

CHAPTER - 4

PROHIBITION OF CUSTODIAL TORTURE UNDER INTERNATIONAL LAW

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The question of individual human rights and fundamental freedoms under customary international law was left to the state, but as society changed, beliefs, practices and laws also changed. This has been the trend with the international community and contemporary international law.¹ Developments in international law of human rights and individual freedoms are not only international concern but also a domestic and regional concern level. Therefore this concern moved beyond the state boundaries.

Torture has been considered as the most barbarous act against humanity as it constitutes the very denial of the essence of human rights. Freedom from Torture and other Cruel, Inhuman or Degrading Treatment or punishment, proclaimed as indefeasible right of human beings is enshrined in the various international legal instruments on human rights. The prohibition of torture and other cruel, inhuman or degrading treatment has been advocated ever since the adoption of the Universal Declaration of Human Rights, 1948 and the Geneva Conventions of 1949 but it was only in 1984 that the United Nations General Assembly for the first time adopted the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or punishment. Among the international human rights instruments relating to criminal justice mention can be made of Universal Declaration of Human Rights (1948)² and

¹ H.H. Mensah, "International Law and the Violation of Human Rights," AIR 2000 (Journal) 49
² Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly Resolution, 217,A (III) of Dec.10, 1948;

International Covenant on Civil and Political Rights (1966).³ The leading specialized conventions, declarations and instruments are the Convention against Torture and other Cruel, Inhuman, Degrading, Treatment or Punishment (1984)⁴, the Convention on the Rights of the Child (1989)⁵. The Declaration of General Assembly against Torture (1975),⁶ the Code of Conduct for Law Enforcement Officials (1979)⁷, the safeguards guaranteeing protection of the rights of those facing the death penalty,⁸ the Principles on Effective Prevention and Investigation of extra-legal, Arbitrary and Summary Executions (1989),⁹ the Principles for the Protection of Persons with Mental Illness and for the improvement of Mental Care,¹⁰ Declaration on the Protection of all Persons from Enforced Disappearance (1992),¹¹ Convention For The Protection Of Human Rights And Fundamental Freedoms,¹² Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment (1988),¹³ Vienna Convention on Consular Relations(1963),¹⁴ American Convention on Human Rights(1969),¹⁵ and African Charter on Human and Peoples rights(1981).¹⁶

International human rights law so developed recognizes the rights of persons to be free from governmental violations of the integrity of the person through illegal means

³ International Covenant on Economic, Social, and Cultural Rights and International Covenant on Civil and Political Rights, both were adopted and opened for signature, ratification, and accession by general assembly resolution 2200 A (XXI) of 16 dec.1966;

⁴ Adopted and opened for signature, ratification, and accession by general assembly resolution 39/46 of 10 Dec.1984; (hereinafter referred to as the convention against torture)

⁵ Adopted and opened for signature, ratification, and accession by general assembly resolution 39/46 of 10 Dec.1984; (hereinafter referred to as the convention against torture)

⁶ The Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly Resolution 3452(XXX) of 9 Dec. 1975; (herein after referred to as the declaration against torture).

⁷ Adopted by general assembly resolution 34/169 of 17 december.1979;

⁸ Approved by economic and social council resolution 1984/50 of 25 may 1984.

⁹ Recommended by economic and social council resolution 1989, /65 of 24 May 1989; compilation, vol.1, 409.

¹⁰ Adopted by general assembly resolution 46/119 of 17 dec.1991; compilation, vol.1, 517.

¹¹ Adopted by General Assembly Resolution 47 Adopted by General Assembly Resolution 46/119 of 17 December, 1991; Compilation, vol.1, 517.

¹² See, United Nations, Treaty Series, vol.213, at 221; compilation, vol.11.

¹³ Adopted by general assembly resolution 43/173 of 9dec. 1988; compilation, vol.1, 265.

¹⁴ United Nations, Treaty Series, vol.596, 261.

¹⁵ *Ibid*, vol.1144, 123;

¹⁶ OAV, document CAB/LEG/67/3/Rev.5;ILM, vol. XXI (1982), 58;

like torture, cruel, inhuman or degrading treatment or punishment, arbitrary arrests and imprisonment, enforced disappearances, extra-legal or summary executions and the denial of free and fair public trial. Torture is prohibited under international law whether in time of peace or of war.

A. INTERNATIONAL STANDARD FOR PROTECTION OF TORTURE:

I. PROHIBITION OF TORTURE IN WARTIME:

The notion of 'laws of humanity' was not specific enough to indicate what kinds of acts were prohibited. A first attempt at clarification was made in the 1929 Geneva Convention concerning the treatment of prisoners of war, where it is stated that 'all kinds of corporal punishment, incarceration in localities without natural light and, generally, all forms of cruelty' are prohibited.¹⁷ In 1943 the three Allied powers UK, USA and the Soviet Union issued the so-called Moscow Declaration on account of evidence from many quarters of German atrocities, massacres and cold-blooded mass executions, declaring that the perpetrators would be sent back to the scene of their crime and judged on the spot. As regards major war criminals 'whose offences have no particular geographical localization', it was decreed that they should be punished by the joint judgment of the Allied governments: this foreshadows the constitution of the Nuremberg Tribunal, which in its charter was given jurisdiction over 'war crimes', including 'ill-treatment' of civilian populations, as well as 'crimes against humanity' - 'murder, extermination ... and other inhumane acts committed on political, racial or religious grounds. The Genocide Convention of 1948, which was approved by the General Assembly the day before the Universal Declaration of Human Rights was adopted, that is 9 December 1948, came into force in 1951. It is, unlike the Universal Declaration of Human Rights, a legal compact, which pledges

¹⁷ Article 46 (3)

every Contracting Party to punish or to extradite for punishment any person committing genocide, as well as conspiracy, incitement or attempt thereto or complicity therein, 'whether they are constitutionally responsible rulers, public officials or private individuals'. It is applicable in peacetime as well as in times of war and encompasses those acts that aim to obliterate, in whole or in part, ethnic, racial or religious groups by 'causing serious 'bodily or mental harm' to their members, as well as outright killing. Other punishable acts covered by the Convention include the sterilization of members of a given group; the separation of men and women and their transfer to different camp or places of banishment; removal of children from one group to another and to other countries as was, the case with thousands of Greek children, during the Second World War; incitement of a population to abuse, narcotics in poisonous doses practiced by the Japanese in China; removal of groups to regions with forbidding climatic conditions or denial of elementary means of sustenance.

The General Assembly's basic resolution on genocide, unanimously adopted on 11 December 1946, declares that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world. This is reinforced by Article 1 of the Convention, which adds in time of peace or in time of war' an, important extension of the Nuremburg Tribunal Charter, which was only applicable to crimes committed during a war. The General Assembly resolution and the Convention are therefore clear expressions of the view that genocide is a crime even for those states, which have not ratified the Convention; the consequence of this is that a national of such a state cannot escape criminal responsibility. Furthermore, it means that an accusation of genocide, quite independently of the Convention, cannot be rebutted by a state with reference to

Article 2(7)¹⁸ of the UN Charter (the domestic jurisdiction clause), whether that state is a Contracting Party to the Convention or not. Disputes on the interpretation, application or fulfillment of the Convention shall be submitted to the International Court of Justice (hereinafter referred as ICJ) under Article IX, which implies an acceptance of the compulsory jurisdiction of the ICJ on the basis of Article 36 (1) of the Court's Charter (the so-called optional clause). If a party to a case before the Court fails to carry out the obligations incumbent upon it under a judgment by the Court, the other party may seek recourse to the Security Council in accordance with Article 94¹⁹ of the UN Charter. In this way the Security Council may be forced to deal with genocide cases, which do endanger international peace, and security.²⁰ The time limit for the prosecution and punishment of war crimes and crimes against humanity has been an issue of considerable contention. It began to receive attention during the mid of 1960s in those countries, such as Sweden, which in their national laws provided for different periods of limitation for various crimes, with no exception made for war crimes or crimes against humanity. This caused deep concern within the UN Commission of Human Rights, which on 9 April 1965 adopted a resolution that no one guilty of such crimes 'shall escape the bar of justice wherever he, may be and whenever he may be detected'. This resulted in a Convention dated 26 November

¹⁸ Article 2(7) which reads as under: Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

¹⁹ Article 94 of the UN Charter which reads as under: 1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, make recommendations or decide upon measures to be taken to give effect to the judgment.

²⁰ Article 34 which reads: The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security. and 39 of the UN Charter which reads: The Security council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with article 41 and 42, to maintain or restore international peace and security.

1968 on the Non-Applicability of Statutory Limitations to war Crimes and Crimes against Humanity, which affirms in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and pledges to secure its universal application. Some countries, however, have been reluctant to waive the time limitation in their national laws, on the grounds that not only was this founded on a deep-rooted principle of criminal law but also because obvious evidentiary difficulties would arise, with the growing risk of miscarriage of justice as time goes by. It is also a fact that to date only some forty states have ratified this Convention: of the five permanent members of the Security Council, only Russia/the states of the former USSR have signed; as have the states of the former Warsaw Pact bordering the West; Germany has signed but not Japan; all the new states of the former Yugoslavia are signatories.²¹

This, then, is the context that influenced the decision to grant a particularly prominent place to the promotion of human rights in the new organization of the world, and that was the driving force behind the subsequent drawing up of the Universal Declaration of Human Rights (UDHR), adopted on 10 December 1948 by the UN General Assembly.

In the time of non-international armed conflicts the four Geneva Conventions of 1949 mark a great advancement by providing uniformly that in such conflicts each party to conflict shall be bound to apply, as a minimum certain humanitarian provisions of a fundamental character. The Geneva Convention of 1949 on Treatment of Prisoners of War for instance, provides that in case of non-international armed conflicts, occurring in the territory of the contracting parties, each party to the conflict shall be bound to apply a minimum standard conduct. These Conventions provide that

²¹ Some 115 states have ratified the Genocide Convention; those failing to sign include Japan.

persons who take no part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat, as a result of sickness, wounds, detention any other cause must in all circumstances be treated humanly without any adverse distinction based on considerations of race, colour, religion or faith, sex birth or wealth, or any other similar reasons. Common Article 3 of the Geneva Conventions prohibits the following acts in respect of these persons:

- (a) Violence to life and person; in particular, murder or all kinds, mutilation, cruel treatment and tortures;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity; in particular, humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of execution without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.²² The Geneva Convention of 1949 on the Protection of War Victims, and the Additional Protocols of 1977, consider 'torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body

²² Article 3 reads as follows: In the case of armed conflict not of an international character in the territory of one of the high contracting parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part persons who take no part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat, as a result of sickness, wounds, detention any other cause must in all circumstances be treated humanly without any adverse distinction based on considerations of race, colour, religion or faith, sex birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the abovementioned persons.

- (a) Violence to life an person; in particular, murder or all kinds, mutilation, cruel treatment and tortures;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity; in particular, humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of execution without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

or health' to be 'grave breaches,' the perpetrators of which states are under an obligation to search for, regardless of their nationality, and to bring them before their courts or hand them over to another High Contracting Party for trial.²³

The Convention, However, provides that these provisions shall not affect the legal status of parties to the conflict. That is to say, the observance of this provision shall not amount to recognition of the belligerency of the insurgents on the part of the legitimate government.

Common Article 3 of the Geneva Conventions laid down rules reflecting elementary consideration of humanity and the general principle of humanitarian law. Notwithstanding this fact, it must be recognized that this provision was uncertain in its scope and vague in its content and its non-observance was almost a universal phenomenon. All this entailed the need to develop and supplement Article 3 by additional standards for providing better protection for the victims of armed conflicts not of international character with a need to achieve this goal the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict adopted on June 8, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to Protection of the victims of the Non-International Armed Conflicts (Protocol II). Article 1 of the Protocol which deals with material field of application provides that this Protocol shall apply to all armed conflicts which are not covered by Article 1 and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other armed groups which, under responsible command, exercise such control over a party of its territory as to enable them to carry out sustained and

²³ That is also laid down in the UN Convention against Torture.

concerted military operations and to implement this protocol. This provision now makes it crystal clear that the provision contained in the protocol shall apply also to guerrilla war and resistance movements provided that conditions mentioned above are fulfilled.²⁴

Part II of protocol lays great emphasis on humane treatment of persons affected by non-international armed conflicts and contains certain Fundamental Guarantees. Of particular mention is the provision which prohibits the following acts against persons affected by non-international armed conflicts at any time and in any place whatsoever; (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment, such as torture, mutilation or any other form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage and; (h) threats to commit any of the foregoing acts.

International humanitarian law developed during the nineteenth century in conjunction with the laws of warfare (*jus in bello*), of which, according to some scholars, it even formed a part. With the sweeping development of the wider concept of human rights, certain notions in particular with regard to acts prohibited under international law are used interchangeably in human rights instruments as well as in humanitarian law instruments. Furthermore, prohibition of the said acts is absolute, that is, non-derogable and therefore applicable also in wartime in the human rights instruments and without any designation of particular categories, as is often the case

²⁴ See, Article 1 (4) of the Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, I.L.M., 16 (1977), at 1391.

in humanitarian law instruments. This means that the said categories are doubly protected, and that relevant human rights instruments safeguard others.

The concepts alluded to be *inter- alia* the following: cruel treatment, torture, humiliating and degrading treatment, medical or scientific experiments, and corporal punishment. Some concepts, like rape and enforced prostitution, in some of the humanitarian law instruments may be subsumed under one or several of the aforementioned. The same may be the case with regard to (physical) mutilation.

In 1991 an optional 'International Fact-Finding Commission' was established under Article 90 of the First Additional Protocol, and granted the competence to enquire into alleged grave breaches or other serious violations of the conventions and protocols. Inspection of places of detention where persons affected by the events of war are being held prisoners of war, detainees or civil internees can be carried out *inter- alia* by the International Committee of The Red Cross in accordance with 1949 Geneva Conventions and the Additional Protocols of 1977. The Red Cross had a right to visit all places of detention in cases of international armed conflict and may, in cases of non-international armed conflicts, based on its rights of initiative, propose to the conflicting parties that it visits such places.

As regards situation characterized by internal disturbances or tension the Red Cross has, outside the convention framework, acquired a right of humanitarian initiative that allows it to offer its services to Governments. This right originates in the very Statutes of the International Red Cross and Red Crescent Movement, which have been approved by the States Parties to the Geneva Conventions: consent on a case by case basis is needed. Since the International Red Cross carries out functions and uses methods similar to those of the CPT Committee, it became necessary to make a distinction between the Geneva Convention and the CPT Convention. This

was achieved by a special provision in the latter to the effect that the CPT shall not visit places which the Red Cross representatives” effectively visit on a regular basis’ by virtue of the Geneva Conventions and the Additional Protocol. Hence the CPT shall not inspect places of detention where there is an armed conflict (international or internal) and the Red Cross effectively; and regularly performs visits. Nevertheless the Red Cross protection does not cover common law detainees and prisoners, but only those who are victims of armed conflicts; nor does it formally cover situations of internal disturbances and tension.

II. PROHIBITION OF TORTURE IN PEACE TIME :

(a) Universal Declaration of Human Rights 1948:

The preamble of the Universal Declaration of Human Rights recognizes the inherent dignity and equality as inalienable rights of all members of the human family as foundation of freedom, justice and peace in the world. The General Assembly proclaimed that the declaration of human rights, as a common standard of achievement all nations shall constantly keep in mind and shall strive by teaching and education to promote respect that all human beings are born free and equal in dignity and rights.²⁵ Article 2 of the Universal Declaration of Human Rights proclaims that everyone is entitled to all the rights and freedoms set forth in the Declaration without distinction of any kind.²⁶ While general standards prohibiting torture, cruel, inhuman or degrading treatment or punishment are laid down in the Universal Declaration of human Rights and International Covenant on Civil and Political Rights of 1966. So

²⁵ See, Universal Declaration of Human Rights, 1948, Article 1 which reads: all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

²⁶ *Ibid.* Article 2 which reads: Everyone is entitled to all the rights and freedoms set forth in this declaration, 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.

Furthermore, no distinction shall be made on the basis of the political jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non- self governing or under any other limitation of sovereignty.

for as freedom from torture is concerned, Article 5 of the Universal Declaration of Human Rights proclaims that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment."²⁷ The important question as to whether the Universal Declaration of Human Rights has become customary law with regard to the rights enshrined therein has not yet received a final answer. At the Tehran Conference on Human Rights in 1968 it was proclaimed that Universal Declaration of Human Rights' constitutes an obligation for the members of the international community. However, the World Conference on Human Rights in Vienna in 1993 took a more cautious approach, stating instead that it 'constitutes a common standard of achievement for all peoples and all nations' and 'has been the basis for the United Nations in making advances in standard, setting as contained in 'the existing international human rights instruments', in particular the two covenants. A judgment based on the stringent standards of the classical doctrine on the determination of the elements, which form international customary law - that is, the convergence of extensive, continuous and reiterated practice and of *opinio juris* - a measured standpoint would be that the Universal Declaration of Human Rights does not in its entirety constitute customary international law. For the purpose of this survey, however, it suffices to assert that very few states would deny that a state is in violation of international law if it practices, encourages or condones torture or other cruel, inhuman or degrading treatment or punishment the possible exception being certain Muslim states, such as Iran, which has indicated to the UN Human Rights Committee that it does not consider itself bound by human rights provisions that conflict with Iran's interpretation of Islamic law.

²⁷ *Ibid.* Article 5 which reads: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

An important piece of evidence on the present attitude of states is Chapter II B 5, entitled Freedom from Torture, of the 1993 Vienna Declaration and Programme of Action, in which it is emphasized that one of the most atrocious violations against human dignity is the act of 'torture' and that freedom from torture is a right which must be protected under all circumstances; including in times of internal or international disturbance or armed conflict'. States are being urged 'to put an immediate end' to this practice and to 'eradicate this evil for ever' through the full implementation of the Universal Declaration as well as the relevant conventions. The Universal Declaration of Human Rights 1948, to the extent that it reflects customary international law, contains the international standards to be followed by States in this respect. It represents an authoritative interpretation, which is binding on States, of the international law of human rights which prohibits States from denying its protection to their citizens²⁸ What is more; the Declaration serves as a point of reference for domestic courts, inasmuch as the international prohibition on torture is unequivocally established in the law of nation. The Universal Declaration of Human Rights did not set up any enforcement mechanism, since it did not impose legal obligations on states.

(b) International Covenant on Civil and Political Rights, 1966:

The International Covenant on Civil and Political Rights, the subsequent instruments adopted by the United Nations and its specialized agencies sought to provide a certain degree of specificity and content to these general international

²⁸ L.B. Sohn has argued that: 'In a relatively short time the Universal Declaration of Human Rights has thus become a part of the constitutional law of the world community; and together with the Charter of the U.N., it has achieved the character of a world law superior to all other international instruments and to domestic law,' L.B. Sohn, *The universal Declaration of Human Rights: A common standard of Achievement*, 8J.Int'I.Comm.Jur.No.2, 17,25-26(1967), Prof .R. Jennings also takes the position that 'the Universal Declaration is certainly not without some legal efficacy.' See R. Jennings *Recent Development in the International Law Commission Its Relation to the Sources of International Law*, 13 Int.L. & Comp.L .Q. 385, 504 (1964).

norms. Again, the article 7²⁹ prohibiting torture and other forms of severe ill-treatment carries the same general wording as Article 5³⁰ of Universal Declaration of Human Rights, with the addition of a sentence covering 'medical and scientific experimentation in Article 7 of the Covenant.³¹ The objective behind this provision is to prevent the recurrence of atrocities similar to those, which were perpetrated in Nazi Concentration camps during the Second World War³² Article 9 clause (1)³³ of the International Covenant on Civil and Political Rights guarantees that everyone has the right to security of person. No one shall be subjected to arbitrary arrest or detention. Article 10 Para (1)³⁴ the International Covenant on Civil and Political Rights guarantee that all persons deprived of their liberty, shall be treated with humanity and respect for inherent dignity of the human person. Any person, the victim of unlawful arrest or detention, shall have the enforceable right of compensation.³⁵ By the virtue of this provision a pre-trial detainee is entitled to respect for his physical and moral dignity, to material conditions and treatment befitting that dignity and to sympathy and kindness. The two articles have notable differences. First, whereas Article 7 is of general application (*lex generalis*), Article 10 targets only persons in detention (*lex*

²⁹ For detail see, International Covenant on Civil and Political Rights, Article 7 provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected to without his free consent to medical or scientific experimentation".

³⁰ Article 5 of the Universal Declaration of Human Rights reads: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

³¹ Article 7 of the Covenant reads: '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 without his free consent to medical or scientific experimentation.

³² U.N. Doc. A/3824, para 16

³³ See, International Covenant on Civil and Political Rights, Article 9(1) Which provides that:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

³⁴ See, International Covenant on Civil and Political Rights, Article 10(1) which provides that "All persons deprived of their liberty shall be treated with humanity and with respect of the inherent dignity of the human person".

³⁵ See, International Covenant on Civil and Political Rights, Article 9(5) which provides that: Any one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

per lalis). Second, and perhaps surprisingly, whereas Article 7 is non-degradable - that is, states must comply with it even in time of public emergency - Article 10: 1 is not protected from infringement in times of crises; measures of derogation may, however, only be taken 'to the extent strictly required by the exigencies of the situation' and may not involve discrimination.³⁶ The observance of this principle of proportionality is also subject to control and review by the Human Rights Committee under Article 40, as is the principle of non-discrimination. Many situations will involve both principles at the same time and therefore require their simultaneous application. The articles do not contain any definition of the different terms and notions used; but the Committee has set out its views on certain aspects.³⁷ The Committee emphasizes that Article 7 allows of no limitation, that no derogation is allowed at any time, and that no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 for any reason, including receipt of an order from a superior officer or public authority.³⁸ The non-justification principle has been affirmed also by other international judicial and official bodies as well as in international instruments, with one notable exception: the UN Convention against Torture of 1984, which permits the infliction of pain and suffering as part of the imposition of lawful sanctions.

State parties to the Covenant on Civil and Political Rights have an obligation to make elaborate system for the supervision of places of detention. Such supervision is vital for the protection of human rights of pre-trial detainees. In order to be effective supervision of places of detention must be carried out by persons who are

³⁶ Article 4 of the convention which reads: In time of public emergency which threatens the life of the Nation and the existence of which is officially proclaimed, the States party to the present Covenant may take measures derogating from their obligations under present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

³⁷ General Comment 20/44 of 3 April 1992 on Article 7 and General Comment 21/44 of 6 April 1992 on Article 10.

³⁸ Article 4 (2) of the convention which reads: No derogation from Article 6, 7, 8 (para 1 and 2), 11, 15, 16 and 18 may be made under this provision.

trained in the rights of detainees under national and international law. Officers of places of detention of prison should be independent of the place, security forces and other officials responsible for the apprehension of offenders or the investigation of offences. On the basis of twin concepts of presumption of innocence and entitlement to humane treatment, the United Nations and its specialized agencies have developed an extensive network of international standards. The norms and standards relating to crime control are of universal character and touch upon nearly all-important aspects of human rights including criminal justice, pre-trial detention, administrative detention, post-trial conviction and imprisonment. The Covenant introduced as implementation machinery a duty on states to report to different UN organs how they had fulfilled their obligations under the covenants.

With regard to the Covenant on Civil and Political Rights (CCPR), the duty to report was complemented by the establishment of a Human Rights Committee (as distinguished from the, UN Commission of Human Rights, the UN's main body, which was set up in 1946 by the Economic and Social Council to deal with all matters relating to human rights - the Commission is 'charter-based'; the Committee is 'treaty-based'). The Committee was granted the power to deal with so-called inter-state complaints, on condition that the states concerned recognized its competence. It was also empowered - in an Optional Protocol to the CCPR - to receive' and consider complaints from individuals alleging violations of the Covenant by states which had accepted this right of petition by their ratification of the Protocol.³⁹ However, ten years passed before the covenants came into force, in 1976. And it is a regrettable fact that fewer than half the states which ratified them have accepted the inter-state

³⁹ Article 2 of the Optional Protocol to the CCPR which reads: subject to provision of article 1, individuals who claim that any of their rights enumerated in the covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

complaints procedure or the right of individual petition, in spite of fervent and repeated appeals by the UN General Assembly and by the World Conference on Human Rights in Vienna in 1993 (Vienna Declaration and Programme of Action). Unfortunately, some states have also appended extensive reservations to their ratifications, thereby appreciably eroding the scale of their commitments. Nevertheless, the delay of almost thirty years, between the adoption of the Universal Declaration of Human Rights and the two covenants, compounded by the reluctance of many states to comply with the implementation mechanisms, have led to the Universal Declaration of Human Rights acquiring a juridical status more important than was originally intended. It is thus gratifying that the Universal Declaration of Human Rights, although it does not lay down enforceable legal obligations, is widely used as a means of judging compliance with human rights obligations under the UN Charter.

(c) Declaration on the Protection of all Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1975:

Now turning to the fight against torture at international level one finds that the first major attempt to define torture and declare it as an offence to human dignity and condemn it in unequivocal terms was made in 1975 when the United Nations General Assembly in its Declaration on Protection of All Persons from being subjected to torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 9 December 1975,⁴⁰ after defining torture,⁴¹ condemned any act of torture as a violation

⁴⁰ Adopted by General Assembly Resolutions 3452(xxx) of 9 Dec.1975, (herein after referred to as the Declaration against Torture).

⁴¹ *Ibid*, Article 1 which reads as under: (1) For the Purpose of this declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the standard minimum rules for the treatment of prisoners.

of the purposes of the United Nations Charter and as a violation of Human Rights and Fundamental Freedoms proclaimed in the Universal Declaration of Human Rights⁴² and directed States not “to permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment” at all.⁴³ The Declaration clearly states that exceptional circumstance such as state of war or a threat of war; internal political instability or any other public emergency may not be invoked as a justification for such treatment or punishment.⁴⁴ Thus the prohibition against torture remains non-derogatory and inalienable right even during the state of emergency. Other guidelines, which the Declaration provides, are as follows:

Each State would take effective measure to prevent torture within its jurisdiction.⁴⁵ States would see that prohibition against torture and similar practices should be taken fully into account in the training of law enforcement officials,⁴⁶ systematic review of interrogation methods and practices.⁴⁷ All acts of torture, as defined in Article 1, to be made offences under the criminal law of each

⁴² *Ibid*, Article 2 which reads as under: Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the universal declaration of human rights.

⁴³ *Ibid*, Article 3: No State may permit or tolerate torture or other, cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

⁴⁴ *Id.*

⁴⁵ *Ibid*, Article 4: Each State shall, in accordance with the provisions of this declaration, take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practiced within its jurisdiction.

⁴⁶ *Ibid*, Article 5: The training of law enforcement personnel and of other public officials who may be responsible for persons deprived of their liberty shall ensure that full account is taken of the prohibition against torture and other cruel, in human or degrading treatment or punishment. This prohibition shall also, where appropriate, be included in such general rules or instructions as are issued in regard to the duties and functions of any one who may be involved in the custody or treatment of such persons.

⁴⁷ *Ibid*, Article 6: Each State shall keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty in its territory, with a view to preventing any cases of torture or other cruel, inhuman or degrading treatment or punishment.

State.⁴⁸ The victim's right to complain to, and to have his case impartially examined by the competent authorities of the State concerned.⁴⁹ Article 2 of the Declaration of the Protection of All Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment, 1975 declares 'torture' as offence against human dignity and as violation of human rights and fundamental freedoms proclaimed in Universal Declaration of Human Rights. The states are directed under Article 3 of the Declaration of the Protection of All Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment, 1975 which deals with torture, cruel, inhuman or degrading treatment or punishment, not to 'promote or tolerate' any form of torture even in exceptional circumstances such as state of war or a threat of war or internal political instability or emergency⁵⁰ Article 4 enjoins on the State to take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practiced within its jurisdiction.⁵¹ Article 6 postulates that every State shall keep under systematic review interrogation methods and practices as well as arrangement for the custody and treatment of persons deprived of their liberty. With a view to preventing any classes of torture or other cruel, inhuman or degrading treatment or punishment, the State shall keep a systematic review thereof.⁵² Any person who alleges that he has been subjected to torture or other cruel, inhuman or degrading treatment or punishment by or at the investigation of a public official shall

⁴⁸ *Ibid.*, Article 7. Each States shall ensure that all acts of torture as defined in article 1 are offences under its criminal law. The same shall apply in regard to acts which constitute participation in, complicity in, incitement to or an attempt to commit torture.

⁴⁹ *Ibid.*, Article 8. Any person who alleges that he has been subjected to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of a public official shall have the right to complain to and to have his case impartially examined by, the competent authorities of the State concerned.

⁵⁰ For detail see, Untied Nations Declaration on the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3.

⁵¹ For detail see, Untied Nations Declaration on the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Ibid.*, Article 4.

⁵² For detail see, Untied Nations Declaration on the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Ibid.*, Article 6.

have the right to complain to and to have his case impartially examined by the competent authorities of the State concerned.⁵³

The Declaration being a resolution of General assembly imposed only non-binding obligations on states. However, it might be useful in interpreting broader human rights. Whatever, its legal quality, the Declaration has set standards by which national behaviour would be measured and to which nations must aspire. The declaration has helped to give contour and content to the generalities of the human rights provisions of the United Nations charter. The Declaration inspired and also provided the basis for the adoption of subsequent conventions on protection from torture. In case of alleged torture, the competent authorities of the state concerned should make an impartial investigation, even if there had been no formal complaint.⁵⁴ Criminal proceedings should be instituted against the alleged offender(s) if an investigation establishes that an act of tortures appears to have been committed, and criminal, disciplinary or other appropriate proceedings to be taken against offenders if the allegations prove to be well founded.⁵⁵ The Right of redress and compensation to victims when it has been proved that torture has occurred.⁵⁶ "Statements" made as a result of torture or other cruel, inhuman or degrading

⁵³ For detail see, United Nations Declaration on the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Ibid.*, Article 8.

⁵⁴ *Ibid.*, Article 9. Wherever there is reasonable ground to believe that an act of torture as defined in article 1 has been committed, the competent authorities of the state concerned shall promptly proceed to and I impartial investigation even if there had been no formal complaint.

⁵⁵ *Ibid.*, Article 11: Where it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation in accordance with national law.

⁵⁶ *Ibid.*, Article 10: If an investigation under article 8 or article 9 establishes that an act of torture as defined in article 1 appears to have been committed, criminal proceedings shall be instituted against the alleged offender or offenders in accordance with national law. If an allegation of other forms of cruel inhuman or degrading treatment of punishment is considered to be well founded the alleged offender or offenders shall be subject to criminal disciplinary or other appropriate proceedings.

treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings".⁵⁷

(d) The United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment 1984:

The non-binding principles of the Declaration against Torture were transformed into legally binding obligations in the United Nations Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment of 1984 (Convention against Torture)⁵⁸ with the result that the prohibition of torture and ill treatment has now become an important norm of contemporary international law. Following the same, Convention against torture and other cruel, inhuman or degrading treatment or punishment, adopted by U.N. General Assembly on December 10, 1984 and which came into force on June 26, 1987, proclaims that the prohibition against torture is absolute and no exceptional circumstances, whatsoever, including war or public emergency or order from superior authority or public servant, can be invoked as justification of torture.⁵⁹ The state parties are, therefore, obligated to prevent and punish not only acts of torture but also other acts of cruel, inhuman or degrading treatment or punishment, whenever freedom against these acts is assailed by or at the instigation of or with the tacit consent of public authorities.⁶⁰ In order to prevent acts of torture in any territory under its jurisdiction, each State party shall take

⁵⁷ *Ibid*, Article 12: Any Statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person any proceedings.

⁵⁸ Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (1984) (herein after referred to as the Anti Torture Convention)

⁵⁹ See, *Convention against Torture and other Cruel, Inhuman and Degrading Treatment of Punishment*. (Adopted by General Assembly Resolution 39/46 of 10 December 1984) Article 2 (2 and 3) which reads :

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

⁶⁰ Jitendra Mishra : "*Custodial Atrocities, Human Rights and the Judiciary*" vol.47:4 J.I.L.I.2005 at 513

effective legislative, administrative, judicial or other measures.⁶¹ Each State party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person, which constitutes complicity or participation to torture.⁶² Each State party shall make these offences punishable by appropriate penalties, which take into account their grave nature.⁶³ India signed the United Nations Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment in 1997, but has failed to ratify the Convention, meaning it has no effect.

It is now universally recognized that every person, whether an accused person or not, or regardless of the charges against him or a convicted person, should be treated with humanity. It is true that the position of such persons are not the same as of any law abiding citizen and in exceptional cases they might be subjected to a certain degree of restraint and coercion, but they cannot be regarded as unworthy for the enjoyment of human rights for the simple reason that they are accused or convicted persons. This Convention is a very important mechanism for combating torture, a practice that is forbidden by international law under any circumstance.

⁶¹ See, *Convention against Torture and other Cruel, Inhuman and Degrading Treatment of Punishment*; (Adopted by General Assembly Resolution 39/46 of 10 December 1984) Article 1(1) and Article 2(1) which reads as under: Article 1(1) For the purposes of this convention the term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person or acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 2(1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

⁶² See, *Convention against Torture and other Cruel, Inhuman and Degrading Treatment of Punishment*. (Adopted by General Assembly Resolution 39/46 of 10 December 1984) *Id.*, Article 4(1) reads as under:

“Each State party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.”

⁶³ *Id.*, Article 4(2) which provides that: Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

The Convention after defining torture imposes several obligations on States to prevent torture. Article 2 of the Convention obliges each State Party to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. An order from a superior officer or a public authority may not be invoked as justification of torture.⁶⁴ These obligations apply in principle also to cruel, inhuman or degrading treatment or punishment, although the applicability of some was left unresolved during the drafting of the Convention. Almost all the provisions of the declaration have their equivalent- albeit differently formulated- in the Convention against Torture. But the Convention against Torture has also taken up the issues of 'non- refoulement', 'non extradition' and non-expulsion, where there is risk of torture if the person is returned to a particular country.⁶⁵

Article 3 prohibits the extradition of persons to another state where there are substantial ground for believing that he would be in danger of being subjected to torture.⁶⁶ Article 4 requires each State Party to make all acts of torture offences punishable with appropriate penalty under its criminal law⁶⁷. Article 5 contains

⁶⁴ *Ibid*, Article 2. which reads:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

⁶⁵ Love Kelberg : *Torture: International Rules and Procedures* at 14 in : *An End to Torture: Strategies for its eradication* (Edited by Bertil Duner) Zed books London & Newyo(1998)

⁶⁶ *Ibid*, Article 3 which reads:

1. 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.
2. For the purpose of determining whether there are such grounds the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross flagrant or mass violations of human rights.

⁶⁷ *Ibid*, Article 4 which reads:

provisions relating to jurisdiction over the offences and imposes an obligation on each state to take measures in the following cases:

- (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is a national of that State;
- (c) When the victim is a national of that State if that state considers it appropriate.

The said Article also requires States Parties to have appropriate procedures to ensure that a person suspected of any act referred to in Article 4 is held for the time necessary to start criminal or extradition proceedings.⁶⁸

Article 7 lays down twofold state obligations. In the first place the State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found should extradite him in the situations mentioned in Article 5. In the event the concerned state does not do so, for what ever reason it should submit the case to its competent authorities for the purpose of prosecution. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state.⁶⁹ In the cases referred to in Article 5, paragraph 2, the standards of evidence required for

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1. Each State party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

⁶⁸ *Ibid*, Article 5. 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

- (a) When the offences are committed in any territory under its jurisdiction or on board a ship or air craft registered in that State;
- (b) When the alleged offender is a national of that State;
- (c) When the victim is a national of that State, if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

⁶⁹ Joseph J. Lampert: *Terrorism and Hostages in International Law* (1990) at 233.

prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in Article 5, Para 1. Any person regarding whom proceedings are brought in connection with any of the offences referred to in Article 4 shall be guaranteed fair treatment in all the proceedings. States Parties are under an obligation to accord fair treatment to offenders during all stages of proceedings brought in connection with any of the offences relating to torture.⁷⁰

Article 8 deals in more detail with the option of extradition. In general, it is preferable that an alleged offender is tried in a state which has a close connection with the offence, whether that State is the territorial State or one of the other States which are required under Article 5 to establish primary jurisdiction over the offences. There is however, no general duty under customary international law to extradite alleged offenders; indeed, in the absence of a treaty many States may not grant extradition.⁷¹

Article 8 accordingly seeks to provide the legal basis for extradition in some situations, thus facilitating the extradition option in many cases and resulting in some cases in an obligation to extradite. Apart from some drafting differences, this Article is virtually identical to Article 8 of The Hague, Montreal and New York Conventions. Similar provisions are also contained in Article 11 of the Rome Convention. While the provisions contained in this Article could serve a useful purpose in that they go some way towards providing legal bases for extradition in some cases where perhaps they would otherwise not exist, the Article is complicated and gives rise to various interpretative and functional difficulties. Through the use of a legal fiction "shall be

⁷⁰ *Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* (1984) Article 7 which reads: 1. The State party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state in the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and convictions shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

⁷¹ Joseph J. Lampert: *Terrorism and Hostages in International Law* (1990) at 234.

deemed”, Paragraph 1 of Article 8 modifies where necessary, all extradition treaties existing between the parties such that all the offences set forth in Article 4-acts of torture attempted torture and participation therein-are considered being extraditable offence within the meaning of those instruments.

However, it should be recognized that the inclusion of torture as an extraditable offence in extradition treaties existing between states parties, by itself, does not automatically oblige states parties to those instruments actually to extradite an alleged offender. All that it means is that torture is one of the crimes for which extradition may be granted. The offence of torture is subject, as or other extraditable offences, to all the terms and condition of each particular treaty in which it is “deemed to be included”. Extradition Treaties include some or all of a number of conditions, exceptions and exclusions, including, *inter- alia*, the political offence exception, the rule of no extradition of nationals of the requested states, on extradition where the alleged offender could be subject to the death penalty in the requesting state, non extradition for offences under military law. The result is that if the political offence exception is included in relevant domestic treaty or law, this Article has no effect on the right of the state to invoke that exception. However if the views of the two writers⁷² expressed in the context of the similar provision of the Hague Convention, 1970, are to be believed as correct this Article enlarges the requisition of the requesting state to effect the extradition in accordance with the convention by nullifying the plea of the political offence to extradition.

Under paragraph 1 of Article 8, parties are obliged to include torture as an extraditable offence in future extradition treaties concluded between them. In effect, this provision is relevant only to treaties which specifically list those offences which

⁷² Shubber: *Aircraft Hijacking under The Hague Convention 1970*; (1973) 221, and Rosenne: *The International Convention against the Taking of Hostages 1979*; at 144. (1981).

are subject to extradition since torture will normally fall within those treaties which do not contain list but which rather include extraditable offences those crimes punishable under the laws of both parties by a certain penalty.

If a state party, which makes extradition conditional on the existence of a treaty, receives a request for extradition from another state party with which it has no extradition treaty, it may consider this convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested state. States parties which do not make extradition conditional on the existence of the treaty shall recognized such offences as extraditable offence between themselves subject to the conditions provided by the law of the requested state. Such offences shall be treated, for the purpose of the extradition between states parties, as if they had been committed not only in the place in which they occurred but also in the territories of the states required to establish their jurisdiction in accordance with Article 5 paragraph 1.⁷³

Article 9⁷⁴ seeks to facilitate criminal proceedings brought in respect of offence under this convention by requiring States Parties to provide each other with the greatest measure of assistance in connection therewith. The course of criminal proceedings may sometimes involve a number of States entities and officials. It is a basic principle of international law that officials of one state may not, without permission, perform sovereign acts which may include such activities as the gathering of evidence as serving of documents in the territory of another State. In view of the

⁷³ Joseph J. Lampert: *Terrorism and Hostages in International Law* (1990) at 235.

⁷⁴ Article 9 of the Convention which reads:

1. States parties shall afford one another the greatest measure of assistance in connection with criminal proceedings but in respect of any of the offences refer to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. State parties shall carry out obligation under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

need of cooperation between States in these activities this Article imposes upon States Parties the obligation to render to each other the greatest measure of assistance in connection with criminal proceedings. While all types of judicial assistance could be rendered pursuant to this Article, the exact nature of obligations imposed by it is imprecise. Article 10 specifically requires States to supply all evidence at their disposal to requesting State, and the transmission of evidence is certainly the most important type of assistance, which can be rendered. The Article requires States to supply all evidence at State disposal but it does not clarify as to when evidence would be regarded at State disposal. Moreover as there is no definite content to the expression 'assistance in criminal matter', the expression may apply to any act designed to assist the criminal matter', the expression may apply to any act designed to assist the criminal processes of another State.

The major problem with the use of this expression is that the domestic laws and treaties on the subject, although containing many similarities, vary considerably as to the type of assistance they authorize.

Paragraph 2 of Article 9 requires States Parties to carry out their obligations under paragraph 1 in conformity with any treaties on mutual assistance that may exist between them. The effect of this paragraph is to delimit the obligations of States with the regards to mutual assistance by existing treaties and conventions on mutual assistance.⁷⁵

Article 10⁷⁶ of the Convention embodies the idea of educating and informing the civil and military personnel, medical personnel, public officials who may be involved in

⁷⁵ Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (1984) (herein after referred to as the Anti Torture Convention, Article 9 (2) of the Convention reads: 2. State parties shall carry out obligation under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

⁷⁶ *Ibid*, Article 10

the custody interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

As torture is often committed in the course of interrogation, and the use of torture can be reduced considerably if the rules of interrogation are specifically laid down and unscrupulously adhered to, keeping this fact in view Article 11⁷⁷ requires each State Party to keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture⁷⁸

Article 12⁷⁹ of the Convention requires States Parties to have an immediate and impartial investigation, wherever there is reason to believe that an act of torture has been committed. Article 13⁸⁰ of the Convention is designed to ensure that any body who claims to have been subjected to torture has the right to complain to competent authorities, who must immediately and impartially examine his case.

Once torture is committed the victim or his dependants have the right to obtain equitable and adequate compensation and means of rehabilitation. Article 14⁸¹ makes

1. Each State party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public official and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

⁷⁷ *Ibid*, Article 11 which reads:

Each State Party shall keep under systematic review interrogation rules, instruction, method and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or Imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

⁷⁸ *Ibid*, Article 11.

⁷⁹ *Ibid*, Article 12 Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

⁸⁰ *Ibid*, Article 13 which reads: Each State party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complaint to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given

⁸¹ *Ibid*, Article 14. It runs as follows:

this principle an enforceable right. Article 14 of the convention provides that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation. Other forms of cruel, inhuman or degrading punishment as defined in the convention which may be committed by persons acting in an official capacity are also prohibited.⁸²

Since torture is inflicted on a person for such purposes as obtaining from him information or a confession the best way to discourage its use is the non-recognition of such statements in evidence. Accordingly, Article 15⁸³ makes any statement which is established to have been made as a result of torture inadmissible as evidence in any proceedings, except against a person accused of torture.⁸⁴ A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.⁸⁵ A Clear example pointing to the possibility of serious consequences for the Torture Convention resulting from the Invocation of National Standards by the States Parties may be found in the U.S. Reservation to Article 16 of this Convention, and in the Sovereignty Proviso asserting the supremacy of the U.S. Constitution over the Convention. The U.S. Reservation to Article 16 of the Torture Convention stated that:

The U.S considers itself bound by the obligation under Article 16 to prevent 'cruel, inhuman or degrading treatment or punishment' only insofar as the term 'cruel inhuman or degrading treatment or punishment' means

(1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependent shall be entitled to compensation.

(2) Nothing in this article shall affect any right of the victim or other persons to compensation, which may exist under national law

⁸² Shankar Sen: *Human rights in developing society*, APH Publishing Corporation, New Delhi (1998) at 13-14.

⁸³ *Ibid*, Article 15: Each State Party shall ensure that any statement which is established to have been made as result of torture shall not be invoked as evidence in and proceedings, except against persons accused of torture as evidence that the statement was made.

⁸⁴ *Ibid*, Article 15.

⁸⁵ *See*, The Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, (entered into force 27 Jan.1980), U.N.Doc.A/CONF.39/27/(1969). Reprinted in 8 I.L.M.679, 690 (1969).

the cruel, unusual and inhuman treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.⁸⁶

The Sovereignty Proviso of the Supremacy of the U.S. Constitution upon which the Senate has conditioned its advice and consent to the Torture Convention, included in the resolution of the Senate on the Convention at the insistence of Senator Jesse Helms of North Carolina,⁸⁷ provided that:

The President would not deposit the instrument of ratification of the United States, until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States⁸⁸

Accordingly, the concerns raised in this commentary concerning the ramifications presented for the effective application of the Torture Convention by the assertion of National Standards by the States Parties are warranted and are shared by some U.S. lawmakers who supported this Convention. Senator Patrick Moynihan, who opposed the inclusion of the Sovereignty Proviso in the resolution of the Senate of its advice and consent to the Convention on the floor of the Senate, stated that:

I remained concerned that this statement [the proviso] will create a political and diplomatic problem for the United States and provide a rhetorical device, which nations using torture can employ to defend their actions. This will not, as I have

⁸⁶ See, 136 Cong.Rec.S17491 (daily ed.27 Oct.1990).

⁸⁷ *Id.*, at S 17487-89, See, particularly the statement of Senator Helms to the effect that 'the U.S. domestic legal system is based on the U.S. Constitution. Our Constitution is unique. It does and must take precedence over any other international legal regime; *Id.*, at S1 7487.

⁸⁸ *Id.*, at S17492

stated, be a sound legal defence to their conduct. Nonetheless, it will inevitably and unfortunately be used⁸⁹

(e) The Convention on the Rights of Child, 1989:

The Convention on the Rights of Child of 1989 which came into force on 2 September 1990 has been ratified by some 190 states including India. Article 37 lays down a prohibition against 'torture, and other cruel inhuman or degrading treatment or punishment in the same way as the International Covenant on Civil and Political Rights; but states are also under a positive obligation to take all appropriate legislative, administrative, social and educational measures to protect the child from all form of physical or mental violence, injury or abuse'⁹⁰

(f) The Optional Protocol to the Convention against Torture:

In spite of International Convention against Torture and several other related international instruments, which have been enacted from time to time to prevent torture, this practice continues unabated. It is not surprising given the fact that mere enactment of legislation is not enough to solve the problem of torture unless it is supported by an effective implementing mechanism and procedure. In this connection it is noteworthy that the evolution of international law is such that it passes from the stage of persuasion to that of coercion. The current efforts to adopt an Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment represent a major step in this direction.

The Optional Protocol aims to create a global inspection system for places of detention as a way of preventing torture and other ill treatment. A specialist Sub-Committee of the Committee against Torture would identify practices, which

⁸⁹ *Id.*, at SI7490. See, also the letter from eight Senators opposing the Proviso printed in this record of pre-ratification debate. *Id.*

⁹⁰ Article 19

facilitate torture, and then initiate a confidential dialogue with Governments to discuss practical remedial measures to prevent such practices.

This initiative, which was first introduced at the UN Commission on Human Rights by Costa Rica in 1980, seeks to implement the various international standards more effectively. The Sub-committee would not act as a quasi-judicial body investigation. Rather, the experts would go and see for themselves the conditions in places of detention and would inform the government about particular practices which facilitate torture and other ill treatment.

A working group of UN Commission on Human rights met in 1995 for the fourth consecutive year to continue drafting the text of this draft Optional Protocol. Unfortunately, a small group of states tried to undermine some of the fundamental principles underlying this innovative proposal. These principles include the right of the Sub-committee to visit any state which has ratified the Protocol without having to seek further permission for each individual mission; the power of the Sub-committee to make a public statement or release its report if the state refuses to cooperate; and a prohibition on states making reservations to the Protocol.⁹¹ The recent move of international community to make individual perpetrators of serious human rights violations like torture accountable and to make States answerable for their violations of international human rights law is a most notable development in the humankind's struggle against torture. Most heartening is the progress made in the creation of a permanent international criminal court, which would be the living embodiment of principles of international criminal law and human rights. The international criminal court is expected to play a role of far-reaching importance in bringing the culprits of

⁹¹ See, Amnesty International Report 1996 (London) at 63.

acts of torture to justice and making them personally liable irrespective of their respective official position.⁹²

It is obvious from the foregoing discussion that international law condemns and prohibits torture and ill treatment of the pre-trial detainees in strongest terms. It enjoins the States with a responsibility to adopt effective legislative, administrative, judicial or other measures against acts of torture and ill treatment. States are now under an obligation to establish a comprehensive programme for the elimination of torture, incommunicado and secrete detention, independent investigation of allegations of torture, exclusion of evidence and compensation and rehabilitation for victims of torture.⁹³ Since the success of such programme ultimately depends on the observance of the standards on the treatment of detainees, states should take necessary steps for the training of officials associated with detention and investigation work.⁹⁴

B. PROTECTION AGAINST TORTURE IN OTHER HUMAN RIGHTS INSTRUMENTS:

On 8 December 1988 the General assembly adopted the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which may be considered as the beginning of a founding charter on prisoners' rights. Principle on Detention usefully complements the standards embodied in the Convention against Torture. Principle 6⁹⁵ contains an unequivocal prohibition on torture. The arresting and prison officers are enjoined in Principle 7 to report violations to higher authorities, both internal and external, with reviewing or remedial

⁹² *Ibid*, at 55

⁹³ See, Amnesty International, torture in the Eighties London, (1984), at 249; 12 Point Programme for the Prevention of Torture, Point 4.

⁹⁴ See, Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution, United Nations New York, 1991 at 44, para 9.

⁹⁵ No person under any form of detention or imprisonment shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. No circumstances whatever may be invoked as a justification for torture or to cruel, inhuman or degrading treatment or punishment.

powers. Principle 21 of the Principles on Detention sets forth the following safeguards:

1. Taking undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or to incriminate himself otherwise or to testify against any other person shall be prohibited.
2. A detained person while being interrogated shall not be subject to violence, threats or methods of interrogation so as to impair his capacity of decision or his judgment.

It is desirable that evidence found to have been procured by torture should not be used by the prosecutor against anyone other than those who used such methods. Accordingly, Guideline 16 of the Guidelines on Prosecutors⁹⁶ recommended as follows:

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitutes as a grave violation of the suspects' human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

Recognising the fact that keeping records of interrogations are necessary to secure freedom from torture and ill treatment 'Principles on Detention' stipulates in Principle 23 as follows:

⁹⁶ See, Guidelines on the Role of Prosecutors (1990) (hereinafter referred to as the Guidelines on Prosecutors).

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.
2. A detained or imprisoned person or his counsel when provided by law shall have access to the information described in paragraph 1 of the present principle.

Another important development with regard to evolution of standards on torture and ill treatment was the adoption in 1984 of the Declaration of Basic Principles of Justice for the Victims of Crime and Abuse of Power.⁹⁷ The Declaration called upon member states to prohibit practices and procedures conducive to abuses, such as secret places of detention and incommunicado detention.

The principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution, adopted by the Economic and Social Council in 1989⁹⁸ and the Declaration on Protection of all Person from Enforced Disappearance in 1992⁹⁹ prohibit the practice of extra-legal, arbitrary and summary executions and enforced disappearances and set forth a series of measures which states must take to prevent such practices.

The Standard Minimum Rules for the treatment of prisoners, 1955 also contained the provisions requiring government authorities to keep records of detainees to prevent their disappearance and to assist in supervision of places of detention.¹⁰⁰

The Working Group on Involuntary Disappearances which was established by the Human Rights Commission in 1980 takes action on behalf of the victims of

⁹⁷ Adopted by General Assembly Resolution 40/34 of 29 Nov.1985;

⁹⁸ Recommended by Economic and Social Council Resolution 1989/65 of 24 May 1989;

⁹⁹ Adopted by General Assembly Resolution 47/133 of 18 Dec.1992;

¹⁰⁰ United Nations, Human Rights and Pre trial Detention: A Handbook of International Standards Relating to Pre-trial Detention, Geneva, 1994 at 2.

disappearances. It receives information from non-governmental organizations, sends urgent appeals and requests for information to Governments and makes occasional country visits. It also plays an important role in the drafting of the international standards in this area. Similar functions are also to be performed by the Special Reporter on Summary or Arbitrary Executions appointed by the Human Rights Commission in 1982.¹⁰¹

Provisions relating to assistance of legal counsel find a place of pride in the International covenant on Civil and Political Rights and the Standard Minimum Rules 1955. They are usefully complemented by the Basic Principles on the Role of Lawyers, 1990¹⁰² the Guidelines on the Role of Prosecutors, 1990¹⁰³ and the Basic Principles on the Independence of the Judiciary, 1985.¹⁰⁴

The U.N. organs have developed a considerable body of standards on the use of disciplinary and restraint measures against detainees in the place of detention. These standards are guided by respect for the presumed innocence of the accused and the obligation of the state to treat all detainees with humanity.¹⁰⁵ While certain degree of restriction and disciplinary measures against the detainees are permitted, it should be commensurate with the requirements of maintenance of order and security in the place of detention. Judging from this perspective corporal punishment, punishment by placing in a dark cell and all cruel, inhuman or degrading punishment are unnecessary

¹⁰¹ United Nations, Human Rights and Pre trial Detention: A Handbook of International Standards Relating to Pre-trial Detention, Geneva, 1994 at 2.

¹⁰² Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990

¹⁰³ *Ibid*, at 330

¹⁰⁴ Adopted by the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 1985 and endorsed by General Assembly Resolution 40/32 of 29 Nov.1985; and 40/146 of 13 Dec.1985;

¹⁰⁵ *See*, Article 10(1) of the Covenant which reads: All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

and unjustified.¹⁰⁶ Accordingly, Rule 31¹⁰⁷ completely prohibits as such punishments. Similarly, instrument of restraint, such as handcuffs chains, irons and strait jackets cannot and should not be imposed as a punishment. In no case chains or irons should be used for putting restraints on detainees. Other instruments of restraint also should not be used save in the following circumstances:¹⁰⁸

As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority; on medical grounds by direction of the medical officer; By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult medical officer and report to the higher administrative authority.

Although the patterns and manner of instruments of restraint are to be decided by the central prison administration, in no case such instruments should be applied for any longer time than is strictly necessary.¹⁰⁹ Rule 35 requires that written information about matters such as the regulations governing the treatment of prisoners of his category, and the disciplinary requirements of the institutions must be provided to

¹⁰⁶ Rule 31 of the Standard Minimum Rules which runs as under: Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishment for disciplinary offences.

¹⁰⁷ *Ibid.*

¹⁰⁸ Rule 33 of the Standard Minimum Rules which runs as under: Instruments of restraint, such as handcuffs, chains, irons and straitjackets, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraints shall not be used except in the following circumstances:

- (a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;
- (b) On medical grounds by direction of the medical officer;
- (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.

¹⁰⁹ Rule 34 of the Standard Minimum Rules which runs as under: The patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary.

every prisoner on admission and if a prisoner is illiterate, this information should be conveyed to him orally.

Principle 7 of the Basic Principles on Prisoners recommends that, efforts aimed at the abolition of solitary confinement or to the reduction of its use must be undertaken and encouraged. It is equally important that, the types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the discretion and duration of disciplinary punishment that may be inflicted and law or legal regulations shall specify the authorities competent to impose such punishment. Such law and legal regulations must be duly published. Before disciplinary action is taken against a detained or imprisoned person he must be given an opportunity of hearing. He must also be given opportunity to bring such action to higher authorities for review.¹¹⁰

Principle 15 of the Principles on the Use of Force¹¹¹ recommends that law enforcement officials should not use force against persons in custody or detention, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened. The absence of firearm protects both the person detained and the officers of the place of detention. Accordingly, principle 16 recommends as follows:¹¹²

Law enforcement officials, in their relations with persons in custody or detention, shall not use firearm, except in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to

¹¹⁰ See, Principle 30 of the Principle on Detention.

¹¹¹ Basic Principles on the Use of Force and Firearms by law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990;

¹¹² *Ibid.*

prevent the escape of a person in custody or detention presenting the danger referred to in principle 9¹¹³

Principle 29 of the Principles on Detention aims at the strict observance of relevant laws and regulations through proper supervision, places of detention shall be visited by qualified and experienced persons, appointed by and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment. Para 2 of the Principle recognizes the right of a detained or imprisoned person to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment, subject to reasonable conditions to ensure security and good order on such places.

Principle 33 stipulates that a detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present Principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant. Every request or complaint shall be promptly dealt with and replied to without undue delay. Neither the detained or imprisoned person nor any complaint

¹¹³ Law enforcement official shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

under paragraph 1 of Principle 33 shall suffer prejudice for making a request or complaint.¹¹⁴

If the request or complain is rejected or in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority.

According to Rule 36 of standard Minimum Rules every prisoner should have the opportunity each weekday of making requests or complaints to the director of the Institution or the officer authorized to represent him. States should ensure that there is opportunity for every prisoner to make a request or complaints, without censorship, to the central prison administration, the judicial authority or other proper authorities through proper channels. It should be possible for him to make requests or complaints to the inspector of prisons during his inspection. He should also be given the opportunity of talking the inspector at a time when the director of prison or other members of the staff are not present. Unless it is frivolous or groundless, such requests or complaints must be promptly dealt with and replied to without undue delay.

When a detainee is found dead, the Government should take following measures to establish the identity of the deceased and the cause and manner of death. First of all, it should order for a thorough, prompt and impartial investigation of all suspected cases of extra- legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Such investigations should be led by police officers of supervisory rank and a coroner with the assistance of expert pathologists and forensic scientists. The purpose of the investigation should be to determine the cause, manner and time of death, the person responsible, and any pattern or practice, which may

¹¹⁴ See, principle on detention.

have brought about that death. The investigation should ascertain whether death in question is natural or accidental or whether it is a case of suicide or homicide. The investigation should also include adequate autopsy, collection and analysis of all physical and documentary evidence, and statement from witnesses.¹¹⁵

The administration should observe the standards regarding autopsy as set forth in Principles 12 and 13 of the Principles on Prevention of Executions. When a detainee dies his body should not be disposed of until a physician, who shall, if possible, be an expert in forensic pathology, conducts an adequate autopsy. Those conducting autopsy should have them right of access to all investigative data, to the place where the body was discovered, and to the place where the death is thought to have occurred. If the body has been buried and it later appears that an investigation is required, the body shall be promptly and competently exhumed for an autopsy. If skeletal remains are discovered, they should be carefully exhumed and studied according to systematic anthropological techniques.¹¹⁶ The body of the deceased should be made available to those conducting the autopsy for a sufficient amount of time to enable a thorough investigation to be carried out. The autopsy shall, at a minimum, attempt to establish the identity of the deceased and the cause and manner of death. The time and place of death must also be determined to the extent possible. Detailed colour photographs of the deceased shall be included in the autopsy report in order to document and support the findings of the investigation. The autopsy report must describe any and all injuries to the deceased including any evidence of torture.¹¹⁷

In a case where the state authorities did not conduct impartial investigation into the circumstances of death of a person in custody, the Human Rights Committee

¹¹⁵ See, Principle 9 of the Principles on the effective Prevention and Investigation of Extra-legal, Arbitrary and summary executions; Recommended by Economic and Social Council Resolution 1989/65 of 24 May 1989 ;(hereinafter referred to as the 'Principles on Prevention of Executions').

¹¹⁶ *Ibid*, Principle 12

¹¹⁷ *Ibid*, Principle 13

held that the State had violated Article 6(1) of the International Covenant on Civil and Political Rights.¹¹⁸ The names and whereabouts of all detainees should be made known to the Court and families because it is vital for supervision of their treatment by the prison authorities. Where possible a Detainee Control Registry should be established to provide complete data of all detained persons regardless of what authority had detained them.¹¹⁹ Apart from the convention and declaration, the Code of Conduct for Law Enforcement Officials¹²⁰ was adopted by the General Assembly on 17 December 1979. The term 'Code' may suggest that this set of rules is legally binding on its target group, namely police officers, but it is not. However, the rules set standards of professional practice and behaviour which have a strong morally binding force without being a legal code, unless they are incorporated into national legislation. Each of the eight articles of the Code is accompanied by commentaries to facilitate its use. Article 1 of the code imposes an obligation on law enforcement officials and stipulates that Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession .

Article 2 mandates to observe human rights of all persons and stipulates that: In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons. Article 3¹²¹ empowers the Law enforcement officials to use force only when strictly necessary for the performance of their duty. Article 5,¹²² contains a prohibition on the use of 'torture

¹¹⁸ *Guillero Igancio Dermit Barbato and Hugo Haroldo Dermit barbato vs Uruguay* (84/1981) (21 oct.1982) Selected Decisions... Vol. 2, at 115, para 9.2.

¹¹⁹ Organization of American States, document OEA/Ser. AG/Doc. 2518 (1989)179-180.

¹²⁰ Adopted by the United Nations General Assembly on December 1979 (resolution 34/169)

¹²¹ Article 3 reads as under: Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

¹²² "No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to

or other cruel, inhuman or degrading treatment or punishment', which derives from the Declaration on the Protection of All persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly, in 1975. It is interesting to note that the article also prohibits the use, in defence, of the 'superior order' plea, which is missing in the 1975 Declaration but was included later on in the Convention against Torture.

In Article 8¹²³ the duty is laid down for Law Enforcement Officials not only to prevent but also rigorously to oppose any violation of the Code as well as to report those they believe have occurred or are about to occur, both to their superiors and to higher authorities, external to the police force, invested with the power to review grievances and complaints. The bringing of violations to public attention through the mass media may also be justified as a last resort, according to the commentaries to the article.

In India, the following Code of Conduct for police was adopted and issued by the Government of India in July 1985.¹²⁴ The code, *inter alia*, emphasis the following:

- (1) The Police must bear faithful allegiance to the Constitution of India and respect and uphold the rights of the citizen as guaranteed by it.
- (2) The police should not question the propriety or necessity of any law duly enacted. They should enforce the law firmly and impartially, without fear or favour, malice or vindictiveness.

national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman degrading treatment or punishment.”

¹²³ Article 8 reads as under: Law enforcement official shall respect the law and the present code. They shall also, to the best of their capability, prevent and rigorously oppose any violation of them. Law enforcement official who have reason to believe that violation of the present code has occurred or is about to occur, shall report the matter to their superior authority and, where necessary to other appropriate authority or organs vested with reviewing or remedial power.

¹²⁴ Union Ministry of Home Affairs letters no. VI-24021 / 87/84-GPA.I dated 4-7-1985 and 10-07-1985 addressed to the Chief Secretaries of all States/ UTs and Heads of CPOs.

- (3) The police should recognize and respect the limitations of their powers and functions. They should not usurp or even seem to usurp the functions of the judiciary and sit in judgment of cases to avenge individuals and punish the guilty.
- (4) In securing the observance of law or in maintaining order, the police should as far as possible, use the methods of persuasion, advice and warning. When the application of force becomes inevitable, only the irreducible minimum of force required in the circumstances should be used.
- (5) The prime duty of the police is to prevent crime disorder, and that the police must recognize that the test of their efficiency is the absence of both or not the visible evidence of police action in dealing with them.
- (6) The police must recognize that they are members of the public, with the only difference that in the interest of the society and on its behalf they are employed to give full time attention to duties which are normally incumbent on every citizen to perform.
- (7) The police should realize that the efficient performance of their duties will be dependent on the extent of ready cooperation that they receive from the public. This is in tune, will depend on their ability to secure public approval of their conduct and actions and to earn and retain public respect and confidence.
- (8) The police should always keep the welfare of the people in mind and be sympathetic and considerate towards them. They should always be ready to offer individual service and friendship and render necessary assistance to all without regard to their wealth or social standing.

- (9) The police always place duty before self, should remain calm in the face of danger, scorn or ridicule and should be ready to sacrifice their lives in protecting those of others.
- (10) The police should always be courteous and well mannered; they should be dependable and impartial. They should possess dignity and courage; and should cultivate character and the trust of the people.
- (11) Integrity of the highest order is the fundamental basis of the prestige of the police. Recognizing this, the police must keep their private lives scrupulously clean, develop self-restraint and be truthful and honest in thought and in deed, in both personal and official life, so that the public may regard them as exemplary citizens.
- (12) The police should recognize that their full utility to the state is best ensured only by maintaining high standard of discipline, faithful performance of duties in accordance with law and implicit obedience to the lawful directions of commanding ranks and absolute loyalty to the force and by keeping themselves in a state of constant training and preparedness.
- (13) As member of secular, democratic state the police should strive continually to rise above personal prejudices and promote harmony and the spirit of common brotherhood among all the people of India transcending religious, linguistic and regional or sectional diversities and to renounce practices derogatory to the dignity of women and disadvantaged segments of the society.

Another attempt to prohibit practice of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is the resolution passed by the United Nations General Assembly in the form of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and

Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹²⁵ also provides duty on the part of health personnel to observe certain ethics of medical profession under Principle 1 in these words:

Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained.

Principle 2 declares that 'it is a gross contravention of medical ethics, as well as an offence under applicable instruments....to engage, actively or passively, in acts which constitute participation in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment'

In this respect Principle 4 further stipulates that it is a contravention of medical ethics for health personnel, particularly physicians:

- (a) To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments;
- (b) To certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction

¹²⁵ Adopted by the United Nations General Assembly on 18 December 1982 (resolution 37/194)

of any such treatment or punishment which is not in accordance with the relevant international instrument.¹²⁶

It is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoners or detainees himself, of his fellow prisoners or detainees, or his guardians, and present no hazard to his physical or mental health.¹²⁷

It is made very clear that There may be no derogation from the foregoing principles on any ground whatsoever, including public emergency.¹²⁸

In the discharge of their duties, law enforcement officials are required to use physical force and many times firearms. Use of physical force and firearms often cause grievous injuries and deaths. It is necessary for the law enforcement officials to resort to force and use firearms as a last resort to keep the use to the minimum. All democratic countries have internal controls and departmental regulations to monitor and supervise the use of force and firearms by their law enforcement officials. United Nations, in order to emphasize the need for minimizing the use of force and firearms, has prescribed a series of 'Principles'.

C. REGIONAL STANDARDS FOR PROTECTION OF CUSTODIAL TORTURE:

In addition, provisions against torture are contained in regional conventions such as the European Convention on Human Rights, the American Convention on

¹²⁶ *Ibid.* Principle 4

¹²⁷ *Ibid.* Principle 5

¹²⁸ *Ibid.* Principle 6

Human Rights, and the African Charter on Human and peoples Rights. These conventions define principles applicable within the region concerned and establish monitoring committees to monitor State's compliance with these provisions.

(i) The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987:

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987 was adopted on 26 November 1987 and came into force in February 1989. It is a procedural convention with no substantive provisions setting up a committee with wide supervisory powers and performing its mandates through inspection visit to states which have ratified it. Article 1 of the convention authorizes the anti-torture committee to make visits of the places of detention and examine the treatment of persons deprived of their liberty due to torture and inhuman or degrading treatment or punishment. The implementation machinery provided in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (herein after referred to as European Convention Against Torture) is more effective and direct than that provided in the Convention against Torture because the Committee establish under European Convention have power, by means of visit, to examined the treatment of persons deprived of their liberty with a view of the protection of such persons from torture and ill-treatment even without the consent of that state party significantly consent of the state party is sine qua non for a visit under the Convention against Torture.

Article 2 of the European Convention makes it obligatory for the states parties to permit such visit of the committee to any place within its jurisdiction where persons are deprived of their liberty by a public authority. A sense of cooperation is expected

between the Committee and the national authority.¹²⁹ The proceeding of any visit by the committee is carried in accordance with Article 8 of the European Convention, which provides:

The Committee shall notify the Government of the State Party concerned of its intention to carry out a visit. After such notification it may anytime visit any place referred to in Article 2.

A party shall provide the Committee with the following facilities to carry out its task:

- 1 a. access to its territory and the right to travel without restriction,
 - b. full information on the places where persons deprived of their liberty are being held,
 - c. unlimited access to any place where persons are deprived of their liberty, including to right to move inside such places without restriction,
 - d. other information available to the party which is necessary for the committee to carry out its tasks. In seeking such information the committee shall have regard to applicable rules of national law and professional ethics.
2. The Committee may in private persons deprived of their liberty.
 3. The Committee may communicate freely with any persons whom it believes can supply relevant information.
 4. If necessary, the Committee may immediately communicate observations to the competent authorities of the party concerns.¹³⁰

A representation may be made by the competent authorities of the state party concerned against any visit only on the grounds of national defence, public safety, and serious disorder in places where persons are deprived of their liberty, the medical

¹²⁹ The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (herein after referred to as European Convention against Torture), Article 2.

¹³⁰ *Ibid*, Article 8.

condition of a person or that an urgent interrogation relating to serious crimes is in progress.¹³¹ After each visit, the committee shall draw up a report on the facts found and may transmit the same with recommendations to the concerned State party. If the State fails to cooperate or refuses to improve the situation in the light of the Committee's recommendation, the Committee may make a public Statement on the matter.¹³²

Independent international monitoring of place of detention can play an important role in the protection of Human Rights of Detainees. In this connection one is reminded of the relevant provisions of the European Convention where the committee can visit any place within the jurisdiction of states parties periodically and other time the committee deems necessary. The international community should consider the possibility of creating a body similar this to visit prisons of those states, which have ratified the Convention against Torture. The machinery provided for in this convention is reasonably better than that available at the global level.

Successful implementation of international standards against torture and ill-treatment depends upon the vigorous investigation of the allegations of torture by independent investigating agencies and the prosecution of the perpetrators of torture. One possible model for the independent investigation of the cases of torture is the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Another way, which the prohibition of torture can be ensured to provide the alleged victims of torture with effective remedies against such practices, including right to obtain compensation.¹³³

It is obvious from the foregoing that international law condemns and prohibits torture and ill treatment in strongest term. It enjoins the States with a legal duty to

¹³¹ *Ibid*, Article 9.

¹³² *Ibid*, Article 10.

¹³³ *See*, Human Rights Committee, General Comment 7 (1).

adopt effective legislative, administrative, judicial or other measures against acts of torture and ill treatment. To meet this obligation states should establish a comprehensive programme with emphasis on the official condemnation of torture, elimination incommunicado and secret detention, independent investigation of allegations of torture, exclusion of evidence found to have been procured by torture.¹³⁴ Since the success of such programme ultimately depends on the observance of the standards on the treatment of detainees, States should take necessary steps for the training of officials associated with detention and investigation work.¹³⁵

Torture is also prohibited under Article 3¹³⁶ of the European Convention of the Protection on Human Rights and Fundamental Freedoms which is applied and interpreted by the European Commission and European Court of Human Rights but the scope of this provision is imprecise and these organs have failed to provide any useful judicial formula for determination of violation of Article 3 without reference to factual situations. The case laws developed by these organs have limited the scope of Article 3 to cases of torture and degrading treatment. Moreover, the European court has taken a restricted view of torture by interpreting it only in sense of physical methods and pain. In the famous *Northern Ireland* case the court held that the combined use of five techniques (hooding, wall standing, subjection to continuous noise, deprivation of sleep and deprivation of food and drink) by Great Britain in Northern Ireland in 1971 did not constitute torture although they amounted to

¹³⁴ Amnesty International, *Torture in the eighties* (London, 1984), at 249, 12- point Programme for the Prevention of Torture, Point 4.

¹³⁵ See, *Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution*, United Nations New York, at 44, para 9.

¹³⁶ Article 3 of the European Convention of the Protection of Human Rights and Fundamental Freedoms provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

inhuman and degrading treatment because these techniques did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood¹³⁷.

The above decision of the Court has for reaching negative implications for the prevention and punishment of torture. It should be recognized that in recent years many dangerous techniques of mental and psychological torture have been developed and used throughout the world and their impact on the victim is greater than that of physical torture. If the Court's opinion were accepted then these sophisticated techniques would not amount to torture although they may be prohibited under inhuman and degrading treatment clause.

In 1979 a declaration on the Police was adopted by the parliamentary Assembly. It covers all individuals and organizations, including such bodies as secret services, military police forces, armed forces or militias performing police duties that are responsible for enforcing the law, investigating offences, and maintaining public order and state security. It declares that "torture and other forms of inhuman or degrading treatment or punishment" remain prohibited in all circumstances. A police officer is under an obligation to disobey or disregard any order or instruction involving such measures." The committee of ministers had not been able to give the declaration its unqualified support due to hesitations on certain points, but it had raised no objection to the rule on torture.

(ii) The American Convention on Human Rights, 1969:

The American Convention on Human Rights, which was signed in November 1969 by the Latin American states as well as the United States, came into force in July 1978. Article 5, Paragraph 2 reads: 'No one shall be subjected to torture or to

¹³⁷ See, Council of Europe, Yearbook of the European Convention on Human Rights 1976 (The Hague, 1977), at 946.

cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person'.

The Convention also incorporated the Inter-American Commission on Human Rights - which had existed since 1948 - as an organ for the Convention's implementation, and established the Inter-American Court of Human Rights. The Convention gives the right of petition to individuals, groups of individuals and non-governmental organizations; inter-state complaints operate only among states that have expressly agreed to such a procedure. These bodies have developed an extensive jurisprudence.

Mention should also be made of the Inter-American Convention to Prevent and Punish Torture, which was adopted in 1985 and came into force on 28 February 1987. Article 1¹³⁸ provides for the prohibition of torture and pledges an obligation on all states Article 2 contains this definition of torture:

For the purposes of this Convention, torture shall be understood to be an 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 measures, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that

¹³⁸ Article 1 which reads: The States Parties undertake to prevent and punish torture in accordance with the terms of this Convention.

they do not include the performance of the acts or use of the methods referred to in this article.

However, a former president of the Inter-American Court has characterized this convention as a 'disappointing' instrument', since it has eliminated the reaffirmation of torture as an international crime and also allows for continued application of the right of asylum, thereby suggesting that torture may be considered as a political crime, excluding it from the application of extradition treaties as well as eroding the principle of universal jurisdiction.¹³⁹

(iii) The African Charter on Human and People's Rights, 1981:

The African Charter on Human and People's Rights which was adopted in 1981 came into force on 21 October 1986. Most of the fifty countries in the African region have ratified it. Article 5 of the Charter is worded as follows:

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.

An *African Commission on Human and People's Rights* is established by the Charter to ensure the promotion and the protection of the rights. The task of promotion involves functions relating to studies, research, information, 'training and further training' - that is, a pedagogical function. It also has quasi-legislative functions, such as proposing and preparing draft Laws on human rights or defining the principles that should apply.

¹³⁹ Pedro Nikken, 'L'action central system interamerican des droids de l' homme', in Antonio Cassese, ed., *The International Fight Against torture*, Nomos verlagsgesellschaft, Baden- Baden, 1991. Cited in Love Kullberg: *Torture: International rules and Procedures in An End to Torture* at 28.

The task of protection consists of examining complaints of human rights violations, submitted either by states or by individuals so – called ‘other communication’ the proceedings are in writing and confidential. The Commission’s factual reports, accompanied by its findings and recommendations, shall be submitted to the Assembly of Heads of State and Government, which may decide that it should be published. No Court is established, since- as it is said- African customs and traditions emphasize mediation, conciliations and consensus rather than the adversarial and adjudicative procedures common to western legal systems. A draft protocol on the creation of an African Court of Human Rights is, however, being discussed.

In 1981 the Universal Islamic Declaration of Human Rights was issued. It states, in article 7, that ‘no person shall be subjected to torture in mind or body, or degraded, or threatened with injuries either to him or to any one related to or held dear by him.’

The final Act of the Conference on Security or Cooperation in Europe (CSCE) was signed in Helsinki on 1st August 1975 by thirty five States: all the countries of Europe (except Albania) plus the USA and Canada. Since 1 January 1995 the Conference on Security or Cooperation in Europe 'has been called the Organization for Security and Cooperation in Europe (OSCE). At the end of the third follow-up meeting of the Helsinki Conference held in Vienna in 1986-89, a Concluding Document, was adopted, on 19 January 1989, which established a procedure for the continuous monitoring of the human rights dimension of the CSCE/OSCE; this has only undergone minor alterations since coming into being. The procedures are cast 'in a traditional form based on reciprocity between two or more states for the settling of differences or disputes regarding the fulfillment of

commitments. Individuals have no direct access to the Vienna mechanism, but may, like NGOs, provide information in general or on individual cases.

D. IMPLEMENTATION MECHANISM:

Since the adoption by the general assembly in 1948 of the Universal Declaration of Human Rights, which did not at the time, and was not intended to, impose legal obligations on States and consequently did not establish any supervisory facility for monitoring and enforcement, there has been a vast expansion of the human rights field, generating a network of bodies, organs, institutions and complaints procedures of almost impenetrable diversity and complexity. Most are of non-judicial character, and use techniques of verification that tend to be more inquisitorial than adversarial: that is, they eschew the system whereby contending parties vie for the result favourable to themselves. Another significant feature is that they only issue legally non-binding recommendations, reports and opinions. Some of these bodies are the product of the very instrument, the compliance of whose provisions they have been mandated to control.

A few of the bodies have a judicial or quasi-judicial function, conducting their examinations and investigations in the form of proceedings between two opposing parties who make submissions to them in oral hearings. The proceedings are concluded with a legally binding appraisal of proffered and alleged fact- often called judgment. Examples is the European Commission of Human Rights/ European Court of Human Rights and Inter-American Commission Court of Human rights).¹⁴⁰

Most of the bodies are offshoots of United Nations activities; some belong to regional organizations. Within the United Nations distinction can be made between those functions which emanate from and are based directly on the UN charter itself,

¹⁴⁰ Love Kelberg, "Torture: International rules and Procedures." at 5-6 in *An End to torture: Strategies for its eradication*, edited by Bertil Duner, Zed Books London (1998)

and those mechanisms which derive from a treaty proper. Thus two distinct spheres of UN human rights activities are discernible: 'charter-based' and 'treaty based'; both are considered herewith:

(1) TREATY-BASED BODIES:

(a) The Human Rights Committee was established in 1977 under the International Covenant on Civil and Political Rights. Its eighteen members are elected by secret ballot by the States Parties to the International Covenant on Civil and Political Rights for a four year term. They serve in their personal capacity, that is, they shall not be under instruction from other bodies or agencies, and may be re-elected.

The task of the Committee is threefold. *First*, there is the mandatory reporting procedure under Article 40, according to which states undertake to submit reports on the measures they have adopted to give effect to the rights recognized by the International Covenant on Civil and Political Rights and on the progress made in the enjoyment of those rights. Many states delay reporting - sometimes inordinately - in spite of reminders. What is more, reports are often inadequate and incomplete and supplementary information is often not forthcoming, although the Committee strives to elicit more during meetings with states' representatives, as well as through follow-up request. Since tardiness and inadequacy in reporting entails no sanctions, the risk arises that immunity from review and accountability will result. It must be said that, on the whole, the reporting system falls considerably short as a means of raising human rights standards and preventing violations.

Second, an optional inter-state complaint procedure is laid down in Articles 41-43, only some 45 states out of 145 have accepted this procedure, which as a result seems to have become a dead letter.

Third, there is also, in an Optional Protocol to the International Covenant on Civil and Political Rights, a procedure for individual complaints, to which some 90 states have adhered. Under this protocol the Committee may be seized by individuals claiming that their rights under the International Covenant on Civil and Political Rights have been violated. The main features of the procedure are as follows:

- (i) The Committee is competent to deal with a complaint if all domestic channels have been exhausted and if the matter is not being examined under another procedure of international investigation or settlement; a complainant may be excused from having to exhaust such channels if this would entail unreasonably prolonged procedures.
- (ii) A complaint which has been declared admissible shall be communicated to the state concerned, which shall within six months submit to the committee written explanations or statements clarifying the matter; it shall also indicate what measures it may have taken to remedy the situation.¹⁴¹ On completion of the case file, the Committee examines in camera the documentations submitted by both parties, after which it forwards its views to the state concerned.¹⁴²
- (iii) Although not provided for in the Protocol, a state may be asked to stay the proceedings against a complainant by so-called 'interim measures', which are not, however, binding. Nor do the final views expressed by the Committee constitute legally binding decisions; nevertheless, because of the moral weight they carry, based as they are on impartial and objective assessment of the facts as presented, many states act on and in accordance with the findings of the Committee.

¹⁴¹ Article 4

¹⁴² Article 5(4)

If the mainly written procedures were to be complemented by oral hearings, the Committee's view would probably assume even greater authority with states. Since its foundation in 1977 the Committee has been petitioned with increasing numbers of complaints, indicating that the procedure is considered a valid and worthwhile one by complainants.

(b) Committee against Torture was established pursuant to Article 17 of The UN Convention against Torture and started its function in 1988. The Committee against Torture (hereafter referred to as the Committee) has 10 member who are elected, in the same way as the members of Human Rights Committee, by the states parties to the Convention against Torture for a four year term. They likewise serve in their personal capacity and may be re- elected.

It is modelled on the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. The Committee has four a four fold task. Three of these functions are formulated in the same way, with minor variations, as the three responsibilities of the Human Rights Committee: the reporting system, the inter-state communication system, and the individual communication system. In addition, the committee has a mandate to conduct confidential inquiries, if it has received well founded indications of systematically practiced torture

(i) The Reporting System:

The primary method of international implementation provided under the Convention against Torture is a reporting procedure. Article 19¹⁴³ of the Convention

¹⁴³ *Ibid*, Article 19 which reads:

1. The states parties shall submit to the committee, through the secretary general of the United Nations, reports on the measures they have taken to give effect to their undertakings under this convention, within one year after the entry into force of the convention for the state party concerned. Thereafter the states parties shall submit supplementary reports every four years on any new measures taken and such other reports as the committee may request.
2. The Secretary General of the United Nations shall transmit the reports to all state parties.

(CAT) provides that the States Parties shall submit to the committee, through the U.N. Secretary General of the reports on the measures they have taken to give effect to their undertaking under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.¹⁴⁴ The Secretary General of the U.N shall transmit the reports to all States Parties. The Committee shall then study the reports and will make such general comments on the reports as it may consider appropriate and shall forward these to the State Party concerned. The States Parties may make observations on any comments made by the Committee. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this Article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with Article 24. If so requested by the State Party concerned, the committee may also include a copy of the report submitted under paragraph 1 of Article 19.¹⁴⁵

The purpose of the reporting system seems to obtain the necessary information about the implementation of the provisions of the Convention by the States Parties. This procedure enables the Committee to develop a dialogue with each State Party with regards to the implementation of the convention. Personal representation by States Parties is not contemplated while the Committee considers the reports.

3. Each report shall be considered by the committee which may make such general comments on the report as it may consider appropriate and shall forward these to the state party concerned. That state party may respond with any observations it chooses to the committee.

4. The committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the state party concerned, in its annual report made in accordance with article 24. if so requested by the state party concerned, the committee may also include a copy of the report submitted under paragraph 1 of this article.

¹⁴⁴ *Ibid*, Article 19, para 1.

¹⁴⁵ *Id*, Article 19, para 4.

The States Parties are free to prepare and submit their own reports to the committee. As the committee has no power to ascertain the correctness of the contents of the report or to demand additional information from States Parties it has to rely on the report submitted by the States. Furthermore, it is not empowered to make suggestions on the reports submitted by the States Parties. Like the Human Rights Committee, all that it can do is to make general comments on the report. Although the report system as contemplated under the Convention may not be very effective, it would nevertheless be a sort of indirect international supervision over States Parties as far as the practice of torture is concerned. Thus the reporting system is a "soft" one. Even then the response of the States is not encouraging.

(ii) Inter-State Communication System:

Besides, the afore-mentioned reporting system, the Convention envisages a system of State-to-State communication on the application of the Convention and conciliation. But this system is an optional one and operates only if a state party declares that it recognizes the competence of the committee to receive and to consider communication that a state party claims that another state party is not fulfilling its obligations under the convention. Inter- state communication system is, further, based on the principle of reciprocity and thus operates only when a state has made a declaration recognizing the competence of the committee. The system will start operating, moreover, only when 5 State Parties have made declaration recognizing the competence of the committee. Article 21 of the Convention¹⁴⁶ provides the following

¹⁴⁶ *Ibid*, Article 21 which reads: 1. A State Party to this convention may at any time declare under this article that it recognizes the competence of the committee to receive and consider communications to the effect that a state party claims that another state party is not fulfilling its obligations under this convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a state party which has made a declaration recognizing in regards to itself the competence of the committee no communication shall be dealt with by the committee under this article if it concerns a State Party which has not made such a declaration communications received under this article shall be dealt with in accordance with the following procedure;

procedures for such inter state communication. If a state party considers that another state party is not giving effect to the provision of this convention, it may, by written communication, bring the matter to the attention of that state party. The receiving state party, within 3 months after the receipt of the communication shall communicate the complaining state party an explanation in writing clarifying the matter. If the matter is not mutually adjusted within six months, either of the state party the

(a) If a State Party considers that another state party is not giving effect to the provisions of this convention, it may, by written communication, bring the matter to the attention of that state party. Within three months after the receipt of the communication the receiving state shall afford the state which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both state parties concerned within six months after the receipt by the receiving state of the initial communication, either state shall have the right to refer the matter to the committee, by notice given to the committee and to the other state;

(c) The Committee shall deal with matter referred to it has ascertained that all domestic remedies have been invoked and exhausted in the matter, inconformity with the generally recognize principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim to the violation of this convention;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of sub paragraph(c), the Committee shall make available its good offices to the states parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this convention. For this purpose, the committee may, when appropriate, set up an ad hoc conciliation commission;

(f) In any matter referred to it under this article, the committee may call upon the state parties concerned, referred to in subparagraph(b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), and shall have the right to be represented when the matter is being considered by the committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the committee shall confine its report to a brief statement of the facts; the written submissions and recorded of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the State Parties concerned. 2. The provisions of this article shall come into force when five States Parties to this convention have made declaration under paragraph 1 of this article. Such declarations shall be deposited by the states parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other states parties. A declaration may be withdrawn at any time by notification to the Secretary general. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any state party shall be received under this article after the notification of withdrawal of the declaration had been received by the secretary general, unless the state party concerned has made a new declaration.

explanation or statement should include to the extent possible pertinent domestic procedures and remedies taken, pending or available in the concerned may refer the matter to the committee by giving notice to the committee and the other state party concerned. The committee, after receiving any such communication, shall ascertain that all available domestic remedies within the state have been invoked and exhausted in the matter in conformity with the generally recognized principles of international law. The committee shall examine the communication in closed sessions. The committee makes available its good offices to the states parties concerned in order to arrive at a friendly solution of the matter. For this purpose, the committee may when appropriate, set up an ad hoc conciliation commission. The concerned state party shall have the right to be represented when the committee is considering the matter and to make submissions orally and/or in writing. The committee shall submit its report on the matter within 12 months after the date of receipt of notice. If a solution is reached, the committee shall confine its report to a brief statement of the facts and of the solution, its report shall confine to a brief statement of facts. The written submission and the record of the oral submission made by the state parties shall be attached to the report. In both the cases, the report shall be communicated to the state parties concerned¹⁴⁷

The procedure of inter state communication envisaged under the convention is a weaker system compared to that of the European Convention on Human Rights. While a separate declaration excepting the competence of the torture committee to receive and consider communication made by other states party is a necessary prerequisite to the operation of the system it is not necessary under the European Convention on Human Rights. Under the European Convention any High Contracting

¹⁴⁷ *Id.*, Article 21

party may refer to the European Commission of Human Rights any alleged breach of the Convention by another High Contracting party.

Apart from the optional nature of the inter-state communication system the fact that state party is free to withdraw its declaration at any time by making a notification to the Secretary General weakens the system further. Lack of enthusiasm on the part of the states parties to except even this weak system makes this system virtually non-operational.

As the record of many countries on the front of protection of human rights in general and the right against torture in particular is hopelessly poor, it would be naïve to expect the careful watch on the observance of the right against torture in other states from them. It is more so in the case of friendly state where torture is being practiced or tolerated by the officials of the government because making complaint will be deemed to be interference in the domestic affairs of that state and will adversely affect by lateral relations. Of course if national interests so demand a state may complaints without looking into its own record in the matter of torture prevention.

(iii) The Individual Communication System:

The Convention against Torture makes provisions for the individual communication to the committee against torture in case of the violation of the right against torture. Under the Convention only citizens of that state party may make communications before the committee who have, by making separate declaration recognized “the competence of the committee to receive and consider communication from or on behalf of individuals subject to its jurisdiction...”

The Convention specifically provides that “no communication shall be received by the committee if it concerns a state party which has not made such declaration,” though it may be a party to the convention.

The citizen concerned must first have exhausted all domestic remedies before communicating with the committee and anonymous communication or one, which the committee considers to be an abuse of the right of petition, or to be incompatible with the convention provisions is inadmissible. The Convention also provides that the committee shall consider no communication unless it has ascertained that the matters not being examined under another procedure of any international investigation or settlement. The committee is required to bring any communication submitted to it under the Convention to the attention of the state party concerned which on its part, is requested to provide the committee with a written explanation of the matter and the remedy, if any, that it might have taken. Meeting in closed session the committee will consider individual communication in the light of all written information made available to it by the individual and by the state party concerned. After that the committee is to forward its views to the state party concerned and to the individual.¹⁴⁸

¹⁴⁸ *Ibid*, Article 22 which reads:

1. A State Party to this convention may at any time declare under this article that it recognizes the competence of the committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a state party of the provisions of the Convention. No communication shall be received by the committee if it concerns a state party which has not made such a declaration.
2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submissions of such communications or to be incompatible with the provisions of this Convention.
3. Subject to the provisions of paragraph 2, the committee shall bring any communications submitted to it under this article to the attention of the state party of this convention which has made a declaration under paragraph 1 and is alleged to be violation any provisions of the convention. Within six months, the receiving state shall submit to the committee written explanation or statements clarifying the matter and the remedy, if any that may have been taken by that State.
4. The committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the state party concerned.
5. The committee shall not consider any communications from an individual under this article unless it has ascertained that:
 - (a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

There are two major differences between the individual petition system of the optional protocol and that of the Convention against Torture. While under the former the petition concerning the violation of rights must normally come from the alleged victim, the Committee against Torture may receive petitions from or on behalf of the alleged victim. It means that, if the victim is unable to communicate to the committee, another person or a body of persons may send petitions to the committee on his behalf.¹⁴⁹ Again, the right to communicate with the Human Rights Committee is conferred under the optional protocol upon the individuals claiming to be the victims of violation, irrespective of their nationality or lack of it. In sharp contrast, the Committee may receive communication only from individuals who claimed to be victims of violation by state party of the provisions of the Convention within the jurisdiction of that state.

If in the opinion of the Committee “torture is being systematically practiced in the territory of a state party” it needs not wait for any individual communication or petition; it may *suo- moto* take up the matter for examination. On the receipt of reliable information with regard to infringement of the provision of the Convention the committee shall invite that state party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned. Taking into account any observation which may have been submitted by

(b). The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is likely to bring effective relief to the person who is the victim of the violation of this convention.

6. The committee shall hold closed meetings when examining communications under this article.

7. The committee shall forward its view to the state party concerned and to the individual.

8. The provisions of this article shall come into force when five states parties to this convention have been made declarations under paragraph 1 of this article. Such declarations shall be deposited by the state parties with the secretary-general of the united –nations, who shall transmit the copies thereof to the other state parties. A declaration may be withdrawn at any time by notifications to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary General, unless the state party has made a new declaration.

¹⁴⁹ *Ibid*, Article 22, Para (1).

the state party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.¹⁵⁰ If an enquiry is made in accordance with paragraph 2 of this Article,¹⁵¹ the Committee shall seek the cooperation of the state party concerned. In agreement with that state party such an inquiry may include a visit to its territory. After examining the findings of its members or members submitted in accordance with paragraph 2 of this Article 22, the Committee shall transmit these findings to the state party concerned together with any comments or suggestions, which seem appropriate in view of the situation. All the proceedings of the Committee referred to in paragraph 1 to 4 of this Article shall be confidential, and at all stages of the proceedings the cooperation of the state party shall be sought. After such proceeding have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may after consultation with the state party concerned decide to include a summary of the results of the proceedings in its annual report made in accordance with Article 24¹⁵².

¹⁵⁰ Article 20 which reads as under:

1. If the committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practiced in the territory of a state party, the committee shall invite that state party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the state party concerned, as well as any other relevant information available to it, the committee may, if it decides that this warranted designate one or more of its members to make a confidential inquiry and to report to the committee urgently.
3. If an inquiry is made in accordance with paragraph 2 of this article, the committee shall seek the co-cooperation of the state party concerned. In agreement with that state party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the committee shall transmit this findings to the state party concerned together with any comments or suggestions which seem appropriate in view of the situation.
5. All the proceedings of the committee referred to in paragraphs 1 to 4 of this article shall be confidential; at all stages of the proceedings the co-operation of the state party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the committee may, after consultations with the state party concerned, decide to include a summary account of the results of the proceedings in this annual report made in accordance with article 24.

¹⁵¹ *Id.*

¹⁵² *Ibid*, Article 24 which reads:

(c) The Committee on the Rights of the Child: It was established pursuant to Article 43 of the Convention on the Rights of the Child.¹⁵³ The Committee monitors the progress made by states in fulfilling their obligations. States have to submit a first report within two years of ratifying the convention and then subsequently at five-year intervals. States shall make their reports 'widely available to the public in their own countries'.

The Convention does not establish any right of petition either in the form of an inter-state or an individual complaints mechanism. Aggrieved parties must resort instead to, for example, the grievance procedures available within the monitoring systems of the Human Rights Committee or the Committee against Torture.

2. CHARTER-BASED BODIES:

(a) The Commission on Human Rights, which was set up in 1946, is the United Nations' central policy organ in the field of human rights. It makes, *inter - alia*, recommendations and 'drafts' international instruments relating to human rights; it also investigates allegations concerning violations of human rights and handles communications relating to such violations. It is composed of fifty-three member states' representatives, elected for three year terms.

In recent Commission has set up organs to investigate human rights problems in specific countries or on thematic simulations: special reporters, representatives or other designates.

As for the Commission itself; elaborate provisions have been laid down in several resolutions by the Economic and Social Council on its competence to study situations

The committee shall submit an annual report on its activities under this convention to the state parties and to the General Assembly of the United Nations.

¹⁵³ It has ten members elected by the States Parties and they serve in their personal capacity for four-year terms and may be re-elected.

'which reveal a consistent pattern of violation of human rights'¹⁵⁴ as well as to consider communications 'which appear to reveal a consistent pattern of gross and reliably attested violations of human rights'.¹⁵⁵ If it finds an investigation warranted, it may appoint an ad hoc committee to conduct it 'with the express consent of the state concerned' and 'in constant cooperation with that state and under conditions determined by agreement with it' and only after 'all available means at the national level have been resorted to and exhausted'; all proceedings in accordance with Resolution 1503 shall remain confidential until such time as the Commission decides to make recommendations to the Economic and Social Council (ECOSOC); in contrast, the debates on situations under Resolution 1253 are in public.

(b) A Special Reporter on Torture (and Country Reporters) was appointed by the Commission on Human Rights in 1985 to examine questions relevant to torture; he was empowered to seek; receive credible and reliable information on such questions and to respond to such information without 'delay'. The Special Reporter corresponds with Governments on measures they have taken or plan to take to prevent or combat torture. Requests for urgent action received by him are brought to the attention of the government concerned to ensure protection of the individual's right to physical and mental integrity. He also holds consultations with governments who express the wish to meet with him, and visits countries where torture occurs or is alleged to occur. The Special Reporter submits an annual report to the Commission of Human Rights. In those reports he has taken the view that, although the mandate is limited to torture as opposed to cruel, inhuman or degrading treatment or punishment, that distinction is a matter of degree and a matter of intent, both highly subjective notions.

¹⁵⁴ Resolution 1253/XLII of 6 June 1967,

¹⁵⁵ Resolution 1503/XLVIII of 27 May 1970.

The difference between the country-oriented and the thematic approach is that a country reporter deals with the violation of all human rights in one specific country, whereas a thematic reporter deals with the violation of one specific human right all over the world.¹⁵⁶ Furthermore, although the thematic mechanisms are created on the basis of Resolution 1253, which explicitly refers to 'situations which reveal a consistent pattern of violations of human rights', their mandate is not restricted to such situations.

(c) The High Commissioner for Human Rights¹⁵⁷ is a post which was created in the wake of the Vienna World Conference on Human Rights of 14 to 25 June 1993. The High Commissioner's tasks are formidable: promoting effective universal enjoyment of all civil, cultural, economic, political and social rights; carrying out the tasks assigned to him or her by 'the competent bodies of the United Nations system in the field of human rights and making recommendations to them; promoting the realization of the right to development and encouraging enhanced support from relevant bodies of the United Nations system; providing, through appropriate institutions, advisory services and technical and financial assistance, at the request of the state concerned and; where appropriate, the regional human rights organizations; coordinating relevant United Nations education and public information programmes in the field of human rights; playing an active role in removing current obstacles and meeting challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world; engaging in a dialogue with all governments regarding the implementation of his/her mandate with a view to securing respect for all human rights; enhancing international cooperation for the promotion and protection of all 'human rights; coordination of human rights

¹⁵⁶ All countries in the world are therefore affected by the appointment of an issue-oriented reporter.

¹⁵⁷ General Assembly Resolution 48/141 of 20 December 1993

promotion and defence activities throughout the United Nations system; rationalization, adaptation, strengthening and streamlining of the United Nations machinery in the field of human rights; overall supervision of the Centre for Human Rights.

It is too early to evaluate the likely impact of the High Commissioner in the field of torture. Much depends on the resources states are willing to allocate.

The problem of Overlapping Competences of Different Supervisory Bodies

Since a number of states have signed several treaties providing for individual as well as inter-state complaints procedures before different supervisory bodies, with regard to the same or similar rights or sets of rights, some have made attempts to guard against a duplication of procedures before different bodies by the same complainant in the same case. Thus, when ratifying the Optional Protocol of the International Covenant on Civil and Political Rights, some states—such as Denmark, Norway and Sweden entered reservations, saying that the Human Rights Committee should not have competence to consider a communication from an individual, unless it has ascertained that the same matter is not being and had not been examined under another procedure of international investigation or settlement. In the Anti-Torture Convention a provision containing those two provisos for admissibility of individual complaints was inserted in its Article 22:5(a).¹⁵⁸

¹⁵⁸ *Ibid*, Article 22 which reads:

5. The committee shall not consider any communications from an individual under this article unless it has ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;