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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY
FORM OF DETENTION OR IMPRISONMENT

TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING
TREATMENT OR PUNISHMENT

Report by the Special Rapporteur, Mr. P. Kooijmans, appointed
pursuant to Commission on Human Rights resolution 1986/50

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I. MANDATE

1. At its forty-first session in 1985, the Commission on Human Rights, by resolution 1985/33 decided to appoint a Special Rapporteur to examine questions relevant to torture. The Chairman of the Commission appointed the Special Rapporteur on 12 May 1985. Pursuant to this resolution, "the Special Rapporteur shall seek and receive credible and reliable information from Governments, as well as specialized agencies, intergovernmental organizations and non-governmental organizations" concerning torture (para. 3) and "respond effectively" to such information (para. 6).

2. As requested, the Special Rapporteur submitted a comprehensive report to the Commission on Human Rights at its forty-second session entitled "Torture and other cruel, inhuman or degrading treatment or punishment" (E/CN.4/1986/15) and informed the Commission on his activities regarding the question of torture, including the occurrence and extent of its practice, together with his conclusions and recommendations.

3. At the same session, the Commission, by resolution 1986/50, decided to extend the mandate of the Special Rapporteur for one year in order to enable him to submit further conclusions and recommendations to the Commission at its forty-third session. The Council endorsed that resolution by decision 1986/138 of 23 May 1986.

4. The interpretation of the scope of the mandate of the Special Rapporteur is contained in his first report to the Commission (E/CN.4/1986/15, paras. 22-24). In the present report he will make some additional comments relevant to the interpretation of his mandate.

5. On various occasions the Special Rapporteur has been asked to disclose the identity of his sources, as they were considered by the country concerned to be unreliable or biased. He has invariably replied that he is not in a position to do so for several reasons. First, if he provided this information in some cases and refused to do so in others, it would put him in an awkward position. And in some cases there are very good reasons for not disclosing the identity of the source in order to protect the persons involved or their relatives against retaliatory measures. This is true in particular when the organization which provided the information is either within the country where torture is allegedly practised or received its information directly from persons living in that country. Secondly, the Special Rapporteur feels that it is his responsibility to determine which information is reliable and which is not. It would be wrong to shift that responsibility to the organization which provided the information. Since torture generally takes place in secluded places and often leaves no directly recognizable physical marks, evidence is hardly ever fully conclusive. It is only by carefully evaluating the concrete information against the background of what is known about the general situation in the country concerned that the reliability of the source can be determined. Moreover, as stated in the previous report, torture almost invariably takes place in a political context. Victims of torture are very often opponents of the government in power. First-hand information about torture, therefore, in many cases inevitably comes from groups whose political ideas are at variance with those of the incumbent régime. The fact that allegations of torture are coming from politically motivated sources does not

imply, however, that the allegations themselves are politically motivated too. Torture is absolutely forbidden under international law and everybody therefore has the right to bring alleged cases of torture to the attention of the world community. To his regret, the Special Rapporteur has found too often that the alleged unreliability of the sources has been used by governments as an argument for not giving detailed information about the cases brought to their attention. The best way to prove the falseness of the allegations is to provide this detailed information or to invite the Special Rapporteur to visit the country and to see for himself what the situation is.

6. As the Special Rapporteur said in his first report, in view of the fact that all States have unequivocally committed themselves to respect the inherent dignity of man, torture should be seen essentially as a non-political issue. It should, therefore, be a matter of concern that still too often disclosure of the practice of torture is seen as a hostile act against the State and that those who have made such disclosures are in danger of being arrested and, possibly, subjected to torture themselves. Highly detailed information is frequently brought to the attention of the Special Rapporteur with the explicit request that it should not be conveyed to the Government of the country concerned as that could place certain persons or their relatives in great danger.

7. The Special Rapporteur wishes to stress that the identity and character of the source which provides the information is not the only criterion for ascertaining its reliability; other factors, such as its consonance with information from other sources and the general human rights situation in the country concerned, are also taken into account.

8. The Special Rapporteur has also been requested on several occasions to plead with Governments not to expel aliens within their jurisdiction to their countries of origin where they might be in danger of being subjected to torture.

9. It may be recalled that article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture and that, for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

10. This conventional specification - which is not yet in force - of the customary law principle of non-refoulement indicates that a State is under a clear obligation not to expel aliens from its territory to their country of origin if there is a real risk that the person involved might be tortured after his return. In the case of asylum-seekers whose request for asylum has been rejected, it is first and foremost for the United Nations High Commissioner for Refugees to intervene with the Governments involved; and, in fact, UNHCR has done so on various occasions in the past.

11. Although in such cases - and even more so in cases where the issue of asylum does not play a role - it is ultimately the Government of the country of sojourn which, under current international law, is competent to decide whether the alien will be returned, the Special Rapporteur feels that might be appropriate for him to draw the attention of that Government to the fact that in the country of origin torture is by no means an exceptional phenomenon and to request it to take this into account in the decision-making process. In this connection, Recommendation R(80)9, adopted on 27 June 1980 by the Committee of Ministers of the Council of Europe recommended Governments:

"1. not to grant extradition where a request for extradition emanates from a State not party to the European Convention on Human Rights and where there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing the person concerned on account of his race, religion, nationality or political opinion, or that his position may be prejudiced for any of these reasons".

II. ACTIVITIES OF THE SPECIAL RAPPORTEUR

A. Correspondence

12. In pursuance of paragraph 3 of resolution 1986/50, the Special Rapporteur addressed notes verbales to Governments and letters to intergovernmental organizations and non-governmental organizations on 17 June 1986 with the request that they provide information on measures taken or envisaged, including legislation, to prevent and/or combat torture and to establish safeguards designed to protect the individual against torture.

13. In a reminder, dated 19 June 1986, the Special Rapporteur reiterated his invitation to Governments to provide him with information on allegations of cases of torture transmitted in 1985. He also stressed the importance of receiving information on legislation aimed at ensuring adequate protection of the right to physical and/or mental integrity of the individual, as well as on training programmes for police and security personnel.

14. In response to his request the following Governments submitted information: Byelorussian Soviet Socialist Republic (23 October 1986), Bolivia (22 June 1986), Congo (17 September 1986), Cuba (16 July 1986), Denmark (23 June 1986), Finland (9 July 1986), German Democratic Republic (26 September 1986), India (18 October 1986), Indonesia (12 August 1986), Italy (5 February 1986), Japan (27 August 1986), Liechtenstein (15 November 1986), Libyan Arab Jamahiriya (2 July 1986), Mexico (15 October 1986), Netherlands (24 July 1986), New Zealand (17 July 1986), Norway (16 January 1986), Nigeria (5 August 1986), Peru (11 August, 10 September 1986), Philippines (15 August 1986), Portugal (30 September 1986), Republic of Korea (6 November 1986), Sweden (11 July, 25 August 1986), Switzerland (2 September 1986), Syrian Arab Republic (14 July 1986), Togo (17 October 1986), Turkey (15 September 1986), Ukrainian Soviet Socialist Republic (2 October 1986), Union of Soviet Socialist Republics (13 October 1986) Zaire (27 August 1986).

15. Information was also provided by the International Labour Organisation (ILO); the United Nations Educational, Scientific and Cultural Organization (UNESCO); the Inter-American Commission on Human Rights; Amnesty International; SOS Torture; the British Medical Association, the Commission on Human Rights of Guatemala; Socorro Jurídico (El Salvador) and the Swiss Committee against Torture.

16. As in 1985, the Special Rapporteur received numerous allegations of the practice of torture from different sources. After analysing them, letters with a brief description of the allegations received were transmitted to 19 countries for clarification. In addition, the Special Rapporteur decided to retransmit, on 19 July 1986, allegations sent to 15 Governments in 1985. At the time of the preparation of this report no replies to specific allegations had been received from the Governments of Afghanistan, the Congo, Egypt, El Salvador, Iran (Islamic Republic of), Iraq, the Libyan Arab Jamahiriya, Mozambique, South Africa, Suriname, the Syrian Arab Republic, Uganda and Zimbabwe.

B. Consultations

17. The Special Rapporteur held consultations in Geneva during visits in June, September and November 1986. Private consultations with those Governments that expressed the wish to meet with him were maintained. He also received non-governmental organizations, private individuals and groups. On 26 November 1986, the Special Rapporteur heard six witnesses, who testified concerning the torture and ill-treatment to which they had been subjected while held in detention.

C. Urgent action

18. A number of requests for urgent action were received during 1986. The Special Rapporteur decided to bring 19 to the immediate attention of the respective Government on a purely humanitarian basis, to ensure that the right to physical and mental integrity of the individual was protected. He also requested information on remedial measures, including those taken by the Judiciary, in case the allegations were proved correct. Most of the allegations concerned persons subjected to torture during interrogation while being held incommunicado by security police.

19. Urgent appeals were sent to the Governments of the following States:

(a) Bahrain (30 September 1986), concerning three persons in investigative detention, two of whom had allegedly needed medical care as a result of the ill-treatment they received;

(b) Bangladesh (5 June 1986), concerning three persons in police custody;

(c) Chile (27 June, 15 July, 3 October and 4 November 1986), concerning a number of persons recently arrested by the security forces;

(d) Colombia (16 July 1986), concerning two persons detained by the military;

(e) El Salvador (6 June 1986), concerning eight persons arrested and detained by security forces;

(f) Indonesia (10 September 1986), concerning a student of East Timor descent who had been arrested at the university campus;

(g) Islamic Republic of Iran (30 September 1986), concerning three physicians held in custody;

(h) Paraguay (17 November 1986), concerning a journalist held in incommunicado detention;

(i) Republic of Korea (6 June 1986), concerning seven persons detained by the military security police;

(j) South Africa (19 June, 15 July and 10 September 1986), concerning a priest and three other persons who were arrested and detained under the state of emergency;

(k) Suriname (24 September 1986), concerning a number of people of Bush-Lepo descent;

(l) Thailand (5 June 1986), concerning persons of Kampuchean descent, who were arrested on a charge of robbery and manslaughter;

(m) Turkey (9 and 30 October 1986), concerning a Turkish national, residing in Sweden, who was arrested after re-entry into Turkey and about 10 persons of Iranian descent;

(n) Zimbabwe (5 June 1986), concerning a leading politician who has been under arrest for some time.

20. In response to his appeal the Special Rapporteur received seven replies:

(1) The Government of Bangladesh reported, by letter dated 7 August 1986, that the matter had been thoroughly investigated by the appropriate authorities; the allegations of torture were found to be baseless and false. The alleged victims of torture were released;

(2) By letters dated 17 and 18 November 1986 respectively, the Government of Chile made reference to the duplication of procedures, since the same cases had been brought to its attention by the Special Rapporteur on the situation of human rights in Chile. Nevertheless, the Government stated that special instructions had been issued on 30 July 1985 regarding treatment of detainees. It also announced the conclusion of an agreement with the International Committee of the Red Cross (ICRC), concluded in September 1986, whereby delegates and doctors paid regular visits to the inmates with whom they held private interviews. Security personnel kept ICRC informed on the status of the list of detainees;

(3) The Government of Colombia transmitted, on 17 October 1986, a reply provided by the Military Prosecutor, dated 29 September 1986. According to the information received, the alleged victims were arrested by the National Police on 28 May 1986. They admitted to having connections with guerrilla groups and signed a declaration stating that they had never been subjected to torture. One of the alleged victims is currently in prison for a common crime.

(4) Informally, the Special Rapporteur was also informed by the Indonesian authorities that the cases brought to the attention of their Government had been thoroughly investigated in conformity with the existing legal procedures. The alleged victims were released on 11 October 1986;

(5) The Government of the Republic of Korea also provided information in a letter dated 6 November 1986 stating that one case was still under investigation. According to the information, no evidence of torture had been found in the other cases;

(6) The Special Rapporteur was informed by the Government of Thailand, by letter dated 4 July 1986, that the alleged victims of torture were common criminals charged with murder and robbery. According to the information, they were arrested on 21 March 1986 and bore no visible evidence of torture.

Subsequently, the Special Rapporteur was provided with additional information. On 27 November 1986, the representative of Thailand met the Special Rapporteur and provided further clarification on the cases. According to an aide-mémoire, the alleged victims of torture received "medical examinations as stipulated by the prison's rules and regulations". Some marks and wounds on their bodies were duly noted, and "... It is conceivable that they might have acquired such marks and wounds prior to being arrested ...";

(7) On 28 November 1986, the Government of Turkey informed the Special Rapporteur that one of the alleged cases of torture (a foreigner who had entered the country illegally), was released on 30 September 1986. As for the second case, no record or information had been found. According to the information, torture is categorically prohibited. "The Turkish Government is resolved to continue its policy of ensuring the protection of the physical and mental integrity of the individual, regardless of whether the individual might be a Turkish citizen or a foreigner".

21. The Special Rapporteur received no reply to his urgent appeals from the Governments of Bahrain, the Islamic Republic of Iran, Paraguay, South Africa, Suriname and Zimbabwe.

D. On-site observations

22. The Special Rapporteur has, on several occasions expressed his readiness to travel to the territory of any member State with the consent or at the invitation of the Government concerned for the purpose of carrying out on-site observations. Such visits would enable the Special Rapporteur to assess the allegations transmitted by different sources on concrete cases and verify facts. During such visits the Special Rapporteur in addition to consulting with the authorities, might also hold private interviews with alleged victims of torture, groups, entities or institutions, including persons sentenced or in detention in local prisons.

III. ROLE OF MEDICAL PERSONNEL IN TORTURE

23. In his first report, the Special Rapporteur mentioned special safeguards that should be adopted concerning arrested or imprisoned people in order to prevent them from being tortured (E/CN.4/1985/15, paras. 45-47). Among the safeguards, article 2 of the Code of Conduct for Law Enforcement Officials, adopted by the General Assembly in resolution 34/169, provides that "in the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons". Accordingly, "an order from a superior officer or a public authority may not be invoked as a justification of torture" (art. 2, para. 3, of the Convention against Torture). States shall furthermore ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment (art. 10, para. 1, of the Convention and art. 5 of the Declaration of 1975). They shall also keep under review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of arrested and detained persons, with a view to preventing any cases of torture (art. 11, of the Convention). Any victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible (art. 14, para. 1, of the Convention).

24. Article 6 of the Code of Conduct for Law Enforcement Officials provides that "law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required". The "medical attention" refers to "services rendered by any medical personnel, including certified medical practitioners and paramedics".

25. Concerning the protection of victims of international armed conflicts, article 16 of Protocol I additional to the Geneva Conventions of 12 August 1949 1/ provides general protection of medical duties. It states that "under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom" (para. 1); that "persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics ..." (para. 2); and that medical personnel shall not be compelled to give any information concerning the wounded and sick who are, or who have been, under their care, if such information would, in their opinion, prove harmful to the patients concerned or to their families. (para. 3).

26. In regard to prisoners, rules 22 to 26 of the Standard Minimum Rules for the Treatment of Prisoners 2/ govern medical services. At every institution the services of at least one qualified medical officer with some knowledge of psychiatry, specialized institutions for specialist treatment, and a dental officer must be available (rule 22). In women's institutions, the necessary pre-natal and post-natal care must be provided, as well as a nursery staffed by qualified persons (rule 23). Every prisoner should be examined by the medical officer as soon as possible after his admission (rule 24). The

medical officer shall have the care of the physical and mental health of the prisoners and should see all sick prisoners daily (rule 25). In addition, he shall inspect the food hygiene, cleanliness, sanitation, heating, lighting, ventilation, clothing and bedding in the institution (rule 26).

27. A Working Group of the Sixth Committee has drafted a number of principles concerning detainees (A/C.6/40/L.18, annex). Draft principle 21 provides that "proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge".

28. In addition to the protective measures described above, the General Assembly decided in resolution 37/194 to adopt the Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment, because it was "alarmed that not infrequently members of the medical profession or other health personnel are engaged in activities which are difficult to reconcile with medical ethics". The expression "health personnel" includes not only physicians, but also people such as physician-assistants, paramedics, physical therapists and nurse practitioners.

29. In the same resolution, the General Assembly recalled with appreciation the Guidelines for Medical Doctors concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to Detention and Imprisonment adopted by the World Medical Association in the 1975 Declaration of Tokyo (A/31/234, annex II). According to paragraph 4 of the Declaration, "the doctor's fundamental role is to alleviate the distress of his or her fellow men, and no motive whether personal, collective or political shall prevail against this higher purpose". In this context, the Principles of Medical Ethics establish that "it is a contravention of medical ethics for health personnel, particularly physicians, to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health" (principle 3).

30. The principle of non-discrimination is incorporated in the Principles of Medical Ethics as follows: "Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained" (principle 1). It is also provided that "there may be no derogation from the foregoing principles on any ground whatsoever, including public emergency" (principle 6). In addition, the General Assembly expressed its conviction in resolution 37/194 that "under no circumstances should a person be punished for carrying out medical activities compatible with medical ethics regardless of the person benefiting therefrom, or be compelled to perform acts or to carry out work in contravention of medical ethics, but that, at the same time, contravention of medical ethics for which health personnel, particularly physicians, can be held responsible should entail accountability". However, persons accused of acting in contravention of these principles might, under particular circumstances, plead force majeure. Consequently, the General Assembly noted that "in accordance

with the Declaration of Tokyo measures should be taken by States and by professional associations and other bodies, as appropriate, against any attempt to subject health personnel or members of their families to threats or reprisals resulting from a refusal by such personnel to condone the use of torture or other forms of cruel, inhuman or degrading treatment".

31. The Principles of Medical Ethics prevent health personnel, particularly physicians, from:

(a) Engaging, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment (principle 2);

(b) Applying their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees (principle 4 (a));

(c) Certifying the fitness of prisoners or detainees for any form, of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or participating in any way in the infliction of any such treatment or punishment (principle 4 (b)); and

(d) Participating in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoner or detainee himself, of his fellow prisoners or detainees, or of his guardians, and presents no hazard to his physical or mental health (principle 5). (Nevertheless, according to the Declaration of Tokyo, "where a prisoner refuses nourishment and is considered by the doctor as capable of forming an unimpaired and rational judgement concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially" (para. 5).)

32. Article 7 of the Covenant on Civil and Political Rights states that "in particular, no one shall be subjected without his free consent to medical or scientific experimentation". The Human Rights Committee indicated that "... the prohibition extends to medical or scientific experimentation without the free consent of the person concerned" and that "special protection in regard to such experiments is necessary in the case of persons not capable of giving their consent". 3/ Moreover, paragraph 6 of the Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind (adopted by the General Assembly in resolution 3384 (XXX)) states that the physical and intellectual integrity of the human personality shall be protected "... from possible harmful effects of the misuse of scientific and technological developments". In addition, draft principle 19 bis of the draft body of principles referred to in paragraph 27 states that "no detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health".

33. In regard to persons detained on grounds of mental ill health or suffering from mental disorder, the Special Rapporteur of the Sub-Commission on that subject concluded that psychiatry "is often used to subvert the political and legal guarantees of the freedom of the individual and to violate seriously his human and legal rights"; that "in some States, psychiatric hospitalization and treatment is forced on the individual who does not support the existing political régime ..."; and that in other States "persons are detained involuntarily and are used as guinea-pigs for new scientific experiments". 4/ The Special Rapporteur of the Sub-Commission also concluded that "by involuntary admission and detention of a patient many of his human and legal rights can be collectively violated", inter alia, "the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment ..."; 5/ and that "some of the scientific and technological advances have adverse effects and in certain cases they pose threats to the physical and intellectual integrity of the patient. Thus, the side-effects of the major tranquillizing and antidepressant drugs can be very severe; for example the administration of strong tranquillizing or antidepressant drugs over a long period may be such as to cause unpredicted personality changes in the patient". 6/

34. Consequently, the Special Rapporteur of the Sub-Commission proposed the adoption of a draft body of principles, guidelines and guarantees for the protection of the mentally ill or persons suffering from mental disorder. 7/ They include the following: "difficulties of adaptation to certain moral, social, cultural or political values or religious beliefs shall not be a determining factor in diagnosing a mental illness or a mental disorder" (draft art. 5, para. 2); "certain therapies and treatments, such as psychosurgery and electroconvulsive treatment, shall never be applied without the patient's consent or the consent of his legal representative" (draft art. 9, para. 3); "medication shall be given to a patient only for therapeutic purposes and shall not be administered as a punishment or used for the purpose of restraint or for the convenience of the medical and nursing staff" (draft art. 10, para. 1); and "every patient shall have the right to refuse treatment" (draft art. 11, para. 1).

IV. RESPONSIBILITY FOR THE VIOLATION OF THE PROHIBITION OF TORTURE

35. In the introduction to his first report the Special Rapporteur concluded that the prohibition of torture could be considered to belong to the rules of jus cogens, since it is an international obligation of essential importance for safeguarding the human being from which no derogation is possible.

36. What kind of responsibility does the violation of such an important international obligation entail? In the first place a distinction must be made between international, individual and State responsibility.

37. In virtually all countries acts of torture are a crime punishable under national law. It goes without saying that this is the most appropriate way for torturers to be brought to justice. However, in view of the fact that torture has been defined in international instruments, such as the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as "any act by which severe pain or suffering ... is intentionally 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 is by no means exceptional that an offender is not prosecuted in the country in which the offence is committed. In fact, this is precisely why torture has become so much a matter for international concern.

38. One of the important elements of the 1984 Convention is, therefore, the establishment of universal jurisdiction with regard to torture. According to articles 4 and 5, each State party shall ensure that all acts of torture, wherever they are committed and irrespective of the nationality of the alleged offender, shall be punishable under its national law, and article 7 introduces the principle of dedere aut judicare for perpetrators of torture.

39. Although the discussion as to whether torture is an international crime has not yet come to a conclusion - a discussion which may be called theoretical as long as no international criminal court has been established - there are strong arguments for including torture - at least if it is practised regularly by an individual - in that category. As the Special Rapporteur of the International Law Commission on a draft code of offences against the peace and security of mankind, Mr. Doudou Thiam of Senegal, said in his second report:

"Violations of human rights may at one time fall within the scope of internal law and at another within that of international law, depending on their seriousness. If the violation goes beyond a certain point, it falls within the category of international crimes and, depending on its seriousness, it may be at the top of the scale, in other words it may be a crime against humanity. There is strictly speaking no difference of nature between the two concepts, only a difference of degree. Once they exceed a certain degree of seriousness, violations of human rights are indistinguishable from 'crimes against humanity'." (A/CN.4/377, para. 40)

40. Although he did not include serious cases of torture explicitly in his draft articles, he did not exclude them either. In his categorization of crimes against humanity in draft article 12, he mentions in paragraph 3 "inhuman acts which include, but are not limited to, murder, extermination,

enslavement, deportation or persecution, committed against elements of a population on social, political, racial, religious or cultural grounds." (A/CN.4/398, para. 262)

41. It may thus be concluded that torture, when practised systematically against certain groups of the population, is a serious crime for which the perpetrator is directly accountable under international law whatever his position in the official hierarchy. In this respect it is relevant to quote draft article 9:

"The fact that an offence was committed by a subordinate does not relieve his superiors of their criminal responsibility, if they knew or possessed information enabling them to conclude, in the circumstances then existing, that the subordinate was committing or was going to commit such an offence and if they did not take all the practically feasible measures in their power to prevent or suppress the offence".

42. The situation with regard to the responsibility of the State within whose jurisdiction torture is practised is more complex. State responsibility creates a legal relationship between the active side and the passive side, the State which has violated its obligations under international law and the injured State. In the case of violations of human rights it may be difficult to identify the injured State since the victims of these violations are generally the offending State's own subjects. As no other State is immediately and indirectly affected by the violation, it could be said that all other parties (in the case of a convention) or all other States (in the case of customary law) have a legal interest in the termination of the violation and, consequently, may intervene with the offending State to that end. Under conventional law this is institutionalized (usually in an optional way) by the right of a State to complain; in more general terms it is virtually established that diplomatic intervention, in the case of serious violations of human rights, by the organized community of States or by individual States does not constitute interference in the internal affairs of the offending State - which is prohibited by international law, although it is still a matter of controversy whether individual States may take unilateral measures which go further.

43. This legal interest of other States in the compliance with international obligations in the field of human rights has been officially recognized by the International Court of Justice if basic human rights are violated. In the case of a State's obligations vis-à-vis the international community as a whole, all States can be held to have a legal interest in their protection; they are obligations erga omnes. As an example of such obligations the Court mentioned, inter alia, obligations deriving from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. 8/

44. There is no doubt that the right not to be tortured belongs to this category of basic human rights and that, consequently, all States have a legal interest in compliance with the prohibition of torture, in other words the transgressor of this prohibition is responsible to the international community as a whole and, in principle, other States may bring a claim as

representatives of that community. If the practice of torture takes on a "massive", "persistent" or "systematic" character, it may even fall within the concept of an "international crime". As the International Law Commission put it:

"Contemporary international law has reached the point of condemning outright the practice of certain States ... in imperiling human life and dignity ... The international community as a whole, and not merely one or other of its members, now considers that such acts violate principles formally embodied in the Charter and, even outside the scope of the Charter, principles which are now so deeply rooted in the conscience of mankind that they have become particularly essential rules of general international law. There are enough manifestations of the views of States to warrant the conclusion that in the general opinion, some of these acts genuinely constitute 'international crimes', that is to say, international wrongs which are more serious than others and which, as such, should entail more severe legal consequences". 9/

45. It is not yet clear what form this special type of international responsibility will take, but the International Law Commission stressed that

"the attribution to the State of an internationally wrongful act characterized as an 'international crime' is quite different from the incrimination of certain individuals-organs for actions connected with the commission of an 'international crime' of the State, and that the obligation to punish such individual actions does not constitute the form of international responsibility specially applicable to a State committing an 'international crime' or, in any case, the sole form of this responsibility" 10/

(which it might do in the case of a less serious international wrongful act (P.H.K.)).

46. In conclusion it can be said that, according to contemporary international law, torture is a violation of an erga omnes obligation and therefore entails the responsibility of the State towards the international community as a whole. If torture is practised in a persistent and systematic manner or on a widespread scale it amounts to an international crime.

V. NATIONAL STANDARDS FOR CORRECTING AND/OR PREVENTING TORTURE

47. In pursuance of paragraph 3 of Commission on Human Rights resolution 1986/50, on 17 June 1986 the Special Rapporteur addressed notes verbales to Governments and letters to specialized agencies, intergovernmental organizations and non-governmental organizations, with the request that they provide information on measures taken or envisaged, including legislation, to prevent and/or combat torture and to establish safeguards designed to protect the individual against torture.

48. By 16 December 1986, the Special Rapporteur had received new information from 19 States concerning their respective standards designed to correct and/or prevent torture, namely: Canada, Congo, German Democratic Republic, Guatemala, India, Italy, Libyan Arab Jamahiriya, Mexico, Niger, Peru, Philippines, Portugal, Republic of Korea, Sri Lanka, Switzerland, Togo, Turkey, Union of Soviet Socialist Republics and Venezuela. The new information complements that contained in the Special Rapporteur's first report (see E/CN.4/1986/15, paras. 69-94).

49. Information was also provided by the International Labour Organisation and UNESCO; the Inter-American Commission on Human Rights; and a number of non-governmental organizations.

50. On 11 January 1986, Canada reported to the Special Rapporteur about the Archambault Institution riot (25 July 1982), during which hostages were taken. As a result, three Correctional Officers were murdered, two instigators of the riot took their own lives, 11 inmates were eventually brought to trial and five were convicted of various charges. In the following weeks, allegations of abuse of inmates emerged during the period following the riot from friends and relatives of inmates, as well as non-governmental organizations, who called for further inquiry into the allegations. In response, the Solicitor General decided, on 23 June 1983, to appoint Correctional Investigator, Mr. Ron Stewart, to conduct an inquiry.

51. The Stewart report documented specific abuses about which inmates testified: unnecessary use of gas, physical abuse, threats and verbal abuse, adulteration and denial of food and water, deprivation of sleep, bedclothes, mattresses and clothing and denial of toiletries and writing materials. The Correctional Investigator concluded that it was likely that certain instances of abuse did occur, however the precise extent or severity of the abuses could not be established, nor could specific abusive acts be linked to specific staff members.

52. Nevertheless, the Correctional Investigator recommended that specific measures be taken to try to prevent similar occurrences in the future. Thus, it was accepted that "during an emergency situation, an accurate record of work assignments be kept" (recommendation 6); that "accurate and intelligible gas inventories be kept and that every withdrawal of gas from the armory be signed for by the recipient, who must indicate in writing the purpose and place of use" (recommendation 8); and that "a health care officer visit each occupied cell in dissociation on a daily basis and speak with each inmate without a guard being present. If the inmate complains of mistreatment, ... he should be taken to the hospital and given a physical examination" (recommendation 13). However, recommendation 10 ("that any disciplinary

charge against a correctional officer found to be valid be permanently recorded on the file of the officer involved") was rejected; and recommendation 15 ("that in those instances where an inmate is suspected of being involved in any incident being investigated by the police and which may lead to criminal charges, he be allowed to consult with counsel prior to being questioned by the police and that he be allowed to have counsel present during such questioning") was kept under consideration.

53. On 21 November 1986, Guatemala transmitted to the Special Rapporteur the text of the Act on the Human Rights Commission of the Congress of the Republic and the Procurator for Human Rights. According to the law, the Commission "is a pluralist body with the function of promoting the study and updating of legislation on human rights in the country ... for the purposes of dissemination, promotion and effective enjoyment of fundamental rights ..." (art. 1). It will be composed of "... a Deputy for each of the political parties represented in the Congress of the Republic ..." (art. 2). Among other competences of the Commission, it may "make recommendations to the Executive for the adoption of measures in favour of human rights and request it to submit the relevant reports"; "maintain constant contact with international bodies concerned with the defence of human rights, for the purpose of consultations and exchange of information" (art. 4 (f) and (g)); and "propose to the plenary congress ... the names of three candidates for the post of Procurator for Human Rights ..." (art. 4 (a)). According to article 6 of the law, the Procurator for Human Rights (equivalent to an ombudsman) "... is a Commissioner of the Congress of the Republic for the defence of the human rights which are safeguarded by the Constitution and the international treaties and conventions acceded to by Guatemala. He shall exercise his duties for a period of five years and shall have legal personality, jurisdiction and competence throughout the Republic; he shall be the highest authority in respect to human rights matters and shall not be subordinate to any organ or official". Among the most relevant of his competences, the Procurator may "investigate any complaints concerning violations of human rights submitted to him by any individual" and "promote actions and remedies, judicial or administrative, wherever appropriate" (art. 15 (c) and (f)). In particular, article 17 establishes that the Procurator "shall take steps to ensure that fundamental rights the exercise of which has not been expressly restricted are fully guaranteed during a state of emergency ...".

54. On 18 October 1986, India transmitted to the Special Rapporteur relevant legislation regarding restraints on the use of force by the law enforcement authorities. Thus, since the process of arresting a person may involve the use of force, the Criminal Procedure Code prescribes the manner in which an arrest must be made: the Police Officer is authorized to touch or confine the body of the person to be arrested only if the person does not submit himself to custody (sect. 46); the arrested person also has the right to request the magistrate to have him examined by a medical practitioner, where such examination will establish the commission by any other person of any offence against his body (sect. 54). In addition to the law, police manuals contain detailed instructions either prohibiting or restricting the use of force by the police while effecting arrests, interrogating suspects and accused persons or during any other stage of investigation.

55. On 5 February 1986, Italy reported to the Special Rapporteur on preventive legislation. In particular, "a specific offence (abuse of authority against arrested or detained persons) is defined in article 608 of the Penal Code, which provides for the penalty of imprisonment for up to 30 months for a public official who subjects to measures of constraint not authorized by law a person who has been arrested or detained and who is in his custody". In addition, "article 41 of the Prison Regulations (Act No. 354 of 26 July 1975) restricts the use of physical force and means of coercion against detainees by establishing that physical force may be used only when essential in order to prevent or thwart acts of violence, to preclude escape attempts or to overcome resistance, even passive, to compliance with orders given ...".

56. On 6 November 1986, the Republic of Korea sent the Special Rapporteur, inter alia, the text of article 125 of the Criminal Code, by which "a person who, in performing or assisting in activities concerning judgement, prosecution, police or other functions involving the restraint of the human body, commits an act of violence or cruelty ... in the performance of his duties, shall be punished by penal servitude for not more than five years and suspension of qualifications for not more than 10 years".

57. As regards corporal punishment, the Special Rapporteur received information about the position of the Libyan Arab Jamahiriya. Article 2 of Act No. 148 of 1972, concerning the Islamic Law, penalty for theft and hiraba (highway armed robbery), provides that "if the conditions stipulated in the preceding article are met, the thief shall be punished by having his right hand cut off"; and article 5 provides that a muharib (one who commits hiraba) shall be punished by having his right hand and left leg cut off if he has unlawfully taken others' property". Moreover, article 2 of Act No. 70 of 1973 provides that an adulterer shall receive 100 lashes, in addition to being liable to imprisonment. Furthermore, Act No. 89 of 1974 provides that any Muslim convicted of drinking alcohol shall receive 40 lashes (art. 5); if he is convicted of having otherwise consumed alcohol, whether in pure or mixed form, he shall receive not less than 10 and not more than 30 lashes. The Government concluded that the Islamic Law penalties are established in the Holy Koran so that they form part of the religion and beliefs of the population and therefore cannot be altered by deletion or attenuation or be replaced by other man-made penalties or by any other internationally approved measures.

58. On 15 October 1986, Mexico reported to the Special Rapporteur on its ratification of the Convention against Torture (23 January 1986) and on the adoption of a Federal Law to Prevent and Sanction Torture (Diario Oficial, 28 May 1986). According to the new law, "whenever any detainee or accused person so requests, he shall be examined by a forensic medical expert or by a physician of his choice ..." (art. 4). It also provides that "any authority having knowledge of an incident of torture is obliged to report it immediately" (art. 6).

59. In 1985, the Government of Peru informed the Special Rapporteur of the establishment of a Peace Commission as an advisory and consultative body of the Presidency of the Republic (see E/CN.4/1986/15, para. 88). On 5 September 1986, Supreme Resolution No. 265-86-JUS abolished the Peace Commission and on the same date Supreme Resolution No. 012-86-JUS established the National Council on Human Rights linked to the Ministry of

Justice. According to article 1, the Council shall be "... responsible for promoting, co-ordinating and advising the Executive with a view to protecting and ensuring the full enjoyment of the fundamental rights of the individual". The Council should be composed of nine people, namely the Minister of Justice, and representatives from the Ministries of Justice, Foreign Relations, the Interior and Education, as well as representatives of the Catholic Church, the Peruvian University, the bar, and a representative of the non-governmental organizations dealing with the protection of human rights.

60. On 15 August 1986, the Philippines reported on the establishment of a Presidential Committee on Human Rights (Executive Order No. 8 of 18 March 1986) for advisory and consultative purposes. In accordance with section 4, the Committee shall investigate complaints of unexplained or forced disappearances, extrajudicial killings, massacres, torture, and other violations of human rights, past or present, committed by officers or agents of the national Government or persons acting in their place or stead or under their orders, express or implied. Furthermore, it shall report its findings to the President and propose procedures and safeguards to ensure that human rights are not violated by officers or agents of the Government.

61. Subsequently, the Presidential Committee adopted Resolution No. CDH-1 of 14 April 1986 by which it proposed to maximize compliance with existing laws, inter alia, permitting family, lawyers, medical or religious personnel, to visit persons arrested, examine, treat and advise persons detained; it also proposed that the education and training of all police, military and other arresting and investigating personnel, especially those in charge of detention and convicted prisoners, shall include, in addition to the national standards, the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Standard Minimum Rules for the Treatment of Prisoners, the United Nations Code of Conduct for Law Enforcement Officials, and the United Nations Principles of Medical Ethics, all of which the Philippines endorsed.

62. In order to strengthen existing law, the Presidential Committee also proposed disarming and disbanding the Integrated Civilian Home Defence Force and other paramilitary units; banning secret arrests and searches, secret detention places (safehouses), and incommunicado detention; suspending from office those charged with violations of human rights, and disqualifying them from promotion while the charges against them are pending; allowing inspection of all detention and imprisonment centres; ratifying Protocol II additional to the Geneva Conventions of 12 August 1949 (see footnote 1/), as well as the United Nations Convention Against Torture of 1984; punishing speedily violence to life or health, physical or mental, of persons who are no longer combatants, in particular political assassination or extralegal executions, forced disappearances, torture, other cruel or degrading treatment, mutilation or any form of corporal punishment, use of truth serums and other drugs; and increasing the penalties provided for by article 235 of the Revised Penal Code on the maltreatment of prisoners.

63. In addition, the Presidential Committee adopted Resolution No. CDH-2 of 22 May 1986, by which it was proposed to repeal or amend the repressive laws, decrees and executive issuances of the past administration violating basic human rights. Moreover, on 30 April 1986, the Philippines deposited its

instrument of acceptance of the United Nations Convention against Torture. Finally on 2 March 1986, Proclamation No. 2 lifted the suspension of the right of habeas corpus in the country.

64. On 30 September 1986, Portugal transmitted to the Special Rapporteur the text of new national standards, stating that "the regulations of the National Republican Guard mention ... the priority utilization, in the event of public disturbances, of persuasion and dialogue with the citizens in preference to any other means of coercion"; and "the use of coercive means to restore law and order and maintain the principle of authority only in cases where they are essential or where the above-mentioned means of persuasion have been exhausted". Members of the internal security service must "use force only to the extent strictly necessary and in fulfilment of their duties" and "not apply, inflict or tolerate acts of torture or any other cruel, inhuman or degrading punishment or invoke orders from their superiors to justify them". Finally, "Decree-Law 324/85 of 6 August provided for the possibility of compensation, through a resolution of the Council of Ministers, for officials against whom terrorist acts have been committed ...".

65. On 5 December 1986, Sri Lanka provided the Special Rapporteur with the text of the Instructions from the Deputy Inspector-General of Police to his officers on arrests under the Emergency Regulations. In accordance with the Instructions, any person arrested under Regulation 18 shall be produced before a magistrate within a reasonable time, in any event not later than 30 days after his arrest. In addition, a person so detained shall be kept in a place authorized by the Inspector-General of Police for a period not exceeding 90 days from the date of his arrest under Regulation 18 and shall, at the end of that period, be released by the Officer-in-charge of the place of detention unless such person has been produced before a court of competent jurisdiction. Moreover, a Police Officer investigating an offence under any Emergency Regulation has the right to question a person detained or held in custody under any Emergency Regulation and to take such person from place to place for the purpose of such investigation during the period of such questioning (Regulation 52 (a)(1)).

66. According to the Detention Order issued by the Minister under section 9 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, where "the Minister has reasons to believe or suspect that any person is connected with or concerned in any unlawful activity", he may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister. Such order may be extended for a period not exceeding three months at a time, provided that the total period of such detention shall not exceed 18 months. "Unlawful activity" is defined in section 31 (1) as

"... any action taken or act committed by any means whatsoever, whether within or outside Sri Lanka, and whether such action was taken or act was committed before or after the date of coming into operation of all or any of the provisions of this Act in the commission, or in connection with the commission, of any offence under this Act or any act committed prior to the date of passing of this Act (i.e. 27 July 1979), which act would, if committed after such date, constitute an offence under this Act".

67. On 24 July 1986, the Parliament adopted, and the President approved the Regulations establishing the Commission for the Elimination of Discrimination and Monitoring of Fundamental Rights under the Sri Lanka Foundation Law No. 31 of 1973. With regard to the role of the Commission emphasis is placed on conciliation, mediation and discussion, rather than on adjudication. Thus, the Commission is vested with the functions of studying and investigating alleged discriminatory acts and reporting thereon; reviewing and researching legal developments which may be discriminatory and violate fundamental rights; and handling complaints and conciliation relating to discriminatory acts. No enforcement powers are vested in the Commission or the Director under the Regulations. Where no remedy is possible by conciliation or settlement, the Commission is required to forward a confidential report to the President setting out the matters at issue and recommending remedial action.

68. On 2 September 1986, Switzerland reported to the Special Rapporteur that "with regard to the training of persons who have to deal with individuals deprived of liberty, the competent Swiss authorities are guided ... by certain non-binding international instruments concerning the prohibition of torture which have been elaborated by the United Nations and the Council of Europe The instruments have an importance which should not be underestimated. The minimum rules of the United Nations have thus been accepted by a great number of States and constitute a very useful frame of reference for the activities of ICRC on behalf of political detainees ...". In particular, "mention should also be made in this context of Recommendation No. R (80) 9 of the Committee of Ministers of the Council of Europe to member States, dated 27 June 1980, concerning extradition to States not party to the Convention [see note 1/]. Swiss law is in harmony with this Recommendation since a provision of the Federal Act of 20 March 1981 on international mutual assistance in criminal matters is drafted in very similar terms".

69. On 18 September 1986, the Minister of Justice of Togo wrote to the Secretary-General transmitting information on a number of allegations and stating that "if necessary, Togo, a former Trust Territory of the United Nations, would always be prepared to receive any delegates which the Organization might wish to send to our country".

70. On 15 September 1986, Turkey transmitted to the Special Rapporteur a report dated 22 November 1985 adopted by the Parliamentary Committee for the Inspection of Prisons and Detention Houses. According to the report, "... the material conditions in the detention centres and prisons are not below the general material and financial norms available in our country". The Committee also reported on a number of charges of torture and ill-treatment before the Martial Law authorities (as of June 1985). A total of 941 cases were opened; of the people involved in those cases, 265 were acquitted, 105 convicted, 12 in detention awaiting trial and 13 on bail awaiting trial. The Committee also stated that "some allegations related to the period before incarceration, others to the period in prison. However, the establishment of facts and collection of legally valid evidence with regard to allegations ... is not an easy task ...". It suggested "an appropriate system for preventing the occurrence of such individual cases in the future. The most adequate way of dealing with these allegations is to ensure that the most complete information concerning the alleged cases be submitted without any delay to the competent jurisdiction of the State". In particular, the Committee suggested that

convicts and detainees should have access to visits and means of communication, including access to legal counsel and telephone communications, that a handbook covering the rights and obligations of inmates should be prepared by the Ministry of Justice and distributed to all inmates, and that a system of following-up inmates' applications should be established.

71. On 13 October 1986 the Union of Soviet Socialist Republics provided the Special Rapporteur with additional information on its national standards. In particular, "pursuant to article 20 of the Fundamental Principles of Criminal Legislation of the URSS and the Union Republics and article 1 of the Fundamental Principles of Corrective Labour Legislation of the URSS and the Union Republics, the purpose of a penal settlement is not to wreak vengeance upon the criminal or to cause him physical suffering or torment, but to reform and re-educate him in the spirit of an honest approach to work, strict observance of the laws, and respect for the rules of socialist society". Moreover, "article 36 of the Fundamental Principles of Health Legislation admits the enforced treatment of persons suffering from tuberculosis, mental illnesses, venereal diseases or chronic alcoholism", and article 62 of the Criminal Code of the Russian Soviet Federal Socialist Republic provides, with regard to alcoholics and drug addicts, that "only if they have committed a crime and if there is a supporting medical opinion, may a court order their compulsory treatment ...".

VI. ANALYSIS OF THE INFORMATION RECEIVED BY THE
SPECIAL RAPPORTEUR ON THE PRACTICE OF TORTURE

72. Torture is still a widespread phenomenon in today's world. From the information he has received the Special Rapporteur has been confirmed in his conviction that no society, whatever its political system or ideological colour, is totally immune to torture. Of particular concern to the international community, however, are situations where torture has become a more or less normal element of daily life. In such situations the authorities have either lost control over the security or law-enforcement personnel and condoned the practice of torture, seemingly for the sake of more important goals, such as "national unity" or "national security", or cast a benevolent eye on such practices, as they help to create an atmosphere of fear or terror where opposition may be fairly easily stamped out.

73. The first is usually the case in situations of civil strife, where there is a confrontation of hostile groups. Violence, fed by mutual hatred, becomes the predominant feature of everyday life. Especially where civil strife has taken the form of guerrilla tactics, military and security personnel feel threatened and may gradually fall into the practice of physical abuse and torture to extract information about their opponents. Every person living within the guerrilla area may be seen as a potential enemy who withholds information and may, therefore, be forced to disclose it by all available means. Although in many cases the victims of such abuse are completely innocent, the inevitable effect of such practices is that mutual hatred increases and life becomes ever more violent. Torture breeds hatred and the increased hatred leads to more atrocities which in themselves seem to justify the practice of more severe torture. The Government may genuinely condemn the practice of torture, but feels that, in view of the need to maintain and uphold national integrity and security, it cannot do anything against it. It, therefore, usually closes its eyes to reality and either flatly denies that torture takes place or contends that it is a reaction to the commission of terrorists acts. Governments should realize, however, that the vicious circle in which they seemingly find themselves may well have started with the abuses and the arrogant practices of the representatives of the official authorities. The prohibition and suppression of such practices are not only an obligation under international law but may also be a matter of sound policy.

74. The Special Rapporteur has received many allegations about the practice of torture in countries where the whole or parts of the country are the scene of civil strife or civil war. In some of these countries the climate of violence has indeed led to a disheartening loss of respect for the physical and mental integrity of the human person and for his dignity. In this respect the Special Rapporteur wishes to mention the situation in Afghanistan. The situation in Sri Lanka, which finds itself caught in a spiral of violence and where civilians are allegedly tortured in order to extract information from them about planned acts of violence by the insurgents is also of great concern. Serious allegations continue to come in about torture practices in El Salvador. In spite of the fact that the Government has once again committed itself to respect and guarantee fundamental human rights, certain parts of the State apparatus have obviously been successful in evading those commitments.

75. In other countries torture is practised to deter civil strike and to stifle opposition. It is used as a means not only to extract information but also to enforce behaviour in conformity with the prevalent rules. In this respect mention may be made of the situation in Chile and in South Africa. The Special Rapporteur has also received alarming reports about the practice of torture in the Islamic Republic of Iran where behaviour or even opinions that deviate from the norm are not tolerated.

76. It is significant that in many of the situations referred to above, either a state of emergency is declared for the whole or parts of the country, under which enjoyment of certain basic human rights has been curtailed or suspended, or special security legislation is in force, under which persons may be arrested without warrant and kept incommunicado for a considerable period. It is well known that such situations easily lend themselves to the practice of torture, as torturers may find it quite simple to avoid criminal responsibility for their acts. It is particularly disquieting that torture becomes so endemic in such a society that even a return to normality does not bring an end to the practice. In various cases the Special Rapporteur has continued to receive allegations from countries where either the previous régime has been replaced or a transfer to a civilian (elected) government has taken place. A firm and unrelenting attitude by the new incumbent is, therefore, required, as well as strict rules and retraining programmes for law enforcement personnel.

77. With regard to some countries the Special Rapporteur has received allegations of torture with regard to certain ethnic or religious groups in particular. In these cases torture usually took the form of gross physical abuses, such as beatings, rape, etc., often combined with robbery, testifying to a serious lack of respect for the dignity of these citizens. In such cases it should come as no surprise if eventually such a situation leads to insurgency of the group concerned, which in its turn will lead to the civil strife described above. Here again, the Government must adopt a firm position.

78. The Special Rapporteur has also received information concerning maltreatment in places of detention (irrespective of whether these were penal institutions) which amounted to torture as the effect was severe mental or physical pain. Such maltreatment can take the form of acts but also of omissions. In these cases the Special Rapporteur intends to start consultations with the Governments concerned and in one particular case has already done so. In such cases, the detained person, because he feels that his detention is the result of his divergent political views and that he is therefore unjustly detained frequently considers himself justified in resisting detention. This in turn leads to abusive treatment by security personnel which, however, is unacceptable if the detainee's physical or mental integrity is injured.

79. There are also cases where a specific type of punishment irreparably damages the integrity of the human person. Here also the Special Rapporteur feels that it is most appropriate to enter into consultation with the Governments involved and, in fact, he has tried to do so.

VII. CONCLUSIONS AND RECOMMENDATIONS

80. Torture is an extremely complex phenomenon. It takes many forms and occurs in widely divergent situations. Its occurrence is often determined by specific political conditions; and at the same time in spite of the varying circumstances it occurs in a strikingly monotonous pattern.

81. Therefore, torture may be the derivative of certain political conditions, its source is invariably the same: contempt for the personality of the other individual which has to be destroyed and annihilated. It is for that reason that torture is one of the most heinous violations of human rights as it is the very denial of the essence of human rights, namely the recognition that each living being has a personality of his own which has to be respected.

82. Therefore, a society that tolerates torture can never claim to respect other human rights; the duty to eradicate torture is thus a primordial obligation. Efforts to realize that goal should first and foremost be concentrated on the prevention of torture. It goes without saying that repressive measures are called for whenever torture has been practised. Those who have committed this offence should be brought to justice; but it is more important to go to the roots of the evil itself and to take away the causes which make torture possible. The Special Rapporteur can, therefore, only repeat the recommendations he made in his first report. In particular he wishes to stress the importance of limiting the period of incommunicado detention under national law, since many of the allegations he has received refer to torture in countries where a detainee may be kept incommunicado for a prolonged period. He also wishes to emphasize the importance of training programmes for law enforcement and security personnel, especially in countries where torture was regularly practised under a previous régime. The United Nations programme of advisory services should be particularly geared to respond favourably to requests made by Governments in this field. In view of the multitude of norms for the conduct of medical personnel, enumerated in chapter III, and the crucial role medical personnel allegedly often play in the practice of torture, the Special Rapporteur recommends that Governments and medical associations take strict measures against all persons belonging to the medical profession who have in that capacity had a function in the practice of torture. He also recommends that the role that the medical profession may play in the practice of torture should be highlighted in all courses on medical ethics.

83. A measure which may have an important preventive effect is the introduction of a system of periodic visits by a committee of experts to places of detention or imprisonment. On 6 March 1980, the Government of Costa Rica submitted to the Commission on Human Rights a draft optional protocol to the draft convention against torture and other cruel, inhuman or degrading treatment or punishment which provided for such a system of periodic visits. In resolution 1986/56 the Commission noting that the draft European convention against torture was based on similar ideas, recommended that other interested regions where a consensus existed should consider the possibility of preparing draft conventions based on the concept of a system of visits. In this context, it may be mentioned that the Inter-American Convention to Prevent and Punish Torture (concluded on 9 December 1985) does not establish such a system of periodic visits nor any other comparable machinery.

84. The introduction of systems of periodic visits should be seen as a preventive rather than a repressive measure. Although the determination of actual acts of torture as a result of such visits could lead to repressive action against the offenders, the main emphasis should be on the advice which experts may give after such a visit with regard to steps to be taken to correct and improve the existing régime in places of detention and imprisonment in the country visited. The element of periodicity is designed to ensure that a system of visits is seen as a means of co-operating with Governments rather than as an instrument for denouncing them. The fact that the idea of periodic visits would eventually form part of regional systems for protection of human rights (of which there are currently three, established in the context of the Organization of African Unity, the Organization of American States and the Council of Europe) would not necessarily stand in the way of the conclusion of a world-wide convention to which States which were subject to such a system of visits under a regional instrument could become party. However, the implementation of the world-wide system could be suspended for States subject to a regional system.

85. Such a system of visits is no more an intrusion in the internal jurisdiction of a State than the visits of staff members of the International Atomic Energy Agency to nuclear plants which may also lead to recommendations for the improvement of existing standards. In both cases such visits would serve a purpose which is recognized by the international community as being of vital importance for the well-being of mankind as they would ensure respect for human dignity and the maintenance of international peace and security, respectively.

86. Until such systems of periodic visits have been established, the granting of admission to ICRC teams to places of detention and imprisonment must be recommended, as such visits by ICRC may contribute to the prevention of torture and - in fact - in some cases have ostensibly done so.

87. In this context, the Special Rapporteur may recall his readiness to visit countries with the consent or at the invitation of the Government, not only on account of allegations of torture he has received, but also on any other occasion for which such a visit may be deemed useful by the Government concerned, for instance, when a power has been transferred to a new Government which wishes to take effective measures to eradicate torture practices which occurred under the previous régime.

88. Another measure which may contribute to the eradication of torture is the establishment of an independent authority which can receive complaints by individuals about administrative abuses, including torture. In some countries such a post already exists, be it under the name of ombudsman or some other title. On several occasions the Special Rapporteur, after having brought allegations of torture to the attention of Governments, has received the reply that they must be false, since under national law victims of torture may lodge a complaint with the judiciary but the persons concerned have not done so. Such a reply seems to underestimate the effects of torture on the victim and the circumstances in which it has taken place. In many cases the victim is afraid to take action against his erstwhile torturer publicly and independently and, rather than go through a further ordeal, prefers to do nothing at all. That may be different if he can appeal to a person who is not part of the State apparatus but has legal authority to take action against

official functionaries and who may decide not to disclose the identity of his informers or only to do so collectively. There again, the long-term effect will be preventive, since people who are in a position to practise torture will know that there is a fair chance that they will be held accountable if they actually do so.

89. Finally, the Special Rapporteur wishes to stress again that torture cannot be justified under any circumstances, be it external war or internal strife. Far too often torture or similar abuses are condoned or even encouraged on grounds of national security. As the Special Rapporteur has pointed out in chapter VI, this plea is usually self-defeating as the practice of torture is often at the root of greater instability and increased violence. The information extracted by torture (the need to obtain information is the usual justification for the practice of torture) in many cases is completely unreliable. The Special Rapporteur has seen many reports in which the victims stated that in the end they had said whatever the interrogator wanted them to say. The long-term effects of torture, however, are far more serious than the "profits" expected from it, not only for the victims but also for society at large.

90. Torture should be viewed objectively and seen by everyone, Governments and individuals alike, for what it is: the criminal obliteration of the human personality, which can never be justified by any ideology or overriding interest, as it destroys the very basis of human society.

Notes

1/ International Committee of the Red Cross, Protocols additional to the Geneva Conventions of 12 August 1949 (Geneva, 1977).

2/ Economic and Social Council resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Procedures for the effective implementation of the rules were adopted by the Economic and Social Council in resolution 1984/47 of 25 May 1984.

3/ Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, general comment 7 (16) (art. 7), para. 3).

4/ Principles, Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental Ill-Health or Suffering from Mental Disorder, report prepared by Erica-Irene A. Daes (United Nations publication, Sales No. E.85.XIV.9), para. 225(a)-(c).

5/ Ibid., para. 243.

6/ Ibid., para. 248.

7/ Ibid., annex II.

8/ Case concerning the Barcelona Traction, Light and Power Company, Limited, Judgment of 5 February 1970: I.C.J. Reports 1970, p. 32, paras. 33-34.

9/ Yearbook of the International Law Commission, 1976, vol. II, Part II (United Nations publication, Sales No. E.77.V.5 (Part II), para. 78, commentary on art. 19, para. (33)).

10/ Ibid., para. (59).