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RIGHTS OF THE CHILD[1]

INTRODUCTION

Violation of the rights of children represent a common occurrence in many parts of the world.[2] These violations take the form of torture, cruel, inhuman or degrading treatment, disappearances, excessive work and labour, prostitution, sexual abuse and slavery. Children also form a significant proportion of the global refugee or stateless population. Millions of children around the world are at serious risk of starvation and malnutrition; according to one estimate, malnutrition, starvation and disease leads to the deaths of 40,000 children every day.[3]

As a response to these violations efforts have been made to establish a regime of international protection of the rights of children. During the twentieth century the movement to protect children was given impetus by Save the

[1] See G. Van Bueren, *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff Publishers) 1995; M. Freeman and P. Veerman (eds), *Ideologies of Children's Rights* (Dordrecht: Martinus Nijhoff Publishers) 1992; D. McGoldrick, 'The United Nations Convention on the Rights of the Child' 5 *IJLF* (1991) 132; P. Alston, S. Parker and J. Seymour, *Children, Rights and the Law* (Oxford: Clarendon Press) 1992; D. Freestone (ed.), *Children and the Law: Essays in Honour of Professor H.K. Bevan* (Hull: Hull University Press) 1990.

[2] The Convention on the Rights of the Child confirming this point notes in its preamble that 'in all countries in the world, there are children living in exceptionally difficult conditions'. Preamble to the Convention on the Rights of the Child (1989). According to Freeman 'there are countries which today are systematically exterminating children as if they were vermin. Poverty, disease, exploitation are rife in every part of the globe'. M. Freeman, 'The Limits of Children's Rights' in Freeman and Veerman (eds), above n. 1, 29–46 at p. 31; W.S. Rogers and J. Roche, *Children's Welfare & Children's Rights: A Practical Guide to the Law* (London: Hodder & Stoughton) 1994.

[3] Van Bueren, above n. 1, at p. 293. G. Van Bueren, 'Combating Child Poverty–Human Rights Approaches' 21 *HRQ* (1999) 680.

Children International Union, an international NGO established shortly after the First World War.[4] In 1924, Save the Children International Union drafted a Declaration, which is more commonly known as the Declaration of Geneva or the Declaration of the Rights of the Child.[5] This Declaration was adopted by the Fifth Assembly of the League of Nations.[6] The Declaration provides for fundamental rights of children such as the right to normal development, the right to be fed, relief from distress and protection from exploitation, and proved to be the inspiration behind subsequent international child rights instruments.

Efforts to promote the rights of children continued after the Second World War. The United Nations Charter (1945)[7] though containing references to human rights does not refer to children's rights *per se*. The UDHR (1948) contains important provisions for children, although the emphasis is upon protection and non-discrimination, rather than granting specific, independent rights to a child as a person.[8] Article 25(2) of the Declaration provides that motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. Article 26 instructs compulsory and free education at elementary level. It also provides for parents to have a prior right to choose the kind of education that shall be given to their children.[9] The ICESCR (1966)[10] contains Articles regarding education and health, issues most intimately connected to children. The ICCPR also has several Articles which protect such valuable rights as the right to life, liberty and security of persons – rights that are applicable to all individuals including children.[11] The Covenant also addresses children's rights in Article 24, which provides that:

(1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
(2) Every child shall be registered immediately after birth and shall have a name.
(3) Every child has the right to acquire a nationality.

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[4] See C.P. Cohen, 'The Role of Non-Governmental Organizations in the Drafting of the Convention on the Rights of the Child' 12 *HRQ* (1990) 137. See Save the Children website: http://www.savethechildren.org/

[5] See C.P. Cohen, 'Natural Law and Legal Positivism' in M. Freeman and P. Veerman (eds), above n. 1, 53–70 at p. 60.

[6] Record of the Fifth Assembly, Supplement No. 23 LONOJ, 1924.

[7] UNTS XVI; UKTS 67 (1946); Cmnd. 7015; See above Chapter 2.

[8] Adopted 10 December 1948, GA Res. 217, U.N. Doc. A/810, 71; see above Chapter 3.

[9] Article 26(3) UDHR.

[10] Adopted at New York, 16 December 1966. Entered into force 3 January 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 993 U.N.T.S. 3 (1967), 6 I.L.M. (1967) 360.

[11] Adopted at New York, 16 December 1966. Entered into force 23 March 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 999 U.N.T.S. 171, 6 I.L.M. (1967) 368.

The Human Rights Committee, which implements the ICCPR, has also elaborated on the provisions of Article 24 through its consideration of State reports and its general comments on the Article.

INTERNATIONAL INSTRUMENTS ON THE RIGHTS OF THE CHILD

As far as children's rights as a distinct category of human rights law is concerned, the real impetus was provided with the adoption of the United Nations General Assembly Declaration on the Rights of the Child in 1959.[12] The Declaration, which consists of ten substantive principles and a preamble, enumerates the most fundamental rights of the child in international law. The principal aim is to provide for a range of rights including the right to a name and nationality, housing, recreation and medical services. The Declaration considers the position of physically, mentally and socially handicapped children and children without a family. It proved instrumental in developing concrete international standards and in particular the drafting of the Convention on the Rights of the Child. The year 1979 was designated by the United Nations General Assembly as the Year of the Child.[13] During 1979, the UN General Assembly authorised the Commission on Human Rights to draft a Convention focusing on the Rights of the Child. A working-group established by the Commission started work on drafting of the Convention, a task that culminated in the adoption of the Convention on the Rights of the Child in 1989.[14]

The Convention came into force in September 1990. It is the most valuable treaty in the armoury of human rights law with which to protect and defend the rights of children the world over. Notwithstanding the fact that the Convention is more comprehensive than any other human rights treaty, it has attracted the greatest number of ratifications.[15] The rights provided in the Convention have been extended by the Optional Protocol to the Rights of the Child on the Involvement of Children in Armed Conflicts[16] and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.[17] Children's rights have been

[12] Unlike the UDHR, this General Assembly Resolution was adopted without any abstentions; GA Res. 1386, XIV, November 1959.

[13] GA Res. 31/169.

[14] Adopted at New York, 20 November 1989. Entered into force 2 September 1990. UN GA Res. 44/25 Annex (XLIV), 44 UN GAOR Supp. (No. 49) 167. UN Doc. A/44/49 (1989) at 166; 1577 U.N.T.S. 3. 28 I.L.M (1989) 1448.

[15] There are currently 191 States parties to the Convention. All States apart from the USA and Somalia have ratified the convention. See Appendix II below.

[16] Adopted by the General Assembly 25 May 2000. GA Res. 263, UN GAOR, 54 Sess., Supp. 49; UN Doc. A/Res/54/263.

[17] Adopted by the General Assembly 25 May 2000. GA Res. 263, UN GAOR, 54 Sess., Supp. 49; UN Doc. A/Res/54/263.

expressly incorporated at the regional level through the European Convention for the Exercise of Children's Rights (1996) and the African Charter on the Rights and Welfare of the Child (1990).[18]

Children's rights have also been integrated into the wider human rights debate. We have already noted a developing human rights jurisprudence emergent from international bodies such as the European Court of Human Rights, and the Human Rights Committee.[19] The subject is increasingly being addressed by various international and regional bodies. The new international criminal court is authorised to consider specific aspects of child rights as it qualifies the conscription of children under 15 years of age as a crime.[20] International economic agencies and intergovernmental bodies such as GATT/WTO are increasingly reacting to sensitive issues of child exploitation and child labour.[21] The focus of this chapter is upon the Convention on the Rights of the Child, however, brief consideration is given to the jurisprudence emerging from regional or national instruments.

THE CONVENTION ON THE RIGHTS OF THE CHILD[22]

The basic thrust of the Convention is that the Child has independent rights and the primary focus of the Convention is to operate in 'the best interests of the Child'.[23] According to Professor Van Bueren the Convention is essentially about what she terms as the 'four Ps'. These are:

> the participation of children in decisions affecting their own destiny; the protection of the children against discrimination and all forms of neglect and exploitation; the prevention of harm to children; and the provisions of assistance for basic needs'.[24]

There are many positive features of the Convention. The Substantive Articles (Articles 1–41) are meant to cover all kinds of civil, political, economic, social and cultural rights. This is a detailed and comprehensive set of rights. The Convention not only provides a series of new rights for children, but also reiterates the fundamental rights which are applicable to everyone. It covers civil and political rights as well as social, economic and cultural rights.

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[18] Adopted July 1990. Entered into force 29 October 1999. OAU Doc.CAB/LEGTSG/REV.1.

[19] See above Chapters 3 and 5.

[20] In its definition of 'war crimes' the Statute of the Court includes the offence of 'Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities' Statute of the International Criminal Court (1998) Article 8 (e)(vii).

[21] See D.E. Ehrenberg, 'The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labour' 20 *YJIL* (1995) 361.

[22] Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 (entry into force 2 September 1990, in accordance with Article 49).

[23] See Article 3(1).

[24] Van Bueren, above n. 1, at p. 15.

There is a detailed coverage of laws and regulations that affect children during armed conflicts. Rights, which are of a general character and have been applied in other human rights treaties, include the right to life, freedom of expression, freedom of religion, respect for privacy and the right to education. The Convention also establishes a regime of innovative rights. According to Cohen 'of the thirty-eight Articles ... which are devoted to substantive rights, at least ten of these have never been recognised for children in any other international instrument'.[25] The innovative rights, which shall be considered in due course, include those contained in Articles 8, 10, 12–16, 25, 37 and 40.

The Convention also provides children with fundamental protection such as the right to be shielded from harmful acts or practices, to be protected from commercial or sexual exploitation, physical or mental abuse, or engagement in warfare. The Convention allows for the participation of the child in various matters concerning his or her welfare, for example the right to be heard regarding decisions to be made affecting one's own life. It is fairly strong as regards provisional as well as protectional aspects. Within the Convention, the wishes of children are given much more prominence. Notwithstanding the many positive aspects in the Convention, there are also difficulties and tensions inherent in the text. The Convention represents tensions between the rights of parents, guardians and even the State *vis-à-vis* those of the child. The language of several articles is weak and vague. Furthermore, as this chapter explores, there are significant limitations in the machinery designed to implement the Convention.

ANALYSING THE SUBSTANTIVE PROVISIONS

The Convention can be broken down into three main parts: a preamble, the substantive articles (Articles 1–41) and measures of implementation (Articles 42–45). The preamble of the Convention spells out the principles and their interrelationship with other international human rights provisions. It makes reference to the human rights provisions of the United Nations Charter, to the UDHR and to the International Covenants on Human Rights. There are also references to the principles derived from the Declaration of the Rights of the Child of 1924 and to the Declaration of the Rights of the Children (1959).[26]

Definitional issues and the obligations of States parties to non-discrimination

The Convention accords the child with a definition. According to Article 1, for the purposes of the Convention a child is 'every human being below the

[25] See C.P. Cohen, 'Natural Law and Legal Positivism' in M. Freeman and P. Veerman (eds), above n. 1, 53–70 at p. 61.

[26] See the preamble to the Convention.

age of eighteen years unless, under the law applicable to the child, majority is attained earlier'. The provision represents a compromise since States parties differ in their views on the age of majority. At the same time the phrase 'unless, under the law applicable to the child, majority is attained earlier' puts the helpfulness of the article in doubt. According to McGoldrick:

> Article 1 clearly permits the national law of a State to provide that majority is attained at an age earlier than eighteen. Although that individual is then entitled to all the human rights of an adult, the special protection applicable to children no longer covers them. A minimum age limit for the declaration of majority by national laws should have been included.[27]

Article 1 uses the term 'human being' and the most common deduction appears to be that it is applicable to a child who is born; a foetus thus cannot be claimed to have rights under the Convention. At the same time, the Convention specifically incorporates in its preamble, the terminology from the United Nations Declaration (1959) which applies 'special safeguards and care, including appropriate legal protection before as well as after birth'.[28] The position, as we have noted already continues to remain ambiguous, and uncertainty exists in other regional and international human rights instruments.[29] Article 2(1) sets out the obligation of the States parties, which are to:

> respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind irrespective of the child's or his or her parents or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

The reference to 'birth or other status' is aimed at according protection to children born out of wedlock. The Convention, in line with other human

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[27] McGoldrick, above n. 1, at p. 133. Also see Human Rights Committee General Comment 17(35) adopted 5 April 1989, para 4.

[28] The strength of the preambular paragraph is however watered down by a statement in the *travaux préparatoires* which notes 'in adopting this preambular paragraph, the working group does not intend to prejudice the interpretation of Article 1 or any other provisions of the Convention by the States parties'. UN Doc E/CN. 4/1989/48, para 43. See P. Alston, 'The Unborn Child and Abortion under the Draft Convention on the Rights of the Child' 12 *HRQ* (1990) 156.

[29] Attempts to incorporate an article in the UDHR prohibiting abortion proved unsuccessful. See Å. Samnoy, 'The Origins of the Universal Declaration of Human Rights' in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Kluwer Law International) 1999, 3–22 at p. 14. See Article 2 ECHR, Article 4(1) ACHR. In the context of inter-American human rights law see the *Baby Boy Case*, Case 2141 (USA), IACHR Annual Report 1980–81, 25; 2 *HRLJ* 110; for commentary on the case see D. Shelton, 'Abortion and the Right to Life in the Inter-American System: The Case of "Baby Boy"' 2 *HRLJ* (1981) *HRLJ* 309.

rights instruments[30] and case law emergent from treaties,[31] aims to eradicate all forms of discrimination against illegitimate children. The terms 'respect and ensure' impose positive obligations on the State. The usage of 'jurisdiction' as opposed to territory is also meaningful and, following Human Rights Committee jurisprudence, covers a wide range of activities which are not necessarily confined to the territorial boundaries of a State.[32] Article 2(2) goes on to provide that:

> States parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

The Article is aimed at ensuring the norm of non-discrimination in so far as children are concerned. The Article relies upon conventional terms, although it is a more comprehensive expression of efforts to prohibit all forms of exclusions and discrimination. The terminology employed here is similar to the non-discriminatory provisions in other human rights treaties. It would appear that the use of the phrase 'birth' is meant to ensure that the child born through the process of artificial insemination also receives non-discriminatory treatment.[33]

Best interest of the child

As already noted, the Convention is built around the principle that all measures undertaken must take into account the best interest of the child. This point is clearly established by Article 3. According to Article 3(1):

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

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[30] See e.g. Article 25(2) Universal Declaration of Human Rights which requires treatment of all children 'whether born in or out of wedlock'; the ACHR also notes that the States 'shall recognise equal rights for children born out of wedlock and those born in wedlock'. For consideration of this Article see S. Davidson, 'The Civil and Political Rights Protected in the Inter-American Human Rights System' in D.J. Harris and S. Livingstone (eds), *The Inter-American System of Human Rights* (Oxford: Clarendon Press) 1998, 213–288 at p. 270. The ICCPR requires children not to be discriminated on grounds of birth and the ICESCR prohibits 'for reasons of parentage'. The European Social Charter (1961) accords rights 'irrespective of marital status and family relations'.

[31] See *Marckx* v. *Belgium*, Judgment of 13 June 1979, Series A, No. 31; *Johnston and others* v. *Ireland*, Judgment of 18 December 1986, Series A, No. 112; for discussion see J.S. Davidson, 'The European Convention on Human Rights and the "illegitimate" Child' in D. Freestone (ed.), above n. 1, at pp. 75–106.

[32] See jurisprudence of Human Rights Committee above Chapter 4.

[33] A. Lopatka, 'The Rights of the Child are Universal: The Perspective of the UN Convention on the Rights of the Child' in M. Freeman and P. Veerman (eds), above n. 1, 47–52 at p. 49.

The usage of the words 'a primary' instead of 'the primary' consideration allows for other factors to be taken into account.[34] In deciding what is in the best interest of the child, the wishes of the child are to be considered. Issues of cultural relativism do however enter the debate, making it difficult for international tribunals to formulate definitive judgments.[35] With regard to the application of the rights, the Convention, in line with the division produced by the International Covenants, distinguishes between civil and political rights of the child *vis-à-vis* economic, social and cultural rights; there is thus a difference between these two sets of rights of the child.[36] The civil and political rights obligations are of immediate application whereas in the case of economic, social and cultural rights, the State parties are to 'undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international protection'.[37] The States in the reports have often relied on the lack of resources to justify their failure to meet the requirements of the Convention. This argument has, however, been criticised by the Committee on the Rights of the Child (the body in charge of supervising the implementation of the Convention) on numerous occasions.[38]

According to Article 5:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

This is an important Article within the Convention. While accepting the realities of parental influences and rights and duties of the wider family, the Article is nevertheless reticent in dealing with situations where the interests, directions and guidance of parents are not 'appropriate' or 'consistent with the evolving capabilities of the child'. The 'evolving capabilities' themselves are not defined.

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[34] Cf. The English Children's Act 1989, which makes the child's interests the paramount factor. In this comparison we see that the child's interests are not given as much weight in the Convention as under national law. This represent one significant criticism of the Convention.

[35] above Chapter 1.

[36] Cf. Van Bueren, above n. 3, at p. 692, where emphasising the interaction between civil and political rights she goes as far as to suggest that 'it is even arguable that the economic and social rights of children have become part of international customary law'.

[37] Article 4.

[38] See e.g. Consideration of Reports submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Egypt, UN GAOR, Committee on the Rights of the Child 3rd Session UN Doc. CRC/C/15/Add.5 (1993); Jordan, UN GAOR, Committee on the Rights of the Child 6th Session UN Doc. CRC/C/15/Add.21 (1994).

Developmental rights of the child

The right to life (as noted throughout this book) is the most fundamental of all human rights.[39] In the case of children, the relevance of the right could not be overstated. Article 6 provides as follows:

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

The ambit of this right is very wide as it includes pre-natal and post-natal care, nourishment and proper development.[40] The right to life also includes freedom from malnutrition, starvation and disease. It is unfortunate that in some regions of the world, starvation has been adopted as a deliberate policy of extermination of certain individuals or groups.[41] In such situations children are the primary casualties. Article 7 of the Convention confers upon States parties the responsibility to ensure the important right to registration after birth, a right to name and to nationality, and the right to have knowledge of his parents. A 'right to identity', an unusual right, is accorded to the child by virtue of Article 8. This Article was sponsored by Argentina with its tragic experiences of the so-called 'Dirty War' and child disappearances.[42] It was prompted by the same feelings as those which led to the incorporation of Article 18 of the ACHR.[43] Article 8 (in combination with Article 30) would also be valuable to children belonging to minority or indigenous groups in preserving their family traditions as well their linguistic, cultural and religious identity.[44]

Article 9 reinforces a significant factor concerning the development of the child. It imposes an obligation on States to make sure that the child is never separated from his parents against their will, unless after due judicial determination it is considered necessary in the best interests of the child. Examples provided in the Article include situations where abuse or neglect

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[39] See Article 6 ICCPR Article 2 ECHR, Article 4 AFCHPR, Article I ADHR and Article 4 ACHR. Article 19 ACHR provides that 'Every minor child has the right to measures of protection required by his condition as a minor on the part of his family, society and the State'.

[40] See Article 24.

[41] Leo Kuper points to Sudan where 'starvation [has been] deployed as a weapon against civilians'. See L. Kuper, 'Theoretical Issues Relating to Genocide' in G. Andreopoulos (ed.), *Genocide: Conceptual and Historical Dimensions* (Philadelphia: University of Pennsylvania Press) 1994, 31–46 at p. 42.

[42] D. Fottrell, 'Children's Rights' in A. Hegarty and S. Leonard (eds), *Human Rights: An Agenda for the Twenty First Century* (London: Cavendish Press) 1999, 167–179 at p. 172; D. Freestone, 'The United Nations Convention on the Rights of the Child' in D. Freestone (ed.), above n. 1, 288–323 at p. 290.

[43] See above Chapter 8.

[44] See J. Rehman, *The Weaknesses in the International Protection of Minority Rights* (The Hague: Kluwer Law International) 2000, at p. 173.

had been perpetrated by the parents or where the parents are living separately and the child's place of abode needs to be decided.[45] The Article also confers on the separated parents the right to maintain personal contact with the child.[46] The aims of Article 9 are further strengthened by Article 10 through encouraging States parties to allow the entrance and departure of parents in order to facilitate union or contact with their children. The rights of children and parents to leave any country and to enter their own country is only subject to such restrictions as are prescribed by law, which are necessary to protect national security, public order (ordre public), public health or morals, or the rights and freedoms of others and are consistent with other rights that are recognised in the Convention.[47] The applicability of this provision has been a problematic one in the immigration laws of many States including the United Kingdom.[48] Domestic legislation and administrative practices purporting to separate children from parents have received the attention of human rights tribunals. The ECHR does not include any articles establishing identical rights, but it has nevertheless been relied upon by individuals claiming that deportation or refusal to enter the State would mean separation from children.[49]

Article 11 ordains that States are to take appropriate measures to prevent the illicit trafficking of children, their abduction and non-return from abroad. Several important regional and international conventions to prevent child abduction have come into operation to reinforce international law concerning child abduction and child custody. These include the Hague Convention on the Civil Aspects of Child Abduction (1980)[50] and the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (1980).[51]

Another subject crucial to the development of children is that of adoption. Article 20 attempts to cater for adoption of the child, although as the provisions confirm there are widespread religious and cultural differences on this subject. Within the *Sharia*, (the Islamic legal system) adoption *per se* is not permissible, although the concept of *Kafalah* exists whereby the child can be taken care of in situations where the biological parents cannot do so. However *Kafalah* is a weaker concept as it does not permit the child to adopt the

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[45] Article 9(1).
[46] Article 9(3).
[47] Article 10(2).
[48] M. Freeman, 'The Limits of Children's Rights' in M. Freeman and P. Veerman (eds), above n. 1, 29–46 at p. 40.
[49] See Article 8 ECHR. *Berrehab* v. *The Netherlands*, Judgment of 21 June 1988, Series A, No. 138; *Moustaquim* v. *Belgium*, Judgment of 18 February 1991, Series A, No. 193. Discussed above Chapter 6.
[50] Cmnd 8281 (1980).
[51] Cmnd 8155 (1980).

family's name and does not confer property or other rights.[52] The *travaux préparatoires* of the Convention reflect substantial disagreements between the Islamic bloc on the one hand and western States on the other.[53] As a consequence the original text, which was drafted in 1982, had to be altered.[54] The final text of the treaty represents a compromise applying only to those States which recognise the institution of adoption.[55] Article 21 while sanctioning inter-country adoption attempts to ensure that the interests of the child are upheld. States parties undertake to ensure the rights of the child in inter-country adoptions. They also guarantee that such adoptions will be undertaken by competent authorities who will safeguard the interests of everyone involved and that such placements are not going to result in 'improper financial gains' for any party.[56]

Children and their freedom of expression, association and religion

Articles 12 and 13 deal with the important rights to be heard and freedom of expression particularly in relation to the matters which affect the person and interests of the child. By virtue of Article 12(1), States undertake 'to assure to the child who is capable of forming his or her own views the right to express those views freely in all matters' which affect the child. Article 12(2) lays particular emphasis on the

> opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13 provides the child with the right to freedom of expression which includes:

> freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

The exercise of the right is, however, subject to restriction. These restrictions are to be established by law and are to be laid down to ensure 'respect of the rights or reputations of others' or 'for the protection of national security or of public order (ordre public), or of public health or morals'. The provisions of Articles 12 and 13 can be criticised for the vague terminology, which allows

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[52] Van Bueren, above n. 1, at p. 95.

[53] The issue of adoption has contributed to reservations from several Islamic States. See W.A. Schabas, 'Reservations to the Convention on the Rights of the Child' 18 *HRQ* (1996) 472.

[54] UN Doc E/1982/12/Add.1, C, para 76.

[55] D. Johnson, 'Cultural and Regional Pluralism in the Drafting of the UN Convention on the Rights of the Child' in M. Freeman and P. Veerman (eds), above n. 1, 95–114 at p. 105.

[56] Article 21(d).

States parties to apply their own standards to justify the exclusion of children from effective enjoyment of their rights.

Article 14 which deals with the right of the child to freedom of thought, conscience and religion is a problematic one. The article has attracted widespread reservations from Contracting States parties. As already noted, it is difficult to state if the right to freedom of religion or belief is fully established in international law – certainly in the light of divisions among States the parameters of any such rights are not clearly drawn.[57] Article 14(1) notes that 'States Parties shall respect the right of the child to freedom of thought, conscience and religion'. However, attempts to incorporate a right for the child to change his or her religion proved abortive.[58] Article 14(2) places an obligation on States to allow parents to direct their children to exercise the rights provided in Article 14(1) and Article 14(3) notes that freedom to manifest one's religion or beliefs can be subject only to minimalist limitations that are established by law and are necessary for public safety, public order, health or morals, or for the protection of fundamental rights and freedoms of others. There are substantial tensions inherent in the provisions of this Article. The Convention is reluctant to allow substantial rights to the child *vis-à-vis* the family, parents and the State. There is a worry for children living in societies which ordain submission – the State, society and parental pressure may force children towards cultural and religious extremism.

Article 15 provides for the recognition of the right to freedom of association and to freedom of peaceful assembly.[59] The limitation clause associated to Article 15 is taken from Article 22 of the ICCPR – right to peaceful assembly.[60] Article 16 prohibits arbitrary or unlawful interference with privacy, family, home or correspondence. The Article also makes it unlawful to attack the honour, dignity and reputation of the child. Article 17 ensures that the child has access to information and materials from a diversity of national and international sources. This is an innovative right and usefully highlights the significance of mass media in the development of the rights of the child. Article 18 obliges States parties to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.[61]

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[57] See above Chapter 9.

[58] UN Doc. E/CN.4/1984/71 (1984) paras 13–33. See Van Bueren, above n. 1, at pp. 157–58; D. Johnson, 'Cultural and Regional Pluralism in the Drafting of the UN Convention on the Rights of the Child' in M. Freeman and P. Veerman (eds), above n. 1, pp. 95–114.

[59] In its original format the Article included the right to privacy. However due to significant differences, two articles instead of one were drafted. See UN Doc. E/CN.4/1987/25 (1987) paras 111–118.

[60] McGoldrick, above n. 1, at p. 142.

[61] Article 18(1).

Measures to combat violence, abuse, exploitation and maltreatment of children

Article 19, obliges States parties to take the necessary appropriate actions to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent, parents or legal guardian. These appropriate actions include 'legislative, administrative, social and educational measures'.[62] Article 19(2) goes on to provide that:

> such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 19 is a very broad article as no definition is provided of 'physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse'. According to Professor Van Bueren,

> the terms neglect and abuse are intentionally undefined in order to avoid the danger that a definition of child abuse and neglect could unwittingly be based upon either arbitrary or ethnocentric assumptions. In general terms child neglect involves either the inability or the deliberate refusal to care for a child with the result that a child's development is impaired. It is also clear that abuse and neglect includes all acts or omissions where the sole motivation is the desire to harm the child.[63]

Following the jurisprudence of the European Convention on Human Rights, States have a positive obligation to ensure the provision of civil and criminal proceedings against those involved in sexual offences against children.[64] Subsequent Articles of the Convention deal with unfortunate practices such as economic exploitation, illicit usage of drugs, sexual abuse and trafficking of children. Article 32 deals with some of most critical issues relating to the rights of the child. It provides as follows:

1. States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and

[62] Article 19(1).

[63] Van Bueren, above n. 1 at p. 88; *Costello-Roberts* v. *United Kingdom*, Judgment of 25 March 1993, Series A, No. 247-C; *A* v. *UK*, Judgment of 23 September 1998, 1998-VI RJD 2692.

[64] See *X and Y* v. *The Netherlands*, Judgment of 26 March 1985, Series A, No. 91. Discussed above Chapter 6.

having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;
(b) Provide for appropriate regulation of the hours and conditions of employment;
(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Notwithstanding the abolition of slavery and slave trade, child slavery and servitude is still being practiced in Africa and Asia. In addition there are millions of children employed in rigorous labour in many parts of the world. Children provide employers with a stable source of cheap labour. They are capable of putting in long hours and are unlikely to question their employers over working conditions and wages. It is estimated that 50 to 100 million children between the ages of 10 and 14 are currently in full-time employment.[65] Child labour is institutionalised in many regions of the world, for example Pakistan, Bangladesh and India. Article 32 not only complements existing human rights provisions but extends them to a significant extent. The UDHR and the ICCPR prohibit slavery, servitude and forced labour for everyone including children. Article 10(3) of ICESCR imposes a duty on States parties to protect children and young persons from economic and social exploitation. It requires States to set age limits below which it would be punishable to employ a child for labour. The Article also makes it punishable by law to employ children in work harmful to their morals or health. Child labour and exploitation for commercial and economic purposes has been an issue raised in a number of quarters. A useful study was prepared by Mr A. Bouhdiba in 1981, which prompted the UN Sub-Commission's working group on Contemporary Forms of Slavery to propose a '35-point Programme of Action for the Elimination of Exploitation of Child Labour'.[66] This proposal was adopted by the UN Commission on Human Rights in 1991.[67] The ILO Convention, Convention No. 138, places an obligation on States to ensure effective protection of children from labour.[68] There is also increasing pressure on international

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[65] Van Bueren, above n. 1, at p. 263.
[66] A. Bouhdiba, Exploitation of Child Labour, E/CN.4/Sub.2/479/Rev.1 (1989); see also Sub-Commission Res. 1990/31 and Commission's Res. 1991/54, Pt II, para 10.
[67] See A. Eide, 'The Sub-Commission on Prevention of Discrimination and Protection of Minorities' in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press) 1992, pp. 211–264 at p. 234.
[68] Article 1. ILO Convention No. 138. Convention Concerning Minimum Age for Admission to Employment, 1973.

trading organisations to impose sanctions on States which allow the practice of child labour.[69]

Article 33 ordains States to take all necessary measures to protect children from the illicit use of narcotic drugs and psychotropic substances. Article 34 is also a very significant Article of the Convention. Children suffer from all forms of sexual exploitation and abuse which the Article designs to criminalise. Child pornography, prostitution, sale as servants and bonded labour, ritual and satanic abuse, or transcultural or transracial adoptions are also widespread contemporary phenomena. Article 34(a) aims to protect children from inducement or coercion to engage in any unlawful sexual activity. This includes sexual expatiation or abuse. Exploitation of children in activities such as prostitution, unlawful sexual practices and exploitation through pornography is also prohibited.[70] The international community has advanced further on prohibiting child pornography through the recent adoption of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.[71]

One of the more problematic areas within international and national family law relates to sexual abuse that takes place within the confines of the home and family. As with many other Articles in the Convention, international human right law provides protection for the child from sexual abuse conducted by non-State personnel. However, in practice these rights often remain ineffective largely due to lack of disclosure and detection. According to McGillivray:

> In a dysfunctional relationship [the] interpretive power displaces the child's view, making disclosure unlikely and detection difficult. The value given to the archetype of the family as a private cohesive unit joined by ties of blood, affection and economic interdependence contributes to the ideology of family loyalty. Children fear breaching the family compact by disclosing problems to outsiders and recant where family cohesiveness is threatened.[72]

By virtue of Article 35, States endeavour to take all appropriate and necessary action to prevent child abduction and the sale and trafficking of children. According to Article 36 'States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare'. Article 37 echoes the traditional human rights approach; it provides for the

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[69] See Ehrenberg, above n. 21, at p. 361.

[70] G. Kent, 'Little Foreign Bodies: International Dimension of Child Prostitution' in M. Freeman and P. Veerman (eds), above n. 1, pp. 323–346; J. Ennew, *The Sexual Exploitation of Children* (Cambridge: Polity Press) 1986.

[71] Protocol on the Sale of Children, Child Pornography and Child prostitution GA Res. 54/263 Annex II (25 May 2000); see M.J. Dennis, 'Newly Adopted Protocols to the Convention on the Rights of the Child' 94 *AJIL* (2000) 789.

[72] A. McGillivray, 'Re-Construction Child Abuse: Western Definition and Non-Western Experience' in M. Freeman and P. Veerman (eds), above n. 1, 213–236 at p. 216.

prohibition of 'torture or other cruel, inhuman or degrading treatment or punishment' for the child. Widespread divergences exist on the subject of corporal punishment of children.[73] Distressing facts have emerged even from the developed world. Thus, for example, the Committee on the Rights of the Child, in its consideration of the report from the United Kingdom, has shown concern at the legislative provisions dealing with reasonable chastisement. The concern according to the Committee is that this so-called 'reasonable chastisement' may 'pave the way for subjective and arbitrary interpretation'.[74] It can be argued that following the cases from the European Convention on Human Rights a general norm is emerging in international law, which regards all forms of corporal punishment of children as violating the provisions of Article 37.[75]

Article 37 also provides for a ban on capital punishment and life imprisonment (without possibility of release) for offences committed by persons below eighteen years of age.[76] It also provides for prohibiting unlawful or arbitrary deprivation of liberty, and provides for requisite safeguards.[77] The prohibition of capital punishment for those under eighteen is a particularly valuable provision with implications for the issue regarding the point of majority, the definition of childhood and the overall campaign for the abolition of death penalty in international law. Notwithstanding the provisions of Article 37(a) and Article 6(5) ICCPR, capital punishment has been imposed on seventeen year olds. A number of such situations have arisen in the United States. In two cases filed in the United States and brought before the Inter-American Commission on Human Rights, the petitioners had argued that a norm of customary international law existed prohibiting the application of the death penalty to individuals below the age of eighteen.[78] While accepting the view that 'in the OAS member States there is a recognised norm of *jus cogens* which prohibits the State execution of children',[79] the Commission could not

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[73] For further consideration see above Chapters 4–6.

[74] See UN Doc. CRC/C/15 Add. 34 para 16.

[75] See *Tyrer* v. *United Kingdom*, Judgment of 25 April 1978, Series A, No. 26 (judicial corporal punishment of 15 year old boy violating Article 3); *A* v. *UK*, Judgment of 23 September 1998, 1998-VI RJD 2692 (caning of a 9 year old boy by stepfather, violation of Article 3). See also the Human Rights Committee's General Comments (forty-fourth session 1992). In the Committee's view 'the prohibition in Article 7 (on torture, cruel, inhuman or degrading treatment or punishment) relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that Article 7 protects, in particular, children, pupils and patients in teaching and medical institutions' para 5.

[76] Article 37(a).

[77] See Article 37(b).

[78] Note Article 6(5) ICCPR which provides that 'Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age'. USA was not a party to the ICCPR at that time.

[79] *Roach and Pinkerton* v. *United States*, Case 9.647, Res. No 3/87, OEA/Ser.L/V/II.71, Doc. 9 rev.1, at 147.

refute the United States contention on the absence of any customary rules for the determination of the age of majority.[80] It is also interesting to note that the United States, upon its ratification of the ICCPR, entered a reservation to Article 6(5) of the Covenant. This reservation has been considered as 'incompatible with the objects and purposes of the Covenant' by the Human Rights Committee which has called for its withdrawal.[81]

Children in wars and conflicts

Article 22 ensures that the child receives the protection of international refugee and humanitarian law. Article 22(1) provides that the States parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee, receives appropriate protection and humanitarian assistance in the enjoyment of applicable rights under the present Convention and other international humanitarian and human rights treaties. The protection applies regardless of whether the child is accompanied by his parents.[82] According to Article 22(2) States are to cooperate with the UN and other intergovernmental agencies to trace the parents or other members of the family of any refugee child or to obtain information with a view to his reunification with his family.

Further safeguards are provided by Article 38 which aims to ensure the compliance and respect for the rules of international humanitarian law applicable to children in armed conflicts. The obligations of the Article are to prohibit the creation of child soldiers and ordains States not to allow those below the age of fifteen years to take a direct part in hostilities.[83] It is important to appreciate that during times of unrest and war, children need greater protection than during peace times. At the same time, it is also unfortunately the case that in times of war, children are more likely to be abused and are vulnerable to being coerced into becoming combatants.[84] A vast majority of contemporary armed conflicts are of a localised nature; examples of such internal conflicts can be

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[80] The Inter-American Commission found the US in violation for its pattern of 'legislative arbitrariness throughout the United States which results in the arbitrary deprivation of life and inequality before the law' (para 173). For commentaries see D.T. Fox, 'Inter-American Commission on Human Rights finds the United States in Violation' 82 *AJIL* (1988) 601; D. Shelton, 'The Decision of IACHR of 27 March 1987 in the Case of Roach and Pinkerton: A Note' 8 *HRLJ* (1987) 355; D. Weissbrodt, 'Execution of Juvenile Offenders by the United States Violates International Human Rights Law' 3 *AUJILP* (1988) 339.

[81] See Report of the Human Rights Committee UN Doc. A/50/40 (1995) para 279; see also Amnesty International Report http://www.amnestyusa.org/abolish/juveniles.html (1 May 2002).

[82] Article 22(1).

[83] Van Bueren, above n. 1, at p. 275.

[84] J.G. Gardam, 'The Law of Armed Conflict: A Feminist Perspective' in K.E. Mahoney and P. Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Dordrecht: Martinus Nijhoff Publishers) 1993, pp. 419–436; M. Elahi, 'The Rights of the Child Under Islamic Law: Prohibition of the Child Soldier' 19 *CHRLR* (1988) 259.

found in many regions of the world. In these armed conflicts children are used as combatants. Children also represent the highest number of casualties and suffer immensely. Until recently the Geneva Convention Relative to the Protection of Civilian Persons in Times of War (1949),[85] supplemented by the Protocols Additional to the Geneva Conventions of 1949 Relating to the Protection of Victims of International Armed Conflict (1977)[86] and the Protection of Victims of Non-International Armed Conflicts[87] have remained the most pertinent treaties protecting the rights of children in international humanitarian law. The combined effect of the aforementioned treaties is to accord protection to children living in occupied or unoccupied territories and to regulate child participation in hostilities. A further extension of humanitarian law has been through the adoption of the Optional Protocol on the Involvement of Children in Armed Conflict.[88] Among regional instruments, there exists the African Charter on the Rights and Welfare of the Child which takes a specific interest in protecting children in civil unrest and internal conflict. Article 22(3) of this chapter deals with children caught up in international and internal armed conflicts. States are required

> to protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall apply to children in situations of internal armed conflicts, tension and strife.

Concerns of disability and health

The Convention also accords rights to mentally and physically disabled children. In its Article 23, States parties recognise the rights of mentally and physically disabled children to have a decent living and to ensure that they live a life of dignity, self-reliance and are enabled to participate in the life of the community. This is an extremely important provision as disabled children are prone to abuse, violence and suffering. Inherent in the Article is the provision of non-discrimination as provided for in Article 2. The Article provides for special care and encourages the State to extend available resources.[89]

The rights in Article 24 are interrelated with those in Article 6, the right to life for the child. Article 24 expands on this right noting that the State parties recognise the right of 'the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health'[90] and that they 'shall strive to ensure that no child is deprived

[85] U.K.T.S. 39 (1958), Cmnd 55.
[86] 1125 U.N.T.S. 3; Misc 19 (1977).
[87] Misc 19 (1977); 1125 U.N.T.S.
[88] GA Res. 54/263, Annex II, 25 May, 2000. See Dennis above n. 71, at p. 789.
[89] Article 23(2).
[90] Article 24(1).

of his or her right of access to such health care services'.[91] Particular emphasis is placed on diminishing the mortality rate of children,[92] and provision of medical and health care[93] to combat malnutrition and disease,[94] to provide maternal pre-natal and post-natal health care,[95] and to ensure that parents, children and others involved in the upbringing of children have the knowledge and education essential *inter alia* for the protection of child health and hygiene.[96] These provisions are much more specific than other human rights provisions including the right to health recognised by Article 12 of ICESCR.[97] While unlike Article 11 of the ICESCR there is no specific reference to the right to food, there is a recognition of the need to combat malnutrition.[98] Making reference to the Convention on the Rights of the Child in its General Comment on the right to health, the Committee on the International Covenant on Economic, Social and Cultural Rights has noted:

> The Convention on the Rights of the Child directs States to ensure access to essential health services for the child and his or her family, including pre- and post-natal care for mothers. The Convention links these goals with ensuring access to child-friendly information about preventive and health-promoting behaviour and support to families and communities in implementing these practices. Implementation of the principle of non-discrimination requires that girls, as well as boys, have equal access to adequate nutrition, safe environments, and physical as well as mental health services. There is a need to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage, female genital mutilation, preferential feeding and care of male children. Children with disabilities should be given the opportunity to enjoy a fulfilling and decent life and to participate within their community.[99]

According to Article 24(3) State parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the

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[91] Ibid.
[92] Article 24(2)(a).
[93] Article 24(2)(b).
[94] Article 24(2)(c).
[95] Article 24(2)(d).
[96] Article 9(2)(d).
[97] According to Article 12 States 'recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' and that steps are to be taken by States to the present Covenant to achieve the full realisation of this right shall include those necessary which are as follows: (a) The provision for the reduction of the still-birth rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.
[98] McGoldrick, above n. 1, at p. 146.
[99] ICESCR General Comment 14, *The Right to Highest Attainable Standard of Health* (Article 12) General Comment No. 14 (11/08/00) (E/C.12/200/4), para 22.

health of children. As an important improvisation, the intention had been to target such practices as female infanticide, male preferences, neglect and abuse of children and female circumcision. During the drafting of the treaty, the issue of female circumcision aroused significant tensions and disagreements.[100] In order to prevent holding up the work on this particular article, it was decided that no examples (including that of female circumcision) could be referenced in the text of the article itself.[101] As noted earlier, the practice of female circumcision continues to take place in many parts of the world, although there is equally a strong condemnation of this activity in many quarters. The abhorrence and condemnation of female circumcision has been so strong that in one case a girl fleeing from a country for fear of forced circumcision was entitled in principle to claim refugee status if she had a well-founded fear of being persecuted by reason of membership of a particular group.[102]

Article 25 of the Convention provides that 'States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement'. There is, however, no elaboration of 'competent authorities' or 'periodic review'. Article 26 recognises the right of children to State benefits such as social security and social insurance The right to social security as an important right has been recognised by Article 9 of the ICESCR and Article 12 of the European Social Charter. Article 27 of the Convention of the Rights of the Child (1989) provides that States 'recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development'. Articles 28 and 29 deal with various aspects of the educational rights of children.

Educational rights

According to Article 28(1) States parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available and free to all;
(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

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[100] For a multitude of literature see Chapter 13.
[101] UN Doc. E/CN.4/1986/42.
[102] See *Mademoiselle X* (9 September 1991). Case is considered in *Public Law* (1993) 197.

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;
(d) Make educational and vocational information and guidance available and accessible to all children;
(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

The Articles develop the obligations inherited from Article 26(1) of the UDHR and Articles 13 and 14 of the ICESCR. As already noted, Articles 13 and 14 of the ICESCR have been the focus of substantial attention by the Committee on the International Covenant on Economic, Social and Cultural Rights, with the right to education being the subject of two General Comments by the Committee.[103] While commenting on the right to primary education the Committee noted:

> [i]n line with the clear obligations under article 14 [relating to primary education] every State party is under a duty to present to the committee a plan of action [which must cover all of the actions necessary in order to secure each of the requisite component parts of the right and must be sufficiently detailed so as to ensure the comprehensive realization of the right. Participation of all sections of civil society in the drawing up of the plan is vital and some means of periodically reviewing progress and ensuring accountability are essential] This obligation needs to be scrupulously observed in view of the fact that in developing countries, 130 million children of school age are currently estimated to be without access to primary education, of whom about two thirds are girls.[104]

The Article is important as many States, particularly those from Asia and Africa continue to invest poorly in education.[105] Although there is increasing emphasis on compulsory primary education, many children for economic or social reasons are forced to remain illiterate. The provisions of Article 28 are complemented by Article 29. The Committee on the Rights of the Child recently noted in its first General Comment that:

> Article 29(1) is not only complementing the right to education recognised in article 28 by a qualitative dimension which reflects the rights and inherent dignity of the child; it also insists upon the need for education to be child-centred, child-friendly and empowering; and it highlights the need for educational processes to be based upon the very principles which are recognised in article 29(1). The education to which every child has a right is one designed to provide the child with life skills, to strengthen the child's capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human

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103 ICESCR General Comment 11, *Plans of Action for Primary Education (Article 14)* General Comment No. 11 (10/05/99) (E/C.12/1999/4); CESCR General Comment 13, *The Right to Education* (Article 13) General Comment No. 13 (S/12/99) (E/C.12/1999/10).

104 Article 14, para 3.

105 See HRCP, *State of Human Rights in Pakistan in 1998* (Lahore: HRCP) 1999, pp. 6–15.

rights values. The goal is to empower the child, through developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence. 'Education' in this context goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, whether individually or collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.[106]

Article 30 is based on Article 27 of the ICCPR. It deals with the rights of minority children. It has attracted criticisms similar to those relating to Article 27: there is no definition of 'minorities' or persons of indigenous origins; the Article itself is drafted in a negative manner; and it is party to the same shortcomings that attach to Article 27.

Criminal justice rights

A number of the provisions within Article 40 draw inspiration from the Beijing Rules. Aspects of the Beijing Rules have developed into recognised rules of criminal law within domestic jurisdictions of States; there are, however, many others which do not have any such binding effect and belong to the regime of 'soft law'.[107] These 'soft laws' however, can prove significant in the development of norms of customary international law or binding treaty law. Article 40 caters for wide diversity in Penal systems. Some States have juvenile courts – separate regimes of administering offences conducted by children – whereas others treat children in more or less the same manner as adults.[108] The Article confirms many principles including the principle of non-retroactivity of penal law,[109] presumption of innocence,[110] being informed promptly of charges,[111] the matter being decided promptly by a competent, independent and impartial authority[112] and non-compulsion of confession.[113]

IMPLEMENTATION OF THE CONVENTION[114]

The second part of the Convention, dealing with its implementation, is provided for in Articles 42–45. Supervision of the Convention is conducted by

[106] Article 29(1): The Aims of Education 08/02/2001. CRC General comment 1.
[107] See above Chapter 1.
[108] Van Bueren, above n. 1, at p. 179–180.
[109] Article 40(2)(a).
[110] Article 40(2)(b)(i).
[111] Article 40(2)(ii).
[112] Article 40(2)(iii).
[113] Article 40(2)(iv).
[114] M. O'Flaherty, *Human Rights and the UN: Practice before the Treaty Bodies* (London: Sweet and Maxwell) 1996, p. 196; C.P. Cohen, S.N. Hart and S.M. Kosloske, 'Monitoring the United Nations Convention on the Right of the Child: The Challenge of Information Management' 18 *HRQ* (1996) 439.

a ten-member Committee called the Committee on the Rights of the Child.[115] The members of the Committee are drawn from States which are parties to the treaty. Members serve in their individual capacity.[116] They are 'of high moral standing and of recognised competence in the field'.[117] Each member's term of office is for four years, with the possibility of re-election.[118] The only mechanism for implementation of the Convention is through a system of periodic reports submitted by States parties.

Under Article 44 the Committee is obliged to forward a biannual report of its activities to the General Assembly via ECOSOC.[119] The Committee started with one session for the year; however, with the growing number of States, it soon became evident that this would be insufficient. Since 1995 three sessions per year have been the standard, these sessions being held in January, May–June and September–October in Geneva. Each of the sessions lasts for three working weeks and is followed by a meeting of one week's duration of a working group to prepare for the next session.

The Convention requires the reports to be submitted within two years of a State's entry and thereafter every five years.[120] According to Article 44(2), reports submitted by States 'shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations' of the provisions within the Convention. Reports are also aimed at providing adequate information of an analysis of the Convention's implementation. The first meeting of the Committee was held in 1991, and the scrutiny of reports started in 1993. During its sessions 1991–1992, the Committee concerned itself with practical issues such as drafting provisional rules of procedure and reporting guidelines. The first periodic report was examined in October 1997.[121]

In order to improve guidance on initial reports by State parties, the Committee has issued guidelines regarding the form and content of these reports.[122] These guidelines aim to provide a clear indication of the nature and depth of information required, and also to impose some degree of uniformity on the production of reports.[123] The Committee has also produced guidelines

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115 Article 43. An Amendment to increase the number of the committee to eighteen was adopted by the General Assembly – GA Res. 50/155 February 1996. The amendment requires acceptance of a two-third majority, and has as yet not come into operation.

116 Article 43(2).

117 Article 44(1).

118 Article 43(6).

119 Article 44(5).

120 Article 44(1).

121 Committee on the Rights of the Child, Report of the Sixteenth Session, CRC/C/69.

122 General Guidelines regarding the form and Content of Initial Reports to be Submitted by States parties under Article 44, paragraph 1(a) of the CRC, UN Doc. CRC/C/5.

123 G. Lansdown, 'The Reporting Procedure under the Convention on the Rights of the Child' in P. Alston and J. Crawford (ed.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press) 2000, 113–128 at p. 114.

on periodic reports.[124] In accordance with the provisions of the Convention, the Committee has asked governments to publish their reports within their own countries.[125] It has also been suggested by the guidelines that summary records of a State party's dialogue with the CRC, alongside the concluding observations, be published. The guidelines recommend a thematic approach for the reports adopting the following structure. Information should be provided with regard to the implementation of the following:

- General measures of implementation (Articles 4, 42 and 44(6)).
- Definition of the child (Article 1).
- General principles (Articles 2, 3, 6 and 12).
- Civil rights and freedoms (Articles 4, 8, 13, 14, 15, 16, 17 and 37(a)).
- Family environment and alternative care (Articles 5, 18(1), 18(2), 9, 10, 27(4), 20, 21, 11, 19 and 25).
- Basic health and welfare (Articles 6(2), 23, 24, 26, 18(3), 27(1), 27(2) and 27(3)).
- Education, leisure and cultural activities (Articles 28, 29 and 31).
- Special measures of protection (Articles 22, 38, 39, 40, 37(b), 37(c), 37(d), 37(a), 39, 32, 33, 34, 36, 35 and 30).

The guidelines highlight four underlying principles in relation to compliance and scrutiny of the Convention rights. These concern non-discrimination (Article 2); the best interest of the child (Article 3); the right to life survival and development (Article 6); and the right of children to participate in decisions affecting them (Article 12). In considering any issue these underlying factors must be central and relied upon. The Articles categorised in one band do not fall neatly in any single aspect of the rights of the child. Such a categorisation, however, places emphasis upon the integration of civil and political rights with those of social, economical and cultural rights – and the reaffirmation of the indivisibility of these sets of rights.

At the end of each session of the Committee, one week is allocated to consideration of the questions to be addressed to the States parties due to appear in the next session. A working group from among the Committee is established for the purpose of identifying areas within the report which raise concern or need further clarification. This pre-sessional working group meets in private; no government representatives are allowed to attend and no public record of the discussion is produced. NGOs are, however, invited to attend the pre-sessional working group. With the input of NGOs and other UN agencies, the Committee writes its list of issues to be presented to the relevant

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[124] General Guidelines regarding the form and Content of Periodic Reports to be Submitted by States parties under Article 44, para 1(b) of the CRC, UN Doc. CRC/C/58.
[125] Article 44(6).

government.[126] A list of issues for transmission to the State parties is compiled with a request for written replies to be considered together with the issues drawn up by members serving as 'country rapporteurs'.[127] In addition, other sources of information derived from NGOs and agencies such as the ILO, UNICEF and the UNHCR are collated.

A State report once submitted is likely to be considered by the Committee within 18 months of submission, although it is difficult to predict at which session the report will be receiving consideration. A three-hour plenary session is allocated to each country report. At the plenary session the governmental representative appears before the Committee. At these sessions NGO representatives are invited to present their comments on the country reports and to identify major areas of concern. Those NGOs who wish to make submissions to the working group should inform the working group in advance and must provide evidence of the relevance of their intervention and interest.

Reports are considered in public sessions and are introduced by the State Representative. The proceedings of the Committee are based on the categorisation as provided within the Convention guidelines. The discussion on each of the categories is introduced by the comments of the State representative, followed by questions and comments of members and concluded by responses of the State representative. At the end of the consideration, the Committee members summarise their observations and make suggestions and recommendations. The State representative may make a final statement and provide a response to the Committee's observations.

After the completion of its review of the report, the Committee produces concluding observations in which the Committee presents its opinion on the adequacy or inadequacy of the report, positive as well as negative features of the report, and considers any possible difficulties of implementation. The Committee also puts forward the issues which it perceives to be a matter of concern and ends with suggestions and recommendations. The concluding observations are issued at the end of each session in the form of public documents and are included in the biannual report to the United Nations General Assembly. These concluding observations are also transmitted to UN specialised agencies such as UNICEF.

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[126] See H. Cullen and K. Morrow, 'International Civil Society in International Law: The Growth of NGO Participation' 1 *Non-State Actors and International Law* (2001) 7 at p. 18.

[127] There are significant benefits derived from this procedure. With the NGO input the Committee members become much more aware of the actual situation. The Committee members can also raise concrete issues and criticises the misinformation within State reports. Government reports are often weak in terms of measures of implementing the Convention rights and the Committee is better placed to show their concerns in its concluding observations. The NGO-produced alternative reports underlines the weakness in the official position. The encouragement NGO to submit this alternative report on behalf of the National NGO body as whole. The con-

INNOVATIVE FEATURES AND OTHER INITIATIVES

In comparison to other reporting treaty-based procedures, the NGOs have a more prominent and formally acknowledged role to play. According to Article 45, the specialised agencies, the United Nations Children's Fund, and other United Nations organs are entitled to be represented at the consideration of the State reports. Thus, for example, when consideration is given to provisions related to employment or labour, the ILO can attend the proceedings of the Committee as of right. The Article also authorises the Committee to request submission of reports from the UN Children's Fund (UNICEF) and other UN bodies on areas falling within the scope of their activities. It can also invite these and other expert bodies (which implicitly includes the NGOs) to provide expert advice on areas falling within their respective mandates.[128] The Committee can consult, for example, the ILO on issues arising out of child labour in a particular State. This is a unique provision among human rights instruments and the Committee has responded by inviting NGOs to submit alternative reports which provide the Committee with a fuller and more critical analysis of the state of children's rights in a country.

The Convention also provides for NGOs to have a function, which is reflected in the rules of the procedure. The Committee has made use of the formal position of NGOs, as important providers of information. NGOs have also established a Group for the Convention on the Rights of the Child, with a full-time Geneva based co-ordinator facilitating the flow of information to the Committee and encouraging NGO contributions at the international and national level. This allows for a more effective contribution to the work of the Convention. Article 45(b) authorises the Committee to transmit at a State's request 'technical advice or assistance' to 'the specialised agencies, UNICEF, and other competent bodies'. The objective is to enable those States which are having difficulties in implementing the Convention to have access to and support from all the relevant competent bodies. In accordance with Article 45(c), the Committee may recommend to the General Assembly that it request the Secretary-General to undertake studies relevant to issues concerning child rights on its behalf. Article 45(d) allows the Committee to make suggestions and general recommendations based on information received through Articles 44 and 45. These suggestions and general recommendations are transmitted to the State party concerned and to the General Assembly.

The Committee has also adopted a number of initiatives. For some years now, for instance, the Committee has devoted one day every year to a general

[128] Article 45(a)(b); Cohen, above n. 4, at p. 146.

discussion of a specific issue. Rule 75 of the Rules of procedure sanctions such an activity. It provides:

> in order to enhance a deeper understanding of the content and implications of the Convention, the Committee may devote one or more meetings of its regular sessions to a general discussion on one specific article of the Convention or related subject.[129]

This provision has been used to set aside a series of 'Days of General Discussion' on a range of topics.[130] The first such discussion took place in 1992 on the subject of children in armed conflict; the second in 1993 related to the economic exploitation of Children; the third in 1994 focused on the role of the family. In 1998 the Committee devoted a day to discuss 'Children living in a world with HIV/AIDS'. The next days of general discussion were dedicated to State violence against children (2000) and violence against children within the family and in schools (2001). These discussions are attended by members of the Committee, NGOs and international organisations. They have been very useful in reaching a greater appreciation of the role of the Committee and in providing a forum of consideration and debate. Such debate may also influence international State practice and lead to the formulation of new standards regarding the Rights of the Child. Days of general discussion are normally announced in the report of the session immediately preceding that in which it is proposed they occur. The announcement may be accompanied by a paper by the Committee on the topic.[131] All those who are interested and concerned are invited to make written representations to the Committee.

Members of the Committee have also undertaken missions to various countries. These missions allow members of the Committee to consider and discuss issues arising out of the implementation of the Convention with the representative of the State, relevant organisations and NGOs. Traditionally all the Committee members have been able to participate on these missions. However, for the future, it is more likely that a selected group of members will be on each of these trips.[132]

CONCLUSIONS

Despite the many positives emerging from the work of the Committee there are concerns and there remains significant room for improvement. One of the outstanding concerns is the volume of work which the Committee is having to

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[129] Rules of Procedure of the Committee on the Rights of the Child, Rule 75, UN Doc. CRC/C/4.
[130] O'Flaherty, above n. 114, at p. 196.
[131] Ibid.
[132] Ibid. p. 197.

deal with. The United Nations has agreed to provide further resources to the Committee. Five new posts have been created providing additional support to the Committee. It has also been proposed that the Committee's membership be increased to eighteen. In terms of substance of the State reports, many of the concerns that are reflective of other treaty bodies, for example the inadequacy, insufficient information, etc. is reflected in the observations of this Committee. With its enormous workload over the last decade, the Committee is increasingly under pressure. There is currently a backlog of reports. However, if the reports are being produced on time, it is inevitable that a delay in their consideration will take place. This will, in turn, lead to a situation where, by the time of their consideration the reports may be outdated.

Another concern regarding the Committee's consideration of the reports has been the inadequate attention given to some sets of rights. These include Articles 13–16 (freedom of expression, religion, conscience and thought, and privacy) and Article 23 (disability). It is important that the Committee pays attention to all the rights equally. On a procedural matter, the pre-sessional working groups have proved very useful. They allow for NGO input and for effective scrutiny. Even in this regard, however, there are some negative points. After a lengthy session of the Committee, members are often exhausted and frequently too few are present. The Committee members tend to show a relative lack of interest in these sessions, which is disappointing for the NGOs.

Having considered some of the weaknesses and limitations of the work of the Committee, the overall contribution of the Committee and the Convention must not be overlooked. The Convention has proved to be a stimulant to almost every State in the world to improve the position of children within its jurisdiction. As we have noted, serious disagreements remain on the scope and nature of many of the rights contained in the Convention. At the same time there is a fundamental recognition that the international community must act in the best interest of the child and must ensure his welfare, and respect his innocence and integrity.

V

CRIMES AGAINST THE DIGNITY OF MANKIND

15

TORTURE AS A CRIME IN INTERNATIONAL LAW AND THE RIGHTS OF TORTURE VICTIMS[1]

INTRODUCTION

> One of the most atrocious violations against human dignity is the act of torture, the result of which destroys the dignity and impairs the capability of victims to continue their lives and their activities.[2]

Throughout this book we have made references to the offences of torture, and inhuman and degrading treatment or punishment. A detailed consideration of the crime of torture and the rights of torture victims is therefore a fitting subject for this penultimate chapter. Actions amounting to torture unfortunately go back as far as human history itself, having been practised in all societies since time immemorial.[3] A historical legal analysis depicts a melancholy picture of the antiquity of this crime. During the twentieth century, torture was conducted in various forms. The two world wars provide tragic examples of torture being conducted during military operations as well as in non-armed conflicts against ordinary civilians.

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[1] N.S. Rodley, *The Treatment of Prisoners in International Law*, 2nd edn (Oxford: Clarendon Press) 1999, A. Boulesbaa, *The UN Convention on Torture and Prospects for Enforcement* (The Hague: Martinus Nijhoff Publishers) 1999; J. Herman Bugers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (The Hague: Martinus Nijhoff Publishers) 1988; D.J. Harris, *Cases and Materials on International Law*, 5th edn (London: Sweet and Maxwell) 1998, pp. 710–764.

[2] United Nations, *Vienna Declaration and Programme of Action* (New York: United Nations Department of Public Information) 1993 para 55 (pt II).

[3] On the historical analysis of acts of torture involving genocide see J. Rehman, *Weaknesses in the International Protection of Minority Rights* (The Hague: Kluwer Law International) 2000, pp. 51–54.

Since the end of the Second World War, there have been many gruesome acts of torture. It is also a crime that is currently practiced on a regular basis in many States of the world.[4]

Torture is an offence against human dignity and is rightly regarded as a crime against humanity.[5] Since the establishment of the United Nations in 1945 significant efforts have been made to eradicate acts of torture. The catalogue of international provisions condemning torture is so extensive that it would be impossible to give a comprehensive list here. There is currently an array of international documents prohibiting and condemning acts in the nature of torture. Among general human rights instruments torture, inhuman or degrading treatment or punishment is prohibited by the UDHR,[6] the ICCPR[7] and by the three regional human rights mechanisms.[8] The international machinery in the fight against those conducting torture has been supplemented by a variety of related instruments. The whole thrust of international humanitarian law is to attempt (in so far as is possible) to reduce pain, suffering and torture during international warfare and internal conflicts.[9] Specific human rights instruments dealing with *inter alia* genocide,[10] slavery and the slave trade,[11] racial discrimination,[12] apartheid,[13] children,[14]

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[4] Boulesbaa, above n. 1, at p. 99.

[5] The Statute of the International Criminal Court incorporates Torture as a 'crime against humanity'. See Article 7(1)(f). It defines torture as 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions' Article 7(2)(e).

[6] Article 5 provides that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

[7] According to Article 7 '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'. The Human Rights Committee has established a substantial jurisprudence on this subject. See above Chapter 4.

[8] Article 3 ECHR (1950) see above Chapter 6; Article 5 ACHR (1969) see above Chapter 8; Article 5 AFCHPR (1981) see above Chapter 9.

[9] See the Geneva Conventions and the Protocols to these Conventions. In particular note the Common Article 3 of the Conventions.

[10] Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948. Entered into force 12 January 1951. 78 U.N.T.S 277. Considered above Chapter 11.

[11] The Supplementary Convention on the Abolition of Slavery, Slave Trade, and Institutions of Slavery and Practices Similar to Slavery (1956). Adopted by a Conference of Plenipotentiaries convened by ECOSOC Resolution 608 (XXI) 30 April 1956, Geneva 7 September 1956.

[12] International Convention on the Elimination of All Forms of Racial Discrimination (the Race Convention). See above Chapter 10.

[13] International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) GA Res. 3068 (XXVIII). Adopted 30 November 1973. Entered into force 18 July 1976; 1015 U.N.T.S. 244.

[14] Convention on the Rights of the Child (1989) Article 37; see above Chapter 14.

women[15] and refugees[16] have also condemned acts of torture and violence. We have already noted that the Commission on Human Rights set up a working group on Enforced or Involuntary Disappearances in 1980.[17] In 1982 a UN Special Rapporteur was appointed on Arbitrary Executions followed by the UN Special Rapporteur on Torture in 1985.[18]

In addition to the aforementioned instruments and mechanisms the United Nations, as this chapter will consider in detail, has established a binding treaty which deals exclusively with the subject of torture, cruel, inhuman or degrading treatment or punishment. This United Nations Convention, known as the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted on 10 December 1984.[19] The adoption of the treaty at the universal level provided the impetus for other regional treaties concentrating on torture. In December 1985, the General Assembly of the OAS adopted the Inter-American Convention to Prevent and Punish Torture,[20] and in 1987 the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment was approved by the Council of Europe.[21]

The existing prohibitions in treaty law on the subject are strengthened by international customary laws. In an earlier chapter we considered that treaties provide evidence of State practice. An overwhelming acceptance of a treaty may lead to the formation of customary international law, which would be binding on all States. In the case of torture, the substantial number of ratifications to the treaties concerned with prohibiting torture (combined with the fact that neither the ICCPR nor any of the regional human rights treaties allow any derogations from those articles that deal with the prohibition of torture) provides persuasive evidence that the norm is binding in international law. Furthermore it can also be argued that the prohibition on

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[15] The UN General Assembly's Declaration on the Elimination of Violence against Women (1993); the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against women. See above Chapter 13.

[16] Convention Relating to the Status of Refugees. Signed 28 July 1951; entered into force 22 April 1954; 189 U.N.T.S. 150.

[17] See above Chapter 2.

[18] See discussion in this chapter.

[19] Adopted and opened for signature, ratification and accession on 10 December 1984 by GA Res. 39/46, 39 UN GAOR, Supp. No. 51, UN Doc. A/39/51, at 197 (1984). Entry into force 26 June 1987. 1465 U.N.T.S. 85; 23 I.L.M. (1985) 535.

[20] Signed 9 December 1985. Entered into force 28 February 1987 O.A.S.T.S.67, GA Doc/Ser.P, AG/doc. 2023/85 rev.1 (1986) pp. 46–54, 25 I.L.M. (1986) 519. See E. Kaplan, 'Combating Inter-American Convention to Prevent and Punish Torture' 25 *Brooklyn Journal of International Law* (1989) 399; S. Davidson, 'No More Broken Bodies or Minds: The Definition and Control of Torture in the Late Twentieth Century' 6 *Canterbury Law Review* (1995) 25.

[21] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, E.T.S. 126, entered into force February 1 1989.

torture is a norm of *jus cogens*, a norm from which no derogation is permissible.[22]

States are bound under international law not only to refrain from torturing their citizens and other residents, but also to punish those involved in committing this act. Having made this universally accepted statement, there nevertheless remain a number of controversial issues. First, while consensus exists on the prohibition of torture, there are disagreements over the meaning and scope of the term 'torture'. Secondly, there are difficulties in identifying the nature of prohibitions involved in treatment or punishment that is cruel, inhuman or degrading. Societies as well as individuals differ in their perceptions. Thus, some societies view certain punishments as cruel, inhuman or degrading whereas others regard them as fair and just means of retribution.[23] Issues of cultural relativism are directly relevant to this debate.[24] Thirdly, there are difficulties in implementing and enforcing the prohibition of torture. As this chapter elaborates, while the UN Convention against Torture provides for implementation mechanisms, there are a number of limitations and weaknesses in the systems which need to be explored.

THE CONVENTION AGAINST TORTURE (TORTURE CONVENTION)

The Convention against Torture is the product of a sustained campaign to respond to growing instances of torture and violence. Many occurrences of torture including those relating to the treatment of political opponents in the East Bengal civil war (1970), in Chile (1973) and under regimes of men like Idi Amin of Uganda (1971–1979) and Francisco Marcias Nguema of Equatorial Guinea (1969–1979) highlighted the necessity of concerted international action. Like the Convention on Elimination of All Forms of Discrimination against Women and the International Convention for the Elimination of All Forms of Racial Discrimination, the Torture Convention was proceeded by a General Assembly Resolution.[25] In 1977 the Commission

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[22] Professor Nigel Rodley makes the valid point that 'it is safe to conclude that the prohibition is one of general international law, regardless of whether a particular state is party to a treaty expressly containing the prohibition. Indeed, it may well be that the same reasons, especially the fact of non-derogability of the prohibition in the human rights treaties, permit acceptance of the view that the prohibition is itself a norm of *jus cogens* or a 'peremptory norm of general international law'. Rodley, above n. 1, at p. 74. On the meaning of *jus cogens* norms see above Chapter 1.

[23] See the Report of the 1982 Working Group, UN Doc. E/CN/1982/L/40 (1982) Text reproduced Addendum UN Doc E/1982/12/Add.1 (1982) p. 3. On capital punishment see above Chapter 4 and Chapter 6.

[24] See above introductory chapter.

[25] See Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by GA Res. 3452 (XXX) of 9 December 1975.

on Human Rights was requested by the General Assembly to draft a convention against torture and other cruel, inhuman or degrading treatment. These negotiations in the Commission (and in later stages in the General Assembly) took place during 1977–1984. Debate centred around a number of areas; these included the implementation of the Convention, and jurisdictional issues such as universal jurisdiction.[26] Agreement was particularly difficult to reach on issues relating to implementation. In March 1984 the drafts of the treaty were transmitted to the General Assembly to finalise the Document. During much of 1984, the General Assembly worked on the improvement of the text and to agree on the implementation of the treaty. The Convention was adopted by the General Assembly on 10 December, 1984 – on the thirty-sixth anniversary of the adoption of the UDHR. The Convention came into operation in 1987 and currently has 128 State parties.[27] The Convention is divided into three sections. Substantive rights are contained in Article 1–16, implementation machinery is provided in Articles 17–24, and clauses relating to ratification, amendments, etc. are contained in the final part consisting of Articles 25–32. The preamble of the Convention, makes reference to the United Nations Charter,[28] to Article 5 of the UDHR and Article 7 of the ICCPR. It also refers to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly.[29]

Provisions contained in the convention

Article 2	Obligation on States to take effective legislative, administrative, judicial or other measures to prevent acts of torture
Article 3	Obligation on States not to return or expel people to countries where they may be subjected to torture
Article 4	Obligation upon States to criminalise all acts (and attempted acts) of torture with appropriately severe punishments
Article 5	Obligation upon States to establish jurisdiction over the offences of torture
Article 6	Obligation to take into custody alleged torturers
Article 7	Obligation to extradite or try alleged offenders
Article 8	Obligation to ensure that extradition is available for torturers

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[26] A-M.B. Pennegård, 'Article 5' in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Kluwer Law International) 1999, 121–146 at p. 130.

[27] It has been correctly pointed out that out of six human rights treaties with an implementing body, the Torture Convention has received the least ratifications thus far. Pennegård, ibid. at p. 130. For details of States parties see Appendix II.

[28] Particularly Article 55.

[29] Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975.

Article 9	Obligation to afford assistance in connection with criminal proceedings in respect of torture, including supply of evidence
Article 10	Obligation to ensure education and information regarding the prohibition against torture
Article 11	Obligation to keep under review, interrogation rules and practices for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment, to prevent torture
Article 12	Obligation to proceed to a prompt and impartial investigation in cases of torture
Article 13	Obligation to ensure the rights of torture victims (including the right to complain and have their case heard by competent authorities)
Article 14	Obligation to provide remedies
Article 15	Obligation to exclude evidence obtained through torture
Article 16	Obligation to prevent acts of cruel, inhuman or degrading treatment or punishment (not amounting to torture)

Defining the concept of 'torture', 'cruel' 'inhuman' or 'degrading treatment' or 'punishment'

A preliminary issue relates to the meaning of the terms of 'torture', 'cruel', 'inhuman' 'or 'degrading treatment' or 'punishment'. At the very outset of our survey of the Torture Convention, there appears to be a discrepancy; while the Convention defines 'torture', there is no detailed exposition of the terms 'cruel', 'inhuman' 'degrading treatment or punishment'. The Convention defines torture as follows:

> For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[30]

A number of issues emerge from this definition. First, the Convention defines and envisages 'torture' as a product of an 'act'. Could an omission with equally serious consequences amount to torture? While the matter was debated during the drafting of the convention, no clear position seems to have been established. It is submitted that omissions if intentionally conducted (for example, denial of food to prisoners) amount to torture. There is

[30] Article 1(1).

evidence to support this argument from case law emergent from human rights bodies.[31]

Similarly to the debate on the scope of 'an act', controversy surrounds the meaning of 'severe'. During the drafting stages several proposals were made in order to delete the term from the definition.[32] It was however retained, with some States expressing the view that pain or suffering must attain a certain threshold before it could amount to torture.[33] There are other limitations in the definition of torture as well. Pain and suffering must be inflicted intentionally and for the purposes listed in Article 1(1) to constitute torture. Pain and suffering administered as a 'lawful sanction' does not come within the definition of torture, although it may lead to 'cruel, inhuman or degrading treatment or punishment'.[34]

The ambit of torture is limited to when this activity is conducted 'by or at the instigation of' or 'with the consent or acquiescence of a public official or other person acting in an official capacity'. This definition only covers torture conducted by public officials (for example, police or other agencies established by the State). The public officials also include paramilitary organisations, vigilantes or death-squads. Torture may also be inflicted by private individuals provided they act on the instigation of, or with consent or acquiescence of State officials. The definition is, however, restrictive in that it excludes acts of torture conducted by non-State actors and private individuals against other individuals or State officials. This appears to be an unfortunate limitation as many instances of torture can be found where the act of torture is committed by non-State actors or private individuals.

The definition provided in Article 1 also raises the issue of the scope of the crime. The obvious intention of the Article is to protect the detainees in the custody of law enforcement agencies or security forces etc. The question has been raised as to the scope of torture outside of places of detention, for example, in public schools etc.[35] Andrew Byrnes, in suggesting a broader

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[31] In *Denmark, Norway, Sweden* v. *Greece*, the European Commission on Human Rights held that 'the failure of the Government of Greece to provide food, water, heating in winter, proper washing facilities, clothing, medical and dental care to prisoners constitutes an "act" of torture in violation of article 3 of ECHR'. See the *Greek Case* Yearbook XII (1969) 1. Also see *Denmark, Norway, Sweden* v. *Greece*, 12 YB 1 (1969). Also see *Loizidou* v. *Turkey* (Preliminary Objections), Judgment of 23 March 1995, Series A, No. 310, para 62.

[32] See the Report prepared by the Secretariat on the fifth UN Congress on the Prevention of Crime of Torture and the Treatment of Offenders (1976) p. 38.

[33] See the summary prepared by the Secretary-General in accordance with the Commission Resolution 18 (XXXIV) containing the comments received from governments on the Draft Articles of the Convention on Torture, Commission on Human Rights, thirty-fifth session, UN Doc.E/CN/1314/Add.1(1979) p. 2.

[34] See Harris, above n. 1, at p. 715.

[35] A. Byrnes, 'The Committee Against Torture' in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press) 1992, 509–545 at p. 515.

approach, notes the possible application of torture to institutions which are *per se* not regarded as places of detention, for example State-run hospitals, offices and schools.[36]

Having pointed to the complexities in the definition of torture, the next issue concerns distinguishing torture from other forms of ill-treatment. These distinctions have been scrutinised by some human rights bodies more closely than others (see, for example, the ECHR as opposed to the ICCPR). Under the Torture Convention, while States are under an obligation to prevent acts amounting to cruel, inhuman, degrading treatment or punishment, the distinction is of significance since certain provisions can apply only to torture (see for example Article 20). A number of important provisions are only applicable when the offences attain the threshold of torture. These provisions are contained in Articles 3–9 and 14.

The absence of terms other than torture has already been alluded to; there is a similar dearth of analysis of these terms in the general corpus of international human rights law. One strategy adopted by some human rights treaty bodies is that of avoiding the issues of distinctions altogether. Thus the Human Rights Committee, the European Committee for the Prevention of Torture and the Inter-American Commission have generally avoided distinguishing torture from cruel, inhuman, degrading treatment or punishment.[37] This is possibly a result of the varying notions of torture; a generalised treatment of violations of particular articles is often seen as less controversial. Andrew Byrnes makes the following valid point:

> while it is obviously desirable that international bodies concerned with the prevention and punishment of torture not work at cross purposes, it is also important to keep in mind that there is no one, standard definition of torture and other ill-treatment that applies in every context. What 'torture' means for the work of one body will depend on the text, purpose and history of its enabling instrument, as well as on its own practice and the relevant practice of States.[38]

In the light of these complexities inherent in defining torture, a broad approach is recommended. It would also be useful for CAT (the Committee which implements the Torture Convention) to develop its jurisprudence in the light of related cases from other treaty bodies. The case law of the Human Rights Committee has been extensive and provides useful guidelines. The Human Rights Committee has classified physical acts such as punching and

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[36] Ibid. 516.

[37] S. Davidson, 'The Civil and Political Rights Protected in the Inter-American Human Rights System' in D. Harris and S. Livingstone (eds), *The Inter-American System of Human Rights* (Oxford: Clarendon Press) 1998, 213–288 at p. 230.

[38] A. Byrnes, 'The Committee Against Torture' in P. Alston (ed.), above n. 35, at p. 513.

kicking,[39] forcible standing for hours,[40] electrocution and shocks,[41] and enforcement of malnutrition and starvation[42] as torture. Other regional bodies have established that physical beatings,[43] the death penalty,[44] disappearances,[45] prolonged periods of detention incommunicado,[46] rape,[47] putting hoods so as to suffocate the victim;[48] mock burials and mock executions,[49] amount to torture. It is also firmly established that torture results not only from physical force, but is also manifested by mental torture and suffering.

Non-expulsions and torture Convention

Article 2(1) of the Convention places an obligation on States parties to the Convention to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'. The obligation is immediate and the emphasis is upon *effective* measures to prevent acts of torture. While these provision are directed towards ensuring that State parties remain under an obligation to ensure effective prevention of torture within their own respective jurisdictions, complications have surfaced where a State decides to expel or extradite individuals to another State

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[39] *Miguel Angel Estrella* v. *Uruguay*, Communication No. 74/1980 (17 July 1980), UN Doc. Supp. No. 40 (A/38/40) at 150 (1983).

[40] *Moriana Hernandez Valentini de Bazzano, Luis Maria Bazzano Ambrosini, Martha Valentini de Massera and Jose Luis Massera* v. *Uruguay*, Communication No. R.1/5 (15 February 1977), UN Doc. Supp. No. 40 (A/34/40) at 124 (1979).

[41] *Alberto Grille Motta* v. *Uruguay*, Communication No. 11/1977 (29 July 1980), UN Doc. CCPR/C/OP/1 at 54 (1984).

[42] *Raul Sendic Antonaccio* v. *Uruguay*, Communication No. R.14/63 (28 November 1979), UN Doc. Supp. No. 40 (A/37/40) at 114 (1982); *Roslik et al.* v. *Uruguay*, Case 9274, Res. No. 11/84, October 3, 1984, OAS/Ser.L/V/II.66, doc.10 rev 1, at 121.

[43] See *Denmark, Norway, Sweden* v. *Greece*, 12 YB 1 (1969), 504; *Raul Sendic Antonaccio* v. *Uruguay*, Communication No. R.14/63 (28 November 1979), UN Doc. Supp. No. 40 (A/37/40) at 114 (1982), paras 16(2) and 20.

[44] In its 1993 Resolution on Peru (IACHR) Annual Report 1993, 478, it noted 'For the Inter-American Commission on Human Rights, there is no premium that can be placed upon human life. The death penalty is a grievous affront to human dignity and its application constitutes cruel, inhuman and degrading treatment of the individual sentenced to death'.

[45] See *Lissardi and Rossi* v. *Guatemala*, Case 10.508, Report No. 25/94, Inter-Am.C.H.R., OEA/Ser.L/V/II.88 rev.1 Doc. 9 at 51 (1995) at 54.

[46] *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

[47] *Aydin* v. *Turkey*, Judgment of 25 September 1997, 1997-VI RJD 1885, para 86; *Caracoles Community* v. *Bolivia*, Case 7481, Res. No. 30/82, March 8, 1982, OAS/Ser.L/V/II.57, Doc. 6 Rev. 1, at 20 September 1982, at 36 (1994). and *Raquel Martí de Mejía* v. *Perú*, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996) at 182–8.

[48] *Lovato* v. *El Salvador*, Case 10.574, Report No. 5/94, Inter-Am.C.H.R., OEA/Ser.L/V/II.85 Doc. 9 rev. at 174.

[49] *Barrera* v. *Bolivia*, Case No. 7824, Res. No. 33/82, Inter-Am.C.H.R., OAS/Ser.L/V/II.57, Doc. 6 Rev. (1982) 44.

in the knowledge that upon their return (to their State of residence or nationality) they are likely to be subjected to torture. Such expulsions of non-nationals have been the subject of intense debate in general inter-national law. We have already considered a number of cases where the Human Rights Committee and the European Commission and European Court of Human Rights have been confronted with this issue.[50] Article 3 of the ECHR has, in particular, led to some striking and exceptional decisions where the claimants have successfully relied on the argument that if expelled or extradited they would suffer from torture, or inhuman degrading treatment or punishment.[51] Article 3 of the Torture Convention, inspired by the case law of the ECHR, provides that:

(1) No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
(2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 3 emphasises the fundamental right of non-refoulement, which is now considered part of customary international law.[52] Similar provisions can be found in Article 33 of the 1951 Convention Relating to the Status of the Refugees.[53] The significance of Article 3 of the Torture Convention is confirmed firstly by the fact that it has been the subject of regular scrutiny by the Committee against Torture (CAT) in its consideration of State reports. Secondly, CAT has thus far produced its only 'General Comment' on this Article and, thirdly and most significantly, a majority of cases dealt with by CAT relate to this particular Article.

An interesting example of the application of Article 3 is provided by *Alan* v. *Switzerland*.[54] In this case the author of the communication, Ismail Alan, was a Turkish national who had been involved in political activities in Turkey for the outlawed Marxist-Leninist group KAWA. During 1981–1983 he was detained a number of times during which he claimed to have been tortured by the Turkish authorities. He was sentenced in 1984 to two and a half years of imprisonment and was awarded a ten-month period of internal

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[50] See above Chapters 4 and 6.
[51] See *Soering* v. *United Kingdom*, Judgment of 7 July 1989, Series A, No. 161; *Chahal* v. *United Kingdom*, Judgment of 15 November 1996, 1996-V RJD 1831.
[52] M. Kjärum, 'Article 14' in G. Alfredsson and A. Eide (eds), above n. 26, 279–295 at p. 285.
[53] Convention Relating to the Status of Refugees. Signed 28 July 1951; entered into force 22 April 1954; 189 U.N.T.S. 150.
[54] *Ismail Alan* v. *Switzerland*, Communication No. 21/1995, UN Doc. CAT/C/16/D/21/1995 (1996).

exile for his involvement with the militant organisation, KAWA. During 1989 and 1989 he was re-arrested. The author claimed that during this period he was tortured and his house was searched by the Turkish police. In 1990, after having left the Turkey on a forged passport, Ismail Alan sought asylum in Switzerland. Despite having produced medical evidence of scars on his body, the Swiss authorities turned down his application on the basis that there were too many inconsistencies in his claim for asylum. Ismail Alan, relying upon Article 3 of the Convention, then complained to the Committee against Torture (CAT). The Committee took account of all the relevant considerations as provided in Article 3(2) of the Convention.[55] It considered the existing consistent and systematic pattern of serious violations of human rights in Turkey, which had been confirmed by its own findings in its enquiry under Article 22 of the Convention.[56] According to the Committee, the critical factor in assessing the validity of the claims based under Article 3 was a determination that the person in question would be in danger of being subjected to torture upon his return to the country. Specific grounds must exist establishing that the individual concerned would be at risk personally.[57] In upholding the author's claim the Committee made the following observations:

> In the instant case, the Committee considers that the author's [Kurdish] ethnic background, his alleged political affiliation, his history of detention, and his internal exile should all be taken into account when determining whether he would be in danger of being subjected to torture upon his return. The State party has pointed out contradictions and inconsistencies in the author's story, but the Committee considers that complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claim.[58]

In its General Comment adopted in 1997, CAT set forth the following guidelines as useful in determining the validity of the applicant's claim under Article 3 of the Convention:

(a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see art. 3, para. 2)?

(b) Has the author been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?

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[55] Para 11.2 and 11.5.

[56] Para 11.2; see below on Article 22 procedure.

[57] Ibid.

[58] Para 11.3

(c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?

(d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?

(e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?

(f) Is there any evidence as to the credibility of the author?

(g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?[59]

In another more recent case, *A.S* v. *Sweden*,[60] CAT relied on the aforementioned guidelines to decide in favour of an asylum claim brought by an Iranian national. The case concerned an Iranian widow, whose husband had died while performing services for the State. After her husband's death, although provided with greater material support, the complainant was subjected to a strict Islamic code and was forced into a marriage with one of the high ranking Ayatollahs. This marriage, the author complained, was enforced through threats of physical harm to her and to her children. The author claimed that while not expected to live with the Ayatollah, she was used for sexual services whenever required. The author subsequently met a Christian man and in her attempts to elope with him was apprehended and allegedly severely beaten and tortured by the police. She was subsequently successful in leaving Iran and on arrival in Sweden submitted an application for asylum. She also submitted that since her departure from Iran she had been awarded the Islamic sentence for adultery (stoning to death) and was fearful of the execution of that sentence were she to be returned. The Swedish Immigration Board turned down her application for asylum, based on what they perceived as inconsistencies in the author's claim. On her communication before CAT, the Committee in upholding the authors' claim noted:

> Considering that the author's account of events is consistent with the Committee's knowledge about the present human rights situation in Iran, and that the author has given plausible explanations for her failure or inability to provide certain details which might have been of relevance to the case, the Committee is of the view that, in the prevailing circumstances, the State party has an obligation, in accordance with article 3 of the Convention, to refrain from forcibly returning the author to Iran or to any other country where she runs a risk of being expelled or returned to Iran.[61]

[59] Para 8.

[60] *A.S. v. Sweden*, Communication No. 149/1999. CAT/C/25/D/149/1999 (1999).

[61] Ibid. para 9.

Torture and the issues of sovereign immunity and universal jurisdiction

The criminalisation of torture is universally acknowledged and in this regard our earlier discussion needs to be recalled. Notwithstanding the prohibition and criminalisation of torture, two issues of fundamental importance remain to be considered. First, whether universal jurisdiction to try and punish those involved in crimes of torture exists. Secondly, to what extent can State or governmental officials rely upon their position to claim immunity from any challenges brought by their victims in domestic courts.

International law has struggled to provide definitive answers since both of these questions affect the very core of the international legal system which is based upon State sovereignty. Subsequent discussion aims to highlight the existing tensions through case law, State practice and the treaty provisions of the UN Convention. A frequently invoked case on the subject is *Filártiga* v. *Pena-Irala*.[62] The case concerned a claim of torture brought in the United States by two Paraguayan refugees against a Paraguayan (former police officer) who was apprehended in the United States. The applicants instituted civil proceedings for damages against the defendant even though the alleged acts of torture took place outside the United States. The plaintiffs claimed that the United States court had jurisdiction to deal with the case under the United States Judiciary Act 1789. The Act establishes federal court jurisdiction over 'all causes where an alien sues for a tort ... [committed] in violation of the law of nations'.[63] The United States Circuit Court of Appeal in confirming the United States courts' jurisdiction to try the case noted:

> A threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations. In the light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice) we find that an act of torture committed by a State official against one held in detention violates established norms of international law of human rights and hence the law of nations.[64]

In the *Filártiga case*, although the defendant was a former police officer, any defences based on acts conducted in an official capacity were disregarded. The decision in *Filártiga*, in particular the recognition by the Court that torture is prohibited by customary international law, has been widely welcomed and publicised.[65] At the same time the views expressed by the court must be expressed with a hint of caution for two reasons. Firstly, because the Court was dealing with a

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[62] 630 F. 2d 876 (1980); 19 ILM 966. US. Circuit Court of Appeals, 2nd Circuit.
[63] 28 U.S.Ct 1350.
[64] Per Circuit Judge, Kaufman.
[65] See J.M. Blum and R.G. Seinhardt, 'Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after *Filártiga v. Peña-Irala*', 22 *Harvard International Law Journal* (1981) 53.

civil liability (as opposed to criminal liability) action, and secondly because it does not address the subject of universality of jurisdiction in the case of torture.[66]

In relation to torture claims, the defence based on sovereign or State immunity has been tested in the English courts. In *Al Adsani* v. *Government of Kuwait*,[67] the plaintiff, who had been tortured by the members of the Kuwaiti Royal Family, brought a civil action for damages against the Government of Kuwait (the first defendant) and individual members of the Royal Family (as second, third and fourth defendants). In dismissing the appeal in so far as it related to the first defendant, the Court of Appeal relied upon the limitations of State immunity as provided by the State Immunity Act 1978.

The enforcement of the Torture Convention appears to have addressed some of these uncertainties. The thrust of the Convention against torture is directed towards any individual committing acts of torture. The holding of official or public position is, therefore, not an excuse or justification for conducting torture. In other words, as Lord Browne-Wilkinson noted in the *Pinochet case*,[68] 'the notion of a continued immunity for ex-heads of States is inconsistent with the provisions of the Torture Convention' and that torture, as established by the Convention 'cannot be a State function'.[69]

The Convention also sets down jurisdictional principles. Article 5 in establishing a multi-jurisdictional system provides that:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
   (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
   (b) When the alleged offender is a national of that State
   (c) When the victim is a national of that State if that State considers it appropriate

[66] Rodley notes that the case 'did not deal, however, with the intractable question of when an international law prohibition, even one that requires penal action by States to repress violations, becomes one that requires or permits universality of criminal jurisdiction' and that 'it must be remembered that *Filártiga* case was one of civil, not criminal law. There is no reason to conclude that criminal liability would not also be the case, but as yet there is no state practice to endorse the point. Indeed, the chances of establishing such a practice will be rare: evidence is hard to come by in torture cases, especially in cases heard outside the country where the torture took place' Rodley, above n. 1, at pp. 128–129.

[67] *Al Adsani* v. *Kuwait* (1996) (CA) Court of Appeal 12 March 1996, *The Times*, March 29 1996; In the proceeding brought by Al-Adsani against the United Kingdom before the European Court of Human Rights, the Court recently decided that there were no violations of Article 3 and 6 of the European Convention on Human Rights. See *Al-Adsani* v. *United Kingdom* 21 November 2001, No. 35763/97 (2002) 34 *EHRR* 11.

[68] *R.* v. *Evans Ex p. Pinochet Ugarte (No. 1)* (HL) 25 November 1998 [1998] 3 WLR 1456; *R.* v. *Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No. 2)* (HL) 15 January 1999 [1999] 2 WLR 272; *R.* v. *Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No. 3)* (HL) 24 March 1999 [1999] 2 WLR 827.

[69] Ibid. at 114 J–115 a–e.

Under the provisions of Article 5(1) States parties are required to esta criminal jurisdiction in cases of torture where torture is conducted in territory;[70] relying upon the nationality principle, when the offender national;[71] relying upon the passive personality principle, where the vi have the State's nationality.[72] The provisions in Article 5(1) are reinforce Article 5(2) according to which '[e]ach State Party shall likewise take measures as may be necessary to establish its jurisdiction over such offe in cases where the alleged offender is present in any territory under its j diction and it does not extradite him pursuant to Article 8 to any of the S mentioned in paragraph 1 of this Article'. Article 5(2) and Article 7 o Convention place an obligation upon the State either to extradite the all torturers or to try them on grounds of universal jurisdiction.[73]

The existence of the multi-State grounds of jurisdiction as provided in Torture Convention have often been equated with 'universal jurisdictio Such a view, however, remains questionable since in the absence of attai a status of customary international law the jurisdictional provisions only l States parties to the treaty.[75] Some commentators have suggested that u the Torture Convention the multi-State jurisdiction 'would permit all Sta including those not parties to it, to prosecute or extradite torturers foun their territory'.[76] Others however have questioned this approach. Accor to Boulesbaa:

> The term 'universal jurisdiction' ... does not connote the same technical meanin as 'universal jurisdiction' over piracy in which any State may prosecute the pirate it obtains personal jurisdiction over him regardless of whether it has any connectio with the crime or the pirate. The multi-State jurisdiction in the Torture Conventio merely connotes 'a multiplicity of jurisdictions' limited to the State parties of th Torture Convention which is intended to deny torturers any safe haven in suc States. It does not include those States not party to the Torture Convention.[77]

Boulesbaa's argument appears persuasive in the light of the recent high p file case concerning General Pinochet. In its second hearing in the House Lords, although their Lordships relied upon a range of sources from gene

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[70] Article 5(1)(a).
[71] Article 5(1)(b)
[72] Article 5(1)(c).
[73] Rodley, above n. 1, at p. 129.
[74] See Burgers and Danelius, above n. 1, at p. 132–133; According to Professor Harris, '[s]igni icantly, the Convention grounds for criminal jurisdiction include universality jurisdiction; it sufficient that "the alleged offender is present" in its territory for the Convention to appl Article5(2).' Harris, above n. 1, at pp. 715–716.
[75] On treaty provisions as binding in customary international law see above Chapter 1.
[76] G.C. Rogers, 'Argentina's Obligations to Prosecute Military Officials for Torture' 20 *Columbia Human Rights Law Review* (1989) pp. 289–290, n. 154.
[77] Boulesbaa, above n. 1, at p. 205.

international law and came to deny a blanket immunity to General Pinochet, nevertheless they limited the scope of the offences of torture and conspiracy to commit torture to after 8 December 1988 – the date when the UK incorporated within its domestic law the Convention against Torture. The majority of their lordships recognised that jurisdiction, in so far as United Kingdom courts were concerned, was established from the time of the incorporation of the Convention into UK law.[78] However the issue also raised confusion. Thus according to Lord Brown-Wilkinson

> [t]he *jus cogens* nature of internal crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any state because the offenders are 'common enemies' of all mankind and all nations have an equal interest in their apprehension and prosecution ... In the light of the authorities to which I have referred (and there are many others) I have no doubt that long before the Torture Convention of 1984 state torture was an international crime in the highest sense.

Having made these substantial comments, he goes on to say:

> until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a world wide universal jurisdiction. Further it required all member states to ban and outlaw torture.

A detailed consideration of the judgments delivered by their Lordships in the *Pinochet case* highlights the existence of a lack of clarity, particularly on issues of jurisdiction of domestic courts. Having said that, the articulation of rules through an international treaty is proving useful. The increasing number of ratifications to the Torture Convention and the equally insignificant number of reservations point towards a growing consensus that, in addition to treaty law, customary international law is moving towards a position where it is envisaged that States would be under an obligation to ensure the existence of universal jurisdiction in cases of torture.

THE COMMITTEE AGAINST TORTURE (CAT)[79]

Part II (Articles 17–24) of the Convention deals with the implementation of the treaty. Article 17, establishes a Committee against Torture (CAT) which

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[78] Incorporation of the treaty effected through S.134 of the Criminal Justice Act 1998. The Act came into force on 29 September 1988.

[79] A. Dormenval, 'UN Committee against Torture: Practice and Perspectives' 8 *NQHR* (1990) 26; A. Byrnes, 'The Committee Against Torture' in P. Alston (ed.), above n. 35, at pp. 509–545; M. O'Flaherty, *Human Rights and the UN: Practice before the Treaty Bodies* (London: Sweet and Maxwell) 1996, p. 139.

consists of ten independent experts. CAT, alongside the Committee on the Rights of the Child, represents the smallest of the treaty-based bodies in the UN System. The small size of the CAT is arguably a consequence of its relatively specific mandate and increasing financial constraints. These members of CAT are of high moral standing and are well known for their knowledge and competence in human rights law. They serve on the CAT in their personal capacity and are elected for a term of four years. They are eligible for re-election if renominated.[80] The Committee members are elected by the States parties although consideration is provided to equitable geographical distribution and to the expertise (in particular legal experience) of the individuals.[81]

The Committee members are elected by secret ballot from a list of persons nominated by States parties.[82] Each State party is allowed to nominate one person from among its nationals.[83] In nominating individuals for membership to the Committee, States parties are required to consider the usefulness of persons who are also members of the Human Rights Committee established under the ICCPR and who are willing to serve on the CAT.[84] Unlike most other treaty-based bodies, it is the States parties and not the United Nations who are responsible for the expenses relating to the meetings of the Committee including staffing costs and other facilities. This feature was modelled on the CERD, although in the latter case the costs of the Secretariat are provided for from the United Nations budget.[85] The financial liabilities on State parties are a potentially discouraging factor in ratifying the treaty. There is also the danger that States could, in a way, hold the Committee 'to ransom'. As States parties go into arrears, there also remains the uncertainty about the prospect of future sessions. Article 18 authorises the Committee *inter alia* to formulate its own rules of procedures, which according to the Article must establish a quorum of six members. The decisions of the Committee are to be made by a majority vote of the members present.

IMPLEMENTATION MECHANISMS

Four methods of monitoring the implementation are provided in the Convention. These comprise: first the reporting procedure, secondly an inter-State complaints procedure, thirdly an individual complaints procedure and, fourthly, the initiation of enquiry and reporting into acts of systematic torture.

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[80] According to Article 17(5) the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.

[81] Article 17(2).

[82] Ibid.

[83] Ibid.

[84] Ibid.

[85] A. Byrnes, 'The Committee Against Torture' in P. Alston (ed.), above n. 35, at p. 521.

The reporting procedure is the only compulsory procedure, the others being optional. We shall deal with each of these mechanisms in greater detail in the remainder of this chapter.

Reporting procedures[86]

Article 19 of the Convention deals with the reporting system. According to Article 19(1) each State party is obliged to submit a report within one year after the entry into force of the Convention. These reports are to be submitted to the Committee via the UN Secretary-General.[87] States parties are required to report on the measures they have taken to give effect to their undertakings under this Convention.[88] Periodic reports are to be submitted once every four years or at the request of the Committee. CAT is given *inter alia* the task of providing consideration to State Reports. In its initial phase CAT held two regular sessions every year, each lasting for two weeks. During each of the sessions, on average, five to seven reports were considered.[89] However, since its tenth session in May 1998 the duration of the sessions has been extended to three weeks, which has allowed the Committee to consider up to ten reports.[90]

As in the case of other treaty bodies there is an enormous amount of reluctance to submit reports as it opens the way for public criticism of State compliance.[91] At the same time, CAT also faces a backlog of examination of reports that have been submitted; and in the case of reports that are examined, pressure of time often does not allow a thorough or adequate discussion. In addition, the work of CAT has been criticised on a number of grounds. These include a failure to investigate the most pertinent questions, a superficiality and vagueness in consideration of reports and posing of questions, and inconsistencies in the approaching of issues among members of the Committee. These shortcomings remain, although the Committee members have, over time, gained more experience and there is now greater informal interaction with NGOs.

CAT like other human rights treaty bodies has issued reporting guidelines to States parties. The guidelines for initial reports are of a very similar nature

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[86] R. Bank, 'Country-Oriented Procedures under the Convention against Torture: Towards a New Dynamic' in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press) 2000, pp. 145–174.

[87] Article 19(1).

[88] Ibid.

[89] R. Bank, 'Country-Oriented Procedures under the Convention against Torture: Towards a New Dynamic' in P. Alston and J. Crawford (eds), above n. 86, at p. 147.

[90] Ibid. p. 149.

[91] CAT has considered (without implementing them) plans to discuss the Convention's implementation in relation to the States which have not submitted reports. Ibid. p. 148.

to those of the Human Rights Committee. In these guidelines, the request is made to States that reports should be divided into two parts: the first part outlining the general legal and constitutional structure within which the Convention is implemented and the second part should provide detailed information on the steps undertaken to implement individual Articles of the treaty. In the second part it is also anticipated that States would provide details of the difficulties experienced in the implementation of the Convention. The guidelines for periodic reports require the States to provide information on new developments in the period preceding their last report. Information that is sought in particular areas relates to institutional, legislative and administrative changes; to relevant case law and details of complaints of torture or other ill-treatment and their outcomes; and information requested by the Committee at the consideration of the previous report. As indicated earlier, CAT faces many of the issues confronted by other treaty bodies for example a growing backlog with overdue reports, inadequate reports or failure to provide additional information. The quality of reports that have thus far been submitted (like reports submitted to other treaty bodies) has been variable, both in terms of quality and relevance of information and length.

Procedure for the consideration of reports

The procedure for the consideration of the State reports is also similar to other treaty bodies. It is the norm that one member of the CAT acts as the Country Rapporteur and another as co-Rapporteur. The task of these members is to consider the reports in detail, to identify key issues, and to formulate a list of questions and comments to be put forward to the State representatives. In order to formulate his views, the Country Rapporteur relies upon the State report itself, on any previous reports, and on information received from the Special Rapporteur on Torture and from the NGOs.[92]

The CAT considers State reports in public sessions. It invites a State representative to introduce the report. The outline by the State representative is followed by questions put to him (or her) by the Committee members. These questions are usually initiated by the Country Rapporteur or a co-Rapporteur. The representative, if unable to answer the questions, appears before the Committee at a subsequent meeting (often held a few days later) to respond to the questions. At this subsequent meeting, CAT members may pose additional questions. The Committee then formulates what are termed 'Conclusions and Recommendations' or 'Concluding Observations/Comments'. These Conclusions and Recommendations, while synthesising the Committee's views

[92] O'Flaherty, above n. 79, at p. 147.

of the report and the overall situation pertaining to torture, consist of an introduction, positive aspects of the report, factors and difficulties impeding the application of the provisions of the Convention, subjects of concern and recommendations.[93] Like the Human Rights Committee and other treaty bodies, the CAT is authorised to make 'General Comments'.[94] The authority for formulating these General Comments is based on the same premise as the one provided for other treaties. The CAT has thus far utilised its authority in this regard very cautiously, adopting only a single General Comments on Article 3.

Inter-State procedure

Article 21 provides for an inter-State complaints procedure, and has distinct similarities to the provisions of Article 41 of the ICCPR. Although part of the same Convention, the procedure is optional with States interested in using this mechanism being required to make an additional declaration.[95] For the procedure to be operative, the complainant State and the State against whom the complaint is made must have made a declaration under Article 21.[96]

To pursue this procedure a State (A) that considers another State (B) is violating the Covenant can bring that fact to the attention of the State party concerned (that is, State B). State (B) must respond to the allegations within three months.[97] If, however, within six months after the receipt of the initial communication the matter has not been resolved, either State may bring the matter to the attention of the Committee.[98] The Committee must decide whether all local remedies have been exhausted (unless they are unreasonably prolonged or are unlikely to bring effective relief to the victim) before considering the case in closed sessions.[99] The Committee's task is to make an attempt to resolve the dispute through its good offices.[100] In order to pursue its functions of conciliation the Committee may appoint an ad hoc conciliation commission. The provision relating to the establishment of the commission is similar to the one provided in Article 41 of the ICCPR. However, unlike ICCPR, the procedures or mechanisms of the conciliation

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[93] For recent examples see Conclusions and Recommendations of the Committee against Torture: Kazakhstan (17/05/2001) CAT/C/XXVI/Concl.7/Rev.1. (Concluding Observations/Comments); Conclusions and recommendations of the Committee against Torture: Slovakia (11/05/2001) CAT/C/XXVI/Concl.4/Rev.1. (Concluding Observations/Comments).

[94] See Article 19(3).

[95] Article 21(1).

[96] Ibid.

[97] Article 21(1)(a).

[98] Article 21(1)(b).

[99] Article 21(1)(c)(d).

[100] Article 21(1)(e).

commission are not addressed in this Convention. The Committee is obliged to produce a written report within twelve months of the date of receipt of notice of complaint. If a solution is reached then the Committee's report will be brief and confined to facts and the solution reached.[101] If a friendly solution has not been reached, the Committee is required to confine its report to a brief statement of facts. The written submissions and a record of the oral submissions made by the States parties are to be attached to the report.[102] In our study we have considered that inter-State mechanisms have been put in place in several human rights instruments.[103] While occasional usage has been made of the inter-State procedures (see for example, the ECHR), by and large States remain reluctant to use these procedure. This reluctance derives largely from a concern of straining diplomatic and political relations. Nor do States wish to establish a precedent which may ultimately be used against them.[104] It is therefore not surprising to note that the CAT has not received an inter-State complaint.

Individual complaints procedure

Article 22 provides for the individual complaints procedure. According to Article 22(1):

> A State Party to this Convention may at any time declare under this article that it recognises the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

The individual complaints procedure is optional and requires States parties to make an additional declaration to recognise the competence of the Committee to receive and consider communications. As at 1 March 2002, forty-six States had made a declaration under Article 22. Like the inter-State procedure described above, the individual complaints procedure is also modelled very closely on the first Optional Protocol to the ICCPR and the rules of procedure adopted by CAT largely mirror those adopted by the Human Rights Committee. There are a number of distinctions between the Optional Protocol and Article 22 which need to be highlighted. First, under Article 22(1) the Communication can be made either by or on behalf of the individual provided there is evidence that the Communication has the

[101] Article 21(1)(h)(i).
[102] Article 21(1)(h)(ii).
[103] See e.g. the ICCPR; Race Convention and the three Regional treaties.
[104] See S. Leckie, 'The Inter-State Complaint Procedure in International Law: Hopeful Prospects or Wishful thinking?' 10 *HRQ* (1988) 249.

authorisation of the victim.[105] By contrast the wording of the first Optional Protocol is restrictive in that it only allows the Human Rights Committee to consider communications from 'individuals'.[106] In practice, however, as we considered in an earlier chapter, the Human Rights Committee has allowed others to petition on behalf of the victim in circumstances where he is being held incommunicado, there is strict mail censorship, there is an incapacitating illness consequent to detention or death has occurred as a result of a State's actions or omissions.[107]

It is also noticeable that while the provisions of Article 22(1) of the Torture Convention authorise Communications to be made on behalf of the victims, the position regarding submissions by NGOs remains uncertain.[108] Thus far NGOs have been unsuccessful in submitting Communications before the CAT. CAT has also not allowed *actio popularis* submissions to be made. In *B.M'B* v. *Tunisia*,[109] a Communication on behalf of a dead victim was held inadmissible since the author of the communication was not able to establish sufficient evidence of authority to act on behalf of the deceased victim.

Secondly, according to the provisions of Article 22, the same matter must not have been (and must not currently be) under consideration through another international procedure.[110] Thus the CAT is unable to hear cases already examined by, for example, the European Court of Human rights or the Human Rights Committee. However it does not affect those situations considered under the ECOSOC Resolution 1503 procedure or those situations under the consideration of the Special Rapporteur on Torture. Similarly it would not be affected by a consideration of such bodies as the UN working group on indigenous peoples or the working group on minorities.[111] Finally, unlike the first Optional Protocol procedure whereby the Human Rights Committee is restricted to taking account of 'written' information, the CAT can consider all the information made available to it by or on behalf of the individual and the State party.[112]

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[105] See above Chapter 4.

[106] Ibid.

[107] See *Herrera Rubio* v. *Colombia*, Communication No. 161/1983 (2 November 1987), UN Doc. Supp. No. 40 (A/43/40) at 190 (1988); *Mtango* v. *Zaire*, Communication No. 194/1985 (27 October 1987), UN Doc. Supp. No. 40 (A/43/40) at 218 (1988). See P.R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Aldershot: Ashgate Publishing Ltd.) 1998, at p. 85.

[108] According to one source NGOs may be entitled to take cases where they can 'justify their acting on the victim's behalf'. See UN Centre for Human Rights, *Fact Sheet No. 17, The Convention against Torture* (Geneva: United Nations).

[109] *B. M'B.* v. *Tunisia*, Communication No. 14/1994, UN Doc. A/50/44 at 70 (1995).

[110] Article 22(5).

[111] O'Flaherty, above n. 79, at p. 160.

[112] Article 22(4).

Article 22 also provides the admissibility requirements, which are similar to those of the other treaty bodies. Thus the communications must not be anonymous.[113] Nor should they be an abuse of the right of submission of such communications[114] or in any manner incompatible with the provisions of this Convention.[115] The individual, before making a communication must also have exhausted all domestic remedies unless they are ineffective or unreasonably prolonged.[116] The Committee has taken the view that a delay of fifteen months in investigating alleged torture is unreasonably prolonged.[117] As regards the burden of proof, while the CAT has refused to accept sweeping generalisations by authors as sufficient evidence of exhausting domestic remedies,[118] it has required the authors of the Communication to establish prima facie evidence of having exhausted domestic remedies. Those communications which are held inadmissible because of the non-exhaustion of domestic remedies can be re-submitted once domestic remedies have been exhausted.[119] At the same time a genuine (although ill-directed) effort to invoke domestic remedies has been held as satisfying the admissibility requirement.[120]

The procedure of handling communications is very similar to those operated for the Human Rights Committee. The Communication should provide all the material information. On receipt of the communication, it is screened by a member of the Secretariat and is allocated to a member of the CAT who is known as the Special Rapporteur. In practice the Special Rapporteur will seek out the information on both the admissibility and merits of the case. When the Special Rapporteur has collated all the relevant information, the case is put before the Committee. The Committee brings the matter to the attention of the State concerned. The State concerned is required to respond within six months by submitting written explanations or statements clarifying the matter and any remedies that have been undertaken.[121] The Committee then considers communications received under this article in the light of all information that is made available to it by or on behalf of the individual and by the State party concerned. There is an opportunity for the author of the Communication and the State party to further his case or to defend it both at the admissibility and merit stages. At the admissibility stage, the author of the Communication is given four weeks on issues regarding admissibility and six weeks at the merit stage to comment and to provide further evidence to

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[113] Article 22(2).
[114] Ibid.
[115] Ibid.
[116] Article 22(5)(b).
[117] *Halimi-Nedzibi* v. *Austria*, Communication No. 8/1991, UN Doc. A/49/44 at 40 (1994).
[118] See *R.E.G* v. *Turkey*, Communication No. 4/1990 reported in UN Doc. A/46/44.
[119] See *I.U.P* v. *Spain*, Communication No. 6/1990 reported in UN Doc. A/48/44 Annex VI.
[120] See *Henri Unai Parot* v. *Spain*, Communication No. 6/1990, UN Doc. A/50/44 at 62 (1995).
[121] Article 22(3).

substantiate his case.[122] The CAT may also seek relevant information from other international agencies and UN specialised agencies.

The Committee makes its decisions to combine the judgment on the admissibility and merit stage. CAT goes on to consider the case on its merits in the light of all available information. The Committee makes decisions in closed meetings during its examination of the questions, and after consideration forwards its 'views' to the relevant State party and individual. There are no sanctions attached to the failure of the State concerned for not respecting the views of the CAT. The Committee reaches its decisions by consensus, although members are free to append individual opinions. Once the Committee has reached a decision, the views are forwarded both to the State party and the individual concerned. Under the provisions of Article 24, the Committee is required to submit an annual report on its activities and to the General Assembly of the United Nations. From a brief history of the CAT, it is apparent that the individual complaints procedure has not been used readily; the contrast between these procedures and those under the ICCPR and the ECHR is striking. A number of reasons can be advanced for this, including the fact that:

> The overwhelming majority of countries accepting the optional article 22 individual complaints procedure are also subject to one or more analogues procedures under the Optional Protocol to the International Covenant on Civil and Political Rights or the European or American Conventions on Human Rights, which potential applicants may feel provide more authoritative remedies ... there is little knowledge of the Convention and its protection system even among lawyers. It may well be that the procedure will only be of substantial use in respect of countries to which no other international procedure is applicable or as regards Convention provisions which are more convention-specific. In this connection it should be noted that the Committee has set up an expedited procedure for dealing with threatened expulsions[123]

Investigation on its own initiative (Article 20)

The CAT is unique among other international treaty-based bodies in that it is authorised to initiate investigations on its own initiative.[124] An essential

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[122] S. Lewis-Anthony, 'Treaty-Based Procedures for Making Human Rights Complaints within the UN System' in H. Hannum (ed.), *Guide to International Human Rights Practice*, 3rd edn (New York: Transnational Publishers) 1999, 41–59 at p. 56.

[123] Rodley, above n. 1, at p. 157.

[124] S. Lewis-Anthony, 'Treaty-Based Procedures for Making Human Rights Complaints within the UN System' in H. Hannum (ed.), above n. 122, at p. 53; commenting on its potential Sir Nigel Rodley remarks 'there is no model for a procedure such as that provided by Article 20 in a United Nations human rights treaty. The innovative character of the procedure is particularly suited to the special elements of the systematic practice of torture. The uniformly clandestine circumstances in which torture occurs make it necessary for information to be compiled from a range of sources including families of victims and national and international Organizations.' Rodley, above n. 1, at p. 160.

prerequisite for initiation of this process is for the Committee to 'receive reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party'.[125] In practice CAT receives such information from NGOs and intergovernmental organisations. The CAT has provided an interpretation of 'systematic practice' according to which:

> Torture is practised systematically when it is apparent that the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question. Torture may in fact be of a systematic character without resulting from the direct intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice.[126]

After having formulated a view that it has received reliable information about the systematic practice of torture, the Committee invites the State party concerned to cooperate through submission of observations on the alleged practices of torture.[127] It requests the State concerned to appoint a representative to meet with the members designated to conduct the inquiry so as to provide them with the relevant information. The inquiry on the part of Committee members may also include, with the consent of the State party, a visit to its territory by the designated members, who may gather evidence and proceed with hearings from witnesses.

In the light of all the available information, and if the Committee considers that there is sufficient evidence to proceed, it appoints one or more of its members to conduct further investigation and report to the Committee as a matter of urgency. After an inquiry has been conducted by its members, the Committee is required to submit its findings to the relevant State party along with its views, comments and suggestions.[128]

This innovative procedure is potentially of great significance for highlighting practices of torture.[129] Its broad nature and possible sources of information presents similarities with the ECOSOC Resolution 1503 procedure. However, unlike ECOSOC Resolution 1503, exhaustion of domestic remedies or other limitations do not apply.[130] The only crucial test is that the information

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[125] Article 20(1).
[126] See Doc. A/48/44/Add.1, para 39.
[127] Ibid.
[128] Article 20(4).
[129] See Harris, above n. 1, at p. 716.
[130] See above Chapter 2.

provided contains well-founded indications that 'torture is being systematically practised in the territory of a State Party'.[131] The possible sources of information include not only individuals but also NGOs and, occasionally, States parties themselves.

Despite the potentially broad nature of this procedure, there are a number of limitations that need to be noted. First, the procedure is confined to situations of torture and is inapplicable to cruel, inhuman or degrading treatment or punishment. The procedure is confidential in nature and can be conducted only with the cooperation of the State. States parties are given a further option to opt-out of the procedure by making a declaration under Article 28(1). This op-out facility is available upon signature, accession or ratification but not once the procedure has been accepted. As at the end of 2001, only thirteen States had maintained a reservation to Article 20.

On the completion of an inquiry under Article 20, the CAT may at its discretion produce only 'summary accounts' of the result, in its annual report which is published.[132] No other sanctions are attached to the Committee's findings under Article 20. Notwithstanding the enormous significance and potential of Article 20, the procedure has only been used three times. The CAT has employed this procedure against Turkey, Egypt and more recently against Peru. Only in the case of Turkey and Peru has it been possible to conduct a visit to the State.[133] In all these instances the published summaries varied significantly in terms of the qualities and issues addressed. In the case of Peru, two members of the CAT visited the State between 31 August 1998 and 13 September 1998. The Committee members came to the conclusion that:

> despite the existence of constitutional provisions protecting them, the rights of detained persons have been undermined by the anti-terrorist legislation, most of which was adopted in 1992 and is still in force, and which makes detainees particularly vulnerable to torture. At the same time, the rights of persons detained for ordinary crimes have also been undermined under the legislation adopted in 1998 on a series of particularly serious offences.[134]

THE UN SPECIAL RAPPORTEUR, THE QUESTION OF THE RIGHTS OF TORTURE VICTIMS AND OTHER INITIATIVES TAKEN BY THE UN

A significant element in furthering the human rights norms has been the use of the institution of Rapporteurs, focusing on human rights on a thematic,

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[131] Article 20(1).
[132] Article 20(1).
[133] R. Bank, 'Country-Oriented Procedures under the Convention against Torture: Towards a New Dynamic' in P. Alston and J. Crawford (eds), above n. 86, at p. 167.
[134] See Doc. A/56/54 (2001) para 164.

geographical or territorial basis. The present study has taken advantage of works conducted by several Rapporteurs; these include: Capotorti, Deschênes, Ruhashyankiko, Abdelfattah Amor, Whitaker, Eide, Krishnaswami and Benito. Of particular significance in the campaign against torture has been the role of the UN Special Rapporteur on Torture. The initial appointment of the Rapporteur had been authorised by the Commission on Human Rights in its Resolution 1985/33. This appointment was to last for a period of one year, and in 1986 the mandate was renewed for a further year. The Commission has since that time extended the mandate of the Special Rapporteur.[135] The first Special Rapporteur was Professor Kooijmans from the Netherlands, who was succeeded by Professor (Sir) Nigel Rodley from the United Kingdom. Sir Rodley gave up his position during 2001 in order to become a member of the Human Rights Committee.

The role of the Special Rapporteur on torture has been of great significance in *inter alia* 'examin[ing] questions relevant to torture'[136] and reporting 'on the occurrence and extent of its practice'.[137] The Special Rapporteur has been able to gain valuable insight into the nature of torture and its modern usage. Since his appointment the Special Rapporteur has submitted yearly and interim reports, which are extremely instructive not only in highlighting incidents of torture but also in providing constructive solutions and making valuable recommendations. His work is characterised by a number of activities – these include seeking information on torture from governments, specialised agencies, intergovernmental organisations and NGOs, responding effectively to the information he receives, sending communications to various States and analysing their responses in the light of the prevalent human rights standards. The communications also include urgent appeals where a particular individual or a group is under imminent threat. Another significant feature of Special Rapporteur work is *in situ* visits (with the consent of the State party concerned) and their follow-ups, which are valuable both for gathering opinions and comments on all alleged incidents of torture. The previous Special Rapporteur made a number of significant visits to several countries, including such afflicted areas as Rwanda (1994),[138] Pakistan (1996)[139] and Columbia (1994).[140]

While it is true that the findings and recommendations of the Special Rapporteur do not have any binding effect and *per se* cannot be enforced, they

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[135] The latest renewal (for a period of three years) was conducted by the Commission on Human Rights in its Resolution 1998/38, 17 April 1998.
[136] Commission on Human Rights Resolution 1985/33 (para 1)
[137] Ibid. (para 7).
[138] See UN Doc E.CN.4/1995/34, para 7.
[139] See UN Doc E.CN.4/1997/7/ Add.2.
[140] See UN Doc E.CN.4/1995/111.

have nevertheless had an impact in raising awareness on the subject, and have been helpful in providing solutions to the problem of torture. Commenting on the value of the Special Rapporteur's contributions, Sir Nigel Rodley notes:

> His work confirms that a person who is tortured or threatened with torture is no longer outside the concern of main organisations of the world's States; on the contrary, the organisation now seeks to hold its members to account for the fate of that individual.[141]

A question that has often been raised relates to the overlap (and possible conflict) of the work of the CAT and the Special Rapporteur. Although CAT and the Special Rapporteur are pursuing the same goals (prevention of torture and punishment of those involved in torturing individuals), the ambit of the Special Rapporteur's mandate is in many respects much broader. First, unlike the CAT, he is not restricted to working with State parties to the Convention against Torture; the Special Rapporteur's mandate in this respect is global. Nor is he inhibited by the limited definition of torture as is provided in the Torture Convention. Secondly, the Special Rapporteur can respond to a call of torture almost immediately. He is not bound by the procedures that are set out in the Torture Convention (for example, exhaustion of domestic remedies etc.) under Article 22. A Special Rapporteur, unlike the Committee under Article 22, looks at situations rather than individual cases. In relation to the examination of investigations under Article 22, the situation has to reach a particular threshold before it is possible for the CAT to examine it; no such limitations apply to the work of the Special Rapporteur.

In addition to the appointment and continued retention of the Special Rapporteur, the United Nations has also established a special Fund called the United Nations Voluntary Fund for Victims of Torture. The fund was established by virtue of the General Assembly Resolution 36/151 of 16 December 1981.[142] The fund is aimed at providing aid to 'individuals whose human rights have been severely violated as a result of torture and to relatives of such victims'.[143] The fund is administered by a board of trustees. Although there are no geographical limitations, as such, to the origin of the beneficiaries, GA Resolution 36/151 provides that priority needs to be given 'to aid victims of violation by States in which the human rights situation has been the subject of resolutions or decisions adopted by either the Assembly, the Economic and Social Council or the Commission on Human Rights'.[144] At the start of the twentieth session of the Board of Trustees of the Fund (18 May–1 June 2001),

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[141] Rodley, above n. 1, at p. 150.
[142] GA Res. 36/151 (16 December 1981).
[143] GA Res. 36/151 operative para 11(a).
[144] Ibid. Operative para 1(a).

the fund had received a total amount of US$1,079,516.[145] Attempts are also currently being made by the CAT for the adoption of an optional protocol to the Convention which would establish an international mechanism for carrying out visits to places of detention.[146]

CONCLUSIONS

A persistent point of reference in our study has been the international community's concerns over acts of torture, and cruel, inhuman and degrading treatment or punishment. We have noted that all international human rights instruments condemn and prohibit torture and other forms of ill-treatment. A number of treaty bodies have established substantial jurisprudence on the subject. In the fight against torture and gross violations of human rights, the enforcement of the Torture Convention represents a significant step forward. This chapter has, however, been critical of the narrow definition that has been given to the offence of torture by the Convention. It is recommended that wherever possible the CAT should take account of the jurisprudence emergent from related articles of other human rights instruments.

As this chapter has explored, the Convention against Torture contains a number of useful mechanisms to protect the rights of the individual. A particularly innovative procedure is provided by Article 20 where by the CAT may investigate a State on its own initiative after having received reliable information that torture is being systematically practised. Article 20 is subject to an opt-out clause, although it is fortunate that only a small minority of States has opted themselves out of this procedure. Despite this, the CAT has thus far been unable to utilise the procedure to its full potential and a greater use of Article 20 is recommended for the future.

On the whole, however, the CAT (since commencing its work) has performed a commendable job. The funding and resource problems which the CAT faces must be addressed. As noted in this chapter, the CAT is funded largely by States parties. However, the purpose of CAT would be much better served if it were funded out of the United Nations budget. Improvements are also required in the provision of resources to this Committee. The present Secretariat comprises of one part-time member, which is inadequate to deal with the substantial workload. While in the early years of the Convention NGO involvement was limited, various organisations have gradually shown an increasing amount of interest in the proceedings of the CAT, which has led to informed discussions of State reports and decisions on individual

[145] See Report of the Secretary-General, *Civil and Political Rights, Including the Question of Torture and Detention, United Nations Voluntary Fund for Victims of Torture*, Commission on Human Rights, E/CN.4/2001/59/Add.1 (4 April 2001).

[146] See Doc. A/56/54 (2001).

complaints. The role of the Special Rapporteur on Torture now seems necessary. Despite the limitations within which the UN system operates, the Special Rapporteur has examined the subject with great maturity and highlighted various instances of torture. His work has also been constructive for many governments in developing procedures and strategies to combat acts of torture. The UN Voluntary Fund for the Victims of Torture also represents a valuable initiative, although its overall impact has thus far been limited.

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TERRORISM AS A CRIME IN INTERNATIONAL LAW[1]

We are all determined to fight terrorism and to do our utmost to banish it from the face of the earth. But the force we use to fight it should always be proportional and focused on the actual terrorists. We cannot and must not fight them by using their own methods – by inflicting indiscriminate violence and terror on innocent civilians, including children.[2]

INTRODUCTION

The consideration of international terrorism in the present chapter provides a fitting conclusion to a volume dedicated to the study of international human rights law. As the events of 11 September 2001 established, terrorism poses the most serious threat to international order and global human rights in the twenty-first century. The crime of international terrorism also represents the culmination of many other human rights violations. Whatever definition is accorded to terrorism, it violates fundamental human rights as enshrined in

[1] See R. Higgins and M. Flory (eds), *Terrorism and International law* (London: Routledge) 1997; M.C. Bassiouni (ed.), *Legal Responses to Terrorism: US Procedural Aspects* (Dordrecht: Martinus Nijhoff Publishers) 1988; Y. Alexander (ed.), *International Terrorism: Political and Legal Documents* (Dordrecht: Martinus Nijhoff Publishers) 1992; Y. Alexander (ed.), *International Terrorism: National, Regional and Global Perspectives* (New York: Praeger) 1976; J. Lodge (ed.), *Terrorism: A Challenge to the State* (Oxford: Martin Robertson) 1981; J. Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979* (Cambridge: Grotius) 1990; L. Freedman et al., *Terrorism and International Order* (London: Routledge & Kegan Paul) 1986.

[2] Kofi Anan, United Nations Secretary-General addressing the United Nations General Assembly (18 November 1999).

the International Bill of Rights.[3] Terrorism also constitutes the violation of specific human rights treaties such as the Convention on the Prevention and Punishment of the Crime of Genocide,[4] the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture),[5] the Convention on the Elimination of All Forms of Discrimination against Women[6] and the Convention on the Rights of the Child.[7] Some of the case law arising out of human rights violations has already been considered in this book.[8] However, as this chapter elaborates, there is no established definition of the precise meaning and scope of the term 'terrorism'. The ambiguity in definition has been used by some States to deny their people's legitimate rights such as freedom of expression and religion, and collective group rights – particularly the right to self-determination.[9]

The present chapter advances the view that international law remains a difficult medium through which to address the subject of terrorism. There is first the difficulty in defining terrorism; perceptions vary, for example in differentiating a terrorist from a freedom fighter. Secondly, there is the

[3] See e.g. *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran*), Judgment 24 May 1980 (1980) ICJ Reports 3, where the International Court notes 'Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with ... the fundamental principles enunciated in the Universal Declaration of Human Rights' ibid. para 91. On the value of Universal Declaration on Human Rights see above Chapter 3.

[4] Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948. Entered into force 12 January 1951. 78 U.N.T.S. 277. For further analysis see above Chapter 11.

[5] Adopted and opened for signature, ratification and accession on 10 December 1984 by GA Res. 39/46, 39 UN GAOR, Supp. No. 51, UN Doc. A/39/51, at 197 (1984). Entry into force 26 June 1987. 1465 UN T.S. 85; 23 I.L.M. (1985) 535.

[6] Adopted at New York, 18 December 1979. Entered into force 3 September 1981. UN GA Res. 34/180(XXXIV), GA. Res. 34/180, 34 GAOR, Supp. (No. 46) 194, UN Doc. A/34/46, at 193 (1979), 2 U.K.T.S. (1989); 19 I.L.M (1980) 33. See also The UN General Assembly's Declaration on the Elimination of Violence against Women (1993); the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against women. For further consideration see above Chapter 13.

[7] Convention on the Rights of the Child (1989) Article 37; see above Chapter 14.

[8] See above, Parts II and III.

[9] See M. Pomerance, *Self-determination in Law and Practice: The New Doctrine in the United Nations* (The Hague: Martinus Nijhoff Publishers) 1982; A. Rigo Sureda, *The Evolution of the Right of Self-Determination: A Study of United Nations Practice* (Leiden: Sijthoff) 1973; F.L. Kirgis Jr., 'The Degrees of Self-Determination in the United Nations Era' 88 *AJIL* (1994) 304; P. Thornberry, 'Self-Determination, Minorities and Human Rights: A Review of International Instruments' 38 *ICLQ* (1989) 867; H. Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press) 1990, p. 33; Y. Blum, 'Reflections on the Changing Concept of Self-Determination' 10 *Israel Law Review* (1975) 509; R. Emerson, 'Self-Determination' 65 *AJIL* (1971) 459; M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' 43 *ICLQ* (1994) 241.

complex issue of defining the meaning and scope of the so-called 'political offences' – should individuals who have committed acts of violence be exempted from prosecution or extradition because their actions are purportedly based on political motivations?[10] Thirdly, there is the difficulty of identifying perpetrators of the crime of terrorism – should the focus of international concern be individuals and other non-State organisations or should attention to be directed towards State-sponsored terrorism? If States are implicated in terrorism, how can international laws be made more effective? Finally, there is the subject of remedies for victims of terrorism. In a fragmented and incoherent system that deals with international terrorism, victims of this crime have frequently been denied access to national and international tribunals to claim their rights.[11]

This chapter is divided into six sections. After these introductory comments, the next section analyses the difficulties in defining international terrorism. This is followed by an overview of the historical developments and a further section that considers international efforts to formulate legal principles in dealing with this crime. The penultimate section looks at the subject in the light of the political events of 11 September. The final section provides a number of concluding observations.

THE DEFINITIONAL ISSUES[12]

As we have noted throughout our study, definitional issues have generated substantial complications in the formulation of international human rights standards.[13] The term 'terrorism' is probably the most difficult to define because of varied perceptions regarding the characterisation of terrorist acts, the purpose and motivation behind such acts and the inconsistent identity of the perpetrator. Indeed the issue has been so controversial that divisions have emerged not only in the proposed definitions but more fundamentally as to

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[10] See C.L. Blakesley, 'Terrorism, Law and our Constitutional Order' 60 *University of Colorado Law Review* (1989) 471 at p. 514; L.C. Green, 'Terrorism, the Extradition of Terrorists and the "Political Offence" Defence' 31 *GYBIL* (1988) 337.

[11] Professor Dinstein correctly points out that 'the principal obstacle on the path of efforts to suppress international terrorism is that too many countries display a double standard in their approach to the problem. While concerned about acts of terrorism directly affecting their own interests (or those of their close allies) they demonstrate a marked degree of *insouciance* to the predicament of others. In the aggregate, the international community seems to lack the political will to take concerted action against terrorists of all stripes. As a result, terrorists frequently manage to get away with murder in the literal meaning of the phrase'. Y. Dinstein, 'Terrorism as an International Crime' 19 *IYHR* (1989) 55 at p. 56.

[12] See G. Levitt, 'Is "Terrorism" Worth Defining?' 13 *Ohio Northern University Law Review* (1986) 97; J.F. Murphy, 'Defining International Terrorism: A Way Out of the Quagmire' 19 *IYHR* (1989) 13.

[13] See, for example, above Chapter 11 (minorities); Chapter 12 (indigenous peoples).

whether it is worthwhile even attempting to define such an elusive concept.[14] Any attempt to reach a consensus on definitional issues is immediately confronted by significant complications.[15] An immediate and intractable question relates to the identification of 'terrorists'. In any ideological and political conflict, is it possible objectively to distinguish between a terrorist and a freedom fighter? In contemporary politics, our perceptions of acts of violence conducted by such groups as the Palestinians, the Kashmiris, the Northern Irish Catholics or the Tamil Tigers is variable. There is a great measure of truth in the well known cliché: One man's terrorist is another man's freedom fighter.

Furthermore, there is a difficulty in agreeing on the entities which could conceivably perpetrate this crime of torture. In this regard there has remained a major ideological conflict between the developing States on the one hand and the developed world on the other. While the developing States have emphasised State terrorism largely in the context of racial oppression and colonial regimes, the developed world has concerned itself with individual acts of terrorism.[16] From a human rights perspective it is arguable that every form of the taking of life, assassination, killings, bombings, hostage-taking and hijacking should be categorised as terrorist activity.[17] The motive, characteristics and underlying causes of any such actions ought not to provide a justification. On the other hand, depending on one's moral and political views, many of these actions have been justified or condoned.[18]

The controversies generated in the definitional debate have exercised the minds of many draftsmen and academics; a leading authority has noted that

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[14] As Professor Bassiouni makes the point that 'there is ... no internationally agreed upon methodology for the identification and appraisal of what is commonly referred to as "terrorism"; including: causes, strategies, goals and outcomes of the conduct in question and those who perpetuate it. There is also no international consensus as to the appropriate reactive strategies of States and the international community, their values, goals and outcomes. All of this makes it difficult to identify what is sought to be prevented and controlled, why and how. As a result the pervasive and indiscriminate use of the often politically convenient label of "terrorism" continues to mislead this field of inquiry.' M.C. Bassiouni, 'A Policy-Oriented Inquiry into the Different Forms and Manifestations of "International Terrorism"' in M.C. Bassiouni (ed.), above n. 1, at p. xvi.

[15] R. Higgins, 'The General International Law of Terrorism' in R. Higgins and M. Flory (eds), above n. 1, 13–29 at p. 14.

[16] As Levitt correctly points out 'governments that have a strong political stake in the promotion of "national liberation movements" are loath to subscribe to a definition of terrorism that would criminalize broad areas of conduct habitually resorted to by such groups; and on the other end of the spectrum, governments against which these groups' violent activities are directed are obviously reluctant to subscribe to a definition that would criminalize their own use of force in response to such activities or otherwise'. Levitt, above n. 12, at p. 109.

[17] R. Higgins, 'The General International Law of Terrorism' in R. Higgins and M. Flory (eds), above n. 1, 13–29 at pp. 14–15.

[18] Examples are also put forward about possible justifications of the (hypothetical) killings of international criminals and gross violators of human rights such as Adolf Hitler. See Blakesley, above n. 10, at p. 474.

between 1936 and 1981 no less than 109 definitions of terrorism were purposed.[19] Within this timeframe, one of the earliest and most prominent definitions was advanced through the 1937 Convention for the Prevention and Punishment of Terrorism.[20] According to Article 1(2) of the Convention:

> In the present Convention, the expression 'acts of terrorism' means criminal acts directed against a State intended or calculated to create a state of terror in the mind of particular persons, or a group of persons or the general public.

To be subject to the provisions of this Convention an act had to come within the ambit of the aforementioned definition. It had to be directed against a State party and the concerned activity had to involve one of the enumerated actions in Articles 2 and 3 of the Convention, namely 'any wilful act causing death or grievous bodily harm or loss of liberty' to a specified category of public officials, 'wilful destruction of, or damage to, public property' or 'any wilful act calculated to endanger the lives of members of the public'.

In the event, the aforementioned definition of terrorism along with the remaining of the 1937 Convention failed to be adopted. Despite this abortive attempt, renewed efforts were made in the 1950s and 1960s to formulate a consensus definition of international terrorism. In 1972 the United States, presented a Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism.[21] Within this draft, offences of 'international significance' include offences committed with intent to damage the interests of or obtaining concessions from a State or an international organisation under certain enumerated transnational circumstances, and those consisting of unlawful killing, causing serious bodily harm, or kidnapping another person (including attempts and complicity in such acts).[22] These actions should have been 'committed neither by nor against a member of the armed forces of a State in the course of military hostilities'.[23]

The 1972 US Draft Convention, like the 1937 Convention, failed to gain the approval of the international community. Instead the United Nations General Assembly established an Ad hoc Committee on International Terrorism to 'consider the observations of States [and] submit its report with recommendations for possible co-operation for the speedy elimination of the problem ... to the General Assembly'.[24] A Sub-Committee of the Ad hoc

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[19] W. Laqueur, 'Reflections on Terrorism' 64 *Foreign Affairs* (1986) 86 at p. 88.

[20] The Convention for the Prevention and Punishment of Terrorism, 16 November 1937, 19 League of Nations Official Journal (1938) 23 reprinted 27 UN GAOR, Annex I, Agenda Item No. 92, UN Doc. A/C.6/418 (1972).

[21] United States Draft Convention for the Prevention of Certain Acts of International Terrorism, UN Doc. A/C.6/L.850 (1972) reprinted in 67 Dep't State Bull. 431 (1972).

[22] Article 1.

[23] Ibid.

[24] GA. Res. 3034, 27 UN GAOR Supp. (No. 30) at 119, UN Doc. A/RES/3034, paras 9, 10.

Committee was established and within the deliberations of the Sub-Committee the following definition of 'international terrorism' was advanced

> (1) Acts of violence and other repressive acts by colonial, racist and alien regimes against peoples struggling for their liberation ...
> (2) Tolerating or assisting by a State the organization of the remnants of fascist or mercenary groups whose terrorist activity is directed against other sovereign countries;
> (3) Acts of violence committed by individuals or groups of individuals which endanger or take innocent human lives or jeopardise fundamental freedoms. This should not affect the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and the legitimacy of their struggle ...;
> (4) Acts of violence committed by individuals or groups of individuals for private gain, the effects of which are not confined to one State.[25]

The contrast between this definition and the 1972 and 1937 definitions considered above is striking. The concern of the Sub-Committee is primarily focused on racist and alien regimes. There also appears to be some form of exception accorded to those activities which are conducted in pursuance of the inalienable right to self-determination. Within this definition, the issue of intent according to one commentator 'has been turned on its head':[26] private gain rather than political motives present the key determining factor.

Ideological divisions regarding the definition have hampered further efforts to draft a treaty dealing with international terrorism. As a consequence of these differences, the most effective way for the international community to proceed has been the consideration of specific aspects of the subject. Thus binding instruments have been adopted in areas of *inter alia* aircraft hijacking,[27] unlawful acts against the safety of civil aviation,[28] marine terrorism,[29] hostage-taking,[30] and theft of nuclear materials.[31]

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[25] 28 UN GAOR Supp (1973).

[26] Levitt, above n. 12, at p. 100.

[27] See the Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963) 704 U.N.T.S. 219; the Convention for the Suppression of Unlawful Seizure of Aircraft, (1970) 860 U.N.T.S. 105.

[28] See Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) 974 U.N.T.S. 177; 10 I.L.M. (1971) 1151.

[29] See the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 27 I.L.M.668 (1988); the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (March 1988). Text available (http://untreaty.un.org/English/Terrorism.asp) 31 January 2002

[30] See the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973) 1035 U.N.T.S. 167; International Convention against the Taking of Hostages 34 UN GAOR Supp. (No.39) at 23, UN Doc.A/34/39 (1979) 18 I.L.M. (1979) 1456.

[31] See Convention on the Physical Protection of Nuclear Materials (1980) 18 I.L.M. (1979) 1419.

Terrorism: a working definition

Before concluding the definitional debate, it must be emphasised that terrorism is a politically, ethically and morally divisive subject. In the existing global environment it may never be possible to arrive at a conclusive definition. An inability to define international terrorism in a comprehensive manner, however, must not be allowed to paralyse efforts to deal with the crime itself. Besides, it is fair to say that most rational and sensible individuals have a basic understanding of what the term entails. As Professor Oscar Schachter has noted, terrorism has a 'core meaning that virtually all definitions recognise'. By this he means:

> the threat or use of violence in order to create extreme fear and anxiety in a target group so as to coerce it to meet political (or quasi-political) objectives of the perpetrators. Such terrorist acts have an international character when they are carried out across national lines or directed against nationals of a foreign State or instrumentalities of that State. They also include the conduct defined in the international conventions against hijacking, ariel sabotage, sabotage at sea, hostage-taking, and attacks on diplomats and other internationally protected persons. Terrorist acts are generally carried out against civilians but they also include attacks on governmental buildings, vessels, planes and other instrumentalities. The objectives of the terrorist are usually political but terrorism for religious motives or ethnic domination would also be included. (However, violence or threats of violence for purely private motives should not be included.)[32]

Further elaboration has been provided by another leading authority, Professor Christopher Blakesley.[33] He takes the view that terrorism is 'the application of terror-violence against innocent individuals for the purpose of obtaining thereby some military, political or religious end from a third party'.[34] From the aforementioned academic definitions, it can be argued that – notwithstanding political and ideological divisions – a generalised and comprehensible meaning can nevertheless be formed.

TERRORISM AND INTERNATIONAL LAW

A historical analysis establishes an unfortunate picture of the antiquity of the crime of terrorism.[35] The phenomenon of terrorism is as old as human history;

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[32] O. Schachter, 'The Lawful use of Force by a State against Terrorists in Another Country' 19 *IYHR* (1989) 209 at p. 210.

[33] Blakesley, above n. 10, at p. 473.

[34] Ibid.

[35] See W. Laqueur and Y. Alexander (eds), *The Terrorism Reader: A Historical Anthology* (New York: New American Library, Penguin) 1987; J. Rehman, *The Weaknesses in the International Protection of Minority Rights* (The Hague: Kluwer Law International) 2000, pp. 51–75.

on every leaf of the chronicle of human endeavours there are sad tales of terrorism and violence against the weak and the inarticulate. Many examples can be found where terrorism was accompanied by gross violations of human rights including torture and genocide. Among these one could mention the horrifying massacres resulting from the Assyrian warfare during the seventh and eight centuries BC, and the Roman obliteration of the city of Carthage and all its inhabitants.[36] Certain religious ideologies, and the wars that were conducted to further those ideologies, held a large imprint of terrorism and intolerance.[37]

In the more modern period the term 'terror' was associated with the Jacobin 'Reign of Terror' in the aftermath of the French Revolution.[38] The Jacobin 'Reign of Terror' led to 17,000 official executions, with several thousand deaths and disappearances.[39] The First World War was the product of an international act of terrorism – the assassination of Archduke Francis Ferdinand on 28 June 1914 by the Serbians.[40] Over the course of the next fifty years, the expression was broadened to include 'anyone who attempts to further his views by a system of coercive intimidation; especially applied to members of one of the extreme revolutionary societies in Russia'.[41] Throughout the twentieth century, the rise of nationalism, totalitarian ideologies such as Nazism and Stalinism, and the upsurge of racial, religious and linguistic extremism have all been accompanied by terrorism. It is also the case that the essence of colonialism was violence, intimidation and terrorism of indigenous peoples.[42] In the aftermath of the Second World War, State-sponsored terrorism was deployed to resist granting the right of self-determination to many of the oppressed nations and

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[36] L. Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven and London: Yale University Press) 1981, pp. 11–18; J.N. Porter (ed.), *Genocide and Human Rights: A Global Anthology* (Washington DC: University Press of America) 1982; L. Kuper, *The Prevention of Genocide* (New Haven: Yale University Press) 1985; L. Kuper, *International Action Against Genocide* (London: Minority Rights Group) 1984; H. Fein (ed.), *Genocide Watch* (New Haven and London: Yale University Press) 1992.

[37] L. Kuper, *Genocide: Its Political Use in the Twentieth Century*, above n. 36, pp. 12–14; See Special Rapporteur B. Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* UN Doc. E/CN.4/Sub.2/1985/6B, pp. 6–7; also see I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press) 1963.

[38] See Murphy, above n. 12, at p. 14.

[39] Lambert, above n. 1, at p. 15.

[40] Dinstein, above n. 11, at p. 56.

[41] Cited in Green, above n. 10, at p. 337.

[42] See S. Qureshi, 'Political Violence in the South Asian Subcontinent' in Y. Alexander (ed.), above n. 1 pp. 151–193; see also the Reports of the sessions of the Working Group on Indigenous Populations and the Working Group on Minorities; Porter, above n. 36, at p. 16; Kuper, *International Action Against Genocide*, above n. 36, at p. 15.

peoples.[43] The terrorism of colonialism produced a backlash. Terrorism was often met with counter-terrorism: the colonisers used terror as an instrument to maintain their hold over their overseas territories, while the indigenous peoples and their national liberation movements resorted to terrorism and political violence as a means to gain emancipation and independence.[44] In their efforts to rid themselves of what they perceived as alien, foreign and unlawful domination, resistance movements were formed. Many of the so-called 'national liberation movements' such as the Algerian Liberation Movement (FLN),[45] the African National Congress (South Africa),[46] the Irish Republican Army (Ireland),[47] the Indian National Congress and Muslim League (British India) have at one point all been deemed terrorist organisations.[48]

At the height of the decolonisation movement, the issue of terrorism became a matter of serious contention between States with overseas colonies on the one hand, and the newly independent and communist States on the other. Even at the end of the decolonisation period, the legacies of colonial times render the subject often an unpalatable one. There is a substantial relationship with the right to self-determination for such groups or peoples as the Palestinians.[49] In this context it must be noted that Osama Bin Laden, the prime suspect for the attack on the World Trade Centre on 11 September 2001, has consistently emphasised the right of self-determination for the Palestinian people as a prerequisite to world peace and security. Another particularly controversial area is the right of the Kashmiri Muslims to self-determination, the conflict between India and Pakistan over the territory of Kashmir having already resulted in three wars.[50]

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[43] O.Y. Elagab, *International Law Documents Relating to Terrorism* (London: Cavendish) 1995, p. iv.

[44] For a useful analysis see Minority Rights Group (ed.), *World Directory of Minorities* (London: Minority Rights Group) 1997.

[45] See L. Kuper, *The Pity of it All: Polarisation and Ethnic Relations* (London: Duckworth) 1977.

[46] See S. Dubow, *The African National Congress* (Sutton: Stroud) 2000; W. Beinart and S. Dubow, *Segregation and Apartheid in Twentieth-Century South Africa* (London: Routledge) 1995.

[47] See H. Patterson, *The Politics of Illusion: A Political History of the IRA* (London: Serif) 1997; M.L.R. Smith and M.L. Rowan, *Fighting for Ireland?: The Military Strategy of the Irish Republican Movement* (London: Routledge) 1995.

[48] P. Hardy, *The Muslims of British India* (Cambridge: Cambridge University Press) 1972; B.R. Tomlinson, *The Indian National Congress and the Raj, 1929–1942: The Penultimate Phase* (London: Macmillan) 1976; A. Jalal, *The Sole Spokesman: Jinnah, the Muslim League, and the Demand for Pakistan* (Cambridge: Cambridge University Press) 1985.

[49] On the complication generated by the definition of 'peoples' and 'indigenous peoples' see above Chapter 12.

[50] For further consideration see J. Rehman, 'Re-Assessing the Right to Self-Determination: Lessons from the Indian Experience' 29 *AALR* (2000) 454.

INTERNATIONAL EFFORTS TO FORMULATE LEGAL PRINCIPLES PROHIBITING ALL FORMS OF TERRORISM

The inter-war years 1919–1939

The absence of established judicial bodies, executive agencies and effective enforcement powers has led to particular difficulties in devising international legal norms to combat terrorism. Such a lacuna has also resulted in serious difficulties in the detection and punishment of terrorists. International terrorism was debated by the third (Brussels) International Conference for the Unification of Penal law held on 26–30 June 1930.[51] Parallel efforts were made by the League of Nations to formulate a binding instrument on international terrorism. Following the assassination of King Alexander of Yugoslavia and Mr Louis Barthou, Foreign Minister of the French Republic in Marseilles in October 1934, the League of Nations drafted a Convention for the Prevention and Punishment of Terrorism.[52] The treaty contained a number of positive elements. In addition to containing a definition, it obliged States parties to prevent and punish acts of terrorism. It imposed criminal sanctions for such acts as attacks on the lives and physical integrity of heads of States and other public officials, destruction of public property and acts calculated to endanger the lives of members of the public.[53] Despite its many positive aspects, the Convention failed to become operative. A prominent feature (which discouraged further ratifications) was the broad definition accorded to terrorism. The Convention remained ineffective, having received one ratification – that from British India. In any event the forces of aggression and terrorism emerged in Europe; the Second World War heralded the demise of the League of Nations, along with its Convention on Terrorism.

Post-1945 developments

At the end of the Second World War, there were renewed efforts to produce a consolidated instrument to deal with terrorism. However, the first two decades of the United Nations period were taken up by a range of issues within which the subject of terrorism formed only an incidental part. The Draft Code on Offences Against the Peace and Security of Mankind as prepared by the International Law Commission in 1954 dealt primarily with

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[51] H. Labayle, 'Droit International et Lutte Contre Le Terrorisme' 32 *Annuaire Français de droit International* (1986) 114.

[52] The Convention for the Prevention and Punishment of Terrorism, 16 November 1937, 19 League of Nations Official Journal (1938) 23 reprinted 27 UN GAOR, Annex I, Agenda Item No. 92, UN Doc. A/C.6/418 (1972).

[53] Article 2.

the principles enshrined in the Charter of the Nuremberg Tribunal and with the Judgment of the Tribunal.[54] Article 2(6), however, defines an offence against the peace and security of mankind as:

> the undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities in another State, or the toleration by the authorities of a State of organised activities calculated to carry out terrorist acts in another State.

Further progress on the completion of the code was hampered *inter alia* by disagreements over the definition of aggression. The General Assembly then turned its attention to the subject of the definition of aggression, an issue that was only resolved through the General Assembly Resolution on the Definition of Aggression (1974).[55] Article 3(g) of the Resolution includes in its explanation of acts of aggression:

> The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed ..., or its substantial involvement therein.

There was, however, a caveat which exempts national liberation movements in their struggle for self-determination.[56] Such an exemption, although a feature of this Resolution (and a number of subsequent UN General Assembly Resolutions), has added considerable uncertainty as regards the condemnation of terrorist activities. In 1979 the General Assembly passed its Resolution 34/145 which condemns all acts of terrorism. At the same time, the Resolution also condemned 'the continuation of repressive and terrorist acts by colonial, racist and alien regimes in denying people their legitimate right to self-determination and independence and other human rights and fundamental freedoms'. The title and the text of the Resolution also confirms that the focus of the Resolution is upon the 'underlying causes of those forms of Terrorism and Acts of violence which lie in Misery, Frustration, Grievance and Despair and which Cause Some people to Sacrifice Human Lives including their own in an Attempt to Effect Radical Changes'.[57] The same emphasis on the

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[54] See UN GAOR Supp (No. 9) at 11–12; UN Doc.A/2693 (1972).

[55] GA Res. 3314 (XXIX) 14 December 1974. G.A.O.R 29th Sess., Supp. 31, 142; 69 *AJIL* (1975) 480.

[56] Article 7 of the Resolution provides 'Nothing in this Definition, and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration'.

[57] UN GA Res. 34/145 (1979).

underlying causes is placed in General Assembly Resolution 36/109 (1981)[58] and General Assembly Resolution 40/61 (1989).[59]

The debates within the United Nations General Assembly have represented fundamental divisions between the developing and the developed world. The developed world has insisted on the absolute prohibition of terrorism regardless of the motives and underlying causes. The developing world on the other hand has remained suspicious of this approach, claiming that underlying causes of terrorism need to provide the determining factors and that national liberation movements must be allowed to resort to every conceivable means to rid themselves of colonial or racist regimes. This conflict has been so severe as to seriously jeopardise any progress in devising international mechanisms to deal with terrorism.

Ending of the cold war and shift in policies

The ending of the cold war and a thaw in East–West relations has brought about a significant change in the policies of the former communist States. Many of these States have embraced the global human rights regime and have also renounced sponsorship of terrorist activities.[60] Over the years, the developing States themselves have shown signs of changing their position. This changing position can be attributed to a variety of reasons. First, with the independence of a vast majority of former European colonies the basis for supporting the national liberation movements has diminished. The case for liberation movements is confined to the struggle of pariah States such as Israel. Secondly, and perhaps more significantly, the new States which emerged from the rubble of decolonisation have themselves been challenged by secessionist movements represented by various groups. Among these groups one could cite the Tamil Tigers, the Sudanese Peoples Liberation Army and the Kashmiri Mujaheedaen.[61] These groups adopted similar tactics hitherto used by the nationalists seeking independent Statehood from European colonisers. Many of the new States, while emphasising the principle of territorial integrity, have treated these secessionist organisations as terrorist groups. Increasingly, these organisations have targeted diplomatic personnel and there have been hijackings of national aircrafts owned by developing States. The emergence of common concerns have led to a fluidity in the position of many countries in Asia and Africa.

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[58] UN GA Res. 36/109 (1981).

[59] UN GA Res. 40/61 (1989).

[60] For the ratification of human rights treaties of the former communist States see Appendix II.

[61] For consideration of these and other cases see Minority Rights Group (ed.), *World Directory of Minorities* (London: MRG) 1997.

Signs of a common concern on terrorism were already emerging in the 1970s. According to the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Amongst States in Accordance with the Charter of the United Nations (1970):[62]

> Every State has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

In 1979, the Ad Hoc Committee on Terrorism, a committee formed pursuant to General Assembly Resolution 3034[63] recommended *inter alia* that the General Assembly condemn attacks of terrorists, take note of the underlying causes contained in the Committee's reports, and that the States work towards the elimination of terrorism in compliance with their obligations under international law, refrain from organising, instigating, assisting or participating in terrorist acts in other States and refuse to allow their territory to be used for such acts and take all possible measures to cooperate with each other to combat international terrorism.

The General Assembly adopted these recommendations, although as noted above, these recommendations were tempered by the terminology of 'underlying causes' and the 'right to self-determination'. Further progress was made in 1985 when the UN General Assembly adopted a Resolution in which it urged States to take measures for the 'speedy and final elimination of the problem of international terrorism'.[64] The Assembly also took the position that it:

> Unequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whoever committed, including those which jeopardise friendly relations among States and their security [and] deplores the loss of innocent human lives which result from such acts of terrorism.[65]

A distinctive feature of the Resolution is that after a protracted debate of fifteen years, for the first time in the United Nations, this Resolution associated the term 'criminal' with terrorism.[66] Another Resolution (based along the lines of the 1985 Resolution) condemning terrorism was adopted by the

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[62] GA Res. 2625 (XXV) (1970).
[63] See Report of the Sixth Committee, UN GAOR A/S969 (1972) at p. 5.
[64] GA Res. 40/61 (1985).
[65] GA Res. 40/61 (1985).
[66] C.Van den Wyngaert, 'The Political Offence Exception to Extradition: How to Plug the "Terrorists' Loophole" without Departing from Fundamental Human Rights' 19 *IYHR* (1989) 297 at p. 297.

General Assembly in 1987.[67] In 1994, the General Assembly adopted a Resolution entitled 'The Declaration on Measures to Eliminate International Terrorism'.[68] Peace, security and restraint of use of force represents the basis of the Declaration. In condemning terrorism the Declaration also calls upon States to refrain from organising, instigating, assisting or participating in terrorist activities, and from acquiescing in or encouraging activities within their territories directed towards the commission of any such acts.

It is noticeable that since the ending of the cold war, the General Assembly has been active in its condemnation of global terrorism. Such activism and unified views on the subject represent a positive development. At the same time it is important to recognise the fact that a significant reason for such activism is that General Assembly Resolutions are not legally binding *per se*; ambiguous terminology can be deployed to represent a show of unanimity in condemning terrorism.[69] The situation would be radically different if States were required to subscribe to any internationally binding agreement on global terrorism. The old differences and suspicions are certain to resurface.

Dealing with specific terrorist activities

As we have noted above, in the light of substantial disagreements over the definition, nature and scope of terrorism, the international community has been unable to formulate a single consolidated instrument dealing with terrorism. Progress has however been made in a number of related areas. A range of treaties have been entered under the auspices of the United Nations and regional organisations. In addition, the International Civil Aviation Organisation (ICAO) and the International Maritime Organisation (IMO) have also been successful in sponsoring conventions dealing with aeriel and maritime terrorism respectively. There are currently more than twelve conventions and protocols that deal with the various aspects of terrorism. These include the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations (1973),[70] the International

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[67] GA Res. 42/159 7 Dec 1987. Writing in 1989, Lambert made the following useful points. 'The change in language in the most recent General Assembly Resolutions must be seen as some progress towards a universal consensus that acts of terrorism are not to be tolerated regardless of the cause. It must also be recognised, however, that the General Assembly continues to send out somewhat mixed signals regarding the issue of national liberation movements.' Lambert, above n. 1, at p. 44

[68] GA Res. A/Res/49/60.

[69] On the value of General Assembly Resolutions see above Chapter 2.

[70] 1035 U.N.T.S. 167; 13 I.L.M. 41 (1974).

Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations (1979),[71] the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997,[72] the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999,[73] the Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963),[74] the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague (1970),[75] the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971),[76] the Convention on the Physical Protection of Nuclear Material (1980),[77] the Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988,[78] the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988),[79] the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (March 1988),[80] the Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991).[81] There are also a number of regional conventions on terrorism, including the Arab Convention on the Suppression of Terrorism (1998),[82] the Convention of the Organisation of the Islamic Conference on Combating International Terrorism (1999),[83] the European Convention on the Suppression of Terrorism, concluded at Strasbourg on 27 January 1977,[84] the O.A.S. Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (1971),[85] the OAU

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[71] 1316 U.N.T.S. 205; 18 I.L.M. 1460 (1979).
[72] Doc. A/Res/52/164; depository notification C.N.801.2001.TREATIES-9 of 12 October 2001.
[73] Resolution A/Res/54/109; depository notifications C.N.327.2000.TREATIES-12 of 30 May 2000.
[74] 2 I.L.M. 1042 (1963).
[75] 10 I.L.M. 133 (1971).
[76] 10 I.L.M. 1151 (1971).
[77] Text available (http://untreaty.un.org/English/Terrorism.asp) 31 January 2002.
[78] 27 I.L.M. 627 (1988).
[79] 27 I.L.M. 668 (1988).
[80] Text available (http://untreaty.un.org/English/Terrorism.asp) 31 January 2002.
[81] Ibid.
[82] Arab Convention on the Suppression of Terrorism, signed at a meeting held at the General Secretariat of the League of Arab States in Cairo on 22 April 1998. (Deposited with the Secretary-General of the League of Arab States).
[83] Text available (http://untreaty.un.org/English/Terrorism.asp) 31 January 2002.
[84] 15 I.L.M. 1272 (1978).
[85] 10 I.L.M. 255 (1971).

Convention on the Prevention and Combating of Terrorism, adopted at Algiers on 14 (1999),[86] the SAARC Regional Convention on Suppression of Terrorism (1987)[87] and the Treaty on Co-operation among States Members of the Commonwealth of Independent States in Combating Terrorism (1999).[88] Furthermore, a range of non-binding international instruments have been adopted. The following sections considers some of the international instruments that have been adopted at the international and regional levels to combat terrorism.

UN Conventions

Hostage-taking breaches all norms of dignity and human rights. It is a serious crime under international law, and has affected both the developed and the developing world. The crime of taking hostages was originally only confined to armed conflict. A number of indictments were brought forward in the Nuremberg Trials for acts of hostage taking.[89] The prohibition on hostage-taking during armed conflicts is incorporated in Article 3 and 34 of the Fourth Geneva Convention (1949).[90]

Since the end of the Second World War, hostage-taking of internationally protected persons as well as ordinary civilians has developed into a major concern. A proliferation of incidents led the international community to adopt binding instruments condemning and criminalising hostage-taking in all its forms. One unfortunate example of the violation of the rights of internationally protected persons was the murder of the Yugoslavian Ambassador to Stockholm in April 1971. Another more publicised instance involved was hostage-taking in Vienna during 1975 when terrorists seized sixty OPEC ministers. In 1973 the General Assembly adopted, by consensus, a Resolution attached to which is the New York Convention. The Convention, known as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973)[91] represents the most far-reaching global instrument dealing with the crime of hostage-taking. The New York Convention protects certain categories of persons from the offences of murder, kidnapping or other attacks upon

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[86] OAU Convention on the Prevention and Combating of Terrorism, adopted at Algiers on 14 July 1999. (Deposited with the General Secretariat of the Organization of African Unity).

[87] Text available (http://untreaty.un.org/English/Terrorism.asp) 31 January 2002.

[88] Treaty on Co-operation among States Members of the Commonwealth of Independent States in Combating Terrorism, done at Minsk on 4 June 1999. (Deposited with the Secretariat of the Commonwealth of Independent States).

[89] See Elagab, above n. 43, at p. 577.

[90] 75 U.N.T.S. (1950).

[91] 1035 U.N.T.S. 167; 13 I.L.M. 41 (1974).

their official premises, private accommodation and means of transportation. The category of persons protected includes heads of State (including members of a collegial body performing the functions of a head of State), heads of governments and ministers for foreign affairs, whenever such persons are in a foreign State – and their family members who accompany them.[92] Protection is also accorded to 'any representative or official of a State or any official or other agents of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.'[93]

In 1979, the General Assembly adopted another convention, the International Convention against the Taking of Hostages. The adoption of the Convention was preceded by a range of incidents including the Entebbe raid[94] and the American hostage-taking by Iran.[95] According to Article 1 of this Convention any person who 'seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely a State, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages within the meaning of the Convention'. Article 1(2) goes on to classify attempts or participating in hostage-taking as offences. Article 2 places the States parties under an obligation to make offences set forth in Article 1 'punishable by appropriate penalties which take into account the grave nature of those offences'.[96] These provisions have similarities with other treaties dealing with grave human rights violations such as genocide.[97] There is a commitment on the part of States to attempt to secure the release of hostages, and to cooperate in the prevention of hostage-taking acts.[98] The Convention also provides a range of jurisdictional grounds including *lex loci*,[99] States with registration

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[92] Article 1(1)(a).

[93] Article 1(1)(b).

[94] For further consideration see D.J. Harris, *Cases and Materials on International Law*, 5th edn, (London: Sweet and Maxwell) 1998, pp. 909–911.

[95] *U.S. Diplomatic and Consular Staff in Tehran Case (United States of America v. Iran)* ICJ Reports 1980, 3; Harris, above n. 94, at pp. 358–362.

[96] Article 2.

[97] See Article 1 of the Genocide Convention. Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948. Entered into force 12 January 1951. 78 U.N.T.S 277. For further analysis see above Chapter 11.

[98] Article 3(1).

[99] Article 5(1)(a).

of aircrafts and ships where the offence is committed,[100] nationality of the offender,[101] the nationality of the hostage,[102] or the presence of the offender in its territory.[103] In common with other treaties dealing with terrorism, the Convention affirms the principle of *aut dedere aut judicare*. The application of this principle means that in cases where the alleged offender is found in the territory of a State party, that State is under an obligation to extradite him or to submit his case before competent national authorities.[104] Following this principle, an attempt is made to ensure the trial of offenders. This provision, however, falls foul of the problem that States refuse extradition of certain individuals because of a variety of reasons. The point is further reinforced by the Discrimination Clause as contained in Article 9.

Regional Conventions

A number of regional instruments have been adopted to combat terrorism. The Council of Europe has passed a series of Resolutions and Declarations.[105] It has also adopted the European Convention on the Suppression of Terrorism[106] and the Agreement on the Application of the European Convention for the Suppression of Terrorism (Dublin Agreement).[107] The European Convention provides for cooperation on matters *inter alia* related to extradition and mutual assistance in criminal proceedings.[108] Article 1 lists a range of offences which are not to be recognised as political offences. These offences are already well-established in international criminal law and include those contained in the hijacking and hostage-taking Conventions. While according priority to the European Convention over previously entered extradition treaties and

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[100] Ibid.
[101] Article 5(1)(b).
[102] Article 5(1).
[103] Article 5(2).
[104] Article 8(1).
[105] These include Recommendation 684 (1972) on International Terrorism; Recommendation 703 (1973) on International Terrorism; Declaration on Terrorism; Recommendation 852 (1979) on Terrorism in Europe; Recommendation 916 (1981) on the Conference on 'Defence of Democracy against Terrorism in Europe – Tasks and Problems'; Recommendation No. R (82) of the Committee of Ministers to Member States Concerning International Co-operation in the Prosecution and Punishment of Acts of Terrorism; Recommendation 941 (1982) on the Defence of Democracy against Terrorism in Europe; Recommendation of the Committee of Ministers to Member States on Measures to be Taken in Cases of Kidnapping followed by a Ransom Demand (1982); Recommendation 982 (1984) on the Defence of Democracy against Terrorism in Europe; Council of Europe Pledge to Step up Fight against Terrorism (1986); European Conference of Ministers Responsible for Combating Terrorism (1980).
[106] 15 I.L.M. 1272 (1978).
[107] 19 I.L.M. 325 (1982).
[108] C. Gueydan, 'Cooperation between Member States of the European Community in the Fight against Terrorism' in R. Higgins and M. Flory (eds), above n. 1, 97–122, at p. 101.

arrangements,[109] the Convention nevertheless allows for refusal to extradite where the requested State has 'substantial grounds for believing that the request for extradition for an offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons'.[110] The Convention preserves the *aut dedere aut judicare* principle.

The European Union (EU) has also passed numerous Declarations, Resolutions and entered into treaty arrangements in order to deal with the problem of terrorism and terrorist activities.[111] The OAS, which has frequently encountered this problem, has also adopted numerous specialist instruments dealing with terrorism. These include the Convention to Prevent and Punish the Act of Terrorism Taking the form of Crimes against Persons and Related Extortion that are of International Significance (1971);[112] and the OAS General Assembly Resolution on Acts of Terrorism (1970).[113] The OAS Convention is of special significance in that it does not allow for the political offence exception. The Convention establishes a duty for States parties to cooperate in the prevention and punishment of 'acts of terrorism'. According to Article 2 of the Convention:

> Kidnapping, murder and other assaults on life or personal integrity of those whom the State has to give special protection according to international law, as well as extortion in connection with those crimes, shall be considered common crimes of international significance regardless of motive.

The Convention is based on the principle of *aut dedere aut judicare* and has provisions regarding extradition.[114] Article 6 provides for the right of asylum and a number of obligations are contained in Article 8 for the purpose of ensuring a general duty of cooperation in the prevention and punishment of the crimes covered. According to Article 9, the Convention is open to the participation of States other than members of the OAS.

In the contemporary debate on terrorism, a number of misconceptions have arisen concerning Islam, Islamic law and the State practices of Islamic States.

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[109] Article 3.
[110] Article 5.
[111] See the Declaration by the European Council on International Terrorism (1976); Resolution on Acts of Terrorism in the Community (1977); European Communities: Agreement Concerning the Application of the European Convention on the Suppression of Terrorism among the Member States (1979); European Parliament Resolution on Problems Relating to Combating Terrorism (1989); also see the Treaty of European Union 1992 (Provisions on Co-operation in the Spheres of Justice and Home Affairs-Article A).
[112] 10 I.L.M. (1971) 255.
[113] 9 I.L.M. (1970) 1084.
[114] Articles 3, 5 and 7.

In order to eradicate some of these misconceptions, it is crucial to analyse the practices and arrangements made by the Organisation of Islamic Conference (OIC), the principal organisation representing the Islamic world. The membership of the OIC is exclusively Islamic. The organisation was formed in Rabbat, the Kingdom of Morocco in September 1969. It currently has a membership of fifty-six States. In view of the growing concerns regarding terrorism, the OIC adopted the Convention of the Organisation of the Islamic Conference on Combating International Terrorism (1999).[115] The Convention represents a strong condemnation of terrorist activities. It defines terrorism in a very clear and precise manner. Thus according to Article 1(2) of the Convention, Terrorism means:

> any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperilling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.

While suggesting an exception in cases of self-determination, the Convention ensures that OIC members accept the established norms which prohibit and condemn international terrorism. The Convention lists major treaties on the subject and requires States parties to follow the principles established in these treaties. According to the Convention special preventive measures are to be introduced by State parties and members are to undertake to cooperate in combating international terrorism.

Aeriel terrorism

As recent events confirm, ariel terrorism poses a serious threat to international peace and security. Historically, there have been many instances of hijacking and sabotage. The first practical response to such forms of terrorism was the adoption of the Convention on Offences and Certain Other Acts committed on Board Aircraft, signed in Tokyo on September 14 1963. The Convention was adopted under the auspices of ICAO. It deals principally with crimes committed on board civilian aircraft. The principal purpose of the Tokyo Convention is to protect the safety of the aircraft and of the persons or property thereon, and to maintain good order and discipline on board.[116] The Convention authorises the aircraft commander, the crew members and

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[115] Text available (http://untreaty.un.org/English/Terrorism.asp) 31 March 2002.

[116] http://untreaty.un.org/English/terrsumen.htm#3 (31 March 2002)

the passengers to take reasonable actions in order to protect the safety of the aircraft, or that of persons or property on board.[117]

The Convention establishes a number of jurisdictional rules dealing with ariel hijacking. The State of registration has the principal jurisdiction to try offences committed on board the aircraft.[118] However, additional grounds of jurisdiction exist *inter alia* in cases of the territory of the State where the offence has effect on its territory,[119] where the offence has been committed by or against a national or permanent resident of such State[120] or the offence is against the security of such a State.[121]

For the purposes of extradition, Article 16 of the Convention provides that offences committed on board the aircraft shall be treated as if they were committed not only in the place where they occurred but also in the territory of the registering State. Other provisions of the Convention concern such matters as taking offenders into custody, restoring control of the aircraft to the commander and the continuation of the aircraft's journey.[122] The Convention represents an important development in international efforts to combat ariel terrorism. At the same time there are a number of shortcomings in the treaty. It does not define or list any offences which States parties are required to suppress; nor does it impose any obligations regarding the extradition or prosecution of offenders.

In order to overcome some of these weaknesses in the Tokyo Convention and to further consolidate international norms on the hijacking of aircraft, the Convention for the Suppression of Unlawful Seizure of Aircraft was adopted in 1970 in The Hague. According to the Convention an offence is committed when any person:

> who on board an aircraft in flight ... unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of that aircraft; or is an accomplice of a person who performs or attempts to perform any such act.[123]

According to Article 2, States parties are obliged to make offences under the Convention punishable by severe penalties. Jurisdiction is granted *inter alia* to the State where the aircraft is registered, to the State where the aircraft lands once an offence has been committed on board and to the State or place of

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[117] Article 6(1)(2).
[118] See D. Freestone, 'International Cooperation against Terrorism and the Development of International Law Principles of Jurisdiction' in R. Higgins and M. Flory (eds), above n. 1, 43–67 at p. 49.
[119] Article 4(a).
[120] Article 4(b).
[121] Article 4(c).
[122] Articles 6–15.
[123] Article 1.

business or residence of the lessee in the case of aircraft which are leases without crew.[124] If the offender is not extradited, the State party where the offender is found undertakes to prosecute him.[125] The Convention obliges parties to allow one another judicial assistance in criminal proceedings brought in respect of the offence.[126] It also requires States parties to report to the Council of ICAO any relevant information in their possession.[127] While both the 1963 and 1970 Conventions deal with aeriel hijacking, the subject of aeriel sabotage was left to be addressed by the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation adopted in Montreal in 1971. According to Article 1 of the Convention a person commits an offence if he unlawfully and intentionally:

> performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger its safety; destroys an aircraft or causes damage to it; places or causes to be placed on an aircraft in service a device or substance which is likely to destroy that aircraft or to cause damage to it which renders it incapable of flight or endangers its safety; destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight or communicates information which he knows to be false, thereby endangering the safety of aircraft in flight.

Article 1 also makes it an offence to attempt to commit the aforementioned offences. The Convention provides for jurisdictional principles which are similar to the Hague Convention. Through a number of provisions, the Convention deals with such issues as custody, prosecution and extradition of the alleged offender. The Convention like the earlier Hague and Tokyo Conventions, does not apply to aircraft used in military, customs or police services. Article 5(1) attempts to provide a wide basis of jurisdiction, approaching the threshold of universal jurisdiction. The Convention follows the principle of *aut dedere aut judicare*.

A further treaty, the Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal, was adopted in February 1988.[128] The Protocol is geared towards dealing with acts of violence which endanger or are likely to endanger the safety of persons at airports serving international civil aviation

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[124] Article 41(a)(b)(c).
[125] Article 7.
[126] Article 10.
[127] Article 11.
[128] Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal, 24 February 1988.

or which jeopardise the safe operations of such airports. The 1988 Protocol adds to the definition of offences as provided in Article 1 of the Montreal Convention, thereby providing for the punishment of any person who unlawfully commits an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause death or serious injury by any device, substance or weapon. The jurisdictional issues are addressed in Article III, which also affirms the principle of *aut dedere aut judicare*.

Maritime terrorism

Under general international law, the crime of piracy has a universal jurisdiction allowing any State to prosecute the offenders.[129] Piracy as a crime, however, is distinguishable from Maritime Terrorism in the sense that the latter is conducted in order to pursue or achieve political ends (as opposed to private ends in the case of piracy).[130] While a number of instances of maritime terrorism have taken place, the *Achille Lauro* incident prompted the international community to take concrete action as regards formulating binding standards for the protection of ships from terrorists.[131] With this objective the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation was adopted in Rome during March 1988. The Convention defines a 'ship' as 'a vessel of any type whatsoever not permanently attached to the sea-bed'.[132] A positive feature in the definition of the offences is the inclusion of murder as a separate crime. As Malivana Halberstam points out, although exceptional when compared to the Convention against Airline Hijacking and Sabotage and the Convention against Hostage-taking, this inclusion was prompted directly by the murder of a crippled Jewish man Leo Klinghoffer on board the *Achille Lauro*.[133]

According to Article 3(1) of the Convention any person commits an offence if that person unlawfully and intentionally:

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

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[129] See Article 101 of the Law of the Sea Convention (1982); M.N. Shaw, *International Law*, 4th edn (Cambridge: Grotius Publication) 1997, at p. 423; Elagab, above n. 43, at p. 465.

[130] Ibid: p. 465.

[131] For further consideration of the incident see J. McCredie, 'Contemporary Uses of Force against Terrorism: The United States Response to Achille Lauro–Question of Jurisdiction and its Exercise' 16 *Georgia Journal of Comparative and International Law* (1986) 435; Note, 'The Achille Lauro Incident and the Permissible Use of Force' 9 *Loyola of Los Angeles Journal of International and Comparative Law* (1987) 481; M. Halbertsam, 'Terrorism on the High Seas: The Achille Lauro, Piracy, and the IMO Convention on Maritime Safety' 82 *AJIL* (1988) 269.

[132] Article 1.

[133] M. Halbertsam, 'Terrorist Acts Against and on Board Ships' 18 *IYHR* (1989) 331 at p. 333.

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) destroys a ship or causes damage to a ship or its cargo which is likely to endanger the safe navigation of that ship; or

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship;

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraph (a) to (f).

The Convention does not cover ships used in military, customs or police service.[134] The jurisdiction of the Convention is very extensive and covers territorial waters as well as the high seas.[135] Equally, the treaty is applicable to ships navigating or scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States, or when the alleged offender is found in the territory of a State party. At the time of approving the Convention in March 1988, a Protocol was also adopted. This Protocol addresses acts committed against 'fixed platforms', fixed platforms being defined as an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes. The offences under the Protocol are almost identical to those under the Rome Convention, differing only in so far as is necessary to take into account of the differences between ships and such platforms.[136] Despite the many positive features of the Convention and the Protocol on Maritime Terrorism, a number of weaknesses have been pointed out. These instruments do not deal with State terrorism; nor do they provide for universal jurisdiction, the absence of which is likely to generate problems where either the State is not a party to the treaty or the offence is committed by a national belonging to a State which is not party to the treaty.[137]

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[134] Article 2.

[135] Article 4.

[136] Article 2.

[137] C.C. Joyner, 'Suppression of Terrorism on the High Seas: The 1988 IMO Convention on the Safety of Maritime Navigation' 19 *IYHR* (1989) 343 at p. 365.

INTERNATIONAL LEGAL DEVELOPMENTS SINCE 11 SEPTEMBER AND DIFFICULTIES RELATED TO COMPENSATION FOR VICTIMS OF INTERNATIONAL TERRORISM

On Tuesday 11 September 2001, four commercial planes were hijacked by terrorists. One hijacked passenger jet leaving Boston, Massachusetts crashed into the north tower of the World Trade Center at 8.45 a.m. setting the tower on fire. Eighteen minutes later, a second hijacked airliner, United Airlines Flight 175 from Boston, crashed into the south tower of the World Trade Center and exploded. Later that morning both the North and South towers collapsed, plummeting into the streets below. At 9.43 a.m., a third hijacked airliner (American Airlines Flight 77) crashed into the Pentagon sending up a huge plume of smoke. A portion of the building later collapsed. At 10.10 a.m. a fourth hijacked airliner (United Airlines Flight 93) crashed in Somerset county, Pennsylvania, south-east of Pittsburgh.[138] The crashing of these hijacked airliners into buildings and on land were the worst terrorist attacks in the history of the United States. They led to the loss of thousands of innocent lives and damaged property running into billions of dollars.

The terrorist attacks not only served as a chilling reminder of the dangers inherent in international terrorism, but have also sent shock waves around the world. The attacks have been unequivocally condemned by all States and by all international organisations. On 12 September 2001, the United Nations General Assembly passed a Resolution condemning the heinous acts which had resulted in the loss of lives and enormous destruction. While showing solidarity with the peoples of the USA, it called for international cooperation to bring to justice the perpetrators, organisers and sponsors of the crimes committed on 11 September. On 12 September, the United Nations Security Council also condemned the terrorist acts, expressing it to be a threat to international peace and security.[139] The Council called upon all States urgently to work together to bring to justice the perpetrators of the crime, organisers and sponsors of the terrorist attacks.[140] A further resolution, Resolution 1373 was adopted on 28 September 2001, requiring States to undertake a series of actions. Since the Council was acting under Chapter VII, all its decision were binding upon States.[141] Under this Resolution, the Council required States to adopt and implement the existing international legal instruments on terrorism. According to this Resolution States are under an obligation to

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[138] Information taken from CNN. September 11 2001: Chronology of terror (http://europe.cnn.com/2001/US/09/11/chronology.attack/).

[139] S/RES/1368 Adopted by the Security Council at its 4370th meeting.

[140] Ibid. para 3.

[141] See above Chapter 2.

prevent and suppress the financing and the freezing of funds and financial matters. It also requires States to offer one another assistance for criminal investigations and proceedings related to the financing or support of terrorist acts.[142] According to the Resolution, States are also to prevent the movement of terrorists or their groups by effective border controls. The Council also determined that States shall intensify and accelerate the exchange of information regarding terrorist actions or movements; forged or falsified documents; traffic in arms and sensitive material; use of communications and technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction. In addition States are required to exchange information and cooperate to prevent and suppress terrorist acts and to take action against the perpetrators of such acts. By Resolution 1373, the Council established a Committee of the Council to monitor the implementation of the Resolution and called upon all States to report on actions they had taken to that end no later than 90 days from the date of the adoption of the Resolution (that is, 28 September 2001). On 4 October, Sir Jeremy Greenstock of the United Kingdom was named chair of the Security Council Committee on terrorism.

Immediately after the terrorist acts of 11 September 2001, there were calls for military action against the terrorists. While the United Nations Charter prohibits the use of force, it does expressly endorse an inherent right to self-defence for States.[143] The military action in and the bombing of Afghanistan that was commenced in October 2001 has principally been justified by the United States and the United Kingdom Governments on the basis of this inherent right of individual and collective self-defence. In the face of the heinous acts of 11 September, the loss and destruction of lives and property and the threat of future attacks by terrorists, there is some strength in reliance upon the principles of self-defence. However, the right to self-defence must be conducted in accordance with well-established principles of international law. According to these principles, which emanate from the *Caroline case* and are now accepted as forming part of customary international law, there must exist 'a necessity of

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[142] Security Council SC/7158 (4385th Meeting) 28 September 2001.

[143] Article 51 provides that 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security'. The United Nations Charter Adopted at San Francisco 26 June 1945. Entered in to force 24 October 1945. 1 U.N.T.S xvi; U.K.T.S 67 (1946); 59 Stat. 1031.

self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'.[144] The right to self-defence, in order to be legitimate, must also comply with the requirement of proportionality.[145] In the present case there are the significant legal questions about the strength of evidence against Osama Bin Laden, and the responsibility of the Taliban and State of Afghanistan – issues which have been consistently raised since the commencement of the bombings in Afghanistan.[146] There have been claims that the US has used an indiscriminate bombing campaign in Afghanistan which has led to a huge number of civilian casualties.[147] A further disturbing feature (which as yet remains unresolved) is the treatment of the suspected terrorists who have been arrested by the United States and taken to its base in Cuba.[148]

While the condemnation of terrorism has been universal, some of the purported actions against the terrorists have been criticised as threatening civil liberties and human rights. Recent legislation adopted by the United States and the United Kingdom has raised substantial concerns;[149] similarly there is a fear that in the aftermath of the events of 11 September, minority groups – in particular Arab-Asian minorities in the western world – would be

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[144] See the *Caroline case* 29 B.F.S.P. 1137–38; 30 B.S.F.P. 195–6 (1837). R.Y. Jennings, 'The Caroline and McLeod Cases' 32 *AJIL* (1938) 82; Shaw, above n. 129 at pp. 787–791.

[145] A. Conte, 'The Cost of Terror' *New Zealand Law Journal* (November 2001), 412 at p. 414; A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' 12 *EJIL* (2001) 993 at p. 995.

[146] International law allows for imputability of acts of private individuals where the concerned State endorses terrorist acts and fails to cooperate with the international community. See further the *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)* 61 I.L.R. 559, para 74.

[147] http://news.bbc.co.uk/hi/english/world/south_asia/newsid_1740000/1740727.stm 'Pressure grows to stop Afghan bombing.' (4 January 2002) 'Continuing reports of civilian casualties in Afghanistan are raising questions about US military tactics and adding to a growing clamour for an end to the bombing. Evidence of civilian deaths in the village of Niazi Qalaye in Paktia province, struck in the early hours of 29 December, offers a direct challenge to the American military's version of the attack. The United Nations says it has an unconfirmed but reliable report from the area that 52 civilians were killed in the raid'.

[148] BBC South Asia, Head to Head (16 January, 2002) prisonershttp://news.bbc.co.uk/hi/english/world/americas/newsid_1763000/1763307.stm Head to Head Guantanamo. See the Statement made by United Nations High Commissioner for Human Rights Mary Robinson, 16 January 2002.

[149] On 13 November 2001, the United States President George W. Bush issued a Presidential Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism providing his administration the option of trying non-US citizens suspected of terrorism before special military tribunals as opposed to civilian courts. The composition and jurisdiction of these tribunals represent substantial curtailments of the rights of the accused. See President Issues Military Order Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html). For the position in the United Kingdom see the Anti-terrorism, Crime and Security Act 2001 c.24 (text available: http://www.hmso.gov.uk/acts/acts2001.htm) 31 January 2002.

discriminated against and their fundamental rights violated. Amidst the complexities in formulating legal principles to prevent terrorism and to punish perpetrators of this crime, a major disturbing feature is the absence of international mechanisms for providing remedies to the victims of terrorism. As we have considered throughout this book, international human rights law remains an unsatisfactory medium in according adequate remedies to victims of violations; nowhere is this more accurate than in the case of victims of international terrorism. In a handful of cases only have individual claimants been able to receive damages before international and national tribunals. In others, the existing State apparatus defies meaningful forms of remedies and compensation. This position can be confirmed through the events arising from the terrorist attacks of 11 September 2001. It would appear that some relatives and next of kin of victims of the attacks that took place in United States are entitled to compensation, though many others would be unsuccessful. A more unfortunate future awaits the millions of innocent men, women and children who have suffered for years under the terrorist regime of the Taliban and have endured the US bombings since October 2001.

CONCLUSIONS

The date of 11 September 2001 has gone down as one of the tragic days in the history of mankind. The hijacking of American airliners, their crash into the World Trade Center and the collapse of the twin towers continues to haunt not only the survivors of the tragedy but all those who believe in the inherent dignity and worth of mankind. The terrorist attacks of 11 September were followed by ariel bombardment (by the United States and the United Kingdom) which led to the unfortunate deaths of thousands of Afghani men, women and children. Although these events represent a tragedy of enormous magnitude, they also provide a number of lessons. First, the events reconfirm the view that international terrorism is a crime against humanity and that the international community of States should treat it as such. In this context it is interesting to note that during the drafting stages of the Statute of the International Criminal Court, attempts were made to provide the new court with a specific jurisdiction to try terrorist offences.[150] However, such efforts proved unsuccessful because of the opposition of many countries – including the United States. In hindsight such an approach can only be regarded as unfortunate. Despite the absence of a specific incorporation of the crime of terrorism, there is sufficient breadth in the definition of crimes against humanity to try crimes

[150] For further consideration of the Statute of the International Criminal Court see above Chapter 11. Conte, above n. 145, at p. 413.

of terrorism.[151] An international criminal court should provide a useful, impartial and internationally acceptable forum for trials of individuals indicted with the crime of international terrorism.

Secondly, the events of 11 September reinforce the need for an internationally binding agreement which condemns terrorism and provides for severe penalties for those involved in committing this crime.

This chapter has considered the enormous ideological and political differences that exist with regard to defining and conceptualising international terrorism. At the same time, a great measure of consensus exists on the absolute criminalisation of certain forms of activities such as hostage-taking of civilians and internationally protected persons, as well as the banning of aeriel and maritime terrorism. Although, as considered earlier, there are treaties criminalising these activities, the global prohibition would be more effective if the major offences were codified in the form of a single binding instrument. Finally, there is an important message in the political developments that led to the events of 11 September 2001. There is a strong connection between human rights violations and terrorist activities; in order to put an end to international terrorism, the international community of States must also address the underlying causes which lead individuals to resort to such extreme measures.

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[151] G. Robertson, *The Guardian* 19 September 2001.