many of the events complained of will have already have taken place. ECOSOC is therefore not in a position to prevent violations, nor does it have the competence to award redress in individual cases. Second, ECOSOC and the Commission on Human Rights are political bodies and may therefore be swayed by political considerations.[19] This conclusion is further supported by the fact that the 1503 procedure takes place *in camera* rather than in open forum. While this might aid the constructive engagement of allegedly delinquent States, it does not assist the immediate victims.

In order to address some of these criticisms ECOSOC has developed a series of new procedures which involve a thematic approach to human rights violations. This requires the Commission to appoint special rapporteurs to oversee and act upon various categories of human rights abuses.[20] In pursuance of this policy, the Commission in 1985 established a rapporteur for torture which enables the special rapporteur to conduct not only wide ranging investigations of the phenomena but, where he or she becomes aware of allegations of systematic use of torture in any State, the rapporteur may make an immediate investigation.[21] The procedure established under the 1985 resolution does not suffer from the confidentiality which attaches to the 1503 procedure and can be engaged much more rapidly. Because of the absence of confidentiality, the rapporteur is able to focus public attention upon torture in a particular State and thus bring pressure to bear. In this way, the 2325 procedure is capable of being utilised in a much more interventionist fashion than the 1503 procedure and is therefore capable of leading to a quicker cessation of the prohibited practice.

18 These procedures are discussed in detail in TJM Zuijdwijk, *Petitioning the United Nations* (1982), passim; T Meron, *Human Rights Law Making in the United Nations* (1986), passim and P Alston, 'The Commission on Human Rights' in P Alston, *The UN and Human Rights* (1992), 126-210.

19 ECOSOC and the Commission on Human Rights consist of 54 and 43 persons respectively: Articles 61 and 68 of the United Nations Charter. They are chosen from UN members and serve in their capacity as governmental representatives. On the composition of the Commission on Human Rights see ECOSOC Resolution E/1979/36.

20 See Alston, op cit, above, note 18, pp 173-80; N Rodley, 'United Nations Action Procedures against "Disappearances", Summary or Arbitrary Executions, and Torture' in P Davies (ed), *Human Rights* (1988), pp 74-98; N Rodley, op cit, above, note 16, pp 120-25 and PH Kooijmans, 'The Role and Action of the United Nations Special Rapporteur on torture' in Cassese, op cit, above note 7, pp 56-72.

21 Resolution 1985/33.

The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR)[22] was the first legally binding instrument of potentially universal application to outlaw torture. The language of the prohibition in Article 7 of the Covenant is identical to that of the Universal Declaration, save for the addition of a sentence on medical experimentation. It provides:

> 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.

While it is readily apparent that the prohibition of torture in the ICCPR takes the issue little further forward than the Universal Declaration in definitional terms, it nonetheless creates a definite legally binding obligation for all States Parties.[23] The addition of the sentence on medical experimentation, which was the subject of much debate at the UN, gives a hint that certain practices are objectively classifiable as torture within the meaning of the Covenant, but it still remains unfortunately opaque when attempting to discover whether there might be a subjective or victim orientated element in assessing whether a particular practice constitutes torture. The ICCPR does make clear, however, that freedom from torture is a right from which there may be no derogation under any circumstances.[24]

In addition to the creation of a legally binding obligation to prohibit the use of torture within the territory of States Parties, the ICCPR also established a supervisory institution in the form of the eighteen person Human Rights Committee.[25] Unlike the other UN institutions discussed above, the Human Rights Committee is apolitical in that it is composed of independent experts.[26] The Committee is endowed with two mechanisms of supervision. The first, which is mandatory for all States Parties, is a periodic reporting procedure under which States must submit reports on the measures which they have adopted to give effect to the rights recognised in the Covenant and on the progress made in the enjoyment of rights by the persons subject to their jurisdiction.[27] This procedure is not as anodyne as might first appear, for the Committee may engage the reporting State in 'constructive dialogue' in order to obtain more detailed information both in writing and from the State's representatives in person when they appear to answer questions before the Committee.[28] The embarrassment which may be occasioned by the Human Rights Committee's probing and the publication of the Committee's final views may give States pause

22 Loc cit, above, note 1. Hereafter '*ICCPR*'.

23 Article 2(1) ICCPR provides: '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 recognised 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.'

24 Article 4 ICCPR. For a comprehensive discussion of the Human Rights Committee and its work see D McGoldrick, *The Human Rights Committee* (1991), passim and T Opsahl, 'The Human Rights Committee' in Alston, op cit, above, note 19, p 369. For a much briefer overview see S Davidson, *Human Rights* (1993), pp 76-88.

25 Article 28(1) ICCPR.

26 Article 28(3) ICCPR. By Article 38 'every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.'

27 Article 40 ICCPR.

28 See McGoldrick, op cit, above, note 24, pp 62-119.

for thought before they attempt to mask the extent of their delinquency, if such there be. The prophylactic effect of the reporting procedure is much harder to estimate in determining whether it acts as a restraint on State behaviour. Certainly, a prudent State which wishes to avoid future embarrassment will either attempt to modify its behaviour so as to ensure eradication of torture and related practices or take all measures to mask its behaviour. The latter course of action is, however, unlikely to succeed in the light of the rapid and effective means of communication which are available today.

The second method of supervision under the ICCPR is an inter-State complaint procedure.[29] This procedure is optional and States Parties must recognise the competence of the Human Rights Committee to receive complaints from other States concerning the violation of the Covenant.[30] Assessment of this mechanism need not detain us for it has never been engaged. The reason for this is readily apparent: inter-State complaint mechanisms, as the experience of the European Convention system has shown, generally exacerbates rather than diminishes political tension between States.[31] This general observation must, however, be tempered by acknowledging that the European Convention has also shown that where genuine humanitarian motives lie behind the initiation of inter-State complaints, they can perform an extremely useful function.[32] The fact remains, however, that inter-State complaint mechanisms are, as a rule, too sensitive to be a constant and reliable method of human rights protection.

In addition to the mandatory reporting procedure and the optional inter-State complaint procedure, there is also an Optional Protocol attached to the ICCPR which allows individuals the right of application to the Human Rights Committee when certain procedural requirements have been satisfied.[33] There is no doubt that in the control of torture, individual complaint mechanisms have much to commend them. They allow for a consistent method of policing alleged violations, and the possibility that a State might be asked to justify its actions before an international institution may provide some deterrent effect. Although the final views of the Human Rights Committee are not legally binding, they generally contain an 'award' of damages and restitution of the rights violated where this is feasible.[34] The final views are also published and may cause further international embarrassment to the State concerned. Apart from the deterrent effect which potential proceedings before the Human Rights Committee under the First Optional Protocol might entail, it must be acknowledged that they are essentially a species of *post hoc* control and not a preventative measure. While deterrence can undoubtedly be an effective weapon when properly deployed, it is clear that the temporal and physical removal of the Human Rights Committee from many of the cases which it is obliged to

29 Article 41 ICCPR.
30 Article 41(1) ICCPR.
31 See Davidson, op cit, above, note 24, pp 103-5.
32 For examples of this proposition see *Denmark, Norway, Sweden and The Netherlands v Greece*, 12 YB (Special Edition) and *Denmark, Norway, Sweden and The Netherlands v Turkey*, 8 EHHR 205.
33 See McGoldrick, op cit, above, note 24, pp 127-56; PR Ghandi, 'The Human Rights Committee and the Right of Individual Communication', (1986) LVII BYIL 201; and S Davidson, 'The Procedure and Practice of the Human Rights Committee under the First Optional Protocol to the ICCPR', (1991) 4 Canta LR 337.
34 McGoldrick, op cit, above, note 24, 150-6. See also C Tomuschat, 'Evolving Procedural Rules: The UN Human Rights Committee's First Two Years of Dealing with Individual Communications', (1980) 1 HRLJ 249 at 255.

consider, perhaps some years after the original actions complained of have taken place, lacks the capacity to act with immediacy.[35]

The elaboration of the concept of torture by the Human Rights Committee has not been entirely satisfactory. Although the Committee has not been slow to characterise certain States Parties as violators of Article 7, there has been little attempt on its part to construct a comprehensive definition of the nature of torture. In considering the reports of States Parties and in its General Comments on Article 7 the Committee has devoted considerable attention to the procedural and practical safeguards in force.[36] As McGoldrick indicates,[37] States have been questioned about whether their domestic laws and practices contain sufficient safeguards for the protection of those held in custody and, in particular, whether these correspond to the UN Minimum Standard Rules for the Treatment of Prisoners,[38] the UN Code for the Conduct of Law Enforcement Officials[39] and the Standard Minimum Rules for the Administration of Juvenile Justice.[40] In terms of individual cases under the Optional Protocol decisions by the Committee appear to have been very much 'fact driven'. It has had no difficulty determining that certain practices amount to torture, but there has been a lack of consistency in its application of Article 7.[41] The Committee has thus been able to find, for example, that physical beatings,[42] application of electric shocks,[43] submarino,[44] being required to stand in a painful posture (planton),[45] insertion of a gun barrel into a detainee's anus,[46] insertion of a piece of wood into a detainee's mouth for lengthy periods of time,[47] beatings,[48] mock executions,[49] mock amputations,[50] threats of torture to friends and family[51] and treatment which results in permanent physical damage[52] all amount to torture. As McGoldrick notes, however, 'despite a number of opportunities the [Committee] has failed to state explicitly that mental or psychological suffering can amount to torture.'[53] The concen-

35 For a consideration of the effectiveness of the Human Rights Committee's individual application procedure under the First Optional Protocol to the ICCPR see McGoldrick, op cit, above, note 24, pp 202-204 and M Nowak, 'The Effectiveness of the International Covenant on Civil and Political Rights: Stocktaking After the First Eleven Session of the UN Human Rights Committee', (1980) 1 HRLJ 136.

36 UN Doc. A/37/40, 94.

37 McGoldrick, op cit, above, note 24, pp 363-4.

38 ECOSOC Resolution 663 C(XXIV) of 31 July 1957 as amended by ECOSOC Resolution 2076 (LXII) of 13 May 1977.

39 General Assembly Resolution 34/169 of 17 December 1979.

40 United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), General Assembly Resolution 40/33, annex, 40 UN GAOR Supp (No. 53) at 207, UN Doc A/40/53 (1985).

41 For an assessment of the Committee's practice see Rodley, op cit, above, note 16, pp 80-3. For a typology of torture see B Sorensen and IK Genefke, 'Medical Aspects of Torture' in Cassese, op cit, above, note 7, p 11 at pp 12-18.

42 *Grille Motta v Uruguay*, Doc. A/35/40, p 132.

43 Ibid.

44 Ibid. Submarino is the immersion of the victim's head in foul water until he or she is nearly at the point of asphyxiation. See Sorensen and Genefke, op cit, above, note 41, p 13.

45 Ibid.

46 Ibid.

47 Ibid.

48 *Lopez Burgos v Uruguay*, Doc. A/36/40, p 176; *OB Acosta v Uruguay*, Doc. A/44/40, p 183.

49 *Muteba v Zaire*, Doc. A/39/40, p 182.

50 *Estrella v Uruguay*, Doc. A/38/40, p 150.

51 Ibid.

52 *Massera v Uruguay*, Doc. A/ 34/40, p 124.

53 McGoldrick, op cit, above, note 24, p 369.

tration by the Committee on the physical aspects of torture have led it not only to avoid defining the term, but also to avoid pronouncing upon the difference between the various prohibited activities contained in Article 7. This has inevitably led to some confusion about the limits of torture and its relationship to other forms of inhumane treatment which fall short of torture.[54] This is not a satisfactory situation since a clear prescription of the practice of torture is a prerequisite to the proscription of State behaviour which is deemed to be offensive.[55]

The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment

The UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,[56] which was adopted by the UN General Assembly in 1984 and which entered into force in 1987 is the most recent international effort to combat torture and associated practices. The difficulty in securing agreement on a definition of torture and the methods of supervision are indicated by the extremely lengthy gestation period of this Convention.[57] Consideration of the issue began in 1975 with the provision of definitions of torture to the General Assembly by both the World Health Organisation[58] and Amnesty International.[59] Although the World Health Organisation itself stated that it was impossible to adopt any particular definition of torture, it nevertheless referred the General Assembly to definitions provided by other organisations such as the World Medical Association.[60] Amnesty International on the other hand argued that it was possible to point to certain characteristics which were inherent in any act of torture.[61]

The definition of torture which was ultimately included in the UN Convention is much broader than those contained in either the Universal Declaration or the ICCPR and adopts an objective approach to the issue. In other words, torture is characterised by particular acts committed with intent and does not depend, prima facie, upon the subjective perceptions of the victim. Article 1 of the UN Convention Against Torture provides:

> For the purposes of this Convention, 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.

54 Ibid, pp 380-2.
55 See below, pp 00-00.
56 Loc cit, above, note 1. Hereafter 'the Convention' or 'UNCAT'.
57 For a detailed account of this see JH Burgers and H Danelius, *The United Nations Convention against Torture* (1988), pp 31-110. On the Convention in general see J Voyame, 'La Convention des Nations Unies contre la torture et autres peines ou traitements cruels, inhumains ou dégradants du 10 décembre 1984' in Cassese, op cit, above, note 7, pp 43-55.
58 World Health Organisation, *Health Aspects of Avoidable Maltreatment of Prisoners and Detainees*, UN Doc. A/Conf.56/9/1979.
59 Op cit, above, note 7.
60 Op cit, above note 58 at annex 1, para 2.
61 Op cit, above, note 7, p 34.

This definition, while clearly fuller than the definitions contained in the universal instruments considered so far, requires some analysis. Perhaps the first point to note is that torture occurs when severe physical or mental pain or suffering is inflicted upon a victim. This clearly requires either the application of some physical force or mental stress upon an individual. The application of physical force, as the cases under the Optional Protocol to the ICCPR amply demonstrate,[62] is one of the more common ways in which torture is committed. Identification of mental pain and suffering is, however, a subject which is rather less tractable. Examples of such behaviour can be elicited from cases considered by a variety of human rights institutions. Mock executions, threats to cause physical harm to either the victim or members of the victim's family, being forced to witness the physical torture of other detainees and similar actions have all been held to amount to torture.[63] Under the European Convention, as we shall see, the European Commission held that depriving individuals of their basic needs might also amount to torture.[64] Thus, deprivation of sleep, prolonged isolation and provision of an inadequate diet might all result in mental pain and suffering.[65]

It will be noted, however, that the pain and suffering involved in torture, whether physical or mental, must be 'severe'. This suggests that there must be an aggravated quality attached to any behaviour if it is to be of sufficient gravity to amount to an act of torture. An isolated slap or punch by a guard to a prisoner while causing pain and perhaps inducing an apprehension of further future mistreatment would not seem to fall within the definition of torture in Article 1 of the UN Convention. Such an act would not seem to be of the kind of gravity required by the Convention. This view is further supported by the further requirement in Article 1 that the pain or suffering must be inflicted 'intentionally'. This would seem to suggest that where such pain or suffering is inflicted as the result of a bona fide accident or because of negligence, that the criteria for the definition of torture to apply have not been fulfilled. It is a moot point, however, whether an omission will result in the commission of an act of torture under the Convention. The use of the word 'inflicted' in Article 1 would seem to require a positive act, but this might not necessarily be so. Would, for example, failure to feed a detainee amount to such an act? Presumably this would depend upon the mental state of the jailer. If the deprivation of food were an oversight, then any resulting severe physical pain would not be torture. If, however, failure to feed a detainee was the result of a conscious policy on the part of the jailer or his or her superiors, then the omission would be assimilable to an act of torture since it would represent a pre-determined policy of starvation. The same would be true of a failure to provide appropriate medical treatment to a detainee following an accident. Neglect to render appropriate treatment would not constitute torture, whereas a conscious decision not to provide treatment would.[66]

62 Above, pp 21-22.

63 In addition to the cases considered above by the Human Rights Committee under the ICCPR Optional Protocol, see also the practice of the Inter-American Commission on Human Rights below, pp 44-45.

64 See below, p 39.

65 As in the case *Ireland v United Kingdom*, 21 YB 602; Eur Ct HR Ser A, No 25 which is discussed below at pp 38-39.

66 See, for example, *Antonaccio v Uruguay*, Doc. A/37/40, p 114 in which the Human Rights Committee held that Uruguay had violated Articles 7 and 10(1)ICCPR in denying the victim the medical treatment which was required.

The definition of torture contained in Article 1 of the UN Convention is also accompanied by a non-exhaustive list of purposes for which torture might be used. This list includes the use of torture to obtain information, to punish, to intimidate, to coerce or for any reason based on discrimination. The purposes for which torture is utilised is, however, largely irrelevant since it adds nothing to the definition. Burgers and Danelius suggest that the inclusion of this non-exhaustive list can be explained largely on the basis that the Convention was designed to elucidate the concept of torture for the purposes of understanding and implementing the Convention, rather than providing a legal definition for direct application in domestic criminal law.[67] Indeed, when the implementation mechanisms of the Convention are examined, the validity of this assertion is evident.

The final part of the definition of torture which requires examination is the question of which persons are capable of engaging the responsibility of the State under the UN Convention Against Torture. It is clear from Article 1 that it is only when the prohibited acts are inflicted by public officials or with their consent or acquiescence that torture is committed. The same acts when committed by a private individual without official sanction will not be torture. Such acts may be criminal acts under domestic law, but the assumption is that that these will be dealt with by the normal criminal justice system. It could be argued, however, that failure of the criminal justice authorities in any state properly to prosecute and punish acts falling within the definition of torture would confer the imprimatur of official sanction or acquiescence and thus transform the acts of private persons into those of the State.[68] In this context it should also be noted that superior orders do not provide a justification for torture,[69] nor may the prohibition be affected by any circumstances whatsoever.[70] Thus, the existence of a state of war, threat of war, internal political instability or any other public emergency may not be used as a justification to derogate from the prohibition.[71] This conforms to other analogous instruments which make freedom from torture a non-derogable right.

Implementation and supervision of the UN Convention is to be achieved in a number of ways. Under Article 4 a State Party must ensure that all acts of torture and inchoate offences related to torture are offences under their criminal law. These offences are to be 'punishable by appropriate penalties which take into account their grave nature'.[72] A State Party is also obliged to extend its jurisdiction over acts of torture to include offences committed on board ships or aircraft registered in that State.[73] Where acts of torture are committed by a national of a State Party, it must also, where necessary, amend its law in order to allow it to exercise jurisdiction, no matter where the offence was committed.[74] In addition to the extension of personal

67 Op cit, above, note 57, p 122.
68 This proposition is derived from the doctrine of State responsibility under which failure by a host State properly to pursue and try a person who has committed a criminal act against an alien within its territory may amount to a denial of justice. See I Brownlie, *Principles of Public International Law*, (4th edn, 1990) pp 529-30.
69 Article 2(3) UNCAT.
70 Article 2(1) UNCAT.
71 Ibid.
72 Article 4(2) UNCAT.
73 Article 5(1)(a) UNCAT.
74 Article 5(1)(b) UNCAT.

jurisdiction, the UN Convention also creates a form of quasi-universal jurisdiction by placing upon a State Party an obligation either to extradite or try an offender who may find him or herself within the territory of that State.[75] Protection of the victim is further reinforced by Article 5(2) of the Convention which allows States Parties, if they so wish, to ground jurisdiction on the basis of the passive personality principle, that is, where the victim of torture is a national of the State, no matter where the offence was committed.[76] The passive personality principle has been much criticised in the past since it is alleged that it allows individuals who are abroad to carry the protective mantle of the laws of their State with them. Despite this criticism, it is nonetheless apparent that in the battle against hijacking, terrorism and torture, States, through their national laws and through international instruments, have come to rely increasingly upon this ground of jurisdiction.[77]

Additional protection is also available for the potential torture victim since Article 3 of the Convention provides that '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.' In order to determine whether such grounds exist, the State Party must take into account all relevant considerations including evidence which tends to disclose a consistent pattern of gross, flagrant or mass violations of human rights.[78]

Supervision of the torture Convention is by the ten person Committee against Torture.[79] This body is elected by the States Parties to the Convention, but the Committee members serve in their individual capacities and not as State representatives.[80] The supervision mechanisms under the Convention include a system of periodic reports by States Parties to the Committee on the measures which they have taken to give effect to the Convention;[81] an optional inter-State complaint mechanism[82] and an optional individual petition system.[83] While inter-State complaints are likely to suffer from the same kinds of political considerations which bedevil other international human rights instruments,[84] it is questionable whether the individual petition mechanism adds anything useful to the already broad array of individual application procedures which exist in analogous instruments. It might be argued, however, that since the case load of the Committee against Torture is likely to be considerably lower than that of the Human Rights Committee, a more expeditious outcome might be

75 Articles 5(2) and 7 UNCAT.
76 See Brownlie, op cit, above, note 68, pp 303-4.
77 I A Shearer, *Starke's International Law* (11th edn, 1994), pp 210-11.
78 Article 3(2) UNCAT.
79 Article 17 UNCAT. The use of the lower case 'a' in the word 'against' precludes the possibility of the Committee's title forming a somewhat inappropriate acronym, for English speakers at least. Under Article 17(2) the States Parties are enjoined to bear in mind the usefulness of nominating persons to the Committee against Torture who are also members of the Human Rights Committee under the ICCPR. The implication here is that the experience of such persons gained in their role as Human Rights Committee members will be of substantial value to the Committee against Torture. For a detailed discussion of the Committee against Torture see A Byrnes, 'The Committee against Torture' in Alston, op cit, above, note 18, p 507.
80 Article 17(1) UNCAT.
81 Article 19 UNCAT.
82 Article 21 UNCAT.
83 Article 22 UNCAT.
84 Above, p 30.

expected.[85] Where an individual applicant has a choice between either of the universal systems or recourse to the mechanisms of one of the regional instruments, it is clear that the latter should be preferred for a variety of reasons. Perhaps the two most compelling are that the regional human rights institutions may have a better understanding of the applicable standards in their geographical regions and may, in the case of breach, award monetary compensation.[86]

The most innovative aspect of the UN Convention Against Torture, however, is a further optional power which is conferred on the Committee to investigate a State Party *proprio motu* when it receives reliable information which suggests that torture is being practised systematically in the territory of such a State Party.[87] In such circumstances the Committee may, after taking into account any observations made by the State and any other relevant information made available to it, designate one or more of its members to make a confidential inquiry and report as a matter of urgency.[88] While the Committee is obliged to seek the cooperation of the State which is the subject of the inquiry, it may nonetheless proceed if such cooperation is not forthcoming.[89] Article 20(3) also indicates that an inquiry may involve a visit to the territory of the State. It seems reasonably clear that such a visit may only be undertaken with the explicit consent of the State in question. Without such consent the visit would constitute a violation of the sovereignty of that State. Despite these observations, it may be reasonably assumed that a State Party which does not cooperate with the Committee and which refuses to allow a visit by Committee members to its territory in the wake of allegations of torture which the Committee assumes, *prima facie,* to be well founded has something to hide. While such an assumption might be condemned as a violation of the principle that silence should not imply guilt, it should be remembered that a State is in sole possession of the facts through which it might be exonerated from an alleged breach of the Convention. It should also be noted that all stages of this procedure are confidential and a State Party is thus granted the opportunity to deal with the issue free from the full glare of international publicity.[90] Following conclusion of the inquiry stage, the Committee transmits the findings of its members to the State Party concerned with any comments or suggestions which seem appropriate.[91] After consultations with the State Party the Committee may decide to include a summary account of the results of the proceedings in its annual report to all the States Parties to the Convention and the UN General Assembly.[92] The net result

85 On the work of the Committee see Byrnes, op cit, above, note 78 and Voyame, op cit, above, note 57 at pp 53-55.

86 See below, pp 37-40 (ECHR) and pp 44-45 (ACHR).

87 Article 20 UNCAT. As Burgers and Danelius point out, this procedure was inspired to some extent by the ECOSOC Resolution 1503 procedure. Burgers and Danelius, op cit, above note 57, p 160.

88 Article 20(2) UNCAT.

89 While this is not stated specifically in the Convention, it is a conclusion which can be drawn by implication. Although the Committee is required to seek the cooperation of the State, there is no substantive provision which prevents it from proceeding should such consent not be forthcoming. This will inevitably make the task more difficult for the Committee and will also preclude the possibility of it undertaking an on-site investigation, but the Committee will doubtless be able to draw the appropriate inferences from a States Party's lack of cooperation.

90 Article 20 (5).

91 Article 20(4).

92 Article 20(5) UNCAT.

of this procedure is that a State Party's wrongdoing becomes notorious through publication.

It cannot be said that the optional procedure under Article 20 is particularly strong, in the sense that it tends to favour the State as opposed the individual victim. As a matter of *realpolitik,* however, the fairly gentle procedure contained in that provision may have the effect of encouraging more States to become party to the Convention. A further advantage may be that it allows the Committee to build up a relationship of trust with States Parties and that this may eventually lead to the development of more robust interventionist mechanisms.[93] It should also be noted as a final point that States which become party to the UNCAT are not obliged to accept the Article 20 procedure. Article 28(1) provides that a State may, at the time of signing or becoming party to the Convention, declare that it does not recognise the competence of the Committee which is provided for in Article 20. This provision, which allows States to 'opt out' of the procedure is somewhat unusual, for most human rights instruments require States to 'opt in' to intrusive supervisory mechanisms. It signifies, however, that one of the objectives of the Convention is to establish a sound cooperative base between the Committee against Torture and the individual States Parties.[94]

The European Convention on Human Rights and Fundamental Freedoms

The European Convention on Human Rights was adopted under the auspices of the Council of Europe in 1950 and entered into force in 1953.[95] It protects the traditional range of civil and political rights including freedom from torture.[96] The major advance in human rights protection signalled by the European Convention was the establishment of two institutions, the Commission and the Court, which were charged with its supervision and enforcement. Both the High Contracting Parties under Article 24 and individuals under Article 25 may bring applications before the Commission alleging violations of the rights protected by the Convention. Because of its relative longevity, the European Convention system has accumulated a substantial jurisprudence and has been able to offer considerable insight into the definition of torture at international law.

Under the European Convention torture is prohibited by Article 3 which provides:

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

This is supplemented by Article 15(2) which indicates that Article 3 may not be derogated from under any circumstances, including time of war and civil strife.[97]

93 Since the Convention by Article 29 allows for the possibility of amendment, it is conceivable that such a development may take place at some future date.

94 Voyame suggests that the inclusion of Article 28(1) 'at the last moment' is to be regretted, although he notes that few States have actually taken advantage of it. Voyame, op cit, above, note 57, p 51.

95 Loc cit, above, note 1.

96 For a comprehensive analysis of the rights protected see P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd edn, 1990), pp 213-517.

97 On the drafting history of Article 3 see BM Klayman, 'The Definition of Torture in International Law' (1978) 51 Temple LQ 449 at pp 468-75.

As with the Universal Declaration and the ICCPR, the prohibition on torture contained in Article 3 of the European Convention is exiguous and is not elaborated upon further. It has therefore fallen to the European Commission and Court to provide definitions of the concept of torture within the framework of the Convention.[98] In the *Greek Case*[99] the Commission was obliged to consider allegations of ill-treatment and torture meted out to opponents of the military junta who were being detained in Greek prisons. It appeared that such treatment occurred as a matter of course and that the authorities had taken no measures to curtail it. The Commission in its report in the *Greek Case*, after referring to the text of Article 3, stated:[100]

> It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is unjustifiable.

The word 'torture' is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.

It will be noted that the definition of torture used by the European Commission on Human Rights does not differ greatly from that adopted in the UN Convention against Torture.[101] The criterion of treatment which causes severe mental or physical suffering is clearly similar to that contained in Article 1 of the UN Convention, but there is no mention of the requirement that it should be inflicted intentionally.[102] Furthermore, the qualification that the treatment must be unjustifiable in a given situation seems to open the way for the incorporation of a reasonably strong subjective element in the definition of torture.[103] Thus, as Beddard points out, the circumstances and identity of the victim might very well be decisive in determining whether any action can be described as torture.[104] This was an issue which was developed by the European Court of Human Rights in *Ireland v United Kingdom.*[105] In that case the Irish government had complained to the European Commission on Human Rights that the use by the United Kingdom's security forces in Northern Ireland of the so-called 'five techniques' to interrogate suspected Provisional IRA members was a violation of Article 3. The 'five techniques', which were also referred to as 'interrogation in depth' by the British security forces, consisted of wall standing, hooding, subjection to noise, sleep deprivation and the imposition of a reduced diet. The Commission, applying its earlier

98 See L Kellberg, 'The Case-Law of the European Commission of Human Rights on Article 3 of the ECHR' in Cassese, op cit, above, note 7, p 96.
99 Denmark, Norway, Sweden and The Netherlands v Greece 12 YB (Special Edition).
100 Ibid, p 186.
101 Above, p 32.
102 Ibid.
103 It has also been suggested that the Commission by using the word 'unjustifiable' left the way open for States to argue that there might be the possibility of justification for torture and similar forms of inhuman treatment. See Kellberg, op cit, above, note 98, p 99.
104 R Beddard, *Human Rights and Europe* (3rd edn, 1993), pp 149-50.
105 Eur Ct H R, Ser A, No 25 (1978).

test established in the *Greek Case,* formed the view that the application of the 'five techniques' amounted to torture.[106] It was contradicted in this finding by the Court which held that the in-depth interrogation techniques were not torture but amounted only to inhuman and degrading treatment.[107] The Court took the view that while the interrogation techniques caused intense physical and mental suffering and aroused in their victims 'feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance', they were not of the particular intensity and cruelty implied by the word torture.[108] The Court indicated that in order to be classified as torture within the meaning of Article 3, the ill-treatment complained of 'must attain a minimum level of severity', but that such level of severity was a relative matter and depended on all the surrounding circumstances of the case, including the duration of the treatment, its physical or mental effects and, in some cases, the victim's sex, age and state of health.[109] From the Court's point of view therefore, while treatment meted out to a young, healthy man might not amount to torture, the same treatment when applied to an infirm, old woman might. Thus, in *Bonnechaux,*[110] the Commission, without finally deciding upon the matter, ruled that the detention for three years of a prisoner aged seventy four who suffered from diabetes and cardio-vascular problems might raise an issue under Article 3.

The introduction of a subjective element into the definition of torture by the Court, while recognising the reality that the perceptions by victims of the treatment to which they are subjected might vary, nonetheless raises certain difficulties. Not least among these is the fact that giving weight to a victim's own impression of his or her treatment may result in the application of differing standards both between the Commission and the Court and in different individual cases.[111] The focus of the UNCAT on the mental state of the torturer rather than on the perceptions of victims arguably leads to a much clearer solution. As van Dijk and van Hoof suggest,[112] there will always be difficulty in applying an abstract norm such as Article 3 to concrete cases, but it is suggested that inconsistency between cases might be reduced if the injection of subjective criteria are minimised. This does not mean to say that the perceptions of victims are irrelevant. Under the definition of torture in Article 1 of the UN Convention, the victim's response might be crucial in determining whether torture has taken place. An example of this might be the interrogator who is aware that his or her victim suffers from arachnophobia. In the normal course of events deliberately exposing a victim to small, innocuous spiders could in no way be considered an act of torture. If, however, the interrogator were aware that the detainee were an arachnophobe, then the deliberate exposure of such a person to spiders of any kind would undoubtedly fall within the

106 ECHR, Ser B at p 411.
107 Loc cit, above, note 105.
108 Ibid.
109 Ibid. This approach has been reaffirmed by the Court in *Tyrer v United Kingdom* Eur Ct H R, Ser A, No 26 and *Soering v United Kingdom* Eur Ct H R, Ser A, No 161.
110 *Bonnechaux v Switzerland,* 23 YB 496.
111 This particular objection will disappear when Protocol 11 to the European Convention enters into force. This will abolish the European Commission on Human Rights and establish procedures by which cases may be heard directly by the Court or a chamber of the Court.
112 Op cit, above, note 96, p 230.

definition of torture in Article 1 of the UN Convention: the interrogator would be intentionally inflicting severe mental pain on his or her victim.

The European Convention for the Prevention of Torture

The European Convention for the Prevention of Torture, unlike other instruments in the field, does not establish a new definition of torture, but is designed simply to improve the institutional structure for the prevention of torture within the territories of the contracting States.[113] The Convention takes as its starting point the prohibition of torture which is contained in Article 3 of the European Convention. This prohibitory provision is not reproduced in the text of the Convention, but is merely reiterated in the preamble of that instrument.[114] The preamble also acknowledges that although there are mechanisms in the European Convention on Human Rights for allowing victims to enforce their rights, the Convention nonetheless goes on to say in its Preamble that the member States of the Council of Europe are:[115]

> Convinced that the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or publishment could be strengthened by non-judicial means of a preventive character based on visits.

The Convention thus establishes a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which consists of a number of members equal to that of the Parties to the Convention.[116] The members serve in their individual capacities for a period of four years.[117] The function of the Committee is to conduct either periodic or ad hoc visits and to examine the treatment of persons deprived of their liberty by a public authority.[118] By Article 2 such visits must be allowed by States which become party to the Convention. It may also, at its discretion, engage experts to assist it in its investigations.[119] Thus, individuals who may have specialist medical expertise in the field of torture trauma treatment may be co-opted to assist the Committee. Prior to the conduct of a visit by the Committee, it must notify the State to be visited.[120] In the case of periodic visits, such notification is usually given in the preceding year. In the case of ad hoc visits, however, the time period may be much shorter, since an ad hoc visit is likely to be prompted by reports of untoward occurrences within the State in question. States Parties may, however, make representations against the time of a visit or the place to be visited by the Committee under Article 9 of the Convention on the grounds of 'national defence, public safety, serious disorder in places where persons are deprived of their liberty, the medical condition of a person or that an urgent interrogation relating to a serious crime is in progress'. It is noticeable that the circumstances in which a State Party may make a

113 (1988) 27 ILM 1152. Hereafter 'the Convention' or 'ECPT'. For comment on the Convention see A Cassese, 'A New Approach to Human Rights: The European Convention for the Prevention of Torture' (1980) 83 AJIL 128; M Evans and R Morgan, 'The European Convention for the Prevention of Torture: Operational Practice' (1992) 41 ICLQ 590.
114 Preamble, para 3.
115 Preamble, para 5.
116 Article 4 ECPT.
117 Article 5(1) ECPT
118 Article 1 ECPT.
119 Article 7(2) ECPT.
120 Article 8(1) ECPT.

representation against a proposed visit are those in which the commission of acts of torture are most likely to occur. The strength of the Convention is, however, that the State is only entitled to make 'representation' against the conduct of such a visit; it is not permitted to forbid such visits. Furthermore, even if the State denounces the Convention, such denunciation only has effect one year after the event.[121] A State which therefore proposed to use denunciation of the Convention in an attempt to 'cover up' prohibited acts would still be open to visits by the Committee in the one year period following such denunciation.[122]

Following the Committee's visit, during which its members are entitled to visit all locations and detention facilities within the territory of a State Party,[123] it draws up a report on the facts found during the visit.[124] Once the report has been adopted by the Committee it is sent to the State Party concerned along with any recommendations.[125] The work of the Committee together with its report and recommendations is entirely confidential.[126] There are, however, two ways in which its report might be published. First, if the State Party agrees or requests such action,[127] and second, under Article 10(2) the Committee may by a majority of two thirds of its members make a public statement on the matter if the State Party concerned fails to cooperate or refuses to improve the situation in its territory in the light of the Committee's recommendations. Before the Committee may do this, however, the State Party must be given an opportunity to make its views known.[128]

There is some disagreement as to whether the European Convention for the Prevention of Torture is a necessary development or whether it simply duplicates the system of protection contained in the European Convention on Human Rights.[129] There seems to be little doubt, however, that the Convention for the Prevention of Torture establishes a useful preemptive mechanism for ensuring the maintenance of appropriate standards for the treatment of detainees in the Council of Europe Member States. The European Convention mechanism is clearly useful for policing violations of Article 3 of that instrument, but by its nature it is *post hoc* and essentially reactive. While the Torture Committee is equipped with the 'sanction' of publicising its views under Article 10(2), its preferred *modus operandi* will be the constructive engagement of States Parties in creating, developing and maintaining the appropriate infrastructure to ensure the proper treatment of those in official detention.

The American Declaration on the Rights and Duties of Man

The formal protection of human rights in the Americas has a long history which is conspicuously unmatched by the actual practice of a number of

121 Article 22 ECPT.
122 Article 22(2) ECPT.
123 Under Article 14(3) ECPT, however, 'a party may exceptionally declare that an expert or other person assisting the Committee may not be allowed to take part in a visit to a place within its jurisdiction.'
124 Article 10(1) ECPT.
125 Ibid.
126 Article 11(1) ECPT.
127 Article 11(2) ECPT.
128 Article 10(2) ECPT.
129 See Cassese, op cit, above, note 113, p 135. Cf Evans and Morgan, op cit, above, note 113, pp 591-4.

States in the Western Hemisphere.[130] For present purposes, however, comprehensive efforts to protect human rights in this region began with the entry into force of the Organization of American States (OAS) Charter in 1948.[131] Although the Charter made only exiguous references to human rights, this was remedied by the contemporaneous adoption of a resolution entitled the American Declaration on the Rights and Duties of Man.[132] Although this resolution was not originally legally binding, it has, through the process of institutional amendment and incorporation within the Charter system, become an authoritative interpretation of the phrase 'human rights' within the Charter.[133] It is also the standard by which all OAS Member States are judged in their protection of human rights.[134]

Unlike the other instruments examined so far, the American Declaration does not contain a specific prohibition on the use of torture. Article XXV of the Declaration which deals mainly with due process in criminal cases provides that persons deprived of their liberty during the criminal process have the right to 'humane treatment during the time [they are] in custody'. Article XXVI also provides that 'every person accused of an offence has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.' While there is little doubt that torture, however defined, would clearly fall within the concept of inhumane treatment within Article XXV or that cruel, infamous or unusual punishment within the meaning of Article XXVI would also comprehend acts of torture, there has, in fact, been little inclination on the part of the Inter-American Commission on Human Rights to elaborate the meaning of these terms with any clarity. While the Commission has not refrained from characterising certain acts as torture, and given the nature of some of these acts, it would have been virtually impossible for any tribunal to avoid conferring such an epithet upon them, it has not felt constrained to provide detailed technical definitions of the concepts involved. The explanation for this is probably derived form the acutely hostile environment in which the Inter-American Commission has been obliged to labour. Faced with massive and widespread human rights violations involving the systematic use of disappearances and torture as means of combating political opposition, the Inter-American Commission has been primarily concerned with developing its protective and enforcement machinery rather than elaborating the meaning or content of the norms which it has been obliged to apply on numerous occasions. In the Commission's view evidence supporting the use of beatings, *submarino,*

130 A record of the human rights situations in various American States can be found in the series of annual and country reports published by the Inter-American Commission on Human Rights. These are also reproduced in the *Inter-American Yearbook of Human Rights* which is published on an annual basis.

131 119 UNTS 48.

132 Loc cit, above, note 1.

133 Inter-American Court of Human Rights, Advisory Opinion OC-10/89 of July 14, 1989, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights* (1990) 29 ILM 379.

134 See the Inter-American Commission on Human Rights decisions in *The 'Baby Boy' Case* Resolution No. 23/81, Case 2141 (United States), March 6 1981, Inter-American Commission on Human Rights, *Annual Report*, 1980-81, 25-54 and the *Juvenile Death Penalty Case 9647 v United States*, (hereafter 'Juvenile Death Penalty Case'), *Annual Report of the Inter-American Commission on Human Rights 1986-87*, OEA/Ser.L/V/II.71. Doc. 9 rev. 1. 22 September 1987. Original: Spanish 147.

bastinado, planton, electrocution and rape as methods of interrogation and punishment have not required precise definition to render them capable of classification as torture.[135]

Under the OAS Charter and its Statute the Inter-American Commission is equipped with three major supervisory and enforcement mechanisms.[136] First, the Commission has a general competence to undertake fact-finding in relation to the protection of human rights under the OAS Charter.[137] In undertaking this task it may become aware of less than satisfactory situations in certain states and may therefore decide to probe more deeply, perhaps by conducting an observation *in loco* with the consent of the State involved.[138] In this way the Commission may identify means of improving the conditions of detainees and make recommendation to the State on this matter. The Commission's second supervisory and enforcement mechanism is by way of the individual petition system under Article 9(bis) of its Statute.[139] Like all other international individual petition systems, that employed by the Inter-American Commission is largely *post hoc* and remedial rather than preventive. Nonetheless it provides a useful mechanism for policing human rights violations including torture. The third supervisory mechanism enjoyed by the Commission is arguably its most effective. This is the country report.[140] Where the Commission becomes aware of widespread human rights violations in a particular OAS Member State it may undertake a detailed investigation of the country concerned. This not only requires the State in question to provide detailed information to the Commission, but it also permits the Commission to request the Member State to allow it to conduct an on-site observation.[141] While the State under investigation is not compelled to allow the Commission to conduct an on-site investigation in its territory, failure to do so necessarily increases the burden of proof on the State when attempting to rebut any allegations of torture made against it. Of course, an on-site investigation is also more likely to lead to the discovery and confirmation of any evidence supporting acts of torture denounced by individuals. A graphic example of this is contained in the report of an on-site investigation conducted by the Commission in El Salvador where it was able to match certain locations with the description of secret torture chambers denounced by a number of individuals. Attempts by the State to suggest that certain electrical equipment was used for photographic purposes and that steel bedsprings stacked outside the cell were simply in storage seemed to confirm rather than displace allegations of electric shock treatment to detainees who were strapped to beds through which electric current was

135 See P Nikken, 'L'action contre la torture dans le système interamericain des droits de l'homme' in Cassese, op cit, above, note 7, p 73 at pp 86-94.

136 See C Medina Quiroga, *The Battle of Human Rights: Gross Systematic Violations in the Inter-American System* (1988), pp 119-59.

137 Ibid, pp 128-9.

138 Ibid.

139 On the development of the individual petition procedure under the Commission's Statute see T Buergenthal and RE Norris and D Shelton, *Protecting Human Rights in the Americas* (3rd edn, 1990), pp 8-15; For a brief discussion of the Commission's development see S Davidson, *The Inter-American Court of Human Rights* (1992), pp 13-18.

140 See T Buergenthal, 'The Inter-American System for the Protection of Human Rights' in T Meron (ed), *Human Rights in International Law* (1984), p 439 at pp 454-5.

141 For the procedure followed in on-site investigations see Buergenthal et al, op cit, above, note 139, pp 286-315.

passed.[142] Again, however, the country report system operates as a form of *post hoc* control rather than a preventive mechanism. While this undoubtedly has its limitations, it may perform something of a deterrent function as far as other States are concerned and may also inhibit the State under investigation from indulging in similar acts in the future.

The American Convention on Human Rights

The American Convention on Human Rights was adopted in 1969 and entered into force in 1980.[143] It is modelled on the European Convention on Human Rights and like that Convention contains a prohibition on the use of torture. Furthermore, it establishes a Commission and a Court to supervise and enforce its operation.[144] Unlike the European Convention, however, the American Convention gives a somewhat clearer indication of the nature of torture by defining the context in which the phenomenon might occur. Article 5 of the Convention which is entitled 'Freedom from Torture' provides:

1. Every person has the right to have his physical, mental and moral integrity respected.
2. 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 their inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors who are subject to criminal proceedings shall be separated from adults and brought before specialised tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

The clear implication to be drawn from Article 5 is that detention, punishment and torture are intimately related to each other. Thus, by indicating the context and the rationale for punishment by detention, the American Convention signifies that torture is never justifiable as a penal measure. Article 5(1) also indicates that torture has both a physical and mental dimension, while its reference to 'moral integrity' manifests the drafters concern with the possibility that an individual might, through torture, be compelled to behave in a manner contrary to his or her conscience. This demonstrates a correlation between freedom from torture and the right to freedom of expression and freedom of thought, conscience and religion.[145] To date, however, neither the Inter-American Commission nor the Inter-American Court has had occasion to rule on the meaning of Article 5. It has been referred to obliquely in the *Honduras Disappearance Cases,* but only to confirm that enforced disappearances are also usually

142 Ibid, pp 330-47.
143 Loc cit, above, note 1.
144 Article 33 designates the Inter-American Convention on Human Rights and the Inter-American Court of Human Rights as the organs competent to hear matters relating to the fulfilment of the commitments made by the States Parties to the Convention. The seven person Commission is established under Article 34, while the seven judge Inter-American Court of Human Rights is provided for in Article 52.
145 These are protected by Article 12 and 13 of the American Convention.

associated with acts of torture.[146] Like the ICCPR and the European Convention, the prohibition of torture in the American Convention is non-derogable.[147]

The enforcement mechanisms of the American Convention are similar to those of the European Convention on Human Rights. The major difference is that whereas the European Convention allows inter-State applications alleging violations of the Convention to be taken to the Commission as a matter of right, the American Convention renders such applications optional and dependent upon reciprocity. The reason for this is clear. In a hemisphere which lacks the cultural and political homogeneity of Europe, the drafters took the view that inter-State applications would be likely to lead to political hostility between disputant States.[148] The experience of the inter-State petition system under the European Convention supports the veracity of this view.[149] The particular conditions of the Western Hemisphere also lends it considerable credibility. When it is recalled that El Salvador and Honduras fought a war over the outcome of a soccer match, it might well be thought that allegations of human rights violations by one State against another would be unlikely to ameliorate the situation of the individuals concerned. The primary method of policing the prohibition on torture in the American Convention therefore is through the individual petition procedure under Article 44. This is somewhat broader than the rights of petition contained in the Optional Protocol to the ICCPR and Article 25 of the European Convention in that there is no requirement that the applicant be a victim. Indeed, the American Convention not only permits an *actio popularis*, but also makes provision for any non-governmental-organisation which is recognised in any of the OAS Member States to lodge a petition.[150] Thus, a variety of NGOs concerned with human rights violations in the Americas located in Canada, Costa Rica or the USA, for example, would be able to lodge denunciations of violations with the Commission without being victims themselves. This is a particularly important development in terms of policing a human rights regime.

The Inter-American Convention to Prevent and Punish Torture

The Inter-American Convention to Prevent and Punish Torture was adopted on 9 December 1985 and entered into force on 28 February 1987.[151] According to its preamble the Convention records that its adoption is necessary in order to permit the rules prohibiting torture in the OAS Charter, the UN Charter, the American Declaration and the Universal

146 *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Series C No. 4, paras 155 and 156; *Fairen Garbi and Solis Corrales Case*, Judgment of March 15, 1989, Series C No. 5, paras 159 and 160. Here the Court said that 'disappeared' persons who had regained their liberty had often been subjected to 'merciless' treatment, including torture and other cruel, inhuman and degrading treatment 'in violation of the right to physical integrity recognised in Article 5 of the Convention'. The Court also declared that the prolonged isolation and deprivation of communication to which disappeared persons were subjected were in themselves 'cruel and inhuman treatment' which were injurious to the psychological and moral integrity of the persons concerned.

147 Article 27(2) ACHR.

148 T Buergenthal, op cit, above, note 140, p 455.

149 Above, p 30.

150 Buergenthal, op cit, note 14, p 441.

151 Loc cit, above, note 1. Hereafter 'Inter-American Convention on Torture' or 'IACPPT'. See FH Kaplan, 'Combating Political Torture in Latin America: An Analysis of the Organization of American States Inter-American Convention to Prevent and Punish Torture' (1989) XV Brooklyn Journal of International Law 399.

Declaration to take effect.[152] While recognising the existence of the prohibition on torture in Article 5 of the American Convention on Human Rights,[153] the clear implication of the Inter-American Convention on Torture is that this is insufficient to meet the wider demands of the prevention of torture. Article 2 of the of the Inter-American Convention defines torture thus:

> For the purposes of this Convention, torture shall be understood to be 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 pain or mental anguish.

Article 2 then goes on to exempt physical or mental pain or suffering which is inherent or solely the consequence of lawful measures, providing that they do not include the acts or use of methods referred to above. The purpose of this provision is to preclude the definition of torture from applying to measures which are incidental and inherent to lawful detention and punishment. Article 5 of the Inter-American Convention also makes clear that torture may not be justified on grounds of national emergency. It also goes on to provide that 'neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.' Furthermore, Article 4 precludes superior orders being advanced as a defence to any criminal liability for the commission of torture.

While there are similarities between the definition of torture in the Inter-American and UN Torture Conventions, the continuity of the latter with the definition in the American Convention is clear since torture's association with the conduct of the criminal investigatory process is clearly identified. It is also noticeable, however, that the Inter-American Torture Convention adopts the objective approach to the definition of the subject matter. One major point of difference between the two instruments is that while the UN Convention demands that the physical or mental pain inflicted by the torturer should be 'severe',[154] there is no such requirement in the Inter-American Convention. The absence of this qualification is a welcome advance since it obviates the need to enter into a qualitative appreciation of the phenomenon and makes it easier to apply the concept to concrete situations. It certainly sets a lower threshold than other instruments and moves away from the subjective analysis which is required under the European Convention on Human Rights.[155]

One further addition to the definition of torture included in the Inter-American Convention which requires some comment is the final sentence which indicates that torture may be committed in circumstances where there is no pain or mental anguish if the intention of the torturer is to obliterate the personality of victims or to diminish their physical or mental capacities. This would clearly comprehend drug-based techniques under

152 Preamble, para 4 IACPPT.
153 Preamble, para 3 IACPPT.
154 Above, p 32.
155 Above, p 39.

which the victims are not aware of pain or mental anguish because of the soporific nature of the drugs, but which nonetheless lead to mental or physical incapacity. This takes torture beyond the narrower definition which includes the deliberate inflicting of physical or mental *pain* and suffering to the realms of the intentional causing of *harm* to a victim. Given that torture may be used as a punishment rather than simply as an interrogation device, the extension of the definition of torture into this area is to be commended. It makes clear that any attack upon the physical or mental integrity of a victim is unacceptable, whether it actually causes perceptible pain to that victim or not.

Under the Inter-American Torture Convention States are required to take effective legislative, administrative, judicial or other measures to prevent and punish torture and inchoate offences associated with torture within their jurisdiction.[156] They are also required to exercise personal jurisdiction over their own nationals who may commit acts of torture outside their territory[157] and may assume passive personality jurisdiction over persons who may have perpetrated torture against one of their nationals.[158] In addition to these jurisdictional extensions, States area also required to apply the principle of *aut dedere aut iudicare* in relation to fugitive offenders.[159] This creates a comprehensive and interlocking jurisdictional regime for combating torture throughout the territories of the States Parties.

Two further aspects of the Convention relating to extradition require some comment. The first is that Article 15 requires that no provision of the Convention may be interpreted as limiting the right of asylum nor as altering the obligations of the Parties in matters of extradition. This raises the unfortunate possibility that a person whose crimes are associated with political offences may well escape prosecution on the grounds of the political offence exception to extradition.[160] To some extent this reflects the political realities of inter-State relations in the Western Hemisphere. Second, like the UNCAT,[161] States Parties agree not to return or extradite person to countries where there are grounds to believe they would be in danger of being subjected to torture.[162]

Under the Inter-American Torture Convention Parties also agree to take measures to ensure that in the training of police officers and other public officials responsible for the custody of persons special emphasis is placed on the prohibition of the use of torture in interrogation, detention or arrest.[163] It is noteworthy that Article 10 of the Convention stipulates that no statement which has been obtained through torture may be admitted as evidence in legal proceedings, except in proceedings against the alleged torturer him or herself as evidence of the means by which the statement was elicited.[164] Where any person makes an accusation that he or she has been subjected to torture, States are required to guarantee that such a person

156 Article 6 IACPPT.
157 Article 12 IACPPT.
158 Article 12(c) IACPPT. See above, pp 00-00 on passive personality jurisdiction.
159 Article 14 IACPPT.
160 For an extensive analysis of the political offence exception in extradition see G Gilbert, *Aspects of Extradition Law* (1991), pp 113-82.
161 Above, p 35.
162 Article 13 IACPPT.
163 Article 7 IACPPT.
164 Article 10 IACPPT.

will have the right to an impartial examination of his or her case.[165] Furthermore, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within the jurisdiction of a State Party, the State must proceed immediately to conduct an investigation into the allegation and initiate the appropriate criminal process to punish any torturer.[166] The Inter-American Convention also lays down the standard of punishment which is to be applied in cases of torture. Article 6(2) provides that States Parties are to make acts of torture 'punishable by severe penalties that take into account their serious nature'. Furthermore, State Parties undertake to incorporate into their national laws a right of adequate compensation for victims.[167] If the domestic legal system should fail the claimant alleging that he or she has been the victim of torture, Article 8(3) makes the rather obvious point that 'the case may be submitted to the international fora whose competence has been recognised by that State.' This also corresponds with Article 16 which makes clear that the Inter-American Convention on Torture does not affect the provisions of the American Convention on Human Rights nor, by implication, the American Declaration on the Rights and Duties of Man nor any other analogous international instrument.

Unlike cognate instruments the Inter-American Torture Convention does not establish a special supervisory institution. It relies instead upon existing OAS institutions to discharge this function. The institution bearing primary responsibility for supervising the Convention is the Inter-American Commission on Human Rights. States Parties are required to inform this body of any legislative, judicial, administrative or other measures adopted in the application of the Convention.[168] The Commission itself is enjoined by Article 17 of the Convention to 'endeavour in its annual report to analyse the existing situation in the Member States of the Organization of American States in regard to the prevention and elimination of torture'. The annual report which is referred to in this provision is that discussed above in the consideration of the Commission's general competences under the OAS Charter.[169] As noted there, this report becomes a matter of public record and is open for discussion by the OAS General Assembly at its annual session. While the specifics of the human rights situation in any particular Member State may or may not be the subject of debate, the report itself becomes a matter of notoriety. Thus State wrongdoing, as well as State progress in combating torture, is exposed to public gaze.

While the institutional aspects of the Inter-American Torture Convention may appear to be weak, it should be noted that this instrument is fundamentally different to those considered so far. The IAPPTC is aimed at strengthening the criminal law and law enforcement procedures of its States Parties within the context of an already comprehensive supranational human rights supervision and enforcement system. The aim of the Inter-American Convention on Torture is to alter the penal cultures of the States Parties by reinforcing the ethos of non-violence in dealing with any detained persons whether in time of peace or national emergency. The

165 Article 8 IACPPT.
166 Ibid.
167 Article 6 IACPPT.
168 Article 17 IACPPT.
169 Above, pp 43-44.

history of the widespread use of torture in the Western Hemisphere in a variety of circumstances indicates that this has been, and in many instances continues to be, a matter of vital importance.

The African Charter

The African Charter on Human and Peoples' Rights is the most recent of the regional human rights instruments. It was adopted in 1981 by the Organisation of African Unity's Assembly of Heads of State and Government in Banjul, and entered into force in 1986.[170] As such a recent addition to the range of international human rights instruments, the Charter and the African Commission on Human Rights created under it have accumulated little practice.[171] This has been further exacerbated by the institutional and economic problems which have beset many African States. In addition to development problems, many countries of the African continent have been racked by internal strife and genocidal impulse both of which have prevented meaningful progress in the field of human rights.[172]

Like all other analogous instruments the African Charter prohibits the use of torture. Article 5 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.

Other than this bare prohibition, there is no further assistance to be had in defining the meaning of torture within an African context. The eleven member African Commission which is empowered to interpret the rights protected under the Charter and to deal with inter-State and individual complaints of violation of those rights has not yet been required to do so. In one sense, this takes the present inquiry no further forward since it adds little to an understanding of the definition of torture from an African perspective. The only point which might be made is that whereas under the Inter-American system torture was seen to be intimately connected with the penal process by virtue of its context,[173] in the African system torture and like practices are contextually linked with slavery and the slave trade. In both instances the prohibitory provisions clearly reflect the immediate historical concerns of both continents. It is perhaps surprising, given the period in which the Charter was drafted, that it does not refer to the system of apartheid or institutionalised discrimination leading to separate development. Article 1 of the International Convention on the Suppression and Punishment of Apartheid which was adopted in 1973 declared apartheid to be an international crime and equated it with genocide. It would therefore have been but a small conceptual leap to have placed this particular practice within the context of torture and related activities in Article 5 of the African Charter.

Despite these observations, it is apparent that should the African Commission be confronted by a situation in which it was compelled to interpret Article 5 of its Charter, then it would be able to have recourse to other

170 Loc cit, above, note 1.
171 For an overview of the African system see Davidson, op cit, above, note 24, pp 152-61.
172 For an example of some of the issues here, see Amnesty International, *Annual Report 1995*, p 249 (Rwanda).
173 Above, pp 44-48.

international practice as an aid. Whether the Commission would rely upon a fundamentally objective approach to interpreting the right or whether it would follow the more subjective approach as evidenced by the European system can only be a matter of speculation.

Torture in customary international law

Investigation of whether torture has become prohibited under customary international law, as opposed to treaty-based international law, is not simply a theoretical nor an academic inquiry, for if it can be demonstrated that torture is thus prohibited, States will be bound to observe the prohibition regardless of whether they have become party to any of the international instruments mentioned above.[174] Furthermore, if it can be argued that the prohibition of torture is a norm of ius cogens,[175] then its absolute and indefeasible character will be beyond question, and any State which violates the norm will be identifiable as an international delinquent. Two practical consequences flow from this. First, any inquiry and complaint by a third State about a State which practices torture cannot be dismissed as an unjustifiable intervention in the latter's internal affairs. Any customary international law prohibition of torture elevates the matter from the realms of domestic jurisdiction to those of the international plane.[176] Second, many States possess constitutions which allow their courts to apply customary international law directly.[177] The customary law prohibition of torture may thus not only provide a source of domestic law prohibition but may also supply an appropriate cause of action leading to the award of damages.[178] The difficulty lies in determining whether torture is prohibited under customary international law and whether it does possess a ius cogens character.

The starting point in determining the precise status of torture in customary international law is Article 38(1)(b) of the Statute of the International Court of Justice. This provision, which describes the sources of international law, defines custom as 'evidence of a general practice accepted as law'.[179] Thus, in order to demonstrate the existence of a customary norm, the proponent must show that there has been widespread and consistent State practice for a sufficient duration which States consider themselves bound to follow as a matter of legal obligation, this latter being known as *opinio iuris*.[180] State practice is demonstrable by reference to domestic legislation, acceptance of treaty obligations, decisions of domestic courts, military manuals and so on. Providing evidence of State practice in the prohibition of torture presents few difficulties.[181] The vast majority of

174 As a matter of international law, States are bound by customary international law whether they have taken part in its creation or not. See M Akehurst, 'Custom as a Source of International Law' (1974-75) 47 BYIL 1.

175 For the definition of *ius cogens* see above, p 25.

176 On matters essentially within the domestic jurisdiction of States see Brownlie, op cit, above, note 69, pp 290-97.

177 For an example of this, see the identification and application of torture as a norm of customary international law in the United States in *Filartiga v Pena Irala* 630 F. 2d 876 (2d Cir. 1980).

178 As in *Filartiga v Pena Irala*, loc cit, above, note 178.

179 Brownlie, op cit, above, note 69, pp 3-11; Akehurst, op cit, above, note 175; van Hoof, *Rethinking the Sources of International Law* (1983), pp 85-116. On the creation of customary international law in the human rights field see T Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), especially pp 3-10.

180 Brownlie, op cit, above, note 69, pp 7-11.

181 Ibid.

States prohibit torture in their domestic legislation and large numbers of States have become party to the various international instruments aimed at outlawing the practice.[182] Whether this has been done out of a sense of legal obligation doubtless varies from State to State and, indeed, it may appear artificial and theoretically difficult to inquire into the subjective motives of complex corporate entities such as States.[183] Despite these reservations, the widespread existence and uniform nature of the prohibition would seem to render such inquiry otiose. This view is reinforced by the non-derogable quality of the prohibition in nearly all the legally binding instruments considered above. The ICCPR, the UNCAT, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter and the relevant Geneva Conventions and Protocols all make clear that the prohibition of torture is one of the few rights from which no derogation is permitted in times of public emergency. It would seem therefore that the prohibition on the use of torture by States and their representatives bears the quality of a *ius cogens* norm.

Despite the adoption of national and international norms prohibiting the use of torture in any situation, there is a clear disparity between the existence of these norms and their observance. It may therefore legitimately be questioned whether the violation of rules prohibiting torture in any way weakens those rules. The view which has been taken by the International Court of Justice on this question is that where deviant conduct is treated as a violation of the rule and is not regarded by third parties as an attempt to alter its content, then this has the effect of strengthening rather than weakening the rule in question.[184] Furthermore, as the UN Human Rights Commission's Special Rapporteur on Torture, Mr Kooijmans, has observed, no State denies the existence of the prohibition on torture; they simply deny that they have performed such an act.[185] Given the general level of condemnation which the practice of torture attracts from a wide variety of State, international institution and NGO sources, it seems undeniable that this is a matter which is now fully regulated by customary international law. The problem, of course, is to determine the content of the rule. This is a question which has yet to be addressed by a competent international tribunal. Even when the matter has arisen before a domestic tribunal as in *Filartiga v Pena Irala*,[186] there has been no attempt to define the concept of torture, but simply to accept that certain brutal practices amount to the prohibited conduct.

Torture as an International Crime?

The criminal responsibility of individuals for certain behaviour under international law has long been recognised. Ever since the eighteenth century it has been accepted that piracy attracts universal jurisdiction which permits any State into whose hands the pirate might fall to exercise

182 For a review of domestic legislation see *Report by the Special Rapporteur*, op cit, above, note 3, pp 17-24.

183 A number of jurists take the view that it should not be necessary to prove the existence of *opinio iuris* or that it can, in any event, be implied from a course of conduct. See Akehurst, op cit, above, note 175, pp 31-42

184 *Nicaragua v United States of America (Paramilitary Activities Case)*, 1986 ICJ Rep at 98. See T Meron, *Human Rights and Humanitarian Norms as Customary International Law*, pp 58-9.

185 *Report by the Special Rapporteur*, op cit, above, note 3, p 23.

186 Loc cit, above, note 178.

jurisdiction over him or her.[187] The rationale for permitting the exercise of such extensive jurisdiction was the fact that piracy was acknowledged to be a practice which all States had a material interest in suppressing. It was not until the end of the Second World War and the establishment of the Nuremburg and Tokyo War Crimes Tribunals, however, that the notion of the international crime was further developed.[188] Article 6 of the Charter of the International Military Tribunal established that international responsibility was to be incurred for crimes against peace, war crimes and crimes against humanity.[189] This has recently been further advanced by the establishment by the UN Security Council of war crimes tribunals for the former Yugoslavia[190] and Rwanda[191] to exercise jurisdiction over, and punishment of, those who have committed similar crimes under international law. In addition to these developments, a number of treaties have declared genocide, apartheid, hijacking, offences against diplomats, hostage taking and terrorism as international crimes that is, crimes deriving their status and content from international rather than municipal law.[192] Furthermore, since 1982 the International Law Commission has been working on a Draft Code of Crimes Against the Peace and Security of Mankind and the creation of an international criminal court for the prosecution and punishment of such crimes.[193] While the draft code refers to the instigation of mass torture as an international crime, it does not take the step of defining torture itself as such, although one member of the ILC has suggested that mass torture be replaced with systematic torture.[194]

In order to determine whether torture is indeed an international crime or whether it has the capacity to become so depends in large measure upon what the definition of an international crime is. Unfortunately there is no agreement upon this either at the practical or theoretical level. A number of commentators have posited various tests, but these remain within the sphere of speculation rather than reality. Some, such as Bassiouni,[195] consider that an international crime has its origins in the convergence of the international aspects of municipal law, while others take the view that in order for an act or omission to be a crime at international law it must derive from either customary or treaty based international law.[196] Whichever of these tests were to be adopted, it seems tolerably clear that torture would fit within both. In the absence of an agreed definition of an international crime, and in the absence of any international criminal court to try and punish any such an offence, the utility of declaring torture an international crime remains debatable.[197] If torture were to be declared a crime by, say, an amendment to the UNCAT, this might have the effect of

187 See M Shaw, *International Law* (3rd edn, 1991), pp 411-12.
188 See H-H Jescheck, 'International Crimes' in *Encyclopedia of International Law* (1995), Vol II, p 1119.
189 (1945) 39 AJIL, Supp, 257.
190 S/Res/827 (1993) of 25 May 1993, (1993) 32 ILM 1203.
191 S/Res/955 (1994) of 8 November 1994, (1994) 33 ILM 1598.
192 See C Bassiouni (ed), *International Criminal Law* (1986) Vol 1: Crimes, pp 363, 367.
193 YBILC 1991, A/CN.4 Ser.A/1991/Add.1(Pt 2), p 103.
194 YBILC 1991, A/CN.4 Ser.A/1991, p 221 (Mr Tomuschat).
195 C Bassiouni, 'An Appraisal of the Growth and Developing Trends of International Criminal Law' (1974) RIDP 405.
196 See Q Wright, 'The Scope of International Criminal Law: A Conceptual Framework' (1975) VJIL 561.
197 Kaplan, op cit, above, note 151 takes a positive view of such an approach.

increasing the gravitas of the prohibition and laying down a marker of future intention should an international criminal court be established, but beyond this it would add little to the current legal status of the norm.

III. CONCLUSION

The many attempts to prevent, control and punish acts of torture since the end of the Second World War have led to a complex system of instruments and institutions at the international level. Whether this has had any measurable effect on the practice of torture is unclear, but it would certainly seem that a State's ability to mask torture which takes place within its territory is now severely curtailed given the intrusive nature of the relevant institutions and their various policing mechanisms. Given the fragmented nature of international action against the practice, however, it might legitimately be asked whether any improvements can be made in the field as a whole. Such an inquiry is, in some senses, academic, since institutional structures take on a life of their own and are only susceptible to modification with the exercise of enormous political will. It is often so difficult to reach agreement at the international level that suggestions for modification of existing structures are often set aside for fear that any reappraisal of the situation will lead to the destruction or dilution of that which is currently in existence. These observations notwithstanding, the question of whether the international regime for the prevention and punishment of torture might be improved can be addressed under the following headings:

Definition. Quibbling over definitions is very often seen as a refuge for those who wish to avoid making decisions on important issues. The need to define torture in the most comprehensive way possible is, however, of crucial importance since this may very well affect the culture surrounding the use of torture in a particular region or State. In reviewing the various instruments above, it has become evident that there are a number of ways of defining torture and that in many instances the context of torture within the broader scope of the prohibition provides a key to the historical concerns of the geographical area within which the instrument has arisen. The Inter-American Convention on Torture, which is the most recent of all the instruments, clearly reflects this view. That instrument contains, however, the most comprehensive and least restrictive definition of torture. Two of its components are particularly relevant for the purposes of the present discussion. First, that it is the intention of the torturer which is crucial in determining whether a particular act amounts to torture and second, the absence of any qualifying criteria attached to the intensity or otherwise of the pain and suffering which is inflicted. It may be argued that focussing upon the intention of the person who commits the act rather than upon its consequences or the perceptions of the victim yields a far more desirable result in terms of characterising the prohibited conduct than does any attempted analysis of the subjective attributes such as the intensity or severity of the pain which is inflicted. Second, the IACPPT makes a qualitative shift away from inflicting pain to causing harm to victims. As noted above, this approach is to be preferred not simply because it makes clear that any physical or mental harm caused with intent is a prohibited act, but because it is a significant attempt to change the perception of torture.

From a practical point of view, however, it is unlikely that a homogeneous definition of torture will arise in a multilateral instrument within the foresee-

able future, but it may nevertheless be possible to argue that the customary law definition may be capable of assuming this wider dimension.

Prevention. Prevention of torture is clearly to be preferred to curing its effects and therefore the institution and periodic review of appropriate domestic protective measures should be the primary focus of international instruments. In this sense the approach adopted by the UN, European and Inter-American torture conventions provide a useful starting point in requiring appropriate domestic supervisory mechanisms be to set in place and to be the subject of review at regular periods. Where this is supplemented with the requirement to report to international bodies, the efficacy of this procedure is likely to be enhanced considerably. Further enhancement undoubtedly arises from the approach adopted by the European Convention Against Torture in which regular on-site visits are required. While such on-site visits by panels of independent persons to inspect a State's detention facilities and control of interrogation procedures for detainees would undoubtedly be the optimum supervisory method in this field, equivalent in some ways to verification in disarmament agreements, it is unlikely that many States would be willing to tolerate such highly intrusive procedures. It is perhaps significant that it is only the European Convention which proposes such an approach, and this can be explained largely on the basis of the political and cultural homogeneity of the States involved and the trust which has been established between these States and the human rights institutions of the region.

Deterrence. While the preventive effects of supervisory systems are clearly their greatest virtue, they also have a deterrent role. For the most part, States abhor the adverse publicity which is attracted by a condemnatory report by an international organisation. Although a number of the investigatory systems established by some of the instruments referred to above are conducted on the basis of confidentiality, they generally terminate in the publication of a report. The wish to avoid adverse comment by the UN Committee against Torture, the European Committee Against Torture or the Inter-American Commission in the wake of an investigation is a strong motivating factor for the governments of most States to ensure that the systematic use of torture is prohibited.

While the primary aim of any action to combat the use of torture should be to create the conditions and the culture which render it inimical to law enforcement and detention, it is undeniable that international cooperation also has a role to play in combating the practice. The strategy adopted by the UN Convention and the Inter-American Convention on torture which extends the jurisdictional capacities of States provides a useful weapon. The application of the *aut dedere aut iudicare* principle creates an interlocking system which does not permit torturers to flee to another jurisdiction in the hope that they will avoid trial and punishment. Furthermore, the adoption of the passive personality principle in the Inter-American Torture Convention and the UNCAT is a useful addition to the grounds for which extradition of an alleged torturer might be extradited from his or her State, no matter where the offence of torture was committed.

Policing. The preventive aspect of supervision which was referred to above is also complemented by *post hoc* policing of State action by the use of inter-State or individual petition procedures in the major international instruments. While these are the least satisfactory of the methods of controlling torture, they can nevertheless perform a useful function. A State which is bent on using torture as a means of interrogation or punishment

may be deterred by the knowledge that individuals or their representatives may have the opportunity to complain to an international institution if they cannot obtain a satisfactory domestic remedy, but this is unlikely. On the other hand, States in which there is a state of emergency or siege or in which the life of the nation is threatened may resort to dubious practices which lie within the penumbra of legitimate or illegitimate practices. Nowhere is this better exemplified than by the British practice of interrogation in depth of Provisional IRA suspects using the 'five techniques'.[198] While better systems of internal control and supervision may have prevented the use of such techniques,[199] the use of *post hoc* State or individual petitions can establish useful criteria by which to measure future practice. Where the right of individual petition is also supplemented by early intervention procedures, as in the European Convention on Torture, this can have the useful effect of providing appropriate interdictive action.

Despite the wide array of international instruments and institutions established over the last fifty years or so to control the use of torture, the reality is that it is a practice which is likely to persist. While it may be carried out in a systematic fashion in those States which are incapable of international embarrassment, the practice may also occur because of lapses in supervision by States which are known to abjure the practice. The fight against torture is therefore likely to be perpetual, but the increasing internationalisation of supervisory systems and institutions may eventually lead to an overarching structure which makes it an aberration in all States rather than a simple choice of interrogatory or punitive method by governments and their agents. The stakes in this fight are high, for while physical injury may mend, the destruction of the human personality which lies at the root of all torture is irreparable. Ultimately, the injunction that there should be no more broken minds or bodies finds its rationale not simply in the need to protect individual victims of torture, but to protect the dignity of all humankind.[200]

198 Above, pp 38-39.

199 Indeed the use of the techniques was abandoned following a judicial inquiry conducted by Lord Diplock. See *Report of the Diplock Commission*, Cmnd 5185. For the background and summary of the Report see (1973) XIX Keesing's Contemporary Archives 25720.

200 As Pieter Kooijmans observes in *The Report of the Special Rapporteur*, op cit, above, note 3, p 2, 'It is the dehumanizing effect of torture — the destruction of exactly that which makes man a human being — which may well explain the general condemnation of the phenomenon of torture. It may be remarked incidentally that not only the victim is affected by this process of dehumanization, but also the torturer. He is forced to ignore and to deny the humanness [sic] of his fellow human being thereby debasing himself. This effect is admitted in the testimonies of many erstwhile torturers.'