

CHAPTER - 3

MEANING AND DEFINITION OF TORTURE

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We have seen in the preceding chapter that various acts were included in the practice of torture in many forms. When at the national and international level a basic human right against torture has emerged and consequently the state has extended its tentacles to secure protection against torture to the individuals. At the same time the right against torture should have its own limitations like any other right. In order to secure the right and extend the protection against torture it becomes significant to define the torture precisely because a right without definition is a right without proper protection. The meaning and the definition of 'torture', therefore, are discussed hereunder to ascertain the acts, which may be prohibited legally and constitutionally.

(a) Definition of Torture:

Torture usually denotes physical punishment or coercion by inflicting severe pain. It means breaking down of the victim under extreme psychological pressure and severe physical pain, whether the confession signed or information given is true or false. Torture carries severe beating, degradation, insults, sexual threats or assaults, forcibly eating excrement, humiliation of one's family etc. The suspect is detained in some isolated place beyond the reach of the family, friends and legal assistance and interrogators control everything, even life. What is most disturbing is that those who practice torture not only deny its commission but also justify it in the name of "sustained interrogation and call it "questioning" or "examining". Whatever the name, brutalization is the result. Torture has been defined in various ways. The term 'torture' according to Black's Law Dictionary means, "to inflict intense pain to body or mind for purpose of punishment, or to extract a confession or information, or for sadistic

pleasure. "The Cambridge International Dictionary of English defines the term as "an act of causing great physical pain in order to persuade someone to do something or to give information or as an act of cruelty." The Compact Oxford Reference Dictionary the torture means "the act of causing severe pain as punishment or to make someone do something."¹ Doubtlessly, the definition enunciates the physical aspect of torture. The word 'torture' usually denotes intense suffering, physical, mental and psychological, aimed at forcing someone to do or say something against his or her will. It means breaking down under severe physical pain and extreme psychological pressure. As early as in 1850 the Torture Commission of India attempted to define 'torture', and quoted Dr. *Jhonson* who said, "Torture was fair which guilt is punished or confession extorted."

The torture may be defined as:

"Torture is the deliberate, systematic, or wanton infliction of physical or mental suffering by one or more person, acting alone or on the orders of any authority, to force another person to yield information, to make a confession or for any other reason."²

It may be noted that definition of torture above tries to set out the possible intents of those who practice torture. Chet Scringna of university, New York defines Torture as Intentional trauma deliberately conceived by *vilemen* to systematically cause pain and suffering to selected individuals ultimately ending with the physical and psychological collapse of the victims.³

¹ Catherine Soannes: *The Compact Oxford Reference Dictionary*, (VIIth Edition) Oxford University Press Inc., New York (2004) at 886.

² See, the definition of torture as adopted by the World Medical Association in its Tokyo Declaration of 1975.

³ Shankar Sen, *Human Rights in a developing Society*, APH Publishing Corporation, New Delhi(1998) at 11.

The essential character of torture is that it is a crime of obedience. A crime that takes place, not in opposition to authorities, but under explicit instruction, or in a political environment in which such acts are implicitly sponsored, expected, or at least tolerated by the authorities. Furthermore, modern state torture and organized violence is characterized by being goal oriented. It serves a wider purpose than violence, punishment, or confession as such.⁴

In the Declaration on the Protection of all Persons from Torture and other Cruel and Inhuman or Degrading Treatments or Punishment⁵ torture is defined in Article 1 as follows:

“Any act by which severe pain or suffering, whether physical or mental is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or the 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”⁶

The above mentioned definition contains following elements:(1) any act by which severe mental or physical pain or suffering is inflicted on the victim;(2) It is intentionally inflicted by or at the instigation of a public official on a person, and (3) the purpose of any such act is to obtain from the victim or the third person information or confession for punishing him for an act he has committed or is suspected of having committed or intimidating him or other persons.

⁴ Malene Mikkelsen, *Causes of Torture and Other Forms of Organised Violence; Implications for RCT Preventive Efforts and Research* (1999) at 5

⁵ Adopted by General Assembly Resolution 3452(xxx) of 9 Dec.1975 (hereinafter referred to as the Declaration against Torture’).

⁶ *Ibid*, Article 1 of International Instruments. (New York, 1983) at 82-83.

Thus the concept of torture is broad in scope in as much as it takes into consideration the physical as well as mental pain or suffering of the victim. In view of its wide scope modern psychological methods of torture such as threats made to the victims, forced withering of torture sessions, sleep deprivation, bad condition of detention are covered by the definition under consideration.

In this definition, torture 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 the Prisoners.⁷ This exclusion created a serious loophole for the States having legislation, which provide for certain brutal physical punishments. For example, some of the Islamic States have laws permitting public whipping, execution by lynching or amputation of limbs as form of punishment. The definition obviously does not cover these so called lawful sanctions under the term torture. It is uncalled for and this loophole should be plugged at the earliest.⁸

Another serious attempt to define the concept of torture was made in Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment⁹. It defines torture as follows;

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 a an act or a third person has committed or is suspected of having committed, or intimidating or concerning him or a third person, or for any

⁷ Adopted by the first U.N Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and subsequently approved by the ECOSOC in 1957, the Standard Minimum Rules for the Treatment of Prisoners list generally accepted Principles and practices regarding the treatment of prisoners. They represent the minimum conditions that are accepted as suitable by the United Nations and as such are intended to protect the Prisoners against mistreatment and torture. *See, Human Rights: A Compilation, Ibid, at 75-82.*

⁸ R.S.Saini, "Custodial Torture in Law and Practice with Reference to India," 36, *JILI* (1994) 166 at 168.

⁹ *See, United Nations Resolutions and Decision's adopted by the General Assembly during the first Part of its Thirty-Ninth Session on 10th Dec. 1984 (Resolution 39/46) (New York, 1985), at 381-82.*

reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the investigation of or with the consent or acquiescence of a public official or other person acting in the official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The above formula retains definition of torture propounded in 1975 Declaration¹⁰ and thus carries the same loophole as in the Declaration. Under the Convention too torture is allowed to continue as prescribed by the law of the land. The definition of torture given by the U.N. Convention has been practically seen in our country. Egregious violations of human rights, especially torturous instinct of police personnel, have become the matter of daily routine. It is difficult to think of any persons in their custody.¹¹

Another attempt was made in Inter-American Convention to Prevent and Punish Torture which was adopted on 9 December 1985 to define torture in Article 2 as follows:

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

¹⁰ Adopted by General Assembly Resolution 3452(xxx) of 9 December 1975

¹¹ Nirman Arora; "Custodial Torture in Police Station in India; A Radical Assessment"; 41, *JILI* (1999) at 515.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

(b) Meaning of the Expression Cruel, Inhuman or Degrading Treatment or Punishment:

The term “cruel, inhuman or degrading treatment or punishment has not been defined by the General Assembly but should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental.

Article 1, para2, of the General Assembly Declaration equated “cruel, inhuman or degrading treatment or punishment” with ‘torture’. But it is nowhere clarified in the Declaration as to what is meant by these terms. The General Assembly attempted a clarification while drafting the Code of Conduct for law Enforcement Officials.¹² Commentary to Article 5¹³ of the Code States; Medical or scientific experimentation with a pre-trial detainee is serious form of torture or cruel, inhuman or degrading treatment. It is expressly prohibited by Article7¹⁴ of the Covenant on Civil and Political Rights. The objective behind this provision is to prevent the recurrence of atrocities similar to those perpetrated in Nazi Concentration Camps during the Second World War.¹⁵

¹² By Resolution34/169 of 17 December 1979, the General Assembly adopted a Code of Conduct for law Enforcement Officials and transmitted it to governments with the recommendation that favourable consideration should be given to its use within the framework of national legislation or practice as a body of principles for observance by law enforcement officials. The General Assembly has recommended the Member States to make all possible efforts to implement these rules. For the text of the Code, see human Rights: A Compilation, Ibid, at 83-86.

¹³ Article 5 of the Code reads as follows:

“No law enforcement officials 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 and threat of a war, or threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment”.

¹⁴ Article 7 of the Covenant: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

¹⁵ U.N., Doc.A/3824,para 16.

When the Article was being discussed in the Commission on Human Rights, there was agreement among the representatives that experiments involving risk should not, in principle, be carried out without the free consent of the subject. It was suggested at that time that exception to the Principle had to be made where the interest of the health of the individual or the community was involved. Several proposals on this line were made in the Commission on Human Rights but could not be accepted due to apprehension regarding the possible abuses of such provisions.

(c) Definitional Issues and Case Law Jurisprudence:

(d) International Humanitarian Instruments:

Both in the UN Declaration and the UN Convention against Torture, torture is defined or described as having the following elements:

1. The nature of the act: an act by which severe physical or mental pain or suffering is inflicted upon a person.
2. The perpetrator of the act: he is a public official or any other person acting in an official capacity.
3. The Perpetrator's aim. his acts are intentional and executed for the purpose, in particular, of obtaining from the victim or a third person information or confessions, or for the purpose of punishing him for an act, which he or a third person has committed or is suspected of having committed, or generally, for the purpose of discrimination of any kind.

One important difference between the two instruments is the formulation of the 'escape clause' at the end of the first sub-paragraph of Article 1, which exempts 'lawful sanctions' from what are otherwise coverall definitions: in the Declaration, pain and suffering arising from such sanctions is not considered to be torture' to extent[they are]consistent with the Standard Minimum Rules for the Treatment of

prisoners' adopted by the UN in 1955; these rules contain inter- alia a clause number 31, which 'completely; prohibits as punishment for disciplinary offences'; corporal punishment, punishment by placing in a dark cell and all cruel, Inhuman or degrading punishment'. Attempts were made to reproduce the formulation of the Declaration in the Convention; this was not accepted because it was argued that the convention is not purport to recommend reform of the system of penal sanctions in different countries and that therefore the formulation would not be acceptable to a range of states. In the Convention this limitative description of lawful sanctions had to be left out There therefore exists a regrettable void: how to qualify as punishment in some countries, for example, strict solitary confinement, in particular for longer periods, or mutilations and indeed stoning as a form of execution or, for that matter, public whipping and stoning as a form of execution or, for that matter, public whipping and flogging. Some hold that such punishments are per se prohibited by international law and therefore not covered by the exception, a view which is certainly not accepted in some parts of the world.¹⁶

The Declaration but not the Convention-contains in its second sub-paragraph a summary definition of torture, which is often quoted by judicial as well as other bodies, and is formulated as follows: 'Torture' constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'. Some call this a 'definition proper' because the first paragraph of Article 1 in both instruments is more of a description than a real definition, to be used as an aid to interpretation when implementing the Convention.

¹⁶ Love Kellberg: "Torture: International Rules and Procedures" at 32 in *An End To Torture* (edited by Bertil Duner) Zed books, London (1998).

In neither instrument there is a reference to 'medical and scientific experimentation,' as we have found in the CCPR, Article 7,¹⁷ Nevertheless it can be argued that such treatment, in particular if it reaches a certain level of severity, is also covered by Article 1 of the Declaration and the Convention.

As was remarked earlier, neither of the instruments defines or describes the phrase 'cruel inhuman and degrading treatment or punishment.' The torture clause in the Inter-American Convention of 1985 is reproduced above. Although the Convention has been criticized for having impaired the international fight against torture, the said clause contains a valuable description of inadmissible methods, to which there is not equivalent in the UN Declaration or in the UN Convention. It included the use of methods upon a person intended to obliterate the personality of the victims or to diminish his physical or mental capacities.¹⁸

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measure, provided that they do not include the performance of the acts or use of the methods referred to in this article. The official General Assembly commentary to the Code of Conduct for Law-Enforcement Officials and Body of Principles for the Protection of Detained or Imprisoned Persons has provided an interpretation of the phrase, 'cruel, inhuman or degrading treatment or punishment', according to which it 'should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental';

¹⁷ Article 7 of the Covenant: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

¹⁸ This reads as follows:

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. This focuses attention of the fact that the aim of torture is not merely; to extract a confession or obtain information from a victim, but to destroy a human being, his personality and identity, for example by chemical mind-control techniques. The escape clause of lawful sanctions also has an important qualifying proviso-unfortunately lacking in the two UN instruments-which takes much of the sting out of this obnoxious clause;

with regard to the Body of Principles, the commentary has been supplemented with an exemplifying addition. The European Committee for the prevention of torture has adopted this interpretive statement as its guiding maxim.

(i) International Monitoring Bodies:

Judicial and other monitoring bodies established under international instruments other than the ones mentioned,¹⁹ and in which there are only straightforward clauses prohibiting torture, inhuman or degrading treatment or punishment without any definitional or descriptive additions, have developed their own jurisprudence or case law germane to their understanding of how to interpret the torture prohibition laid down in the instruments the compliance of which they are monitoring. Some examples of this, from what may be called 'leading cases,' should be compared with the 'treaty definitions/descriptions' given above.

(a) Judicial Bodies:

The European Commission for Human Rights was the first to make a reasoned formal finding in the case of Greece (1969) that torture and ill-treatment had taken place, when applying Article 3 of the ECHR; it indicated as its view that 'torture' comprises inhuman and degrading treatment and that 'inhuman treatment' comprises degrading treatment; it thereafter went on to describe its notion of 'inhuman treatment', as well as 'degrading treatment', in the following way:

The notion of inhuman treatment covers at least such treatment, as deliberately cause's severe suffering, mental or physical which, in the particular situation, is unjustifiable. The word 'torture' is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment

¹⁹ Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.²⁰

The Commission was criticized for contemplating the possibility of 'justification' of inhuman treatment. Therefore it elaborated on this issue a later case, that of Northern Ireland (1976), concluding 'that the prohibition under Article 3 of the Convention is an absolute one and that there can never be, under the convention or under international law, a justification for acts in breach of that provision.' It must be said, however, that what was in mind was the mitigation possibility referred to above, as well as the fact that the kind of ill-treatment that constitutes inhuman treatment of torture will depend upon its character (degree of severity) and the circumstances in which it is inflicted: then the notion is not absolute. It is a question of relativity of assessment, often perceived subjectively.²¹

The aforementioned case of Northern Ireland offers an illustration of this point, in that the European Commission unanimously had found the methods (the so-called 'five techniques') used at interrogation centre for IRA detainees to be torture, whereas the European Court to which the case was referred 'reduced' this finding to 'ill treatment'. It is no secret that this 'downgrading' caused some surprise within the Commission, since it had heard all the witnesses (some 150), which the Court had not; to add to that, the UK Government had accepted this unanimous finding by the Commission. The five techniques have been described as follows:

“(a) wall-standing: forcing the detainees to remain for periods of some hours in a 'stress position' described by those who underwent it as being 'spread-eagled against the wall, with their fingers [put high above the head against the wall,

²⁰ Love Kellberg, *Torture: International Rules and Procedures* at 35 in *An End To Torture* (edited by Bertil Duner) Zed books, London (1998).

²¹ *Id.*

the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers’;

- (b) Hooding: putting a black or navy coloured bag over the detainees’ heads and, at least initially, keeping it there all the time except during interrogation;
- (c) Subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
- (d) Deprivation of sleep: pending their interrogations, depriving the detainees of sleep;
- (e) Deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogation.

For the Commission, those methods, euphemistically called ‘interrogation in depth’, involved sensory deprivation (prevention of the use of one’s sense), which directly affected the personality physically and mentally and was sufficient to break the will of the detainee for the purpose of obtaining information and confessions. The commission considered that ‘the systematic application of [these] techniques...shows a clear resemblance to those methods of systematic torture which have been known over the ages.’ The Court did not quarrel with the Commission on this point but took another line: for the Court the crucial issue was the distinction to be drawn between torture and inhuman or degrading treatment, which derives principally from a difference in the intensity of the suffering inflicted.’ It continued: ‘it appears...that it was the intention that the Convention, with its distinction between “torture” and “inhuman degrading treatment,” should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering’, And, ‘although the five techniques, as applied in combination, undoubtedly; amounted to inhuman and degrading treatment...they did not occasion suffering of the particular

one may not be inhuman or degrading, but they may well be or become so if combined or interacting. The CPT does not hesitate to say this in its Reports, without however referring to any particular treaty provision prohibiting such treatment or punishment.

The 1949 Geneva Conventions, on the basis of which the International Committee of the Red Cross (ICRC) performs its inspection visits, do not contain any definition or description of the concept of torture other than saying that 'torture' or inhuman 'treatment' shall be considered as 'grave breaches' for prosecution purposes. And the ICRC has not formulated its own definition but uses, when necessary, those already established. The one generally accepted today is that of the UN, which defines torture as an aggravated form of cruel, inhuman and degrading treatment.²⁵

(e) The Origins and Evolution of Article 1:

In 1978, at the thirty-fourth session of the Commission on Human Rights, Sweden and the International Association of Penal Law introduced different draft Conventions for Consideration.²⁶ The Original Swedish draft added in the definition of torture "Torture constituted an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."²⁷

²⁵ *Id.*, at 37

²⁶ For the Original Swedish draft Convention see U.N.Doc.E/CN.4/1285 (1978).

For the Draft Convention for the Prevention and Suppression of Torture introduced by the International Association of Penal Law, see, U.N.Doc.E/VN.4/NGO.213

²⁷ *Id.*, Article 1(2) Article 1 of the Swedish draft, which was borrowed from Article 1 of the 1975 U.N. Declaration on the Protection of All Persons from Being Subjected to Torture, reads:

1. For the purpose of the present Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. 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.

2. Torture constituted an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

This draft²⁸ represented an acceptable basis for further discussion. Reasoning that the Convention was to be a legally binding instrument and required more precision, others took the view that the definition in the Swedish draft was vague and needed to be clarified²⁹

Concerning the scope of paragraph 2 of Article 1 of this draft, the debate focused on the conceptual relationship between 'inhuman treatment' and 'torture'. The central issue was whether the Convention should cover only 'acts of torture' or also 'other' acts of cruel, inhuman or degrading treatment or punishment' that fall short of the infliction of severe physical or mental pain as defined in paragraph 1. Many representatives took the position that the scope of Article 1(2) should be limited to acts of torture. They argued that the concept of 'other inhuman treatment' couldn't be defined in terms favourable to all countries and legal systems.

The comments of States in support of and against this paragraph were equally divided.³⁰ Some States took the position that the definition should be limited only to acts of torture. Others were in favour of the wording of the paragraph with its inclusion of the concept of 'cruel, inhuman or degrading treatment or punishment'. The former U.S.S.R. held the former position; the U.S. and the Swiss Government held the latter. The former U.S.S.R argued that the concept of 'torture' and that of 'cruel, inhuman or degrading treatment or punishment' should be treated as legally distinct. As far as it was concerned, the institution of punishment is an acceptable part of the legal system of States and that its application to offenders is a common practice by all States. In the former U.S.S.R.'s opinion, the Convention required a clear

²⁸ For the Original Swedish draft Convention see U.N.Doc.E/CN.4/1285 (1978).

²⁹ See, The Report of the 1978 Working Group on the Draft Convention on Torture, U.N.Doc.E/CN.4/L (1978), at 30.

³⁰ See, The Summary prepared by the Secretary-General in accordance with Commission Resolution 18 (XXXIV) containing the comments received from Governments on the Draft Articles of the Convention on Torture, Commission on Human Rights, Thirty-Fifth Session, U.N.Doc.E/CN.4/1314 (1978), at 7-8.

distinction between punishments that can be justly applied to offenders and forms of treatment or punishment, which, because of their cruel, inhuman or particularly degrading nature, cannot be applied. The former U.S.S.R. objected to the paragraph on the premise that there are no criteria by which the concept can be defined.

The Swiss government took the view that the definition should extend both to acts of torture and to cruel, inhuman or degrading treatment or punishment, and proposed an amendment to paragraph 2 of Article 1.³¹ The U.S. agreed that it is not possible to draw a sharp line between acts of torture and other lesser forms of acts of cruel, inhuman or degrading treatment or punishment, reasoning that torture is merely the most extreme form of such acts.³²

At the pre-session discussions prior to the thirty-fifth session of the Commission on Human Rights, Sweden submitted a revised draft Convention based on the Comments of States.³³ In the revised draft clause (2) of Article 1 was deleted.³⁴ The draft broadened the scope of the Convention to include acts committed

³¹ The Swiss amendment reads: "The term "torture" includes cruel, inhuman or degrading treatment or punishment".

³² See, The Summary prepared by the Secretary-General in accordance with Commission Resolution 18 (XXXIV) containing the comments received from Governments on the Draft Articles of the Convention on Torture, Commission on Human Rights, Thirty-Fifth Session, U.N.Doc.E/CN.4/1314 1978), at 5.

³³ The comments of States were made in accordance with Resolution 18 (XXXIV) of the Commission on Human Rights which invited the Members of the U.N. to comment on the Swedish Draft Convention of 1978. See, Res.No.18 (XXXIV) of 7 March 1978 of the Commissions on Human Rights entitled 'Draft Convention on Torture and other Cruel, inhuman or Degrading Treatment or Punishment'. The Commission in that resolution had made a recommendation to the Economic and Social Council to the effect that it authorizes the holding of a meeting of a working group, open to all members of the Commission on Human Rights for one week prior to the Thirty-Fifth Session of the Commission with the task of preparing concrete drafting proposals for the Commission on the basis of the relevant document of its thirty-fourth session and any comments received from Governments. See, Commission on Human Rights, Report on the Thirty-Fourth Session, ESCOR, Supp. No.40, at 121, U.N.Doc.E/1978/34 (1978). This resolution is the product of the Revised Draft Resolution submitted by Sweden in Doc.E/CN.4/L.1400 (1978).

³⁴ Article 1 of this revised version reads:

1. For the purpose of the present Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he has committed or is suspected of having committed, intimidating or coercing him

with the consent or acquiescence of a public official or other person acting in an official capacity in accordance with the definition of torture as suggested by some States. It also added coercion and the infliction of pain or suffering based on discrimination of any kind to the list of the purposes of torture. However, this draft Article omitted the reference to the Standard Minimum Rules for the Treatment of Prisoners, and the entire second paragraph of the original draft. The above draft was debated, but no agreement could be reached on its provisions. The differences of opinion on this draft were as great as on the previous one.

In an effort to narrow the differences between the positions of the Members of the Working Group and find a compromise formula, Sweden resubmitted the revised draft Article 1 in which clause 2 was again reinstated³⁵

At the thirty-eight session of the Commission on Human Rights, the Working Group of the Commission reopened the discussion on the paragraph. There was, however, no change in the positions of the delegations. The proponents of the paragraph insisted that the paragraph was necessary for the purposes of their domestic criminal law because it clarified the definition of torture in a concise manner. Its opponents argued that there was no universally accepted concept of cruel, inhuman or

or other persons, or for any reason based on discrimination of any kind. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

2. See, The Revised Draft Convention submitted by Sweden in U.N.Doc.E/CN.4/L.1400 (1978). It may be found also in J.H.Burgers and H.Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Appendix 7 (1988), at 208.

³⁵ 1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally, inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. Torture is an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

3. This Article is without prejudice to any international instrument or national legislation, which does or may contain provisions of wider application relating to the subject matter of this Convention.

degrading treatment or punishment and, therefore, it was inappropriate to include it in the Convention.³⁶

The debate on this matter then shifted to Article 16, paragraph 1, which led to the solution of the problem. As a result of the debate on this Article and the incorporation of new language in its first paragraph (similar to the one contained in paragraph 2 of Article 1), the Working Group decided to delete the paragraph. Thus, paragraph 3 of Article 1 became 2 in the present Article of the Convention. These indications gave some guidance to those who proposed the text of a definition for inclusion in 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 UN General Assembly on 9 December 1975.³⁷

In the case of *Ireland vs. the United Kingdom*,³⁸ the European Commission of Human Rights and the European Court of Human Rights were faced with interpreting article 3 of the European Convention in relation to five” interrogation techniques”³⁹ which had been used against detainees in Northern Ireland.

It is easy to see that some of the elements in the European Commission’s Report also appear in the 1975 Declaration.⁴⁰

³⁶ See, the report of the 1982 Working Group, U.N.Doc.E/CN.4/1982 L/40 (1982), the text of which is reproduced in an addendum, U.N.Doc.E/1982/12/Add.1 (1982), at 3.

³⁷ Chapter II, section 3 concerning the preparation and the contents of the 1975 Declaration.

³⁸ *Ireland vs. UK*, YB XIX (1976) at 512

³⁹ In the Court’s judgment of 18 January 1978, these five techniques are described as follows:

- “(a) Wall-standing forcing the detainees to remain for periods of some hours in a ‘stress position’ described by those who underwent it as being ‘spread-eagled against the wall, with their fingers [put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers’;
- (b) Hooding: putting a black or navy coloured bag over the detainees’ heads and, at least initially, keeping it there all the time except during interrogation;
- (c) Subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
- (d) Deprivation of sleep: pending their interrogations, depriving the detainees of sleep;
- (e) Deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.”

⁴⁰ Article 1 reads as follows:

The Commission considered unanimously that the combined use of these five techniques in the cases before it constituted a practice of inhuman treatment and of torture in breach of article 3 of the European Convention. The Court, on the other hand, considered that the techniques did not attain the severity implied in the concept of torture.⁴¹

“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 a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does 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.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”

⁴¹ In its judgment, it set out its reasoning as follows:

“167. The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their victims feeling of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

On these two points, the Court is of the same view as the Commission. In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted.

The Court considers in fact that, while there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the contracting States but which does not fall within Article 3 of the Convention, it appears on the other hand that it was the intention that the Convention, it appears on the other hand that it was the intention that the convention, with; Its distinction between 'torture' and 'inhuman or degrading treatment'. Should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering?

Moreover, this seems to be the thinking lying behind Article 1 in fine of Resolution 3452(XXX) adopted by the General Assembly of the United Nations on 9 December 1975, which declares:

“Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment’. Although the five techniques, as applied in combination, undoubtedly; amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.’

168. The Court concludes that recourse to the five techniques amounted to a practice of inhuman and degrading treatments' which practice was in breach of Article 3.”

After the present Convention was adopted in 1984, the inter-American Convention to Prevent and Punish Torture was adopted 1985.⁴² In its article 2⁴³ it contains a definition of torture, which is influenced by not identical to, the definition in the present Convention.

As regards the definition of torture in paragraph 1 of article 1 of the Torture Convention, the following remarks may be made. The act of torture is defined as being the infliction of severe pain or suffering, whether physical or mental. The most characteristic and easily distinguishable case is that of infliction of physical pain by beating, kicking or similar acts. In many cases, the pains inflicted with the help of objects such as canes, knives, cigarettes or metal objects, which transmit electrical shocks. In order to constitute torture, the act must cause severe pain. Alternative workings, such as extreme or extremely severe pain, were suggested during the *travaux préparatoires*, but the phrase "severe pain" was considered sufficient to convey the idea that only acts of certain gravity shall be considered to constitute torture. Proposal that it should be added as a further criterion that the pain was inflicted systematically was not reflected in the final text of the article, which means that even a single, isolated act can be considered to constitute torture.⁴⁴

The acts inflicting severe mental pain or suffering can be of very different kinds. One category consists of acts, which imply threats or which threats or which

⁴² See, Inter-American Convention to Prevent and Punish Torture: Signed at Cartagena de Indias, Columbia, on 9 December 1985 at the Fifteenth Regular Session of the General Assembly of the Organizations of American States; See, Officials Doc. OEA/Ser.A/42 (SEPF) 1986.

⁴³ Article 2 of the Inter-American Convention reads as follows:

"for the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article."

⁴⁴ J. Herman Burgers & Hans Danelius: *The United Nations Book Against Torture*, Martinus Nijhoff Publishers, London (1998) at 118

create fear in the victim. Examples are that the victim is made to believe that he will be killed or that reprisals will be taken against his wife or his children if he; does not co-operate. Another category is where the victim is forced to witness event's such as the execution or the torture of other detainees or of his own family; members. The facts of not satisfying certain basic need of a person, could also, in some circumstances, constitute torture. Examples of this are deprivation of food or water or of sleep, prolonged isolation, perhaps even in darkness, etc. In all of these cases, however the act concerned can only be described as torture if the pain or suffering inflicted is severe.⁴⁵

Normally, what constitutes torture is a positive act, and the definition in article1 only refers to acts and not to omissions. This does not exclude, however, that in special cases an omission should be assimilated to an act.

The intentional failure to provide a prisoner with food or drink could be a case in point. Article 1 does not expressly refer to medical or scientific experiments being carried out on a prisoner against his will and without any therapeutic purpose. This does not exclude, however, that subjecting a person to such experiments could in some cases amount to torture, provided of course, that the experiments could be said to have resulted in severe pain or suffering. In this respect, it may be recalled that article 7⁴⁶ of the International Covenant on Civil and Political Rights does mention medical or scientific experimentation as a characteristic examples of acts violating the prohibition of torture and inhuman or degrading treatment or punishment. According to the definition in Article1, torture must be an intentional act. It follows that where

⁴⁵ *Id.*

⁴⁶ Article 7 of the Covenant: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

pain or suffering is the result of an accident or of mere negligence; the criteria for regarding the act as torturer are not fulfilled.

During the *travaux préparatoires*, there were different views as to whether the definition should include a reference to the purposes for which severe pain or suffering is intentionally inflicted. The result was a compromise: the most common purposes are indicated, but the list of purposes is not exhaustive. Just like the list in article 1 of the 1975 Declaration, it is preceded by the words “such purposes as.” There could be other purposes as well; however, there cannot be understood as “any other purpose” as mentioned in article 2 of the 1985 Inter-American Convention. The words “such...as” imply that the other purposes must have something in common with the purposes expressly listed.⁴⁷ This requirement does not necessarily mean that the purposes must be illegitimate. Several purposes of the list, in particular obtaining information or a confession, punishing or even intimidating and coercing, may be perfectly legitimate on condition that legitimate methods are used to achieve them. In principle, the common element of the purposes referred to in the definition should rather be understood to be the existence of some even remote connection with the interests or policies of the State and its organs. It is important to note, in this context, that the primary objective of the Convention is to eliminate torture committed by or under the responsibility of public officials for purposes connected with their public functions. Precisely because the public interest is sometimes seen in such cases as a justification, the authorities may be reluctant to suppress these practices. The provisions of the Convention are intended to ensure that torture does not occur in such cases or that, if it occurs, action is taken against the offender.⁴⁸ If the purposes referred to in article 1 must be understood as having some connection with the interests or

⁴⁷ J. Herman Burgers & Hans Danelius: *The United Nations Book Against Torture*, Martinus Nijhoff Publishers, London (1998) at 118

⁴⁸ *Id.*, at 119

policies of the State and its organs, it could be argued that torture committed by a public official without any such purposes but for purely; sadistic or otherwise private motives would fall outside the scope of the Convention. It should be observed, however, that even where a sadistic motive is predominance, there is normally; also an element of punishment or intimidation, which would bring the act under the definition, article. Moreover, it can after be assumed that where a public official performs such an act, there is also to some extent a public policy to tolerate performs such an act, there is also to some extent a public policy to tolerate or to acquiesce in such acts. Only in exceptional cases should it therefore be possible to conclude that the infliction of severe pain or suffering by a public official would not constitute torture as meant in the definition on the ground that he acted for purely private reasons.

Finally, if severe pain or suffering is inflicted in the course of a fully justified medical treatment, it is obvious that this cannot constitute torture as defined in article 1. In the first place, the purpose would belong to a different category. In the second place, the severe pain or suffering would not be inflicted “intentionally;” in the sense of the definition. On the contrary, such pain or suffering would be an unintended side effect of the treatment, which the performers of the treatment would endeavour to reduce as far as possible. A similar line of reasoning may be applied to other situations where severe pain or suffering would be caused by a deliberate act but where nonetheless the element of “intentional infliction” would be lacking.⁴⁹ Among the purposes mentioned in article 1 of the most typical one is that of obtaining information or a confession. While normally the intention is to obtain the information or the confession from the person who is tortured, it is also possible that a third person is the

⁴⁹ *Id.*, at 119

one whom the torturer wishes to make speak (for example, the wife is tortured in order to make the husband speak). Other purposes mentioned are those of punishment, intimidation, coercion and discrimination.

Another question, which caused some discussion during the *travaux préparatoires*, was whether or not an act of the kind referred to in article 1 should be regarded as torture irrespective of who committed the act. The conclusion was, however, that only torture for which the authorities could be held responsible should fall within the article's definition. If torture is committed without any involvement of the authorities, but as a criminal act by private persons, it can be expected that the normal machinery of justice will operate and that prosecution and punishment will follow under the normal conditions of the domestic legal system. The problem with which the Convention was meant to deal was that of torture in which the authorities of a country were themselves involved and in respect of which the machinery of investigation and prosecution might therefore not function normally. A typical case is torture inflicted by a policeman or an officer of the investigating or prosecution authority. But many variations are conceivable. It could be that the torturer is not directly connected with any public authority but that the authorities have hired him to help gather information or have at least accepted or tolerated his act. All such situations where the responsibility of the authorities is some how engaged are supposed to be covered by the rather wide phrase appearing in Article 1: "inflicted by or at instigation or with the consent or acquiescence of a public official or other person acting in an official capacity."⁵⁰ Whereas Article 1 specifies the category of persons bearing responsibility for the acts of inflicting severe pain or suffering, namely public officials and other persons acting in an official capacity, the definition

⁵⁰ *Id.*, at 120

contains no particulars as to the victims of these acts. Instead, it simply refers to pain or suffering being inflicted “on a person”. The same holds true for the definition set out in the 1975 Declaration.⁵¹ However, this does not imply that the category of victims is indefinite. The history of the Declaration and the Convention made it clear that the victims must be understood to be persons who are deprived of their liberty or who are at least under the factual power or control of the person inflicting the pain or suffering.

The 1975 Declaration was drawn up by the Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders in response to a request from the General Assembly “to include, in the elaboration of the Standard Minimum Rules for the Treatment of Prisoners, rules for the protection of all persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman or degrading treatment or punishment”. Two years after the adoption of the 1975 Declaration, the General Assembly requested the Commission on Human Rights to draw up a draft convention “in the light of the principles embodied in the declaration”. All work undertaken in the framework of the Commission on Human Rights to draw up a draft Convention” in the light of the principles embodied in the Declaration”. All work undertaken in the frame work of the Commission for preparing the present Convention was performed under an agenda item reading” Question of the human rights of all persons subjected to any form of detention or imprisonment. The connection between the phenomenon of torture as dealt with in the Convention and deprivation of liberty is also apparent from articles 10 and 11 which explicitly refer to persons “subjected to any form of arrest, detention or imprisonment”. Ignoring this connection might lead to interpretations of the Convention that its authors never had

⁵¹ Adopted by General Assembly Resolution No 3452 (xxx) of 9th December 1975.

in mind. Any use of armed force by the military or by the police in the exercise of such functions as the defence of the country, the maintenance of law and order and the arrest of criminals would come under the formula of intentional infliction of severe pain or suffering by public officials for coercive purposes. Yet this would not constitute torture in the sense of the Convention. The fact that the use of armed force for military and police purposes does not by itself constitute torture is particularly relevant in the light of article 2, paragraph 2, of the Convention which states that 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.

The second sentence of paragraph 1 article 1 is probably the most controversial element of the whole article. It provides that torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. It has often been said that this is a too far-reaching exception, since it might be interpreted so as to also allow a state to practice methods which would normally be regarded as torture, by making them lawful sanctions under its own legal system. On the other hand, it has been argued that while the convention was intended to strengthen the already existing prohibition of torture in international law, it was not intended to lead to a reform of the system of penal sanctions in different States and that, if that had been the intention, the convention would have been unacceptable to a number of countries.⁵²

In the original Swedish proposal for the text of the Convention, the exception for lawful sanctions, as was also the case in the 1975 Declaration, was limited to such sanctions as were consistent with the Standard Minimum Rules for the Treatment of

⁵² J. Herman Burgers & Hans Danelius: *The United Nations Book Against Torture*, Martinus Nijhoff Publishers, London, (1998) at 121.

Prisoners.⁵³ These Rules, which were adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and subsequently approved by the Economic and Social Council, are not binding international treaty, and for that reason it was considered inappropriate at or refer to them in a binding instrument as the Convention against Torture. At the same time, no binding international instrument existed which indicated with any precision which penal sanctions are so harsh and severe as being contrary to international standards.⁵⁴

There was a certain divergence of opinion between those who thought that the Convention should exclusively deal with acts of torture which were also illegal under national law and those who considered that there must be a limit beyond which sanctions provided for by national law are so cruel as to constitute torture. The second sentence of paragraph 1 of article 1 does not resolve this controversy in an unequivocal manner. It is true that it makes a general exception for lawful sanctions, but it does not make it clear whether, in order to be lawful, a sanction must also be consistent with international law under which cruel, inhuman or degrading treatment

⁵³ See, Standard Minimum Rules for the treatment of prisoners; Article 31 to 34 reads as under:

31. 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.

32. (1) Punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.

(2) The same shall apply to any other punishment that may be prejudicial to the physical or mental health of a prisoner. In no case may such punishment be contrary to or depart from the principle stated in rule 31.

(3) The medical officer shall visit daily prisoners undergoing such punishments and shall advise the director if he considers the terminations or alteration of the punishment necessary on grounds of physical or mental health.

33. 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.

34. 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.

⁵⁴ J. Herman Burgers & Hans Danelius: *The United Nations Book Against Torture*, London (1998) at 121.

or punishment is prohibited. It may therefore be argued that various forms of corporal punishment, including those involving mutilation, are not covered by the exception in the second sentence, but this is undoubtedly a view which is not shared by everyone. In this context it is appropriate to observe that, although we have referred to paragraph 1 of article 1 as containing a "definition" of torture. It should not be understood as a definition in the strict sense of penal law. Unlike earlier international instruments, which simply refer to the concept of "torture," the 1975 Declaration as well as the present Convention elucidates what the concept implies by listing a number of constitutive elements. In this way paragraph 1 gives a description of torture for the purpose of understanding and implementing the convention rather than a legal definition for direct application in criminal law and criminal procedure. This explains, for instance, why the authors could decide to include in this description a non-exhaustive list of purposes by using the formula "for such purposes as" in accordance with the example given by the Declaration. In national penal law, the definition of a crime by using an open ended list of purposes might give rise to objection that this would run counter to a strict application of the *principle "nullum crimen sine lege"*⁵⁵

It should be observed that article 1 of the Convention contains no definition of cruel, inhuman or degrading treatment or punishment, although, according to the title of the Convention, it also deals with such treatment or punishment. In fact, it has been found impossible to find any satisfactory definition of this general concept, whose application to a specific case must be assessed on the basis of the entire particularities of the concrete situation. It may also be appropriate to point out that, although the definition of torture in Article 1 may give the impression of being a very precise and detailed one, of the basic concepts which it contains, namely "severe pain or

⁵⁵ *Id.*, at 122

suffering,” is in fact a rather vague concept, in the application of which to a specific case there may be very different views. It would not be surprising if the opinions of different persons on this matter would be influenced by their legal background and by the role humanitarian considerations play within their own societies. Nevertheless, it was not the intention of those who drafted the Convention that the content of the concept of torture should vary from country to country. One of the basic tasks of those who are to apply the Convention, and in particular of the Committee against Torture set up under its article 17, should be to determine a uniform level above which pain or suffering becomes so severe that the infliction of it constitutes torture.

1. General Description:

As Article 1 defined the subject matter of the Convention, its operative premise consists of the Article’s four legal aspects: a. the nature of the conduct; b. the intention of the offender and the purpose of the conduct; c. the identity of the offender; and d. the exclusions of conduct.

A. The Nature of the Conduct:

The prohibited conduct is defined as ‘any act by which severe pain or suffering whether physical or mental...’

‘Act’

In the drafting stage, no difficulty was encountered with this phrase, for as an act of commission, its meaning is unambiguous. In contrast with an act, however, the question arises as to whether torture can occur as a result of an omission. For example, while the use of a thumbscrew is clearly an act, is the omission of the provision of food, water or medical attention to be regarded as a prohibited act?

There is no reference to this question at any stage in the preparatory work of the Convention. Thus, the search for the answer to this question must be sought in the

principles of the major legal systems and in the light of international treaties. Under the Civil Law System, the word 'act' is often interpreted to cover an 'omission.' The word 'human act' in Article 1382 of the French Civil Code,⁵⁶ which laid down the legal norms of dialectal liability, has been interpreted to include 'omission.'⁵⁷ But under other legal systems, exemplified by the common law, there is no liability for negligent omissions unless there is a legal duty to act.⁵⁸ French Law, however, is very liberal and goes so far as to require the rescue of others⁵⁹ even without the requirement of any explicit legal connection triggering the duty to act under the Anglo-American Law. Under French law, like that of many other systems of law, the deliberate omission rescue action will invariably entail criminal liability⁶⁰ because the elements of criminal liability are: act, intent and causation. Thus under this system of law an 'omission' is an 'act.'

Anglo-American Criminal Law basically functions in a similar way to the French law, at least as clarified in the Model Penal Code⁶¹ of the U.S. it defined the term conduct as an 'act' or 'omission' and the U.S. Courts have held that conduct as an 'act' or 'omission' and the U.S. Courts have held that 'conduct resulting in death

⁵⁶ Article 1382 states 'Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation'. See, J.H.Crabbe, the French Civil Code (1977), at 253.

⁵⁷ A.T.V.Mehren & J.R. Gordley, *The Civil Law System* at 577 (1977).

⁵⁸ *Id.*, at 581

⁵⁹ Article 63 of the Penal Code of 13 April 1954 states: 'Without prejudice to the application in a proper case of severer penalties prescribed by the present Code and by special laws, anyone who could, by his prompt action, without risk to himself or to third person, prevent either crime or a delict against the bodily security of a person, and who wilfully abstains from so acting, shall be punishable by imprisonment of from three months to five years and by fine of from 360F to 15,000F, or by only one of these penalties'. See, G.A.Bermann, H.P. de vries and N.M. Galston, *French Law; Constitution and Selective Legislation, Penal Code*, 8-11 (1990).

⁶⁰ *Id.*

⁶¹ Model Penal Code 1.13 (5) states that in this Code, unless a different meaning plainly is required: "conduct," means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omission'. See, The American Law Institute, *Model Penal Code Official Draft and Explanatory Notes: Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at A Washington, D.C.: May 1962.*

may take the form of act or omission⁶² Accordingly, American and English law has evolved toward recognition of liability as a result of the failure to act (omission) for an offence defined in terms of commission (act).⁶³ For instance, a parent may be held liable for criminal homicide if the death of a child is caused by parental failure (omission) to provide food⁶⁴ and medical treatment,⁶⁵ even though the offence of homicide is defined in terms of commission⁶⁶ The Anglo American law, however, like that of the Civil Law regards 'omission' as an 'act' only where the legal duty⁶⁷ to act is specifically required by law.⁶⁸ For example, this system of law imposes the legal

⁶² See, *Eicher vs. Dillon*, 73A.D.2d 431, 426 N.Y.S.2d 517 518(1980); *Soper vs. Storar* 52N, Y2d64, 438N.Y.S.2d266, cert.denied, 454U.S.858 (1981)

⁶³ Paul Robinson, *Criminal Liability for Omission A Brief Summary and Critique of the law in the United States* 29 N.Y.L.sch.LRev.102 (1984). See, generally S.I. Shum, *an, Act and Omission in Criminal Law: Towards anon-subjective Theory*, 17 J.Legal Ed.16 (1964).

⁶⁴ See, *People vs. Lynch* 47Mich.App.8, 208 N.W.2d656 (1973); *State vs. Crawford*, 188Neb.378.196N.W.2d915 (1972); *R. vs. Instan* {1893} I O.B.450, 453-453.

⁶⁵ See, *Eaglen vs. Stated*, 249 Ind.144, 231 N.E.2d 147(1967); *State vs. Williams* 4Wash. App.908, 483(1971), at 2d 1167; *R. vs. senior*, {1899} I.Q.B.283; *R. vs. Love*, [1973] All E.R..805.

⁶⁶ The states of the jurisdiction where the above American cases were decided define murder in the active rather than passive sense, i.e. murder is an unlawful killing. See, Ind. Cose ANN.35-42-1-1 (Burns 1979); Mich.Stat.Section 28.548 (Callaghan 1990); Neb.Rev.Stat.28.302 (1989); Wash. Rev. Code ANN.9A.32.010 (1977).

⁶⁷ In *R. vs. Instan* the Court stated that: 'it would not be correct to say that every moral obligation involves a legal duty: but every legal duty is founded on moral obligations {1893} I.Q.B.450, 453-454.

⁶⁸ See, *People vs. Beardskey*, The deceased voluntarily consumed alcohol and morphine during an assignation with the defendant at his home. The prosecution charged the defendant with her resulting death on the theory that, as the woman was in his house, the defendant 'stood towards this woman for the time being in the place of her natural guardian and protector, and as such owed here clear legal duty which he completely failed to perform.' On appeal, the court rejected this argument stating that to convict an individual for his failure to act, there must be a duty imposed by law or contract.150 Mich.214, 113 N.W.1131 (1907). See, also *Jones vs. United States*, in which the trial court convicted the defendant of involuntary manslaughter for the death of an infant under her care. The Court of Appeals subsequently held it reversible error not to have instructed the jury that to find the defendant guilty it would first have to find that she was under a legal duty to provide food and necessities to the infant.308F.2d 307,311 (D.C.Cir 1962) The model penal code 2.01f(3)(b), which governs this general issue, provides that: 'Liability for the commission of an offence may not be based on an omission unaccompanied by action unless...A duty to perform the omitted act is otherwise imposed by law.' For a detailed analysis of the duty to act, see, W.LaFave & A.Scott, *handbook of Criminal Law*, section 47(1972). The U.S. Court of Appeals for the Seventh Circuit in *Byrd vs. Briske*, stated that 'the defendant is not usually held to be responsible for inaction. However, where the defendant is under some affirmative duty to act and he fails to act accordingly, he may be held negligently responsible for his omission'. Consequently it held that a police officer who stood by and watched a person being beaten in a public place could be held liable. See, 466F.2d6.10-11(1972). In *Hampton vs. Hanrahn*, this court held that 'the fact some police officers did not personally participate in the abuse, but instead callously chose to watch, would not preclude their liability'. See, 600, F.2d600.626 (1979). In *Maclin vs. Paulson*, it was held that a police chief could be liable for being present, yet not intervening, when his officers beat a pre-trial detainee. See, 627F.2d 83,86(1980). In *Fundiller vs. City of Cooper City*; The US Court of Appeals held that

duty to act in four situations: First, where a statute imposed a duty to care for another⁶⁹ second, where one stands in a certain status relationship to another;⁷⁰ third, where one has assumed a contractual duty to care for another⁷¹, finally, where one has voluntarily assumed the care of another and has so secluded the helpless person as to prevent others from rendering aid.⁷² An omission⁷³ under the Indian Law can only be regarded as an act⁷⁴ was there is a legal duty to act.

On the other hand, under the concepts of liability as adopted by the legal systems of the majority of States in the world, the failure to provide food, water and medical help to someone to whom one owes no legal duty (as by virtue of a parental relation) is not an omission. With respect to the issue addressed above, this concession raises the question of whether, on a larger scale, sites are under the legal duty to provide these necessities of life, or, by contrast, does their 'omission's do so constitute an 'act' that falls comparably within the scope of Article 1 of the Torture Convention. This issue must be dealt with in both its narrow and its broad meaning. In the narrow meaning of the question, a State which incarcerates an individual is obliged to provide him with food, water and medical care, not by virtue of prescriptive laws, but by virtue of the detainee's humanity. In the broad sense of the question, the issue must be viewed in the light of the norms and principles of international law. The right to

an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force could be held liable for nonfeasance. See, &&& F.2d 1436,144-42 (11th Cir.1985).

⁶⁹ See, D.C.Code section 22.902: Md. Ann. Code, Family Law, title 5-203(b) (1) (1984); Craig State, 220Md 590.155A.684.

⁷⁰ Parents are under the legal obligation to provide to their minor children food, clothing and medical treatment, see, *Sins vs. Virginia Elec. & Power Co*, 550F.2d 929(4th Cir.), cert. denied 431 U.S. 925 (1977); *State vs. winters*, 346 so 2d 991,993(Fla.1977); Commonwealth, Howard, 265 Pa.Super.C.R.535: 402A.2d 674(1979), cited in A. Boulesba at 11.

⁷¹ *People vs. Montecino*, 66 Cal.App.2d 85; 152 P.2d 5(1944) in which the defendant, under contractual duty to care for elderly woman, was convicted of involuntary manslaughter for failing to perform his contractual duty.

⁷² See, *Glanzer vs. Shepherd*, 233 N.Y.236 (1922); *Jones vs. United States*, 308F.2d 307,310(1962).

⁷³ *Glanville Williams, Text book of Criminal Law* 2nd edition at 148-49.

⁷⁴ *Id.* at 148

food⁷⁵ and to freedom from hunger⁷⁶ has been recognized in many international human rights instruments⁷⁷ and the States Parties to these instruments are legally bound to implement the necessary steps progressively to achieve the realization of these rights.

The Four Geneva Conventions of 12th August 1949 and the Two Additional Protocols of 10 June 1977,⁷⁸ which deal with the protection of different victims in time of war and civil strife, which is the core of the present humanitarian law, have direct relevance and importance to the issue at hand. These international instruments are

⁷⁵ For a detailed analysis of the subject, See, Alston and L. Tomasevski (eds), *The Right to Food* (1984)

⁷⁶ The General Assembly of the U.N. in Resolution 36/185 of 17 December 1981 reaffirmed that 'Food is a universal human right which Governments endeavour to guarantee their people and, in that context, stresses its belief in the general principle that food should not be used an instrument of political pressure'. See, 36G.A GAOR, Supp. (No.51), at 118-119, U.N.Doc.A/36/51 (1982).

⁷⁷ The International Human Right Instruments that specifically recognized the right are the Universal Declaration of Human Rights, the international Covenant on Civil and Political rights and the International Covenant on Economic, Social and Cultural Rights. Article 25 of the Universal Declaration of Human Rights reads: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services...' The last sentence of paragraph 2 of Article 1 of the International Covenant on Civil and Political Rights reads: 'in no case may a people be deprived of its own subsistence'. International Covenant on Civil and Political Rights (I.C.C.P.R), adopted 19 Dec. 1966, entered into force on 23 March 1976, G.A.Rds.2200 (XXI), 21 U.N.GAOR Supp. (No.16), at 52, U.N.Doc.A/6316(1966). Article 11 of the International Covenant on Economic, Social and Cultural Rights provides: '(1) The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential important of international cooperation based on the free consent. (2) The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes, which are needed.' Adopted 19 Dec. 1966, entered into force 3 Jan. 1976, G.A.Res.2200 (XXI), 21 U.N.GAOR, Supp. (No.16) 49, U.N.Doc. A/6316 (1966)

⁷⁸ The First Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, of August 12, 1949, opened for signature 12 Aug. 1949, entered into force on 21 Oct. 1950, 6 U.S.T.3114, T.I.A.S.6 U.S.T.3114, T.I.A.S.No.3362, 75 U.N.T.S.31; the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, opened for signature 12 Aug. 1949, entered into force Oct. 21, 1950, 6 U.S.T.3217, T.I.A.S.No.3363, 75 U.N.T.S.85; the Third Geneva Convention Relative to the Treatment of Prisoners of War, of 12 August, 1949, entered into force on 21 Oct. 1950, 6 U.S.T.3316, T.I.A.S.No.3364, 75 U.N.T.S.135; the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 12 Aug. 1949, opened for signature 12 Aug. 1949, entered into force 21 October, 1950, 6 U.S.T.3516, T.I.A.S.No.3365, 75 U.N.T.S.287; Protocol Additional to the Geneva Convention of 12 Aug. 1949, and relating to the Protection of victims of International Armed Conflicts, opened for signature 12 Dec. 1977, entered into force 7 Dec. 1978, U.N.Doc.A/32/144 (1977), 72 American Journal of International Law 457 (1978), 16 International Legal Materials 1391 (1977); Protocol II Additional to the Geneva Convention of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 12 Dec. 1977, entered into force 7 Dec. 1978, U.N.Doc.No.A/32/144(1977), 72 A J I L 502 (1978), 16 I.L.M. 1442 (1977).

intended to regulate the conduct of States in these extreme situations in which torture and other horrible crimes against humanity are carried out on a large scale, causing untold sorrow to human beings. These Conventions, including the U.N. Standard Minimum Rules for the Treatment of Prisoners,⁷⁹ impose a legal duty on States to provide food, water and medical attention⁸⁰ and specifically prohibit the utilization of starvation as a means of warfare.⁸¹ However, whether the breach of international law by States in these respect through 'omission's an 'act' that falls within the scope of Article 1 of the Torture Convention, or is an 'act' that falls within the scope of the other conventions mentioned above depends on the purpose and the circumstances of the 'omission'. For instance, the failure to provide food and medical care to the general population as a result of the negligence or corruption of the Government involved may well be a breach of the International Covenant on Economic, Social and Cultural Rights, but it would not qualify as an 'act' of torture. On the other hand, the failure of States to provide these necessities, resulting in the infliction of pain and suffering thereby implicates the ends stated in Article 1 involving an 'act' of torture. Under the two legal systems that have just been reviewed, 'omission' is an 'act' where there is a legal duty to act and, as the legal duty of States to act in this respect has been

⁷⁹ Article 20 of these rules reads: 'Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served drinking water shall be available to every prisoner whenever he needs it.' See, R.B. Lillich, *International Human Rights: Problems of Law and Policy* (1979), at 894, 897.

⁸⁰ Article 55 of the 4th Convention concerning the Protection of Civilian Persons in Time of War Provides that: 'To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the recourses of the occupied territory are inadequate'.

Article 26 of the 3rd Convention relating to the Treatment of Prisoners of War provides that: 'The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Accounts shall also be taken of the habitual diet of the prisoners. The Detaining Power shall supply prisoners of war who work with such additional rations as are necessary for the labour on which they are employed.... Collective disciplinary measures affecting food are prohibited.'

⁸¹ Both Articles 54(1) and 14 of the Protocols Additional to the Geneva Conventions of 12 August 1949 and of 10 June 1977 relating to the protection of Victims of international and Non-international Armed conflicts provide: 'Starvation of civilians as a method of warfare is prohibited.' See, *Supra* note 49.

established in the previous international convention. It would be absurd to conclude that the prohibition of torture in the context of Article 1 does not extend to conduct by way of omission.⁸²

‘The word voluntarily’

To conclude that the prohibition of activity in this particular context does not extend to conduct by way of ‘omission’s nothing less than a ploy to help States evade the provisions of the Convention. Such a conclusion is antithetical to the objects and purposes of the Convention, and would result in their defeat by dint of violating international law. According to the law, treaties are to be interpreted in the light of their object and purpose⁸³ the object and purpose of the Torture Convention are the regulation and prohibition of all governmental conduct that inflicts pain or suffering for the ends stated in Article 1, regardless of whether such conduct is affirmative or negative. The purpose and effect of the conduct are the decisive elements in determining whether they constitute torture. Negative acts may inflict as much physical and mental harm as positive acts and achieve the same inhuman ends. To conclude otherwise would also be inconsistent with the developing awareness of the international community regarding the need to impose sanctions against States that attempt to evade the Convention. Following this reasoning, the European Commission on Human Rights has, in the case of *Denmark et al vs. Greece*,⁸⁴ held that ‘The failure of the Government of Greece to provide food, water, heating in winter, proper washing facilities, clothing, medical and dental care to prisoners constitutes an “act”

⁸² Ahcene Boulesbaa: *The U.N. Convention on Torture and the Prospects for Enforcement*; Martinus Nijhoff Publishers, London (1999) at 15.

⁸³ Article 31(1) of the Vienna Convention on the Law of Treaties 1969 reads: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

⁸⁴ *See*, YB XII (1969), at 1.

of torture in violation of Article 3 of the ECHR.⁸⁵ In the case of Ireland vs. U.K.⁸⁶ the commission addressed the question of whether the combined application of the five sensory deprivation techniques used by the British Forces in Northern Ireland against the IRA members, including wall-standing, hooding, noise and sleep and food deprivations are a violation of Article 3 of the European Conventions on Human Rights. They held that the Geneva Conventions of 1949 discussed above are a restatement of the general principles of International law⁸⁷ and that the techniques in question constituted a practice of inhuman treatments and torture in breach of Article 3 of the Convention.⁸⁸

‘Severe Pain or Suffering, whether physical or mental’

In this phrase, the words ‘pain and suffering’ are so clear and understandable, especially when coupled with the words ‘physical or mental’ that they should not give rise to difficulties in interpretation. The commentary on this phrase will therefore concentrate on the other words, which are susceptible to legal difficulties in interpreting the Convention.

‘Severe’

During the evolution of the term, a number of proposals were made for its deletion. However, all such proposals were defeated. The proposal to delete the word during the drafting⁸⁹ of the U.N Declaration on Torture of 1975, from which the Swedish draft of 1978 was borrowed, was rejected⁹⁰

⁸⁵ *Id.*, at 461-505; Sieghart, *International Law of Human Rights* (1983), at 164

⁸⁶ *Ireland vs. U.K.*, Y.B. XIX (1976), at 512

⁸⁷ *Id.* at 790

⁸⁸ *Id.* at 794

⁸⁹ The Fifth U.N. Congress on the Prevention of Crime and the Treatment of Offenders drafted the Declaration of the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The General Assembly at its thirtieth session, unanimously adopted the Declaration. However, it changed the word ‘principles’ in Article 2 of the draft declarations the word ‘purposes’. See, G.A. Resolution 3452(XXX) of 9 Dec.1975, concerning the Declaration on the Protection of All Persons from Being Subjected to Torture and

The same thing is true with respect to the former U.S.S.R.'s Proposal to delete the word in the debates of the Third Committee on the Torture Convention after the finalization of its drafting by the Working Group of the Commission on Human Rights⁹¹The Insistence on the word 'severe' in the U.N. Declaration, and in Article 1 of this Convention, is clear evidence that the 'severity' of the pain or suffering is the essential ingredient for establishing that the conduct amounts to torture.⁹²It also suggests that not each and every mistreatment would constitute torture.⁹³The states, during their deliberations on Article 1 of the 1978 Swedish draft, argued in favour of the 'requirement of severity' of the pain or suffering as a result of the injurious governmental conduct. The U.S. not supported this position; it further requested that the inclusion in the negotiating history of the Convention contain the requirement of 'intensity' and 'severity'. Which it is argued, was an inherent aspect of torture. Moreover, Washington took the position that it was not necessary for the injurious conduct to result in the permanent impairment of physical or mental faculties in order to be considered 'severe.' For the impairment of physical or mental faculties is not an element of the crime of torture, it is merely evidence of such crime⁹⁴The U.K.,

Other Cruel, Inhuman or Degrading Treatment or Punishment, 30 U.N.GAOR, Supp. (No.34), at 91, U.N. DocA/10034(1976).

⁹⁰ See, the Report prepared by the Secretariat on the Fifth U.N Congress on the Prevention of Crime and the Treatment of Offenders (1976), at 38.

⁹¹ See, U.N.Doc.A/C.3/39/L.63 relating to the amendments to the draft resolution for adoption of the Convention contained in document A/C.3/39/L.40 (1984)

⁹² Leslie Riesman Wellbaum holds that 'what raises certain tortuous injury to the level of torture is its severity....' See, L.R. Wellbaum, International Human Rights Claims after Tel-Oren vs. Libyan Arab Republic: Swan Song for the Legal Lohengrin? 9:1 *Hast. Int'l. &Comp. L.Rev.* (1985), at 107,127

⁹³ The European Commission in the Greek case noted that: 'It appears from the testimony of a number of witnesses that a certain roughness of treatment of detainees by both police and military authorities is tolerated by most detainees and even taken for granted... This underlines the fact that the point up to which prisoners and the public may accept physical violence as being neither cruel nor excessive, varies between different societies and even between different sections of them.' See *Yearbook XII* (1969); the Greek case, *supra* note 54 at 50I.

⁹⁴ See, The Summary prepared by the Secretary General in accordance with Commission Resolution 18(XXXIV) containing the comments received from Governments on the Draft Articles of the Convention on Torture, Commission on Human Rights, Thirty-Fifth Session.U.N.Doc E/CN.4/1314 (1979), at 5.

however, was not comfortable with the utilization of the word 'severe'. It proposed that 'severe' be replaced by the word 'extreme.' The reasoning given by Britain was that 'severe' in the first paragraph of Article I of the 1978 Swedish draft made its definition inconsistent with its second paragraph, which is similar to Article 3 of the European Convention on Human Rights, endorsed by the European Court.⁹⁵ However, the British proposal was not taken seriously.

There was little substantive discussion on the issue of what constitutes 'severe' by the Working Group during the evolution of the Convention. Neither did the States in their commentary on the Article deal with the definition of 'severe.' However, the framers of the Draft Convention for the Prevention and Suppression of Torture⁹⁶, which was submitted by the International Association of Penal Law at the thirty-fourth session of the Working Group, did address the problem. Although the Working Group rejected this draft, their deliberations resulted in perhaps the most useful formalization of this terminology.⁹⁷ The scope of severe encompasses prolonged coercive or abusive conduct, which in itself, is not severe, but becomes so over a period of time.⁹⁸

Thus, for the purpose to determining what constitutes 'severe' under the Torture Convention, reference should be made to the above definition and the test to be employed for so doing is a subjective one according to the circumstances of each

⁹⁵ See, The Summary prepared by the Secretary-General in accordance with Commission Resolution 18(XXXIV) containing the comments received from Governments on the Draft Articles of the Convention on Torture, Commission on Human Rights, Thirty-Fifth Session U.N.Doc.E/CN.4/1314/Add.1 (1979), at 2.

⁹⁶ See, The Draft Convention for the Prevention and Suppression of Torture, submitted by the International Association of Penal Law, U.N.Doc.E/CN.4/NGO.213 (1978).

⁹⁷ Article 2 of that Convention provides 'For the purposes of this Convention, torture is any conduct by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by or at the instigation of a public official or for which a public official is responsible under Article 3, in order: (a) to obtain from that person or another person information or a statement or confession; or (b) to intimidate, discredit or humiliate that person or another person; or (c) to inflict punishment on that person or another person, save where such conduct is in a proper execution of a lawful sanction not constituting cruel, inhuman or degrading treatment or punishment'.

⁹⁸ M.C. Bassiouni, Commentary on the Draft Convention for the Prevention and Suppression of Torture of the International Association of Penal Law, 48 *Revue Internationale de Droit Penal*, o.3-4 (1978), at 282-94.

case. There is support for this view in the jurisprudence of the European Court of Human Rights. In the case of Ireland vs. U.K.⁹⁹ referred to the Court by Ireland after its consideration by the European Commission, the Court said that:

As was emphasized by the Commission, ill-treatment must attain a minimum level of severity of it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and in some case, the sex, age and state of health of the victim, etc.¹⁰⁰

'Mental'

What constitutes 'mental suffering', or for that matter what is included in such wording, was not debated by the Working Group and remains unclear. The former German Democratic Republic had commented that the wording could be interpreted in many ways¹⁰¹ Portugal proposed the inclusion of the use of psychiatry in the definition of torture. It proposed a third paragraph for that purpose which reads:

3. For the purpose of the present convention, the use of psychiatry for one of the objects referred to in paragraph or the abuse of psychiatry with a view to prolonging the confinement of any person subjected to a measure or penalty-involving deprivation of freedom shall be regarded as torture¹⁰²

Barbados suggested that the definition be expanded to include the application of more sophisticated weapons of torture such as the administration of 'truth' drugs which do not produce apparent physical or mental suffering.¹⁰³ At the thirty-fifth

⁹⁹ See, European Human Rights Reports, vol.2 (1979-80), at 79.

¹⁰⁰ *Id.*, at 79.

¹⁰¹ See, The Summary prepared by the Secretary-General in accordance with Commission Resolution 18 (XXXIV) containing the comments received from Governments on the Draft Articles of the Convention on Torture, Commission on Human Rights, Thirty-Fifth Sessions, U.N. Doc. E/CN.4/1314/Add.I (1979), at 7.

¹⁰² *Id.*

¹⁰³ *Id.* at 5

session of the Commission, on Human Rights, one member of the Working Group of the Commission, which was not identified in the records of the legislative history of the Convention, expressed its doubts whether the term 'mental torture' is complete. For this delegation the term was not clear enough for the purpose of criminal law of States.¹⁰⁴ Britain agreed that the concept was too ambiguous for the national courts of States to assess, especially when dealing with the motive of discrimination.¹⁰⁵

The U.N. Conventions has consistently included the prohibition of 'mental torture' within the scope of the prohibition of torture¹⁰⁶ and the term can be, and had been, defined with sufficient precision. The European Commission on Human Rights in the Greek case has defined mental torture as:

The infliction of mental suffering through the creation of a state of anguish and stress by means other than bodily assault¹⁰⁷

It is important here to note that the United State has defined 'mental torture' in the process of its ratification of the Torture Convention. The Senate has conditioned its ratification of the Convention on Five Understandings. The understanding on Article 1 of the Convention has defined 'mental torture' and the circumstances that cause it with sufficient specificity. It reads:

Mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of

¹⁰⁴ See, The Report of the 1979 Working Group on the Draft Convention on Torture as contained in the Report of the Commission on Human Rights on its Thirty-Fifth Session, U.N.Doc.E/CN.4/1347 (1979), at 39.

¹⁰⁵ See, The Report of the Secretary-General containing the comments of States on the Draft Convention on Torture, U.N.Doc.A/39/499 (1984), at 19.

¹⁰⁶ See, the U.N. Commentary, Chapter VI, paragraph 13(1955), at 31.

¹⁰⁷ See, Op.Com., 5Nov.1969, Greek case, supra note 54 at 461

imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality¹⁰⁸

B. The Intention of the offender and purpose of the Conduct:

The conduct is prohibited when it 'is intentionally inflicted on a person...'

'Intentionally'

This term is clear and should not present difficulties in the interpretation of the Convention. The term, however, serves very important function because it implies the exclusion of negligent conduct from the application of Article 1. The question then arises: When does a particular conduct cease to be considered merely negligent? There is no reference to the question at any stage in the drafting of the Convention. In many systems of law, however, 'intent' is defined in terms of 'specific' and 'general intent', and negligence is determined by the reasonable standard under the circumstances. Thus, when a State fails to provide food and water to prisoners in its custody and is accused of torture by way of omission, such State would not be able to escape liability by claiming that its conduct was not intentional but was merely negligent outside the scope of Article 1.

'General intent' may be established from the nature of the conduct. The responsibility of the State in this instance would depend on whether the omission, according to the reasonable standard, is determined to be 'simple negligence' or 'gross negligence' in which the 'general intent' is presumed from the conduct. For the U.S., the utilization of other terms such as 'deliberate' and 'malicious' may serve better

¹⁰⁸ See, 136 Cong. Rec. S1749I (daily ed. Oct. 27 1990). For a discussion of the question of mental torture See, also D.P. Stewart, "The Torture Convention and the Reception of International Criminal Law within the United States" 15 *Nova L. Rev.* (1991) at 449, 455-457.

functions in the definition and could replace the list of purposes of torture contained in paragraph 1, since this is not meant to be all-inclusive.¹⁰⁹ It therefore proposed that Article 1 should read:

‘For the purpose of the present Convention, the offence of torture includes any act by which extremely severe pain or suffering, whether physical or mental, is deliberately and maliciously inflicted on a person by or with the consent or acquiescence of a public official.’

The U.S. was the only country that was not satisfied with the term ‘intentionally.’ No other State commented on it; it invited no serious discussion from the Working Group and the U.S. proposal was not adopted. In this respect the U.S. has taken the same position that it took during the drafting of the Torture Convention in the process of its ratification. In Understanding on Article 1 of the Convention discussed earlier, the U.S. has limited the application of the Convention to acts of torture, which are ‘specifically intended to inflict severe physical or mental pain or suffering.’¹¹⁰ Intension has been defined as the fixed direction of the mind to a particular object or a determination to act in a particular manner and it is distinguishable from motive which incites or stimulates action.¹¹¹ The plea of intension is expressed in law not only by the words ‘intension,’ or ‘with intend to’ but also by other words such as ‘with the purpose of’ or willfully.¹¹²

¹⁰⁹ See, The Summary prepared by the Secretary-General in accordance with Commission Resolution 18 (XXXIV) containing the comments received from Governments on the Draft Articles of the Convention on Torture, Commission on Human Rights, Thirty-Fifth Session, U.N.Doc.E/CN.4/1314, (1979), at 6.

¹¹⁰ See, 136 Cong. Rec. SI7491 (27 October, 1990).

¹¹¹ A.N. Shah: *Mitra's Legal and commercial dictionaries*, Eastern Law House, New Delhi, Vth Edition (1998) at 409.

¹¹² Glanville Williams, *Text Book of Criminal Law* second edition, Stevens and sons, London (1983) at 75

‘Purpose’

The conduct is prohibited when it is intentionally inflicted’...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....

At the thirty-fourth session of the Commission on Human Rights, the Working Group of the Commission debated the purposes of torture contained in the first paragraph of Article 1 of the 1978 Swedish draft. Some States supported the idea of the reference to the purposes of torture, but others thought that this was done in too restrictive a manner and therefore the reference should be deleted¹¹³ The legislative history of the Convention indicates that the list of purposes was meant to be ‘indicative’ rather than ‘all-inclusive.’ Britain, in its comment on those purposes, thought that the formula was imprecise and expressed its preference for making the list of purpose of torture to be rather exhaustive.¹¹⁴ The Swiss were doubtful whether the formula would cover the infliction of pain or suffering as a result of a medical or scientific experimentation not required by the state of the health of the individual. It therefore proposed that the following should be inserted after the first sentence of paragraph:

It [the term ‘torture’] also means medical or scientific experiments that are not justified by a person’s state of health and serve no therapeutic purpose.¹¹⁵

¹¹³ See, The Report of the 1978 Working Group on the Draft, Convention on Torture, U.N.Doc.E/CN.4/I.1400 (1978), at 31.

¹¹⁴ See, The Summary prepared by the Secretary-General in accordance with Commission Resolution 18(XXXIV) containing the comments received from Governments on the Draft Articles of the Convention on Torture, Commission on Human Rights, Thirty-Fifth Session, U.N.Doc.E/CN.4/1314/Add.I (1979), and at 2.

¹¹⁵ See, The Summary prepared by the Secretary-General in accordance with Commission Resolution 18 (XXXIV) containing the comments received from Governments on the Draft Articles of the

Even though the Swiss proposal was consistent with the U.N. Covenant on Civil and Political Rights¹¹⁶ and its *travaux preparatoires*¹¹⁷ it was not incorporated into the Convention.

At the thirty-fifth session of the Commission on Human Rights, the Working Group of the Commission again debated the question of whether or not the Article should specify the purposes of torture. Some delegations suggested that it would be unduly restrictive to specify any purposes at all. Others, however, considered the list of purposes of torture contained in the Article 1 to be indicative rather than all inclusive.¹¹⁸ Consequently they supported the retention of the list in the Article, which was extended to include as torture such acts as the infliction of severe pain and suffering for any reason based on discrimination of any kind.

The British representative, however, was unhappy with the words of 'or for any reason based on discrimination of any kind.' For him the inclusion of the motivation of discrimination in the list of purposes of torture was unnecessary and posed certain difficulties in its determination in a criminal offence before the courts of States¹¹⁹ consequently, he requested that the following statement be included in the negotiating history of the Convention:

The United Kingdom shares the concern to eliminate all forms of torture.

Including any motivated by discrimination. The United Kingdom is doubtful

Convention on Torture, Commission on Human Rights, Thirty-Fifth Session U.N.Doc E/CN.4/1314, (1978), at 8.

¹¹⁶ 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 involving risk, where such is not required by his state of physical or mental health.' Also, see, P. Van Dijk & G. J. H. Van Hoof, *Theory and Practice of the European Convention on Human Rights*, (1984), at 192-200.

¹¹⁷ U.N.G.A.O.R, U.N.Doc.A/2929 at 32 (1955)

¹¹⁸ See, The Report of the 1979 Working Group on the Draft Convention on Torture as contained in the Report of the Commission on Human Rights on its Thirty-Fifth Session, U.N.Doc.E/CN.4/1347,178180(1979), at 38.

¹¹⁹ *Id.*, at 39

of the need to isolate this particular motivation and in practical terms the United Kingdom thinks that there will in any case be difficulties in doing so with the necessary degree of precision for a criminal offence.

In the debate on the text of the U.N. Declaration on Torture, which is the edifice upon which the Torture Convention was built, proposal was made for adding the words 'or for any other purpose,' after 'or other persons' but it was defeated.¹²⁰ The use of these words in this Convention would have given it added strength. During the consideration of the Convention by the General Assembly for its adoption in 1984, the U.S took the view that the definition of torture in Article 1 should be understood to apply not only to the specific purposes mentioned in the definition, but also to any purpose or motive regardless of whether it was mentioned in Article.¹²¹ Britain, however, expressed its preference for the inclusion of the concept of 'gratuitous torture', Known phenomenon in the list of the purposes of torture.¹²²

C. The Identity of the Offender:

The conduct is prohibited:

'When such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity....'

With respect to the description of the person whose conduct was to be regulated, the delegations at the thirty-fourth session took different views. Some argued that the Article should apply to both public officials and private individuals. Others contended that acts of torture committed by private persons are not as serious

¹²⁰ See, the Report prepared by the Secretariat on the Fifth U.N. Congress on the prevention of Crime and the Treatment of Offenders (1976), at 40.

¹²¹ See, The Report of the Secretary-General containing the comments of States on the Draft Convention on Torture, U.N.Doc.A/39/499, (1984), at 21.

¹²² *Id.*, at 19

as those inflicted by governments and thus should not be included in the application of the Article¹²³No agreement was reached on this subject at this stage.

The issue was raised again in the Third Committee of the General Assembly during its discussion of the Convention in 1978. The French representative insisted that the Convention should mention the question of torture by private individuals¹²⁴The Director of the U. N's Division of Human Rights also brought to the attention of the Committee the existence of institutions in certain countries which provide instruction on torture methods, and recommended that the problem might require further consideration by the committee.¹²⁵ During the discussion of the Working Group of the Commission on Human Rights at the thirty-fifth session, some representatives took the position that the scope of the Convention and the definition of torture should not be limited to a 'public official'. They proposed that the Convention should apply to all individuals under the jurisdiction of the contracting States, regardless of their status. Others insisted that the laws of individual nations would more appropriately cover the acts of individual, other than public officials. For these representatives, the Torture Convention was intended to deal only with situations where national remedies are not likely to be provided.¹²⁶The records of the drafting of the Convention, however, do not reveal the identity of the representatives who put forward this argument.

The Working Group was, however, in a position to reach agreement on the expansion of the definition of acts committed by a public official. It agreed explicitly that the definition should include 'acts committed by, or at the instigation of, or with

¹²³ See, The Report of the 1978 Working Group on the Draft Convention on Torture, U.N.Doc.E/CN.4/L1400 (1978), at 31.

¹²⁴ See, The Summary Record of the 73rd meeting of the Third Committee held on 8 Dec.1978 in which the Committee had discussed the Report of the Secretary-General on the question of Torture and the Draft Convention against it, U.N.Doc.A/C.3/33/SR.73 (1978), at 2.

¹²⁵ *Id.*

¹²⁶ See, The Report of the 1979 Working Group on the Draft Convention on Torture as contained in the Report of the Commission on Human Rights on its Thirty-Fifth Session, U.N.Doc.E/CN.4/1347(1979), at 37.

the consent or acquiescence of a public official or any other person acting in an official capacity.¹²⁷ But the Working Group failed to define the concept of 'public official' during this session, any more than it had in the previous one.¹²⁸

During the debates in the General Assembly on the Convention in 1984, after the completion of its drafting of it's by the Working Group, Panama expressed its dissatisfaction with the description of the persons whose conduct was to be regulated by the Convention. It considered the language limited the definition of torture and the scope of the application of the Convention. In Panama's opinion, the language mentioned in Article 1 suggests that it does not apply to acts of torture committed by an individual, civilian organization or pseudo religious sect.¹²⁹ The legislative history of the Convention seems to concur with that position.

The discussion of the Working Group on this question indicates that the Convention was intended to cover only government involvement in torture. In the view of the Government of Panama, however, the prohibition of torture should not have been limited to public officials since the purpose of the Convention is to eradicate any and all activities which result in the violation of the physical and psychological integrity of the individual.¹³⁰

'Instigation'

The Term 'instigation' means incitement, inducement or solicitation and as such it requires the direct or indirect involvement and participation of the public official in the act of torture in order to give rise to State responsibility and the application of the Article. The concept did not include the omission or failure of a

¹²⁷ *Id.*

¹²⁸ Ahcene Boulesbaa: *The U.N. Convention on Torture and the Prospects for Enforcement*; Martinus Nijhoff Publishers, London (1999) at 15.

¹²⁹ See, The Report of the Secretary-General containing the comments of States on the Draft Convention on Torture, U.N.Doc.A/39/499/Add.I (1984), at 11.

¹³⁰ *Id.*, at 11

public official to act when he had reasonable grounds to believe that torture had been or was being committed. For this reason the U.S suggested the concept of 'acquiescence' of a public official rather than 'instigation by', and proposed the insertion of the words 'or with the consent or acquiescence after' at the instigation of.¹³¹ The U.S. considered the concept of instigation as limiting the application of the definition of torture. It was the only country that commented on the term. The proposal was adopted without comment.

In the process of its ratification of the Torture Convention, the U.S. has further contributed to the development of the 'concept of acquiescence.' In its Understanding of Article of the Convention dealing with the meaning of the term 'acquiescence', it stated that the term requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.'¹³² The Deputy Assistant Attorney General in the Criminal Division in his statement before the Foreign Relations Committee during its debate on the Torture Convention, has interpreted the key element of knowledge emphasized in the U.S. Understanding of Article 1 as to include not only actual knowledge, such as when a superior actively directs or participates in the prohibited activity, but also willful blindness, that is the situation where the superior has a duty to prevent the misconduct and deliberately close his eyes to what would otherwise have been obvious to him¹³³

¹³¹ See, The Summary prepared by the Secretary-General in accordance with Commission Resolution 18 (XXXIV) containing the comments received from Governments on the Draft Articles of the Convention on Torture, Commission on Human Rights, Thirty-Fifth Session, U.N.Doc.E/CN.4/1314, (1978), at 6.

¹³² See, 136 Cong.Rec.S17491-92 (daily ed.27 Oct.1990).

¹³³ See, *Convention Against Torture: Hearing before the Committee on Foreign Relation, United State Senate, One Hundred First Congress, Second Session Jan.30 (1990), at 17.*

'Public official'

During the thirty-fourth session of the Commission on Human Rights, the Working Group of the Commission, despite lengthy discussion, was unable to decide upon a definition of the term 'public official.' Britain suggested the insertion of the phrase 'or any other agent of the state' after 'public official,' in order to clarify the concept;¹³⁴ Austria took the position that the concept of 'public official' could be expanded to include 'persons acting in an official capacity'.¹³⁵ But both the U.S. and the Federal Republic of Germany proposed that the term 'public official' be defined. Moreover, the U.S.,¹³⁶ proposed an amendment in the form of a new Article for defining the concept and the conditions under which a public official would be liable for the commission of torture.¹³⁷

The German proposal was broader, covering a wide range of cases and extending to individuals outside the government:

The Federal Government felt that, in particular, it should be made clear that the term public official contained in paragraph 1 refers not only to persons who, regardless of their legal status, have been assigned public authority by state organs on a permanent basis or in an individual case, but also to persons who, in certain regions or under particular conditions, actually hold and exercise authority over others and whose authority is

¹³⁴ See, *Add. I* of U.N.Doc.E/CN.4/1314 at 2

¹³⁵ See, The Summary prepared by the Secretary-General in accordance with Commission Resolution 18(XXXIV) containing the comments received from Governments on the Draft Articles of the Convention on Torture, Commission on Human Rights, Thirty-Fifth Session, U.N.Doc.E/CN.4/1314, (1978), at 9.

¹³⁶ The U.S. draft Article read:

1. A public official is any person vested with the exercise of some official power of the state, either civil or military;
2. Any public official who (a) consents to an act of torture, (b) assists, incites, solicits, commands, or conspires with others to commit torture, (c) fails to take appropriate measures to prevent or suppress torture when such person has knowledge or should have knowledge that torture has or is being committed and has or is being committed and has the authority or is in a position to take such measures, also commits the offence of torture within the meaning of this Convention.

¹³⁷ *Id.*

comparable to government authority or-be it only temporarily-has replaced government authority or whose authority has been derived from the aforementioned persons.¹³⁸

But it may be pointed out here that the Working Group did not incorporate these proposals in the Torture Convention.

D. The Exclusion of Conduct Inherent in or Incidental to Lawful Sanctions from the Definition of the Article:

The prohibition of torture in Article 1 does not include pain or suffering arising only, from, inherent in or incidental to lawful sanction.'

The words 'inherent in or incidental to lawful sanctions' are vague and very broad. Without clarification there is a danger that an extensive interpretation of these words would render the Convention impotent.

'Inherent in or Incidental to'

It is extremely difficult to determine that sanctions are 'inherent in or incidental to lawful sanctions' in a particular legal system and what are not. The Working Group on the Convention neither provided any criteria for making such determination nor did it define the terms. But even if it could be done, the nature of the findings would so differ from one legal system to another that they would give rise to serious disputes among the Parties to the Convention. The 1978 Swedish draft, even though it did not define this terminology, qualified its application as being consistent with the U.N. Standard Minimum Rules for the Treatment of Prisoners. But the reference to these rules in this draft caused considerable discussion at the thirty-fourth session of the Working Group. It was suggested that the reference to such rules would

¹³⁸ See, The Summary prepared by the Secretary-General in accordance with Commission Resolution 18(XXXIV) containing the comments received from Governments on the Draft Articles of the Convention on Torture, Commission on Human Right, Thirty-Fifth Session, U.N.Doc. E/CN.4/1314/Add.2 (1979), at 2.

make the issue more complicated, for it would endow the rules with a semblance of legal binding force.¹³⁹

The Commentary of States on this draft took the same position. Many States proposed that the reference be deleted.¹⁴⁰ They reasoned that these rules had been adopted by the General Assembly in the form of a recommendation and were not internationally binding legal obligations. For these States to refer to these rules in a legally binding convention would confer upon the rules the character of legal binding force.

The Danish Government simply proposed to amend the rules to read:

To the extent consistent with international rules for the treatment of persons deprived of their liberty.¹⁴¹

As a result of the objection to the above-mentioned rules in that draft Article, Sweden omitted reference to them and in 1979-drafted Article 1 in its present form. But the limitation clause dealing with 'pain or suffering arising only from, inherent in or incidental to lawful sanctions' in this draft Article raised serious concern and caused considerable discussion among the Members of the Working Group at the thirty-fifth session. Some representative's thought that the limitation clause was very vague and broad and might result in the frustration of the spirit and purpose of the Convention. They therefore proposed the reintroduction of the Swedish proposal for reference to the Standard Minimum Rules for the Treatment of Prisoners contained in the original draft. Several delegations, speaking in support of this position, suggested

¹³⁹ See, The Report of the 1978 Working Group on the Draft Convention on Torture, U.N.Doc.E/CN.4/L.1400 (1978), at 31.

¹⁴⁰ The States, which proposed the deletion of the reference to the Standard Minimum Rules for the Treatment of Prisoners, were: Britain, the Federal Republic of Germany, the German Democratic Republic, Spain and the U.S.

¹⁴¹ See, The Summary prepared by the Secretary-General in accordance with Commission Resolution 18 (XXXIV) containing the comments received from Governments on the Draft Articles of the Convention on Torture, Commission of Human Rights, Thirty-Fifth Session, U.N. Doc. E/CN.4/1314, (1978), at 9.

the inclusion of a reference to 'existing international standards' as the criteria for determining the validity and applicability of the clause. Others objected on the grounds that the controversial rules were designed to regulate only the conditions of imprisonment¹⁴² and they pointed out that these rules are not internationally binding.

Finally, the Working Group decided against any reference to these rules, leaving the conduct of States, 'inherent in or incidental to lawful sanctions' unqualified by any other international standards or limitations, subject only to their domestic laws and interpretation. There is nothing in the records of the legislative history of the Convention that indicates that the drafters had agreed on the application of any international standards to such conduct of States. The language of the present definition of torture in Article 1, which is the final expression of the intent of the drafter, confirms this conclusion. Consequently under this definition, any State that is committed to the practice of torture would be able to take its conduct outside the scope to the Convention by making it a lawful sanction under its legal system of government and argue that the conduct is 'inherent in or incidental to lawful sanctions,' which are excluded from the definition of the prohibited conduct.

The exclusion of the conduct, 'inherent in or incidental to lawful sanctions,' from the application of the Convention renders certain objective standards external to the legal systems of the Parties meaningless. The exclusion of the conduct 'inherent in or incidental to lawful sanctions' enables Parties to violate the Convention without being found in breach of it. This glaring loophole is recognized by the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities: its study of the meaning and scope of requirements, concepts and terms relating to limitations or restrictions on human rights and fundamental freedoms has concluded

¹⁴² See, The Report of the 1979 Working Group on the Draft Convention on Torture as contained in the Report of the Commission on Human Rights on its Thirty-Fifth Session, U.N.Doc E/CN.4/1347 (1979) at 38.

that such terminology as 'determined by law',¹⁴³ 'prescribed by law',¹⁴⁴ 'established by law',¹⁴⁵ or 'provided by law',¹⁴⁶ which are contained in many human rights conventions, 'unless qualified, would mean in effect that the State would be able to avoid its international obligations in the matter by enacting laws limiting the individual's right and freedom.'¹⁴⁷ One important difference between the two instruments is the formulation of the 'escape clause' at the end of the first subparagraph of Article 1, which exempts 'lawful sanctions' from what are otherwise overall definitions: in the Declaration, pain and suffering arising from such sanctions is not considered to be torture 'to extent [they are] consistent with the Standard Minimum Rules for the Treatment of prisoners' adopted by the UN in 1955; these rules contain inter-alia a clause number 31, which 'completely prohibits as punishment for disciplinary offences'; corporal punishment, punishment 'by placing in a dark cell and all cruel, Inhuman or degrading punishment.' Attempts were made to reproduce the formulation of the Declaration in the Convention; this was not accepted because it was argued that the convention is not purport to recommend reform of the system of penal sanctions in different countries and that therefore the formulation would not be acceptable to a range of states. In the Convention this limitative description of lawful sanctions had to be left out. There therefore exists a regrettable void: how to qualify as punishment in some countries, for example, strict solitary confinement, in particular for longer periods, or mutilations and indeed stoning as a form of execution or, for that matter, public whipping and stoning as a form of execution or, for that matter, public whipping and flogging. Some hold that such

¹⁴³ See, the Universal Declaration of Human Rights; Article 29(2) and the Covenant on Economic, Social and Cultural Rights, Article 4,

¹⁴⁴ See, the Covenant on Economic, Social and Cultural Rights; Article 8(I) (c),

¹⁴⁵ See, the Covenant on Civil and Political Rights; Article 9(1),

¹⁴⁶ See, the Covenant on Civil and Political Rights; Article 12(3)

¹⁴⁷ See, U.N.Doc.E/CN.4/Sub.2/432/Add.2 (1979), at 1.

punishments are per se prohibited by international law and therefore not covered by the exception-a view, which is certainly not accepted in some parts of the world.¹⁴⁸

The Declaration but not the Convention-contains in its second sub-paragraph a summary definition of torture, which is often quoted by judicial as well as other bodies, and is formulated as follows: 'Torture' constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'. Some call this a 'definition proper' because the first paragraph of Article 1 in both instruments is more of a description than a real definition, to be used as an aid to interpretation when implementing the Convention.

In neither instrument there is a reference to 'medical and scientific experimentation,' as we have found in the ICCPR, Article 7,¹⁴⁹ Nevertheless it can be argued that such treatment, in particular if it reaches a certain level of severity, is also covered by Article 1 of the Declaration and the Convention.

To close this escape route, the definition should have retained the reference to the Standard Minimum Rules for the Treatment of Prisoners. The UN committee on Crime Prevention and Control, in its review of these Rules, found that they exercised a significant influence on the positive development of the laws and regulations of a great number of countries and jurisdictions in the treatment of prisoners.¹⁵⁰ These Rules themselves comprehensively prohibit torture and other maltreatment. Article 31 of the Rules provides that:

¹⁴⁸ Love Kellberg, *Torture: International Rules and Procedures* at 32 in *An End To Torture* (edited by Bertil Duner) Zed books, London (1998).

¹⁴⁹ 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 experimentation involving risk, where such is not required by his state of physical or mental health.; *Ibid.*

¹⁵⁰ U.N.Doc.E/CN.5/536 (1976), at 16

Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely; prohibited as punishments for disciplinary offences.

Article 32(2) also states that:

The same shall apply to any other punishment that may be prejudicial to the physical or mental health of a prisoner.¹⁵¹

The retention of the Rules in the limitation clause would thus imposed some restraints on States in their interpretation of 'inherent in or incidental' to lawful sanctions.

'Lawful Sanctions'

Although at first glance this term appears to be clear enough, in fact its ambiguity poses difficult problems. The delegation of Uruguay, at the fortieth session of the Working Group on the Convention, questioned the meaning of 'lawful sanctions' that might cause pain or suffering.¹⁵² The Canadian representative also complained about the ambiguity 'lawful sanctions.'¹⁵³ For instance, what may be lawful in one legal system may not be so in another. The amputation of a hand for the offence of theft is 'lawful' in some Arab States, which follow the traditions of Islamic Law, but is not in others and in the rest of the world. Thus, if States were allowed to employ, their national legal standards, exclusively to determine exceptions of 'lawful sanctions' the result may be the justification of torture that the Convention was

¹⁵¹ Adopted 30 Aug. 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N.Doc.A/CONF./6/I, Annex 1, A (1956); adopted 31 July 1957 by Economic and Social Council, E.S.C.Res.663f (XXIV) c, 24U.N.ESCOR<Supp. (No. I), at II, U.N.Doc.E/3048 (1957)...

¹⁵² See, The Draft Convention Against Torture. Summary Record of the 33rd Meeting of the Commission on Human Rights in which the Working Group, and other various representatives had commented on the provisions of the Convention, U.N. Doc. E/CN.4/1984/SR/33(1984), at 10.

¹⁵³ See, The Report of the 1984 open-ended Working Group on the Draft Convention Against Torture and other Cruel, inhuman or Degrading Treatment or Punishment, U.N.Doc.E/CN.4/1984/L.2 (1984): U.N.Doc.E/CN.4/1984/72 (1984), at 7.

intended to prohibit. Such deviant practices underscore the urgent need for a uniform definition of 'lawful sanctions' on the international plane.¹⁵⁴

In recognition of this need, many States argued for the clarification of the exception. While it was important for the U.S. to retain the exception of lawful sanctions for the application of the Convention in order to dispel the fears of the States that the Convention might encroach on their criminal law, it was equally important to clarify the exception. It therefore proposed that the exception of lawful sanctions should be made inapplicable when such sanctions were imposed in flagrant disregard of accepted international standards—for example, as noted by the U.S., Article 2 of the Universal Declaration of Human Rights and Article 75 (4) of Protocol 1 to the 1949 Geneva Conventions.¹⁵⁵

Belgium took the position that the concept of lawful sanctions is ambiguous, and as such provides an escape clause for the States Parties.¹⁵⁶ It would have preferred the concept of lawful sanctions to be worded differently. Nevertheless it accepted the Convention as submitted to the United Nations General Assembly. Britain, Italy and the Netherlands took the view that the expression of 'lawful sanctions' must be interpreted as reflecting commonly accepted international legal standards.¹⁵⁷ In other words, the domestic law of States must conform to international law for the purposes

¹⁵⁴ AHCENE BOULESBA: *The U.N. Convention on Torture and the Prospects for Enforcement*; Martinus Nijhoff Publishers, The Hague/Boston/London (1999) at 31.

¹⁵⁵ The Four Geneva Conventions of 12 August 1949 and this Protocol, however, apply only to international armed conflict. Article 3 of this Protocol reads: This Protocol, which supplements the Geneva Convention of 12 August 1949 for the Protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions. Article 2 (b) of the same Protocol reads: Rules of international law applicable in armed conflict means the rules applicable in armed conflict set forth in international agreements to which the parties to the *conflict are* parties and the generally recognized principles and rules of international law which are applicable to armed conflict. The Second Protocol to the above Conventions, however, is intended for the Protection of Victims of Non-International Armed Conflicts'.

¹⁵⁶ See, The Report of the Secretary-General containing the comments of States on the Draft Convention on Torture, U.N.Doc.A/39/499, (1984), at 4.

¹⁵⁷ *Id.*, at 11, 13, 19 and 21.

of this Convention. Western scholars in the field of human rights support the Western position in this point. *Paul Sieghart*, for instance, has argued that:

What is needed for the resolution of such problems is a universal standard of legitimacy against which all laws can be tested anywhere on our planet regardless of the local constitution, religion or culture.¹⁵⁸

The failure of the Working Group, on the Convention to grapple with these problems and to specify the standards or the qualification for determining the legitimacy of 'lawful sanctions', is regrettable. The General Assembly, in its request to the Commission on Human Rights to draft the Convention, expressly demanded that the Convention include the principles of the Declaration on Torture, which contains a reference to the Standard Minimum Rules for the Treatment of Prisoners.¹⁵⁹ Such rules were adopted by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and were approved by the Economic and Social Council in 1957.¹⁶⁰ Therefore, even though such rules are not a U.N. Convention, they are of considerable importance, because not only have they been approved by the Economic and Social Council, but also because the General Assembly referred to them in Its Resolution on Torture which set the stage for the Torture Convention. Even if the objection to these rules is valid, some other mechanism should have been created to limit the human rights abuses of States, which hide behind the lawful sanctions exception. Paragraph 2 of the U.S. Alternative Proposal to Article 1 of the 1978 Swedish draft could have made an important contribution to solving this problem. It reads:

¹⁵⁸ P. Sieghart, *Professions as the Conscience of Society*, *II.J. Med. Eth.* (1985), at 121.

¹⁵⁹ See, Res.No.32/62 of 8Dec 1977 of the General Assembly entitled 'Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in which it requested the Commission on Human Rights to draw up the Convention on Torture, 32 U.N.GAOR, Supp. (No.45), at 127, U.N.Doc.A/32/45(1978).

¹⁶⁰ See, Economic and Social Council Resolution 663 C (xxiv) (1957).

2. Torture does not include pain or suffering arising only from, inherent or incidental to sanctions lawfully; imposed: but does include sanction imposed under colour of law but in flagrant disregard of accepted international standards.¹⁶¹

The Over breadth of the Definition of Torture in Article 1:

The definition is not completely satisfactory.¹⁶² It is vague and loose, thus making it easy for States to evade the Convention. The British representative to the Working Group on the Convention argued that 'a vague definition would only make implementation of the Convention less effective.'¹⁶³

The argument that the definition of Article 1 is vague and unsatisfactory does not mean that the Convention is without success some of the problems identified here are corrected; the Convention has great potential to fulfill the developing aspirations of our rapidly changing world community. The vagueness of the definition can be resolved by recourse to regional and international instruments that contain comparable definitions of the prohibited conduct. The European Commission of Human Rights has rendered the following interpretation of the comparable Article in the E.C.H.R:

It is plain that there may be treatment to which all these description [in Article 3] apply, for all torture must be inhuman and degrading treatment, and inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately cause severe suffering mental or physical, which in the particular situation is unjustifiable. The

¹⁶¹ See, The Summary prepared by the Secretary-General in accordance with Commission Resolution 18(XXXIV) containing the comments received from Governments on the Draft Articles of the Convention of Torture, Commission on Human Rights Thirty-Fifth Session, U.N.Doc.E/CN.4/1314 (1978) at 6.

¹⁶² A. Boulesbaa, "An Analysis of the 1984 Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," 4 *Dick J.Int'l.L.* 189 (1986).

¹⁶³ See, The Draft Convention on Torture. Summary Record of the 33rd Meeting of the Commission on Human Rights in which the Working Group, and other various representatives had commented on the provisions of the Convention, U.N.Doc.E/CN.4/1984/sr/33(1984), at 8.

word 'torture's often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confession, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.¹⁶⁴

These definitions are certainly helpful to the definition of the prohibited conduct of the Convention and can serve to illuminate the gaps created by the process of compromise and consensus during the drafting of the Convention.

The Saving Clause against the Weakening of Other Conventions and National Laws of States:

Article 1 (2)¹⁶⁵ of the Torture Convention reads as under:

This article is without prejudice to any international instrument or national legislation, which, does or may contain provision of wider application.

'Does or may contain provision of wider application'

There was not substantial discussion on the wording of this paragraph, however; this does not present serious problems, as the paragraph is unlikely to give rise to difficulties. This paragraph is a saving clause against the weakening of existing international conventions and national laws of States, which may have wider application or definition than the Torture Convention. It was first introduced in the version proposed by the delegation of Sweden at the pre-session discussions of the thirty-fifth session. That version, however, used different wording, the alternative words 'establish wider prohibition' after the words 'does or may'¹⁶⁶The revised

¹⁶⁴ Op.Com. 5 nov.1969, Greek case at 186

¹⁶⁵ See, United Nations Resolutions & Decision's adopted by the General Assembly during the first Part of its Thirty-Ninth Session (New York, 1985) at 381-82.

¹⁶⁶ See, The Report of the 1979 Working Group on the Draft Convention on Torture as contained in the report of the Commission on Human Right on its Thirty-Fifth Session, U.N.Doc.E/CN.4/1347 (1979), at 37.

Swedish draft replaced the word 'establish' with the term 'contain' and added the words 'provisions of wider application' relating to the subject matter of this Convention¹⁶⁷

This draft was adopted by consensus at this session. At the next occasion on which the paragraph was reconsidered it was decided to change the terms 'national legislation' to 'national law' in order to make the paragraph consistent with paragraph 2 of Article 6, which contained a similar saving clause¹⁶⁸ using the same terms. The paragraph as adopted at the thirty-seventh session reads:

This Article is without prejudice to any international instrument or national law, which does or may contain provisions of wider application.

The records of the thirty-eighth¹⁶⁹ session of the discussion of the Working Group on the Convention do not contain any further debate on the paragraph. The text of the paragraph, however, as it appears in the annex to the records of that session¹⁷⁰ and in the present Article contains the words 'national legislation' in their early form. This may well have been an error since there appears to have been a deliberate attempt to bring the paragraph 2 of Article 6.

¹⁶⁷ *Id.*, at 39

¹⁶⁸ *See*, The Report of the 1981 Working Group, U.N.Doc.E/CN.4/L.1576 (1981), at 3; *See*, also Commission on Human Rights, Report on the Thirty-Seventh Session, ESCOR, Supp. (No.5), at 50, U.N.Doc.E/1981/25 (1981) U.N.Doc.E/CN.4/1475 (1981), at 53.

¹⁶⁹ *See*, The Report of the 1982 Working Group, U.N.Doc.E/CN.4/1982 L/40 (1982), the text of which is reproduced in an addendum, U.N.Doc.E/1982/12/Add.I (1982), at 3.

¹⁷⁰ *Id.*, at 19s