THE UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT OR HOW IT IS STILL BETTER TO LIGHT A CANDLE THAN TO CURSE THE DARKNESS

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I Introduction

At the World Conference on Human Rights in June 1993 the Vienna Declaration and Programme of Action was adopted by the representatives of 171 states.[1] During the ten days of the Conference intense debate and negotiation resulted in a number of profound gains for human rights advocates in the United Nations. Of these, two will have far-reaching consequences for the world community: (1) Paragraph 5 of the Vienna Declaration and Programme for Action recognised that "all human rights are universal, indivisible and interdependent and interrelated",[2] thus rejecting the idea of derogability upon the basis of cultural conditions, and (2) in paragraph 18 the creation of the office of High Commissioner for Human Rights at the United Nations was recommended.[3] Such an officer now exists with policy and administrative authority over the Human Rights Centre of the United Nations in Geneva.

The World Conference dealt with the full range of human rights issues including the problem of torture. It found that "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".[4] This paper will examine the way in which the United Nations has attempted to alleviate and prevent the use of torture as an instrument of state action. Its primary vehicle is through the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention")[5]

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1 United Nations Department of Public Information, New York, 1993, DPI/1394-39399, at1.

2 Ibid at 30.

3 Ibid at 49.

4 Ibid at 60.

5 (1984) 23 I.L.M. 1027. For thorough examinations of this treaty, see M. Lippman, "The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (1994) 17 Boston College International and Comparative Law Review 275; and J.H. Burgers and H. Danielius, *The United Nations Convention Against Torture* (Dordrecht: Martinus Nijhoff, 1988). For a comparison with the European Convention on Torture, see A. Cassese, "A

which established a committee of experts in the area of human rights charged with the important duty of monitoring the implementation by states parties of their obligations under that treaty. The Committee is referred to as the Committee Against Torture ("CAT")[6] and its work, which began in 1988, is aimed at the reduction and eventual elimination of incidents of torture the world over.[7] This is carried out under four major jurisdictions pursuant to the Torture Convention: the submission of initial and periodic reports[8] (i.e., the state reporting jurisdiction); the power of the CAT to send special investigative teams to the territory of a state party when there is evidence that incidents of torture are endemic in that country[9] (i.e., the investigative jurisdiction); the power of the CAT to receive and consider communications from a state party regarding incidents of torture in the territory of another state party[10] (i.e., the denunciatory jurisdiction); and the power of the CAT to receive and consider communications from individuals regarding incidents of torture, etc., alleged to have occurred in the territories of states parties[11] (i.e., the individual communications jurisdiction).

In this paper, we will examine the history and practice of the Torture Convention and the CAT as part of the UN Human Rights Treaty Body system. Since the Torture Convention and the CAT are inextricably bound up with the general UN human rights system, we will begin with a brief account of the origins of the current UN human rights order. Then, we will consider the history of the Torture Convention and the CAT; the work of the CAT under (a) its state reporting jurisdiction; (b) its investigative jurisdiction; (c) its denunciatory jurisdiction; as well as (d) its individual communication jurisdiction. Finally, we will consider the relationship between the CAT and the UN Special Rapporteur on Torture, before assessing the effectiveness of the Torture Convention and CAT.

II A Brief Account of the UN Human Rights System

Even though the concept of human rights itself[12] and even the transnational

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New Approach to Human Rights: The European Convention for the Prevention of Torture" (1989) 83 American Journal of International Law 128.

6 The CAT is established by Art. 17 of the Torture Convention.

7 See for example Art. 2 of the Torture Convention.

8 See Art. 19 of the Torture Convention.

9 See Art. 20 of the Torture Convention.

10 See Art. 21 of the Torture Convention.

11 See Art. 22 of the Torture Convention.

12 An interesting debate currently rages in scholarly circles about the exclusivity of the notion of human rights to modern western societies and whether non-western societies did have notions of human rights. Even though a detailed examination of this debate is beyond the scope of this paper, suffice it to say that there is now an emerging recognition that even though the currently dominant conception of human rights is pre-eminently of western pedigree, non-western societies have had, and continue to this day to have, similar and other notions of human rights. For details of this debate, see R. Howard, "Cultural Absolutism and the Nostalgia for Community" (1993) 15 Human Rights Quarterly 315; M. wa Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" (1995) 35 Virginia Journal of International Law 339; D. Bell, The East Asian Challenge to Human Rights: Reflections on an East-West Dialogue" (1996) 18 Human Rights Quarterly 641; J. Donnelly, *Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989);

protection of human rights[13] pre-dates the Second World War and can be found throughout most of our recorded history,[14] the current global human rights system, steeped as it is in the United Nations order, is rightly conceived as being for the most part a post-World War II creation of governments, non-governmental organisations, and even scholars.[15] Throughout the history of humankind, the bitter experience of the scourge of war has sometimes produced the kind of political will that is necessary for governments to undertake the type of massive human rights activism that has occurred in the years since World War II.[16] The post-war years have seen considerable activity in the many departments of human rights activism; particularly standard setting, standard elaboration, and standard implementation.[17]

Starting with the United Nations Charter, which proclaimed the promotion and protection of human rights as one of the principal purposes of the United Nations,[18] the United Nations has sought to set minimum standards for the relationship between the state and individuals within its territory.[19] The 1945 Charter of the United Nations was followed in 1948 by the Universal Declaration on Human Rights[20] (UDH) which, despite its many limitations, is highly respected in international human rights circles as the well-spring from which the spirit of

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J. Oloka-Onyango and S. Tamale, "The Personal is Political' or Why Women's Rights are Human Rights: An African Perspective on International Feminism" (1995) 17 Human Rights Quarterly 691; S.B. Gutto, *Human and Peoples Rights for the Oppressed* (Lund: Lund University Press, 1993); B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in a Paradigmatic Transition* (New York: Routledge, 1995); and A.A. An Na`im, ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1991).

13 Professor Nathaniel Berman has, for example, focused much of his scholarly writing on the protection of national minorities in the inter-war years under the League of Nations system which pre-dated the United Nations system. See for example N. Berman, "A Perilious Ambivalence: Nationalist Desire and the Limits of the Inter-War Framework" (1992) 33 Harvard International Law Journal 353.

14 See, for example, R.B. Bilder, "An Overview of International Human Rights Law" in H. Hannum, ed., *Guide to International Human Rights Practice* (Philadelphia: University of Pennsylvania Press, 1984) at 4; and P. Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983).

15 See M. wa Mutua, "The Ideology of Human Rights" (1996) 36 Virginia Journal of International Law 589 at 593.

16 See H. Hannum and D.D. Fischer, "The Political Framework", in H. Hannum and D.D. Fischer, eds., *U.S. Ratification of the International Covenants on Human Rights* (New York: Transnational, 1993) at 7.

17 Ibid.

18 See Hannum and Fischer, ibid.

19 Even though this was an improvement on the customary international law position in which aliens were in a better position than citizens of the relevant state, this approach has been recently criticised as still far too restrictive, because, inter alia, it does not capture the violation of human rights by private agents such as multinational corporations. For an example of this critique, see J. Gathii and C. Nyamu, "Reflections on United States' Based Human Rights NGOs' Work on Africa" (1996) 9 Harvard Human Rights Journal 285.

20 U.N. Doc. A/810 (1948) (hereinafter refered to as the "UDH"). This declaration was adopted without a dissenting vote by a relatively exclusive UN General Assembly in 1948 as the first part of the "International Bill of Rights".

the human rights movement flows.[21] Even though it was not a formally binding instrument, but was merely intended to have a hortatory effect, the UDH contains a set of human rights standards that have been reproduced and elaborated in subsequent legally binding instruments, the oldest and most universal of which are the two covenants which were adopted in 1966 and came into force in 1976 after about three decades of intense political negotiations. These are the International Covenant on Civil and Political Rights[22] (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[23] These two covenants in effect translate the largely political language of the UDH into the language of binding international agreements.[24] Following these two covenants, the international community has also adopted a large number of other standard setting agreements of both binding[25] and non-binding quality,[26] covering a wide range of subject-matter.

Since the time of the adoption of the two covenants, a number of international human rights treaties have, in addition to laying down human rights standards, established international supervisory mechanisms for monitoring the compliance of states parties with the obligations that they freely assumed under the relevant treaty. The body that is charged with this responsibility under the ICCPR is the Human Rights Committee.[27] Unlike the ICCPR, however, the ICESCR did not in and of itself establish a new institution to monitor its implementation but required states parties to submit reports to a political organ of the United Nations, the United Nations Economic and Social Council (ECOSOC).[28] This situation was altered in May 1986 when ECOSOC set up a new committee of experts, referred to as the Committee on Economic, Social and Cultural Rights, which is now charged with overseeing the implementation of the covenant.[29] Similar bodies have been established under other international human rights treaties such as the United Nations Convention on the Prevention and Punishment of Torture,[30] the International Convention on the Elimination of All Forms of Racial

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21 See M. wa Mutua, supra, note 15.

22 999 U.N.T.S. 171 (1966).

23 999 U.N.T.S. 3 (1966).

24 See H. Hannum and D.D. Fischer, supra, note 12 at 4. Figures such as Canada's John Humphrey, Lebanon's Charles Malik, China's P.C. Chang, as well as the United States' Eleanor Roosevelt contributed immensely to this process through their work for and in the Commission on Human Rights. For an account of this process, see J. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry, New York: Transnational, 1984); and R. St. J. MacDonald, "Leadership in Law: John P. Humphrey and the Development of the International Law of Human Rights" (1991) 29 Canadian Yearbook of International Law 3.

25 See, for example, the Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 ("Racial Convention").

26 For an overview of these instruments, see *Human Rights: A Compilation of International Instruments*, Vol. I (First Part) (New York: United Nations, 1994) ("Human Rights").

27 The Human Rights Committee (hereinafter the "HRC") is established by Article 28 of the ICCPR.

28 See Hannum and Fischer, supra, note 16 at 10.

29 See E.S.C. Res. 1985/17, 1985 U.N. ESCOR, Supp. (No. 1), U.N. Doc. E/1985/85 (1985); P.Alston, "Out of the Abyss: The Challenges Confronting the New Committee on Economic, Social and Cultural Rights" (1987) 9 Human Rights Quarterly 332.

30 Supra, note 5.

Discrimination[31] and the International Convention on the Elimination of Discrimination Against Women.[32] Apart from these treaty-specific bodies, the implementation of human rights in our world is also monitored by the United Nations through its political organs as well as in its Commission on Human Rights.[33] Within the United Nations Secretariat itself, the Office of the UN High Commissioner for Human Rights as well as the UN Centre for Human Rights also helps in the monitoring of the implementation of international human rights treaties the world over.[34]

The rationale for the creation of these committees is not so much that they are expected to actively *enforce* compliance, but that they might be able to improve the human rights situation in much of the world principally through the method of persuading and pressuring governments to conform to the proper standards over time. Whether or not this expectation is or can be fulfilled is a matter of contention, and in this paper, we will undertake a brief examination of the history, jurisprudence, practice, and effectiveness of the Torture Convention.

III A Brief Account of the Convention and Committee Against Torture

According to Nigel Rodley, by the end of the 18th century the practice of torture, hitherto considered legal in Europe as a way of obtaining the truth in cases of serious crimes, had been virtually banished from that continent.[35] Torture was thus considered a thing of the past there until the rise to power in Germany of the Nazi party which legalised torture under the guise of "third degree interrogation" and freely practised it in its occupied territories.[36] It was therefore fitting that at the end of World War II, torture was prohibited, first by the UDH,[37] and later by a host of international treaties and instruments such as the Geneva Conventions of 12 August 1949,[38] the ICCPR,[39] the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Declaration"),[40] and of course the Torture Convention. Yet despite the multitude of textual prohibitions available to those committed to ending the scourge of torture, the practice has persisted to this day in nearly every part of the world.[41]

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31 660 U.N.T.S 195.

32 G.A. Res. 34/180, 34 U.N. GAOR, Supp. (No. 46) 193 (1979).

33 See Alston, supra, note 29.

34 See H. Hannum, "Setting a New Agenda for U.N. Human Rights Activities" (1994) 15 Michigan Journal of International Law 823.

35 See N. Rodley, *The Treatment of Prisoners Under International Law* (Oxford: Clarendon Press, 1987) at 7-10.

36 Ibid.

37 See Human Rights, supra, note 26.

38 See common Art. 3.

39 See Human Rights, supra, note 26.

40 A/Res. 3452 (XXX) of 9 December 1975.

41 See Amnesty International, *Report on Torture* (London: Amnesty International, 1973); Amnesty International, *Torture in the Eighties* (London: Amnesty International, 1984); Amnesty International, *International Report*, 1996: Summary (http://www.amnesty....96sum.htm#worldwide); the *Report of the UN Special Rapporteur on Torture* U.N. Doc. E/CN.4/1986/15; the *Report of the UN Special Rapporteur on Torture* U.N. Doc. E/CN.4/1995/34; and the *Joint Reports of the UN Special Rapporteur on Torture*

As is evident from the above list of some of the international treaties and instruments that prohibit torture, the continuity and persistence of this form of gross violation of human rights has not been due to a lack of effort on the part of the international community acting largely, but not exclusively, through the United Nations.[42] For, as Nigel Rodley has shown, the struggle against torture has attracted considerable attention of the United Nations in the post-World War II era.[43] Stimulated in part by the brutalities surrounding the death of Steve Biko in South Africa and the ouster from power and assassination of Salvador Allende in Chile, as well as intense NGO lobbying, the United Nations General Assembly has since 1973 taken a number of measures aimed at the prevention and elimination of torture. Programmes such as the Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders held in 1975[44] and the UN Voluntary Fund for Victims of Torture created in 1981,[45] have in different ways aided the efforts by the UN to set anti-torture human rights standards as well as attempting to eliminate such conduct and to alleviate its consequences upon its victims. So has the creation of the post of a United Nations Special Rapporteur on the Question of Torture by the UN Commission on Human Rights in 1985.[46]

Commendable as the other efforts toward the eradication of torture have been, the most significant product of the standard-setting and implementation effort to date has been the adoption, entry into force, and ongoing implementation of the Torture Convention. That Convention was adopted by the United Nations General Assembly on 10 December 1984,[47] and entered into effect on 26 June

and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions U.N. Doc. E/CN.4/1995/111.

42 Regional treaties such as the American Convention on Human Rights, 9 I.L.M. 673 (Arts. 4, 5, and 7); the African Charter on Human and Peoples' Rights, 21 I.L.M. 59 (Articles 4-7); and the European Convention for the Protection of Human Rights and Fundamental Freeedoms, 213 U.N.T.S. 221 (Articles 2, 3, and 5) have also prohibited torture. In addition, some regional arrangements have also been set up primarily for the prevention of torture and other forms of ill-treatment. These are the Inter-American Convention to Prevent and Punish Torture, AG/Res. 783 (XV-085); and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment, C.E. Doc. H (87) 4 (which entered into force on 1 February 1989). This purely preventive system of visits without notice was mooted by the Swiss lawyer and humanist, Jean-Jacques Gautier in 1976. Under the European system for instance, a purely preventive system is established. A committee of persons of diverse expertise is authorised to undertake visits to places of detention without previous notice to the host country as to the particular facility that the committee intends to visit. Notice of the visit to the country as a whole is, however, given. It has also been said that the European system was influenced by the Draft Optional Protocol to the Torture Convention first submitted by Costa Rica to the United Nations Commission on Human Rights in 1980 (a later version of this document can be found in U.N. Doc. E/CN.4/1991/66). See M. Nowak and W. Suntinger, "International Mechanisms for the Prevention of Torture" in A. Bloed et al, eds., *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms* (Dordrecht: Martinus Nijhoff, 1993) at 146-148. See also A. Cassese, supra, note 5.

43 Supra, note 35 at 17.

44 Ibid at 42.

45 A/Res/36/151 of 16 December 1981.

46 U.N. Doc. E/CN.4/1985/SR.55. See also N. Rodley, supra, note 35 at 42.

47 A/Res/39/462 of 10 December 1984.

1987.[48] In the years before then, the General Assembly had adopted the Torture Declaration and a number of other non-binding instruments which in some way prohibited torture and other forms of ill-treatment. The UN Commission on Human Rights began work on drafting the Convention in 1978 pursuant to a 1977 mandate of the General Assembly.[49] While the Convention was based on the broad framework of the Torture Declaration, it departs from it in important respects, such as the changes it introduced in the wording of the definition of torture.[50] The Convention absolutely prohibits torture and makes it punishable as a grave criminal offence.[51] In addition, torture may not be justified on grounds of any exceptional circumstances whatsoever.[52]

The Torture Convention also established the CAT, which is the body of experts in the area of human rights that is charged with the implementation of its provisions. Article 17 of the Torture Convention requires that these experts, apart from being nationals of states parties to the Torture Convention, must also be independent persons of high moral character.[53] Consideration is given in the constitution of the CAT to the need to ensure the equitable representation on the CAT of all the major geographic, legal and civilisational systems of the world, and of the participation of some persons who possess legal experience and/or who are also members of the Human Rights Committee established under the ICCPR.[54] The members of the CAT are elected by states parties to the Torture Convention for a term of four years and are eligible for re-election.[55] The CAT elects its own officers and such officers, who are elected for two-year terms, are eligible for re-election.[56] Subject to the provisions of the Torture Convention, the CAT has power to establish its own rules of procedure,[57] and has continuously

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48 Joseph Voyame and Peter Burns, "The Convention Against Torture, etc." in *Manual on Human Rights Reporting* (1997, U.N.O. Geneva) at 367.

49 A/Res/32/62 of 8 December 1977.

50 Note, however, that the definition of "torture" and other forms of "ill-treatment" in the Torture Convention is still circumscribed in the sense that acts of torture committeed by private persons or non-state agents do not come within its purview. See Article 1 and M. Lippman, "The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (1994) 17 Boston College Int. and Comp. L. Jnl. 275 at 314.

51 Art. 4. It also prohibits torture - induced statements from being introduced into legal proceedings, except against the alleged torturer: Art. 15.

52 Art. 2(2). The Convention also extends to prohibit cruel, inhuman or degrading treatment or punishment, not amounting to torture: Art. 16. It imposes an obligation upon states to keep their interrogation rules constantly under review (Art. 11), to enable complainants to have access to the proper authorities (Art. 12) and to ensure that an adequate compensation system is in place (Art. 14). It also obliges states to educate police, military or civil personnel regarding their obligations under the Torture Convention (Art. 10).

53 Art. 17 (1)

54 Ibid.

55 Art. 17 (3)-(5).

56 Art. 18 (1), and rules 15-20 of the rules, infra, note 58. These officers are the Chairperson, three Vice-Chairpersons, and a Rapporteur. See Voyame and Burns, supra, note 48 at 388.

57 Art. 18 (2). These rules also contain provisions dealing specifically with the procedures

revised its rules to ensure greater efficiency in its proceedings.[58] The rules provide for the CAT to hold two regular sessions annually, as well as such number of special sessions as the Committee shall deem fit in accordance with the rules.[59] The provisional agenda for regular sessions is prepared by the UN Secretariat while those for special sessions consist of those items proposed for consideration at that special session.[60] All meetings of the CAT are held in public unless it otherwise decides or the Torture Convention otherwise provides.[61] The CAT is required to submit an annual report on its activities to the states parties as well as to the General Assembly of the United Nations.[62]

Therefore, as a treaty monitoring body, the CAT is quite similar to other human rights treaty monitoring bodies such as the HRC established under the ICCPR.[63] Indeed, it may be safely asserted that the CAT is in conception and design, largely a thematic, highly specific, albeit unique, variant of the HRC. It therefore owes its origins in part to the same historical forces and pressures that led to the establishment of the HRC.[64] It must be kept in mind, however, that the CAT also differs from the HRC in a number of important respects which will be discussed in a later section of this paper. Despite these differences, both bodies are nevertheless remarkably similar in nature and the near-universality of their reach; a reach which has continued to enjoy the privilege of rapid and progressive expansion.[65]

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to be followed by the CAT when acting under its jurisdiction as spelt out in Articles 19-22 of the Torture Convention.

58 U.N. Docs. CAT/C/3/Rev.1 of 29 August 1989 and CAT/C/3/Rev.2 of 31 January 1997 ("Rules").

59 Rules 2 and 3.

60 Rules 6 and 7.

61 Amongst the in camera proceedings are those held by the CAT under article 20 of the Torture Convention. See, for instance, Report of the Committee Against Torture GAOR 50th Sess., Supp. No. 44, U.N. Doc. A/50/44 (1995) at 26, para 187.

62 Rule 63.

63 Additional similarities include the facts that like all the others, the CAT reaches its decisions by a majority vote (Art. 18); conducts its proceedings largely in writing, and is serviced by the same secretariat, the Communications Branch of the United Nations Centre for Human Rights in Geneva. See T. Zwart, *The Admissibility of Human Rights Petitions* (Dordrecht: Martinus Nijhoff, 1994) at 11.

64 This connection is made even more explicit by the fact that the original Swedish draft Torture Convention envisaged that the body responsible for the implementation of the convention would be the Human Rights Committee. It was only upon the advice of the UN's Legal Counsel that a new implementation body, the CAT, was eventually created under the convention.

65 As of 28 April 1989, the closing date of the second session of the CAT, there were 41 states parties to the Torture Convention; see Report of the Committee Against Torture GAOR 44th Session, Supp. No. 46, U.N. Doc. A/44/46 (1989) at 1 ("1989 Report"). As at 4 May 1990, this number had increased by 11 to 52; see Report of the Committee Against Torture GAOR 45th Session, Supp. No. 44, U.N. Doc. A/45/44 (1990) at 1 ("1990 Report"). As at 3 May 1991, the number had increased by 3 to 55; see Report of the Committee Against Torture GAOR 46th Session, Supp. No. 46, U.N. Doc. A/46/46 (1991) at 1 ("1991 Report"). As at 8 May 1992, the number had increased by 12 to 67; see Report of the Committee Against Torture GAOR 47th Session, Supp. No. 44, U.N. Doc. A/47/44 (1992) at 1 ("1992 Report"). As at 30 April 1993, the number had increased

Like the other United Nations human rights treaty bodies, the CAT is not *per se* a tribunal or a court.[66] The CAT has declared that it is "not an appellate, a quasi-judicial or administrative body, but rather a monitoring body ... with declaratory powers only".[67]

The ambiguous nature of the CAT has not, however, generally interfered with the willingness of states to adhere to the Torture Convention. Thus, the Torture Convention has elicited a sizeable number of ratifications and accessions which has in a relatively short time extended its jurisdiction to most of the Nations of the world. By the end of May 1998, the Convention had 105 states parties, many of whom had accepted the jurisdiction of the CAT to receive and consider communications against them from other states parties and from individuals within their territories, as well as its investigative jurisdiction. The obligation of states parties to submit initial and periodic reports is imposed upon becoming a party to the convention. In the following sections of this paper, we will examine the four types of jurisdiction exercised by the CAT.

IV The State Reporting Jurisdiction of the Committee Against Torture: Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.
2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.
3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.

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by 5 to 72; see Report of the Committee Against Torture GAOR 48th Session, Supp. No. 44, U.N. Doc. A/48/44 (1993) at 1 ("1993 Report"). As at 28 April 1994, the number had increased by 9 to 81; see Report of the Committee Against Torture GAOR 49th Session, Supp. No. 44, U.N. Doc. A/49/44 (1994) at 1 ("1994 Report"). As at 5 May 1995, the closing date of the fourteenth session, the number had increased by 7 to 88; see Report of the Committee Against Torture 1995, supra, note 57 ("1995 Report"). As of 21 February 1997, when Kenya deposited its instrument of accession to the Torture Convention, the number had increased by 14 to 102; see United Nations Treaty Collection at http://www.un.org/Depts...rt_boo/iv_boo/iv_9.html.

66 See Voyame and Burns, supra note 48 at 389-90. See the comments of Keith J. in *Wellington District Legal Services Committee* v. *Tangiora* [1998] 1 NZLR 129 at 134-135 to like effect in relation to the Human Rights Committee.

67 General Comment by the Committee Against Torture on the Implementation of Article 3 in the Context of Article 22 of the Convention Against Torture, CAT/C/XX/Misc. 1, 21 November 1997. Under its declaratory function the CAT may, for example, condemn states for not meeting their obligations under the Torture Convention when considering country reports pursuant to Art. 19.

> 4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.[68]

This provision of the Torture Convention, which requires states parties to submit initial and subsequent four-yearly reports, is akin to similar procedures established under other international human rights treaties.[69] Initial reports must be submitted within one year of the Torture Convention entering into force for the state party. In this as in all the other cases, the state reporting obligation is not a one-time undertaking and it imposes a significant burden in terms of resources upon them. In the particular case of the Torture Convention, the obligations assumed by states parties under it to submit initial and subsequent periodic reports to the CAT have been reinforced by, and outlined in, the Rules of Procedure of the CAT[70] as well as in the General Guidelines Regarding the Form and Contents of Initial Reports[71] and the General Guidelines Regarding the Form and Contents of Periodic Reports.[72]

In our view, it is essential to read the treaty and the other supplementary documents alongside each other in order to achieve a full appreciation of the nature and extent of the state reporting obligations of states parties. Such a combined reading indicates that like all the other treaties, the Torture Convention requires that reports submitted to it by states parties, be they initial or periodic reports, must be drafted in sufficient detail so as to indicate the extent of the state party's compliance with the convention. This would cover all the measures taken by the party to give effect to the convention whether or not it pre- or ante-

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68 Art. 19 of the Torture Convention.

69 See, for example, Art. 28 of the ICCPR and Art. 8 of the Racial Convention. An important difference between the reporting obligations created by Art. 19 of the Torture Convention and those created under the other treaties is that unlike the position under the other procedures, in this case the subsequent periodic reports are not expected to be of the same character as the initial report. Subsequent reports are merely expected for the most part to be concerned with any new measures taken, while initial reports are supposed to be comprehensive. On this and the general point, see Burgers and Danelius, supra, note 5 at 157.

70 Supra, note 58 at 23-24, especially rules 64-68.

71 Adopted by the CAT at its 82nd meeting (sixth session) on 26 April 1991. See Annex V of the 1991 Report. These guidelines require the report to be organised into two major sections. The first section shall contain information of a general nature relating to the extent to which the state party has complied with its obligations under the Torture Convention. The second section shall contain information in relation to each of the Articles of the convention.

72 Adopted by the CAT at its 85th meeting (sixth session) on 30 April 1991. See Annex VI of the 1991 Report. These guidelines mandate that the periodic reports that states parties submit to the CAT shall be presented in two parts. The first shall contain information on new measures and new developments relating to the implementation of the Convention. The second shall contain any additional information requested by the Committee during its consideration of the preceeding report of the relevant state party.

dated the convention.[73] While there is no particular *a priori* way of determining the exact content of a report that would satisfy this requirement, the relevant guidelines have set flexible standards upon which the reports of states parties might be usefully evaluated. While the convention itself is silent about the procedure for the consideration of these reports, the rules have filled this gap.

The CAT is required to consider the reports submitted by states parties in the presence of one or more representatives of that state.[74] Thereafter, the CAT may make such general comments as it may consider appropriate on the reports.[75] The relevant state party may subsequently submit to the CAT its own observations on these comments.[76] While there is still some haze surrounding the exact nature of the comment of the CAT on the reports of states, the one thing that seems clear is that the major purpose of the state reporting procedure is to foster a *constructive dialogue* centred around the CAT and the state party but which often includes NGOs and other such groups.[77] According to Voyame and Burns, when the CAT is seized of a state report under its Article 19 jurisdiction:

> The purpose of the presentation and the examination of a report is to start constructive dialogue with the reporting state.[78]

In practice the CAT does evaluate the extent to which states parties have complied with their obligations under the convention as evidenced by the contents of their reports and other sources. Though this has not been a very frequent occurrence,[79] the CAT has on occasion deplored the non-compliance of some states parties with their obligations under the Torture Convention. For instance, it has done so while considering the initial report of Chile in 1989[80] as well as in the case of Argentina in 1993.[81] Moreover, the CAT has also to varying degrees commended the performance of certain states in attempting to comply with their obligations under the convention. For instance, in 1993, it considered that the Libyan legal system was in conformity with the convention, and commended Norway for its progress between its initial report in 1989 and its second periodic report in 1992.[82] In 1989, it extended similar commendations to

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73 See Burgers and Danelius, supra, note 5.

74 The CAT shall, through the UN Secretary-General, notify the states parties as early as possible of the meeting when their reports will be considered to enable them to send representatives. See rule 66.

75 Rule 68.

76 Ibid.

77 See for instance *Commentary of Al-Haq on Israel's Initial Report to the Committee Against Torture* (Ramallah, West Bank: Al-Haq, 1994); and *Statement by Al-Haq on Israel's Special Report to the Committee Against Torture* (Ramallah, West Bank: Al-Haq, 1996). Israel's Special Report is itself reproduced in U.N. Doc. CAT/C/33/Add.2.

78 Supra, note 48 at 389.

79 While exercising its state reporting jurisdiction, the CAT usually adopts the method of pointing out areas for improvement in the record of states. See for example its comments on the initial reports of Canada, Colombia, and Tunisia, at pp. 42-46, pp. 57-62, and pp. 74-79 respectively of the *1990 Report*, supra, note 65.

80 See *1990 Report*, supra, note 65 at 62-69.

81 See the *1993 Report*, supra, note 65 at 22.

82 Ibid at 17-36.

France and Switzerland, and gave the initial report of the USSR a qualified approval.[83] Indeed, the CAT has gone as far as declaring that torture does not occur in the Netherlands.[84]

The Torture Convention has been fortunate to have attracted a large number of state parties in a relatively short period of time. Indeed, it secured a sufficient number of ratifications to begin functioning only three years after the adoption of the Torture Convention by the UN General Assembly in 1984.[85] This record is quite remarkable when compared to the more than ten years it took the HRC to achieve the same thing. Again, the Torture Convention has been ratified by 105 states spread across all corners of the globe, conferring upon it a reach which is all but universal.[86] As this reporting obligation is a compulsory one, the jurisdiction of the CAT to receive, consider, and comment upon the reports of states parties is universal so far as the pool of states that have become parties to the convention[87] is concerned.

This relative universality of its reach in the case of its state reporting jurisdiction has not meant, however, that the operation of the mechanism has been entirely successful. In some cases, reports have not been submitted even after on-going reminders. For instance, in the *1995 Report*, the CAT strongly deplored the fact that Uganda, Togo, Guyana, Guinea, and Brazil had not submitted their initial reports after at least 6 reminders in each case, and noted that this kind of behaviour constituted a violation of the obligations of such states under the Torture Convention.[88] In particular, it deplored the fact that Togo and Uganda had not submitted their initial reports after 11 reminders.[89] Even when reports have been submitted, they have nearly always been submitted late.

An analysis of the data provided by the United Nations in Annex III of the *1995 Report* which shows a very high rate of *eventual* compliance with the state reporting obligation, also indicates a pattern of late submission of state reports that is historically enduring and endemic.[90] Of the 7 initial reports due in 1991 all had been filed, except for those of Somalia and Malta, but all were filed late.[91] This was repeated between 1992 and 1995[92] to the effect that in general, the later the year, the more the number of reports that were due but outstanding.[93] Such

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83 See the *1989 Report*, supra, note 65 at 13-28.

84 See the *1990 Report*, supra, note 65 at 79-84.

85 A/Res/39/46 of 10 December 1984.

86 There are still some notable exceptions though. For instance Africa's most populous state, Nigeria, which signed the treaty on 28th July 1988, had not ratified the Convention as of 1st February 1997. See U.N.Treaty Collection, supra, note 65.

87 CAT has devoted a large amount of its time to its work under this mechanism. For instance it spent 14 of the 18 meetings held during its third session to the consideration of the initial reports of states parties. See *1990 Report*, supra, note 65 at 12.

88 See the *1995 Report*, supra, note 65 at 7-8.

89 Ibid.

90 Ibid.

91 Ibid.

92 In each of these years, all the reports that were submitted were late.

93 Supra, note 88: 5 of 10 reports were outstanding in 1992; 6 of 8 in 1993; 5 of 8 in 1994; 3 of 3 as of 5 May 1995. The analysis is based on data collected before 5 May 1995, but is still sufficient to demonstrate the point.

tardiness has often been serious as the examples of Togo, Uganda, Guinea and Brazil show. In fact 26 of the 59 initial reports which had been actually filed by 5 May 1995 were submitted more than one year late.[94] A similar pattern of lateness is evident from an examination of Annex III of the *1993 Report* which reveals the data for the period between 1989 and 1990.[95] What is clear though is not an unwillingness amongst states parties to submit initial reports. On the contrary the rate of *eventual* compliance is quite high. Instead, there is an apparent inability to submit reports within the prescribed time periods. Interestingly, even though this propensity to submit late reports occurs amongst both developed and developing countries, when an analysis of the countries that complied within one year of their respective due dates is done, it becomes evident that the propensity is worse amongst developing and Eastern European countries.[96] As these states are in general relatively poorer than those of Western Europe and North America, one factor that can explain this difference is resources. Not all states have the present capacity to devote the necessary financial and human resources to the task of servicing their obligation to report to the CAT. We shall return to this factor later in this paper.

Another significant problem that has affected the successful implementation of the reporting mechanism is that of the submission of reports by states parties which do not contain sufficient information or detail as envisaged by the Convention and the guidelines. This often leads to requests by the CAT to the relevant state party for additional information, and in some cases, an additional report. For example, during the consideration of the initial report of Argentina at its third session, the CAT was constrained to request Argentina, *inter alia*, to furnish it with statistics regarding the number of government officials, if any, that had been punished for practicing torture as well as information on a variety of other matters.[97] Similarly, during the consideration of the initial report of Cameroun at the same session, the CAT also requested Cameroun to supply it with additional information including information relating to the conformity of Camerounian penal legislation with the Torture Convention and the conditions in which detainees are kept in that country.[98] In the case of China, after considering its initial report, the CAT requested an *Additional Report* to it by 31 December

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[94] Ibid.

[95] See supra, note 65 at 82-84. Of the 10 initial reports due in 1989, all had been submitted except for that of Guyana, but only the Report of Chile had come in before the due date. In 1990 only Finland sent in an early report. We must also point out that Sweden sent in an early report in 1993-see Annex III of the *1995 Report*.

[96] An analysis of the *1995 Report* shows that while 21 of the 35 (60%) initial reports that were due from developed countries were submitted within one year, the ratio for developing countries was only 12 of 24 (50%). The percentage for developed countries increased to about 85% if resource poor, largely Eastern European countries were removed from this category. The United Nations Human Rights Centre, Geneva, which administers the Torture Convention has provided workshops on preparing reports under the human rights treaty system and has published a manual to assist states in that respect: supra, note 48.

[97] The initial report of Argentina was considered during the CAT's 30th and 31st meetings held on 16 November 1989. See *1990 Report*, supra, note 65 at 30-33.

[98] Cameroun's initial report was considered by the CAT at its 34th and 35th meetings held on 20 November 1989. See ibid at 47-51.

1990.[99] The reason for the request for an Additional Report instead of additional information in this particular case may be gleaned from the statement of the CAT at paragraph 476 of the *1990 Report*:

> The members of the committee welcomed with interest the report, which contained fairly detailed information on the constitutional framework and demonstrated the Government's desire to cooperate with the committee. They nevertheless expressed regret that the report had been drafted in too general a manner and failed to give details of the practical application of each of the Convention's provisions in China. It did not therefore conform to the committee's general guidelines regarding the form and contents of initial reports (CAT/C/4/Rev.1).[100]

The jurisprudence of the CAT has also been that in the event that a change of Government in a state party ushers in a new regime between the submission of a report and its consideration by the CAT, which new regime has a different point of view from that contained in the report, the CAT may allow the new regime to submit a new report in the place of the earlier one.[101] This was the case in the case of the consideration of the initial report of Afghanistan by the CAT at its 120th and 121st meetings held on 10 November 1992, when the CAT requested Afghanistan to submit a *new report* incorporating an Initial Report, an Additional Report, and a Periodic Report in a single document.[102]

Yet another problem with the operation of the state reporting of the CAT concerns the sources and credibility of the evidence that it uses in its assessment of the reports submitted to it by states parties. An analysis of its reports from 1989 till 1995 reveals that in the assessment of the information provided by the reporting state party, the CAT is heavily dependent upon information supplied by both domestic and international human rights non-governmental organisations[103] as well as the reports of the United Nations Special Rapporteur on Torture.[104] It has little or no independent operational capacity to collect its own evidence, and relies in part on such information to assess the material provided by the state party as well as to reach its conclusions.

It is also important to note that the CAT has not been unaware of the need to enhance its effectiveness, and has over the years paid considerable attention to improving its state reporting mechanism. Accordingly, pursuant to rule 65, it has since its second session in 1988 consistently sent reminders to states parties

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99 Ibid at 90.

100 Ibid at 85.

101 See *1993 Report*, supra, note 65 at 12-13.

102 Ibid at 13.

103 Indeed, the CAT has even gone as far as to adjudge a country, Liechtenstein, to be free from incidents of torture, on the basis that no NGO or governmental organisation had affirmed the existence of torture in that country. See *1995 Report*, supra, note 65 at 14.

104 The CAT relied on factual data collected by the Special Rapporteur in its assessment of China's initial report. See *1990 Report*, supra, note 65 at 90. The CAT did the same thing in its consideration of the additional report of China at its 143rd and 146th meetings held on 22 and 23 April 1993. See *1993 Report*, supra, note 65 at 62-68. The Special Rapporteur's reports have been quite critical of China. For an example see U.N. Doc. E/CN.4/1993/26 which deplored the use of torture in China.

that are late in submitting their reports.[105] Since 1990, the UN Secretary-General, has on behalf of the CAT, *automatically* sent reminders to such states.[106] The CAT has also created the positions of Country and Alternate Country Rapporteurs mandated to study and evaluate each report, and to draw up a list of questions to be put to the representatives of the reporting state[107] and to preface its general conclusions.[108] This arrangement has, in the opinion of the CAT itself, had a salutary effect on the efficiency of their work, and in particular enabled the CAT to formulate better organised conclusions. The quality and quantity of these conclusions and recommendations have also been enhanced by the decision of the CAT at its twelfth session in 1994 to emphasis them in the drafting of its reports to the UN General Assembly and states parties, on its state reporting jurisdiction.[109] Unlike past practice CAT now divides its general conclusions under the following headings: introduction, positive aspects, factors and difficulties impeding the application of the provisions of the convention, subjects of concern, and recommendations.[110] This has had the effect of making these conclusions clearer and more specific. Since the clarity of a decision has been shown to be a very important factor that contributes to its compliance-pull,[111] this is an important improvement in the way the mechanism functions. This search for clarity and efficiency is also enhanced by the issuance of its new and more detailed rules of procedure, particularly in 1989 and 1997,[112] as well as by the detailed guidelines issued by the CAT for the drafting of reports by states parties.[113] In addition the CAT has for some time adopted the practice of recommending to states which have not been able to submit their due reports partly for reasons of a lack of competent officials, and who are so willing, to take advantage of the technical assistance programmes of the United Nations Centre for Human Rights in Geneva.[114]

V The Investigative Jurisdiction of the Committee Against Torture: Article 20

> 1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.[115]

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105 See the *1989 Report*, supra, note 65 at 7.
106 See for example the *1993 Report*, supra, note 65 at 8.
107 See the *1990 Report*, supra, note 65 at 3-4.
108 See the *1991 Report*, supra, note 65 at 3.
109 See the *1994 Report*, supra, note 65 at 4.
110 Ibid.
111 See T.M. Franck, *The Power of Legitimacy Amongst Nations* (New York: Oxford University Press, 1990).
112 Supra, note 58.
113 Supra, notes 71 and 72.
114 See *1995 Report*, supra, note 65 at 7.
115 Art. 20 (1).

This provision,[116] which applies only to torture and not to other forms of ill-treatment, authorises the CAT to institute, *proprio motu*, an inquiry into the systematic practice of torture in the territory of a state party.[117] At all stages, this provision emphasises confidentiality, the consent of the relevant state party, and the provision of ample opportunity for that state party to make its views known to the CAT. One important departure, however, from the emphasis on confidentiality and the consent of the state party is that the CAT is given full discretion whether or not to include a summary account of the completed proceedings in its annual report.

The procedure is set in motion if the CAT receives *reliable* information which appears to it to contain *well-founded allegations* that torture is being *systematically* (as part of state policy) practised in the territory of a state party. Even though the text is silent as to the kinds of sources that the CAT may rely on, it seems that the important question is not so much the source of the information as its reliability.[118] It must be noted, though, that the question of the reliability of information is often inextricably linked with that of the historical credibility of its source.

If the CAT decides that the information has come to its attention from a reliable source and that such information contains a well-founded allegation of torture which is systematically practised, then it is duty bound to move on to the next stage of the procedure which is to offer the relevant state party an opportunity to cooperate with it in the examination of the information received and to submit observations thereon.[119] The CAT is of course not bound to divulge the identity of its sources to the state party,[120] or to any other body for that matter. At the end of the second stage, the CAT *may*, if it comes to the conclusion that the evidence so warrants, designate one or more of its members to make a confidential inquiry and to report to the CAT urgently. Such an inquiry may, depending on whether or not the relevant state party permits it, include a visit to its territory. The report of the investigative team on the matter is thereafter considered by the CAT, which shall proceed to formulate and transmit to the relevant state party such comments or suggestions as it considers appropriate, together with the findings of the inquiry.

Unlike the state reporting jurisdiction of the CAT, the investigative powers of the CAT are much more circumscribed in terms of its territorial scope. The reach of Article 20 is much narrower than that of Article 19 because of Art. 28(1) which allows states parties, at the time of signature or ratification of the Convention or accession thereto, to exclude the reach of Art. 20. This is understandable given

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116 The provisions of Art. 20 are reinforced by rules 69-84.

117 This procedure is similar to the older so-called "Resolution 1503 procedure" used by the UN Commission on Human Rights. This procedure was itself authorised by Resolution 1503/1970 of the UN Economic and Social Council. See Burgers and Danelius, supra, note 5 at 160. Pursuant to Art. 28(1) of the Torture Convention it applies only to those states that, at the time of signature or ratification of the Torture Convention,do not declare against the CAT's jurisdiction under Art. 20.

118 Burgers and Danelius, supra, note 5 at 161.

119 Ibid.

120 Ibid.

that the investigative powers under Art. 20 are unique in a human rights treaty.[121] Several states have exercised the option to exclude the effect of Art. 20. As of 1 February 1997,[122] eleven states parties have made declarations clearly opting out of the procedure, while another (Cuba) has made a declaration insisting that the procedure must be invoked in strict compliance with the principle of the sovereignty of states and implemented only with the prior consent of the states parties. As this declaration is not compatible with the content of Article 20, Cuba's declaration could be interpreted as not removing it from the investigative jurisdiction of the CAT under Article 20. Considering, however, that as of the relevant date, 102 states had ratified, acceded, or succeeded to the convention, the percentage of states parties that have opted out of this invasive mechanism (just under 11%) is remarkably low.

One feature of Art. 20 is that despite its relatively impressive territorial reach, it has not yet been applied to many states. Indeed, so far, the CAT has published information regarding only two of the proceedings that it has undertaken under Art. 20, namely investigations relating to Turkey and Egypt.[124] Between its fourth session in 1990 and its tenth session in 1993 when the CAT actually began its work under Article 20, it had devoted 27 closed meetings to its activities under this procedure.[125] By the close of its twelfth session in 1994 the number of meetings had increased to 35.[126] And by the end of its fourteenth session in 1995, the number had increased to 42.[127]

Another feature of Art. 20 procedure is that of the availability of credible evidence before the CAT. The fact that the procedure is activated by the receipt of reliable information containing a well-founded allegation that torture is systematically being practised in the territory of a state party, underscores the importance of the availability of credible evidence before the CAT. Once the procedure has been invoked, and a fact-finding team has actually visited the relevant territory, the CAT possesses the capacity to collect evidence itself. But it has no way of independently collecting its own evidence at the very beginning when it receives the allegations. How does it decide which sources are reliable and what information is well-founded? The convention and the rules give no guidance, and the CAT is obviously heavily dependent upon information supplied by NGOs, governmental organisations, the U.N. Secretariat and the Special Rapporteur on Torture.

The CAT has been taking a number of measures to improve this procedure. Mindful of the need for it to contribute meaningfully and within its powers to the eradication of torture, the CAT has issued detailed and specific rules meant

121 See Burgers and Danelius, supra, note 5 at 60.

122 See Treaty Library Records, supra, note 65.

123 These states are Ukraine, Tunisia, Poland, Morocco, Kuwait, Israel, China, Chile, Bulgaria, Belarus, and Afghanistan.

124 In accordance with Art. 20(5) and after consultations with Turkey, the CAT publicly announced that it was including a summary account of the results of the proceedings relating to its inquiry on Turkey in its annual report. The document is contained in U.N. Doc. A/48/44/Add.1 (1993). See *1995 Report*, supra, note 65 at 26. In 1996, the CAT also published its findings on its inquiry on Egypt.

125 See *1993 Report*, supra, note 65 at 73.

126 See *1994 Report*, supra, note 65 at 26.

127 See *1995 Report*, supra, note 65 at 26.

to guide its activities under this procedure. Since the voluntary compliance-pull of international norms and processes is to some extent dependent upon the clarity of the norms and processes themselves,[128] states parties are more likely to agree to cooperate with the CAT under this procedure if the rules of engagement are clear and concise. The CAT has also participated in the on-going efforts by the UN human rights bodies to produce an Optional Protocol to the Torture Convention that will create a separate mechanism for preventive visits without notice to the territory of states which adhere to it. During its sixth session in April 1991, the CAT considered the draft Optional Protocol submitted by Costa Rica to the UN Commission on Human Rights.[129] While the CAT approved the document in principle, members expressed reservations as to the complexity of the envisaged system, its financial cost, the language barriers that may exist between the members of the sub-committee of the CAT that will be responsible for the implementation of the protocol and the interviewees at the places of detention that would be visited by the sub-committee.[130] One of the things that can be said in favour of this Optional Protocol is that it may to a limited extent provide the CAT with an additional source of objective evidence as to the status of torture in a number of states.

VI The Denunciatory Jurisdiction of the Committee Against Torture: Article 21

> 1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies, taken pending or available in the matter;...

This Article provides for what is styled the denunciatory jurisdiction of the CAT. The principle encapsulated by this provision has an established pedigree within the UN human rights system, dating back to the adoption of the ICCPR in 1966. Since that time it has appeared in every UN (as well as regional) human rights convention that establishes a monitoring mechanism similar to the CAT.[132] This procedure, which is optional for the states parties to the Torture Convention, and which operates on the basis of reciprocity amongst them, came into effect upon its adherence by five states parties.[133]

The provision envisages that states parties might on the basis of reciprocity make complaints, in the first instance, to a state which another views as not

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128 See Franck, supra, note 111.

129 See U.N. Doc. E/CN.4/1991/66. The major deficiency of such a protocol is the obvious one: the states that persistently engage in torture will never ratify it.

130 See *1991 Report*, supra, note 65 at 4-5. See also *1992 Report*, ibid at 4-5.

131 Art. 21(1)(a). This provision is reinforced by rules 85 to 95.

132 See Burgers and Danelius, supra, note 5 at 164.

133 Art. 21(2).

complying with its obligations under the convention. If the matter is not resolved at this stage, then the complaining state may then refer the matter to the CAT. The procedure is subject to the operation of the exhaustion of domestic remedies rule,[134] but this rule shall not apply where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the alleged violation of the Torture Convention. The proceedings of the CAT when acting under this provision are confidential,[136] and the gravamen of the entire procedure is that the CAT shall facilitate a solution between the states parties by providing its good offices to them including, where appropriate, appointing an *ad hoc* conciliation commission.[137] Unlike the individual communication procedure, the CAT has no authority to impose a solution in the absence of an agreement between the states parties concerned.

Despite this rather soft feature of the provision, many states have not felt able to make the declaration pursuant to Article 21(1) accepting this jurisdiction of the CAT. As of 5 May 1995, only 38 of the 88 states parties to the convention at that time (ie less than 50%) had accepted this jurisdiction of the CAT.[138] By the end of February 1997, this number was 39 of 102 states parties (ie less than 40%).[139] Thus, there has been a net decrease in the percentage of states parties that have submitted themselves to this procedure. This dismal record in the acceptance by states parties of this particular procedure is even more pronounced by the fact that not once has the CAT had a case referred to it, nor has any other similar human rights mechanism.[140]

VII The Individual Communications Jurisdiction of the Committee Against Torture: Article 22

> 1. A State Party may at any time declare under this article that it recognizes the competence of the committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be the 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.

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134 See, infra, notes 167 - 170.

135 See Art. 21(1)(c).

136 See Art. 21(1)(d).

137 See Art. 21(1)(e).

138 See *1995 Report*, supra, note 65 at 32-35.

139 See CAT/C/2/Rev. 4 at 29-39.

140 For example, a similar mechanism established by Art. 41 of the ICCPR has remained dormant since that convention came into force. See V. Dimitrijevic, "The Monitoring of Human Rights and the Prevention of Human Rights Violations through Reporting Procedures" A. Bloed, et al., eds., supra, note 42 at 2. This is also the case in the European system. See R. Mullerson, "The Efficiency of Individual Complaint Procedures: The Experience of CCPR, CERD, CAT, and ECHR" in Bloed, et al., eds., supra, note 42 at 25-26.

141 Art. 22(1). This provision is reinforced by rules 96-112.

Most of the text of this provision was borrowed from the Optional Protocol to the ICCPR which establishes the individual communications/complaints procedure relating to that covenant.[142] Comparable procedures are contained in other international and regional human rights treaties.[143] The work of the CAT under this provision commenced at its second session which closed on 28 April 1989.[144] At that session, the CAT considered the first three individual communications that had been submitted to it.[145]

This mechanism is designed to allow individuals, who claim that any of their rights contained in the Torture Convention have been violated by a state party to the Convention, to submit a written communication to the CAT for consideration.[146] This mechanism is remarkably similar, at least in all important respects, to comparable mechanisms established under other human rights treaties. For instance, the jurisdiction of the CAT is dependent upon the voluntary declaration of a state party to the Torture Convention that it accepts the jurisdiction of the committee to receive and consider personal communications filed against that state party.[147] Again, the CAT will not entertain a communication[148] which it considers to be abusive of the right of submission, or which lacks a minimum of substantiation,[149] or which is incompatible with the provisions of the Torture Convention,[150] or which has been submitted without the exhaustion of all the domestic remedies that are available in the target state party,[151] or which discloses an issue which is subject, or has already been subject, to another procedure of international investigation or settlement.[152] If, however, a communication to another international mechanism has been rejected on a purely formal (procedural) ground, we agree with Burgers and Danelius that there is probably no obstacle to a new examination by the CAT.[153] Similarly, it does not appear that an investigation under the ECOSOC Resolution 1503 is sufficient ground for rejecting a communication submitted to the CAT, since

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142 See Burgers and Danelius, supra, note 5 at 166.

143 Ibid.

144 The Article came into effect upon its acceptance by five states parties. The provision cannot be applied retroactively to any time before 26 June 1987.

145 See *1989 Report*, supra, note 65 at 40.

146 Similar provisions are contained in Art. 2 of the Optional Protocol to the ICCPR and Art. 14 of the Racial Convention.

147 Art. 22(1). Similar provisions appear in Art. 1 of the Optional Protocol to the ICCPR and Art. 14 of the Racial Convention.

148 The conditions for the admissibility of a communication are set out in Rule 107.

149 See *X* v. *Switzerland* Communication ("Comm.") No. 17/1994; and *Y* v. *Switzerland* Comm. No. 18/1994.

150 See *L.B.* v. *Spain* Comm. No.9/1991 (CAT), *1992 Report*, supra, note 65 at 82-83.

151 See *H.U.P* v. *Spain* Comm. No. 6/1990; *A.E.M. and C.B.L.* v. *Spain* Comm. No. 10/1993; *M.A.* v. *Canada* Comm. No. 22/1995; *A.E.* v. *Switzerland* Comm. No. 24/1995; and *K.K.H.* v. *Canada* Comm. No. 35/1995.

152 These provisions are supplemented in the relevant areas by the jurisprudence and practice of the three committees.

153 This is different from the position under the Optional Protocol to the ICCPR which limits the authority of the committee only in cases where the matter is simultaneously being examined under another international procedure. See J.H. Burgers and H. Danelius, supra, note 5 at 167.

154 Ibid.

investigations conducted under that resolution concerns a "whole situation" and not the violation of a single individual's rights as such.[154] The Torture Convention does not, at least in general, allow communications from groups *qua* groups.[155] Because of the very nature of the subject-matter it covers, the non-inclusion of groups in the Torture Convention has not presented much of a problem in practice, whereas the reverse has been the case with regard to the HRC. In the case of the ICCPR regime this exclusion of groups is quite problematic given Arts. 1 and 27 of the ICCPR which clearly protect group rights. It must be noted, however, that while the HRC has maintained the general position that its justification is confined to communications from individuals, it has been willing to allow a group of individuals to co-author a single communication notwithstanding their large numbers.[156] The CAT may also indicate interim measures of protection to avoid irreparable damage to the petitioner(s) before the committee has rendered its decision.[157]

In summary, the way the procedure is designed to work is that when a communication has been submitted to the CAT[158] and has been registered, it is brought to the attention of the relevant state party by the committee which shall then give that country a period of six months within which to submit written statements to the committee clarifying the matter, and stating the remedy, if any, that it may have taken. After consideration of the matter, which happens in camera,[159] the CAT then forwards its views to both the concerned state and the petitioner(s). A precis of the decision may be included in the summary of its activities relating to its individual communications jurisdiction included in its annual reports.[160] It is important to note that the CAT is entitled under Article

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155 See Art. 22(1). Unlike the position under this treaty, Art. 14 of the Racial Convention explicitly allows communications from individuals as well as groups.

156 See, e.g., *Ilmari Lansman et al* v *Finland* Comm. No. 511/1992, reproduced in Human Rights Committee: Final Decisions CCPR/C/57/1 of 23 August 1996, at 74. In this case the co-authors were 48 members of the Sami ethnic minority group in Finland.

157 See *Balabou Mutombo* v. *Switzerland* Comm. No. 13/1993 (CAT). For a similar rule under the ICCPR regime, see T. Zwart, supra, note 63 at 14-15, citing, *Ominayak* v. *Canada* (HRC).

158 A communication under this procedure must be submitted by or on behalf of a victim of a violation of the Torture Convention. It appears from the decision of the CAT in *B. M'B* v. *Tunisia* Comm. No. 14/1994 that a communication would be declared inadmissible by the CAT if the author has not submitted sufficient proof to establish his or her authority to act on behalf of the victim. This important element of "authority to act on behalf of the victim" was introduced by Rule 107(1)(b). That rule provides that communications may be brought by relatives, or designated representatives, or others, on behalf of an alleged victim when it appears that the victim is unable to submit the communication, and the author is able to justify his or her acting on the victim's behalf. An NGO communication on behalf of a victim would therefore have to pass this test in order to render the communication admissible.

159 See for example the *1990 Report*, supra, note 65 at 97.

160 See Arts. 4-6 Optional Protocol, Article 14 Racial Convention, and Arts. 22 and 24 Torture Convention. The period allowed the state party within which it is to respond to a communication is 6 months in the cases of the HRC and the CAT, but 3 months in the case of CERD. In all three committees confidentiality prior to publication of the decision is rigorously complied with.

22(4) to take account of all information made available to it which probably includes oral information presented during consideration of the communication by members of the committee itself. This a departure from the position under the ICCPR regime where the HRC is virtually confined to the consideration of written information.

This Article 22 procedure, which has the potential of serving as an important resource for those concerned with exposing the practice of torture within states has, regrettably, not attracted the adherence of most states parties to the Torture Convention. An examination of the records reveals that the pattern of adherence to this procedure is not impressive. As of May 1990, 23 of the 52 states that had become parties to the convention at that time had adhered to the procedure. By April 1994 these figures had become 35 of 80 states.[161] The figures for the period between that date and May 1995 were 35 of 88.[162] By February 1997, only 39 of the 102 states parties to the Torture Convention had adhered to the procedure.[163] The United States of America and the United Kingdom are the only two states that have accepted the jurisdiction of the CAT under Art. 21 without adopting its Article 22 jurisdiction.[164] China and Israel are two other important countries that have not accepted both the Art. 21 and Art. 22 jurisdictions of the CAT.[165] Thus while the number of states parties to the Convention increased by 52 between May 1990 and February 1997, the number of states which had recognised this jurisdiction of the CAT increased by only 16 during the same period. A North-South analysis of the 1995 data also indicates that of the 35 states which had adhered to this procedure in 1995, 28 were from countries of the North (i.e., including Eastern Europe), while only 7 were from the countries of the South.[166]

The rule that the author(s) of a personal communication must exhaust all available and effective domestic remedies before submitting a communication to any of the three committees is a well-established rule of international law which is designed to allow states an opportunity to remedy matters through their own legal systems.[167] This rule will not apply, however, if domestic remedies are either unavailable (i.e., the petitioner cannot make use of it in the circumstances); ineffective (e.g., where an appeal has no objective prospect of success); insufficient (i.e., incapable of redressing the complaint); or if certain special circumstances are considered to have absolved the author of the communication of the obligation to comply with the rule.[168] Such special circumstances may include the disappearance of lawyers who tried to file an appeal on behalf of the author.[169] The rule does not also apply if the local process

[161] See *1994 Report*, supra, note 65 at 27.

[162] See *1995 Report*, supra, note 65 at 32-35.

[163] See U.N. Treaty Collection, supra, note 65.

[164] Ibid.

[165] Ibid.

[166] See *1995 Report*, supra, note 65 at 32-35.

[167] See Zwart, supra, note 63 at 187-215.

[168] Ibid. For a similar position under the ICCPR regime, see *Peter Holder* v. *Trinidad and Tobago* Comm. No. 515/1992; and *Lincoln Guerra and Brian Wallen* Comm. No. 575/576/1992.

[169] This has not yet happened in any communication that has come before the CAT. But an analogy from the practice of the HRC is useful. See Comm. No. 29/1978 (HRC); and *Gerald Griffin* v. *Spain* Comm. No. 493/1992 (HRC).

is unduly prolonged.[170] In practice, even though the rule seems to be a necessary one at the international level, it imposes a practical constraint on the ability of local counsel to quickly seize the CAT of serious claims, or for the CAT to be utilised effectively by domestic lawyers to delay irreparable damage to individuals while international public opinion and pressure and other available resources are being mobilised. The rule often requires the CAT to declare a petition inadmissible without an enquiry into the merits of a matter in cases that may require urgent intervention because of, for example, impending deportation.

Again, only the individual who has been a victim of violations, or persons acting on his or her behalf may petition the CAT.[171] A victim is a person who has been personally affected.[172] This term has, happily, been widely defined to include duly authorised lawyers and close relatives of a deceased victim.[173] But NGOs have no standing in this respect, except when they have obtained the express authority of the victim or the victim's family.[174]

One notable and very important improvement that the CAT has made to the operation of this procedure is its creation of the position of an *Inter-Sessional Rapporteur* on 16 November 1994.[175] This officer is a person appointed from amongst the members of the CAT, who is responsible for dealing with urgent matters arising from new communications submitted to the CAT in between its sessions.[176] The person so appointed is required to report to the full committee at the beginning of its subsequent session as to the measures he/she deemed necessary to take.[177]

The workload of the CAT has dramatically increased in recent years as the result of the interplay between Article 22, providing for individual communications to it, and Article 3(1), imposing an obligation upon state parties not to "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".

Since some of the states that have ratified Article 22 are also the primary states of choice by refugee claimants (e.g., Canada, Denmark, the Netherlands, Sweden and Switzerland) it is not surprising that many unsuccessful refugee claimants should turn to the CAT as a tribunal of last resort. Given that the CAT meets only twice a year, such a communication will inevitably lead to the CAT requesting the state party to defer action until it has a chance to deal with the

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170 See Art. 22(5)(b). The decision of the HRC in *Sandra Fei* v. *Colombia* Communication No. 514/1992 (HRC) is instructive in this regard.

171 See Art. 22(1). For the more restricted position under the ICCPR regime, see A. De Zayas et al., supra at 11. See also *Aumeeruddy-Cziffra* v. *Mauritius* Comm. No. 35/1978 (HRC); and *Leo Hertzberg et al.* v. *Finland* Comm. No. 61/1979 (HRC).

172 See Zwart, supra, note 63 at 50.

173 See D. Shelton, "International Enforcement of Human Rights: Effectiveness and Alternatives" (1980) ASIL Procs 6 at 14.

174 See O. Prounis, "The Human Rights Committee: Toward Resolving the Paradox of Human Rights Law" (1985) 17 Columbia Human Rights Law Review 103 at 105-108. See also N. Lerner, *The United Nations Convention on the Elimination of All Forms of Racial Discrimination* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1980) at 84.

175 See *1995 Report*, supra, note 65 at 3.

176 Ibid.

case, except in those rare instances where the threshold of admissibility has patently not been met. Thus, in even (ultimately) unmeritorious cases a state party is likely to agree to deferring expulsion of the author of the communication in accordance with CAT's interim measures processes, which invariably take several months to play out.

In order to provide guidance to potential authors of communications and states parties, the CAT, at its 317th meeting on 21 November 1997, issued its first "General Comment" or direction dealing with this matter.[178] It held that the reference to torture in Article 3 is as defined in Article 1 and the phrase "another state" means not merely the state to which a person is being expelled etc. to but also a state to which he may subsequently be expelled etc.

The General Comment also emphasized that the reference to "a consistent pattern of gross, flagrant or mass violations of human rights" in Article 3(2), which may be evidence of the risk of torture if an author is expelled etc. to another state, is confined to conduct investigated by, consented to or acquiesed in by a public official or person acting in an official capacity.

It imposed a burden on the author to establish a *prima facie* case for the purpose of admissibility under Article 22 by fulfilling the requirements of rule 107 of the Rules of Procedure. The author also has the burden of presenting an arguable case with respect to the application of Article 3 on the merits. It requires a sufficient basis of fact to require a response from the state party. The burden upon the author is to show that the risk of torture goes beyond mere theory or suspicion but does not have to meet a test of being highly probable.

The General Comment reveals that the CAT is essentially a declaratory body and that when communications pursuant to Articles 22 and 3 are dealt with by it, considerable weight will be given to findings of fact made by organs of the state party, but that such findings of fact are not binding upon the Committee. Instead, the CAT has the power of "free assessment of the facts" based upon the relevant circumstances in every case.

Such relevant circumstances, according to the General Comment would include, *inter alia*:

(a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights?;

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

(c) Is there medical or other independent evidence to support a claim of torture or maltreatment by the author in the past? If so, has it had after-effects?;

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

(e) Has the author engaged in political or other activity within or outside the State concerned that could make him/her particularly vulnerable to

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177 Ibid.

178 Supra, note 67.

the risk of being placed in danger of torture if he/she were to be expelled, etc., to the State in question?;

(f) Is there any evidence as to the author's credibility?; and

(g) Are there factual inconsistencies in the author's claim? If so, are they relevant?

Obviously, this General Comment goes beyond just those cases involving Article 22 and Article 3 cases. Its more general statements about the nature of the CAT, including the burden on an author in presenting a case, as well as the CAT's fact-finding function extends to all Article 22 cases and not merely those involving an alleged breach or potential breach of Article 3 by a state party.

VIII The CAT and the UN Special Rapporteur on Torture

The CAT is not the only UN mechanism entirely devoted to the fight against torture.[179] The UN has, *inter alia*, created a thematic Special Rapporteur to investigate allegations of torture the world over. At its forty-first session in 1985, the United Nations Commission on Human Rights ("Commission") adopted resolution 1985/33 by which it decided to establish the position of a UN Special Rapporteur on Torture.[180] On 12 May 1985, the then Chairman of the Commission appointed Peter Kooijmans of the Netherlands as the first Special Rapporteur on Torture.[181] Pursuant to this mandate, and its renewal by UN Commission on Human Rights Resolution 1988/32 and ECOSOC Decision 1988/130, Mr. Kooijmans submitted a number of reports[182] to the Commission until 1993 when he resigned and was replaced by Nigel Rodley.[183] Rodley presented his first report to the Commission in 1994 and has since then presented a total of four annual reports to the Commission.[184] In addition, he has also presented a joint report with Bacre Waly Ndiaye concerning their joint visit to the Republic of Colombia from 17 to 26 October 1994.[185] The present mandate of the SRT is largely as contained in Commission Resolutions 1995/37, 1995/37 B, and 1996/33 B, and has not changed in substance since the first SRT was appointment in 1985.[186]

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179 Aside from UN mechanisms, the CAT has sought to cooperate and consult with the European Committee for the Prevention of Torture (C.P.T.) through Dr. Bent Sorenson, who for many years was a member of both bodies, and who provides the CAT with information regarding the status and activities of the C.P.T. See for instance the *1992 Report*, supra, note 65 at 4.

180 On the nature of thematic Special Rapporteurs, see N.S. Rodley, "United Nations Action Procedures Against Disappearances, Summary or Arbitrary Executions, and Torture" (1986) 8 Human Rights Quarterly 700. Professor Rodley is the present special Rapporteur on Torture. The legal basis for the thematic mechanisms of the UN Commission on Human Rights can be found in ECOSOC Resolution 1235 (XLII) of 6 June 1967. Until 1980, the Commission had appointed only Country Rapporteurs.

181 Hereinafter referred to as the "SRT".

182 See, for example, U.N. Docs. E/CN.4/1986/15; E/CN.4/1987/13; E/CN.4/1988/17 and Add.1; E/CN.4/1989/15; and E/CN.4/1990/17.

183 See UN Commission on Human Rights Resolution 1993/40.

184 See U.N. Docs. E/CN.4/1994/31; E/CN.4/1995/34 and Add.1; E/CN.4/1996/35 and Add.1; and E/CN.4/1997/7 and Add.1/Add.2.

185 See U.N. Doc. E/CN.4/1995/111 of 16 January 1995.

186 See U.N. Doc. E/CN.4/1997/7 at 4.

The mandate of the SRT is fundamentally concerned with torture but it has also been viewed to include what the first SRT described as the "grey zone" between torture and other forms of cruel, inhuman , and degrading treatment or punishment.[187] Amongst the phenomena which in the opinion of the SRT falls within this grey zone is corporal punishment.[188] It must be noted though that as Kooijmans, the first SRT, has demonstrated, the mandate of the SRT is limited to torture and does not extend to other cruel, inhuman or degrading treatment.[189] An examination of the four reports so far filed by Nigel Rodley, the present SRT, does not indicate that he has made any clear distinction between acts of torture and other forms of ill-treatment. The SRT is empowered to seek and receive *credible and reliable information* concerning torture from governments as well as from specialised agencies, intergovernmental organisations and non-governmental organisations.[190] The mandate also reminds the SRT of the need and importance of being able to respond effectively to credible and reliable information that comes before him and of carrying on with his or her work with discretion.[191]

The SRT enjoys the advantage of a thematic mandate which applies to all member nations of the UN[192] whereas the jurisdiction of the CAT extends only to incidents of torture or cruel, inhuman or degrading treatment or punishment conducted by state parties to the Torture Convention. Again, the SRT is not bound by the rule which requires the prior exhaustion of domestic remedies before certain international mechanisms can be activated.[193] This does not mean, however, that the reports of the SRT always cover all the state parties to the UN Charter. Indeed, an analysis of the *1997 Report* of the SRT and the addendum thereto indicates that it covered only 78 of the over 180 member states of the UN, as well as the Palestinian Authority.[194]

The SRT has sought to carry out his/her mandate primarily by the methods of urgent action, correspondence with governments, visits to selected countries, cooperation with other mechanisms (including other thematic as well as country-oriented Special Rapporteurs), and the publication of an annual report. As we shall see later, the SRT has also sought to cooperate with the CAT in order to avoid a duplication of each other's activities. It must be pointed out though that while the SRT is engaged with a particular government under any one of the

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187 Ibid.

188 This is a controversial interpretation of the mandate. While the SRT takes the view that the mandate includes corporal punishment because it is a form or torture, some countries such as Saudi Arabia have contested this view. See ibid at 4-7. The CAT has not yet had to rule on this issue, having jurisdiction over cruel, inhuman and degrading treatment and punishment pursuant to Art. 16 of the Torture Convention, but only vis-à-vis States Parties.

189 See P.H. Kooijmans, "The Role and Action of the UN Special Rapporteur on Torture" in A. Cassese, ed., *The International Fight Against Torture* (Baden-Baden: Nomos Verlagsgesellschaft, 1991) at 59.

190 Ibid.

191 Ibid.

192 Ibid at 59.

193 Ibid at 68.

194 See E/CN.4/1997/7 and Add.1.

above methods, he/she is not supposed to take a position on the merits of the allegations upon which the procedure was activated.[195]

The procedure of urgent action, described by Kooijmans as a very important part of the mandate[196] is not *"per se* accusatory, but essentially preventive in nature and purpose".[197] It consists of the communication of an urgent message to a relevant government which bypasses the normal diplomatic channels.[198] Such a message is sent to the government of a country when the SRT has received information alleging that a person has been arrested and that it is feared that he/she will be tortured, or it is alleged that he/she is actually being tortured.[199] This procedure, which is obviously reserved for the most urgent cases, is also utilised by the other thematic rapporteurs within the UN system.[200] The record of the activities of the SRT indicates that a lot of work has been done through this procedure. For instance in his *1990 Report*, the then SRT, Mr. Kooijmans, revealed that during the period covered by the report, he brought 51 urgent appeals to the attention of 26 governments, of which only 14 had replied to him.[201] In his *1997 Report*, the SRT (Nigel Rodley) included information which showed that he had transmitted a total of 130 urgent appeals to 45 countries on behalf of some 490 individuals, at least 50 of whom were known to be women, and at least 10 of whom were known to be children. This information shows a considerable increase in the number of states and persons that have been affected by the use of this procedure.[202]

The procedure of sending letters to government concerning allegations of torture within their territories is reserved for the less urgent of the cases that the SRT deals with annually. Such letters are sent upon the receipt of credible and reliable information regarding an alleged act of torture. In his *1990 Report* for instance, the SRT included details of the items of correspondence that he had sent to 21 countries (including China and Israel) regarding less urgent matters related to the practice of torture.[203] In his *1997 Report*, he provided data that showed that he had sent 68 letters to 61 Governments concerning some 669 cases.[204]

The SRT is entitled to undertake both consultative and investigative visits *in situ* to any country in need of a visit, and which extends an invitation to that effect.[205] While the distinction between the two functions is often tenuous, it seems that in the recent past at least the SRT has mostly carried out visits that can be considered to be part consultative and part investigative, with the

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195 See E/CN.4/1990/17 at 2.
196 See Kooijmans, supra, note 189 at 59.
197 See U.N. Doc. E/CN.4/1997/7 at 50.
198 Ibid at 63-64.
199 Ibid.
200 Ibid.
201 See U.N. Doc. E/CN.4/1990/17 at 5.
202 See U.N. Doc. E/CN.4/1997/7 at 9. For a statement of the factors that the SRT considers in deciding whether or not to activate this procedure in a particular case, see ibid., at 49.
203 Supra, note 201 at 5-55.
204 Supra, note 202 at 9.
205 See Kooijmans, supra, note 189 at 66.

consultative function being the predominant one.[206] This view is also supported by data included in the *1990 Report* of the then SRT, Mr. Kooijmans, which show that his visits to Guatemala and Honduras were partly consultative and partly investigative. At the end of such visits, the SRT prepares a set of evaluations and recommendations which is forwarded to the relevant Government as well as to the Commission on Human Rights. The SRT may, at a later stage, undertake some follow-up action regarding the visit such as occurred in the cases of Turkey and the Republic of Korea.[207]

One limitation to the otherwise potentially universal jurisdiction of the SRT is that he/she does not as a rule seek to visit a country in respect of which the United Nations has established a country-specific mechanism, such as a Special Rapporteur, unless of course a joint visit seems to both of them to be necessary.[208] This is also a way of cooperating with other UN mechanisms and ensuring the efficient use of UN human rights resources. Another way of cooperating with other UN mechanisms is by working with[209] and issuing joint reports with other thematic rapporteurs. A good example is the joint report issued in 1995 by the current SRT, Nigel Rodley, with the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Bacre Waly Ndiaye.[210]

As the *1997 Report* of the SRT shows, the SRT has also sought to maintain contact, consult, and cooperate with the CAT;[211] and vice versa. This cooperative approach is clearly mutually beneficial to both mechanisms and the fears expressed in some quarters at the time of the creation of the SRT that its establishment might be harmful to the progressive development of both the Torture Convention and the CAT have not materialised.[212] Indeed, this cooperation has been welcomed by the UN Commission on Human Rights in its Resolution 1990/34, as well as by the UN General Assembly in its Resolution 44/144.[213] The basis of this cooperation has been largely as stated in the *1994 Report* of the CAT, that:

> Both the Committee and the Special Rapporteur stressed that their mandates were *different, but complementary* to achieve the common goal of reducing and eventually eradicating the plague of torture in the world. They were of the view that the existing coordination of their respective areas of work made it possible to avoid any overlap in their activities and that exchanges of views and information should continue on a regular basis.[214]

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206 See, for instance, the *Report of the Visit of the Special Rapporteur to Pakistan* U.N. Doc. E/CN.4/1997/7/Add.2; and the *Report of the Visit of the Special Rapporteur to the Russian Federation*, U.N. Doc. E/CN.4/1995/34/Add.1.

207 See the 1990 Report of the SRT, supra, note 195 at 56-80.

208 See U.N. Doc. E/CN.4/1997/7 at 50.

209 For instance, when allegations received contain a combination of human rights violations which are each covered by a special mandate, the dominant element determines under which mandate action will be taken. See U.N. Doc. E/CN.4/1990/17 at 2.

210 See U.N. Doc. E/CN.4/1995/111.

211 Supra, note 202 at 50.

212 See Kooijmans, supra, note 189 at 58.

213 See *1990 Report*, supra, note 65 at 5.

214 See U.N. Doc. A/49/44 at 4.

If the basis of cooperation between these two mechanisms is that their mandates are "different but complementary", it is important to underscore these differences. First, it is important to note that while the geographical reach of the SRT is universal, at the moment that of the CAT is only potentially so, as it extends to only those 102 states that have ratified the Torture Convention. Moreover, while the investigative mechanism of the CAT can only be activated in situations where it has been alleged that there has been a systematic practice of torture, this limit does not apply in the case of the SRT.[215] Again, the capacity of the CAT to undertake investigative visits *in situ* is even more severely limited by the small number of states that have adhered to Article 20 of the Torture Convention. This is not so with respect to the SRT which can at least in principle visit nearly every country in the world. Second, consistent with its policy-oriented and humanitarian nature, the activities of the SRT are in general of a more public character than that of the CAT.[216] Third, while the CAT may often take a position on the merits of particular cases, the SRT does not usually do the same. Fourth, the SRT is, unlike the CAT, not bound by the domestic remedies rule before investigating specific complaints. Finally, the *raison d'etre* of the two mechanisms differ in the sense that unlike the CAT, the SRT is mainly charged with urgently intervening with governments based upon humanitarian grounds and visiting states for consultation.[217]

IX Effectiveness of the Torture Convention Procedures

There is a need for a paradigmatic transition in the way in which the effectiveness of international human rights institutions generally are assessed. It is our view that any accurate assessment of the effectiveness of an international human rights institution (which is a genre that includes the CAT) cannot but situate such an institution within a larger universe that includes the entirety of our system of international relations. Such an assessment must also imagine such institutions as only one of a number of other *resources* (domestic and international) that are available to protect human rights and enhance human dignity. The failure to do so will result in painting an unrealistic picture of their performance. As such, in assessing the effectiveness of the CAT, the important question is not so much what it has achieved, as the differential between what it could have achieved in the context of our contemporary inter-state system and what it has achieved so far. Thus, a holistic assessment would centre around the differential that exists between "the possible" and "the actual".

Another important related point that ought to be made at the outset is the necessity for a fundamental transition in the theory of effectiveness that forms the basis for the assessment of the performance of such bodies as the CAT. Two competing yardsticks need to be distinguished from each other. The measure of "mere direct compliance" with the declarations and recommendations of the CAT ought to be distinguished from that which adopts an holistic basis for the measurement of effectiveness. In the latter model, effectiveness is conceived of as the total contribution of the Torture Convention and the CAT to the

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[215] See Kooijmans, supra, note 189 at 71.

[216] Ibid.

[217] Ibid at 70-71.

enhancement of the culture of constraint and restraint that is the bedrock of any successful normative or institutional order. For example, while the direct compliance of states with the declarations of the CAT is probably not as impressive as it should be,[218] it would be an analytical error to regard that index as fully representative of the extent to which the CAT has been able to contribute to the struggle against torture. This is all the more apparent if it is considered that such a paradigm does not capture the continuing value of the publicity generated by the activities of the CAT in the context of a number of factors, such as the desire of most states to enjoy the respect of their peers;[219] the effectiveness of the use of the technique of shame in persuading governments to protect human rights;[220] and the variety of creative ways in which the jurisprudence and procedures of the committees have been used by domestic institutions and activists.[221]

Again, all too often, the literature in this area bemoans the absence of an international government which has at its disposal a sheriff to enforce the decisions of international institutions.[222] This is so despite compelling analytical and empirical evidence that the largely horizontal international order, which is sustained by the voluntary compliance of states to their international obligations,[223] is not necessarily worse off in terms of compliance and effectiveness

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218 That of the HRC has been credibly estimated at about 25%. See See E. Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures* (The Hague: Martinus Nijhoff, 1996) at 196.

219 See W. Tarnopolsky, "The Canadian Experience with the ICCPR Seen From the Perspective of a Former Member of the Human Rights Committee" (1987) 20 Akron Law Review 611 at 621.

220 Ibid.

221 Even in the more problematic African situation, a similar body and treaty regime has been creatively utilised by activist lawyers and judges with salutary effects. In *CRP (On behalf of Gen. Zamani Lekwot and ors)* v. *Nigeria* (Comm. No. 87/93 -(1996) 3 IHRR 137), an interim order of protection issued by the Banjul based African Commission on Human and Peoples' Rights was utilised by activist lawyers to secure an order from the Lagos High Court staying the execution of the petitioners. Their death sentences were later commuted to five year jail terms. In *Olisa Agbakoba* v. *Director, State Security Services and anor* (Unreported, Suit No. CA/L/225/92 of 6 July, 1994), the Court of Appeal of Nigeria utilised the treaty regime establishing the commission to oust the authority of the Nigerian Military Government to seize a citizen's travel passport. For a discussion of this decision, see O.C. Okafor, "The Fundamental Right to a Travel Passport Under Nigerian Law: An Integrated Viewpoint" (1996) 40 Journal of African Law 53. In *Ugochukwu Agballah* v. *National Electoral Commission and ors* (Unreported Suit at the Federal High Court Enugu, Nigeria), counsel for the plaintiff (Obiora Chinedu Okafor) utilised the same body and its treaty regime to frame a challenge to an electoral law which excluded persons below the age of 35 years from putting themselves forward as candidates for an election; a challenge which would not have been otherwise legally possible.

222 See, e.g., C.C. Joyner, "Sanctions, Compliance and International Law: Reflections on the United Nations' Experience Against Iraq" (1992) 32 Virginia Journal of International Law 1. It is unclear what Joyner means when he argues that the international system is still primitive, implying that a movement toward a domestic style order is an "evolutionary" imperative, and/or a desirable phenomenon.

223 See Franck, supra, note 111.

than the largely vertical domestic order.[224] Again, there is also compelling evidence that even the most hierarchical domestic systems are largely sustained by the voluntary compliance of their citizens to most of the rules most of the time, and not necessarily by the presence or power of the "sheriff".[225] Thus, it is unclear what significant benefits would be derived from creating an international order that mirrors the domestic order; especially as Louis Henkin has convincingly argued:

> Without police and with few courts, the international system has engendered internal motivations within states, built external inducements and *developed a culture of compliance*."[226]

And it is such a culture of compliance that is the bedrock of any successful normative or institutional order.

In the preceding section, we have seen that the CAT suffers the burden of being expected to function effectively in the face of an ever growing caseload and a paucity or unavailability of an adequately staffed and equipped secretariat.[227] Indeed, for some time financial uncertainties have surrounded the work of the CAT.[228] Other problems have included the very nature of the structure of international life with its continuing emphasis on the fact of relative state sovereignty;[229] the absence of the kind of political will amongst states that is necessary to operationalise the CAT's Article 21 procedure; the lack, amongst certain states, of the kind of human and material resources that is required to comply with their obligations under the Torture Convention; the CAT's relative youth as an international institution;[230] and its legal status as a hortatory rather than an imperative institution.

Happily, however, the CAT has taken clear practical measures to enhance its effectiveness. Aside from issuing clear and detailed rules of procedure, the appointment of inter-sessional and country rapporteurs, its enhancement of the clarity and detail of the concluding comments that it makes on the reports of states parties, its participation in the process of adopting an optional protocol to

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224 See L. Henkin, *International Law: Politics and Values* (Dordrecht: Martinus Nijhoff, 1995) at 45-47.

225 Ibid.

226 Ibid at 47. Emphasis supplied. Note, however, that in the particular context of international human rights law, Henkin did scale down his optimism somewhat: ibid at 206.

227 See, for instance, the *1995 Report*, supra, note 65 at 4. See also Zwart, supra, note 63 at 3. This has affected its capacity to deal expeditiously with communications. At present the time between registration and decision is between 2-3 years; see ibid at 10. Note, however, that the Committee has taken quite commendable steps, such as the appointment of rapporteurs for each state party's report, in order to remedy this and deal with its increasing workload.

228 See R. Higgins, "The United Nations: Still a Force for Peace" (1989) 52 Modern Law Review 1 at 20.

229 See J.S. Watson, "The Limited Utility of International Law in the Protection of Human Rights" (1980) ASIL Procs. 1 at 2-6.

230 The CAT has actually functioned for only a decade.

the Torture Convention, and its cooperation with other mechanisms, especially the SRT, the CAT has also utilised a system of reminders to states parties to the convention and has achieved a fair record of eventual compliance by them with their obligations to submit initial and periodic reports to the CAT.[231] Another effective strategy used by the CAT is its insistence on *follow-up* procedures in many cases. For instance, during the consideration of the initial report of Turkey at its sixth session, the CAT promised to continue to pay close attention to the situation with regard to the practice of torture in Turkey,[232] and lived up to this promise by *inter alia* launching an Article 20 investigation on the situation in Turkey and publishing a summary of this activity in its *1995 Report*. Again, as part of its efforts to monitor the progress of states in implementing its recommendations, in its *1994 Report*, the CAT expressed concern that Ecuador had not implemented its 1991 recommendations to that state party.[233]

These achievements have not, however, been enough to ensure that the CAT is as effective as it could be in the fight against torture. Reservations such as those entered by the United States to certain sections of the Torture Convention which in the interpretation of many of the other states parties is in effect a denunciation of the gravamen of the convention,[234] are illustrative of a number of problems that continue to hinder the work of the CAT. Another problem is that it is beginning to become apparent that the less resource-rich countries are increasingly overburdened by the expanding number of human rights institutions to which they have to answer. As Vojin Dimitrijevic has noted:

> The multitude of human rights treaties and the relatively short reporting intervals in some cases have put a serious strain on administrations of some states, especially the developing ones.[235]

An analysis of the data provided in the 1989-1995 Reports of the CAT supports this view. For as revealed in those reports, the major problem that is evident is not that states will not comply with their reporting obligations, but that they are most often late in doing so. Indeed, our analysis shows that the later the report is submitted, the more likely it is to be from a resource-poor South or Eastern

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231 The record of the CAT is relatively impressive in this regard considering that in 1996, more than two-thirds of the states parties to the ICCPR were in arrears of their reports to the HRC, which is much more established than the CAT. See J. Connors, "An Analysis and Evaluation of the System of State Reporting" Paper Presented at the Conference on Enforcing International Human Rights Law held at York University, Toronto, Canada, 22-24 June 1997. See also U.N. Doc. A/51/44 at paragraph 22-23. In 1995, less than 30% of the states parties to the Torture Convention were in arrears of their initial reports, and only about 50% were in arrears of their second periodic reports.

232 See the *1991 Report*, supra, note 65 at 23. Another strategy adopted by the CAT is to urge states to contribute to the United Nations Voluntary Fund for the Victims of Torture, a fund which assists many rehabilitation centres around the world for torture victims: see, e.g., the comments of Dr.Sor ensen, a member of CAT to the Cuban delegation in remarking upon its Initial Report, CAT/C/SR.309, 19 November 1997, at para 50.

233 Supra, note 65 at 17.

234 See U.N. Treaty Collection, supra, note 65.

235 Supra, note 140 at 14.

European country.[236] This is a problem that does not augur well for the ability of the CAT to secure the compliance of these states with their obligations under the convention.

As we have already stressed in earlier sections of this paper, a variety of problems exist with regard to the operation of the four procedures available to the CAT. For example, our general assessment of the state reporting mechanism is that it has functioned relatively well[237] but probably requires a number of reforms to be truly effective. Reforms are also needed with regard to the other procedures.

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[236] Indeed, at the April 1994 meetings of the CAT, Uganda and Croatia requested technical assistance in order to train the staff that would prepare their overdue reports. The CAT recommended that the UN Centre for Human Rights extend such technical assistance. See the *1994 Report*, supra, note 65 at 8-9.

[237] For instance, an analysis of the records of the activities of the CAT under this jurisdiction as contained in its annual reports suggests that the CAT has achieved only moderate success. In more cases than not, states have responded more or less positively to the CAT's recommendations for improvement in their various legal systems with a view to the eradication of torture. In the three examples of China, Israel and the United Kingdom, the CAT's efforts have yielded some slight improvements.

In the case of China (which ratified the convention on 8 October 1988) the CAT requested and eventually received an additional report from China which showed some, albeit slight, improvements on the situation as detailed in the initial report submitted by that country. This additional report, requested at its fourth session in 1990 was considered at its ninth session in 1992. See the *1993 Report*, supra, note 65 at 8. The December 1992 report of Amnesty International on the status of toture in China is, however, quite stinging, and only highlights the fact that the task faced by the CAT is herculean. Nevertheless, even this report recognises the improvements that have been made by China. See ASA 17/58/92.

While considering the initial report of Israel (which ratified the convention on 3 October 1991) the CAT noted that while some positive changes have occurred in Israel regarding the investigation of the practice of torture, it was concerned that there had been no real steps to implement the convention domestically against a background of the existence of a large number of heavily documented cases of ill-treatment in custody that appear to amount to breaches of the convention. See the *1994 Report*, supra, note 65 at 24-25. Futhermore, the CAT has kept a close watch on the situation in Israel and its occupied territories, and pursuant to information supplied to it by Al-Haq (the local chapter of the ICJ) it has recently requested and received a *Special Report* from Israel on the decision of the Israeli High Court in *Hamdan v. The General Security Service* (H.C. 8049/96) which basically legalised the use of force (so-called "moderate physical pressure") in interrogation of terrorist suspects in some circumstances. The CAT considered this special report on 7 May 1997 (see U.N. Doc. CAT/C/SR.295 and 296) and came to the conclusion that the said practice violated the convention and ought to cease immediately. There is no evidence that Israel has complied. See U.N. Press Release No. HR/4326 of 12 May 1997.

While considering the initial report of the UK (which ratified the Convention on 8 December 1988) the CAT has deplored some interrogation practices used in Northern Ireland. In particular the CAT deplored the absence of video recordings of interrogations, that solicitors could be excluded from interrogations, that accused persons had no right to silence, and that the state of emergency had been in place for over twenty years. The second periodic report of the UK to the CAT indicates that

But one thing stands out. The Torture Convention and the CAT have measurably contributed to the development and implementation of basic human rights norms within their sphere of jurisdiction. The CAT has influenced state behaviour and most states parties for the most part observe the terms of the Torture Convention and comport to the exhortations of the CAT. Those states that do not are subjected to both moral and political pressure to comply. The work of the CAT, like that of the HRC, continues to be received by an ever-enlarging group of participating states.

As a result, we can envisage a situation in the future when most states in the world community have signed on to the CAT, and those that have not are the small group of "pariah states" that reject the categorically imperative nature of human rights norms, including the prohibition of torture. So, although torture may never be eradicable, its practitioners will find themselves politically isolated as a result of their human rights stance and over time their behaviour may become modified so as to comply in whole or in part with the Torture Convention.

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while some of these practices have continued, the UK had comissioned studies with a view to evaluating the desirability of change. See the *1992 Report*, supra, note 65 at 19-26. This report also revealed that most of the more objectionable interrogation methods had ceased or been modified.

But this is not to say that the story has always been one of success. The disappointments have also been many. In May 1995, the initial reports of Uganda and Togo had been overdue for seven years, that of Guyana for six years, and that of Brazil for five years.