

De rol van het Comité in de ontwikkeling van het VN-Verdrag tegen foltering

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The Role of the Committee in the Development of the UN Convention against Torture

Summary

1 Introduction

This book is about the UN-Convention against Torture,¹ and about the practice of its supervisory body, the Committee against Torture. Both are part of an elaborate set of instruments designed to protect and promote human rights.

The aim of the Convention against Torture is to strengthen the existing prohibition against torture and other cruel, inhuman or degrading treatment or punishment. States Parties undertake to strengthen this prohibition by implementing the provisions of the Convention in their national law and practice. Each State Party agrees among other things to treat torture as a criminal offence under national law, to investigate cases of torture promptly and impartially, and to prosecute suspects of torture, wherever the offence may have been committed. States agree to cooperate with each other in this field. States Parties also agree not to return or extradite a person to another state when substantial grounds exist for believing that he or she would be in danger of being subjected to torture in that state. Each State Party further agrees to ensure that victims of torture be able to obtain redress and compensation under their national legal system. States Parties additionally agree that any statement made as a result of torture will not be used as evidence in any legal proceeding. Certain of these obligations also apply to forms of cruel, inhuman or degrading treatment or punishment other than torture.

The Committee against Torture was established in 1988. States Parties vested the Committee against Torture with competence to supervise the implementation of Convention obligations through the review of state reports, the handling of complaints submitted by States Parties or individuals, and through the examination of a situation in a given State Party by way of an inquiry procedure.

The Committee performs functions with respect to torture and other prohibited cruel treatment which are similar to the functions performed by other bodies established under earlier human rights instruments. The prohibition against torture has been described in various instruments, including article 3 of the Universal Declaration of Human Rights, and article 7 of the International Covenant on Civil and Political Rights (ICCPR). Under

¹Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/Res/39/46, Annex, New York, 10 december 1984. Entry into force 26 June 1987. See for the text of the Convention the Annex.

these instruments, supervisory bodies such as the Human Rights Committee and human rights rapporteurs of the United Nations have been active for several decades, and have developed an elaborate practice in the field.

In view of the existence of these earlier established human rights instruments, procedures, and supervisory bodies, it is questionable whether the expansion of procedural and substantive obligations is an appropriate and effective means of strengthening international protection against torture and other cruel, inhuman or degrading treatment or punishment. Do new instruments, procedures and bodies contribute, substantively and/or procedurally, to the promotion and protection of human rights? The aim of this book is to appraise the role of the Committee against Torture, as well as its contribution to the international prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

Because the Committee has only been active since 1988, a complete assessment of its practice and contribution to the protection of human rights is not yet possible. The period is long enough, however, to enable a full description of the role of the Committee, and to permit an interim evaluation of its activities. In order to appraise the role and contribution of the Committee, Part I (chapters 2 and 3) provides a context for discussion: an account of the origins and history of international supervision and the international prohibition of torture, and a brief account of the drafting history of the Convention. Part II provides an analysis of the supervisory practice of the Committee. Part III provides an analysis of the practice of the Committee in interpreting the Convention.

2 Basic Assumptions

The concept of law is put in perspective in the Introduction. This exercise was necessary in order to place the activities of the Committee against Torture in a legal context. To this end, first a number of elements relating to the concept of law and the development of law are formulated. Apart from the elements based on positive law, such as *consensus ad idem* and enforcement, also relevant are the views which obtain in society of what law is and ought to be. Law is described as being the result of a quest for the harmonization of these elements is sought. The aim of realizing the notions of law and justice steer this process. The author assumes that these notions of law and justice constitute the test of law, irrespective of the question of whether they deserve to be called law.

The appropriate test is to be found in that part of society which is relevant to the study, namely, in the international community, which consists of individuals from a wide diversity of societies. The author assumes that a test of this international society is the norm that infringements of human dignity are not allowed. A flagrant infringement is, for instance, torture. The lawfulness of a state's exercise of sovereignty must be tested against standards of human dignity.

For instance, all kinds of constitutions, legal provisions and independent judicial bodies have been created throughout history to protect against the unchecked exercise of power and to ensure human dignity. It was established that the state, which provided these instruments and bodies, is the appropriate entity to prevent violations of human dignity,

and it has generally proved to be effective in doing so. In any case, the concept of the state under the rule of law emerged as an idea worth pursuing. Unfortunately, it turned out that the state monopoly on using force has often been employed to do just that, to infringe on human dignity, especially through torture. The state can degenerate into a violator of human rights, into a lawless state, in which an independent judiciary can no longer counter developments. Here, we have the fundamental problem of the state; designated to ensure human rights, it may, however, have an interest in violating them. And precisely because violations are committed by the state, it is unlikely, in the majority of cases, that the state will counter them.

History, as outlined in Chapter 2, has shown that, initially, torture was an accepted part of legal proceedings. Only in the past two centuries has it been considered contrary to human dignity. Standards of human dignity had to be enacted within the context of the state. Where a state seriously failed to guarantee these standards, other states used the occasion to interfere, gently or by force, in part under the guise of safeguarding these standards. Thus, the standards of human dignity gained relevance in interstate relations. Although states often offered a different reason, in particular economic or power-political reasons, for interfering, they used humanitarian arguments to justify their actions. Humanitarian considerations could set aside other fundamental considerations, such as issues of sovereignty. And so we see a drawback with regard to interference by states: the question as to whether interference is justified, has often been inspired by other than humanitarian considerations, so that the issues become politicized. Partly for this reason, it is preferable to have an independent human rights supervisory system which is capable of determining independently whether interference is justified. Such a system - in fact the counterpart of national independent judicial bodies - came into existence in the form of various instruments governing human rights, for instance, within the context of the United Nations. One of these instruments was the Convention against Torture and its Committee against Torture.

It can be concluded at this early stage that international supervisory systems *per se* represent an additional benefit with respect to the protection of human rights, because they are not tied to states. This enables them to examine whether a state uses its power monopoly appropriately. This benefit certainly exists in a system in which states assess one another. The acknowledged *possibility* that states fail in the exercise of their state authority, without these failures being corrected internally, calls for supervision by other institutions. The assessment of whether a state has in effect failed in the exercise of its state authority must be left to *independent* bodies, which will not be derailed by states, as is the case with national judicial bodies. In addition, it should be left to such bodies, which, in contradistinction to states, have no power-political interest in violations. In short, bodies which do not wield political power, but do have legal authority; bodies which have no interest in applying torture, let alone the means for enforcing it. A distinction must be made between a body which is authorized to exercise its monopoly of force and a body which is authorized to assess the lawfulness of the use of the monopoly. Treaty bodies, such as the Committee against Torture, are excellently suited to assess lawfulness.

It is logical, therefore, that independent bodies such as treaty bodies test the actions of states against standards of human dignity. This means that the judgment of a treaty body should weigh more heavily than that of states in these matters. As observed earlier, a study of law, and for that matter a study of a treaty as well as of the practice of a treaty body, must not disregard 'notions of justice' as an element, irrespective of the defects of other elements. Defects exist, for instance, in the element of enforcement by the Committee against Torture. The Committee's existence is justified by the important moral judgment: torture is a crime. This notion is the basic assumption on which the work of the Committee is based, in particular in respect of states which have lost sight of this assumption. From the description of its work, one learns that the Committee plays a very special role in law: it investigates and determines whether states do in fact perform their part as states, and guarantee human dignity. Here lies the basis for the Committee's authority. This context in particular makes the role of the Committee (and that of other treaty bodies) a legal one.

This theoretical exercise has yet another important effect on the way in which we view the sources of international law. Traditional scholars take their point of view primarily from the legal sources in which states figure prominently. Such a traditional view of international law is in the interest of traditional actors. This is a static view, incompatible with processes of change. It has too little to do with the failures of states themselves, with fundamental new developments, and in particular with the development of law-related actors other than states, such as treaty bodies. From an international law perspective, it is clear that the States Parties are obliged under the Convention to report to the Committee against Torture. But the *practice* of such bodies as the Committee against Torture has not yet been discussed among scholarly writers as a matter of law. According to the author, the traditional view, which attributes the role of lawmaker to states, is flawed. Where a state abuses its monopoly on force and degenerates from a state under the rule of law into a lawless state, we can no longer rely on this actor as law 'maker', especially where human rights are concerned. The idea that states make law in an international context must take second stage, simply because actors who have an interest in preserving a persistent practice may hide behind the state.

The norms and values of a society, and not the cloak of state sovereignty, form the basis of law, also of international law. In the latter we encounter, for instance, the test of human dignity. This also means that law, whatever its components, goes beyond the state, in part because the interests of individuals against an obstinate state must be protected from that state. International law can and must be dynamic. As will be legal sources, such as international customary law and treaty law. It is also incorrect to assume that standards are exclusively to be found in treaties, or that repeated application, *i.e.* custom, is needed to invest a standard with the character of a standard of international law. It is further incorrect to assume that standards can only be derived from state action. No one, not even a state, will argue that the prohibition against torture is not a rule of international law, because the standard is not supported by uniform state practice confirming it. Clearly, certain standards are accepted as international law, irrespective of persistent state practice, and even in spite of it.

It is imperative to identify an acceptable way, apart from state recognition, by which norms become legal standards in the international community. Treaty bodies, such as the Committee against Torture, for reasons earlier stated, lend themselves very well to this purpose. In human rights issues, therefore, more weight should be attached to *opinio iuris*. The International Court of Justice seems to have embraced this view. In the Nicaragua-Case, the Court acknowledged the importance of UN resolutions, in which it found evidence of *opinio iuris* and state practice, unrelated to any concrete act of state from which state practice could be inferred.²

3 Findings

Although a supervisory body, such as the Committee against Torture, may in theory make a contribution to human rights protection, the question is whether this has been so in practice. The Committee has limited options. It still derives its powers from a treaty drafted by the very states. In addition, another treaty body, the Human Rights Committee, was active in the same area before the Committee against Torture began to take action.

3.1 The Convention against Torture

The history of the Convention against Torture is discussed and critically assessed in Chapter 3. The author concludes that the Convention builds on existing international obligations, but also offers a treaty body new ways of monitoring, in particular through the inquiry procedure. Furthermore, it reinforces the prohibition against torture, since states are now obliged to take a number of new measures, such as the creation and exercise of universal criminal jurisdiction. This resulted at the same time in an expansion of international monitoring, since states are required to report on their compliance with these obligations.

The Convention, however, does have its lacunae, particularly in comparison with other treaties and accepted practice under the ICCPR and the European Convention on Human Rights (ECHR). An example is the vague definition of torture as a result of the exception relating to lawful sanctions. Furthermore, a clear distinction was made between torture and other cruel, inhuman or degrading treatment or punishment. Because of this division, the obligations were not automatically applicable to both prohibitions. In consequence, during the negotiations the question was raised as to which treaty obligations were applicable to torture and which to other cruel, inhuman or degrading treatment or punishment. As a result, the obligations relating to the prohibition against other cruel, inhuman or degrading treatment or punishment are more limited in extent than those relating to torture.

²International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, ICJ Reports (1986), pp. 14-15. See also Th. Meron, *Human Rights and Humanitarian Norms as Customary International Law*. Oxford: 1989, p. 113-114; Th. Meron, *International Criminalization of Internal Atrocities*, AJIL 89 (1995), pp. 554-577 (577).

Problems of sovereignty were again partly responsible for determining the substance of the Convention and the possible role of the Committee against Torture. States, after all, were not prepared to grant the Committee a wide-ranging mandate as granted to other treaty bodies. The objective and purpose of the Convention was clear, however: reinforcement of the prohibition against torture. This would, perhaps, give the Committee the opportunity to derive and develop from the Convention a number of implied powers, in particular where express powers would be insufficient and effective monitoring would require further measures.

Finally, it was concluded that the Committee against Torture was dealt a role in an area in which other institutions were already active. No institutional link between these organs was provided, however. With regard to the Human Rights Committee, the question of the contribution of the Committee against Torture becomes particularly relevant.

3.2 The Role of the Committee in the Development of Monitoring Procedures

In this section, the key subjects of Committee practice are introduced.

3.2.1 The Committee against Torture

Although the Committee's means are limited, it derives its power to function as an impartial and independent organ from the Convention. As earlier observed, this position is essential. In practice, the Committee has confirmed this position on several occasions. In the debate about conflict of interest in the inquiry procedure, however, it failed to seize the opportunity to expressly reconfirm and strengthen this position.

In view of the objective and purpose of the Convention against Torture, the objective of the Committee is to combat torture. The procedures laid down in the Convention provide a means towards this end. In the majority of procedures, the Committee's functioning in practice is for a large part contingent on the attitude of the States Parties to the Convention. Where a State Party continues to grossly neglect to meet its obligations, fails to implement, and moves away from the objective and purpose of the Convention, and where the express powers of the Committee as specified in the treaty provisions also fail, the Committee itself must find a solution in the spirit of the Convention. To this end, it may use those powers which are inherent in the objective and purpose of the Convention, insofar as these are not contrary to the express attribution of powers.

In practice, however, the Committee got off to a slow start. Its attitude was one of reserve and it did not even make full use of its expressly granted powers. Subsequently, it began to define its supervisory task seriously, taking a number of measures to intensify its supervision. In its Rules of Procedure, and in practice, the Committee has accorded itself all kinds of powers for which there is no express legal base in the Convention, but which have not been disputed by the States Parties

The deliberations on the failure to submit reports reveal that the Committee tended to repeat itself and was far from decisive in acting. Again and again, decisions on important matters, in particular the question of whether the Committee was formally empowered to deal with the implementation of the Convention by a State Party in the absence of a state report, were postponed. Making decisions by consensus, in which a very small minority blocked the decision-making, was partly to blame for this. Achieving consensus may enhance the authoritativeness of statements. During the past few years, however, a positive tendency can be seen: consensus is sought more actively by formulating the greatest common denominator of the views held by the Committee members, with the acquiescence of a small minority.

Has the Committee against Torture made a positive contribution? The answer to this question depends on the activities undertaken by the Committee within the framework of treaty procedures. It can be concluded however, even at this early stage, that the Committee against Torture entailed an expansion of human rights instruments. An additional treaty body came into existence, allowing for more time and energy to combat torture. The question is whether this additional time and energy should have been invested in the creation of another treaty body.

3.2.2 *The Reporting System*

Although the reporting system of the Convention against Torture has its limitations, it has proved to be an important procedure, perhaps the most important procedure available to the Committee. The procedure offers a framework within which the implementation of the Convention can be continually tested by all States Parties. It enables the Committee to encourage the effectuation of treaty provisions in national legal orders. The Committee made it a practical procedure by apportioning a clear role to non-governmental organizations, by appointing state rapporteurs, by sending reminders, by including in its annual report a blacklist of non-reporting states, and by being univocal through conclusions and recommendations, although the latter took a little longer. A number of measures, in particular against failures by States Parties to report, notifying such States Parties and actually considering a State Party's implementation of the Convention in the absence of a report, was not taken but should be taken urgently.

The Committee should distance itself more from States Parties by charting its own course: report, or no report, the Committee will treat the situation in the country of the State Party in question every four years. The Committee ought to develop a policy by which the situation in countries of States Parties which are grossly neglecting their obligations, will be handled if need be on the basis of information from other sources, in conformity with the policy of a number of other treaty bodies. The Committee would have to expressly indicate that information received from certain sources could not be verified, because there was no state report, so that the Committee was only able to state its preliminary findings.

Other treaty bodies, including the Human Rights Committee, have further developed and strengthened their reporting procedure. It is to be hoped that the Committee against Torture eventually do the same.

Furthermore, the absence of general comments has a noticeable bearing on the situation. The Committee against Torture has adopted only one, rather restrictively formulated, general comment. In view of the desire for interpretation of the substantive provisions, this is a very meagre result, which is in contradistinction with the practice of the Human Rights Committee.

There is a clear overlap between the reporting procedure of the Committee against Torture and that of the Human Rights Committee. Both treaty bodies deal in virtually the same way with the same matter, as will be treated below. Now that a special treaty procedure for cases of torture has been set up, many more possibilities exist than before to devise specific measures against torture. The Committee against Torture has a contribution to make to the extent that it can deal with problems of torture more intensively than is possible for the Human Rights Committee. The latter treaty body has a more limited reporting procedure, since the States Parties also report on other human rights. Their reporting on issues of torture therefore remains without much detail. Although the reporting procedure of the Committee against Torture seems to create a benefit at first sight, it is to be preferred that this expansion of human rights instruments occur in the context of the Human Rights Committee. It is therefore doubtful whether the Convention against Torture constitutes a strengthening of the human rights edifice in general. This will be discussed in more detail below in sections 4 and 5.

3.2.3 *The Inquiry Procedure*

At the time the Convention was drafted, the inquiry procedure laid down in article 20 constituted an enhancement of international human rights protection. The role of the Committee against Torture based on this procedure was, however, limited by states, not least by enabling states to make express reservations with regard to this competence. Many states, against whom the procedure would have been instituted, were not a party to the Convention or submitted reservations based on article 28. Those States Parties to the Convention which did not make reservations are often those states which do not systematically apply torture. article 20 is aimed at the systematic practice of torture. There are not many States Parties in whose territories torture may be so characterized. In addition, the procedure is not lightly instituted by the Committee, because institution of the procedure would be regarded as an unfriendly act.

In spite of these limitations, the procedure offered the Committee an opportunity to play a part in combatting torture. Of its own motion, the Committee may start investigations, which may result in unequivocal conclusions and recommendations. These may also be made public. Judging from its attitude in two well-known investigations, the Committee showed that it goes about its business thoroughly and does not shy away from drawing hard conclusions. The procedure, however, is rather complex and time-consuming: before taking the next step, the cooperation of the State Party in question must be sought. This

causes, often unnecessary, back and forth between the Committee and the State Party. A State under investigation cannot frustrate progress, however. In the procedure involving Egypt, the Committee made it clear that a refusal to cooperate would not hinder the public disclosure of the report. Perhaps this stance will speed up procedures in future.

Although the Committee has used its power, thus far it has subjected only four states to its inquiries; in two of these cases, an inquiry was conducted from which a public report ensued. Such a result is fair at best. Furthermore, the Committee against Torture no longer seems to be the only treaty body conducting inquiries. Whereas, in the drafting stage of the Convention, the procedure represented something new and beneficial, now various treaty bodies, among whom the Human Rights Committee, seem to be widening their mandate in a similar way. In spite of the absence of an express mandate, there is a growing practice among these bodies, in exceptional and frequently urgent situations, to subject a country to an inquiry, irrespective of the existence or non-existence of a report. Visits may be made, with the consent of the State Party in question, naturally. Not only does this development demonstrate that treaty bodies are quite capable of widening their mandates, it also shows the limitation of the Convention against Torture, since a state can make its ratification subject to a reservation pursuant to article 28, in which it reserves the Committee's competence. It seems out of the question, therefore, that the Committee will develop a similar practice vis-à-vis those States Parties which submitted such a reservation with regard to the Committee's power of inquiry. In consequence, the Committee's role has been limited under the Convention itself. The inquiry procedure of the Committee against Torture could thus lose its value in view of the activities of the Human Rights Committee.

There is also overlap where the Special Rapporteur is concerned. The Special Rapporteur investigates on his own motion questions of torture and other cruel, inhuman or degrading treatment or punishment all over the world. Such an inquiry may involve a visit to the state in question. In practice, the Special Rapporteur used to include in his annual reports very detailed recommendations, which with regard to substance were in conformity with the Convention against Torture. During the past few years, the Special Rapporteur has also made state-specific recommendations in state-specific reports. Furthermore, judging from the length of his reports, in the inquiry procedure the Rapporteur takes an increasingly active role, more active than the role played by the Committee against Torture.

Only recently have the Special Rapporteur and the Committee started to coordinate their activities. When the Committee decides to conduct an inquiry into a serious situation related to a State Party, the Special Rapporteur refrains from action in that same situation. Nonetheless, coordination, and perhaps improved coordination at the institutional level between the Committee against Torture, the Special Rapporteur and the Human Rights Committee is to be desired.

3.2.4 *Complaints Procedures*

As a result of the flood of complaints pursuant to article 3, the complaints procedure for individuals was created. The Committee laid down the procedure in considerable detail in the Rules of Procedure, a procedure which is more far-reaching than that of the other treaty bodies. For the organization of the procedure, the Committee more or less based itself on the ideas outlined by the Human Rights Committee. Unfortunately, it lacked a structural follow-up. The small number of complaints in which it was eventually concluded that a State Party had violated the Convention may be partly to blame for that.

The fact that there was only a small number of complaints about having been subjected to torture or other cruel, inhuman or degrading treatment or punishment is remarkable. Action in such cases should be spearheading the Committee's programme. The possible reason for the small number of individual complaints is that few States Parties which commit torture have recognized the Committee's competence to receive individual complaints. What is more worrying, however, is that an individual complaint about having been subjected to torture apparently does not easily reach the Committee. There are several reasons for this. The Committee against Torture will probably not be able, at least not for a while, to emulate the Human Rights Committee which has a similar mandate in this area. The individual complainant may lodge a complaint with the Committee for Human Rights about torture as well as a complaint about violations of related rights and other rights under the ICCPR, so that complaints lodged with the Human Rights Committee have a better success rate than complaints lodged with the Committee against Torture. The Convention against Torture is, after all, more limited in scope. In practice, complaints about torture or other cruel treatment are usually not lodged in isolation, but in most cases the complaints are about torture or other cruel treatment *in addition to* violations of other rights laid down in the ICCPR. Furthermore, the Human Rights Committee has procedures in place and has developed case law which are more far-reaching than those of the Committee against Torture. All in all, these are the reasons why in particular the individual complaint procedure may provide an individual complainant less opportunities than are afforded by the individual complaints procedure of the Optional Protocol to the ICCPR.

Yet another reason for the small number of individual complaints is the subject matter of the Convention against Torture. It is no small matter to complain about torture. Victims must first exhaust domestic remedies before they may address themselves to the Committee against Torture. Torture victims, however, are in a very vulnerable position. They run risks when they lodge a complaint with the authorities.

Under these circumstances, the Committee ought to specifically examine whether the requirement of having to exhaust domestic remedies is justified where a State Party claims that this requirement has not been met. Alternatively, the Committee could consider whether those domestic remedies which constitute a risk to the complainant, are effective remedies, so that the exhaustion requirement is sooner satisfied. It stands to reason that not all complaints are automatically declared admissible, but the dangers which may arise when a person lodges a complaint in his own state should be taken into account. In this connection, it is to be recommended that the Committee against Torture grant non-govern-

mental organizations the opportunity to lodge a complaint on behalf of the victim, in exceptional cases perhaps even without the victim's consent. Without these measures, it cannot be expected that in individual complaints procedures a large number of cases originating from States Parties of countries where torture is practised, will be heard.

The Committee against Torture has accommodated individual complainants where proof of torture or the threat of torture was concerned. Torture, and certainly the threat of torture, is very difficult to prove. The Committee devised an elegant solution by not requiring hard evidence of the actual torture and the threat of torture. An evenly balanced division of the burden of proof was considered reasonable. For torture actually suffered, the complainant needs to submit initial proof, and the State Party must subsequently prove that it investigated the complaint promptly, seriously and impartially, as prescribed by articles 12 and 13 of the Convention against Torture.

In view of the subject matter of the Convention and the problems noted which individuals may have in lodging a complaint, an option would be the states complaints procedure. States Parties could lodge a complaint against other States Parties which fail to comply with the obligations under the Convention. Such a procedure has a number of flaws, however. It does not end with a clear decision on the matter by the Committee. Moreover, the right of complaint for states has remained a dead letter in practice, as it has under other Conventions recognizing the right of complaint for states. States are reserved in the use of this procedure against other states, because institution of such a procedure would be regarded as an unfriendly act. This is why the Committee against Torture was unable to play a role of any kind under this procedure, as was the case with other treaty bodies.

All in all, complaints procedures do not contribute any clear added benefit, nor do the other monitoring procedures of the Convention against Torture. The most important reason for this is that the Human Rights Committee employs a similar procedure in the same matters as that laid down in the Convention against Torture. The substance of the Convention and the role of the Committee against Torture in developing it is the subject of the subsequent section.

3.3 The Role of the Committee in the Development of the Substantive Treaty Obligations

From the description of the practice in Part III it can be seen that the Committee has played a role in exercising its monitoring power, and in interpreting and developing the substantive treaty obligations. The author examined the matters in the Convention which could be improved, especially in comparison with other conventions and the practice of other treaty bodies. If we look at the practice of the Committee against Torture, it is striking that the Committee has not been afraid of stretching its mandate in certain respects. It is also worth noting that the majority of treaty provisions, as well as their interpretation by the Committee, did not extend beyond and sometimes do not even extend as far as the case law of the Human Rights Committee.

3.3.1 *Definition of Torture*

The Convention against Torture makes it possible to urge States Parties to adopt into their national legislation the definition of torture laid down in the Convention. The inclusion of a clear definition of torture in national legislation has facilitated implementation, communication and monitoring considerably; this is an advantage over other conventions which could be used more fully. Unfortunately, it took until 1994 for the Committee to consistently urge States Parties to adopt the treaty definition into their national legislations.

The treaty definition, however, has its drawbacks, due perhaps to being so detailed. All the elements of the definition must be satisfied in order for torture to have been committed within the meaning of the Convention. This has allowed the Committee less room to manoeuvre than those bodies which have not had to act on the basis of such a detailed definition, such as the Human Rights Committee, the Special Rapporteur and the European Committee against Torture. Furthermore, such a detailed definition leaves less room for developing its mandate.

That the Committee has been hindered by the large amount of detail in the treaty definition is also evidenced in practice where the exclusion of lawful sanctions from the definition of torture was concerned. It is worrying that cruel sanctions, in the guise of lawful sanctions, in particular corporal punishment, have not been expressly excluded under the Convention. In the ICCPR, there is no such exception for cruel lawful sanctions, so that the Human Rights Committee is not faced with a tricky dilemma. In Chapter 8, it is argued that also under the Convention against Torture there is no room for such cruel punishments as corporal punishment. Be this as it may, the Committee against Torture kept well away from lawful sanctions in the beginning. After a wavering stance, the Committee only in May 1997, almost ten years after it started its work, rejected certain forms of corporal punishment which had been presented as lawful sanctions. The Committee, however, has not yet expressed itself in a more general sense on the substance of lawful sanctions. This probably relates to the fact that the Committee has not yet proceeded to adopt general comments on the subject.

It is poignant that the Committee only in a late stage denounced corporal punishment and for the remainder wavered in practice, since the Human Rights Committee and the Special Rapporteur had denounced all forms of corporal punishment unconditionally before the Committee against Torture even started functioning. Because the Committee's denouncement came so late, the Convention against Torture seems to have offered less protection in this area than the ICCPR, and thus seemed to have undermined even the practice of the Human Rights Committee, as well as that of the Special Rapporteur. It is strange that an organ which has been especially set up against torture, was less outspoken in the beginning on the subject than the Human Rights Committee.

3.3.2 *Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Pursuant to articles 2, 10, 11 and 16 the Committee was able to become involved in a wide area of national practice and the internal law of the States Parties. For instance, in relation to the measures relating to the prevention of torture within the meaning of article 2, par. 1, as well as measures related to other cruel, inhuman or degrading treatment or punishment within the meaning of article 16, par. 1, the Committee deemed the existence of all sorts of procedural guarantees of major importance. The Committee expected that persons who had been detained by the authorities were treated in conformity with the provisions of the ICCPR and the Standard Minimum Rules. The Committee also urged that measures be taken to ensure the independence and impartiality of the prosecuting and judicial bodies.

The Committee left no doubt about article 2, par., 2: torture cannot be justified under any circumstances. It also underscored article 2, par. 3: in no circumstance may an order for torture exempt a person from criminal liability. article 2, par. 3 does leave open the possibility that an order to apply torture may be a mitigating factor justifying a lesser sentence. The Committee has not made clear in which circumstances this is so.

In the reporting procedure, the Committee regularly indicated the situations and cases in which article 16 applies. Individual members of the Committee paid attention to the death penalty, but the Committee as a whole did not come out with clear statements on the question of whether imposing the death sentence is a contravention of the Convention. As among the members of the Human Rights Committee, the general feeling among the members of the Committee against Torture is that in certain circumstances the death penalty is not contrary to international law. The circumstances and time of its execution could, in the eyes of the members of the Committee, indeed constitute cruel, inhuman or degrading treatment or punishment.

The Committee based its interpretation of this provision in general on the interpretation of article 7 ICCPR by the Human Rights Committee. The Human Rights Committee, however, did not need to distinguish between the prohibition against torture and that against other cruel treatments because both prohibitions were referred to in a single breath in article 7 ICCPR. This renders the Committee on Human Rights more flexible. It is again remarkable that the latter treaty body has already provided most of the measures here discussed, and has developed a body of case law which may serve as a source for the Committee against Torture.

3.3.3 *Non-refoulement with respect to the Danger of Torture*

Of importance are decisions of the Committee concerning article 3. Due to the large number of individual complaints submitted to it, the Committee was in a position to interpret the meaning of the prohibition of *refoulement* where the danger of torture is present. Following the influx of complaints, the Committee summarized its case law concerning this provision and issued its first general comment. It developed and presented

useful criteria for assessing whether substantial grounds are present to believe that a person is in danger of being subjected to torture if he or she were to be returned or extradited to a third state. These criteria are in line with the practice of the Human Rights Committee on *refoulement*.

The Committee against Torture took the safety of the individual complainant as its starting-point. Because it is very difficult to prove that a person is in danger of being tortured, the Committee did not require conclusive evidence. Rather, it sought a combination of factors to indicate substantial grounds that a person faced a danger of torture. The person concerned was given the benefit of the doubt.

It should be pointed out that the Human Rights Committee can and does take a broader approach than that of the Committee against Torture: it can determine the presence of substantial grounds for the threat of torture and cruel, inhuman degrading treatment or punishment, as well as the presence of an impending violation of other individual rights under the ICCPR. In general, individuals under threat of *refoulement* fear not *only* torture, but violation of other human rights as well. The Committee against Torture on the other hand, is authorized to evaluate the threat of torture only. Presumably, the Human Rights Committee could equally have dealt with the individual complaints which were submitted to the Committee against Torture.

Moreover, the Convention against Torture is concerned with torture by public authorities only, while torture under the ICCPR is not restricted to state torture. The Human Rights Committee can evaluate the danger of torture originating from non-governmental actors as well. On the basis of the practice of the Committee against Torture, it is clear that a person submitting its complaint to the Committee will not be protected from *refoulement* to a state if he is in danger of torture by non-governmental actors. For these reasons, an individual with this type of complaint would be well-advised to submit his complaint to the Human Rights Committee instead of the Committee against Torture.

The Committee affirmed the absolute character of the prohibition against *refoulement* in the reporting procedure. The Committee found that article 3 also imposes positive obligations, such as providing immigration officials with instructions regarding the prohibition against return. The Committee brought its practice somewhat nearer to the practice of the Human Rights Committee. It considered that the prospect of inhuman circumstances involved in carrying out the death penalty constituted a substantial ground for not returning a person to a third state.

3.3.4 Criminal Enforcement

Chapter 11 concerns criminal *enforcement*, which is a matter of pre-eminent concern of the Committee. Although the Committee is neither a prosecutor's office nor a criminal court, it should as a matter of course be concerned with the actions of public prosecutors and criminal judges.

The Convention against Torture may be regarded as an important landmark in the general recognition of individual criminal responsibility for international crimes. If the Committee can take the lead anywhere, it is in the area of the prosecution of the crime of torture, including universal jurisdiction over the crime. The provisions of the Convention, particularly the provisions creating universal jurisdiction, provide the Committee an advantage as compared to other supervisory bodies.

Although the provisions are not watertight, and their implementation is often blocked by political obstacles, they do contain the potential for international criminal enforcement of the prohibition against torture. Unfortunately, the Committee has mostly dealt with universal jurisdiction on an abstract level.

In general, the Committee has urged States Parties to take the prosecution of suspects of torture seriously. However, when specific situations have arisen in which the Committee was called upon to take an unequivocal position (such as in the case of Pinochet in The Netherlands and Avril in Colombia), the Committee failed to do so. This is disappointing, precisely because it is the system of universal jurisdiction which could so contribute to the protection of human rights. The potential contained in these provisions may very well be the reason that the Committee has refrained from stringently supervising the implementation of these provisions in practice.

A possible and promising change occurred, however, at the end of 1998 when Pinochet turned up in the United Kingdom. The Committee, notified of ongoing proceedings in England, urged the United Kingdom to submit the case to its own competent authorities for the purpose of prosecution if it did not intend to extradite Pinochet to Spain. The Committee considered that immunity for the former head-of-state from prosecution in the English criminal jurisdiction did not apply.

The Committee could take inspiration in these matters from the practice of the international criminal tribunals, as well as from the actions of daring public prosecutors and judges in several states. They have begun to put the prosecution of suspects of serious crimes against humanity on a public agenda, employing, among others, the principles of universal jurisdiction. To date, however, the Committee against Torture has been reluctant to take full advantage of the provisions of the Convention, and can hardly outbid the activities of the Human Rights Committee.

Perhaps the Committee could adopt a more vigorous approach, possibly formulating a general comment in which it could confirm that merely establishing universal jurisdiction is not enough. The Committee should urge States Parties to bring any suspect of the crime of torture to justice, whenever the suspect turns up in a territory under their jurisdiction. The Committee should advise States to cooperate with each other, to exchange information, and to coordinate actions and investigations with a view to prosecuting and convicting offenders. For this purpose States Parties must actually check if persons reporting to their immigration service or turning up in their territory are suspected of torture.

3.3.5 *Victims of Torture*

Chapter 12 concerns the practice of the Committee against Torture with respect to the position of the victims of torture. More specifically, this chapter treats the right to submit a complaint concerning alleged torture which should lead to a prompt and impartial investigation by the authorities (article 13), the right to redress (article 14), and the inadmissibility in any proceedings of a statement made as a result of torture (article 15). The practice of the Committee with respect to these provisions has been consistent with the practice of the Human Rights Committee, which means that the Committee has given a rather broad interpretation of the treaty provisions. It considered, for example, that the obligations of articles 14 and 15, which only mention torture, also apply to cases of cruel, inhuman or degrading treatment or punishment. Thus, the Committee freed itself from some of the restrictions of the Convention.

The Committee received three individual complaints related to articles 13 and 14 during one of its early sessions. In its decision on the (joined) complaints, the Committee confirmed, in spite of the inadmissibility of the complaint, the importance of an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In addition, in its consideration of state reports, the Committee opined that where the responsibility of an offender cannot be established, the government itself should take responsibility for providing redress and compensation to victims of torture.

The Committee has not yet stated an opinion on the admissibility of an individual complaint about the refusal or reluctance of a State to *prosecute* an alleged offender of torture, in violation of the right to redress of article 14. Such a complaint has not yet been submitted to the Committee. Perhaps a non-governmental organization will try a test-case on this question in the future.

The Human Rights Committee, in comparison, appears to perform a role similar to the Committee against Torture with regard to redress, the right to submit complaints about torture, the right to a prompt and impartial investigation, and the inadmissibility in any proceedings of statements made under torture. The role of the Human Rights Committee, however, has been more pronounced. It has adopted several general comments in this area, as well as a large number of relevant views on effective remedy and impunity. It is remarkable that since the first three individual complaints relating to article 14 were submitted to the Committee against Torture, no additional complaints on this article have since been decided by it, while similar complaints have continued to reach the Human Rights Committee.

4 Final Considerations

4.1 The Contribution of the Committee against Torture

Although treaty bodies are in principle excellently suited to supervise the implementation of human rights by states, in practice they are reluctant to do so. This is partly due to the fact that states do not fully accept this principle and generally prefer to supervise their

own actions themselves. Because of disagreement among states in the drafting phase of the Convention about the range of international supervision, a number of lacunae resulted. Examples are the 'lawful sanctions,' and the distinction in the obligations with respect to the prohibition of torture on the one hand, and with respect to the prohibition of other cruel, inhuman or degrading treatment or punishment on the other hand. Also of note is the lack of a clear competence to adopt general comments, while at the time of the drafting of the Convention, several treaty bodies had already proceeded to adopt general comments of their own accord, without the existence of a clear competence to adopt such general comments. Notwithstanding these lacunae, the Committee against Torture could get to work with the positive points of the Convention.

In appraising the Committee without comparing it to other treaty bodies, it may be observed that this treaty body has acquitted itself of its task fairly well: the Convention has not turned out to be a dead letter. Initially the Committee had to clarify the issues which the drafters of the Convention had not been able to resolve. It introduced some, but not all, necessary improvements in its procedures as well. The Committee largely pursued the same courses of action in developing the supervisory procedures and case law as the other treaty bodies. In any case, the decisions of the Human Rights Committee and the Committee against Torture are more or less in line with each other.

Assessing the *contribution* of the Committee against Torture, however, it may be concluded that the mandate of the Committee is largely covered in practice, both substantively and procedurally, by the Human Rights Committee. This treaty body has developed a practice on most issues of the Convention against Torture (except on universal jurisdiction). In many respects the Human Rights Committee takes an even broader view than the Convention against Torture itself, as indicated by the large number and purport of the general comments and decisions adopted by the Human Rights Committee. Moreover, the Human Rights Committee appears to be better equipped to deal with individual complaints related to a violation of the prohibition of torture and of other provisions of the ICCPR combined. The problems of corporal punishment and lawful sanctions illustrate that the Human Rights Committee was ahead of the Committee against Torture, while at the same time the latter did little to distinguish itself in those areas where it does have an advantage: the inquiry procedure and universal jurisdiction.

The reason the Human Rights Committee has had the lead is obvious. It has been in the position to gain more experience: it has been active longer, it is in session more frequently and for more weeks, and there are considerably more members in the Human Rights Committee. It has the additional advantage that more states are party to the ICCPR than to the Convention against Torture. Finally, the Human Rights Committee is less restrained by its constituting treaty than the Committee against Torture.

It will not be an easy task for the Committee against Torture to catch up with other supervisory bodies for the very reason that its mandate has been worked out in such detail. The drafters of the Convention set the boundaries of the Committee's mandate at the outset. Although benevolent States Parties seriously implementing the Convention may benefit from the large amount of detail in the provisions, the detail may hinder the Committee in developing procedural and substantive provisions. While it is true that the

Committee has been able to develop its mandate somewhat, the Committee would probably have had more opportunities for development with a less detailed mandate.

This study is an examination of the role of the Committee against Torture, but, *en passant*, it demonstrates the success of the Human Rights Committee. This Committee has been procedurally as well as substantively not only a serious 'rival' of the Committee against Torture, but also of the drafters of the Convention themselves. Because of its comprehensive mandate, and little detail in the provisions of the ICCPR, the Human Rights Committee has proven to be more flexible than the Committee against Torture and the drafters of the Convention. This finding is not only a matter of some concern for the Committee against Torture, it is also quite promising for independent international supervisory bodies like the Human Rights Committee. The issues the drafters laboriously negotiated had already been developed, previously and better, by the Human Rights Committee. This history demonstrates that one can have confidence in an independent treaty body like the Human Rights Committee to develop human rights and international supervision.

Of course, states were right to invest time and energy (and a budget) in making the prohibition of torture more effective. It would have been preferable, however, to invest the time and energy in making an existing authoritative treaty body more effective. Instead of investing in the Committee against Torture, states could have invested in expanding the mandate of the Human Rights Committee and in shoring up its supporting UN-Secretariat.

For these reasons, one may argue that only those provisions of the Convention which amount to a true *addition* to the practice under the ICCPR, and which would probably not be developed by the Human Rights Committee, should have been added to the ICCPR, in a protocol. An example would be the provisions on universal jurisdiction. The matters which had already been dealt with, or would most likely be dealt with by the Human Rights Committee, should not have been made the subject of negotiations among states. This would include nearly all of the other provisions of the Convention against Torture. Supervision should have been entrusted to the Human Rights Committee. Consequently, the membership of the Human Rights Committee should have been increased. The authority of the human rights edifice *as a whole* would benefit from such a course of action.

In the future, states should be aware of the consequences of establishing a new treaty body with a competence which is largely covered by other bodies. In short, it is better to invest in and perfect existing supervisory bodies. States should refrain from establishing a new supervisory body with a similar mandate in the same domain. Further developments, including the eventual establishment of subbodies, should be left as much as possible to the existing supervisory body itself. It has been demonstrated that a treaty body is very capable of expanding on its mandate. In the future therefore, limited resources should be put into the reinforcement and expansion of existing supervisory bodies.

Apart from a strategic argument, an argument of principle can be made as well. Legal authority and political power should remain separate. Political power must be prevented from interfering with legal authority. It cannot be overemphasized that it is of vital importance that an independent international body - legal authority - be in a position to assess

how far states - political power - implement human rights and act in accordance with the rule of law. This competence to assess, as well as the development of this competence, should be left to institutions which function independently of states. A state violating human rights should not be in a position to have the last word on its human rights record, whereas international supervisory bodies are not in a position to violate human rights.

4.2 What Remains for the Committee?

What has developed separately should be brought together. There are ways to create a stronger and more united human rights team. Structural coordination with the Human Rights Committee, and possibly with the Special Rapporteur against Torture and the UN-country rapporteurs, is highly desirable. A more coordinated approach would avoid inconsistencies and overlap. Human rights bodies could in addition make the most of their positive distinguishing features through concerted action.

Cooperation and coordination between the various supervisory bodies is critical. The political bodies and the independent legal bodies should benefit from and complement one another. By working in concert they can create and build pressure against non-cooperating states. Political bodies could make use of the independent and impartial - and therefore authoritative - opinions and decisions rendered by non-political bodies. The facts ascertained by an independent treaty body and the opinions drawn upon them, could, for example, be put on the agenda of the Commission on Human Rights, which may be able to wield more political power. In addition, the various bodies should dedicate themselves to the development of those competences which are not covered by other bodies.

Thus, the Committee against Torture could take spearhead action on the issue of the prosecution of torture, including the exercise of universal criminal jurisdiction. Moreover, the preference expressed in Convention article 17(2), namely, the nomination of persons as candidates for the Committee against Torture who are also members of the Human Rights Committee, should become the rule. Treaty bodies could begin coordinating their activities within the framework of the regular meetings of the chairpersons of treaty bodies. Perhaps, in the long run, the Committee against Torture could constitute a more organic part of the Human Rights Committee. Both treaty bodies could, for example, hold joint sessions. In the future both treaty bodies, and maybe all of them, could fuse into one. The expertise of the various treaty bodies could consequently find a place in subcommittees of a new human rights committee.

In addition, this united supervisory body could subdivide its activities in three functional branches: a subcommittee for the reporting procedure under all human rights instruments, a subcommittee for the inquiry procedure into practices of systematic violations of human rights, and a subcommittee for the consideration of individual complaints concerning violations of provisions of human rights instruments. An important step in this direction would be for the Committee against Torture, as well as the meeting of chairpersons of the treaty bodies, to make declarations in favour of such an approach.

Moreover, the Committee against Torture could adopt a primarily preventive approach, and urge States Parties to bring national legislation and practice in line with the Convention. Within the framework of the reporting procedure, the Committee is in a position to make observations on the progress made. It is true that a negative observation is a serious matter for a State Party, but at the same time the Committee offers the State an opportunity to clean up its record, and to report on its improved situation. However, where there is no evidence of improvement, the Committee can confirm that and transfer the case to other bodies better equipped to induce these states to cooperate. The Special Rapporteur against Torture may make a confidential inquiry, for example.

The Special Rapporteur (and other rapporteurs) should in the first place deal only with those states which for whatever reason, fall outside the system of the Convention against Torture (as well as other human rights instruments). Rapporteurs should refrain from dealing with states which cooperate with supervisory bodies. The Special Rapporteur against Torture should only address specific groups of non-cooperating states: states which are not party to the Convention against Torture, possibly States Parties which have not recognized the competence of the Committee to make an inquiry, States Parties which have been unable to improve their human rights record, and, finally, States Parties which have failed to report to the Committee for a considerable length of time. A state which does not submit to international supervision voluntarily, and does not wish to cooperate with a supervisory body, may expect special treatment, such as a visit by the Special Rapporteur to its territory, or the appointment of a country rapporteur. It is only since 1998 that the Committee against Torture and the Special Rapporteur have begun to coordinate their activities.

States which systematically violate human rights should not get away by bluntly refusing to cooperate. Instead, they must fear a condemnation by the Commission on Human Rights, a condemnation based on an inquiry report of a rapporteur. Additional pressure can be brought to bear as well. The UN General Assembly, and even the Security Council can call these states to account. Also, these issues can be communicated to other international organizations capable of exerting political pressure, such as the International Monetary Fund and the Worldbank. In order to prevent the Committee from stepping into a political mine-field, these contacts should be restricted to sending all its - and thus not specific - conclusions and recommendations to relevant organizations.

The UN High Commissioner for Human Rights and its Secretariat play an important role in forging greater unity among the various bodies, and in coordinating the potentially overlapping activities of all of these UN-organs. It is generally known that the UN-Secretariat is a compartmentalized, bureaucratic entity with little budget and capacity. Institutional reforms initiated by the High Commissioner for Human Rights may also bring more openness and less compartmentalization to the practice of supervisory bodies. However, the Secretariat remains understaffed, and it must therefore be strongly recommended that its capacity be expanded.

Effective supervision of human rights by independent international bodies is of vital importance. The benefits of supervision by international bodies outweigh the costs by far. It is true that states are primarily responsible for the implementation of human rights.

However, since a state can deteriorate and violate human rights on a large scale, effective means must be made available to bring about the necessary corrections in a timely manner. One must therefore keep in mind that the state is not an end in itself, but only one of the possible means to guarantee the observance of human rights. A state justifies its right to exist by safeguarding and enhancing the human rights of its citizens. Only by submitting to effective supervision over its activities in this field, can a state demonstrate that it is ready to be governed by the rule of law. The state naturally bears the burden of proof in these matters.