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

TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT
OR PUNISHMENT

Report by the Special Rapporteur, Mr. P. Kooijmans, pursuant to
Commission on Human Rights resolution 1987/29

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Introduction

1. At its forty-first session, the Commission on Human Rights, by resolution 1985/33, decided to appoint a special rapporteur to examine questions relevant to torture. On 12 May 1985, the Chairman of the Commission appointed Mr. Peter Kooijmans (Netherlands) Special Rapporteur. Pursuant to that resolution, the Special Rapporteur, inter alia, seeks and receives credible and reliable information concerning torture and responds effectively to such information.

2. As requested, Mr. Kooijmans submitted a comprehensive report to the Commission at its forty-second session (E/CN.4/1986/15) and informed the Commission of his activities, together with his conclusions and recommendations. The mandate was subsequently renewed at the forty-second session of the Commission by resolution 1986/50.

3. At its forty-third session, the Commission had before it a report of the Special Rapporteur (E/CN.4/1987/13) and adopted resolution 1987/29, by which it again decided to continue the mandate of the Special Rapporteur for another year, in order to enable him to submit further conclusions and recommendations to the Commission at its forty-fourth session. The Economic and Social Council endorsed that resolution by decision 1987/146.

I. ISSUES RELATING TO THE MANDATE

4. The entry into force of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 26 June 1987 may be called an important step forward in the effort to eradicate the phenomenon of torture. It is encouraging indeed that this Convention, which has now been ratified by 28 States, came into force only slightly more than two years after it had been opened for signature. That may be taken as evidence of the fact that the international community seriously wants to come to grips with one of the most abhorrent forms of violations of human rights. It is, therefore, to be hoped that in the near future the number of parties to the Convention will considerably increase to the point where it is almost universally applied.

5. The Committee, to be established under article 17 of the Convention, was elected on 26 November 1987. It therefore seems appropriate to compare in this report the function entrusted by the Convention to the Committee with the mandate of the Special Rapporteur as determined by the Commission.

6. First of all, the Committee only has competence with regard to those States which have become parties to the Convention, whereas the Special Rapporteur - as is the case with all the thematic procedures established by the Commission - can address the Governments of all States Members of the United Nations and of all States which have observer status with that organization. Of more importance, however, is the difference in character between the mandate of the Committee and that of the Special Rapporteur. The Committee has to determine whether parties to the Convention comply with their obligations under that treaty. It can do this in various ways: by considering the reports which States parties have to submit under article 19 of the Convention and by commenting on these reports; by considering State-complaints or individual complaints whenever its competence to do so is recognized under articles 21 and 22 of the Convention; and finally by carrying out an inquiry in cases of a systematic practice of torture, whenever its competence to carry out such an inquiry has not been excluded by the State party. Its main task therefore is to determine whether individual States are complying with or have complied with their obligations under the Convention. Its function can therefore be described as quasi judicial.

7. The function of the Special Rapporteur on questions relevant to torture is completely different. He has to report to the Commission, a body composed of government representatives, on the phenomenon of torture in general. This is reflected in his mandate, as contained in paragraph 12 of resolution 1987/29, where he is requested to report to the Commission on "his activities regarding the question of torture, including the occurrence and extent of its practice, together with his conclusions and recommendations".

8. In order to carry out this mandate, the Special Rapporteur approaches individual Governments requesting information about the legislative and administrative measures taken to prevent the occurrence of torture and to remedy the consequences of torture where this may have taken place.

9. In order to be able to report on the occurrence and extent of the practice of torture, he is entitled to receive information for Governments, intergovernmental and non-governmental organizations. This information inevitably nearly always deals with specific cases occurring in individual

countries. Whenever he has received credible information of this kind, he can bring it to the attention of the Government concerned and ask for its comments. In doing so and in reporting subsequently to the Commission, he does not take a stand on the well-foundedness of each and every allegation; the information received together with the comments by Governments enable him to draw for the Commission a picture of the occurrence and the extent of the practice of torture in the world. This is an important difference between the mandate of the Committee and that of the Special Rapporteur: the Committee has to determine whether a complaint is well-founded; the Special Rapporteur may bring allegations to the attention of Governments and ask for their comments; in the light of those comments and any consultations which may take place between the representative of the Government and the Special Rapporteur, conclusions and recommendations of a general nature are included in the report.

10. There is, however, another, may be even more striking difference between the mandates of the Committee and the Special Rapporteur. The Committee, like every quasi judicial organ, is essentially passive. Apart from the competence to start an inquiry, mentioned in article 20 of the Convention, the Committee has to wait until a report is submitted or until a complaint is lodged before it can carry out its function. The Special Rapporteur, however is invited "to bear in mind the need to be able to respond effectively to credible and reliable information that comes before him". This provision, which is contained also in other mandates established by the Commission, has led to the so-called urgent action procedure. It is precisely this provision which underlines the essentially humanitarian character of the mechanisms established by the Commission, which make it possible to avert a potential violation of human rights by drawing the attention of the Government concerned to a specific case.

11. The difference between the tasks of the Committee and those of the Special Rapporteur may also be characterized in the following way. The Committee must determine whether a State which has accepted specific obligations under a treaty complies with those obligations; if not, the Committee must establish that the State concerned has violated those obligations; that is a matter of the establishment of State responsibility and, in the case of an individual complaint, the classic rule of the exhaustion of local remedies must be applied. However, the instrument of thematic procedures has been developed by the Commission as a tool in the struggle against practices which have been outlawed by the international community and as a means to come to the rescue of potential or real victims of such outlawed practices. Hence, the emphasis is laid on the element of "effectiveness" and on the adoption of preventive measures.

12. The mandates of the Committee and the Special Rapporteur are, therefore, complementary rather than competitive. For Governments, however, the existence of these two separate mechanisms may imply a certain duplication of work; this duplication should be avoided as far as possible. For example, the periodic reports to be submitted by States parties to the Committee under article 19 of the Convention, should also be conveyed to the Special Rapporteur; he would then not have to approach such Governments for information on legislative and administrative measures during the interval between the submission of reports to the Committee. It must be pointed out again, however, that the way in which this information is used by the two mechanisms is basically different. The Committee needs this information to be

able to establish whether the State party has complied with its treaty obligations; for the Special Rapporteur this information is essential as it enables him to draw a general pattern of the existence of preventive measures and, on this basis, to make recommendations of a general nature.

13. In view of the complementary character of the two mechanisms, the Special Rapporteur is looking forward to the Committee taking up its functions and he is confident that fruitful co-operation will enrich both mechanisms, since their ultimate goal, the eradication of torture, is identical.

II. ACTIVITIES OF THE SPECIAL RAPPORTEUR

A. Correspondence

14. In pursuance of paragraph 8 of resolution 1987/29, the Special Rapporteur addressed note verbales to Governments on 3 July 1987 requesting that they provide information on measures taken or envisaged to prevent and/or combat torture. The Special Rapporteur also drew attention to the importance of the establishment of a system of periodic visits as well as training programmes for law enforcement and security personnel. Furthermore, he requested general information or observations in connection with his mandate.

15. In response to his request, the following Governments submitted information: Argentina (7 December 1987), Bahrain (14 August 1987), Bulgaria (20 August 1987), Byelorussian Soviet Socialist Republic (17 September 1987), Canada (8 September 1987), Cuba (12 September 1987), Cyprus (15 October 1987), Greece (16 November 1987), German Democratic Republic (23 September 1987), Guatemala (25 August 1987), Iraq (17 July 1987), Libyan Arab Jamahiriya (12 October 1987), Mexico (23 September 1987), Netherlands (11 August 1987), Panama (22 September 1987), Paraguay (20 July 1987), Peru (25 July and 21 August 1987), Philippines (1 October 1987), Poland (29 October 1987), Republic of Korea (24 September 1987), Sudan (19 November 1987), Trinidad and Tobago (30 September 1987), Turkey (8 September 1987), Ukrainian Soviet Socialist Republic (12 November 1987), Yugoslavia (16 October 1987). The Governments of Burma and Kenya provided information in reply to the request sent by the Special Rapporteur in July 1986.

16. As in previous years, the Special Rapporteur received numerous allegations of the practice of torture from different sources. After analysing them, letters with a summarized description of these allegations were transmitted to 29 countries for clarification. In addition, the Special Rapporteur decided to retransmit, on 26 June 1987, allegations sent to 17 Governments in 1985 and 1986. At the time of preparation of this report, no replies to these reminders had been received from the Governments of Afghanistan, Burkina Faso, the Congo, Guatemala, the Islamic Republic of Iran, Israel, Mozambique, the Sudan, Suriname, the Syrian Arab Republic, Togo, Uganda, Zaire and Zimbabwe.

B. Urgent action

17. A number of requests for urgent action were received during 1987. The Special Rapporteur decided to bring 14 of these to the immediate attention of the respective Governments on a purely humanitarian basis, to ensure that the right to physical and mental integrity of the individual was protected. He also requested information on remedial measures, including those taken by the judiciary, in case the allegations were proved correct. Most of the allegations concerned persons subjected to torture during interrogation while being held incommunicado by security police.

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

(a) El Salvador (7 January and 18 September 1987) concerning seven agricultural workers held in incommunicado detention, one woman arrested by the security police during a public demonstration and a man captured at the university campus by unknown individuals;

(b) Guatemala (1 December 1987) concerning three persons allegedly detained and held incommunicado in a military base;

(c) Lebanon (28 July 1987) concerning a number of people from the same village arrested and detained by the military;

(d) Paraguay (9 January, 29 April and 18 September 1987) concerning a radio broadcaster arrested and held incommunicado by security personnel, six common criminals and four detained political leaders;

(e) Peru (1 December 1987) concerning the rearrest and possible disappearance of one person reportedly arrested by military personnel;

(f) South Africa (28 April 1987) concerning five persons held in incommunicado detention, by South African security forces in Namibia, under the Terrorism Act;

(g) Suriname (29 June 1987) concerning one person detained by the security police;

(h) Syrian Arab Republic (29 September and 4 November 1987) concerning five persons held in custody by military intelligence personnel and four others arrested by the internal security personnel and placed in incommunicado detention;

(i) Turkey (1 May 1987) concerning a woman detained by the police for interrogation on her husband's whereabouts;

(j) Zimbabwe (27 January 1987) concerning a person held in incommunicado detention under the Emergency Forces Regulations.

19. In response to appeals sent in 1987, the Special Rapporteur received the following replies:

(a) The Government of Suriname transmitted a reply by telex on 6 August 1987, rejecting all allegations that the detainee had been subjected to any form of torture. According to this reply, the detainee had been visited by a representative of the International Committee of the Red Cross (ICRC) and was entitled to legal assistance;

(b) On 17 July 1987, the Government of Turkey informed the Special Rapporteur that the detained woman had been released on 13 May 1987 and that no complaint had been made to the Turkish authorities regarding torture. In addition, it was reiterated in the reply that "Turkish authorities are compelled by law to commence an official inquiry in cases of such complaints, as torture is categorically prohibited and is subject to prosecution";

(c) In a letter dated 25 November 1987, the Government of South Africa provided information on five individuals detained by the South West Africa police, under the provisions of section 6 (i) of the Terrorism Act 83 of 1967, and allegedly subjected to torture. According to the Government, "inquiries have revealed that they were neither assaulted nor psychologically mistreated. All have been visited fortnightly by magistrates and medical

practitioners operating independently. The detainees were informed of their right to petition to the Cabinet of the Transitional Government concerning either their conditions of detention or their release. No such petition was received";

(d) Regarding El Salvador, the Special Rapporteur was informed that seven agricultural workers and one woman held in detention had been released under the amnesty law. No information was provided on the alleged torture and disappearance of a man in September 1987 which occurred at the university campus;

20. The Special Rapporteur received five replies concerning appeals transmitted during 1986 from Bahrain (14 August 1987), El Salvador (11 February and 7 September 1987), Paraguay (20 January 1987) and South Africa (2 February 1987).

C. Consultations

21. Following the established practice, the Special Rapporteur held consultations in Geneva during visits in April, June, July, September and December 1987. Private consultations with representatives of those Governments which expressed the wish to meet with him were maintained. He also met members of non-governmental organizations and private individuals who claimed to be victims of torture.

D. On-site observations

22. On several occasions the Special Rapporteur has expressed his readiness to travel to the territory of any member State with the consent or at the invitation of the Government concerned for the purpose of carrying out on-site consultations. In this connection, the Special Rapporteur held preliminary talks in Geneva early in 1987 with representatives of Argentina, Colombia, Peru and Uruguay. He proposed a regional visit with the purpose of exchanging views with governmental authorities, focusing in particular on remedial and preventive measures aimed at assisting in the eradication of the phenomenon of torture. All four Governments invited the Special Rapporteur who initially planned his visit from 6 to 18 December 1987. By letter dated 27 October 1987, he formally transmitted to the above-mentioned Governments dates and programmes, which were acceptable to all except Peru, which expressed a preference for the visit to take place in January 1988 in view of the fact that, during the period suggested by the Special Rapporteur, few, if any, of the officials he wished to meet would be available.

III. NATIONAL STANDARDS FOR CORRECTING AND/OR PREVENTING TORTURE

23. In pursuance of paragraph 8 of the Commission resolution 1987/29, on 3 July 1987 the Special Rapporteur addressed notes verbales to Governments with the request that they provide information on measures taken and/or envisaged to prevent and/or combat torture. Further attention was drawn to paragraphs 2 and 6 of the same resolution pertaining to the establishment of a system of periodic visits and to the importance of training programmes for law and security personnel.

24. In response to his request, the Special Rapporteur received information from 25 States concerning their respective regulations designed to correct and/or prevent torture, namely: Argentina, Bahrain, Byelorussian SSR, Canada, Cyprus, Greece, German Democratic Republic, Guatemala, Iraq, Libyan Arab Jamahiriya, Mexico, Netherlands, Panama, Paraguay, Peru, Philippines, Poland, Republic of Korea, Sudan, Trinidad and Tobago, Turkey, Ukrainian SSR, Yugoslavia.

25. Argentine reported that torture was prohibited by the Constitution and that article 144 of the Argentine Penal Code had been amended by Law No. 23097 of 28 September 1984 in pursuance of which:

"Any public official who subjects individuals, lawfully or unlawfully deprived of their freedom, to any kind of torture, shall be punished by rigorous or ordinary imprisonment from 8 to 25 years and by general disqualification for life, it being sufficient that the official has de facto power over the victim even if the latter is not legally in his charge. The same penalty shall be applied to private individuals who carry out those acts. Further, in the event that death of the victim should ensue in consequence of the torture, a custodial penalty, rigorous or ordinary imprisonment, will be enforced. The same provision defines as torture not only physical suffering but also the inflicting of mental suffering when it is sufficiently serious (art. 1 of Law No. 23097 amending art. 144 (3) of the Argentine Penal Code). The foregoing implies that torture is equated with the crime of murder in the Argentine legal order."

In addition, this law lays down severe penalties for any public officials who, although in a position to do so, do not prevent the crime of torture from being committed and for those who, having knowledge of such a crime, do not report it within 24 hours. If the official in question is a doctor, the Law makes him liable to specific disqualification from exercising his profession for twice as long as the prison sentence imposed. Under the Law the same charge can be brought against a judge who, having knowledge of any such facts by reason of his office, does not draw up the corresponding indictment or report the matter to the competent judge within 24 hours.

26. The Special Rapporteur was informed by the Governments of Bulgaria (20 August 1987), the Byelorussian SSR (17 September 1987), Iraq (17 September 1987), Mexico (23 September 1987), Panama (22 September 1987), the Sudan (19 November 1987), Trinidad and Tobago (23 September 1987) and the Ukrainian SSR (12 November 1987) on their domestic legislation on prohibition of torture with specific reference to their respective Constitutions, Penal Codes and Codes of Criminal Procedure.

27. On 14 August 1987, the Government of Bahrain informed the Special Rapporteur that torture was prohibited by articles 19 (d) and 20 (d) of the Constitution. It also made reference to article 208 of the Penal Code and article 218, paragraph 1 of the Code of Criminal Procedure and transcribed the text in accordance with which the accused, or his defence counsel had the right to present to the court complaints on torture or degrading treatment.

28. The Government of Bulgaria made reference to the information submitted in the past, reiterating its support for action aimed at proscribing the use of torture and other cruel, inhuman or degrading treatment or punishment and informed the Special Rapporteur that it had ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 1 December 1986.

29. By a note verbale of 8 September 1987, the Government of Canada made reference inter alia to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Government stated that Canada had ratified the Convention on 24 June 1987. In order to ensure compliance with the Convention, it had amended the Criminal Code to create a specific offence of torture (sect. 245.4). The amendment prohibited acts of torture committed by officials, such as peace officers, public officers and members of the military forces, or by persons acting at the instigation of or with the consent or acquiescence of such persons. In accordance with the terms of the Convention, the jurisdiction to try these offences had been extended to acts committed outside Canada. With regard to the legal provisions governing police and security forces the Government of Canada wished to advise the Special Rapporteur that, in addition to the above, the use of force by police agencies was regulated by legislative, regulatory and administrative provisions. The standards set out in those provisions met and often exceeded those set out in the United Nations Code of Conduct for Law Enforcement Officials.

30. On 25 August 1987, the Government of Guatemala informed the Special Rapporteur that on 13 August 1987 the Congress had elected by consensus the Procurator for Human Rights. It may be recalled that, in accordance with article 6 of the Act on the Human Rights Commission of the Congress of the Republic, the Procurator (equivalent to an ombudsman) is a commissioner of the Congress of the Republic for the defence of human rights which are safeguarded by the Constitution and the international treaties and conventions acceded to by Guatemala. He exercises his duties for a period of five years and has legal personality, jurisdiction and competence throughout the Republic; he is the highest authority in respect to human rights matters and is not subordinate to any organ or official. Among the most relevant of his competences, the Procurator may "investigate any complaints concerning violations of human rights submitted to him by any individual" and "promote actions and remedies, judicial or administrative, wherever appropriate" (art. 15 (c) and (f)). In particular, article 17 establishes that the Procurator "shall take steps to ensure that fundamental rights, the exercise of which has not been expressly restricted, are fully guaranteed during a state of emergency ...".

31. The Special Rapporteur took special note of the information submitted by the Government of the Republic of Korea. In addition to the legal safeguards stated in the Constitution and other internal legislation, the Government stated that an Ad Hoc Committee had been established in 1987 for the protection of human rights under the direction of the Prime Minister. The Committee conducted a study regarding legal, institutional and other aspects of human rights violations, and made recommendations with a view to improving the legal and institutional safeguards against human rights violations. In addition, Human Rights Counselling Offices had been set up in all District Prosecutors Offices and their branches throughout the country. Those Offices were established to deal with cases involving human rights violations with regard to compensation for victims of torture incidents.

Article 2 of the National Compensation Act Liability for Redress of Damages, stated that "when public officials inflict damages on other persons intentionally or negligently in the course of performing their official duties, in violation of laws or decrees ... the State or local autonomous governments shall redress the damages".

32. On 11 August 1987, the Government of the Netherlands informed the Special Rapporteur that it was finalizing its preparations for the ratification of the Convention against Torture, which was expected to take place in the near future. The Government also stated in the report of the Netherlands to the Human Rights Committee regarding article 7 of the International Covenant on Civil and Political Rights, that the new feature of the revised Constitution of the Netherlands is the inclusion of the right to inviolability of the person in article 11. Restrictions on this right may only be introduced by or pursuant to statutory regulations. Additional article VII allows the legislative branch a certain amount of time for the enactment of this statutory regulation.

33. On 20 July 1987, the Government of Paraguay reported that article 65 of chapter V of the Constitution entitled "Concerning individual guarantees" warns that the inhabitants of the Republic against certain acts, including as follows:

"No one shall be subjected to torture or to cruel or inhuman treatment. The prison system shall be organized in suitable, salubrious and clean institutions, and it shall seek to promote the social rehabilitation of the prisoner, by a comprehensive treatment to be determined by the law."

The Government also states that "proceedings have been instituted against persons responsible for security and public order in cases when they have perpetrated abuses of authority resulting in infringements of the aforementioned provision of the Constitution".

34. The Government of Peru transmitted the text of Law No. 24700, enacted on 24 June 1987, on "Rules for the conduct of the police investigation, proceedings and trial of crimes committed for terrorist ends." According to this law:

"When a person is arrested or denounced for the crime of terrorism, the police authority, the relatives of the person arrested or the commissions on human rights shall notify the matter immediately and in writing to the competent magistrate, who shall present himself forthwith at the place which will be an official detention centre. The police shall

notify in writing the person indicated by the detainee. The provincial magistrate shall assume direct responsibility for the investigation in defence of the legality, human rights and interests protected by the law; the members of the police forces shall participate and act in the investigations ordered by the magistrate. The participation of the defence counsel in each and every one of the investigations conducted is essential. The right to a defence may not be waived. If, for any reason, the defence counsel fails to respond to two consecutive summonses, the representative of the Public Prosecutor's Department appoints another defence counsel forthwith. In the event that it is essential for the elucidation of the crime, the provincial magistrate shall request the examining magistrate to authorize the incommunication of the detained person for a period not exceeding 10 days. The incommunication does not preclude conferences in private between the defence counsel and the detained person. Such conferences may not be prohibited by the police, in any circumstances. Neither do they require any prior authorization, by notifying the provincial magistrate. Once the police investigation is concluded, the Public Prosecutor's Department shall report to the examining magistrate within a period of 24 hours, if it considers the act complained of to constitute an offence."

35. By a note verbale dated 8 September 1987, the Government of Turkey made reference to information submitted to the Special Rapporteur on 16 September 1985, on 26 November 1985 and on 16 September 1986 and stressed the importance of training law enforcement personnel. In that regard the Government stated:

"In Turkey the parliament, the Government, judicial authorities, the press and public opinion are sensitive to the subject of ill-treatment. Recognizing the fact that an insufficient level of education is one of the root causes of isolated acts of ill-treatment, the Turkish Government has taken measures with a view to increasing the educational level of the police forces. The aim of the new educational measures is to increase the sensitivity of the personnel towards fundamental human rights and freedoms, and thus to promote respect for these concepts. To this effect, courses on 'Relations with citizens, laws regarding constitutional rights, the Criminal Code and disciplinary regulations' are offered to students. As to the issue of identifying the offence and the suspect and to that of handing over the criminals to judiciary authorities, courses entitled 'On-the-spot investigation, prosecution, interrogation and interrogative techniques and psychology of the criminal' are offered with a view to enabling police officers to work with scientific methods".

36. Regarding training programmes for law enforcement and security personnel, the Governments of Cyprus, Greece and the Philippines also made specific references. In this connection the Government of Cyprus informed the Special Rapporteur that police recruits were undergoing "courses on law, in particular criminal law and procedure, which lasted about one academic year; also regular refresher courses lasting about 10 weeks were held. Furthermore, the Police Regulations before the House of Representatives contained a provision that any complaint against a member of the police for ill-treatment of a person under detention or during his trial would be examined by a special committee on complaints".

37. The Government of the Philippines stated that the following measures had been taken by the Government to prevent and/or combat torture:

"... the study of human rights as an integral and indispensable part of the education and training programmes of all military and police units, service schools and academies, including the Philippine Military Academy, in compliance with OP Memorandum Order No. 20 dated 4 July 1986; [the organization of] seminars, jointly with the Department of Justice, for ranking military/Integrated National Police officers and prosecuting fiscals on subjects pertaining to human rights, such as arrest, search and seizure; custodial investigation, filing and prosecution of cases, handling and administration of persons in custody, and other related subjects; ... troop information and education campaigns for all military and police personnel with emphasis on respect for human rights; [the establishment of the] Special Action Committee (SAC) at General Headquarters, Armed Forces of the Philippines, and at the Headquarters of Major Services and Regional Unified Commands to act promptly on issues and complaints that are related to human rights violations. SAC actions include ... the monitoring, investigation, and reporting of human rights violations".

38. In his first report the Special Rapporteur referred to the 1983 United States Export Administration Regulation under which export licences for "specially designed implements of torture" could be granted. By letter of 22 April 1987 the United States Government informed the Special Rapporteur that the Export Administration Regulations had been amended as of 10 April 1987. Paragraph 375.14 dealing with the export licence requirements for crime control and detection commodities now contains the following provision: "Application for validated export licences for 'specially designed implements of torture' will be denied". The Special Rapporteur was also informed that under the previous legislation no export licences for "specially designed implements of torture" had been granted.

39. It has been brought to the Special Rapporteur's attention that in some federal States the competence to enact legislation and to decide upon administrative regulations with regard to law enforcement personnel and the régime of places of detention lies with the constituent States. The authorities of the constituent States are often not fully aware of the developments which have taken place at the international level. Consequently, implementation of the various instruments adopted within the context of the United Nations in such cases may not comply fully with the standards which might be expected. In this respect, it might be useful to remind the Governments concerned that a similar situation is covered by article 41 (b) of the 1951 Convention relating to the Status of Refugees, where it is said that:

"... with respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment".

This provision might find analogous application in cases where the complete prohibition of torture must be given effect. In this context it is also interesting to note the provision of article 41 (c) of the same Convention, which requests a federal State party to supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action. The Special Rapporteur would appreciate it if federal Governments were to provide him with information not only about what has been done to implement the prohibition of torture at the federal level but also at the level of the constituent units.

IV. TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

40. In his first report to the Commission (E/CN.4/1986/15), the Special Rapporteur made a distinction between two main types of torture: physical torture on the one hand and psychological or mental torture on the other (para. 118); he continued by giving a list of methods of torture (para. 119). He cautioned, however, that the two main types of torture were interrelated and that, ultimately, both had physical and psychological effects. He also cautioned that the list of methods of torture was not exhaustive.

41. In another part of that same report the Special Rapporteur said that there was a "grey area" between torture (proper) and other treatment or punishment: he submitted that he had to take certain cases of cruel, inhuman or degrading treatment or punishment into account since they could, in a further analysis, constitute an act of torture (para. 23). Recently, various situations have been brought to the attention of the Special Rapporteur, which can be said to belong to that "grey area". They are described below.

A. Corporal punishment

42. The penal codes of some countries recognize corporal punishment, e.g. flogging or amputations, as a sanction against violators of the law. First of all, it must be said that the fact that these sanctions are accepted under domestic law does not necessarily make them "lawful sanctions" in the sense of article 1 of the Convention against Torture. In this respect reference may be made to the opinion of the Human Rights Committee that "the prohibition (of art. 7 of the Covenant on Civil and Political Rights) must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure". ¹/ It is international law and not domestic law which ultimately determines whether a certain practice may be regarded as "lawful".

43. The Special Rapporteur has had consultations with the representative of a State where these forms of corporal punishment are recognized under domestic law and are actually applied. He has welcomed these consultations and expresses the hope that they will be continued, and that the representatives of other States which have comparable legal provisions will be in a position to do likewise. The said representative told the Special Rapporteur that such forms of punishment were based upon religious prescriptions; moreover, within the socio-cultural context of his country, those sanctions were effective and must, therefore, be deemed indispensable; besides, they were also generally accepted by the people as a whole. It was also pointed out that such sanctions, though severe and therefore applied only in exceptional circumstances, were milder than the death penalty, since the convicted person's life was not affected. Capital punishment, however, was not forbidden under international law.

44. The fact that highly authoritative religious books recognize or even legalize certain institutions and instruments does not necessarily mean that those institutions and instruments are valid for all places and all times. Slavery may be taken as an example: although slavery was accepted by virtually all traditional religions, it is now generally recognized that it is not compatible with the inherent dignity of man; consequently it is outlawed and seen as one of the most serious violations of human rights. In a similar

way, an opinio iuris has developed to the effect that the infliction of severe physical or mental pain is irreconcilable with the required respect for man's physical and mental integrity, even in cases where sanctions in themselves are fully appropriate and even called for.

B. Inhuman prison conditions

45. In various instances the Special Rapporteur's attention has been drawn to the extremely poor prison conditions prevalent in some countries, either in general or with respect to certain categories of prisoners. Inhuman prison conditions may indeed lead to severe suffering in an aggravated form, especially when they are the consequence of a deliberate policy, and therefore constitute torture in the proper sense of the word. Severe suffering may however also be the result of negligence or extreme lack of care on the part of the authorities. Since in that case the suffering is not intentionally inflicted it does not come under the definition of torture proper; nevertheless such inhuman prison conditions can easily constitute "inhuman or degrading treatment" which would imply a violation by a State of its obligations under international law as well.

C. Generally applied harsh treatment

46. What has been said above about inhuman prison conditions is also relevant to a large extent for harsh treatment of detainees. When harsh treatment is applied deliberately to certain categories of detainees or when there is a clear intention to inflict pain on an inmate of a place of detention, this may be a form of torture. When the régime in such places in general is extremely harsh, for example when it takes the form of indiscriminate beating, it constitutes inhuman or degrading treatment.

D. Prolonged stay on death row

47. It is not uncommon that persons who have been sentenced to death have to wait for long periods before they know whether the sentence will be carried out or not. If this delay is the consequence of appeal procedures or requests for pardon, it is inevitable; if the uncertainty, however, lasts several years (which is far from unusual), the psychological effect may be equated with severe mental suffering, often resulting in serious physical complaints. Here, again, it may be asked whether such a situation is reconcilable with the required respect for man's dignity and physical and mental integrity.

E. Detention of minors together with adults

48. The attention of the Special Rapporteur has been drawn to the fact that in some countries minors (sometimes of a very young age) who are suspected of or convicted for common crimes are detained together with adults. It is not unusual for the other prison inmates to exploit these minors mercilessly, sometimes even physically (i.e. sexually). Although this practice of detaining minors together with adults is already at odds with the generally accepted principle of rehabilitation of convicted persons, and is in contravention of article 19, paragraphs 2 (b) and 3, of the International Covenant on Civil and Political Rights, it may also lead to severe physical and mental suffering for the minors concerned.

49. Although these categories of treatment of detainees are to a certain extent entirely different in character, they all seem to belong to the grey area, referred to earlier. In some cases this treatment may constitute torture, especially since torture also includes the infliction of pain or suffering with the acquiescence of a public official. In other cases it may be more appropriate to speak of cruel, inhuman or degrading treatment or punishment. For this reason the Special Rapporteur feels that, whenever he is provided with reliable information dealing with such treatment of detainees, he is acting within the terms of his mandate if he brings such information to the attention of the Governments concerned and asks for their comments. In this respect it seems worthwhile to repeat what was said about the character of the mandate in chapter I, namely that comments by States are needed in order to enable the Special Rapporteur to draw a general picture of the existence of torture and similar practices and to formulate recommendations to prevent such practices.

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

50. The information received by the Special Rapporteur during the period under review confirms the picture given in the two previous reports: torture is still a widespread phenomenon. The fact that allegations keep coming in from some countries where, after a change of régime, the present Government has unequivocally stated that it will not tolerate torture any more proves how tenacious the practice of torture is. Evidently harsh treatment of detainees, often amounting to torture, has become a way of life in such a society and it seems to be extremely difficult to change those patterns of behaviour. Under such circumstances very strict retraining programmes and heavy penalties whenever torture actually occurs are vitally necessary. Also visits to places of detention by external experts, who can make recommendations to the authorities after these visits, may contribute to a change of the prevalent climate.

51. The fact that torture is still widespread is partly the result of civil strife or internal war in a number of countries. As was pointed out in the previous reports, such a situation easily lends itself to the practice of torture, since respect for human life and human dignity is generally low. The problem, however, is compounded by the fact that in many cases a state of emergency is declared for the regions which are particularly afflicted by the civil unrest, or in some cases for the whole country. If under such a state of emergency article 9 of the International Covenant on Civil and Political Rights or comparable provisions of national law are suspended, the guarantees for the respect of the prohibition of torture from which no derogation may be made (art. 7) are also jeopardized. Even when provisions governing national remedies, such as habeas corpus or amparo are maintained, as was recommended in the Special Rapporteur's first report (para. 42), the effectiveness of such guarantees is often undermined since the judiciary, which has to provide those guarantees, often has no access to places of detention in areas under a state of emergency which are generally under military control. Therefore, people can be kept in detention virtually indefinitely and their whereabouts can remain unknown. These circumstances are exceptionally "well-suited" to the practice of torture as the allegations received in a great number of cases attest. The psychological conditions for the practice of torture may be strengthened by the fact that insurgents also apply inhuman practices vis-à-vis the military and other public officials and sometimes the local population as well, although such insurgents are often indistinguishable from that local population. Under those circumstances every person is a potential suspect and, since he can be kept incommunicado for a considerable time, ruthless interrogation methods can be used and very often are. Sometimes it is even maintained that torture is inevitable and therefore pardonable, if practised against "terrorists" in order to obtain information necessary to save the lives of innocent people.

52. Torture, however, is generally recognized to be prohibited under all circumstances, as is clearly and unequivocally spelt out in article 2 of the 1985 Convention against Torture. Although it serves no purpose to underestimate the difficulties in such situations and the near impossibility of maintaining the rule of law wholly intact, Governments should be continuously aware that national security is not an aim in itself but has to be achieved for the well-being of the people. They should therefore constantly remind those who are primarily in charge of the task of restoring

national security and internal stability that the basic human rights of the civilian population should be scrupulously respected. Only then can national security and human rights, which are seemingly so often in conflict in the situation just described, be reconciled to the best possible extent.

53. It is even less pardonable when torture is practised to prevent civil unrest, to extirpate all opposition and to stifle all dissent. In the former case there is a lack of control on the side of the authorities, in the latter case there is complete control. Here it is the Government itself which deliberately uses torture as a means to spread terror. In this case the possibilities for other Governments to bring pressure to bear on that Government are much clearer. In this respect it should be recalled that the practice of torture is not only a violation of a State's obligations under international law towards its own subjects, but also towards the other members of the international community, since the prohibition of torture is one of the erga omnes obligations of a State (see the Special Rapporteur's second report, paras. 35-46).

54. The picture provided by the information received by the Special Rapporteur is, however, more diffuse and complex than may be assumed from the description of the situations discussed until now. Allegations also come in with regard to countries where the circumstances mentioned above do not prevail. Dealing with those allegations the Special Rapporteur has come to the conclusion that there is a very close link between article 7 of the International Covenant on Civil and Political Rights (the prohibition of torture) and article 10, paragraph 1, which states that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

55. It is the Special Rapporteur's considered opinion that there is a sliding scale which extends from the treatment of detainees which is not in conformity with the provision of article 10, paragraph 1, through inhuman or degrading treatment to real torture. The grey area, referred to in chapter IV, may eventually be much larger than was depicted there. What article 10, paragraph 1, in fact says is that detainees are human beings like those who detain them, that they have the same human dignity and that they are not a despicable group of persons removed from society but are only temporarily (and in some cases indefinitely) deprived of their liberty and consequently cannot move around in that society; places of detention, however, are as much part of that society as other institutions and the same basic rules of law apply to them.

56. This viewpoint, authoritatively recognized by the international community, nevertheless calls for a change of attitude since for centuries detainees have been seen as outcasts, as inferior persons having no rights or privileges. Many prison régimes basically still reflect that view and it is precisely in those places that torture is alleged to take place on an incidental, or sometimes even on a regular basis. As long as this attitude of mind prevails, even if only a few preventive factors which are normally present are removed, that may be sufficient for non-humanitarian treatment to become inhuman treatment or even torture.

57. It is for this reason that the Special Rapporteur has emphasized in his previous reports the importance of training and of re-education programmes for law enforcement and security personnel. He has learned with satisfaction from

information conveyed to him that in several countries, in particular in countries where torture was regularly practised under a previous régime, new training programmes have been introduced (this information is reflected in chap. III). It is, however, necessary for all Governments to evaluate their training programmes periodically in order to see whether they are still in conformity with the precepts of articles 7 and 10, paragraph 1, of the International Covenant on Civil and Political Rights. For, in order to eradicate torture, it is not sufficient merely to prohibit it in a penal code in which it is sanctioned by severe penalties. Such provisions, though necessary, place torture in a separate category of serious crimes and nobody, and certainly not a person who is entrusted with the enforcement of the law, sees himself easily in the role of a serious offender of the law. But experience has shown that torture very often is the last phase of a long process, starting with the negation of the detainee's human dignity. This process, ending with physical abuse, has its origin however in the mind and it is there that preventive measures have to start.

58. The Special Rapporteur also received information about measures taken against victims of torture who have publicly testified about what has happened to them and against persons who have taken up their cause. It seems to be quite common for detainees on their release to have to sign a statement or to declare that they will not make any comments on the way they were treated during detention. If they nevertheless denounce what happened to them, they are sometimes rearrested. In other cases representatives of human rights organizations who publicly expose torture practices have been the victims of harassment or have even been arrested. In some cases lawyers who have lodged a complaint about torture with the authorities on behalf of their clients have themselves been arrested or debarred. It goes without saying that such practices are in flagrant contravention of the spirit of the prohibition of torture. People who declare themselves to be the victims of torture should under all circumstances be able to lodge a complaint and to obtain redress, as is also provided in article 14 of the Convention against Torture. Even if, as is sometimes maintained, these denunciations are made for political motives to embarrass the authorities, each formally lodged complaint should be the subject of an independent judicial inquiry.

VI. PREVENTIVE MEASURES

59. In his first report (para. 8) the Special Rapporteur stated that as long as there were situations in which human beings found themselves in the absolute power of other human beings, such situations would be conducive to the practice of torture. He continued by saying that as such situations would always occur, it was highly important to develop a system with built-in checks and balances. In this chapter some more detailed attention will be given to such a system which also could be described as a network of preventive measures.

60. However, first one remark of a more general nature must be made. In a reply from a Government received by the Special Rapporteur it was submitted that some of the preventive measures recommended by him in his second report were not necessary in the case of that particular country, since the existing legislative and judicial guarantees to obtain redress in case of abuse of power by governmental officials were fully satisfactory. A clear distinction, however, must be made between preventive measures and repressive measures. Both are equally necessary but they are not interchangeable since their respective function is different. The availability of means to obtain redress and the existence of legal provisions which make it possible to punish severely persons who have practised torture deal with the consequences of torture once it has occurred. Preventive measures have the function of forestalling the occurrence of torture. The punishing of torture with severe sentences may have a preventive effect also but its main function is repressive. Since situations which are conducive to torture will exist in any society, the main emphasis should be on measures which are geared to the prevention of torture. Such measures can never be replaced by repressive measures which do nothing to correct the situations which make torture possible.

61. In his second report, the Special Rapporteur drew attention to a system of periodic visits by a group of experts to places of detention or imprisonment, along the lines of the proposal contained in the draft optional protocol to the (then draft) convention against torture, submitted by the Government of Costa Rica in 1980. In 1985, the Commission on Human Rights decided to postpone consideration of that proposal, since a similar idea was under discussion in the context of the Council of Europe. Concurrently it recommended that other interested regions where a consensus existed should consider the possibility of preparing draft conventions based on the same concept.

62. In the meantime the deliberations in the Council of Europe have led to a successful result. On 26 June 1987, the European Convention on the Prevention of Torture and Inhuman and Degrading Treatment and Punishment was adopted and on 26 November 1987 it was opened for signature. The Special Rapporteur has been informed that the conclusion of a comparable convention in the context of the Organization of American States is under consideration.

63. Although the Special Rapporteur remains of the opinion that the existence of regional conventions would not necessarily stand in the way of the conclusion of a world-wide convention to which States which are subject to such a system of visits under a regional system could also become parties, he feels that the present moment may not be propitious for the conclusion of such a world-wide treaty, since a great number of States may be preoccupied with regional efforts.

64. There is no reason, however, to leave the idea of a system of visits completely to regional arrangements and not to pursue it at a world-wide level at the same time. As a provisional measure consideration might be given to requesting the Secretariat to establish a panel of experts within the context of the programme of advisory services: each Government, which feels that it is in a position to do so, could, through the Centre for Human Rights, invite members of the panel to visit its country and inspect places of detention, preferably on a periodic basis. Some experience could be gained from such a system of visits, which would be of great value when the idea of a world-wide convention is eventually taken up again. The mandate and terms of reference for each visiting team could be drawn up by the country concerned and the Centre for Human Rights each time, which would assure a maximum of flexibility.

65. The importance of a system of visits as a preventive measure against torture and similar practices can hardly be exaggerated, even if provisionally it is realized only on a purely voluntary basis. It would be a highly effective form of advisory service, rendered on the spot. For this reason it should remain on the agenda of the United Nations even if, for the time being, it is not given a conventional basis.

66. In this context it is also useful to remind Governments of the possibility of granting admission to ICRC teams to places of detention and imprisonment. The important contribution afforded by such visits to a greater respect for the human dignity of detainees in past and present needs no further illustration.

67. It is generally known that torture is most common when people are held in incommunicado detention. Since torture is practised in secrecy this secrecy is best protected by incommunicado detention. Abolishment by law of all possibilities for incommunicado detention therefore would be a highly effective preventive measure. In this context, mention should also be made of the fact that countries which do not allow incommunicado detention under their national legislation sometimes nevertheless recognize that a person under arrest may be locked up for a certain period (e.g. 24 or 48 hours) in a police station before the case is brought to the attention of the judicial authorities. Great care must also be taken during this limited period to ensure that the physical and mental integrity of the detainee is not harmed.

68. Preventive effects may also be expected from a medical examination of detainees immediately after their arrest. If a detainee is certified to be in sound condition at the moment of his arrest, it will be more difficult to explain why his health has deteriorated during his period of detention. Such a measure is also in conformity with Rule 24 of the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 which states that the medical officer (of the institution) shall see and examine every prisoner as soon as possible after his admission. In order to be really effective this examination should take place not only in official prisons but in all places where people are detained, for example for interrogation purposes.

69. Quite frequently people die during detention and their death is alleged to be due to torture. In other cases the bodies of persons who have disappeared but who have allegedly been kept by some State entity are found for example in the street. In all these cases a formal autopsy should be held

in the presence of persons chosen by the relatives of the deceased. The drafting of a set of minimum rules on autopsy with a particular reference to the phenomenon of torture could be envisaged.

70. In another part of this report (para. 57) the Special Rapporteur has again stressed the importance of training programmes for police and security personnel. It suffices to refer to this paragraph here.

71. In his second report, the Special Rapporteur recommended the establishment of an independent ombudsman-type authority which could receive complaints about administrative abuses, including torture. The establishment of such an institution would be a combination of a repressive and a preventive measure. The long-term effect would certainly be preventive if its repressive function was seen to be effective. In order to be effective, the authority should be easily accessible, people should be able to consult it unnoticed, the threshold of approach should be as low as possible and formalities should be minimal.

72. A network of preventive measures of this kind or of a related nature (recommended in previous reports) to be taken on the national level may well be the most meaningful contribution to the eradication of the phenomenon of torture.

VII. CONCLUSIONS AND RECOMMENDATIONS

73. The crusade against torture within the United Nations has been under way now since 9 December 1975, when the General Assembly, by consensus, adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Important instrumental and institutional steps have been taken since then. Reference may be made to the adoption of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 10 December 1984, the appointment of a Special Rapporteur of the Commission on Human Rights on questions relevant to torture on 22 May 1985, the entry into force of the Convention on 26 June 1987 and the election of the Committee against Torture, to be established under that Convention, on 26 November 1987.

74. Of more importance, however, is the question whether this crusade has led to concrete results. Certainly one of the consequences is that there has been a general awakening to the phenomenon of torture: the Governments as well as the peoples of this world universally condemn torture as one of the most heinous violations of basic human rights; all over the world non-governmental groups have sprung up which deal specifically with the subject of torture; numerous symposia have been organized to discuss ways and means to eradicate this evil.

75. But in spite of all this, allegations of torture have continued to come in; their number does not show a tendency to decrease. New techniques of torture - sometimes horrifyingly sophisticated - are invented, new instruments for torture - sometimes specifically designed not to leave physical marks - are developed. The cries of pain and anguish from the victims of torture are still louder than the cries of indignation at the practice of torture, although the former often cannot be heard.

76. How can this remarkable discrepancy between legal opinion (opinio iuris) and practice be explained, a discrepancy which is not unknown in the field of human rights in general but is all the more remarkable with respect to torture, since here the practice is never justified by those who are alleged to have practised it but is flatly denied.

77. The Special Rapporteur feels that one of the reasons is that torture generally is not an isolated phenomenon which can be set aside and attacked separately. Torture is intricately linked to other violations of human rights and is only an excessive outgrowth of such other violations. This is very clear in the case of situations of civil strife and civil war where allegations of torture are invariably accompanied by allegations of involuntary disappearances and wilful killings. Often an allegation contains the simple but gruesome message that the severely mutilated body of a person who disappeared on such and such a date has been found.

78. However, in other cases torture is largely the concomitant of other human rights violations and of the absence of the rule of law. That does not mean that torture cannot occur in countries where the rule of law is securely guaranteed. As the Special Rapporteur said in his previous reports, no State may think it is wholly immune from torture, since torture may occur in any situation where man has complete power over his fellow man. However, whenever there are effective and speedy methods of redress, such cases of torture will remain isolated. But where the rule of law starts to decline torture can

easily occur. It is specifically for this reason that the Special Rapporteur placed the phenomenon of torture in a wider context in the chapter dealing with the analysis of the information received.

79. This simple but elemental truth is worded in a masterful way in the first sentence of the preamble of the Universal Declaration of Human Rights: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [including political opponents and suspected and convicted criminals] is the foundation of freedom, justice and peace in the world". When these words are taken lightly, the barriers against the practice of torture are wafer-thin; however, when they are taken seriously, the crusade against torture can never be a crusade against the symptoms, but has to acquire the character of a crusade against the root causes of torture and these root causes can be perceived in completely different places from the rooms where torture is actually practised.

80. The recommendations which the Special Rapporteur has made throughout the report must - in order to be effective - therefore be seen in this wider context; really effective measures against torture have the same starting point as the rule of law in general. The rule of law can take various forms in various circumstances (there is no single model for the rule of law), but it can never allow for torture since that is the complete and total negation of the inherent dignity and the equal and inalienable rights of all members of the human family.

81. The Special Rapporteur has made a number of recommendations throughout the present report. Some of those recommendations are summarized below and should be read together with those which have been made in previous reports and which cannot be repeated here in toto.

(a) Since many alleged cases of torture are reported to have taken place during incommunicado detention, every effort should be made to declare incommunicado detention illegal;

(b) Each arrested person should be handed over without delay to the competent judge, who should decide on the legality of his arrest immediately and allow him to see a lawyer;

(c) Every person under arrest should undergo a medical examination as soon as possible after being arrested;

(d) Whenever a person dies while in detention, an autopsy should be held in the presence of a representative of his relatives. Minimum rules on autopsy with special reference to the phenomenon of torture should be drafted;

(e) Places of detention should be regularly inspected by external experts. A system of inspection on a national level should preferably be combined with periodic visits by international experts. To this end a panel of experts should be established within the context of the programme of advisory services of the Centre for Human Rights. Governments of States not parties to a convention establishing a periodic system of visits could make use of the facility offered by the Centre;

(f) Training programmes for law enforcement and security personnel should reflect the view that detained persons are entitled to all the rights contained in the Universal Declaration of Human Rights and other legal instruments adopted by the international community. Instruction programmes and manuals on interrogation techniques should contain strict and explicit rules with regard to the prohibition of torture and other cruel, inhuman or degrading treatment.

Note

1/ Report of the Human Rights Committee, Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, para. 2.