Vanderbilt Journal of Transnational Law

Volume 11
Issue 4 *Fall 1978*

Article 3

1978

Torture and Other Forms of Cruel and Unusual Punishment in International Law

Steven Ackerman

TORTURE AND OTHER FORMS OF CRUEL AND UNUSUAL PUNISHMENT IN INTERNATIONAL LAW

*Steven Ackerman**

TABLE OF CONTENTS

I. INTRODUCTION

Torture has virtually become a worldwide phenomenon, inflicted upon individuals regardless of sex, age, or state of health.

* Referral Attorney, Senior Citizen's Crime Commission; Family Violence Center; Member of Illinois Bar. B.A., 1972, University of Illinois; J.D., 1977, De Paul College of Law.

According to Amnesty International, "torture has been used against suspects and detainees in some 65 countries, rapidly becoming a state institution, a regular administrative practice in more than 30 of them."[1] The reasons for torture fall into four categories: (1) to extract information, (2) to extract confessions or renunciations of previously expressed opinions, (3) to punish for suspected or supposed crimes, and (4) to intimidate specific groups within a population.[2] Torture as an institutionalized state act involves all levels of society. A recent analysis of the use of torture by nations stated the following:

> Policeman, soldiers, doctors, scientists, judges, civil servants, politicians are involved in torture, whether in direct beating, examining victims, inventing new devices and techniques, sentencing prisoners on extorted false confessions, officially denying the existence of torture, or using torture as a means of maintaining their power. And torture is not simply an indigenous activity: it is international; foreign experts are sent from one country to another; schools of torture explain and demonstrate methods; and modern torture equipment used in torture is imported from one country to another.[3]

---

1. Dolan & Van Den Assum, Torture and the 5th United Nations Congress on Crime Prevention, 14 REV. INT'L COMM'N JUR. 55, 55 (1975).

For a survey of nations practicing some form of torture, see AMNESTY INTERNATIONAL, ANNUAL REPORT, 1977, A.I. Pub. 79/00/77 (mentioning 116 countries) [hereinafter cited as 1977 ANNUAL REPORT]; AMNESTY INTERNATIONAL, REPORT ON TORTURE 114-239 (1st Am. ed. 1975) [hereinafter cited as 1975 REPORT]; AMNESTY INTERNATIONAL, *Evidence of Torture: Studies by the Amnesty International Danish Medical Group,* in 1977 ANNUAL REPORT, *supra.* The following countries were cited in *1975 Report:* in Africa—Angola, Burundi, Cameroun, Ethiopia, Ghana, Malawi, Morocco, Namibia, Rhodesia, South Africa, Tanzania, Togo, Tunisia, Uganda, Zambia; in Southeast Asia—India, Indonesia, North Vietnam, Pakistan, Philippines, South Korea, South Vietnam; in Europe—Albania, German Democratic Republic, Portugal, Spain, Turkey, U.S.S.R.; in South and Central America—Argentina, Bolivia, Brazil, Chile, Costa Rica, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela; in the Near East—Bahrain, Egypt, Iran, Iraq, Israel, Oman, Saudi Arabia, Syria, Yemen; and the United States.

For a discussion of limitations on quality and quantity of evidence on torture, see 1975 REPORT, *supra, id,* at 114-17. For example, the absence from the list of an inaccessible country such as Cambodia does not imply the absence of torture, only the absence of evidence. Countries where torture is most thoroughly documented, such as the United States, are often those whose governments are most willing to cooperate in investigating and eliminating torture.

2. Dolan & Van Den Assum, *supra* note 1, at 56.

3. 1975 REPORT, *supra* note 1, at 21.

Torture may take a variety of forms, including physical brutality, the more refined methods illustrated in Biderman's chart of coercion,[4] and pharmacological torture.[5] The moral and legal objections to unnecessary cruelty, as well as the inefficiency which would result within a criminal justice system which utilizes coerced and often inaccurate confessions, demand international prohibition of torture in all forms. These objections to torture in no way derogate from the legitimate state interest in vigorous interrogation in matters regarding domestic law enforcement.

Although historically legal interest in human rights has been the special province of scholars, recent worldwide economic realignment has educated the public to global interdependency, vindicating those who foresaw a nexus between human rights and the maintenance of world order. "[A]n interdependent global community cannot sustain itself . . . if the coin of common exchange is genocide and discrimination."[6] A pragmatic understanding of the relationship between the maintenance of world order and the protection of human rights suggests that tolerance and fulfillment of the world expectation of human rights may not be a goal that can be universally achieved. It is, however, an ideal to be sought after, requiring definition of human rights and creation of procedural safeguards for adjudicating and enforcing violations of those rights. The fulfillment of human rights must occur in a world of conflicting national interests and divergent philosophical and cultural biases.[7] The political issues of national sovereignty and conflicting systems are absorbed into the single juridical issue of human rights when the global "elites" attempt to stabilize their territories at "tolerable levels of oppression."[8] This "tolerable level of oppression" can be accorded a legal definition, thereby introduc-

4. *See id.* at 53. A.D. Biderman conducted extensive research into the methods of torture used by the Chinese during the Korean War. His research led him to develop a classification scheme for manipulative techniques known as DDD (Dependency, Debility and Dread). Briefly, during the process of debilitation, the prisoner is deprived of food, sleep, and human contact. Paradoxically, the prisoner becomes dependent on his torturer to provide these things. The dependency leads to dread of continued deprivation. It is Biderman's theory that once the prisoner has experienced DDD, compliance is a natural consequence.

5. *See id.* at 55.

6. Reisman, *Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination,* 1 DEN. J. INT'L L. & POL. 29, 43 (1971).

7. Nanda, *The Implementation of Human Rights by the United Nations and Regional Organizations,* 21 DEPAUL L. REV. 307, 309 (1971).

8. *See* Reisman, *supra* note 6, at 64.

ing procedural safeguards into political order, reducing the potential for inhumane treatment. Therefore, the scope of this article will be to provide an international human rights framework for the prospective prevention of torture and all other forms of cruel and unusual punishment which might apply to all nations.

II. THE PROHIBITION OF TORTURE AS AN INTERNATIONALLY PROTECTED HUMAN RIGHT

Justice Tanaka's dissenting opinion in the 1966 *South West Africa* case[9] is perhaps the best exposition of the concept of equality in legal literature because of its sound juridical analysis and its penetrating analysis of national law.[10] Since international judicial review of the acts of sovereign states is still in the formative stages, Justice Tanaka's methodology provides fertile precedent for analysis of developing trends in judicial thought in the field of human rights. Although in *South West Africa* the International Court of Justice did not address the merits of the case because of lack of justiciability, Justice Tanaka did address the issue of whether the South African system of administering South West Africa had violated international legal norms. Justice Tanaka's application of the sources of international law under article 38 of the charter of the International Court of Justice provides for a sound methodology for examining the legality of torture and other forms of cruel and unusual punishment.[11]

A. *International Conventions*

Under article 38(1)(a), international conventions, of which the Charter of the United Nations is preeminent, are primary sources

9. South West Africa Cases (Second Phase), [1966] I.C.J. 6, 250.

10. BASIC DOCUMENTS ON HUMAN RIGHTS 455 (I. Brownlie ed. 1971).

11. Article 38 of the Statute of the International Court of Justice provides:

(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

(2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

U.N. CHARTER, Annex, art. 38.

of international law. Article 55 of the United Nations Charter provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: . . . (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[12]

Under article 56, the obligation to observe human rights and fundamental freedoms is legally binding and self-executing.[13] Although the exact nature of the obligation is not well-defined, specific content is suggested by other sources of international law included under article 38:[14] "[T]he legislative imperfections in the definition of human rights and freedoms and the lack of mechanism for implementation [in the Charter] do not constitute a reason for denying their existence and the need for their legal protection."[15] The issue thus becomes whether the Charter, having established certain general principles and purposes, incorporates by reference specific protections of human rights which are now evolving from various sources of international law.[16] More specifically, the question is whether torture and other forms of cruel and inhuman punishment are thus embodied in the human rights provisions of articles 55 and 56.

Although article 5 of the Universal Declaration of Human Rights provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading punishment,"[17] scholars have differed in regard to the status of the Universal Declaration in international law. One author has termed the Universal Declaration "a part of

12. U.N. CHARTER art. 55.

13. Judge Spiropoulos noted: "As the obligation to respect human rights was placed upon Member States by the Charter, it followed that any violation of human rights was a violation of the Charter. 3 U.N. GAOR, C.6 (138th mtg.) 765, U.N. Doc. A/C.6/SR (1948).

Judge Jessup noted: "Since this book is written *de lege ferenda,* the attempt is made throughout to distinguish between the existing law and the further goals of the law. It is already the law, at least for Members of the United Nations, that respect for human dignity and fundamental rights is obligatory. The duty is imposed by the Charter." P. JESSUP, MODERN LAW OF NATIONS 91 (1948).

14. Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition,* 7 VAND. J. TRANSNAT'L L. 25, 53 (1973).

15. [1966] I.C.J. at 289-90 (J. Tanaka, dissenting).

16. Bassiouni, *supra* note 14, at 53.

17. G.A. Res. 217, U.N. Doc. A/810, at 73 (1948).

the constitutional law of the world community," which, together with the United Nations Charter, "has achieved the character of a world law superior to all other international instruments and to domestic law."[18] This viewpoint would suggest that the entire Declaration has become an international obligation by incorporation into articles 55 and 56 of the Charter, just as the Bill of Rights was incorporated into the United States Constitution.

The Universal Declaration, however, originated as a simple resolution of the United Nations General Assembly. The United Nations Charter, article 13, delineates the General Assembly's authority in human rights as follows:

> The General Assembly shall inititate studies and make recommendations for the purpose of:
> (*a*) promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;
> (*b*) promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[19]

In Justice Tanaka's 1966 *South West Africa* dissent, he reasoned that under the authority of article 13, a General Assembly resolution such as the Universal Declaration is not necessarily incorporated into the Charter, and thus not legally binding as a convention. He stated that "The 'Universal Declaration of Human Rights and Fundamental Freedoms' of 1948 which wanted to formulate each right and freedom and give them concrete content, is no more than a declaration adopted by the General Assembly and not a treaty binding on the member states."[20]

Another viewpoint was expressed by Vice President Ammoun of the International Court of Justice in his separate opinion in the *Namibia* case:[21]

> Although the affirmations of the Declaration are not binding *qua* international convention within the meaning of Article 38, paragraph 1(a), of the Statute of the Court, they can bind states on the basis of custom within the meaning of paragraph 1(b), of the same

18. Sohn, *The Universal Declaration of Human Rights*, 8 J. INT'L COMM'N. JUR. 17 (Special Issue No. 1 1968).

19. U.N. CHARTER art. 13, para. 1.

20. [1966] I.C.J. at 288.

21. Legal Consequences of the Continued Presence of South Africa in Namibia, [1971] I.C.J. 16, 67.

> Article, whether because they constituted a codification of customary law as was said in respect of Article 6 of the Vienna Convention on the Law of Treaties, or because they have acquired the force of custom through a general practice accepted as law, in the words of Article 38, paragraph 1(b) of the Statute. One right which must certainly be considered a pre-existing binding customary norm which the Universal Declaration of Human Rights codified is the right to equality, which by common consent has ever since the remotest times been deemed inherent in human nature.
>
> . . . .
>
> It is not by mere chance that in Article 1 of the Universal Declaration of the Rights of Man there stands, so worded, this primordial principle or axiom: "All human beings are born free and equal in dignity and rights."
>
> From this first principle flow most rights and freedoms. . . . The ground was thus prepared for the legislative and constitutional process which began with the first declarations or bills of rights in America and Europe, continued with the constitutions of the nineteenth century, and culminated in positive international law in the San Francisco, Bogota and Addis Ababa charters, and in the Universal Declaration of Human Rights which has been confirmed by numerous resolutions of the United Nations, in particular the above-mentioned declaration adopted by the General Assembly in resolutions 1514 (XV), 2625 and 2627 (XXV). The Court in its turn has now confirmed it.[22]

Some scholars have argued that this passage is sufficient authority to incorporate the provisions of the Declaration into the Charter and has given the Declaration binding effect:

> A quarter of a century ago the Declaration expressed the consensus of the member states and since then it has become part of those "General Principles of International Law recognized by civilized nations." Thus, the provisions of the Declaration can be construed as legally binding because they interpret the principles and purposes of the Charter and are applicable to member states as the embodiment of Article 55, execution of which is required by Article 56. Furthermore, as part of international law's "General Principles," the transgression of its norms could constitute a violation of international law to which state responsibility would attach.[23]

Additional support for this view may be found in the Proclamation of Teheran,[24] as well as from the endorsement of the decision as a

22. *Id.* at 76-78.

23. Bassiouni, *supra* note 14, at 55.

24. The Proclamation of Teheran, adopted unanimously, provides: "The Universal Declaration of Human Rights states a common understanding of the peo-

whole by the United Nations General Assembly[25] and the Security Council.[26]

Although the majority opinion does not accept the theory that the Declaration is a convention within the meaning of International Court of Justice statute article 38(1)(a), it does suggest that the Declaration may be customary international law within the meaning of article 38(1)(b). "One right which must certainly be considered a pre-existing binding customary norm which the Universal Declaration of Human Rights codified is the right to equality, which by common consent has even since the remotest times been deemed inherent in human nature."[27]

The incorporation into the Charter of the prohibition against racial discrimination contained in the Declaration does not imply that all provisions will be incorporated. This selective incorporation is analogous to the doctrine of selective incorporation in United States constitutional theory, thus requiring an independent determination of whether each particular right is incorporated into the Charter.[28] Therefore, whether article 5 of the Universal Declaration is selectively incorporated into the Charter can be determined only by a consideration of its status under article 38(1)(b) and (c).

The legal status of the International Covenant on Civil and Political Rights is also the subject of debate.[29] Article 7 of the Covenant provides that: "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." To prevent states from resorting to

---

ples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community . . . ." Final Act of the International Conference on Human Rights, U.N. Doc. A/Conf. 32/41 (1968). For a synopsis of the Conference, see U.N. Doc. O.P.I./336; Guggenheim, *Of the Right to Emigrate and Other Freedoms: The Feldman Case* 5 HUMAN RIGHTS 75, 80 (1975).

25. G.A. Res. 2871, 26 U.N. GAOR, Supp. (No. 29), U.N. Doc. A/8429 (1971) (adopted 111-2-10).

26. S.C. Res. 301, 26 U.N. SCOR (1598th mtg.) 8, 9, U.N. Doc. S/INF/27 (1971) (adopted 13-0-2).

27. Legal Consequences of the Continued Presence of South Africa in Namibia, [1971] I.C.J. at 76.

28. U.N. CHARTER, Annex, art. 14. For a discussion of the United States doctrine of selective incorporation, see Adamson v. California, 332 U.S. 46, 64 (1947) (Frankfurter, J., concurring).

29. G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N.Doc. A/6316 (1966).

special emergency acts, article 4(1) provides that: "no derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision."

The Covenant has been ratified by 27 countries;[30] the Covenant will enter into force when 35 nations have ratified it. Even though a state is not required to implement a covenant prior to validation, it must refrain from acts contrary to the covenant's objectives and purposes after it has ratified the agreement. Articles 4(1) and 7 of the Covenant are thus arguably binding as a convention upon nations which have ratified.

B. *International Custom*

In the *South West Africa* case, Justice Tanaka also addressed the issue of whether resolutions and declarations of international organs fall within the purview of article 38(1)(b) as evidence of a general practice. Justice Tanaka would have held that individual resolutions, such as the Universal Declaration of Human Rights, have no binding effect because "what is required for customary international law is the repetition of the same practice . . . ."[31] Since each resolution is the manifestation of the collective will of individual participant states, he said, the accumulation over time of authoritative pronouncements in the form of resolutions and declarations generates customary law through collectivism.[32] The *South West Africa* case included a long history of resolutions condemning racial discrimination that were adopted by the overwhelming majority of the General Assembly. The frequency and recurrence of those resolutions constituted an authoritative pronouncement even in the absence of unanimity.[33]

Various resolutions and declarations have been adopted by United Nations organs regarding torture and other forms of cruel and unusual punishment. Article 5 of the Universal Declaration of Human Rights provides that "[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[34] In 1949, the Trusteeship Council recommended that corporal punishment should be abolished immediately in the Came-

30. Guggenheim, *supra* note 24, at 78.

31. South West Africa Cases (Second Phase), [1966] I.C.J. at 288.

32. *Id.*

33. *Id.*

34. *See* G.A. Res. 217, *supra* note 17. The vote was 48-0 with eight states—Byelorussian S.S.R., Czechoslovakia, Poland, Saudi Arabia, South Africa, Ukranian S.S.R., U.S.S.R. and Yugoslavia—abstaining.

roons and Togoland and formally abolished in New Guinea.[35] On November 15, 1949, the General Assembly endorsed that recommendation and suggested that "the observance of human rights and fundamental freedoms for all" requires the "adoption of strong and effective measures to abolish immediately the corporal punishment of whipping in Ruanda-Urundi."[36] The General Assembly later expanded its recommendation to include the complete abolition of corporal punishment in all Trust Territories and requested the Administering Authorities to report on this matter to the General Assembly.[37] In 1952, the General Assembly resolved that while corporal punishment had been reduced in Trust Territories, complete abolition was necessary, and it urged "that corporal punishment (by whip, cane or any other means) should be completely abolished as a disciplinary punishment in all prisons . . . and that administering authorities should enforce immediately legislation with a view to replacing corporal punishment in all cases by methods of modern penology. . . ."[38] Recognizing that torture and other forms of cruel and unusual punishment occur at all stages of detention of an individual by the state, United Nations organs have gradually broadened their approach in examining and recommending procedural safeguards.

In 1955 the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the *Standard Minimum Rules for the Treatment of Prisoners,*[39] developed by an Advisory Committee of Experts established according to a plan prepared by the Secretary-General and approved by the General Assembly.[40] Article 31 provides that "corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offenses."[41] Other provisions establish safe-

35. 4 U.N. GAOR, Supp. (No. 4) 9, 36, 66, U.N. Doc. A/933 (1949).

36. G.A. Res. 323, U.N. Doc. A/1251 at 39 (1949) (vote 52-1-4).

37. G.A. Res. 440, 5 U.N. GAOR, Supp. (No. 20) 53, U.N. Doc. A/1775 (1950) (vote 55-0-2).

38. G.A. Res. 562, 6 U.N. GAOR, Supp. (No. 20) 59, U.N. Doc. A/2119 (1952) (vote 48-0-4).

39. First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF.6/L.17 at 3 (1955) [hereinafter cited as U.N. Congress]. Rule 95 of the Rules was extended by the ECOSOC in May 1977 to all pre-trial detainees, E.S.C. Res. 2076, 62 U.N. ESCOR, Supp. (No. 1) 35, U.N. Doc. E/5988 (1977). 1977 ANNUAL REPORT, *supra* note 1, at 20.

40. *See* G.A. Res. 415, 5 U.N. GAOR, Supp. (No. 20) 37 & annex, U.N. Doc. A/1755 (1950).

41. U.N. Congress, *supra* note 39, at 9.

guards in areas of administrative responsibility, staff training, minimum standards for sleeping and sanitation facilities, adequacy of food, medical treatment, and the right to a grievance procedure. These standards are to apply to all types of restrictive facilities, and prisoners are to be categorized and tested according to their status in the criminal justice system. Prisoners under sentence are to be treated in accordance with rehabilitative goals including vocational training, recreation, and an emphasis on family ties. Special facilities are to be provided for the insane and mentally ill, and for pre-trial detainees.[42]

On July 31, 1957, the Economic and Social Council, pursuant to statutory authority,[43] invited nations to give favorable consideration to the adoption of the Standard Minimum Rules, and to utilize the other recommendations as fully as possible in the administration of their penal and correctional institutions.[44] The Preliminary Observations to the Standard Minimum Rules nevertheless provided that:

> 1. The following rules are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.
> 2. In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavor to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.[45]

---

42. The Congress also endorsed the *Recommendations on the Selection and Training of Personnel for Penal and Correctional Institutions, id.* at 22, and *Recommendations for Open Penal and Correctional Institutions, id.* at 29. These dealt with various forms of minimum security institutions emphasizing increased inmate responsibility under modern theories of penal reform.

43. U.N. CHARTER art. 62, para. 2 provides that the Economic and Social Council "may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all." U.N. CHARTER art. 68 provides that: "The Economic and Social Council shall set up commissions in the economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions."

44. E.C.S. Res. 663C, 12 U.N. ESCOR, Supp. (No. 1) 11, U.N. Doc. E/3048 (1957).

45. U.N. Congress, *supra* note 39, at 3.

Since the Standard Minimum Rules "set out what is generally accepted as being good principle and practice" rather than adopting an absolute minimum obligation, the evidentiary value of the Economic and Social Council resolution is probably less than an unqualified endorsement by the participating states. It does reflect an attempt, however, to abolish torture and other forms of cruel and unusual punishment through a system of procedural safeguards.

A committee established by the Commission on Human Rights[46] has studied legal procedures to prevent abusive practices prior to trial and produced the *Draft Principles on Freedom from Arbitrary Arrest and Detention.*[47] Article 24 of the Draft Principles provides:

> No arrested or detained person shall be subjected to physical or mental compulsion, torture, violence, threats, or inducements of any kind, deceit, trickery, misleading suggestions, protracted questioning, hypnosis, administration of drugs or any other means which tend to impair or weaken his freedom of action or decision, his memory or his judgment.[48]

Article 24(3) further permits admissions into evidence only when they are "made voluntarily in the presence of [a defendant's] counsel and before a judge or other officer authorized by law to exercise judicial power."[49] Article 10 requires that an arrested person be brought before a judicial officer within 24 hours of arrest, and article 26 requires that the detainee be transferred to an authority independent of the police following compliance with the provisions of article 10. "By limiting the duration of the period within which the arrested person can be kept in police custody, this article [26] aims to minimize the risk that he might be subjected to improper treatment or pressures by the police."[50] To safeguard against improper interrogation, article 22 requires that counsel must be present at any questioning. Article 27 provides that the treatment accorded any person, whether arrested or convicted, should not be less favorable than that stipulated by the Standard

46. Established pursuant to E.S.C. Res. 624B, 11 U.N. ESCOR, Supp. (No. 1) 11 U.N. Doc. E/2929 (1956). The committee's report was published under the auspices of the United Nations Commission on Human Rights as the *Study of the Right of Everyone to Be Free from Arbitrary Arrest, Detention and Exile,* U.N. Doc. E/CN.4/826/Rev. 1 (1962) [hereinafter cited as *Human Rights Study*].

47. The Draft Principles were incorporated into the *Human Rights Study, supra* note 46, at 205.

48. *Id.* at 212.

49. *Id.*

50. *Id.*

Minimum Rules.[51] Other provisions assert the presumption of innonence, define and proscribe an "arbitary arrest," prohibit the application of unnecessary force in effecting the arrest, require notice of charges and the "opportunity" to provide bail, require officials to inform the arrested person of his rights, including the right not to incriminate himself and to contact family and counsel, and require that a judicial authority must review the case at least every four weeks to ensure that detention is not unduly prolonged. Article 34 also attempts to restrict emergency acts to "the duration of the emergency and to the extent strictly required by the exigencies of the situation."

In considering the evidentiary value of the Draft Principles, the relationship between the Draft Principles and the Universal Declaration of Human Rights should be noted. The introduction to the Draft Principles states:

> The Committee decided to prescribe the rules and practices under different legal systems in respect of the subject of the study to the end that nations may share experiences and may work individually or jointly toward the achievement of the common standards set forth in the Universal Declaration of Human Rights.[52]

The Draft Principles and the Standard Minimum Rules, are considered to be ideals, but the enforceability of these documents must be viewed in the context of the total framework of human rights efforts. Taken together, the documents confirm the concept of the prisoner as a human being by elaborating upon procedural safeguards already embodied in the Universal Declaration[53] or the International Covenant on Civil and Political Rights.[54] Similar procedural safeguards and proscriptions can be found in the American Declaration on the Rights and Duties of Man,[55] the Declaration of the Citizen's Rights in the Arab States and Countries,[56] the

51. U.N. Congress, *supra* note 39.

52. 13 Commission on Human Rights (Agenda Item 3) 3, U.N. Doc. E/CN.4/1044 (1957).

53. G.A. Res. 217, *supra* note 17, arts. 7, 11, at 73.

54. G.A. Res. 2200A, *supra* note 29, arts. 9, 10, 14, 15, at 54, 55.

55. American Declaration of the Rights and Duties of Man, art. 10, OAS Handbook of Existing Rules Pertaining to Human Rights, OEA/Ser.L/V/II.23, OAS Doc. No. 21 (Rev. 2) 15 (1975), *reprinted in* BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 187, 192 (L. Sohn & T. Buergenthal eds. 1973).

56. Declaration of the Citizen's Rights in the Arab States and Countries, *cited in* 1975 REPORT, *supra* note 1, at 38.

European Convention on Human Rights,[57] and the American Convention on Human Rights.[58] Special provisions for situations of war appear as well in the four Geneva Conventions of 1949 on the treatment of the wounded and sick of the military,[59] prisoners of war,[60] and civilians.[61] Common article 3 of the Geneva Conventions also prohibits the use of torture in the case of armed conflict not of an international nature. Thus it has been written that in cases of civil war, "no claim of domestic jurisdiction can be invoked by the parties to the conflict to deny the international illegality of the use of torture."[62]

Although the resolutions and declarations establish an obligation, the extent of that obligation depends upon the status of the resolutions under international law. Justice Tanaka suggested that the accumulation of authoritative pronouncements and declarations over time generates customary law through collectivism.[63] As decided in the *South West Africa* case, the long history of resolutions adopted by the overwhelming majority of nations may be sufficient evidence to constitute binding customary international law.

The regional and international declarations and resolutions, taken together, indicate that the historical evolution of the prohibition against torture and all other forms of cruel and inhuman punishment has moved from recognition and codification to prohibition. The General Assembly has recently affirmed this trend.[64] While such a viewpoint is consistent with the expectations of the juridical role in human rights advocacy, extending customary law

57. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221, 224.

58. American Convention on Human Rights, Nov. 22, 1960, O.A.S. T.S. (No. 36) 1, OAS Doc. No. OEA/SER.A/16 (English) (not yet in force).

59. Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, arts. 3 & 12, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, arts. 3 & 12, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31.

60. Convention Relative to the Treatment of Prisoners of War, August 12, 1949, arts. 3, 13, 17, 33, 88, 98, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

61. Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, arts. 3, 32, 68, 76, 118, 119, 6 U.S.T. 3516, T.I.A.S. No. 3364, 75 U.N.T.S. 287.

62. 1975 REPORT, *supra* note 1, at 38.

63. *See* South West Africa Cases (Second Phase), [1966] I.C.J. at 291-93.

64. *See* G.A. Res. 3059, 28 U.N. GAOR, Supp. (No. 30) 74, U.N. Doc. A/9030 (1973).

to include practices of political organs of the United Nations has a potential for political abuse.

C. *General Principles of Law*

In the *South West Africa* case, Justice Tanaka's dissenting opinion also addressed the issue of whether a violation of a general principle of law recognized by civilized nations within the meaning of article 38(1)(c) of the Statute of the International Court of Justice constitues a violation of an international legal norm. Justice Tanaka defined a general principle of law as "the recognition of the juridical validity of a similar legal fact without any distinction as between the municipal and the international legal sphere," and as "common elements among diverse national laws."[65] The recognition of a general principle of law by civilized nations does not necessarily require recognition by "all" civilized nations.

> [T]he statute does not exclude the possibility of a few dissidents for the purpose of the creation of a customary international law and that the contrary view of a particular state or states would result in the permission of obstruction by veto, which could not have been expected by the legislator who drafted the said article.[66]

Although it is beyond the scope of this article to analyze the narrowly defined domestic standards of torture and other forms of cruel or unusual punishment for all nations, a survey of world constitutions is sufficient to justify the conclusion that "it is perhaps even more important within the sphere of international law in terms of general legal principles expressed by civilized nations to note that in no country is torture, *eo nomine* officially sanctioned, and it is expressly prohibited in the legal systems of the vast majority of countries."[67]

Of 136 countires surveyed, 70 expressly prohibited torture, other forms of cruel or unusual punishment, or physical or moral harm to prisoners, either through their constitutions or by their ratification of the European or American Conventions.[68] Fifteen of the remaining 66 countries declared the "inviolability of the human person" as a fundamental right. Another thirteen countries, all newly emerging countries, delcared in the preambles of their re-

65. [1966] I.C.J. at 296.
66. *Id.* at 291.
67. Van Niekerk, *Torture—Our Last Hurdle Towards Civilization*, 91 S. AFR. L.J. 515, 517 (1974).
68. *See* Appendices I & II *infra.*

spective constitutions adherence to the Universal Declaration of Human Rights. An additional fourteen countires include such vague terms as "physical and moral integrity," "personal freedom," and "human dignity," which in some contexts might reasonably be construed to refer to torture. The remaining 24 countries either have no specific constitutional provisions, or have no constitution at all. Thus, 112 countries out of 136, approximately 80 percent, have provisions that could reasonably be interpreted as prohibiting torture. The totality of the evidence reasonably suggests that torture and other forms of cruel and unusual punishment are violations of a general principle of international law,[69] and therefore violate articles 55 and 56.

III. HUMAN RIGHTS AS A SWORD: THE ORIGIN AND DEVELOPMENT OF THE PROTECTION OF HUMAN RIGHTS THROUGH INTERNATIONAL CRIMINAL LAW

International criminal law has been characterized as "the product of the convergence of the international aspects of municipal criminal law and the criminal aspects of international law."[70] The former includes such issues as extradition, recognition of foregin penal judgments, transfer of criminal proceedings, execution of sentences abroad, taking of evidence depositions in countries other than that of the legal proceedings, letters and commission rogatories and law enforcement cooperation among nations. The criminal aspects of international law, by contrast, include the control of war, the regulation of armed conflict, the prosecution of violations of the laws of war in both its initiation and conduct, and common crimes of international interest.[71] The lack of developmental cohesion and the conflicting approaches to international criminal law have resulted from the imperfect merger of international law and criminal law. On the one hand,

> International law is a legal system built on the assumption of consensus and voluntary compliance by its principal subject (states) whose relationship is one of co-equals and where no superior authority enforces the mandates of the sysfem. On the other hand, criminal law in all municipal systems is predicated on the vertical authoritative decision-making processes which rely on coercive means to

69. *See* [1966] I.C.J. at 293.

70. Bassiouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law,* 45 REVUE INTERNATIONAL DE DROIT PENAL [R.I.D.P.] 405, 407 (1974).

71. *Id.* at 409.

> enforce the mandates of the system. . . . Publicists will, therefore, tend to frame international criminal law in terms of treaty obligations and customary practices among nation states, emphasizing the consensual but binding nature of the international obligation undertaken by states to implement the proscriptions of international criminal law through their municipal legal systems. Penalists, however, will tend to devise an international model of enforcement parallel to the municipal criminal model and will seek the codification of international criminal prescriptions and their implementation through an international system of criminal justice.[72]

The divergence in models is reflected in the differing value judgments regarding the goals and purposes of international criminal law, as well as differences with respect to its sources, its scope and subject matter, its form, the participants, the structures to be employed, the necessary resources, enforcement techniques to be employed, sanctions, and procedural approaches.[73] This divergence, coupled with what one author has termed susceptibility to current fashions in political ideology,[74] has resulted in considerable scholarly disagreement about what international criminal law may become. International criminal law has arguably become a misnomer, since the concept consists only of its six parts.[75] Another has defined international criminal law in broad as well as specific terms.

> A crime against international law in the most general sense is an act which violates a fundamental interest protected by international law committed with conscience or presumptive knowledge that such an act or omission is criminal. It is believed that the fundamental interests protected by international law include interests of mankind, of nations and of individuals. They, therefore, extend to the peace and security of the community of nations and to the authority of its general organizations as defined in the United Nations Charter; to the territorial integrity, political independence, and self-determination within the domestic jurisdiction of sovereign states and the protection of their diplomatic agents as defined by the Charter and by general international law and the laws of war; and to the human rights and fundamental freedoms of individuals as defined in the United Nations Charter and the humanitarian provisions of the law of war.[76]

---

72. *Id.* at 426.

73. *Id.* at 426-27.

74. Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROB. 2763, 263 (1950).

75. *Id.* at 264.

76. Wright, *The Scope of International Criminal Law: A Conceptual*

Either approach, whether emphasizing customary international law or conventional international legal obligations, imposes liability directly upon the individual for such sanctions as are prescribed by either international or municipal law.[77] Such crimes as piracy and banditry are generally accepted as customary international crimes because they are beyond the jurisdiction of any individual state.[78] The Nuremberg Trials, however, which prosecuted defendants for crimes against peace, war crimes, and crimes against humanity that were codified by the London Charter of 1945, have been criticized as an arbitrary exercise of power by the victorious.[79] If these criticisms are valid, the Nuremberg Trials could not be justified even by the unanimous confirmation of the General Assembly.[80] Notwithstanding the question of the validity of the prosecutions, the criticism has led to a search for greater specificity through codification.[81] Certain developmental patterns have emerged as a result of the effort to codify international criminal law:

1. The conduct in question is deemed criminal in the municipal order.
2. An expression of its international prohibition emerges in scholarly writings and international gatherings.
3. A draft treaty or treaty is elaborated usually at first only to declare the conduct as offensive or violative of international law.
4. One or more additional conventions usually follow, each one more specific, the final step being the declaration that the conduct in question is an international crime for which there is universal

---

Framework, 15 VA. J. INT'L L. 561, 567 (1975).

77. Tournaritis. *The Individual as a Subject of International Law*, Public Information Office, Cyprus, at 40 (1972).

78. *See* Wright, *supra* note 76, at 569.

79. Tournaritis, *supra* note 77, at 48.

80. *See* Ryu & Silving, *International Criminal Law—A Search for Meaning*, in M. BASSIOUNI & V. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 22, 27 (1973).

81. "In 1947 the General Assembly of the United Nations adopted the International Law Commission's draft of a Formulation of the Nuremberg Principles; in 1948 the Genocide Convention was drafted; in 1949 the International Commission of the Red Cross opened for signature four Geneva Conventions; in 1953 the United Nations Committee on the Creation of an International Criminal Jurisdiction reported on a Draft Statute for an International Criminal Court (tabled); in 1954 the General Assembly was presented with the Draft Code of Offenses against the Peace and Security of Mankind; in 1968 the General Assembly passed a resolution entitled Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity." Bassiouni, *supra* note 70, at 418-19.

> jurisdiction to prosecute, that signatory states bind themselves to the duty to enact municipal criminal laws to the same effect and to prosecute such offenders or, in the alternative to extradite them.[82]

The development of controls upon war is reflected in a number of multilateral treaty obligations: the Hague Conventions of 1899 and 1907 on the Pacific Settlement of International Disputes;[83] the Treaty of Versailles of 1919, which condemned aggressive war;[84] the Covenant of the League of Nations, which prohibited war of aggression in 1920;[85] the Kellogg-Briand Peace Pact of 1928 on the renunciation of war as an instrument of national policy;[86] the 1945 London Declaration, which criminalized war;[87] and the United Nations Charter of 1946, which prohibited war except in self-defense.[88] Such a developmental progression has been made possible only through the world commitment to the shared value of ending war.

> Such a commitment, however, is only attainable after the type of activity sought to be regulated by world community proscriptions has reached a certain level which so offends the common morality of mankind, or offsets its identified common interest, that a common need and desire to regulate or prohibit such activity becomes a natural world community aspiration. Admittedly there will seldom be a uniform level or homogeneous sense of values amongst all peoples in the world which would give rise to this condition, and consequently a minimum common denominator must be found to attain that desired goal.[89]

The codification of values resolved by the thirtieth session of the General Assembly may indicate that the international community

---

82. *Id.* at 422.

83. Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, *reprinted in* 2 MAJOR PEACE TREATIES OF MODERN HISTORY., 1648-1967, at 1197-221 (F. Israel ed. 1967) [hereinafter cited as MAJOR PEACE TREATIES]; Convention for the Pacific Settlement of International Disputes, July 29, 1899, *reprinted in* 2 MAJOR PEACE TREATIES, *supra,* at 1115-34.

84. Treaty of Versailles, June 28, 1919, *reprinted in* 2 MAJOR PEACE TREATIES, *supra* note 83, at 1265.

85. *See* LEAGUE OF NATIONS COVENANT art. 16.

86. Treaty of Paris (Kellogg-Briand), Aug. 27, 1928, *reprinted in* 4 MAJOR PEACE TREATIES, *supra* note 83, at 2393.

87. Agreement for the establishment of an International Military Tribunal, Aug. 8, 1945, *reprinted in* 9 M. HUDSON, INTERNATIONAL LEGISLATION 632 (1945).

88. U.N. CHARTER art. 2, para. 3. The seven documents listed in text accompanying notes 86-87 are discussed in Bassiouni, *supra* note 70, at 410.

89. Bassiouni, *International Aspects of Drug Abuse: Problems and a Proposal,* 9 J. MAR. J. PRAC. & PROC. 3 (1975).

has attained a sufficient understanding of the relationship between and need for human rights and world public order to prescribe a minimum common denominator for the criminality of torture. A resolution entitled *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[90] was passed, defining and codifying substantive principles in the evolution of the prohibition against torture that were previously scattered throughout various international declarations, resolutions, and conventions. The resolution defines torture to include both severe physical and mental pain:

> 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 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.[91]

Article 2 of the resolution would incorporate the definition of torture into a specific violation of the Charter obligation imposed upon members as well as non-members.[92] Article 3 would provide that a state of emergency shall not be a justification for exception to the general prohibition against torture. The remaining articles would impose affirmative obligations to criminalize and prosecute torture at the municipal level, to protect against violations from government as well as non-governmental concerns, to train all law enforcement and prisoner custodial personnel to act in accordance with the provisions of the declaration, to systematically review interrogation and custodial practices to prevent violations, to impose an exclusionary rule in criminal proceedings upon statements obtained contrary to the declaration, and to provide means of com-

90. G.A. Res. 3452, 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/10034 (1975). For a study and proposal of an international convention prohibiting torture, see Bassiouni, *An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture*, R.I.D.P. (Nos. 3 & 4 1977).

91. *Id.* at 1.

92. Article 2(6) of the United Nations Charter provides that: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." U.N. CHARTER art. 2, para. 6.

pensation to victims of torture. The effect of the resolution is to codify the minimum standards acceptable as a moral ideal. A series of conventions will be necessary to correct defects in the resolution and to make the substance of the resolution binding upon nations.

IV. Recommendations to be Considered in Developing A Draft Convention for Criminalizing Torture and Other Forms of Cruel and Unusual Punishment

Because the limits and enforceability of international legal obligations regarding torture as derived from general principles of international law are not clear, a comprehensive analysis of world legal standards governing both pre-trial and post-trial proceedings is required. *The Study of the Right of Everyone to be Free From Arbitrary Arrest, Detention and Exile*[93] is inadequate, for although it analyzes the stages of administrative and judicial proceedings, no attempt is made to systematically compare and contrast varying national standards. Comment in the *Study* is limited to practices in a few countries rather than a comprehensive study. Both the Draft Principles and the Standard Minimum Rules evidence minimum goals, but both were nonbinding and were arbitrarily created without documentation of present legal obligations under general principles of law. The study should encompass a thorough analysis of a nation's constitution, its statutes, its judicial opinions, and its administrative regulations and practices. Once the present minimum legal obligations for pre-trial and post-trial detention have been ascertained, debate and consideration could be given to revision of a comprehensive code similar to both sets of draft principles. Five problem areas have been cited by the Fourth United Nations Congress regarding the Standard Minimum Rules: first, the nature and scope of the Rules and their possible recasting to correspond with human rights and sound correctional practice; second, possible extension of their application to all persons and to new correctional practice; third, elevation of the Rules to the level of a declaration or convention; fourth, implementation of the Rules nationally and internationally; and last, problems concerning technical revision.[94]

A separate and distinct draft criminal statute for use by nations should be adopted which would impose distinct criminal penalties

93. *See Human Rights Study, supra* note 46.
94. Dolan & Van Den Assum, *supra* note 1, at 58.

upon battery, manslaughter, or murder which results from torture. The penal provision should treat each category of criminal torture at least as severely as the municipal law treats the related traditional crimes. Although some countries can demonstrate that torture is already illegal under existing domestic law, consideration should be given to the deterrent effect of a specific statute prohibiting torture. Moreover, a jurisdiction should have no valid objection to a separate statute which incorporates specific international standards only recently articulated.

Since the elimination of torture and other forms of cruel and unusual punishment will be a time-consuming process, the role of the educational process should also be considered. Countries should at least obligate themselves to teach respect for internationally accepted standards and for local and regional interpretations of that standard. Whether nations which practice torture can be forced to participate in such an educational process is an issue which remains unresolved, however. In addition, professional organizations should also be included in the codification of professional obligations regarding torture, since members of virtually all professions are sometimes implicated in acts of torture. The General Assembly has recently been considering utilizing the World Health Organization to formulate medical standards.[95] Existing organizations, such as the Medical Commission of Amnesty International, have also considered the issue.[96] The General Assembly

95. G.A. Res. 3453, 30 U.N. GAOR, Supp. (No. 34) 92, U.N. Doc. A/10034 (1975). For a draft code for law enforcement officers proposed by the General Assembly's Committee on Crime Prevention and Control Through the Commission for Social Development and ECOSOC, see 1977 ANNUAL REPORT, *supra* note 1, at 20.

96. "A. The Medical Commission adopts as its guiding principle the following rule taken from the International Code of Medical Ethics: 'Under no circumstances is a doctor permitted to do anything that could weaken the physical or mental resistance of a human being, except for strictly therapeutic or prophylactic indications imposed in the interest of the patient.'

"B. Medical and associated personnel shall refuse to allow their professional or research skills to be exploited in any way for the purpose of torture, interrogation or punishment nor shall they participate in the training of others for such purposes. This injunction shall be understood to apply to the protection of political dissenters in whatever institution they are confined. Members of the conference are aware of the participation of medical personnel in examinations of alleged criminals who themselves may request such consultation in preparing their own defense and concede that such practice has legitimate ends.

"C. Physicians should dilligently avoid abuse of their special power to commit persons to mental hospitals.

"D. Medical and associated professionals should remain scrupulously vigilant

has taken steps toward codification of professional standards regarding torture by calling for the development of an International Code of Police Ethics.[97]

Ultimately, the implementation of international legal norms will be accomplished only through the establishment of world habeas corpus.[98] The surrender of such domestic sovereignty is doubtful, however, in a politicized world that confines its human rights adjudication to selective targets such as Israel[99] or Chile.[100] In an effort to minimize this political element, greater input might be given to non-governmental organizations, such as Amnesty International or the International Commission of Jurists, rather than political organs of the United Nations. Their activities could encompass the following: gathering and disseminating information about torture, sending investigators to the countries concerned, sending observers

---

of the possibility that their research be used for purposes contrary to the original intent of the investigation and should avoid involvement in any work which seems likely to be so abused. Research done on behalf of or with material assistance from military or security organizations should be particularly suspect.

"E. Medical personnel working in prisons or other security camps should insist that they be employed by and responsible to an authority independent from that of the confining institution.

"F. Medical personnel who have knowledge of instances of torture or plans for such are under the obligation to report such to responsible bodies, national, international, or both, as appropriate.

"G. Medical experimentation in whatever institution, but particularly where the person is held against his will, should be carried out only with the strictest observance of the Declaration of Helsinki which defines the rules of conduct for human experimentation.

"H. Prisoners and others held against their will shall have the right of free access to physicians of their own choosing.

"I. Members of the medical profession shall give all possible support to colleagues who are penalized for abiding by this code of ethics.

"J. National and local medical organizations are also under an obligation to pursue the campaign to eradicate torture. They should incorporate the rules proposed here and encourage their members to abide by them." Van Niekerk, *supra* note 67, at 524 n.29.

97. G.A. Res. 3453, *supra* note 93. *See also* 1977 ANNUAL REPORT, *supra* note 1, at 20 (regarding the W.H.O. medical code of ethics on torture).

98. *See generally* L. KUTNER, WORLD HABEAS CORPUS (1962); Kutner & Carl, *An International Writ of Habeas Corpus: Protection of Personal Liberty in a World of Diverse Systems of Public Order,* 22 U. PITT. L. REV. 469 (1961).

99. See Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, 25 U.N. GAOR, U.N. Doc. A/8089 (1970).

100. *See* G.A. Res. 3448, 30 U.N. GAOR, Supp. (No. 34) 89, U.N. Doc. A/10034 (1975). *See also Amnesty International Human Rights in Uganda,* A.I. Report AFR 59/05/78 (1978).

to trials where the issue of torture is likely to be raised, lobbying with those who can influence governments or institutions, and developing long-range plans to strengthen human rights protection and to support existing mechanisms, such as the European Human Rights Commission.[101]

Any efforts made by the international community toward implementation of minimum standards or controls upon torture will require extensive fact-finding. Such international obligations must be based upon impartial investigation into the use of torture that should inevitably encourage states to adopt stricter forms of control. The political organs of the United Nations have failed to pursue such investigations. It is suggested that the United Nations formulate proposals that give impartial non-governmental organizations a substantial role in conducting such investigation. Just as international political organs encourage member states to bolster their domestic credibility by surrendering sovereignty to international tribunals, the credibility of United Nations political organs arguably rests in their own willingness to surrender sovereignty to non-political institutions. The United Nations should provide financial support for an International School of Human Rights to conduct legal and factual investigations into the use of torture throughout the world. Without such impartial investigations, the United Nations program for human rights will remain an abstract entity of politicians and diplomats.

V. Regional Interpretation of Internationally Protected Human Rights

It has been observed that "to make a Moslem fall to his knees and kiss the cross can be a humiliation and torture for him, while the same act for a Christian would not be."[102] Clearly, torture and cruel and unusual punishment are sometimes culturally influenced. In accommodating conflicting ideologies and legal systems, human rights documents are drafted to dilute the obligation into vagueness: "The basic values presently demanded in the . . . In-

101. 1975 Report, *supra* note 1, at 77. For the role of non-governmental organizations, see Da Fonseca, How to File Complaints of Human Rights Violations, A Practical Guide to Inter-Governmental Procedures (Commission of the Churches on International Affairs 1975); Woito, International Human Rights Kit (A World Without War Publication 1977); New Aspects of the International Protection of Human Rights,Twenty-fifth Report of the Commission to Study the Organization of Peace (1977).

102. 1975 Report, *supra* note 1, at 32.

ternational covenants . . . are formulated at high levels of abstraction . . . ."[103] Although articles 31 through 33 of the 1969 Vienna Convention on the Law of Treaties[104] established international standards of treaty interpretation, one scholar has suggested that "its identified rules of construction probably will have no more effect on the human rights clauses than so-called rules of statutory interpretation have had on the United States Bill of Rights."[105]

Since the standard of prohibited conduct will vary from one culture to another, the basic goal of a treaty controlling torture must be the achievement of the shared expectations of the parties in language which allows for individual state differences. Thus, signatory states to such an agreement must develop a methodology to give effect to that intention by interpreting the agreement in accord with the following criteria:

1. the context of the treaty;
2. its object and purposes;
3. its preparatory work;
4. the circumstances of its conclusion;
5. the special meaning to be given to a term if the parties intended such a term to have a special meaning;
6. any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;
7. any subsequent practice which established the common understanding of the meaning of the terms as between the parties generally; and
8. any relevant rules of international law applicable in the relations between the parties.[106]

By applying this standard and interpreting an agreement in the light of general principles of international law, domestic obligations and minimum acceptable standards may be ascertained with greater specificity. It is conceivable that the expectation of one country on a given issue might impose a higher obligation than

103. Chen, Lasswell & McDougal, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 AM. J. INT'L L. 237, 265 (1969).

104. Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/Conf. 39/27, *reprinted in* 8 INT'L LEGAL MAT. 679 (1969).

105. Newman, *Interpreting the Human Rights Clauses of the United Nations Charter*, 5 REVUE DES DROITS DE L'HOMME 283 (1972).

106. Hassan, *The International Covenants on Human Rights: An Approach to Interpretation*, 19 BUFFALO L. REV. 35, 37 n.9 (1969).

upon a significant portion of the international community. These divergent expectations may give rise to conflicting obligations. Since countries are unwilling to submit to a resolution of this conflict, a draft convention on torture may allow for interpretation on either the multilateral international or a regional level. A country accused of violating the convention would be entitled to a change of venue from perhaps the International Court of Justice to the European Commission on Human Rights. A regional development model might involve the Islamic system, the European Commission on Human Rights or a broader body based upon the Western European tradition, Southern Africa, Latin America, the Socialist Republics, the non-Socialist Orient, or the Socialist Orient. Countries would voluntarily align themselves both geographically and according to their legal and political traditions. A country might fall within several different regional systems, each with its unique notions of obligations and enforcement mechanisms. The advantage of such a system would be that countries would feel less threatened by power politics and might be willing to surrender a greater degree of domestic sovereignty.

Such a system of regional forums is not without precedent. The Racial Discrimination Treaty employs this concept, providing for enforcement in six different international forums.[107] A scheme based upon multiple forums in both regional and international organs would permit a country to submit to graduated levels of enforcement, depending upon the level of national sovereignty the state is willing to surrender. A profile of each nation's laws should be compiled for use as a guide for determining which enforcement schemes a country should be willing to accept.

VI. THE UNITED STATES CONCEPTION OF TORTURE AND OTHER FORMS OF CRUEL AND UNUSUAL PUNISHMENT

Although the eighth amendment to the United States Constitution provides a prohibition against "cruel and unusual punishment"[108] the phrase has often been intertwined with the due process provisions of the fifth and fourteenth amendments.[109] Regard-

107. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

108. U.S. CONST. amend. VIII.

109. *See* Paust, *Constitutional Prohibitions of Cruel, Inhumane or Unnecessary Death, Injury or Suffering During Law Enforcement Process*, 2 HASTINGS CONST. L.Q. 873, 877 (1975).

less of the constitutional basis upon which decisions construing "cruel and unusual punishment" have rested, the developing policy consideration is premised upon the feeling that penal measures are constitutionally repugnant if they are incompatible with "'the evolving standards of decency that mark the progress of a maturing society.'"[110] or if they "'involve the unnecessary and wanton infliction of pain.'"[111] United States courts have assumed the responsibility of deterring official misconduct by applying an exclusionary rule in state criminal proceedings to illegally coerced information, by protecting a victim's right to civil sanctions, and by providing civil and criminal sanctions against individuals who violate the civil rights of another while acting under color of state law.[112]

As early as 1878, the Supreme Court recognized that the parameters of the protection from cruel and unusual punishment were not fixed. In the opinion in *Wilkerson v. Utah,* the Court stated:

> Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.[113]

The Court in *Wilkerson v. Utah* held that neither shooting nor hanging as a mode of executing the death penalty for the crime of murder was within the meaning of the prohibition. The Court noted in dicta, however, that the amendment is limited to very atrocious punishments, such as "where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female."[114] Twelve years later, the Court held that electrocution was a constitutionally permissible method of execution and seemed to reject the broad "unnecessary cruelty" test. "[I]f the punishment . . . were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be [unconstitutional] . . . . Punishments are cruel when they involve torture or a lingering death . . . . It im-

110. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Trope v. Dulles, 356 U.S. 86, 101 (1958)).

111. *Id.* at 103 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

112. *See* 18 U.S.C. § 242 (1976); 42 U.S.C. § 1893 (1970).

113. Wilkerson v. Utah, 99 U.S. 130, 136 (1879).

114. *Id.* at 135.

plies there is something inhuman or barbarous . . . ."[115]

In 1947, in the case of *Louisiana ex rel Francis v. Resweber,* the Supreme Court permitted the state to execute the petitioner after a first attempt was unsuccessful due to equipment failure, by applying the "unnecessary cruelty" test, "[T]he . . . law forbids the infliction of unnecessary pain in the execution of the death."[116] It has been observed that the "inhuman and barbarous" test can be reconciled with the "unnecessary cruelty" test in three ways:

> First, if both are viewed as limiting the *amount* of permissible punishment, the *Kemmler* test can be read as the absolute maximum degree of permissible punishment; that is, even if additional punishment is considered "necessary" to achieve one of the goals of the penal system, it will be unconstitutional if the amount of pain to be inflicted is "inhuman and barbarous."
>
> Second, if both tests are viewed as limiting not the amount but the *nature* of the punishment, they can be seen as identical delimitations of the amendment. Since *Wilkerson, Kemmler,* and *Resweber* all involved challenges to modes of execution, they may mean that the only modes of execution permitted by the Eighth Amendment are those in which death is not lingering. All others are "unnecessarily cruel"; and they are "inhuman and barbarous" because they prolong the criminal's agony before death. Finally, one of the two tests could apply to the nature, and the other to the amount, of permissible punishment. Punishment could be said to be constitutional only in such quantities as are "necessary" to achieve the legitimate goals of the penal system, and only if the punishment is not "inhuman and barbarous" by nature. Thus, even though all three cases involved similar factual situations, the combination of *Wilkerson, Kemmler,* and *Resweber* failed to answer two basic questions: (1) Does the eighth amendment limit the amount or the nature of punishment, or both? (2) Whatever the answer to that question, what is the test to be applied in determining whether constitutional limits have been exceeded?[117]

It has since been held that the amendment restricts both the amount and the nature of permissible punishment and that the concept of "cruel and unusual punishment" is an evolving concept that must be measured on an ad hoc basis.[118] A survey of some of

115. *In re* Kemmler, 136 U.S. 436, 446-47 (1947).

116. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947).

117. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment,* 24 STAN. L. REV. 838, 840-41 (1972).

118. "[The amendment] is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." Weems v. United States, 217 U.S. 349, 378 (1910).

the problem areas reveals that a considerable overlap exists between the concepts of torture, cruel methods of punishment, and cruelly excessive punishments.[119]

An accused individual is particularly vulnerable to abusive treatment during the arrest and pre-trial detention. Although Federal courts have long excluded confessions obtained by threats of physical coercion,[120] it was not until 1936 that the Supreme Court excluded confessions which were obtained through improper police procedures from state courts.[121] In that case, the confessions were obtained by actual physical coercion. The Court held that since statements obtained by physical coercion were of dubious reliability, permitting them into evidence would violate the due process clause of the fourteenth amendment.[122] Subsequent cases affirmed exclusion, but expanded the rationale for exclusion to encompass policy considerations regarding the judicial role in restraining offensive police misconduct,[123] and interrogation procedures that, while not the product of conscious police wrongdoing, were such that the defendant's free choice was impaired.[124] Under this rationale, United States courts must examine the "totality of the circumstances" surrounding each confession and exclude confessions which were obtained through physical abuse,[125] threats,[126] extensive questioning,[127] incommunicado detention,[128] denial of the right to counsel,[129] or the exploitation of individual suspect characteristics such as lack of education,[130] emotional stability,[131] age,[132] and

119. On the evolution of standards, see Trop v. Dulles, 356 U.S. 86, 99, 101 (1958). "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

120. *E.g.*, Hopt v. Utah, 110 U.S. 574 (1884).

121. Brown v. Mississippi, 297 U.S. 278 (1936).

122. *Id.*

123. *E.g.*, Rogers v. Richmond, 365 U.S. 534 (1961).

124. The administering of truth serum by doctors and subsequent questioning by police who claimed to be unaware of the drug's effect produced a reliable confession without offensive police conduct, but was excluded because it was not a product of the defendant's "free and rational choice." Townsend v. Sain, 373 U.S. 293 (1963).

125. Lee v. Mississippi, 332 U.S. 742 (1948).

126. Payne v. Arkansas, 356 U.S. 560 (1958).

127. Turner v. Pennsylvania, 338 U.S. 62 (1949).

128. Davis v. North Carolina, 384 U.S. 737 (1966).

129. Fay v. Noia, 372 U.S. 391 (1963).

130. Columbia v. Connecticut, 367 U.S. 568 (1961).

131. Spano v. New York, 360 U.S. 315 (1959).

132. Gallegos v. Colorado, 370 U.S. 49 (1962).

health.[133] This test, together with the *Miranda* requirement[134] act as procedural safeguards to protect the defendant from proscribed coercion. The vigorous application of these safeguards coupled with statutory criminal and civil sanctions against violations have significantly deterred abuses.

Punishments which are cruelly excessive in proportion to the offense are also within the scope of the amendment.[135] In one case, a minor public official who falsified public records to conceal an embezzlement was fined, sentenced to fifteen years of "hard" labor, constant enchainment, lifetime surveillance, and deprivation of parental authority and the right to dispose of his property *inter vivos*. The Supreme Court found this scheme to be cruelly excessive: "Such penalties for such offenses amaze those who have formed their conception of the relation of a state to its offending citizens from the practice of the American commonwealths, and believe that it is [a] precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[136]

A third category of cases within the meaning of the eighth amendment are those in which the punishment is cruel *per se*. The Supreme Court has held that discretionary death sentences are unconstitutional. Although the Court is in disagreement as to the rationale, several justices adopted the position that the capricious and discriminatory manner in which the discretionary death sentence may be applied to particular economic or racial groups constituted a form of cruel and unusual punishment.[137] State statutes that operate to disenfranchise either convicted felons[138] or anyone convicted of a crime of moral turpitude,[139] however, have been held to be valid exercises of the state police power and therefore not inherently cruel.

Cruel punishments have most often been found to occur in the post-conviction setting, in part because of the recent trend of judicial intervention into the prison system. In general, courts have applied a "totality of the circumstances test" to protect prisoners from inhumane conditions such as arbitrary denial of requests for medical treatment, forced labor from prisoners who are physically

133. Jackson v. Denno, 378 U.S. 368 (1964).
134. Miranda v. Arizona, 384 U.S. 436 (1966).
135. Weems v. United States, 217 U.S. 349 (1910).
136. *Id.* at 366-67.
137. Furman v. Georgia, 408 U.S. 238 (1972).
138. Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968).
139. Kronlund v. Honstein, 327 F. Supp. 71 (N.D. Ga. 1971).

unable to work, and prison conditions so barbaric that they "shock the conscience."[140] Although courts are reluctant to interfere with prison administration, if a particular method of punishment is sufficiently offensive, it will be held to be a violation of civil rights sufficient to justify civil remedies. For example, while solitary confinement for disciplinary reasons is not in itself cruel and unusual, it may become so if the conditions fail to satisfy basic health requirements,[141] or if the punishment is arbitrary and does not satisfy minimal requirements of due process.[142] Due process requirements are satisfied, however, if the prison does not arbitrarily restrict freedom of movement, but is merely acting pursuant to a legitimate function of transferring the inmate from one penal institution to another.[143]

Conduct that involves the physcial well-being of the inmate will be scrutinized more closely. This imposes an affirmative obligation upon prison authorities to provide adequate qualified medical personnel and equipment[144] and to provide adequate protection against physical assaults by other inmates.[145] Physical punishment of prisoners, such as the application of electric shock devices, teeter boards, or whipping on bare skin, is also prohibited by the eighth amendment.[146]

In summary, the American conception of cruel and unusual punishment proscribes torture, cruelly excessive punishment, and conduct that is cruel per se. Because of the development of the federal system, these forms are closely related by the prohibitions of the eighth amendment and the due process clause. Violations give rise to exclusion of evidence obtained unlawfully, and may result in federal criminal and civil sanctions.[147]

---

140. Fife v. Crist, 380 F. Supp. 901 (D. Mont. 1974) (holding that the punishment did not violate the Eighth Amendment).

141. Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

142. Thompson v. Montemuro, 383 F. Supp. 1200 (E.D. Pa. 1974).

143. United States *ex rel.* Gallagher v. Daggett, 326 F. Supp. 387 (D. Minn. 1971).

144. Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1975).

145. Gates v. Collier, 501 F.2d 1291, 1309 (5th Cir. 1974).

146. Jackson v. Bishop, 268 F. Supp. 804, 815 (E.D. Ark. 1967).

147. For the United States response to international human rights violations, see Foreign Assistance Act of 1961, Pub. L. No. 87-195, §§ 116(d), 502(b), 75 Stat. 424 (1961). HOUSE COMM. ON INTERNATIONAL RELATIONS, SUBCOMM. ON INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS CONDITIONS IN SELECTED COUNTRIES AND THE U.S. RESPONSE, 95TH CONG., 2D SESS. (1978); *Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 95th Cong., 1st Sess. (1977).

VII. THE EUROPEAN CONCEPTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Article 3 of the European Convention on Human Rights, which provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment,"[148] has been considered so important that it has been exempted from article 15, permitting derogations from the Convention in times of war or public emergency. While the exclusion seems to suggest that this prohibition applies only to very grave measures, the ambiguous language of article 3 promotes flexibility in interpretation, and can only be developed through case law. Since this flexibility must be reconciled with varying state obligations under the Convention and its amending protocols,[149] several procedures have been devised which deter juridical solution by encouraging negotiation and settlement where a petition has been declared admissible.[150] As of December 1974, 6,847 cases have been registered against states by individuals; 127 have been declared admissible.[151] Since friendly settlements[152] and unofficial arrangements[153] are encouraged, and exhaustion of remedies is required,[154] few cases have been adjudicated. Yet the final effect of admissible applications is to provide test cases that develop the parameters of states' substantive obligation while providing a government a graceful means of departure from an ungraceful position. Admissible cases thus have a value of prospective prevention that should encourage other nations to adopt similar regional conventions.

Torture and inhuman treatment can be broadly defined as the deliberate infliction of physical or mental pain or suffering against the will of the victim, and when forming part of criminal punish-

148. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 57 art. 3.

149. For a succinct description of the protocols, see EUROPEAN COMMISSION OF HUMAN RIGHTS, STOCK-TAKING ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Doc. No. DH (75) 4, at 1 (A. McNulty ed. 1975) [hereinafter cited as MCNULTY REPORT]. This report was published in an attempt to assess the efficacy of the European Convention on Human Rights. As such it is a useful repository of unreported cases brought before the Commission of Human Rights. It is cited repeatedly *infra* when no other source is available.

150. For a discussion of procedural rights, see *id.* at 2-4.

151. *Id.* at 65.

152. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 57, art. 28(b), at 125, 133.

153. *Id.*, art. 30, at 125, 130.

154. F. CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 84 (1974).

ment, it must be out of proportion to the offense.[155] Taken together, article 3 proscriptions generally involve four situations: imprisonment and detainment, racial discrimination, expulsion and extradition, and where government conduct, whether challenged by another state or an individual, is alleged to be a continuing violation of article 3. A number of cases illustrate these situations.

In *Kamma v. Netherlands*[156] the Commission declared inadmissible that part of the applicant's petition challenging his confession to a murder charge as induced by severe psychological pressure. The applicant had been lawfully incarcerated in a prison on a separate charge, however, and had been transferred to a "sobering up" detention cell at police headquarters which was alleged to be inadequately lighted and ventilated. The Commission observed that the disputed conditions of the cell, taken together with the interrogators' threats and promises of leniency, did not constitute "severe suffering" within the meaning of the *Greek* case.[157] Similarly, in *Baader, Meins, Meinhof and Grundmann v. Federal Republic of Germany,*[158] *Berberich v. Federal Republic of Germany,*[159] and *Mahler v. Federal Republic of Germany,*[160] the Commission declared petitions from the Baader-Meinhof Group complaining of solitary confinement, restrictions on visits, correspondence, and newspaper purchases to be inadmissible. The Commission found that although prolonged solitary confinement was undesirable, particularly for a prisoner whose trial had been remanded, in this case it was a justified security measure. The Commission relied upon the German court's finding that the petitioners had reading material and radios in their cells and had been permitted extensive visitation. Further, the decision of inadmissibility was based upon the fact that the petitioners had encouraged their supporters to continue armed struggle and to arrange an escape.

Cases involving confinement in mental institutions raise potential article 3 violations. In *Applicant Z v. United Kingdom,*[161] the

155. *Id.* at 83.

156. [1972] Y.B. EUR. CONV. ON HUMAN RIGHTS 414 (applic. no. 4771/71) (Eur. Comm. of Human Rights), *cited in* MCNULTY REPORT, *supra* note 149, at 42.

157. [1972] Y.B. EUR. CONV. ON HUMAN RIGHTS 414, 434. For a description of the *Greek* cases, see text accompanying 175 *infra.*

158. [1975] Y.B. EUR. CONV. ON HUMAN RIGHTS 132 (applic. no. 6166/73) (Eur. Comm. of Human Rights), *cited in* MCNULTY REPORT, *supra* note 149, at 43.

159. [1974] Y.B. EUR. CONV. ON HUMAN RIGHTS 386 (applic. no. 5874/72) (Eur. Comm. of Human Rights), *cited in* MCNULTY REPORT, *supra* note 149, at 43.

160. *See* MCNULTY REPORT, *supra* note 149, at 43 (applic. no. 6038/73).

161. *See id.* at 44 (applic. no. 5712/12).

Commission declared an applicant's petition invalid where he was transferred from prison in the Bahamas to the United Kingdom at the request of the Bahamian government, upon a subsequent conviction for murdering the prison warden. Although the applicant had no personal links with the United Kingdom, the Commission relied upon his history of violent crime and his subsequent detention in an English prison mental hospital on the basis of medical reports finding him a paranoid psychotic. The Commission observed that although no prisoner can choose a place of incarceration, an article 3 violation may well occur where a prisoner is incarcerated 3,000 miles from his family and home country. The Commission held, however, that detention in an institution specifically designed for mentally unstable criminals, although distant, was more humane than confinement in an unsuitable institution in the Bahamas. The Commission concluded that the detention was necessary in a democratic society for the prevention of disorder or crime and for the protection of others.[162] In the case of *Simon-Herold v. Austria,*[163] however, a partly paralyzed polio victim on remand for an alleged bad check violation charged that the general condition of detention, the lack of medical attention, and his detention for fourteen days in a closed psychiatric section of a hospital violated article 3. Although the Commission approved a friendly settlement that did not admit a violation of article 3, it noted that the Austrian Federal Minister for Justice subsequently issued a general instruction to judicial authorities that confinement of a prisoner on remand to the closed ward of a psychiatric hospital or the equivalent in a general hospital might constitute a legal violation where no doubts exist as to the prisoner's mental health. The Commission in *Kormanm v. Federal Republic of Germany,*[164] however, declared inadmissible an applicant's complaint that excessive force had been used by prison authorities in effecting a disciplinary transfer to a solitary cell. The Committee of Ministers found that although considerable force had been used, it was necessary and reasonable to overcome the applicant's violent resistance. A strait jacket had been forcibly applied only after the applicant continued to resist violently in the disciplinary cell.

---

162. *Id.* at 45.

163. [1971] Y.B. EUR. CONV. ON HUMAN RIGHTS 352 (applic. no. 4340/69) (Eur. Comm. of Human Rights), *cited in* MCNUTLY REPORT, *supra* note 149, at 32.

164. [1966] Y.B. EUR. CONV. ON HUMAN RIGHTS 304 (applic. no. 2686/65) (Eur. Comm. of Human Rights). The Commission did, however, declare admissable other parts of Kornmann's petition in which he alleged additional mistreatment at the hands of prison officials. *Id.* at 494, 510.

Denial of entry into a country, traditionally reserved to the discretion of the sovereign, was attacked as a violation of article 3 in *25 East African Asians v. United Kingdom* and *6 East African Asians v. United Kingdom.*[165] The Commission therein admitted a petition alleging that the refusal by the government of the United Kingdom to allow applicants to enter England violated several provisions of the Convention, including the respect for family life, the freedom from discrimination in regard to the rights and freedoms guaranteed by the Convention, and the freedom from inhuman or degrading treatment within the meaning of article 3. The applicants were all United Kingdom passport holders, either United Kingdom citizens residing in Uganda or Kenya, or British protected persons whose continued presence in Uganda or Kenya had become either difficult or illegal. In the aftermath of cases, the British government has accelerated its normal rate of entry so that most of the approximately 280 applicants who registered complaints with the Commission have been admitted to the United Kingdom. Although the settlement and pending adjudication leave the final outcome of this case uncertain, it may broaden the concept of "degrading treatment" to include racial discrimination.[166]

In a deportation case, *X v. Federal Republic of Germany,*[167] the applicant, an Algerian national incarcerated for theft, alleged that his deportation to Algeria would violate article 3 by subjecting him to reprisals as a result of having served as a conscript in the French Army in 1960-1962. In December 1967 the application was declared admissible by the Commission, and the applicant was released in January 1968, and permitted to reside and work in Berlin pending the outcome of the proceedings.[168] Similarly, in *Kerkoub v. Belgium*[169] the applicant was serving a prison sentence in Belgium for theft. The applicant argued that Belgian compliance with an Algerian request for extradition could contravene article 3 by exposing the applicant to serious reprisals in Algeria.[170] The applicant asserted that he married a French national in 1954, and that

165. *See* McNULTY REPORT, *supra* note 149, at 39-41.

166. F. CASTBERG, *supra* note 154, at 83.

167. *See* McNULTY REPORT, *supra* note 149, at 30.

168. The case was dismissed when the applicant subsequently disappeared.

169. *See* McNULTY REPORT, *supra* note 149, at 31.

170. The applicant had served as a volunteer in the French Army in 1954-1962, had collaborated with the Algerian regime since 1964 until the *coup d'Etat* of June, 1965, and had served a prior prison term in Algeria for political activities in which he acted as an "agent de liaison" for the opposition movement.

his parents were granted French nationality. The case was mooted when the Belgian government accepted an outstanding request for extradition made by the French government.

Conversely, in the case of *X v. Federal Republic of Germany*,[171] the Commission declared inadmissible the complaint of a Syrian citizen who was to be extradited from the Federal Republic of Germany to Turkey despite his claims that he would be subjected to political persecution. It should be noted that while Turkey has not recognized the competence of the European Commission of Human Rights or the European Court, it has ratified the European Convention of Human Rights and is legally obligated to satisfy the requirements of article 3. Furthermore, Turkey may be required to incorporate European case law into its own case law under its domestic conflicts of law rule. In *Amekrane v. United Kingdom*,[172] the applicant contested the conditions of her deceased husband's detention after he had requested political asylum in the United Kingdom for his involvement in a plan to kill the King of Morocco. His request for asylum had been denied and he was returned to Morocco where he was executed after a conviction by court martial. Although the Commission skirted the issue of whether the United Kingdom's failure to grant asylum under the political offense exception could constitute an article 3 violation where execution was certain, the complaint was declared admissible. The parties agreed upon a friendly settlement, and the United Kingdom paid the applicant 35,500 pounds without admitting legal fault or obligation. Taken together, the *X, Kerboub,* and *Amekrane* cases indicate a European sensitivity regarding compliance with extradition request of countries that may not share European conceptions of cruel and degrading punishment. This trend may well alter European extraditions in the aftermath of the *Amekrane* execution.

A number of petitions have alleged systematic misconduct in derogation of article 3. In the *Cyprus Cases*[173] the Commission admitted 29 allegations of article 3 violations brought by Greece against the United Kingdom, while Cyprus was still under United

171. [1963] Y.B. EUR. CONV. ON HUMAN RIGHTS, 462, 480 (applic. no. 1802/62) (Eur. Comm. of Human Rights).

172. [1973] Y.B. EUR. CONV. ON HUMAN RIGHTS 356 (applic. no. 5961/72) (Eur. Comm. of Human Rights), *cited in* MCNULTY REPORT, *supra* note 149, at 26.

173. Greece v. United Kingdom (The Second Cyprus Case) [1957] Y.B. EUR. CONV. ON HUMAN RIGHTS 186 (applic. no. 299/57) (Eur. Comm. of Human Rights (decision on admissibility).

Kingdom sovereignty. A political solution embodied in the 1959 Zurich and London agreements terminated the proceedings without examining the merits, however. In the *Greek* cases,[174] Norway, Denmark, and Sweden alleged that the Greek military regime installed by the 1967 coup d'etat was resorting to systematic violations of article 3. Although the Sub-Commission was permitted to question government officials and political prisoners, Greece denounced the Convention and its membership in the Council of Europe when the Sub-Commission officially submitted a report to the Committee of Ministers describing numerous violations.[175]

In the *Northern Ireland Cases,*[176] the Irish government challenged the legality of English procedures alleged to constitute Convention violations of numerous articles, including article 3. As a result of partial settlement, certain techniques of "interrogations in depth" were discontinued; however, the other aspects of English conduct remain suspect, and judicial proceedings are incomplete.[177] Conflict in Northern Ireland has generated a number of individual applications as well. On April 5, 1973, the seven cases of *Donnelly and others*[178] were declared admissible. About 200 other individual applications have been adjourned pending forthcoming decisions on the *Northern Ireland Cases* and the *Donnelly* cases. Decisions in those cases may provide an excellent opportunity for the Commission to articulate the scope of article 3.

The European Convention and its indirect sanction approach premised upon prospective conciliation rather than confrontation and fault-finding has evolved into a regional model for the world.

---

174. Denmark v. Greece (applic. no. 3321/67), Norway v. Greece (applic. no. 3322/67), Sweden v. Greece (applic. no. 3323/67), Netherlands v. Greece (applic. no. 3344/67), [1968] Y.B. EUR. CONV. ON HUMAN RIGHTS 690, 730 (Eur. Comm. of Human Rights) (decision on admissibility), *cited in* MCNULTY REPORT, *supra* note 132, at 6-9.

175. F. CASTBERG, *supra* note 137, at 86. The Committee of Ministers found numerous violations of article 3, and published the report of the Commission in a separate volume of the 1969 *Yearbook.* [1969] Y.B. EUR. CONV. ON HUMAN RIGHTS. THE GREEK CASE (Eur. Comm. of Human Rights), *cited in* MCNULTY REPORT, *supra* note 149, at 7-8.

176. Ireland v. United Kingdom, [1972] Y.B. EUR. CONV. ON HUMAN RIGHTS 76, 254 (Eur. Comm. of Human Rights). The Commission found admissible, and therefore retained, some of the allegations contained in Application No. 5310/71. Application No. 5541/72 was struck from the Commission's list of cases.

177. *Id.*

178. [1973] Y.B. EUR. CONV. ON HUMAN RIGHTS 212 (applic. no. 5577/72-5583/72 (joined)) (Eur. Comm. of Human Rights). *See generally* AMNESTY INTERNATIONAL, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO NORTHERN IRELAND, A.I. Index EUR 45/01/73 (1978).

Based upon this model, human rights has evolved in Europe from the stage of enunciation and codification to a stage of actual voluntary enforcement of regionally-defined human rights.

VIII. CONCLUSION

Torture and other forms of cruel and unusual punishment are rapidly becoming an institutionalized state practice permeating all economic and political philosophies. Prohibition of torture by customary international law, general principles of international law, and indirectly by the United Nations Charter itself has not deterred the spread of torture. Recent declarations by the United Nations General Assembly, however, may indicate a world resolve to minimize proscribed conduct by creating binding legal obligations within international criminal law. By providing a definition of torture, by declaring that nations have affirmative obligations to provide domestic civil and criminal sanctions against individuals responsible for torture, by providing for systematic review of pre-trial and post-trial detention procedures, and by establishing an exclusionary rule for evidence illegally obtained, the world community has articulated the minimum common denominator of law acceptable as a moral ideal.

Through a developmental progression of treaties, greater specificity regarding standards governing torture can be established through codification. The adoption of the Draft Convention for the Prevention and Suppression of Torture[179] would further this goal. A comprehensive analysis of general principles of law related to arrest and detention is necessary so that signatories may share common expectations. It is suggested that non-governmental organizations have major input into the drafting process. The constitution, statutes, and case law of member nations, should also be analyzed. Drafters may also recommend more progressive standards by revising the Standard Minimum Rules and Draft Principles. A series of treaties could thus create more stringent due process obligations without offending the shared expectations of signatory states. Specific interpretation and enforcement of these legal obligations on a regional level would reduce cultural diversity and thus offer practical advantages. This would not restrict the possibility of multiple forums such as that provided in the Racial Discrimination Treaty. An acceptable means of forum-shopping could make the conventions more acceptable in a politically divided world.

179. Comm'n on Human Rights, U.N. Doc. E/CN.4/Nao/213, Annex (1978) (written statement submitted by the International Association of Penal Law).

APPENDIX I

A SURVEY OF WORLD CONSTITUTIONS FOR PROVISIONS REGARDING OR RELATING TO TORTURE OR OTHER FORMS OF CRUEL AND UNUSUAL PUNISHMENT*

AFGHANISTAN—Art. 26, para. 10: "Torturing a human being is not permissible. No one can torture or issue orders to torture a person even for the sake of discovering facts, even if the person involved is under pursuit, arrest or detention or is condemned to a sentence."

ALBANIA—Constitution of 1946 (as amended), Art. 22, para. 1: "All the citizens are guaranteed the inviolability of the person."

Draft of Constitution published January 21, 1976 (not currently in force): No provision.

ALGERIA—Art. 48: "The State guarantees the inviolability of the individual."

ARGENTINA—Art. 18: "The penalty of death for political offenses, all kinds of torture, and flogging, are forever abolished. The prisons in the nation shall be healthy and clean, for the security and not for the punishment of the prisoners confined therein; and any measure under pretext or precaution which inflicts on them punishment beyond the demands of security, shall render liable the judge who authorizes it."

AUSTRIA—No provision.

BANGLADESH—Art. 35, para. 5: "No person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment."

BELGIUM—No provision.

BENIN—No provision.

BHUTAN—No provision.

BOLIVIA—Art. 12: "Any kind of torture, coercion, extortion or other form of physical or moral violence is prohibited, under penalty of immediate removal from office and without prejudice to sanctions

* Copies of these constitutions may be found in English translation in CONSTITUTIONS OF THE WORLD (A. Blaustein & G. Flanz eds. 1971) (15 volumes and supplement). This is a series of texts, chronologies, and annotated bibliographies, and is current to April 1978.

that may be incurred by anyone who applies, orders, instigates, or consents to them."

BOTSWANA—Art. 7, para. 1: "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

BRAZIL—Art. 153, para. 14: "All authorities shall be required to respect the physical and moral integrity of arrested and imprisoned persons."

BULGARIA—Art. 48, para. 1: "The freedom and inviolability of the person are guaranteed."

BURMA—Art. 24: "Punishments shall not be awarded in violation of human dignity."

BURUNDI—No provision.

CAMBODIA—*See* Democratic Kampuchea.

CAMEROON—Preamble: "The People of Cameroon, . . . [a]ffirm its attachment to the fundamental freedoms embodied in the Universal Declaration of Human Rights and the United Nations Charter . . . ."

CANADA—Canadian Bill of Rights, Art. 2: "[N]o law of Canada shall be construed or applied so as to . . . [para. 6] impose or authorize the imposition of cruel and unusual treatment or punishment."

CENTRAL AFRICAN EMPIRE—Preamble: "The human person is sacred. All agents of the public power have an absolute obligation to respect and protect it."

CHAD—Preamble: "The fundamental principles of the constitutional organization of the Republic of Chad are: . . . the guaranty of the rights of the citizen founded on the principles of liberty, humanity and equality."

CHILE—Constitutional Act No. 3, Art. 1: "This Constitutional Act guarantees all individuals: [para. 1] [t]he right to life and the integrity of the individual, notwithstanding the legal status of penalties under the law."

PEOPLES REPUBLIC OF CHINA [COMMUNIST CHINA]—Art. 28: "The citizens' freedom of person and their homes shall be inviolable."

REPUBLIC OF CHINA [TAIWAN]—No provision.

COLOMBIA—Art. 23: "No one may be molested in his person or family, or imprisoned or arrested or detained, or have his domicile

searched, except by virtue of a warrant issued by competent authority, with all legal formalities and for cause previously defined by law."

THE CONGO [BRAZZAVILLE]—Art. 6, para. 1: "The human person is sacred. The state has the obligation to respect it and to protect it."

Art. 6, para. 3: "The freedom of the human person is inviolable."

COSTA RICA—Art. 40: "No one may be subjected to cruel or degrading treatment or to life imprisonment, or to the penalty of confiscation."

CUBA—Art. 57, para. 1: "Freedom and inviolability of persons is assured to all those who live in the country."

Art. 57, para. 3: "The person who has been arrested or the prisoner is inviolable in his personal integrity."

Art. 58, para. 3: "No violence or pressure of any kind can be used against people to force them to testify."

Art. 58, para. 4: "All statements obtained in violation of the above precept are null and void and those responsible for the violation will be punished as outlined by the law."

REPUBLIC OF CYPRUS—Art. 8: "No person shall be subjected to torture or to inhuman or degrading punishment or treatment."

TURKISH FEDERATED STATE OF CYPRUS—Art. 9, para. 2: "No person shall be subjected to ill-treatment or torture."

Art. 9, para. 3: "No punishment incompatible with human honour and dignity shall be imposed."

CZECHOSLOVAKIA—Art. 30, para. 1: "Inviolability of the person shall be guaranteed."

DAHOMEY—*See* Benin.

DENMARK—Art. 71, para. 1: "Personal liberty shall be inviolable."

DOMINICAN REPUBLIC—Art. 8: "The effective protection of the rights of the human being and the maintenance of the means which will permit him to improve himself progressively within the system of individual liberty and social justice, compatible with public order, the general well-being and the rights of all, are recognized as the principal aims of the state. In order to guarantee the accomplishment of these aims the following standards are set: 1. The inviolability of life. Therefore, neither the death penalty, torture, nor any other punishment or oppressive procedure or penalty that implies loss or diminution of the physical integrity or health of the individual may be established."

ECUADOR—Art. 141: "The State guarantees: 1. The inviolability of life and personal integrity. There is, therefore, no death penalty or torture."

EGYPT—Art. 42: "Any citizen who is arrested, imprisoned, or whose freedom has been restricted by any means, must be treated in such a manner that will preserve human dignity. It is inadmissible to cause physical or moral harm to him."

EL SALVADOR—Art. 168, para. 1: "The death penalty may be imposed only for the crimes of rebellion or desertion in the field of battle, treason and espionage, and for the crimes of parricide, murder, and for robbery or arson if they result in death."

Art. 168, para. 2: "Imprisonment for debt, life imprisonment, infamous punishments, proscriptive penalties, and any form of torture are prohibited."

EQUATORIAL GUINEA—No provision.

ETHIOPIA—Constitution of 1955, art. 57: "No one shall be subjected to cruel and inhuman punishment."[1]

Draft Constitution of August 6, 1974, Art. 38, para. 1: "No one shall be subject to flogging [or] cruel and inhuman punishment."

FIJI—Art. 7: "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

FINLAND—Art. 6: "Every Finnish citizen shall be protected by law as to life, honor, personal liberty, and property."

FRANCE—Preamble: "The French people hereby solemnly proclaims its attachment to the Rights of Man . . . ."

GABON—Preamble, para. 1: "The Gabonese people, conscious of their responsibility before God, moved by a determination to safeguard their independence and national unity and to order community life according to the principles of social justice, reaffirm solemnly the rights and liberties of man defined in 1780 and consecrated by the Universal Declaration of the Rights of Man in 1948."

THE GAMBIA—Art. 17, para. 1: "No person shall be subjected to torture or inhuman or degrading punishment or other treatment."

FEDERAL REPUBLIC OF GERMANY [WEST GERMANY]—Art. 104, para. 1: "Detained persons may not be subjected to mental nor physical ill-treatment."

---

1. This constitution was suspended in 1974, and a Draft Constitution issued on Aug. 6, 1974.

GERMAN DEMOCRATIC REPUBLIC [EAST GERMANY]—Art. 30, para. 1: "The personality and freedom of every citizen of the Democratic Republic are inviolable."

GHANA—No provision.[2]

GREECE—Art. 7, para. 2: "Torture, any bodily injury, impairment of health or the use of psychological violence, as well as any other offense against human dignity, are prohibited and punished as provided by law."

GUATEMALA—Art. 55, para. 2: "No arrested or imprisoned person shall be prevented from satisfying his natural functions. Nor shall physical or moral torture, cruel treatment, infamous punishment or acts, hardships, or coercion be inflicted, nor shall a person be compelled to perform work prejudicial to his health or incompatible with his physical constitution or his dignity, nor may he be made the victim of extortion."

GUINEA-BISSAU—Art. 11: "In accordance with the fundamental principles of the Universal Declaration of Human Rights and the revolutionary democractic objectives of this Constitution, the State shall guarantee fundamental rights, whose aim is personal development and the progress of society."

GUYANA—Guyana Independence Order 1966, Schedule 2, Art. 7, para. 1: "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

HAITI—Art. 17, para. 8: "Any unnecessary force or restraint in the apprehension of a person or in keeping him under arrest, any moral pressure or physical brutality, is forbidden."

HONDURAS—Art. 65, para. 2: "Beating and every form of torture are absolutely forbidden. Consequently, shackles, chains and any undue punishment are prohibited. Violations of these provisions shall be punished by law."

HUNGARY—Sec. 66: "The Hungarian People's Republic ensures the personal freedom and inviolability of the citizens, the privacy of correspondence and of the home."

ICELAND—No provision.

INDIA—Art. 21: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

---

2. The Ghanan Constitution of 1969 was suspended by the National Redemption Council, in N.R.C. (Establishment) Proclamation of Jan. 13, 1972, art. 2.

INDONESIA—No provision.

IRAN—Supplementory Constitutional Law of October 8, 1907, Art. 9: "Individuals are protected and safeguarded against offenses of any kind against their lives, their progeny, their homes and their honor. No one may be molested, except in accordance with the laws of the land."

IRAQ—Art. 22, para. a: "The dignity of man is safeguarded. It is inadmissible to cause any physical or psychological harm."

IRELAND—Art. 40, para. 3(1): "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

ISRAEL—No constitution.

ITALY—Art. 13: "All acts of physical and moral violence on persons subjected to limitations of freedom are punished."

IVORY COAST—Preamble: "The people of Ivory Coast declare their adherence to the principles of Democracy and the Rights of Man, as they have been defined by the Declaration of the Rights of Man and the Citizen of 1789, by the Universal Declaration of 1948, and as they have been guaranteed by this Constitution."

JAMAICA—Art. 17, para. 1: "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

JAPAN—Art. 36: "The infliction of torture by any public officer and cruel punishments are absolutely forbidden."

JORDAN—No provision.

DEMOCRATIC KAMPUCHEA—Art. 6: "Any coercion, brutality, or treatment which goes beyond the penalty imposed on imprisoned persons who have been deprived of their liberty is forbidden. The authors, accessories, and accomplices of such offenses shall be punished by law."

KENYA—Art. 74, para. 1: "No person shall be subject to torture or to inhuman or degrading punishment or other treatment."

DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA [NORTH KOREA]—Art. 64: "Citizens are guranteed the inviolability of person and residence and the privacy of correspondence."

REPUBLIC OF KOREA [SOUTH KOREA]—Art. 10, para. 2: "No citizen shall be subject to torture of any kind, nor be compelled to testify against himself in criminal cases."

LAOS—No provision.

LEBANON—Art. 8: "Personal freedom shall be guaranteed and protected."

LESOTHO—Art. 8: "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

LIBERIA—Art. I, sec. 8: "No person shall be deprived of life, liberty, property or privilege, but by judgment of his peers, or the law of the land."

Art. I, sec. 10: "Excessive bail shall not be required nor excessive fines imposed, nor excessive punishment inflicted."

LIBYA—Art. 31(C): "The accused or imprisoned shall not be subjected to mental or physical harm."

LUXEMBOURG—Art. 11, para. 3: "The State guarantees the natural rights of the individual and the family."

Art. 18: "The death penalty shall be abolished for political offence as well as civil death and branding iron."

MALAGASY REPUBLIC—Preamble: "Inspired by the Universal Declaration of the Rights of Man of the United Nations, The Malagasy people solemnly proclaim that:

. . . .

"No one may be detained arbitrarily. Harshness or coercion greater than strictly necessary to arrest or detain a person or any form of moral pressure or physical brutality are forbidden."

MALAWI—Art. 2(III): "The government and the people of Malawi, shall continue to recognize the sanctity of the personal liberties and shrines in the Universal Declaration of Human Rights and of adherence to the laws of the nation."

MALAYSIA—No provision.

MALDIVES—No provision.

MALI—Preamble: "The Republic of Mali solemnly reaffirms the Rights of Man and Citizen as sanctioned by the Universal Declaration of the Rights of Man of December 10, 1948."

MALTA—Art. 37, para. 1: "No person shall be subjected to inhuman or degrading punishment or treatment."

MAURITANIA—Preamble: "They proclaim their adherence to the Moslem religion and to the principles of democrary as set forth in the Declaration of the Rights of Man of 1789 and the Universal Declaration of December 10, 1948."

MAURITIUS—Art. 7, para. 1: "No person shall be subjected to torture, or to inhuman or degrading punishment or other such treatment."

MEXICO—Art. 19: "Any ill-treatment during arrest or confinement; any molesting without legal justification; any exaction or contribution levied in prison are abuses which shall be punishable by law and repressed by the authorities."

MOROCCO—Preamble: "Realizing the need to place its action within the framework of the international organizations, the Moroccan Kingdom, which has already become an active and dynamic member of these organizations, subscribes to the principles, rights and obligations embodied in their Charters."

MOZAMBIQUE—Art. 33: "Personal Liberties are guaranteed by the state to all citizens."

Art. 33, para. h: The Peoples Assembly may "sanction the suspension of constitutional guarantees when a state of siege or emergency has been declared."

NEPAL—No provision.

THE NETHERLANDS—No provision.

NEW ZEALAND—No formal constitution.

NICARAGUA—Art. 52: "Any act of cruelty or torture against persons detained, tried, or convicted is prohibited. The violation of this guarantee constitutes a crime."

NIGER—Preamble: "The People of Niger declare their adherence to the principles of Democracy and the Rights of Man, as they have been defined by the Declaration of the Rights of Man and the Citizen of 1789, by the Universal Declaration of 1948, and as they are guaranteed by this Constitution."[3]

NIGERIA—The present constitutional status is uncertain, although the proposed constitution, by art. 27(1)(a) provides: "No person shall be subjected to torture or inhuman or degrading treatment."

NORWAY—Art. 96: "Interrogation by torture must not take place."

PAKISTAN—Art. 4(2)(a): "No action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law."

Art. 14, para. 2: "No person shall be subjected to torture for the purpose of extracting evidence."

PANAMA—Art. 27: "The prison system is based on principles of

3. The Niger constitution was suspended by Ordinance No. 74-1, on April 22, 1974.

security, rehabilitation and social protection. The applicaton of measures injurious to the physical, mental or moral integrity of prisoners is prohibited."

PARAGUAY—Art. 65: "No one shall be subjected to torture or to cruel or inhuman treatment. Penal institutions must be adequate to the purpose, healthful, and clean, and shall be designed to rehabilitate the confined person by means of a complete program that shall be determined by law."

PERU—No provision.

PHILIPPINES—Art. IV, sec. 20: "No force, violence, threat, intimidation, or any other means which vitiates the free will shall be against him. Any confession obtained in violation of this section shall be inadmissible in evidence."

Sec. 21: "Excessive fines shall not be imposed, nor cruel or unusual punishment inflicted."

POLAND—Art. 74: "The Polish People's Republic guarantees to citizens inviolability of the person."

PORTUGAL—Art. 25, sec. 2: "In no case shall the death penalty be applicable."

Art. 26, sec. 2: "No-one shall be subjected to torture or to cruel, degrading or inhuman treatment or punishment."

QATAR—Art. 5(e): "The state shall adhere to the principles of the United Nations Charter which aim at supporting the right of peoples to decide their own future, promoting international cooperation for the good of all mankind, spreading peace and security in all parts of the world, adherence by States to the principle of settling their disputes by peaceful means and establishing their relations with each other on a basis of justice and equality in accordance with the principles of international law."

ROMANIA—Art. 31: "The citizens of the Socialist Republic of Romania shall be guaranteed inviolability of the person."

RWANDA—Art. 13: "The fundamental liberties, as defined by the Universal Declaration of the Rights of Man, are guaranteed to all citizens."

SAUDI ARABIA—No formal constitution.

SENEGAL—Preamble: "The people of Senegal solemnly proclaim their independence and their attachment to the fundamental rights as they are defined in the Declaration of the Rights of Man and of the Citizen of 1789 and in the Universal Declaration of

December 10, 1948."

Art. 6: "Everyone shall have the right to life and to its physical integrity under the conditions defined by law."

SIERRA LEONE—Art. 6, para. 1: "No person shall be subjected to torture or to any punishment or other treatment which is inhuman or degrading."

SINGAPORE—No specific constitutional prohibitions other than what is inherited from English law.

SOMALIA—Art. 6, para. 1: "The generally accepted rules of international law and international treaties duly concluded by the Republic and published in a manner prescribed for legislative acts shall have the force of law."

Art. 7: "The laws of the Somali Republic shall comply, in so far as applicable, with the principles of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948."

Art. 19: "Any physical or moral violence against a person subject to restriction of personal liberty shall be punishable as a crime."

SOUTH AFRICA—No provision.

SPAIN—No provision.

SRI LANKA—Art. 18(1)(b): "[N]o person shall be deprived of life, liberty, or security of person except in accordance with the law."

SWAZILAND—Art. 7, para. 1: "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

SWEDEN—No provision.

SWITZERLAND—Art. 65, para. 2: "Corporal punishments are prohibited."

SYRIA—Art. 28, para. 3: "No one shall be tortured physically or mentally or be treated in a humiliating manner. The law defines the punishment of whoever commits such an act."

TANZANIA—No provision.

THAILAND—No provision.

TOGO—No unified constitution.

TONGA—No provision.

TRINIDAD AND TOBAGO—Art. 5: "No person shall be subjected to

torture or to cruel, inhuman and degrading treatment or punishment."

TUNISIA—No provision.

TURKEY—Art. 14: "No individual shall be subjected to ill-treatment or torture."

UGANDA—Art. 12, para. 1: "No person shall be subjected to torture or to inhuman or degrading punishment or other like treatment."

UNION OF SOVIET SOCIALIST REPUBLICS—Art. 127: "Citizens of the U.S.S.R. are guaranteed inviolability of the person."

UNITED ARAB EMIRATES—Art. 26: "No man shall be subjected to torture or other indignity."

UNITED KINGDOM—The English Bill of Rights, 1689: "That excessive bail ought not to be required nor excessive fines imposed nor cruel and unusual punishments inflicted."

UNITED STATES OF AMERICA—Amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

UPPER VOLTA—Preamble: "The Voltaic people . . . solemnly proclaims its attachment to the Rights of Man as defined by the Declaration of the Rights of Man and of the Citizen of 1789 and by the Universal Declaration of the Rights of Man of 1948."

URUGUAY—Art. 26: "In no case shall brutal treatment be allowed in prisons; they shall be used only as a means of assuring that convicts and prisoners are reeducated, acquire an aptitude for work, and become rehabilitated."

Art. 12: "No one may be punished or imprisoned without due process of law and a legal sentence."

VENEZUELA—Art. 60(3): "No one may be held incommunicado nor subjected to torture or to other proceedings which cause physical or moral suffering. Any physical or moral attack inflicted on a person subjected to restriction of his liberties is punishable."

VIETNAM [DEMOCRATIC REPUBLIC OF VIETNAM, NORTH VIETNAM]—Art. 28: "The law guarantees the inviolability of the homes and the citizens of the Democratic Republic of Viet-nam and the inviolability of the mails."

4. The Upper Volta constitution was suspended on Feburary 8, 1973, following a seizure of power by the military.

WESTERN SAMOA—Art. 7: "No person shall be subjected to torture or to inhuman or degrading treatment or punishment."

YEMEN ARAB REPUBLIC—Art. 42(c): "It is not permissible to torture prisoners bodily or morally."

YEMEN—Art. 39: "No person shall be subjected to torture during interrogation nor shall he be forced to admit or be treated in an inhuman way. Corporal punishment is prohibited."

YUGOSLAVIA—Art. 176: "The inviolability of the integrity of the human personality, personal and family life and of other human rights shall be guaranteed."

ZAIRE—Present constitutional status is uncertain.

ZAMBIA—Art. 17(1): "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

APPENDIX II

Categorization of Countries by Constitutional Provisions

I. Countries with constitutional provisions prohibiting torture, cruel or unusual punishment, or physical or moral harm.

A. The following countries are legally obligated to adhere to article 3 of the European Convention on Human Rights which provides that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[5]

1. Austria
2. Belgium
3. Cyprus
4. Denmark
5. France
6. Federal Republic of Germany
7. Greece
8. Iceland
9. Ireland
10. Ireland
11. Luxembourg
12. Malta
13. The Netherlands
14. Norway
15. Portugal
16. Sweden
17. Switzerland
18. Turkey
19. United Kingdom.

B. The following countries are legally obligated to adhere to article 5(2) of the American Convention on Human Rights, 1969, which provides that: "No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."[6]

1. Chile
2. Colombia
3. Costa Rica
4. Ecuador

5. European Convention on Human Rights, art. 3, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

6. American Convention on Human Rights, Nov. 22, 1960, O.A.S. T.S. No. 36, art. 5, para. 2, OAS Doc. No. OEA/SER.A/16.

5. El Salvador
6. Guatamala
7. Honduras
8. Nicaragua
9. Panama
10. Paraguay
11. Uruguay
12. Venezuela.

C. The following countries are legally obligated by their Preambles to adhere to article 5 of the Universal Declaration of Human Rights, which provides that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[7]

1. Malagasy Republic
2. Somalia ("conscious of the sacred right of self-determination of people solemnly consecrated in the Charter of the United Nations . . . .")

D. Other prohibitions of torture, cruel or unusual punishment, or physical or moral harm.

1. Afghanistan
2. Algeria
3. Argentina
4. Bangladesh
5. Bolivia
6. Botswana
7. Canada
8. Dominican Republic
9. Egypt
10. Ethiopia
11. Fiji
12. The Gambia
13. Guyana
14. Haiti
15. Iraq
16. Jamaica
17. Japan
18. Democratic Kampuchea (formerly Cambodia)
19. Kenya
20. Korea
21. Lesotho
22. Libya

---

7. G.A. Res. 217, U.N. Doc. A/810, at 73 (1948).

23. Mauritius
24. Nigeria
25. Pakistan
26. Philippines
27. Sierra Leone
28. Swaziland
29. Syria
30. Thailand
31. Trinidad and Tobago
32. Uganda
33. United Arab Emirates
34. United States of America
35. Western Samoa
36. People's Democratic Republic of Yemen
37. Yemen Arab Republic
38. Zambia.

II. Countries with provisions regarding the inviolability of the person.

1. Albania
2. Bulgaria
3. China
4. The Congo [Brazzaville]
5. Cuba
6. Czechoslovakia
7. German Democratic Republic [East Germany]
8. Hungary
9. Democratic People's Republic of Korea [North Korea]
10. Mongolia
11. Poland
12. Romania
13. Union of Soviet Socialist Republics
14. Vietnam
15. Yugoslavia.

III. Countries which refer in their constitutions to their allegiance to the Universal Declaration of Human Rights.[8]

1. Cameroon: Preamble
2. Chad: Preamble
3. Gabon: Preamble
4. Guinea-Bissau: Ch. II, art. 11

8. *Id.*

5. Ivory Coast: Preamble
6. Malawi: Ch. 1, § 2, cl. (iii)
7. Mali: Preamble
8. Mauritania: Preamble
9. Niger: Preamble
10. Qatar: Part Two, art. 5, para. (e) (refers to principles of U.N. Charter but does not expressly mention Universal Declaration)
11. Rwanda: Title II, ch. 1, art. 13
12. Senegal: Preamble
13. Upper Volta: Preamble.

IV. The following countries have provisions ensuring ambiguous rights, such as "Human Dignity," "Personal Freedom," "Physical and Moral Integrity," and "Humanity,"[9]

1. Brazil—Title II, ch. IV: Lists specific individual rights and guarantees.
2. Burma—Ch. 2, art. 24: "Punishments shall not be awarded in violation of human dignity." Ch. XI, art. 159(a): "Personal freedom and security of every citizen shall be guaranteed."
3. Republic of China—Ch. 2, art. 8: "Personal freedom shall be guaranteed to the people."
4. Finland—
5. France—Preamble: "The French people hereby solemnly proclaim its attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789 . . . ."
6. India—Preamble: states that one purpose of the Constitution is to promote "Fraternity assuring the dignity of the individual and the unity and integrity of the Nation."

Part III, sec. 21: "No person shall be deprived of his life or personal liberty except according to procedure established by law."
7. Iran—Art. 8: "Inhabitants of the Empire of Iran shall enjoy equal rights before the law."
8. Lebanon—Ch. II, art. 8: "No person may be arrested or kept in custody except in accordance with law."
9. Liberia—Art. 1, sec. 1: "All men are born equally free and independent, and have certain natural and inalienable rights."

---

9. *See* CONSTITUTIONS OF THE WORLD, *supra* note 1.

10. Mexico—Title I, ch. 1, art. 19 states: "Any ill-treatment during arrest or confinement; any molesting without legal justification; any extraction or contribution levied in prison are abuses which shall be punishable by law and repressed by the authorities."
11. Morocco—
12. Portugal—Art. I: "Portugal is a sovereign republic based on the dignity of the human person . . . ." Art. 26: sec. 1 states: "The moral and physical integrity of the citizens shall be inviolable."
13. Sri Lanka—.

V. The following countries cannot be classified elsewhere for various reasons, such as lack of a formal constitution, uncertain status as to the present constitution, or non specific provisions that would proscribe torture or other forms of cruel or unusual punishment; however, this does not imply that torture is lawful in these countries, for it may be prohibited by statute, domestic custom, or religious law.

1. Bhutan
2. Burundi
3. Central African Empire
4. Equatorial Guinea
5. Ghana
6. Indonesia
7. Israel
8. Jordan
9. Laos
10. Malaysia
11. Maldives
12. Mozambique
13. Nepal
14. New Zealand
15. Peru
16. Saudi Arabia
17. Singapore
18. South Africa
19. Spain
20. Tanzania
21. Togo
22. Tonga
23. Tunisia
24. Zaire.