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The Response of the United Nations General Assembly to the Challenge of Torture

1. Introduction

Since the end of World War II, the need to prohibit the torture and ill-treatment of prisoners has been the focus of much activity among intergovernmental organisations. After the right to self-determination (decolonisation), the right not to be subjected to racial discrimination (including apartheid), and the right to freedom of association (trade union rights), the right not to be subjected to torture has received more attention from intergovernmental organisations than any other human right.

It is not intended here to explore in detail the background to the establishment of the norm condemning torture. The prohibition of torture appeared naturally and uncontroversially in the Universal Declaration of Human Rights, the landmark catalogue of human rights and fundamental freedoms adopted by the General Assembly of the United Nations in 1948.[1] Its inclusion signalled the desire 'to eliminate the medieval methods of torture and cruel punishment which were practiced in the recent past by the Nazis and fascists'.[2] Specifically, article 5 of the Declaration states: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' The same language is to be found in article 7 of the International Covenant on Civil and Political Rights (the Covenant),[3] wherein the motivation for including the prohibition is similarly obvious.[4] The atrocities of World War II also led to the inclusion of a prohibition against torture and other ill-treatment in the Geneva Conventions of 12 August 1949 on the protection of victims of war.[5] The same motivation lies behind the prohibition against torture in the European Convention on Human

[1] UNGA Res 172 A (III) (10 December 1948).

[2] Robinson, *The Universal Declaration of Human Rights—its Origin, Significance, Application and Interpretation* (1958), 108.

[3] (Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). The following language is added to that of the Universal Declaration (article 5): 'In particular no one shall be subjected without his free consent to medical or scientific experimentation.'

[4] Dinstein, 'The Right to Life, Physical Integrity and Liberty', in Henkin (ed), *The International Bill of Rights—The Covenant on Civil and Political Rights* (1981), 125.

[5] The relevant articles are mentioned in the next chapter.

Rights.[6] Subsequent instruments, such as the American Convention on Human Rights,[7] the African Charter on Human and Peoples' Rights,[8] and the revised Arab Charter[9] could not thereafter fail to include the prohibition.[10]

The United Nations is the body which has devoted most attention to the problem of torture and other ill-treatment.[11] While, as will be seen, many organs of the UN have dealt with particular aspects of the issue, the political initiative was taken primarily by the General Assembly. A programme of standard-setting that the Assembly started in 1974 was completed in 1988 with the adoption of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (see below). Several aspects of this standard-setting work are dealt with in detail in later chapters; the aim here is to concentrate on the period from 1973 to 1977 when the Assembly played its most creative and innovative role, since a description and review of this role provides the necessary background to matters dealt with at length in later chapters.

First to be examined are the developments leading up to the adoption by the General Assembly in 1975 of the Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration against Torture; see Annex 1). (The formula 'other cruel, inhuman or degrading treatment or punishment' will in this text be abbreviated to 'other ill-treatment' except where the separate parts are relevant to the discussion.) There will follow a description of the General Assembly's initiatives in developing several documents: the above-mentioned Body of Principles; the Code of Conduct for Law Enforcement Officials; and the Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment. Following this there is a brief outline of three major General Assembly initiatives: the decision to mandate the drafting of a convention against torture or other ill-treatment; the devising of a questionnaire by means of which compliance by governments with the Declaration against Torture might be ascertained; and the promotion of unilateral declarations against torture and other ill-treatment. This chapter deals with the first fifteen years of Assembly actions in the field, a period in which it provided the political momentum for action. In

[6] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entry into force 3 September 1953) ETS 5 (ECHR), article 3.

[7] (Adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR), article 5.

[8] (Adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (ACHPR), article 5.

[9] (Adopted 22 May 2004, entered into force 15 March 2008) reprinted in 12 Int'l Hum Rts Rep 893 (2005), article 8.

[10] In addition, a number of treaties on specific areas of human rights include a prohibition of torture in relation to the subject matter of those conventions; see Chapter 2.

[11] Developments at the regional level, particularly within the Council of Europe and the Organization of American States, will be referred to in subsequent chapters dealing with substantive topics.

later chapters, the role of the Assembly in other significant developments will be described in the context of examination of those developments, for instance, its decision to support the Istanbul Protocol on effective investigation and documentation of torture and other ill-treatment (see Chapter 4).

2. Discussion of Torture at the UN General Assembly 1973–1975

2.1 Resolution 3059 (XXVIII) of 2 November 1973

In 1975, the General Assembly of the United Nations adopted its landmark Declaration against Torture. This was a pivotal event in a process which had started in 1973 and was to continue for some fifteen years. Statements by the Foreign Ministers of Denmark, Sweden, and The Netherlands at the General Assembly's General Debate at its twenty-eighth session (1973) led the way for discussion of the issue of torture. The Danish Foreign Minister spoke of being 'alarmed by the many reports of torture' and referred approvingly to 'the many endeavours aimed at condemnation and the elimination of the use of torture'.[12] His Netherlands counterpart referred to 'reports from various parts of the world [which] provide evidence that this appalling practice has become rife and is often used against people suspected of having committed a political offence'.[13] Meanwhile, according to the Foreign Minister of Sweden: '[i]n recent years world opinion has become increasingly aware of the use of torture in connection with armed conflicts and internal political conflicts in different countries'.[14] There is evidence that these initiatives were prompted by the activities of non-governmental organisations (NGOs). For example, when, subsequent to the General Debate, Sweden introduced a draft resolution on the subject of torture at the General Assembly's Third Committee,[15] a suggestion of the context that provoked the initiative was apparent in the statement that to 'work actively for the complete eradication of every form of torture was a common humanitarian duty, since torture knew no frontiers, as pointed out by the Chairman of Amnesty International, the former Irish Foreign Minister, Mr Sean MacBride'.[16] Similarly, during the

[12] *GAOR*, 28th Session, 2128th Plenary Meeting, para 106.

[13] Ibid para 171.

[14] Ibid, 2149th Plenary Meeting, para 33.

[15] Report of the Third Committee, *GAOR*, 28th Session, Annexes, Agenda item 56, UN Doc A/9249, para 6. (The text of the draft resolution was also contained in UN Doc A/C.3/L.2010 and was sponsored by Austria, Costa Rica, Ireland, The Netherlands, Sweden, and Trinidad and Tobago, subsequently joined by Lesotho and Nepal.) The Third Committee is a committee of the whole specialising in social, humanitarian, and cultural affairs, including human rights. Most of the General Assembly's work is carried out in such specialised committees; their recommendations can usually be expected to be confirmed in plenary session.

[16] *GAOR*, 28th Session, Third Committee, Summary Records, UN Doc A/C.3/SR.1998, para 1.

same debate Denmark referred to 'the campaign launched by the Danish section of Amnesty International for the collection of signatures as a protest against the use of torture prevalent in many parts of the world'.[17] The one-year Campaign for the Abolition of Torture, launched by Amnesty International in December 1972 with the support of a broad range of NGOs,[18] may therefore be considered as having contributed the political context for an initiative at the UN. The campaign included the quest for petition signatures referred to by Denmark, the publication of a report on torture (the main part of which comprised a 'World Survey of Torture'), and an international conference that was to take place in December 1973.[19] There was therefore intense press and governmental interest generated by the NGO activities at both the national and international levels.

While the NGO campaign may have created the context of awareness and interest necessary for an initiative, there still had to be the political will to act. A principal factor here was the overthrow of the constitutional government of Chile by the Chilean armed forces on 11 September 1973 and the death of its president, Salvador Allende. A number of delegations to the General Assembly made reference to harrowing press reports of repression and brutality by the Chilean armed forces. The representative of Chile, speaking in reply to comments made by Norway, Yugoslavia, and Belorussia,[20] stated that representatives of the International Red Cross, the UN High Commissioner for Refugees, and the Inter-American Commission on Human Rights had visited Chile, and he announced that a delegation from Amnesty International would shortly do so.[21] Thus, the issue of torture became closely associated with the expression of worldwide disgust at the brutality of the overthrow of the Allende government, a connection that would also affect developments in subsequent years. This, then, was the context for discussion of torture in 1973: growing NGO action combined with the sharp focus provided by events in Chile.

It should be noted that no delegation felt able to defend the use of torture, even though many of the governments represented had been cited publicly as having perpetrated it.[22] Nor, as pointed out by Sweden, had anyone questioned the existence of torture.[23] It is unsurprising that no stance of outright opposition to the initiative was taken, given that such a stance might have been seen as an admission of guilt, or as approval of the practice of torture.

The draft resolution introduced by Sweden had two operative paragraphs: the first provided that the General Assembly would 'examine the question of torture' as a separate agenda item at its next (twenty-ninth) session; the second requested

[17] Ibid UN Doc A/C.3/SR.1999, para 18.

[18] Amnesty International, *Annual Report 1972–1973*, 15.

[19] Ibid 23–4; see also Amnesty International, *Conference for the Abolition of Torture—Final Report, Paris 10–11 December 1973*.

[20] (n 16), A/C.3/SR.2000, paras 23 (Norway), 24–7 (Yugoslavia), and 50–5 (Belorussia).

[21] Ibid para 57.

[22] See, for example, Amnesty International, *Report on Torture* (1973).

[23] (n 16) A/C.3/SR.2002, para 5.

the Secretary-General 'to prepare a report on the question' for presentation at that session.[24] This draft underwent changes that were to be symptomatic of subsequent developments. First, new material was introduced: the first two operative paragraphs of resolution 3059 (XXVIII) as it emerged from the debate had no analogues in the original draft. By them the Assembly:

1. Rejects any form of torture and other cruel, inhuman or degrading treatment or punishment;
2. Urges all governments to become parties to existing international instruments which contain provisions relating to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.[25]

To this extent, the draft was strengthened by an effective reaffirmation of existing norms.

Second, although the summary records of the discussion disclose no open criticism of the two operative paragraphs of the original draft, these were significantly weakened: Sweden introduced a revised draft whereby the proposed 'report' from the Secretary-General would become an 'introductory note' that would 'tak[e] into account' consideration that other UN bodies might give to the question.[26] This was even though, during the earlier General Debate, The Netherlands had pressed 'for the adoption of an expedient such as an impartial enquiry, in order to bring the facts to light'.[27] The change was explained by Sweden as being 'to emphasise that the note should be impartial and concise, so as to constitute a starting point for the discussion of the question of torture'.[28] Clearly, Sweden's consultations had revealed opposition to giving the Secretary-General a fact-finding mandate to report in detail on the incidence of torture. Even the retreat from 'report' to 'introductory note' apparently did not satisfy those opposed to any form of fact finding. On the proposal of Egypt[29] it was decided that the Secretary-General should be requested merely 'to inform the General Assembly . . . of the consideration which may have been given to this question by the Sub-Commission on Prevention of Discrimination and Protection of Minorities . . . or by the Commission on Human Rights'.[30] This effectively became the third operative paragraph of General Assembly resolution 3059 (XXVIII).

The first operative paragraph of the original draft, by which, it will be recalled, the General Assembly was to examine the question of torture at its twenty-ninth session under a separate agenda item, was finally amended so as to provide that the General Assembly would 'examine the question of torture

[24] UN Doc A/C.3/L.2010 (n 15).
[25] UNGA Res 3059 (XXVIII) (2 November 1973).
[26] (n 15) para 7. (The text of the revised draft resolution was also contained in UN Doc A/C.3/L.2010/Rev.1.)
[27] (n 13). [28] (n 17) para 25.
[29] (n 16) UN Doc A/C.3/SR.2001, para 86.
[30] (n 15), para 8(a). (The text of the Egyptian proposal was contained in UN Doc A/C.3/L.2015.)

and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment as an item of a future session' (emphasis added).[31] The addition of the words emphasised here affords a considerable clarification of the scope of the issue, which in the original draft was referred to simply as 'the question of torture'. On the other hand, it was no longer stipulated that the consideration would occur at the next General Assembly session but only at some unspecified future session. (And even this limited commitment to future consideration would have been omitted had an Egyptian proposal on the subject succeeded.[32]) It was also made clear that any such future discussion would not be under a separate agenda item, as had been envisaged in the original draft. This was effected by the device of obliging the Secretary-General to submit his information 'under the report of the Economic and Social Council'—this wording is contained in operative paragraph 3 of the final text.[33] The advantage of a separate agenda item is that it would have given the issue greater visibility and possibly greater momentum.

The final text, then, appears to reflect a compromise between those who wanted the speediest consideration of the problem by the General Assembly and those who would have preferred no commitment to any such consideration. By adopting (unanimously) resolution 3059 (XXVIII),[34] the General Assembly may be seen to have come out of its first skirmish with the problem of torture and other ill-treatment ready to reaffirm its clear objection to the practices and its support for the existing human rights treaties prohibiting them. But at the same time it appeared decidedly unwilling to envisage any measure of monitoring the practice and reluctant to be drawn into protracted consideration of the problem. Nevertheless a number of countries had wanted to ensure consideration of the question the following year and it was apparent that they could be expected to take advantage of the information to be provided by the Secretary-General in order to press for further discussion.

2.2 Resolution 3218 (XXIX) of 6 November 1974

At the next (twenty-ninth) General Assembly, a number of countries took advantage of the General Debate to announce their concern with the issue of torture: the Foreign Ministers of Norway and Belgium and the Prime Minister of Luxembourg all referred to continuing reports of torture around the world;[35] the United States Secretary of State and the Netherlands Foreign Minister indicated that they would be bringing specific proposals before the Assembly;[36] the Danish, Irish, and Austrian Foreign Ministers also denounced torture, with the

[31] Ibid para 17. [32] (n 30). [33] (n 15).
[34] *GAOR*, 28th Session, 2163rd Plenary Meeting, para 37.
[35] UN Docs A/PV.2241, 83 (Norway); A/PV.2244, 12 (Belgium); A/PV.2253, 8 (Luxembourg).
[36] UN Docs A/PV.2238, 42 (United States); A/PV.2252, 29–30 (Netherlands).

latter referring specifically to the torture of political prisoners.[37] Norway's Foreign Minister took the opportunity 'to pay tribute to the work carried out by Amnesty International and the campaign against torture which that organisation has launched'.[38] Similar themes were taken up in the Third Committee, when several delegations referred to reports of the increasing use of torture and of the negative reaction to it of public opinion, as well as to the need to end the practice.[39] For example, the Federal Republic of Germany, referring to various sources, including 'non-governmental organisations and the mass media', maintained that torture was 'one of the most serious and widespread forms of ill-treatment of human beings at the present day . . . in particular with regard to political prisoners and political opponents'.[40] Sweden pointed out that 'interest in the question seemed to have grown considerably as indicated by the conference on torture organised by Amnesty International and held in Paris in December 1973'.[41] Once again, therefore, it seems that NGO activities had contributed to the formation of a political context conducive to an initiative on torture, just as they had in 1973.

But this year, too, Chile was a formidable factor. The draft resolution on torture which formed the basis of resolution 3218 (XXIX) was discussed in tandem with draft resolutions on human rights in Chile and many delegations spoke in favour of action on both topics.[42] The effect of this may have been implicitly, at least, to invoke concern over the one in aid of support for the other. NGOs had a penumbral role in this aspect of the debate also: Belgium and Bulgaria both referred to the report issued by Amnesty International after the visit of its delegation to Chile (this was the visit that the Chilean representative had announced the previous year). Similarly, the USSR pointed to testimony placed before the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities by such NGOs as the Women's International League for Peace and Freedom, the International Commission of Jurists, and Amnesty International.

This year the potentially divisive issue of fact-finding was not to be found in the draft resolution.[43] There were, however, expressions of opinion in favour both of investigation and implementation: during the General Debate, the Irish Foreign Minister had denied the right of any country 'to infringe basic human rights, let alone use torture within its territory, or to be free from inquiry, from inspection, or from condemnatory action by the international community in

[37] UN Docs A/PV.2242, 12 (Denmark); A/PV.2243, 31 (Ireland); A/PV.2244, 42 (Austria).

[38] UN Doc A/PV.2241, 83.

[39] *GAOR*, 29th Session, Third Committee, Summary Records, UN Doc A/C.3/SR.2064–71.

[40] Ibid UN Doc A/C.3/SR.2064, para 15.

[41] Ibid para 24.

[42] Report of the Third Committee, *GAOR*, 29th Session, Annexes, Agenda item 12, UN Doc A/9829, paras 15–21. (For the discussion, see n 39.)

[43] Ibid para 12. For The Netherlands, which introduced the draft resolution, the aim was 'the strengthening of the rules governing the conduct of those exercising authority over the detainee . . . [as] a first step towards providing effective remedies and protection for the victims of torture' (n 40 para 5).

respect of such breaches of the rights of man'.[44] Greece, newly emerged from military government, spoke in the Third Committee of the need for 'the system of protection by the United Nations [to be] strengthened',[45] while Australia implied that it would, at the Fifth UN Crime Congress (see below), be working for 'the strengthening of machinery to achieve wider compliance with international laws prohibiting torture'.[46] The sponsors of the draft resolution, which was introduced by The Netherlands, probably had several factors in mind when deciding to refrain from pursuing general measures of implementation of the prohibition against torture and other ill-treatment. First, it may have seemed that no further progress was politically possible at that stage. In this connection, it must be noted that it was not until 1980, when especially propitious circumstances obtained, that the UN established its first 'thematic' mechanism (that is, a mechanism whereby a UN body would be empowered to receive and act upon information of a particular kind of human rights violation; the first instance of this was the establishment of the Working Group of the Commission on Human Rights on Enforced or Involuntary Disappearance (see Chapter 8)). Second, it must have seemed that the moment was right to secure an advance in *ad hoc* implementation through the adoption of a resolution dealing specifically with the human rights situation in Chile.[47] The initiatives taken in respect of Chile were important innovations: with the exceptions of the special cases of the countries of southern Africa[48] and the occupied territories of the Middle East,[49] there had been no systematic investigation of human rights violations within the borders of a member state of the UN. The investigation of Chile in this respect was to change that and would provide an important precedent.[50] Third, as the Secretary-General's information paper pointed out,[51] the Sub-Commission on Prevention of Discrimination and Protection of Minorities had just embarked on an 'annual review' of the 'question of the human rights of persons subjected to any form of detention or imprisonment', and it might have been hoped that this review would afford a measure of implementation (see Chapter 5). These three factors, then, may account for the absence in the draft resolution of reference to implementation.

[44] UN Doc A/PV.2243, 31.

[45] (n 39), A/C.3/SR.2068, para 39.

[46] Ibid para 10.

[47] UNGA Res 3219 (XXIX) (6 November 1974).

[48] Carey, *UN Protection of Civil and Political Rights* (1970), 95–126; Zuijdwijk, *Petitioning the United Nations—A Study in Human Rights* (1982), 244–80.

[49] Rodley, 'The United Nations and Human Rights in the Middle East' (1971) 38 Social Research 217, and 'Monitoring Human Rights by the U.N. System and Nongovernmental Organizations', in Kommers and Loescher (eds), *Human Rights and American Foreign Policy* (1979), 157, 162–3; Zuijdwijk, ibid 281–303.

[50] Marie, 'La Situation des droits de l'homme au Chili: enquête de 1a Commission des droits de l'homme des Nations Unies' (1976) 22 Annuaire français de droit international 305; Zuijdwijk (n 48) 47, 304–19.

[51] UN Doc A/9767 (1974).

The draft that was, with amendment, to become resolution 3218 (XXIX) was introduced by The Netherlands,[52] with the specification that the thrust was not one of fact-finding and denunciation, but one of aiming 'to provide remedies for, and strengthen the defences of, those unfortunate individuals who found themselves to be the victims of torture'.[53] The remedies and defences would be normative, with the object of strengthening national legal protections. The paragraph of the draft resolution that laid the basis for formulating the Declaration against Torture requested the Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders (hereinafter the Fifth UN Crime Congress) to consider 'rules for the protection of all persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman or degrading treatment or punishment'.[54] It was reasonable to infer that these rules would be discussed in the light of an analytical summary that the Secretary-General was to prepare on the basis of comments requested from governments, concerning various aspects of legal safeguards against arbitrary arrest and detention.[55]

Taking up a theme that had been dormant at the Commission on Human Rights[56] for ten years and upon which the UN Economic and Social Council (Ecosoc) had recently sought to elicit action,[57] the Assembly also requested the Fifth UN Crime Congress 'to give urgent attention to the question of the development

[52] (n 42) para 12. (The text of the draft resolution was found in UN Doc A/C.3/L.2106.)

[53] (n 40) para 4.

[54] UNGA Res 3218 (XXIX) (6 November 1974), operative paragraph 4.

[55] Ibid operative paragraphs 1 and 2, which read as follows:

'1. *Requests* Member States to furnish the Secretary-General in time for submission to the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and to the General Assembly at its thirtieth session;
   (a) Information relating to the legislative, administrative and judicial measures, including remedies and sanctions, aimed at safeguarding persons within their jurisdictions from being subjected to torture and other cruel, inhuman or degrading treatment or punishment;
   (b) Their observations and comments on articles 24, 25, 26 and 27 of the draft principles on freedom from arbitrary arrest and detention prepared for the Commission on Human Rights;
2. *Requests* the Secretary-General to prepare an analytical summary of the information received under paragraph 1(a) and (b) above, and submit it to the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the General Assembly at its thirtieth session, the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.'

[56] The Commission of Human Rights was a functional (i.e. specialised) commission of 53 representatives of UN member states. It was established by the Economic and Social Council (Ecosoc) which elected its members. Ecosoc is composed (at present) of representatives of 54 UN member states. It is a 'principal organ' of the UN and concentrates on the economic and social aspects of the UN's concerns, but not the political and security aspects. It reports to the General Assembly (composed of all UN member states), which in practice has ultimate responsibility for UN policy in the economic and social field. On 15 March 2006, the General Assembly adopted resolution A/RES/60/251 to replace the Commission on Human Rights with a Human Rights Council reporting directly to the General Assembly. On 27 March 2006, the Commission on Human Rights concluded its final session. The Council, whose 47 member governments are elected by the General Assembly, held its first session in June 2006.

[57] Ecosoc Res 1794 (LIV) (18 May 1973).

of an international code of ethics for police and related law enforcement agencies'.[58] The Assembly went on to invite the World Health Organization (WHO) to draft 'an outline of the principles of medical ethics which may be relevant to the protection of persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman or degrading treatment or punishment';[59] this draft was to be brought to the attention of the Fifth UN Crime Congress.

Thus, the General Assembly was following four potentially normative lines:

1. rules against torture and ill-treatment;
2. safeguards against arbitrary arrest and detention;
3. professional ethics for police and analogous officials;
4. professional ethics for medical personnel.

As will be seen, the Congress was able to deal conclusively with only the first strand of this mandate, the latter three strands constituting an agenda for post-Congress activity.

The number of issues that were to be set before the Fifth UN Crime Congress, which would report to the following (thirtieth) session of the General Assembly in 1975, now clearly justified the inclusion of a specific item on the General Assembly's agenda. The last paragraph of resolution 3218 (XXIX) expressly committed the Assembly to consider 'the question of torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment'.[60]

The decision to place the problem of torture and other ill-treatment before the Fifth UN Crime Congress deserves brief comment at this point, since torture had previously been seen largely as a human rights issue and it may be wondered why the matter was not left with the human rights bodies. The following reasons may be speculatively advanced:

(a) the Congress was already to have before it two agenda items directly relevant to the concerns of General Assembly resolution 3218 (XXIX). One concerned 'the treatment of offenders in custody… with special reference to the implementation of the Standard Minimum Rules for the Treatment of Prisoners'.[61] In so far as rules relevant to torture might figure as part of revised Standard Minimum Rules, this agenda item seemed to complement the substance of resolution 3218 (XXIX). The other relevant item was 'the emerging roles of the police and other law enforcement agencies, with special reference to changing expectations and minimum standards of performance'.[62] Clearly this would be pertinent for a discussion of police ethics, which matter Ecosoc had already referred to the Committee on Crime Prevention and Control, the body responsible for much of the preparatory work for the Congress.

[58] UNGA Res 3218 (XXIX) (6 November 1974), para 3.

[59] Ibid para 5. [60] Ibid para 6.

[61] *Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders—Report*, UN Doc A/CONF.56/10 (1976) (hereinafter *Fifth UN Crime Congress Report*), para 260.

[62] Ibid para 193.

(b) the problem of torture is indeed one of criminality, albeit criminality typically committed by those charged with crime prevention. Indeed, the Committee on Crime Prevention and Control had just categorised torture as a 'major [crime] of transnational concern'.[63]
(c) the participants in the Congress are drawn largely from the ranks of national administrations of justice (judges, prosecutors, senior police officers, and so on) rather than from foreign offices, as is the case with most UN meetings. It might be expected that representatives with this background might want to confirm that torture was the antithesis of their calling.
(d) since the Congress meets only once in every five years deferral of the issue, the traditional tactic of those wishing to obstruct an initiative, was less likely to be successful.[64]
(e) the First UN Crime Congress had, in 1955, successfully completed and adopted the Standard Minimum Rules for the Treatment of Prisoners and, twenty years on, the possibility of developing another landmark document might create a certain momentum in favour of the torture issue.
(f) the Congress had implementation of the Standard Minimum Rules on its agenda, so it might have been hoped that the issue of torture would give that discussion some focus, and in turn benefit from any developments within it.

2.3 The Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders (1975)

At the beginning of the Congress an informal intersessional working group was established by the Congress Steering Committee with a mandate to deal with the work of the Congress relating to implementation of General Assembly resolution 3218 (XXIX).[65] The Swedish and Netherlands delegations had, on the first day of the Congress, submitted a draft recommendation which set out the text of a draft declaration on the protection of all persons from being subjected to torture and other cruel, inhuman, or degrading treatment or punishment, to be adopted by the General Assembly.[66] Most of the working group's efforts were concentrated

[63] Report of the Committee on Crime Prevention and Control, Third Session (UN Doc E/CN.5/516; E/AC.57/21/Rev.1), paras 27 and 39 (1974). The Committee was at that time composed of 15 individual experts appointed by the UN Secretary-General, reporting to the Commission for Social Development which, like the Commission on Human Rights (n 56), was an intergovernmental functional commission of Ecosoc. It was later composed of 27 individual experts elected by Ecosoc on the basis of nominations from governments, reporting directly to Ecosoc. In 1992, the Committee was replaced by a new Commission on Crime Prevention and Criminal Justice, another functional Commission of Ecosoc, composed of representatives of 40 member states; see generally Clark, *The United Nations Crime Prevention and Criminal Justice Program* (1994), 1–57.

[64] Professor Clark, citing most of these suggested reasons with approval, doubts this particular one, a five-year delay being 'not unheard of at the U.N.': ibid 102.

[65] *Fifth UN Crime Congress Report* (n 61) para 290.

[66] UN Doc A/CONF.56(V)/Misc.2 (1 September 1975) (not reproduced in the *Fifth UN Crime Congress Report* but copy on file with the author, who attended the Congress as an observer for Amnesty International).

on discussing this draft declaration and it was unable to discuss to any conclusion the creation of a code of police ethics or amendments to the Standard Minimum Rules.[67] The group's recommendations were, therefore, limited, covering only the text of a revised version of the Swedish/Dutch draft.[68]

It is hardly possible to reconstruct the full development of this text as it progressed from the original Swedish/Dutch draft to the final approved text. The Congress Report[69] does not reproduce the original draft; which is therefore not easily accessible.[70] In addition the Report condenses two discussions into one: the draft declaration as it was adopted by the working group was discussed and amended first in a Congress committee (or Section IV as it was called)[71] and then in plenary session.[72] The Congress report, however, gives the impression that the text was finalised in one stage.[73] Furthermore, its account of the discussions is so sketchy that the reasoning behind changes remains obscure. The first articles of both texts aim to define torture; the next two articles condemn torture and other cruel, inhuman, or degrading treatment or punishment under all circumstances; the rest of the articles deal with the obligation on states to take 'effective measures' to prevent torture and other ill-treatment and with the possibility of defining the practices as criminal.

2.3.1 Changes in definition

As will be seen in Chapter 3, the view was expressed at the 1974 General Assembly discussion leading to the adoption of resolution 3218 (XXIX) (which gave the Congress its mandate to deal with torture) that there was a need to define the concept of torture. This task was attempted in the first article of the Swedish/Dutch draft.

Like the final text (see Annex 1, article 1) the Swedish/Dutch draft began the definition by describing torture as 'any act by which severe pain or suffering, whether physical or mental, is deliberately inflicted on a person . . .'. The only change made by the working group at this stage was the substitution of 'intentionally' for 'deliberately'. But the element of deliberation was retained; whereas the Swedish/Dutch text went on to describe torture as 'an aggravated form of cruel, inhuman or degrading treatment or punishment', the final text uses the term 'aggravated and *deliberate* form . . .' (emphasis added). A subsequent attempt to delete 'intentionally' failed.[74] So far then, changes were more of form than of substance.

A major change came in the part of the definition which describes the purposes for which severe pain or suffering are inflicted. The Swedish/Dutch draft envisaged

[67] *Fifth UN Crime Congress Report* (n 61) paras 254–8 and 283–9.
[68] Ibid paras 291–2. [69] Ibid para 260A.
[70] See n 66. [71] *Fifth UN Crime Congress Report* (n 61), para 458.
[72] Chapman, 'Torture motion passed to UN', the *Guardian* (London), 13 September 1975.
[73] *Fifth UN Crime Congress Report* (n 61), paras 290–300.
[74] Ibid para 301. It is unclear what, if anything, the notion of deliberation adds to the notion of intentionality.

only two purposes, namely, that of obtaining from the person subjected to the pain or suffering, or from a third person, 'information or confessions' and that of 'punishing him for an act he has committed or is suspected of having committed'. Such a definition would, however, have been too narrow to take account of the range of purposes for which torture was known to be practised. This was doubtless made clear in the working group's discussion, for in the final text the purposes now included the broader one of 'intimidating him or other persons'. Furthermore, it referred not only to these particular purposes, but 'such purposes as' these purposes. Such a definition was far more suitable than the rather limited one of the draft to encompass the modern practice of torture as state terror. It should be noted that the purposive element was perceived as significant; this is indicated by the failure of a proposal during the formal Congress sessions to add the words 'or for any other purpose'.[75]

Another change inserted by the working group was the specification that the act must be committed 'by or at the instigation of a public official'.[76] The motivation for introducing the status of the perpetrators of torture or other ill-treatment as an issue presumably reflects the working group's wish to restrict international concern with torture to those acts which were not purely private acts of cruelty. Opposition to this limitation was expressed during the Congress, but no change resulted.[77] The limitation has obvious validity, to the extent that acts of torture or other ill-treatment committed by private citizens would in most circumstances incur criminal proceedings in domestic law. A difficulty arises, however, in the case of political entities that may not necessarily be governments but do exercise effective control over substantial populations. This problem was dealt with in the paragraph of the draft resolution by which the General Assembly would adopt the declaration 'as a guideline for all states and other entities exercising effective power'.[78]

The final change in the definition of torture took place during the formal deliberations of the Congress, first in Section IV and then in plenary session. To ensure that the definition did not catch suffering necessarily incidental to ordinary incarceration, Section IV inserted the additional sentence: 'It [torture] does not include pain or suffering arising only from, inherent in or incidental to lawful deprivation of liberty to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.'[79] By the time it emerged from plenary, the only further change was to substitute the word 'sanctions' for the term 'deprivation of

[75] *Fifth UN Crime Congress Report* (n 61). The point seems confirmed by the words of the Netherlands representative, introducing the eventual draft to the General Assembly's Third Committee: for him 'it would be possible to give a precise definition of torture if the question was approached through the purpose for which it was used'. *GAOR*, 30th Session, Third Committee, Summary Records, UN Doc A/C.3/SR.2160, para 3 (1975). See also Chapter 3.

[76] *Fifth UN Crime Congress Report*, ibid para 292.

[77] Ibid para 301.

[78] See generally Rodley, 'Can Armed Opposition Groups Violate Human Rights?' in Mahoney and Mahoney (eds), *Human Rights in the Twenty-first Century—A Global Challenge* (1993), 297.

[79] UN Doc A/CONF.56/L.6/Add.1, para 16. This document is the draft report of the rapporteur of Section IV, reproduced in a two-volume compilation by UNIFO Publishers: *UN Crime Conference Keynote Documents Edition—Fifth United Nations Crime Congress 1–12 September 1975* (1976), ii, 542 ff.

liberty'.[80] The broader concept of 'lawful sanctions' (covering all penalties, not just deprivation of liberty) was apparently inserted in response to concern expressed by countries that retain corporal punishment.[81] In practice it is difficult to read the sentence in a way that would meet their concerns. The Standard Minimum Rules deal with the conditions of detention and disciplinary treatment of prisoners; they are not relevant to judicial sentences which do not involve incarceration. Corporal punishment cannot, therefore, be 'consistent with' the Standard Minimum Rules in such circumstances. The Standard Minimum Rules are relevant, of course, to disciplinary corporal punishment, but would hardly serve the interests of those who sought to exclude corporal punishment from the definition of torture, since rule 31 of the Rules expressly prohibits such punishment (see Chapter 10).

2.3.2 International prohibition of torture

There was no change to draft article 2, by which torture and other ill-treatment, described collectively as an 'offence to human dignity', are 'condemned as a denial of the principles of the Charter of the United Nations and as a violation of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights'. In the version that emerged from the working group, the word 'denial' had been replaced by 'breach', and yet the final text in the Congress Report contains the original word 'denial'. Curiously, the report of the Congress discussions contains no mention of any challenge to the use of the word 'breach'.

There was no substantive change to article 3 of the Swedish/Dutch text, which prohibits states from tolerating torture or other ill-treatment, regardless of any exceptional circumstances 'such as a state of war... or any other public emergency' (see Annex 1, article 3). According to the Congress Report, some participants recommended deletion of the second sentence of the draft article, part of which has just been quoted and which in effect demands that the prohibition operate in all circumstances. It is fortunate that there was no consensus on this proposal, for it could have had the effect of undermining the position taken by the International Covenant on Civil and Political Rights and the other human rights and humanitarian law conventions: the human rights conventions prohibit suspension of the prohibition of torture in circumstances where derogation from several other rights is permitted and the humanitarian law conventions treat torture as a 'grave breach' or war crime.

2.3.3 Effective measures by states

Article 4 of the final text is the same as article 4 of the Swedish/Dutch draft and contains a general obligation on states to 'take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment'. The remaining articles refer to specific measures to be taken by states. Thus, article 5

[80] *Fifth UN Crime Congress Report* (n 61), para 300.
[81] n 72.

of the final text reproduces, with editorial amendments, the Swedish/Dutch draft article 5, which requires states to ensure that the training of, and general rules for, persons charged with custody of prisoners must reflect the prohibition on torture and other ill-treatment. Similarly, article 6 of both texts envisages the need to keep interrogation methods and detention practices under review.

A significant change concerning the formula 'torture *or other* cruel, inhuman or degrading treatment or punishment' (emphasis added) occurred in the next cluster of draft articles (articles 7, 8, and 9 of the Swedish/Dutch draft) which became articles 7, 8, 9, and 10 of the final draft. The obligations in these articles relate to criminal responsibility for, and methods of investigation into, torture and cruel, inhuman, or degrading treatment or punishment. The Swedish/Dutch draft made no distinction between the two branches of the formula. Both would have been required to be treated as criminal offences under domestic law (draft article 7); there would have been an obligation on the competent authorities to investigate both, either on the initiative of the alleged victim (draft article 9) or on their own initiative where they had reasonable grounds to believe that the prohibited acts had been committed (draft article 8); finally, there would have been an obligation to institute criminal proceedings against offenders (draft articles 8 and 9).

Articles 7, 8, 9, and 10 of the final text reflect the action of the working group, which modulated the obligations according to whether torture or other ill-treatment were at issue. Thus, the obligation contained in the final text is to make acts of torture alone necessarily criminal offences (article 7), which acts the competent authorities are expected of their own initiative to investigate, whether or not there is a formal complaint (article 9), and to institute criminal proceedings where torture appears to have been committed (article 10). As far as 'other cruel, inhuman or degrading treatment or punishment' is concerned, the obligation is to investigate only on complaint of the alleged victim (article 8) and to subject alleged offenders to 'criminal, *disciplinary or other appropriate proceedings*' (emphasis added, article 10). This distinction between the two parts of the definition was presumably made in view of the absence of a definition of the formula 'cruel, inhuman or degrading treatment or punishment' and the consequent difficulty of according it criminal status.[82] Nevertheless, it is regrettable that it was felt that acts of cruel, inhuman, or degrading treatment or punishment not amounting to torture should be subjected to investigation only upon complaint of the alleged victim.

Except for the addition of the words 'by or at the instigation of a public official', article 11 of the final text reproduces article 10 of the Swedish/Dutch draft, which provides for redress and compensation for victims of torture and other ill-treatment. Finally, article 11 of the Swedish/Dutch draft, stipulating the inadmissibility in legal proceedings of statements made as a result of torture or ill-treatment, is maintained in the final draft as article 12, but in strengthened

[82] This is how The Netherlands representative was to present the issue at the subsequent General Assembly discussion (n 75).

form. Whereas in the Swedish/Dutch draft (and the draft as it emerged from the working group) the inadmissibility related only to proceedings against the person from whom the statement was coerced, in the final text it relates also to proceedings against 'any other person'. An attempt to extend the inadmissibility to include not only statements but also 'physical evidence' failed.[83]

2.3.4 Implementation

Article 12 of the Swedish/Dutch draft was a modest attempt to incorporate some element of implementation of the normative provisions of the preceding articles. This article underwent significant change during the course of the Congress and was eventually excised. The draft article read:

Article 12

All States shall cooperate in implementing this Declaration. Where appropriate; regional bodies may be set up for the purpose of assisting States in elaborating rules or standards or in investigating cases of alleged violations of the principles of this declaration.

Thus, international 'implementation' would be confined to an obligation of government-to-government cooperation, with an implicit expression of approval for regional multilateral cooperation. By the time this draft article emerged from the working group (as article 13), it had been transformed:

Article 13

All States shall endeavour to implement this Declaration as soon as feasible. All appropriate international governmental organizations are requested to co-operate in the implementation of these standards in accordance with international law and practice.

The first sentence of this revised text had the effect of radically weakening the nature of the obligations contained in the draft declaration. By its original terms the declaration was to be 'a guideline for all States and other entities exercising effective power'. Under the revised draft article 13, however, the obligation would be only to attempt to implement the declaration and even that was to be done only 'as soon as feasible'. The second sentence of the revised draft article may have been intended to envisage a more active implementing role for universal intergovernmental organisations such as the UN itself, but its actual wording sought only 'co-operation' between 'appropriate' intergovernmental organisations, a formulation so flexible as to have little force. The removal of the provision for the setting up of regional bodies to assist with the elaboration of standards further weakens the obligations contained in the article.

In the end, the whole article was abandoned by Section IV and, despite considerable efforts, of the Greek delegation in particular,[84] the declaration was to

[83] Fifth UN Crime Congress Report (n 61), para 301.

[84] Amnesty International, 'Report on the Geneva Congress' (Index no. NS206, 14 October 1975), 4, which describes the Greek delegation as having 'let no opportunity pass during the entire

have no implementation procedures. Nevertheless, as the Congress recognised, 'there clearly remained the need to move towards more effective international procedures to implement that declaration'.[85] Indeed, in words reflecting the view propounded by the Australian delegation,[86] the Congress continued: 'The ultimate objective would of course be the development of an international convention ratified by all nations.'[87] Perhaps the Congress was not a suitable body to develop specific measures of implementation and its strength lay in its ability to suggest normative advances and recognise the need for future implementation.

By the end of the Congress the draft declaration was being acclaimed as 'the major achievement of the Congress, comparable in significance to the Standard Minimum Rules [for the Treatment of Prisoners] elaborated by the first Congress in 1955'.[88] According to the Congress's General Rapporteur, 'passionate concern over the use of torture . . . had been the most significant and pressing aspect of its work'.[89] Further, there had been broad participation in the Congress discussions. The first draft of the text of the declaration had been introduced by Sweden and The Netherlands, states which had taken the lead in raising the matter in the 1973 and 1974 General Assembly sessions, but the working group had been chaired by a member of the Yugoslav delegation[90] and its rapporteur was a member of the Zambian delegation.[91] During the debate on the draft in Section IV of the Congress, representatives of twenty-five governments from all geographical and political regions are reported as having spoken, and they did so uniformly in support of the draft declaration.[92] The Congress was attended by 101 government delegations, many of the members of which were senior officials in their national systems of administration of justice. Congress support for the declaration was therefore not only a positive expression of foreign policy from all geographic and political areas of the world, it can also be interpreted as an authentic expression of their official law enforcement policies.

Other relevant aspects of the Congress's work, including extension and implementation of the Standard Minimum Rules for the Treatment of Prisoners and the development of a code of ethics for police and other law enforcement

congress to stress their own recent experience that once a regime is willing or determined to torture its citizens, neither natural laws nor international declarations can stop it'.

[85] *Fifth UN Crime Congress Report* (n 61), para 298.

[86] 'Report on the Geneva Congress' (n 84), 4.

[87] *Fifth UN Crime Congress Report* (n 61), para 298.

[88] 'Report on the Geneva Congress' (n 84), 4.

[89] *Fifth UN Crime Congress Report* (n 61), para 379.

[90] Professor Bogdan Zlataric, Faculty of Law, University of Zagreb (author's recollection).

[91] E. L. Sekala, Director of Public Prosecutions, Ministry of Legal Affairs, Lusaka (author's recollection).

[92] 'Report on the Geneva Congress' (n 84), 4; even though, as noted above, some participants also suggested amendments. The 25 countries were Australia, Austria, Belgium, Bolivia, Cameroon, Canada, Cuba, Czechoslovakia, Egypt, France, German Democratic Republic, Greece, India, Iraq, Ireland, Mexico, The Netherlands, Pakistan, Qatar, Sri Lanka, Sudan, Sweden, United Kingdom, United States of America, Zaïre.

officials and of ethical principles for medical personnel, none of which came to any conclusive result, are dealt with below and in Chapters 9 and 12. Similarly, the Congress did not discuss the report of the WHO, since this did not contain the draft principles of medical ethics which had been requested by the General Assembly.[93] Meanwhile, the draft declaration left the Congress for the General Assembly with broad support. The main question was what, if any, further action the General Assembly would authorise once it had adopted the declaration.

2.4 Resolution 3452 (XXX) of 9 December 1975—The Declaration against Torture

As already noted, the question of torture and other ill-treatment had acquired its own agenda item by the thirtieth session of the General Assembly (1975), having first been raised in 1973 under an agenda item dealing with the twenty-fifth anniversary of the adoption of the Universal Declaration of Human Rights, then in 1974 under the report of Ecosoc. Before discussion of the agenda item in the Third Committee, the General Debate heard the United States Secretary of State and the Belgian, Dutch, and Norwegian Foreign Ministers[94] mention with approval the Fifth UN Crime Congress's recommendations on torture. Further, the Swedish, Danish, and Austrian Foreign Ministers,[95] as well as the spokesperson from Ecuador, all raised the issue of torture, as did the Permanent Representative of Libya.[96] It would appear that by this time the issue had a momentum of its own and was less a matter of reaction to outside influence. None of those parts of the interventions dealing specifically with torture referred to NGOs, though one of the interventions in the Third Committee preceding adoption of the Declaration against Torture did so.[97]

The Netherlands introduced the draft declaration prepared by the Fifth UN Crime Congress as the first matter of business of the Third Committee under the agenda item on torture.[98] Having described the background at the Congress,[99] it went on to observe that 'without purporting to impose a legal obligation, the declaration imposed a moral obligation on States to ensure that their national legislation conformed to the standards laid down therein'.[100] Sweden also mentioned

[93] UN Doc A/CONF.56/9 (1975).

[94] UN Docs A/PV.2355, 52–3 (United States); A/PV.2361, 61 (Belgium); A/PV.2362, 32 (Netherlands); A/PV.2364, 36 (Norway).

[95] UN Docs A/PV.2358, 51 (Sweden); A/PV.2360, 8–10 (Denmark); A/PV.2371, 53–5 (Austria); A/PV.2376, 94 (Ecuador).

[96] UN Doc A/PV.2375, 57.

[97] *GAOR*, 30th Session, Third Committee, Summary Records, UN Doc A/C.3/SR.2165, para 53: Australia referred to its support for 'the activities of Amnesty International and the International Commission of Jurists aimed at exposing the practice of torture'.

[98] Report of the Third Committee, *GAOR*, 30th Session, Annexes, Agenda item 74, UN Doc A/10408, para 5.

[99] (n 97), UN Doc A/C.3/SR.2160, para 3.

[100] Ibid para 5.

that 'the text would not be a legally binding instrument', though it would be 'a suitable basis' for 'an international convention' that it was 'clearly necessary to envisage'.[101] This statement presaged a specific initiative two years later (see below).

The substance of the draft declaration seemed to be widely approved, since it provoked very little discussion. Norway, Greece, the Federal Republic of Germany, and Australia did, however, address the theme of implementation and the need for international supervision that had been omitted from the final text.[102] Greece was particularly insistent on this theme, again invoking its own experience that, under a military dictatorship, 'domestic legislation did not suffice' and that exposure of such a dictatorship's crimes to, and their condemnation by, the international community was necessary to prevent torture. Greece also proposed a new preambular paragraph that would envisage 'appropriate systems of supervision and international measures', but this was not accepted.

The draft declaration underwent only one amendment. Where, under article 2, torture and other ill-treatment were to be 'condemned as a denial of the principles of the Charter of the United Nations', it was proposed by the German Democratic Republic that the word 'purposes' be substituted for the word 'principles'.[103] This was because 'the latter word [that is "principles"] was freely used in international law to mean specific rights and duties among states'.[104] It is not clear whether it was meant that the prohibition against torture was not a specific right or duty or that it was not a right or duty pertaining to interstate relations. In any event, the proposal was logical in so far as human rights and fundamental freedoms are referred to in article 1 of the UN Charter, dealing with the purposes of the organisation, not in article 2, which deals with the principles of interstate behaviour in furtherance of the purposes. The amendment was agreed without discussion.[105] Immediately afterwards, the Third Committee adopted the draft declaration, as amended, 'by acclamation'.[106] On 9 December 1975, at a plenary meeting of the General Assembly, the Declaration against Torture was formally adopted.[107]

3. Developments Following the Adoption of the Declaration against Torture

The thirtieth General Assembly, in addition to adopting the Declaration against Torture, also agreed to embark on a programme of specific standard-setting.

[101] (n 97) UN Doc A/C.3/SR.2165, para 56. Australia had earlier spoken in a similar vein (ibid para 54).

[102] (n 97) UN Doc A/C.3/SR.2160, paras 7 (Norway), 14 (Greece), and 20 (Federal Republic of Germany); and UN Doc A/C.3/SR.2165, para 54 (Australia).

[103] (n 97) UN Doc A/C.3/SR.2166, para 37.

[104] Ibid. [105] Ibid para 39. [106] Ibid. [107] UNGA Res 3452 (XXX).

3.1 Resolution 3453 (XXX) of 9 December 1975

At the start of the third meeting of the Third Committee's consideration of the torture issue, before the adoption of the draft declaration, Greece had introduced a draft resolution[108] that, after discussion and amendment, was to become General Assembly resolution 3453 (XXX). The part of the draft that survived substantially unchanged was essentially the unfinished business of the previous year's resolution 3218 (XXIX). It related to standard-setting and dealt with several specific aims.

3.1.1 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

In the terms of the Greek draft resolution, the Commission on Human Rights would elaborate 'a code on the protection of all persons under any form of detention or imprisonment'. This would be based on the *Study of the right of everyone to be free from arbitrary arrest, detention and exile* (a document prepared for the Commission over a decade earlier), and the draft principles annexed to it.[109] While the Declaration against Torture had reflected some of these principles (for example, the inadmissibility of coerced statements,[110] and the right to compensation in case of violation[111]), it had omitted reference to many others that could be relevant (for example, the right not to be held in detention incommunicado and the right to have the legality of detention independently determined[112]). There was still need, therefore, for a compilation of pertinent standards.

The USSR expressed reservations on this issue, on the grounds that 'the international standards of conduct in that respect were already contained, for example, in articles 7 and 10 of the International Covenant on Civil and Political Rights and there was no need to establish new standards'.[113] India would have deleted the whole paragraph referring to a code of protection (and which also referred to implementation—see below) as being 'too broad and general'.[114] Since there was no further substantive criticism of the idea, the final text required the Commission on Human Rights to elaborate 'a body of principles [not a code[115]]

[108] (n 98) para 8. (The text of the resolution was contained in UN Doc A/C.3/L.2187.)

[109] UN Department of Economic and Social Affairs, *Study of the right of everyone to be free from arbitrary arrest, detention and exile* (UN Doc E/CN.4/826/Rev.1) (1964). The Draft Principles on Freedom from Arbitrary Arrest and Detention form part VI of the study. The study and the principles were drawn up in 1962 by a committee established by the Commission on Human Rights; the Commission did not act on them.

[110] Ibid, Draft Principles, art. 24.

[111] Ibid art. 10.

[112] Ibid arts. 10, 19, and 36.

[113] (n 97), UN Doc A/C.3/SR.2167, para 36.

[114] Ibid para 50.

[115] The dropping of the word 'code', which would imply a more solemn document than 'body of principles' was a concession to the USSR, India, 'and others': (n 97), UN Doc A/C.4/SR.2172, para 14.

on the protection of all persons under any form of detention or imprisonment'.[116] The history of the subsequent development of the Body of Principles is to be found in Chapter 11.

3.1.2 Code of Conduct for Law Enforcement Officials

Since the Fifth UN Crime Congress had not been able to produce a text on police ethics, although it approved the aim, the proposal in the Greek draft, that the Committee on Crime Prevention and Control should be requested to assume the task, was uncontroversial. Several speakers, both before[117] and after[118] the introduction of the Greek draft, spoke in favour of developing such a code of ethics, and no substantive change to the draft was necessary. The history of the subsequent drafting process, and of the adoption by the General Assembly, of the UN Code of Conduct for Law Enforcement Officials is to be found in Chapter 12.

3.1.3 Principles of Medical Ethics

The proposal that the WHO be invited 'to give urgent attention' to the study and elaboration of relevant principles of medical ethics[119] was more problematic. In its report to the Fifth UN Crime Congress, the WHO had concluded that practices of extreme maltreatment of prisoners 'are in such flagrant contradiction to the principles of health ethics implicit in the WHO Constitution that it would be idle to pursue the matter further'.[120] Thus, the Greek draft seemed to be urging action on a reluctant specialised agency that saw no need for a new text. Following this, the United Kingdom voiced the concern that 'Governments should reflect on the content of the WHO's report before any action was taken',[121] and for India, the WHO report meant that the relevant paragraph of the draft was 'superfluous'.[122] This led Greece to substitute the term 'further attention' for the term 'urgent attention', otherwise leaving the meaning intact.[123] Despite India's reiterated opposition,[124] the text underwent no further change. The history of the subsequent development and adoption by the General Assembly of the UN Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman, or degrading treatment or punishment is to be found in Chapter 12.

3.1.4 Implementation

In one respect, the Greek draft underwent a substantial change. It had envisaged that the Commission on Human Rights would 'give urgent consideration

[116] UNGA Res 3453 (XXX) (9 December 1975), para 2(b). [117] e.g. (n 102).
[118] e.g. (n 113). [119] (n 98) para 8. [120] UN Doc A/CONF.56/9, para 26 (1975).
[121] (n 113) para 3. [122] Ibid para 50.
[123] UNGA Res 3453 (XXX) (9 December 1975).
[124] (n 97) UN Doc A/C.3/SR.2172, para 17. See also UN Doc A/PV.2433, 78, where India's continuing misgivings were voiced after the adoption of resolution 3453 (XXX).

to further steps for ensuring the implementation of international norms prohibiting torture or other cruel, inhuman or degrading treatment or punishment'.[125] However, the USSR expressed unspecified 'serious doubts' about this, and since the paragraph concerned was also that which provided for the elaboration of a code for protecting detainees or prisoners from torture or other ill-treatment, India's opposition (see above, under Body of Principles) was applicable to this as well. Greece was therefore led to propose a reformulation whereby the Commission on Human Rights would 'study the question of torture and all necessary steps for: (a) Ensuring the effective observance of the Declaration against Torture.[126] With the substitution of the word 'any' for 'all', this was the wording of the final text. It was, of course, weaker than the draft, in that 'implementation' had been replaced by 'effective observance' and 'urgent consideration' had become 'study'. Nevertheless, there was here an embryonic mandate for the Commission on Human Rights to embark on implementation. That it failed to do so—until ten years later, when it created the mandate of Special Rapporteur on the question of torture—is described and discussed in Chapter 5.

3.2 Resolutions 32/62, 32/63, and 32/64 of 8 December 1977

By adopting resolution 3453 (XXX) the General Assembly was again agreeing to have a specific torture item on its agenda the following year,[127] as (except for the years 1991, 1993, 1995, and 1997) has happened annually to date. Most of the Assembly's work under the item during the period being reviewed was to supervise the development of the standard-setting programme it had initiated in 1975. This, for example, was the thrust of the 'essentially procedural'[128] resolution 31/85 of 13 December 1976. The only matter of substance in this resolution was a call on governments and on intergovernmental and thirty-one non-governmental organisations concerned with human rights 'to give maximum publicity' to the Declaration against Torture. Valuable as good-faith compliance with this call might have been, mere publicity for the Declaration against Torture could be expected to have limited practical value in regard to its enforcement.

In 1977, however, the thirty-second session of the General Assembly was to exhibit increased initiatives on the torture issue. It set in motion the drafting

[125] (n 108).

[126] Ibid para 10 (the text of the revised draft resolution was contained in UN Doc A/C.3/L.2187/Rev.1).

[127] UNGA Res 3453 (XXX) (9 December 1975), para 5.

[128] These are the words of the Portuguese representative when introducing the draft of what became General Assembly resolution 31/85, 13 December 1976: *GAOR*. 31st Session, Third Committee, Summary Records, UN Doc A/C.3/31/SR.63, paras 23–6. The resolution was mainly aimed at encouraging progress in the development of the instruments set in train by resolution 3453 (XXX). It also encouraged Ecosoc to consider an amendment to the Standard Minimum Rules for the Treatment of Prisoners that sought to assure the applicability of the Rules not only to persons charged or convicted, but also to persons arrested or imprisoned without charge or conviction (para 3).

of a treaty against torture (resolution 32/62), authorised the development of a questionnaire to governments on their compliance with the Declaration against Torture (resolution 32/63), and developed the technique of encouraging unilateral declarations by governments which would commit them to obey the terms of the Declaration against Torture (resolution 32/64).

The context in which the debate on the issue of torture took place was suggested by one of the resolutions (32/63), which described the General Assembly as 'gravely concerned over continued reports from which it appears that in some countries State authorities are systematically resorting to torture and other cruel, inhuman or degrading treatment or punishment'.[129] These reports were in the main coming from non-governmental sources which were continuing to demand effective international action to deal with the problem. Denmark, Austria, Spain, the United Kingdom, and Libya all cited the work of Amnesty International in this area.[130] The United States also referred to 'the careful work of independent organizations such as Amnesty International, the International Commission of Jurists and the International League for Human Rights', which had 'indicated that the current list of practitioners of torture was a long one'.[131]

Another important influence on the debate was the recent death in detention of the South African Black Consciousness movement leader Steve Biko. The discussion is replete with references to his death,[132] and a special resolution was tabled, discussed, and adopted under the torture item, by which the General Assembly was to express its strong condemnation of 'the arbitrary arrest, detention and torture which led to the murder of Stephen Biko by [South African] agents'.[133]

3.2.1 A convention against torture

Introducing the draft of what was to become resolution 32/62,[134] by which the Commission on Human Rights would be requested 'to draw up a draft convention against torture and other cruel, inhuman or degrading treatment or punishment', Sweden argued that the Declaration against Torture 'should not be the ultimate goal of United Nations efforts to protect all persons from torture, and that the work should lead up to a legally binding international instrument'.[135] This echoed similar statements made by Sweden and Australia at the time the Declaration against Torture was adopted (see above). Political support for this

[129] UNGA Res 32/63 (8 December 1977), sixth preambular para.

[130] *GAOR*. 32nd Session, Third Committee, Summary Records, UN Docs A/C.3/32/SR.35, para 14 (Denmark) and para 17 (Austria); A/C.3/32/SR.36, para 40 (Spain); A/C.3/32/SR.37, paras 10 and 13 (United Kingdom); and A/C.3/32/SR.38, para 20 (Libya).

[131] Ibid UN Doc A/C.3/32/SR.36, para 35.

[132] e.g. (n 130).

[133] UNGA Res 32/65 (8 December 1977).

[134] Report of the Third Committee, *GAOR*, 32nd Session, Annexes, Agenda item 80, UN Doc A/32/355, para 8 (1977).

[135] *GAOR*, 32nd Session, Third Committee, Summary Records, UN Doc A/C.3/32/SR.35, para 22.

resolution was notable. It was the first resolution on the topic to have the sponsorship of countries from all the geographical regions (and thus all political tendencies) within the membership of the United Nations.[136] No doubts about the substance of the idea were expressed in the debate. At this stage, the proposed convention was proffered with the aim of giving conventional legal form to the principles contained in the Declaration against Torture. Neither the text of the resolution nor statements made during the debate explicitly envisaged the establishment in the convention of implementation mechanisms. Sweden's own intentions were made clear when, a few months later, it presented to the Commission on Human Rights a draft convention that contained a proposed implementation mechanism with pioneering elements (see Chapter 5), in addition to providing for universal jurisdiction over suspected torturers (see Chapter 4). In 1980 the General Assembly, following a suggestion of the Sixth UN Crime Congress, confirmed that the convention should include 'provisions for the effective implementation of the future convention'.[137] The subsequent developments in drafting the convention and its adoption in 1984 as well as the adoption in 2006 of an Optional Protocol aimed at prevention, are examined in Chapters 2 to 5.

3.2.2 Questionnaire on the Declaration against Torture

A more positive step towards implementation was contained in resolution 32/63 whereby the Secretary-General was requested 'to draw up and circulate among Member States a questionnaire soliciting information concerning steps they have taken, including legislative and administrative measures, to put into practice the principles' of the Declaration against Torture. The Netherlands introduced the draft that became resolution 32/63 in highly nuanced language that suggested a temporary stocktaking exercise.[138] Further, it noted that the information received as a result of the questionnaire 'might provide the Commission [on Human Rights] with useful guidance in drafting the convention'.[139] Although the resolution was adopted without a vote, the fears of some delegations of a potential implementation measure were reflected in 'explanations of vote' in the Third Committee discussion.[140] Five delegations expressed doubt about a

[136] The sponsors were Austria, Cuba, Denmark, Ecuador, Egypt, Ghana, Greece, India, Iran, Jamaica, Kenya, Mexico, Morocco, The Netherlands, New Zealand, Portugal, Spain, Sweden, and Yugoslavia, subsequently joined by Angola, Australia, Cameroon, Colombia, Costa Rica, Cyprus, German Democratic Republic, Hungary, Iraq, Ireland, Italy, Lesotho, Mali, Mozambique, Nigeria, Norway, Panama, Poland, Tanzania, Upper Volta, and Zambia.

[137] UNGA Res 35/178 (15 December 1980), para 2.

[138] (n 135) para 27: 'It was now propitious to assess, even if only provisionally, the progress made towards abolishing all forms of torture. Information on the action taken by Member States to put the Declaration into practice would be useful in evaluating what had been accomplished as well as in determining what action was still to be taken by the United Nations in that field.'

[139] Ibid para 31.

[140] The system of adopting texts 'without a vote' is a device to permit a measure to pass even though particular states may have reservations about it. These reservations are often expressed by way of statements made 'in explanation of vote' even though no proper vote has taken place.

preambular paragraph that portrayed the General Assembly as 'gravely concerned over continued reports from which it appears that in some countries State authorities are systematically resorting to torture . . .'.[141] For Argentina, the paragraph was 'dangerously ambiguous',[142] while for Laos it was 'unacceptable, as it left the door open to outside interference'.[143] Of the dissenting faction, only Laos went as far as to say that on these grounds, and also because the procedure itself 'was too complicated for implementation by developing countries',[144] it would have abstained had there been a vote. That the fears of these countries were misplaced can be seen in Chapter 5 where further developments relating to the questionnaire are discussed.

3.2.3 Unilateral declarations against torture

Resolution 32/64, which was also adopted without a vote, was initiated by India.[145] In it the General Assembly called upon all member states 'to reinforce their support' for the Declaration against Torture 'by making unilateral declarations . . . along the lines' of a model annexed to the resolution and 'by depositing them with the Secretary-General'. According to the model unilateral declaration, a government would declare its intention to 'comply with' the Declaration against Torture and to 'implement, through legislation and other effective measures, the provisions of the said Declaration'. The resolution was the first to be initiated by a 'Third World' country.[146] In its introduction to the draft that was to become resolution 32/64, India said that the unilateral declarations called for by the resolution 'would be an expression of the good faith of governments and their moral commitment to the provisions of the Declaration on Torture'.[147] There was no questioning of the value of the resolution during the Third Committee debate, but eight delegations later indicated that they would have abstained had there been a vote.[148] The only reason given was that of Madagascar (supported by four of the others), whose representative reserved his government's position in the absence of instructions on the point.[149] The moral, political, or legal effect of such declarations is discussed in Chapter 2.

[141] *GAOR*, 32nd Session, Third Committee, Summary Records, UN Doc A/C.3/32/SR.42, paras 22 (Argentina), 29 (Uganda), 33 (Laos), 34 (Iran), 35 (Guinea) (1977).

[142] Ibid para 2.

[143] Ibid para 33.

[144] Ibid.

[145] (n 134) para 15.

[146] In a subsequent plenary meeting of the General Assembly the same year (1977), Belgium observed that 'it is to the Government of India, principally supported by the Governments of Bangladesh and Egypt, that we owe the draft resolution'. (*GAOR*, 32 Session, Plenary Meetings, vol. III, 98th Meeting, para 54). Belgium then announced that it would be the first to deposit a declaration (ibid para 55).

[147] (n 141), UN Doc A/C.3/32/SR.37, para 27.

[148] (n 141), paras 21 (France), 23 (Togo), 27 (Madagascar, Mali, Cameroon, Benin, and Venezuela), and 35 (Guinea).

[149] Ibid para 27.

4. Summary

In the wake of vociferous non-governmental activities aimed at exposing and denouncing widespread practices of torture, the General Assembly in 1973 embarked on its first, tentative consideration of the issue. Governments playing a leading role in the process linked their concern to the NGO activities and, as the Assembly gathered, the brutality of the sudden overthrow of the Allende government in Chile served to highlight the problem of torture and harness it to the general revulsion at events in that country. The Assembly's action in 1973 was modest, confined essentially to a rejection of torture and ill-treatment and a vague prediction of further consideration of the problem at an unspecified future session.

Nevertheless, the problem was again before the Assembly in the following year. Once again, NGO reports were invoked by the initiating governments, and the unimproved human rights situation in Chile continued to provide an illustrative focus as well as to provoke parallel action. In contemplation of the Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders, to be held the following year (1975), the Assembly selected a number of aspects of the problem of torture that it deemed suitable for consideration by the Congress. These were all normative in character: the possibility of developing rules against torture and ill-treatment; safeguards against arbitrary arrest and detention; rules of professional ethics for law enforcement agents and medical personnel who may encounter abuses of detainees or prisoners. Torture and ill-treatment would be a specific agenda item for the General Assembly's 1975 session after the Congress. Despite expressions of opinion in favour of UN action to implement the prohibition of torture and other ill-treatment contained in existing international instruments, no such action was formally proposed.

The Fifth UN Crime Congress considered that torture was the most significant issue before it and a working group was specially created to deal with a proposed draft General Assembly declaration against torture. Delegations from all parts of the world spoke in favour of the draft that emerged, which stressed the impermissibility of torture under any circumstances and raised violation of the norm against torture and other ill-treatment to the level of non-compliance with the UN Charter. It specified a number of national measures to be taken against torture, but avoided any reference to international measures of implementation.

The Declaration against Torture adopted by the General Assembly some two months later was, with a minor amendment, the text forwarded by the Congress. A growing number of states represented at the General Assembly expressed concern about the problem of torture. Recognising that the Congress had not been able to initiate the formulation of specific rules against arbitrary arrest and detention (a terrain in which torture thrives) nor to develop relevant rules of professional ethics, the Assembly set in motion the drafting of texts on these matters.

While avoiding the word 'implementation', it also this time laid the groundwork for the Commission on Human Rights to take steps to ensure the effective observance of the Declaration. The results of these initiatives are considered in subsequent chapters.

The 1976 session of the General Assembly was not one of major activity on the torture issue, but by 1977 a new spate of initiatives was undertaken. Again, some of the governments spearheading the drive invoked NGO information on the issue. The recent death under torture of Steve Biko, like the brutalities of the military rulers in Chile, served to galvanise attention to the problem. With the broadest sponsorship of any initiative yet taken, the Assembly agreed to call for the drafting of a convention against torture and other ill-treatment. It also decided that member states should respond to a questionnaire on their compliance with the Declaration. Finally, in response to the first initiative to originate from among the non-aligned countries, the Assembly decided to invite formal unilateral declarations pledging such compliance. Developments in these areas are also to be found in later chapters.

Thus, international awareness of the problem of torture, instigated by the activities of NGOs and focused by the notorious developments in post-1973 Chile and the death of Steve Biko, stimulated the General Assembly to embark on a major programme of standard-setting. Two years after it first considered the issue, it adopted the Declaration against Torture. Subsequent developments form important segments of a number of later chapters. Highlights are the adoption of the Convention against Torture, in 1984 (see chapter 2) and an Optional Protocol to the Convention, in 2002 (see chapter 5).

In fact, the Assembly has adopted virtually annual resolutions on the issue.[150] In 1999, it began to receive annual interim reports from the Special Rapporteur on Torture, a mandate established by the Commission on Human Rights in 1985 (see Chapter 5).[151] The latest non-treaty instrument in the field to receive the support of the Assembly, as recommended by the Special Rapporteur, is the Istanbul Protocol on effective investigation and documentation of torture and other ill-treatment.[152]

[150] e.g. UNGA Res 63/167 (18 December 2008).

[151] UNGA Res 53/139 (9 December 1998), paras 10 and 24. The first written report is contained in UN Doc A/54/426 (1999), the latest in A/63/175 (2008).

[152] See UNGA Res 55/99 (4 December 2000), para 3.