

Part One

NGO Advocacy and the Development of Human Rights Norms

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1

Outlawing Torture: The Story of Amnesty International's Efforts to Shape the U.N. Convention against Torture

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Introduction

Several years after its formation in 1961,¹ Amnesty International (“Amnesty”) began its official push to transform torture into an act as legally and morally unacceptable and “as unthinkable as slavery.”² Central to achieving this goal was the creation of an international human rights instrument that would unequivocally and plainly codify the prohibition on torture. After devoting the best part of a decade of work to this groundbreaking treaty, the instrument—the United Nations

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1. Amnesty International was founded by British lawyer Peter Benenson after he learned that two Portuguese students had been imprisoned for toasting a drink to freedom. In May 1961, the *Observer* provided a platform for the “Appeal for Amnesty 1961” campaign when it published Benenson’s article, “The Forgotten Prisoners.” In 1962, Amnesty was established as a permanent organization and its headquarters, the International Secretariat, was set up in London in 1963. Amnesty is based on worldwide voluntary membership and consists of “. . . sections, structures, international networks, affiliated groups and international members,” with an International Executive Committee (IEC) responsible for its “leadership and stewardship” (see Articles 5 and 7 of Amnesty’s Statute). See generally Amnesty International, *The History of Amnesty International*, available at <http://www.amnesty.org/en/who-we-are/history>; Statute of Amnesty International, as amended by the 28th International Council, meeting in Morelos, Mexico, Aug. 11–17, 2007; Peter Benenson, *The Forgotten Prisoners*, *OBSERVER*, May 28, 1961; STEPHEN HOPGOOD, *KEEPERS OF THE FLAME: UNDERSTANDING AMNESTY INTERNATIONAL* 55 (2006).

2. Amnesty Int’l, *Conference for the Abolition of Torture, Paris, Dec. 10–11, 1973, Final Report*, 10 (1974) [hereinafter *Paris Conference Final Report*] (citing Seán MacBride, Chairman of Amnesty’s IEC). See also ANN MARIE CLARK, *DIPLOMACY OF CONSCIENCE, AMNESTY INTERNATIONAL AND CHANGING HUMAN RIGHTS NORMS* 39 (2001).

(“U.N.”) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention” or “Torture Convention”)—opened for signature in December 1984.

The story of Amnesty’s work on the Torture Convention demonstrates the power of moral vision when backed by thousands of individuals around the world who organize themselves as members of a single movement. The story also provides key insights into the organization itself and the role of human rights non-governmental organizations (“NGOs”) more generally in developing international norms at the U.N. At the time of the drafting of the Torture Convention, Amnesty had been at the forefront of revealing torture as a worldwide practice—from the increased use of torture in Latin America to the torture following the military coup in Greece in 1967, to the torture and death of South African black consciousness leader Steve Biko.³ With the drafting of the Convention, Amnesty could extend its traditional work on behalf of individual prisoners to a push for international norms through a U.N. convention that would address the very violations that such prisoners suffered.

Recently, some States have sought to undermine the full protections of the torture prohibition in the context of the “War on Terror.” In many ways, these attempts have been nuanced. They have not challenged the fact that international law prohibits torture and cruel, inhuman or degrading (“CID”) treatment or punishment. Instead, they have sought to narrowly construe what the prohibition encompasses, relying on restrictive interpretation tools to read the Torture Convention as prohibiting less than what it intends.⁴ The story of Amnesty’s work on the Torture Convention provides important substantive and tactical insights to combat such efforts and to ensure that the full scope of the torture prohibition is observed.

3. See, e.g., AMNESTY INT’L, ANNUAL REPORT 1975–76 49 (1976); J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 13 (1988); CLARK, *supra* note 2, at 39–43; IAIN GUEST, BEHIND THE DISAPPEARANCES: ARGENTINA’S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS 76–86 (1990); MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 104 (1998); WILLIAM KOREY, NGOs AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, “A Curious Grapevine” 172 (1998); NIGEL RODLEY, TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 21, 24–26, 41 (2d ed. 1999).

4. See, e.g., U.S., *List of issues to be considered during the examination of the second periodic report of the United States of America: Response of the United States of America* 1–7 (2006) [hereinafter *Response to Comm. Against Torture List of Issues*]; Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1. See further Karen J. Greenberg, THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (2005); Manfred Nowak, *What Practices Constitute Torture? U.S. and U.N. Standards*, 28 HUM. RTS. Q. 809 (2006); Nigel Rodley, *The Prohibition of Torture; Absolute Means Absolute*, 34 DENV. J. INT’L L. & POL’Y 145 (2006).

Amnesty's Early Involvement on the Torture Issue

Amnesty's push against torture officially started several years after its formation when it determined that it would address all uses of torture and not just torture in situations of political imprisonment. The organization recognized the need for an international instrument that would reflect this conviction as a matter of treaty law. At Amnesty's request, in August 1971, a U.K. barrister prepared a Draft Convention on Torture and the Treatment of Prisoners for Amnesty's International Executive Committee.⁵ When Amnesty launched its renowned Campaign for the Abolition of Torture on December 10, 1972, its dual aims were to increase public awareness of torture and to promote international machinery to proscribe the practice.⁶ Indeed, this Campaign "stimulated" some governments to bring the question of torture before the U.N. General Assembly.⁷ On November 2, 1973 the General Assembly adopted Resolution 3059 (XXVIII), which "[r]ejects any form of torture and other cruel, inhuman or degrading treatment."

A little over one month later, Amnesty published its first comprehensive *Report on Torture*.⁸ The report surveys practices in more than sixty-five countries and assesses the arguments being advanced both for and against the use of torture. These arguments have not changed much over time. For example, the *Report on Torture* identifies the ticking time bomb scenario as "the most effective presentation of the argument justifying torture today"⁹ and describes it in terms very similar to those used recently in connection with the "War on Terror:"¹⁰

The classic case is the French general in Algiers who greeted visiting dignitaries from the metropolis with: 'Gentlemen, we have in our hands a man who has planted a bomb somewhere out in that city. It

5. See Amnesty Int'l, *Draft Convention on Torture and the Treatment of Prisoners* (Aug. 1971) (on file with Amnesty International). This draft contained provisions that, *inter alia*, outlined the status of torture as a crime under international law and envisaged enforcement mechanisms consisting of an International Commission on Torture and the Treatment of Prisoners, as well as an International Court to try crimes under international law in breach of the Convention.

6. See CLARK, *supra* note 2, at 18, 43–55; HOPGOOD, *supra* note 1, at 81–82; KOREY, *supra* note 3, at 171.

7. See BURGERS & DANIELIUS, *supra* note 3, at 13.

8. AMNESTY INT'L, *REPORT ON TORTURE* (Am. ed. 1975).

9. *Id.* at 23.

10. As demonstrated more than thirty years ago by Amnesty, it has again been incumbent on NGOs to resist this line of argument. See, e.g., The Assoc'n for the Prevention of Torture, *Defusing the Ticking Bomb Scenario: Why we must say No to torture, always* (2007), available at <http://www.ap.t.ch/content/view/109/lang/en/>.

will go off within four hours. Would you not use every means to save the lives of innocent people?’¹¹

The report had a dramatic impact. It was covered by the press even before its release when *Time* magazine published an article in July 1973 that announced Amnesty’s upcoming “worldwide survey” of torture practices.¹² Amnesty also had plans to follow-up the report’s release with a large Conference for the Abolition of Torture to be held one week later in Paris. Amnesty’s Secretary General Martin Ennals gave the job of running the conference to Eric Abraham, a nineteen-year-old refugee from South Africa, who had been active in the National Union of South African Students (“NUSAS”).

This was a huge task, made more difficult when one week before the Conference, the U.N. Educational, Scientific and Cultural Organization (“UNESCO”) withdrew its promise to host. UNESCO argued that Amnesty’s *Report on Torture* was part of the conference and thus “breached the UNESCO contract rule that its member states may not be criticized.”¹³ As soon as Amnesty heard of the decision, Ennals, Amnesty’s Legal Officer, Nigel Rodley (one of the co-authors of this Chapter) and the Chair of Amnesty’s French section, Marie-José Protais, met with UNESCO’s top leadership—on a Saturday—to discuss how the issue could be resolved. UNESCO’s Director-General was in Morocco on mission, so the Amnesty delegation promised UNESCO’s Deputy Director-General that it would keep the *Report on Torture* out of the conference. However, despite a sympathetic hearing, UNESCO rejected Amnesty’s offer by the end of the same weekend, confirming Amnesty’s suspicion that its decision was due to pressure from governments and not actually because of a problem with the contract. In the end a balance was struck, with Amnesty holding the conference at the new Tour Olivier de Serres Center and UNESCO providing translation services and equipment. A few months later Amnesty’s request to be granted formal “consultative relations” with UNESCO was agreed.

With this crisis averted, on December 10, 1973, one week after the *Report on Torture*’s release, 300 delegates and participants attended the conference in Paris. The Conference coincided with the twenty-fifth anniversary of the Universal Declaration of Human Rights and was convened to shape the second phase of Amnesty’s Campaign.¹⁴ In particular, Amnesty had to make a decision about whether and how to continue leading the campaign to end torture. The organization was

11. AMNESTY INT’L, *supra* note 8, at 23–24.

12. *Amnesty for the Defense*, TIME, July 9, 1973, available at <http://www.time.com/time/magazine/article/0,9171,907502,00.html>.

13. Amnesty Int’l, *Paris Conference Final Report*, *supra* note 2, at 10.

14. See Amnesty Int’l, *Campaign for the Abolition of Torture, Strategy for 1973*, Act. 42/IEC 73, Agenda Item 9(c) (1973) (on file with Amnesty International).

divided. On the one hand, the *Report on Torture* and the Campaign's first phase had had an enormous impact. However, by late 1973, the International Secretariat was urging Amnesty's International Executive Committee to shift responsibility for the torture issue to another NGO or NGOs. It argued that the torture work was not restricted to political imprisonment, which was the main focus of Amnesty's mandate, and that torture had become such a big issue that it might dominate Amnesty's work. International Executive Committee member Eric Baker, one of Amnesty's founders, strongly resisted the International Secretariat's attempts to hand off the torture issue. His efforts were successful. From both the Paris conference and the International Executive Committee meeting held in Paris at around the same time, there was a "predominant feeling" that Amnesty should continue to lead the Campaign.¹⁵ With this new mandate, Amnesty established its Campaign Department "[w]ithin 24 hours of the end of the Conference..."¹⁶

Amnesty in Transition

Amnesty's evolving approach to the torture issue exemplified its transition during the 1970s. Established in response to a single instance of human rights violation, the organization had developed a case-based methodology by which it would "adopt" cases of prisoners of conscience (those imprisoned for expressing their beliefs without advocating violence) on whose behalf the organization and its national sections would work. It now faced a transition from being a case-driven lobbying group to becoming a norm-oriented *human rights* organization that looked beyond situations of political imprisonment. This transformation necessarily meant increased attention to international law and universal human rights *principles*.

The genius of Amnesty's approach lay in how it would integrate this newer focus on international institutions and principles with the work of its national sections on behalf of prisoners of conscience worldwide. The possibilities were endless and exciting. Amnesty's increased attention to universal human rights principles assisted national sections' case-based activism because it showed that Amnesty was independent and above national politics.¹⁷ At the same time, Amnesty could use its campaign work to authoritatively contrast its worldwide factual findings on torture and disappearances with the international human rights principles that existed in documents such as the Universal Declaration of Human Rights.¹⁸ This campaigning built consensus in the minds of the "public

15. See Amnesty Int'l, *Post Paris CAT*, Act. 04/IEC 73, Agenda Item 12 (1973) (on file with Amnesty International).

16. See Amnesty Int'l, *Paris Conference Final Report*, *supra* note 2, at 17.

17. See GUEST, *supra* note 3, at 78; KECK & SIKKINK, *supra* note 3, at 88.

18. See CLARK, *supra* note 2, at 37.

and [among] elites” that new norms were necessary.¹⁹ Later, as these new norms took shape, Amnesty would utilize its national sections to mobilize their governments on contentious drafting issues, such as whether there should be universal jurisdiction for torture offenses.²⁰

Amnesty knew that to maximize its work at the international level, it would need additional expertise and a more planned and professionalized approach toward the U.N.²¹ Amnesty had gained U.N. Economic and Social Council (“ECOSOC”) consultative status—the official means by which the NGOs can provide input to U.N. bodies—quite quickly (about three years after Amnesty’s formation).²² However, Amnesty had no permanent staff representation in either Geneva or New York and relied primarily on its volunteers for its U.N. work.²³ This situation changed when in early 1973, before adding the Campaign Department, Amnesty added a Legal Officer, Nigel Rodley.²⁴ Within Amnesty this appointment was perceived as recognition of its increased attention to international law to safeguard the human rights of prisoners of conscience. Accordingly, direct responsibility for work with the U.N. shifted from the organization’s Secretary General to Rodley.²⁵ As an experienced international lawyer, Rodley was well placed to lead Amnesty’s new focus to develop international norms at the U.N.²⁶

The Lead-Up to the Drafting of the Torture Convention

This new focus yielded a number of results over the next few years. For example, during 1974 and 1975, Amnesty played a critical role in the formulation of professional codes of conduct for police, military, prison and medical personnel prohibiting torture.²⁷ Amnesty also demonstrated its ability to make both substantive and strategic contributions on the

19. *Id.*

20. See, e.g., Virginia Leary, *A New Role for Non-Governmental Organizations in Human Rights: A Case Study of Non-Governmental Participation in the Development of International Norms on Torture*, in U.N. LAW/FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW 197, 206 (Antonio Cassese ed. 1979).

21. See, e.g., Amnesty Int’l, *Minutes of the International Organizations Sub-Committee* (May 31, 1978) (on file with Amnesty International).

22. See U.N. Econ. & Soc. Council [ECOSOC], *List of non-governmental organizations in consultative status with the Economic and Social Council as at 31 August 2006*, 10, U.N. Doc. E/2006/INF/4 (Oct. 26, 2006).

23. See CLARK, *supra* note 2, at 7.

24. The title switched from Legal Officer to Legal Adviser around 1975.

25. See Amnesty Int’l, Int’l Executive Comm. Int’l Orgs. SubComm., *Strategy, Planning and Structure of AI work at the UN*, Agenda Item 11(a) (June 1978) (on file with Amnesty International).

26. See Leary, *supra* note 20, at 206.

27. See Amnesty Int’l, *Paris Conference Final Report*, *supra* note 2, at 14, 17.

question of torture in its work on the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Declaration”). The Declaration was adopted at the Fifth U.N. Congress on the Prevention of Crime and the Treatment of Offenders in the first half of September 1975. Amnesty’s role included submitting a sixteen-page document containing recommendations; circulating that document, accompanied by a personal message, to fifty governments in advance of the Congress; mobilizing national sections to press their governments to support the recommendations; and sponsoring two events at the Congress on the torture issue.²⁸

While Amnesty “had a virtual monopoly, as a non-governmental organization authority speaking the language of universal human rights,”²⁹ other organizations were also working toward an international instrument prohibiting torture. Amnesty’s approach to these other groups was to work very closely with the Geneva-headquartered International Commission of Jurists (“ICJ”) and participate in larger informal multilateral NGO collaborations as necessary.

ICJ and Amnesty had a close institutional relationship because Seán MacBride, one of Amnesty’s founders, was both Chairman of Amnesty’s International Executive Committee (from 1961 to 1974) and ICJ Secretary-General (from 1963 to 1970). MacBride had also acted as a “liaison and an inside ‘ear’ for Amnesty International in the early days of its U.N. consultative status,” i.e., from 1964 onward.³⁰ By the time the draft torture convention was on the table, Rodley’s main counterpart at the ICJ was MacBride’s successor, Niall MacDermot. MacDermot was occasionally impulsive and a very forceful character, and “[n]o one talked down to MacDermot, and no one ignored him. Diplomats deferred to him and dreaded his rebukes.”³¹ However, these personality traits did not interfere with a relationship between MacDermot and Rodley that was for the most part extremely collaborative and productive.

In addition to this close relationship with the ICJ, Rodley and Amnesty were also active in informal NGO collaborations that were working toward entrenching the legal prohibition of torture. The question of how best to coordinate such action was comprehensively discussed at an International Symposium on Torture held at the Institut

28. See generally AMNESTY INT’L, ANNUAL REPORT 1975–76, *supra* note 3, at 40; Amnesty Int’l, *Report on Geneva Congress* (Oct. 14, 1975) (on file with Amnesty International); Helena Cook, *Amnesty International at the United Nations*, in “THE CONSCIENCE OF THE WORLD”: THE INFLUENCE OF NON-GOVERNMENTAL ORGANISATIONS IN THE U.N. SYSTEM 181, 190 (Peter Willetts ed., 1996); Leary, *supra* note 20, at 202–204.

29. See HOPGOOD, *supra* note 1, at 54.

30. See CLARK, *supra* note 2, at 7.

31. See GUEST, *supra* note 3, at 112.

Henry–Dunant in Geneva on May 5 and 6, 1977. Among the twenty persons who participated was Amnesty’s Dick Oosting, who presented the possibilities for increased coordination and cooperation among NGOs opposing torture.³²

His presentation inspired an informal luncheon meeting approximately two weeks later between representatives of Amnesty, the ICJ, the International Committee of the Red Cross (“ICRC”), the World Council of Churches’ Commission of the Churches on International Affairs (“WCC”), and Michael A.S. Landale of the Australian Mission to the U.N.³³ It was agreed at this meeting that the four NGOs would meet regularly (every four to six weeks), that representation at these meetings would be high level, and that the collaboration would be kept informal (e.g. there would no permanent secretariat).³⁴ The ICRC in particular insisted on the latter requirement, as they would have been unable to participate in a formal collaboration.³⁵ This arrangement also suited Amnesty. Driven by concerns about independence and impartiality, Amnesty also had a general policy of only occasional formal cooperation with other NGOs on substantive issues, especially on country-specific matters.

The group called itself the Informal Liaison Group on Torture and held its first meeting on July 8, 1977 at the Institut Henry Dunant in Geneva.³⁶ From the outset, the meetings focused on the substantive and strategic issues surrounding the three draft proposals for a torture convention³⁷—the Swiss Committee Against Torture’s (“Swiss Committee”) draft Convention concerning the Treatment of Persons Deprived of their Liberty (May 1977), the International Association of Penal Law’s (“IAPL”) Draft Convention for the Prevention and Suppression of Torture,³⁸ and the text being prepared by the Swedish government.

32. See *Symposium on Torture*, 195 INT’L REV. RED CROSS 330, 330–331 (1977).

33. See, e.g., Nigel Rodley, Amnesty Int’l, *Report on Visit to Geneva–19–22 May, 1977* (May 23, 1977) (on file with Amnesty International).

34. *Id.* See also Letter from A–Dominique Micheli, Delegate to Int’l Orgs., Int’l Comm. of the Red Cross, to Martin Ennals, Sec’y Gen., Amnesty Int’l (June 20, 1977) (on file with Amnesty International).

35. See Rodley, *supra* note 33.

36. See Letter from Micheli to Ennals, *supra* note 34; Minutes, Meeting of Informal Liaison Group on July 8, 1977 in Geneva, Switzerland (undated) (on file with Amnesty International).

37. The Group also addressed other relevant standard-setting activities being conducted at the time, such as the draft 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.

38. See U.N. ESCOR, Comm’n on H.R., submitted by Int’l Ass’n of Penal Law, *Draft Convention for the Prevention and Suppression of Torture*, E/CN.4/NGO/213 (1978).

Amnesty provided input on all three texts. However, in August 1977, the organization withdrew its “openly active support” for the draft prepared by the Swiss Committee.³⁹ It made this decision primarily because it “long regarded an international convention through the highest inter-governmental body, the United Nations, allowing the widest participation without compromising on effectiveness, as a necessary and urgent target.”⁴⁰ Jean-Jacques Gautier, the founder of the Swiss Committee, was not well pleased. He had proposed the core idea embodied in the draft—that empowering a commission to conduct regular inspections of States would prevent ill-treatment—and was devoted to the proposal. It fell to MacDermot of the ICJ to manage the situation. He proposed to Gautier that the draft first be promoted outside of the U.N. process. Gautier agreed and he and the ICJ championed his proposal at the European level.

These efforts resulted in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which opened for signature on November 26, 1987, over a decade after Gautier put forward his original plan. That Convention provides for a preventative system to protect detainees from ill-treatment by establishing a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment that undertakes visits to places of detention. The Swiss Committee’s draft was also turned into a proposed optional protocol to the draft torture convention. Costa Rica formally submitted this draft to the U.N. Commission on Human Rights on March 6, 1980 with the request that it be considered after the Convention’s adoption. In 1991, Costa Rica re-submitted the draft, and it eventually formed the basis for the Optional Protocol to the Torture Convention adopted by the U.N. General Assembly in December 2002. Given that the Swiss Committee’s proposal was taken forward in these different ways, Gautier did not try to change Amnesty’s position on the Swiss Committee’s draft. It was also relevant that by June 1978 Amnesty had officially decided not to support any of the specific drafts produced for the Convention.

With Amnesty’s eye firmly on the U.N., one of its and the Informal Liaison Group’s first goals was to try to influence which U.N. body would produce the Torture Convention. The challenge was to dissuade the Swedes, and in particular, then Under-Secretary for Legal and Consular Affairs of the Swedish Ministry of Foreign Affairs, Hans

39. See Letter from Martin Ennals, Sec’y Gen., Amnesty Int’l, to Jean-Jacques Gautier, Founder, Swiss Comm. Against Torture (Aug. 1, 1977) (on file with Amnesty International).

40. See Amnesty Int’l, *AI Position on the Jean-Jacques Gautier Proposal for Use by Swiss Section* (Aug. 24, 1977) (on file with Amnesty International).

Danelius,⁴¹ from asking the General Assembly to task the U.N. Commission on Human Rights with this role.⁴² It was Amnesty's aim to convince Sweden and other governments that the drafting of the Convention should instead be dealt with at the 1980 U.N. Congress on the Prevention of Crime and the Treatment of Offenders. The Commission was a politicized body, composed of diplomats who would more readily see the significance of the draft convention and potentially block its progress. In contrast, the Congress was composed of technocrats acting primarily in their capacity as officials involved in the administration of justice and law enforcement. They were not as affected by the political divides of the Commission and could not easily oppose the subject matter of the proposed convention as torture was a crime in most, if not all, of their jurisdictions.

Promoting Principles for Inclusion in the Draft Convention

Despite these efforts, on December 8, 1977, the General Assembly requested the U.N. Commission on Human Rights to draw up a draft convention against torture and other CID treatment or punishment. On January 15, 1978, the IAPL submitted its Draft Convention for the Prevention and Suppression of Torture and three days later the Swedish government submitted its draft.⁴³ A little less than two weeks later, on January 30, 1978, Amnesty's International Executive Committee Sub-Committee on International Organizations ("Sub-Committee") met in London to formulate its recommendations to the International Executive Committee on how Amnesty should approach the drafting of the Torture Convention.

Amnesty's International Executive Committee adopted the Sub-Committee's recommendations in early June 1978, agreeing that Amnesty's position on the draft convention would follow five key elements:

- I. AI welcomes the decision of the General Assembly to develop a convention against torture and hopes this will be produced without undue delay.
- II. AI has taken no stand, and will take no stand, on the various drafts or texts produced for this convention.

41. See BURGERS & DANIELIUS, *supra* note 3, at vi.

42. See, e.g., Draft Minutes, Meeting of Informal Liaison Group on Torture on Oct. 5 1977 in Strasbourg, France (undated) (on file with Amnesty International); Draft Minutes, Meeting of Informal Liaison Group on Torture on Aug. 26 1977 in Geneva, Switzerland (undated) (on file with Amnesty International).

43. U.N. ESCOR, Comm'n on H.R., submitted by Sweden, *Draft International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. E/CN.4/1285 (1978).

III. AI hopes, however, that when the convention is adopted it will include the following principles:

- a. Every state should be obliged to either extradite, or itself to try, alleged torturers within its jurisdiction.
- b. There should be universality of jurisdiction in respect of alleged torturers.
- c. There should be an effective implementation mechanism to deal with allegations of torture.
- d. The question of cruel, inhuman or degrading treatment or punishment should be addressed.

IV. When and where appropriate, AI should voice this position (I, II and III) above. Expert AI members or staff can in their individual private capacities enter into textual details of this convention, so long as they make clear this is done in their personal capacity.

V. AI should devote more of its resources to exposing the continuing practice of torture and the non-adherence of governments to the UN declaration against torture than to the formulation or adoption of the convention.⁴⁴

Amnesty's participation in the drafting process was particularly guided by elements II, III and IV. In November 1981, the International Executive Committee confirmed that Amnesty would continue to focus on the four principles in element III—extradition or trial of alleged torturers, universal jurisdiction over torture, implementation of the torture prohibition, and inclusion of the prohibition of CID treatment or punishment—as well as the issue of how “lawful sanctions” should be dealt with in the Torture Convention's definition of torture.⁴⁵

“II. AI has taken no stand, and will take no stand, on the various drafts or texts produced for this convention.”

At its meeting on January 30, 1978, the Sub-Committee had before it the IAPL and Swedish drafts. Following a lengthy discussion on the IAPL draft, the Sub-Committee decided to recommend that Amnesty adopt the principle that it would avoid associating with a particular text.⁴⁶ This recommendation was taken up by the International Execu-

^{44.} See Amnesty Int'l, *Report of IEC*, June 2–4, 1978 (on file with Amnesty International).

^{45.} See, e.g., Letter from Stephanie Grant, IEC Member, Amnesty Int'l, to Walter Kälin, Swiss Section, Amnesty Int'l (Feb. 2, 1982) (on file with Amnesty International).

^{46.} See Amnesty Int'l, *Report from the Sub-Committee on International Organisations held in London on Jan. 30 1978*, AI Index IOR 41/03/79 [hereinafter *Report from the Sub-Comm. on Int'l Orgs*] (on file with Amnesty International).

tive Committee and from this point onward Amnesty officially saw it as its “role to support principles which should be incorporated in such drafts.”⁴⁷

Amnesty continued to adhere to this position even when the Swedish draft was the only text being considered at the U.N. It was a deliberate policy choice in favor of impartiality. In November 1981, at the request of the organization’s Swiss and German sections,⁴⁸ the International Executive Committee revisited its June 1978 decision and determined that, despite developments (i.e., the fact that only the Swedish draft was being considered), the organization’s position should not change. This was because of Amnesty’s belief that public association with government texts could damage its reputation for impartiality.⁴⁹

This commitment to independence, balance and political neutrality was the cornerstone of Amnesty’s identity.⁵⁰ Indeed, in the lead up to the thirty-ninth session of the General Assembly in 1984, Margo Picken, Amnesty’s representative in New York, had expressed concern that Amnesty should not be perceived as the “non-governmental wing of the Dutch,”⁵¹ the government that was responsible for shepherding the Torture Convention through its final drafting and adoption phases. Fortunately, some enlightened governments were less worried about the risk of appearing to be the governmental wing of Amnesty or the ICJ and closely collaborated with both organizations at all stages.

Despite the obvious benefits of this collaboration, Amnesty and others (including the Dutch) were nevertheless concerned that Amnesty should not appear to be too closely associated with the draft. This concern pointed in two different directions: either that Amnesty would insist too much on improved language (such as in the area of “lawful sanctions”), encouraging some governments sensitive to Amnesty’s per-

47. See Letter from Thomas Hammarberg, Sec’y Gen., Amnesty Int’l, to Niall MacDermot, Sec’y-Gen., Int’l Comm’n of Jurists (June 1, 1984) (on file with Amnesty International).

48. See Letter from Walter Kälin, Swiss Section, Amnesty Int’l, to IEC, Amnesty Int’l (Oct. 1981) (on file with Amnesty International); Letter from Luise Scherf, Board Member, German Section, Amnesty Int’l, to IEC, Amnesty Int’l (Nov. 11, 1981) (on file with Amnesty International).

49. See Letter from Grant to Kälin, *supra* note 45; Letter from Stephanie Grant, IEC Member, Amnesty Int’l, to Luise Scherf, Board Member, German Section, Amnesty Int’l (Feb. 2, 1982) (on file with Amnesty International). The fact that the letter was signed by Grant may reflect Rodley’s disaffection with an application of the principle he found bureaucratic and difficult to reconcile with the aim of effective reconciliation with other NGOs.

50. See GUEST, *supra* note 3, at 78; HOPGOOD, *supra* note 1, at 61–62; KECK & SIKKINK, *supra* note 3, at 88.

51. See Margo Picken, Amnesty Int’l, *Note on lunch meeting with Alphons Hamer (Netherlands), 4 April 1984* (Apr. 6, 1984) (on file with Amnesty International).

spective to re-open already satisfactorily decided issues and potentially expose the entire draft to re-negotiation; or that the interests of Amnesty as a human rights organization would be so closely identified with the text that non-cooperative governments would become intractable in their opposition to the draft. Amnesty had to balance these concerns against its interest in working closely with the drafters to ensure that the principles in the International Executive Committee's June 1978 decision were included in the final text. Amnesty's compromise in the lead up to the Convention's adoption in 1984 was to draw attention to any remaining concerns it had regarding the text, while simultaneously making it very clear that the organization did not want to jeopardize the Convention's adoption.⁵²

“IV. Expert AI members or staff can in their individual private capacities enter into textual details of this convention, so long as they make clear this is done in their personal capacity.”

Amnesty's decision not to submit draft text stemmed from similar concerns that motivated its position on not supporting specific drafts, such as the importance of impartiality, as well as apprehension about the capacity of the national sections to negotiate complicated textual details.⁵³ This position also was aimed at preventing Amnesty from being too closely associated with the weak and compromised text that is often the product of government negotiations.⁵⁴

This caution meant two things in practice. First, that Amnesty provided observations but would not promote these observations in the form of textual amendments and second, that Rodley primarily provided textual input in his personal capacity. Indeed, when recollecting the contribution of NGOs like Amnesty to the drafting process, Amnesty receives credit as an organization but contributions are also remembered in terms of what individual representatives like Rodley and Niall MacDermot of the ICJ did and said.⁵⁵

However, neither of these approaches was static in practice. For example, Amnesty's policy of providing observations could not prevent situations when an Amnesty comment inadvertently became a textual

^{52.} See, e.g., Amnesty Int'l, *AI's concerns at the 39th Regular Session of the UN General Assembly New York, September–December 1984*, AI Index IOR 41/06/84 (July 9, 1984) (on file with Amnesty International).

^{53.} See Letter from Grant to Kälin, *supra* note 45; Letter from Grant to Scherf, *supra* note 49.

^{54.} See Cook, *supra* note 28, at 191.

^{55.} Telephonic Interview with Erika Feller, Assistant High Commissioner–Protection, United Nations High Commissioner for Refugees (July 2, 2007). Ms. Feller had arrived in Geneva in 1980 as First Secretary in the Australian Mission to the U.N.

amendment. For example, Article 12 of the original Swedish draft addressed the right to compensation, but had not specified that compensation would include “rehabilitation.” A meeting of medical groups at Amnesty’s International Secretariat in London inspired Rodley to make an oral statement on rehabilitation at the 1980 session of the Commission’s Working Group on the draft convention. The Greek Chair of the session, Anestis Papastefanou, said that he would put in the Amnesty “amendment” and the Working Group ultimately adopted the article with the term “rehabilitation” in square brackets (signaling non-agreement within the Working Group).⁵⁶

Additionally, the policy that expert Amnesty members or staff should only submit text in a personal capacity was not so rigid as to prevent Amnesty as an organization from proposing text on the Torture Convention’s fundamental provisions. As demonstrated below, Amnesty departed from its policy twice during drafting, proposing textual modifications in Amnesty’s name on the issues of “lawful sanctions” and CID treatment or punishment.

Amnesty’s Position on the Content of the Treaty

Trial or Extradition and Universal Jurisdiction

It was Amnesty’s hope that the Torture Convention would include two principles on jurisdiction over the offense of torture: first, that “Every state should be obliged to either extradite, or itself to try, alleged torturers within its jurisdiction” and second, that “There should be universality of jurisdiction in respect of alleged torturers.” The aim of both principles was to fight impunity for torturers, a cornerstone of any Convention that would truly seek to outlaw torture. Indeed, when the Convention was considered by the U.N. Commission on Human Rights in 1984, Amnesty’s Secretary General Thomas Hammarberg gave a statement that heralded the Convention’s “crucial principle” of universal jurisdiction and emphasized that there should be “no safe haven for torturers.”⁵⁷

This “crucial principle” was understood by all of those involved in drafting the Torture Convention to be contained in its Article 5. Article 5 provides a number of bases for establishing jurisdiction, including where the State does not extradite an offender present in its territory. While strictly speaking Article 5 does not provide for “pure” universal jurisdiction (in which no nexus to the State would be required), “universal

^{56.} See BURGERS & DANIELIUS, *supra* note 3, at 68–69.

^{57.} See Thomas Hammarberg, Sec’y Gen., Amnesty Int’l, *An International Convention Against Torture* (1984) (on file with Amnesty International).

jurisdiction” became the simplified way to refer to the “wide domestic jurisdiction” set out in Article 5 of the Torture Convention and in Article 8 of the original Swedish draft.⁵⁸

It was somewhat remarkable that the original Swedish draft included such wide-ranging bases for establishing jurisdiction over torture. When Sweden submitted its original draft there was virtually no precedent for universal jurisdiction to be included in an international human rights instrument intended to be binding on States. There were similar provisions in other instruments, such as the Geneva Conventions in the international humanitarian realm and in conventions dealing with international terrorism. While there was also a universal jurisdiction provision in the International Convention on the Suppression and Punishment of the Crime of Apartheid, which had opened for signature on November 30, 1973; this instrument was largely discredited at the time of drafting the Torture Convention. Nor did universal jurisdiction appear in the Declaration on which much of the initial Swedish draft was based.⁵⁹ Instead, in large part, it was NGOs that were pushing for the linking of universal jurisdiction and torture—for example, the IAPL’s draft that preceded the original Swedish text by three days included a wide basis for the exercise of jurisdiction in its Article IX.

According to Hans Danelius, the Swedes’ decision to include the principle of universal jurisdiction in their original draft was based primarily on similar provisions in other conventions at the time, e.g., conventions dealing with terrorism.⁶⁰ While these provisions evidently provided some guidance, it was still a significant step to include a provision originally designed to eliminate loopholes for those suspected of (mainly transnational) crimes of terrorism in a treaty designed to eliminate impunity for those suspected of crimes of torture—often crimes carried out by State officials within their own countries. Indeed, apart from the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Torture Convention would be the first international human rights convention to include such wide criterion for establishing jurisdiction over human rights violations.

This achievement was all the more marked given that the Swedes, particularly the Ministry of Justice, did not want the Torture Convention to explicitly mention that torture was a crime under international law, in addition to being an act that the Convention required States to criminalize under domestic law. There was a moment of hope that the Swedes would change their position on this point. At around the time the original Swedish draft was being prepared in December 1977, the

58. See BURGERS & DANELIUS, *supra* note 3, at 58.

59. *Id.* at 35.

60. Telephonic Interview with Hans Danelius, former Justice of the Supreme Court of Sweden (July 6, 2007); see also BURGERS & DANELIUS, *supra* note 3, at 35–36.

Swedish Attorney-General, Helga Romander, was participating in the IAPL drafting committee in Siracusa. At that meeting he told Rodley that he strongly supported the IAPL draft's principle of universality of jurisdiction, giving Amnesty hope that Sweden might also agree to explicitly categorize torture as a crime under international law in the draft text.⁶¹

However, Sweden continued to oppose this approach. A number of other governments were in a similar position—positive about the idea of a Torture Convention, but either uncomfortable or unfamiliar with the concept of a “crime under international law.”⁶² There was a general lack of clarity concerning both what constituted a crime under international law and the legal implications that flowed from so classifying an act.⁶³

Amnesty representatives believed that torture already had acquired the status of a crime under customary international law, but that a treaty was needed to make this “absolutely clear” and to identify the consequent legal obligations.⁶⁴ At the same time, they were well aware that efforts to draft treaties explicitly recognizing particular violations as international crimes had seen limited success thus far. In particular, there was some embarrassment around the existence of the International Convention on the Suppression and Punishment of the Crime of Apartheid, which had defined apartheid and related acts as “violating the principles of international law.” Having been pushed through by the African States (with the support of the Soviet Union and others) over Western objections, it did not have wide support and its legal drafting was considered deficient. Countries did not want to be put in the inconsistent position of promoting one convention that referred to the enumerated violations as an international crime, but not another.⁶⁵

In light of all of these factors, Amnesty decided to uphold its policy that torture should be classified as a crime under international law but to stop actively lobbying for this to be explicitly recognized in the Convention.⁶⁶ It was ultimately more important to ensure that the text

61. See Nigel Rodley, Amnesty Int'l, *Report on a visit to Geneva, Siracusa and Paris, 15–19, December 1977* (internal) (undated) (on file with Amnesty International).

62. See Nigel Rodley, Amnesty Int'l, *Proposed Convention on Torture: Crime under International Law*, Int'l Org. Sub-Comm., Agenda Item 11e (1978) (on file with Amnesty International); Letter from Nigel Rodley, Legal Adviser, Amnesty Int'l, to Karl-Walter Bluhm (Oct. 6, 1980) (on file with Amnesty International).

63. See Rodley, *Proposed Convention on Torture: Crime under International Law*, *supra* note 62.

64. *Id.*

65. *Id.*

66. See Amnesty Int'l, *Report from the Sub-Comm. on Int'l Orgs.*, *supra* note 46; Rodley, *Proposed Convention on Torture: Crime under International Law*, *supra* note 62; Letter from Rodley to Bluhm, *supra* note 62.

stipulate core obligations rather than explicitly recognize the concept of an international crime itself. This position was also taken by other groups, notably the ICJ.

By deciding to focus on core obligations, Amnesty could direct its lobbying efforts toward those key governments that were particularly resisting the Convention's inclusion of universal jurisdiction. This included, for example, Australia and the Netherlands. In relation to the latter, Amnesty faced a big challenge because J. Herman Burgers, a member of the Netherlands delegation to the Commission, and chairperson-rapporteur of the Commission's Working Group between 1982 and 1984,⁶⁷ particularly had reservations about the concept of universal jurisdiction as applied to the crime of torture.

This was reflected in the Netherlands's position in the early stages of the drafting process. For example, in 1980 the Netherlands supported making universal jurisdiction contingent on the rejection of an extradition request, a move which would have limited the extent to which the Convention would prevent safe havens for torturers. By 1981, the Netherlands was no longer advocating this position, but still sought to make the exercise of universal jurisdiction contingent "upon complaint by any interested party."⁶⁸ In 1982 this proposal was withdrawn and J. Herman Burgers as chairperson-rapporteur worked diligently to find a compromise on universal jurisdiction that would bring all parties together. During this process, Amnesty's efforts at the international level were supplemented by its Dutch national section, which partnered with the Dutch section of the ICJ to get a motion favoring universal jurisdiction through the Dutch parliament.

The import of the Torture Convention's jurisdiction provisions cannot be overstated. The Torture Convention's principle of *aut dedere aut punire* (extradite or punish on the basis of simple presence in the forum country), along with its application to acts of public officials, were key factors in the 1999 landmark decision of the U.K. House of Lords that Senator Augusto Pinochet did not have immunity for certain crimes committed during his previous tenure as Chile's head of state. This result was possible because the original Swedish draft convention provided for universal jurisdiction. The explicit inclusion of the concept was so contested throughout the Commission's Working Group's sessions that, had it not been in the original text, it surely would not have been added at a later stage. From Amnesty's perspective—and indeed that of any NGO—it was much easier to defend existing text rather than having to advocate for the introduction of such a far-reaching principle. This was

67. See BURGERS & DANIELIUS, *supra* note 3, at vi.

68. *Id.* at 72.

also the lesson of the long battle about how the Convention would apply to CID treatment or punishment, explored later in this Chapter.

Implementation

Along with universal jurisdiction, implementation provisions were a major sticking point during drafting, and a major priority for Amnesty. In his speech before the plenary Commission in 1984, Hammarberg emphasized the importance of the implementation provisions of the Torture Convention in the following terms: “The purpose of a convention against torture should . . . be to ensure the *enforcement* of the international prohibition on torture.”⁶⁹

The draft convention that was sent to the General Assembly for adoption in 1984 contained four implementation procedures. Two of these procedures were optional, meaning that they required states to declare that they recognized the competence of the Committee against Torture to receive complaints against it from other states (Article 21) and from individuals (Article 22). The other two implementation procedures were more integral to the Convention, and also more controversial. Article 19 provided for periodic reporting to the Committee and the Committee’s consideration of these reports. While this was in essence a standard treaty body function, there was disagreement over the sub-paragraphs which set out what the Committee could do in respect of the state reports received.⁷⁰ These sub-paragraphs, along with the fourth implementation procedure in Article 20, were the *only* provisions of the draft convention that were unresolved when sent to the General Assembly.⁷¹

The fact that Article 20 caused so much disagreement was unsurprising. Article 20 established a procedure by which the Committee was empowered to initiate a confidential inquiry into allegations of systematic torture in a state. This was an innovation for a U.N. human rights treaty and a radical one at that. Delegations differed significantly on whether the procedure should be mandatory or optional.

Amnesty took the former position and focused its lobbying efforts to emphasize the importance of the inquiry system being mandatory. These efforts continued right up until the eleventh hour at the U.N. General Assembly, when the Swedes told Hammarberg that to overcome the Soviet Union’s objection to the mandatory nature of the Article 20 inquiry procedure they were going to accept a provision (now Article 28) by which states could “opt out” of Article 20. Hammarberg telephoned

69. See Hammarberg, *An International Convention Against Torture*, *supra* note 57.

70. See BURGERS & DANIELIUS, *supra* note 3, at 97.

71. *Id.* at 96–107.

Rodley to consult on this proposal, who thought it a very good solution to what was otherwise proving to be an intractable problem. Rodley guessed that many states that would not have supported the Article 20 procedure would be loath to make the requisite declaration in order to opt out of it. Amnesty therefore agreed with the Swedish proposal and the text moved forward to adoption.

Cruel, Inhuman or Degrading Treatment or Punishment

Amnesty's commitment to including CID treatment or punishment in the draft convention was heavily influenced by the fact that the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment deals with both torture and CID treatment or punishment. The Declaration's approach itself reflected the unfortunate but all too real distinction that the European Commission of Human Rights had made in the *Greek Case* (1969), defining torture to be an aggravated form of CID treatment or punishment.⁷² Making this distinction was unfortunate because it ran contrary to the intention of the framers of the Universal Declaration of Human Rights who used the holistic phrase of "torture or cruel, inhuman or degrading treatment or punishment" (in Article 5) to have a flexible formula that could encompass practices such as medical experiments of the Holocaust.⁷³ Three months after the adoption of the U.N. Declaration, the European Court of Human Rights confirmed this distinction by holding that five specific interrogation techniques the Commission had found to be torture in *Ireland v. United Kingdom* (1976)⁷⁴ were not sufficiently aggravated to be so categorized. Rather, the Court found them to be "inhuman and degrading treatment."⁷⁵ Amnesty's position was also consistent with the U.N. General Assembly Resolution that had requested the Commission to draft a convention against torture and other CID treatment or punishment.

In accordance with the language in the Declaration and the Resolution, the original Swedish draft had contained a number of references to CID treatment or punishment. Article 1(2) of the original Swedish draft defined torture as an "aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment" and virtually all of its substantive articles applied to both torture and CID treatment or punishment. However, the revised Swedish draft of February 19, 1979⁷⁶ addressed

^{72.} *Greek Case*, 1969 Y.B. Eur. Conv. on H.R. 1, 186 (Eur. Comm'n H.R.).

^{73.} See RODLEY, *supra* note 3, at 75.

^{74.} *Ireland v. United Kingdom*, 1976 Y.B. Eur. Conv. on H.R. 512 (Eur. Comm'n H.R.).

^{75.} *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. 25, 165–168 (1978).

^{76.} U.N. ESCOR, Comm'n on H.R., submitted by Sweden, *Revised text of the substantive parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. E/CN.4/WG.1/WP.1 (1979).

CID treatment in a more limited way. The draft bracketed the reference to CID treatment or punishment in Article 1(2), reflecting that it was disputed. It also removed other references to CID treatment or punishment in the substantive guarantees, e.g., *non-refoulement* and criminalization provisions. Instead, there was a new Article 16 that stated that the “Convention shall be without prejudice to any provisions in other international instruments or in national law which prohibit cruel, inhuman and degrading treatment or punishment.”

Before the end of the 1979 session of the Commission’s Working Group, MacDermot suggested to Danelius that the revised Swedish draft should also stipulate a general duty to prevent CID treatment or punishment not amounting to torture.⁷⁷ In the lead up to the January 1980 session of the Working Group, MacDermot and Rodley corresponded on this new draft language. At Rodley’s suggestion, they agreed that MacDermot’s proposed general duty statement should be followed by text specifying which articles in the Convention applied to CID treatment or punishment. After some back and forth, they agreed that the draft provision should specify seven such articles: Articles 3 (*non-refoulement*), 10 (education), 11 (review of practices with a view to prevention), 12 (right of complaint), 13 (prompt and impartial investigation), 14 (compensation) and 15 (non-use of evidence obtained under torture) of the Swedish revised draft of February 19, 1979. Given the importance of ensuring that the Torture Convention would not only stipulate a general duty to prevent CID treatment or punishment not amounting to torture, and the need to cooperate effectively with the ICJ, Amnesty departed from its policy of not submitting draft text. Accordingly, at the 1980 session of the Commission’s Working Group, Amnesty and the ICJ jointly⁷⁸ submitted the following proposal for a second paragraph in Article 16:

2. Each State Party shall take effective measures to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1. In particular, the obligations contained in articles 3, 10, 11, 12, 13, 14, and 15 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.⁷⁹

⁷⁷ See Letter from Niall MacDermot, Sec’y–Gen., Int’l Comm’n of Jurists, to Hans Danelius, Under–Sec’y for Legal and Consular Affairs, Swedish Ministry of Foreign Affairs (Oct. 29, 1979) (on file with Amnesty International).

⁷⁸ This submission has previously been incorrectly referred to as the sole initiative of the ICJ: see BURGERS & DANIELIUS, *supra* note 3, at 70–71.

⁷⁹ Amnesty Int’l & the Int’l Comm’n of Jurists, *Suggestion for an additional paragraph to Article 16*, H.R. (XXXVI)/W.G.10/W.P.5 (1980), in BURGERS & DANIELIUS, *supra* note 3, at 70.

Based on developments at the Working Group's session, Amnesty and the ICJ then submitted a revised draft of this paragraph for insertion as the first paragraph in Article 16:

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not constitute torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles [3], 10, 11, 12, 13, [14] and [15] shall apply with the substitution for reference to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.⁸⁰

The square brackets denoted disagreement among the delegations about whether the obligations of *non-refoulement* (Article 3), compensation (Article 14) and non-use of evidence obtained under torture (Article 15) should apply to CID treatment or punishment. While Rodley wanted all of these articles to be included, he was particularly concerned about the potential omission of Article 14, which he regarded as essential to ensuring enforcement of the prohibition on CID treatment or punishment. The United Kingdom was the main opponent to Article 14's inclusion, so both before and after the 1980 Working Group, Amnesty and Paul Sieghart of Justice (an ICJ affiliate in the U.K.) lobbied the U.K. government in London and Geneva. This was to no avail. In addition to Article 14, none of the other articles that were put in square brackets in 1980 made it into the final version of Article 16 of the Torture Convention.

The failure of Amnesty and ICJ's proposal that Article 16 include reference to Article 3 has adversely impacted the consistency of state practice on inter-state transfer of individuals. In particular, the United States has argued that the only treaty obligation it has with respect to *non-refoulement* is contained in Article 3 of the Convention and has stressed that the obligation only applies to torture and not to CID treatment or punishment.⁸¹ The United States has also sought to undermine the prohibition on *refoulement* to torture, not by disputing that there is such a prohibition, but through the asserted use of "diplomatic assurances" to effect transfer,⁸² and restrictive standards to assess the

^{80.} See Amnesty Int'l & the Int'l Comm'n of Jurists, H.R. (XXXVI)/W.G.10/W.P.5/Rev. 1 (1980), in BURGERS & DANIELIUS, *supra* note 3, at 71.

^{81.} U.S., *Written Response to List of Issues to Be Taken Up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America* [hereinafter *Written Response to Human Rights Comm.*] 16–18 (2006); U.S., *Response to Comm. Against Torture List of Issues*, *supra* note 4, at 49–50.

^{82.} See, e.g., Condoleezza Rice, U.S. Sec'y of State, Remarks Upon Her Departure for Europe (Dec. 5, 2005) (transcript available at <http://www.state.gov/secretary/rm/2005/57602.htm>).

likelihood of torture upon transfer.⁸³ These challenges to the scope of the prohibition on transfer both to torture and to CID treatment or punishment are believed to have been made with a view to enabling the “rendition” or “extraordinary rendition” of terrorism suspects to countries for coercive interrogation.⁸⁴ More generally, the Convention’s separate treatment of torture and CID treatment or punishment has given States an incentive to argue that certain acts do not meet the definition of torture contained in Article 1, but rather should be treated as CID treatment or punishment.

Amnesty and other groups working on the Convention could not have fully contemplated or guarded against the unscrupulous ways in which states would seek to exploit the text’s distinction between torture and CID treatment or punishment. Indeed, Amnesty argued strongly at the time that because this distinction had been made by an influential international human rights body (the European Court of Human Rights), the Torture Convention needed to address both forms of ill-treatment. It is impossible to guess in hindsight what would have happened if the Convention had either not addressed CID treatment at all or had dealt with it in the same way as the prohibition on torture. Nor is it necessarily realistic given that the General Assembly Resolution had requested the Commission to draft a convention against torture and other CID treatment or punishment and the trend by the time of drafting was to distinguish between the two components in some way.

However, it is possible that, in pursuing its position, Amnesty was unduly influenced by the approach taken in the Declaration and the European Court of Human Rights, as well as the fact that the original Swedish draft included CID treatment or punishment in its very definition of torture. In retrospect, it may have been better to work for CID treatment or punishment to be left out of the Torture Convention altogether, as was the case nearly a decade later with the Inter-American Convention to Prevent and Punish Torture. The Article 1 definition of torture in the Convention would have been sufficient to catch the behavior that the Torture Convention was aiming to stop.

Lawful Sanctions

Another contentious issue in the drafting of the Convention was how “lawful sanctions” would be excluded from the definition of torture. Article 1 of the Declaration states that torture “. . . does not include

83. For example, the United States utilizes a “more likely than not” standard to assess the likelihood that an individual will be subject to torture.

84. See, e.g., U.N. Human Rights Committee [hereinafter Hum. Rts. Committee], *Concluding Observations: United States of America*, ¶ 16, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.” Article 1 of the original Swedish draft followed the Declaration and similarly excluded lawful sanctions from the definition of torture “to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.”

The language in both the Declaration and the original Swedish draft strikes a careful balance between two competing concerns. On the one hand, the exclusion of “lawful sanctions” reflects the fact that neither the Declaration nor the draft convention sought to unduly interfere with a country’s penal sanctions.⁸⁵ Indeed, the exclusion of “lawful sanctions” from the Declaration’s definition of torture was apparently a response to states that sought to maintain such practices as corporal punishment.⁸⁶ On the other hand, the requirement that “lawful sanctions” be consistent with the Standard Minimum Rules for the Treatment of Prisoners seeks to avoid a potential loophole by which states could try to allow acts effectively amounting to torture by legalizing them as penal sanctions under its domestic law.

Amnesty’s focus on the issue of “lawful sanctions” was prompted by events at the Commission’s Working Group in 1979. This Working Group had before it the original Swedish draft and in the opening days of the Working Group, several participants objected to its reference to the Standard Minimum Rules for the Treatment of Prisoners. MacDermot in particular strongly supported removing the reference, arguing that a non-legal document should not be mentioned in a legal definition and that the reference was vague. It was one of the few occasions on which Amnesty and the ICJ departed significantly on the substance of the text. At this time, Amnesty’s Secretary General, Martin Ennals, was attending the Working Group session on Amnesty’s behalf. Although Ennals knew that the removal of the reference would be detrimental, he was not equipped to resist the forceful approach of MacDermot. By the time Rodley joined the session on February 8, 1979, much of the damage on “lawful sanctions” had been done and Amnesty would spend the next five years trying to mitigate its impact.

Amnesty efforts on this front commenced during that Working Group’s session. On February 23, 1979, Rodley delivered a statement proposing several solutions to this problem, including “to delete the exemption altogether and make no reference to lawful punishment.”⁸⁷

85. See BURGERS & DANIELIUS, *supra* note 3, at 121.

86. See RODLEY, *supra* note 3, at 31.

87. See Amnesty Int’l, Transcript of a Statement of Nigel Rodley in respect of Article 1 of the Revised Swedish Draft Convention Against Torture Before the Working Group on

MacDermot robustly resisted this position again, with the result that the Article 1 definition of torture was amended to provide that torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions” without referencing the Standard Minimum Rules for the Treatment of Prisoners or any other international standards.

For the next few years, Amnesty continued to denounce the Article 1 amendment as an “invitation to legislate the rack”⁸⁸ and to promote the suggestions set out in its February 23, 1979 statement. Ultimately, in June 1984, Amnesty decided to seek deletion of the lawful sanctions exclusion, and failing that, to seek an amendment of the text to specify that only sanctions lawful under international law would be excluded from the torture definition.⁸⁹ The latter approach was deemed more realistic than seeking reinstatement of the reference to the Standard Minimum Rules for the Treatment of Prisoners, and would have substantially the same effect. In articulating this position, the International Executive Committee Sub-Committee on International Organizations noted that:

To this end, although AI does not usually make a practice of drafting texts, in this case certain specific textual proposals might give governments an idea as to how to proceed with suggested modifications of the text. But this should not be done in such a way as to cause AI to appear to be approving or disapproving of particular texts as such.⁹⁰

Despite the efforts of Amnesty and others on this front, the text remained as it was adopted in 1979. In lieu of modifying the text, Amnesty had also advocated that other measures should be taken to clarify that the definition of torture would only exclude sanctions lawful under both domestic and international law. One such measure was for governments to indicate to the U.N. General Assembly the view that “lawful” had to be read to mean “lawful under international law.” At least four countries (Italy, Netherlands, the United Kingdom and the

Drafting the Convention of the UNHCR (Feb. 23, 1979) (on file with Amnesty International).

88. See, e.g., Letter from Nigel Rodley, Legal Adviser, Amnesty Int'l, to Mr. M.K.O. Simpson-Orlebar, Esq., U.K. Foreign and Commonwealth Office (Dec. 5, 1979) (on file with Amnesty International).

89. See, e.g., Letter from Wolfgang Heinz, IEC Member, Amnesty Int'l, to Reinhard Marx, Chairperson, German Section, Amnesty Int'l (June 19, 1984) (on file with Amnesty International); Letter from Nigel Rodley, Legal Adviser, Amnesty Int'l, to Michael Landale, Counsellor, Australian High Comm'n. (July 23, 1984) (on file with Amnesty International).

90. See Amnesty Int'l, IEC Int'l Orgs. Sub-Comm., *AI and the UN* (June 1984) (on file with Amnesty International).

United States) did, in fact, affirm this position in their comments on the draft to the 1984 General Assembly.⁹¹

Disappearances?

The question of disappearances was not on Amnesty's list of principles for inclusion in the Torture Convention. This was not because Amnesty felt the Convention should not properly encompass disappearances. Rather, it was in part because Amnesty's U.N. work on disappearances was being directed through other processes that were happening at the same time as the drafting of the Convention, such as the establishment of the U.N. Working Group on Enforced or Involuntary Disappearances in 1980. It also owed to the fact that these U.N. efforts on disappearances were not then focused on standard-setting.⁹² Defining disappearances was a normative challenge that had not yet been resolved and which may have unduly complicated the Convention drafting process.

In retrospect, there may also have been a strategic concern that raising the issue of disappearances in the drafting of the Torture Convention might open the text up to the type of sabotage being experienced on the disappearance question elsewhere in the U.N.⁹³ Again, it would have been difficult for the NGOs and delegations involved to predict the consequences of failing to push for the explicit inclusion of the prohibition on enforced disappearances in the Convention. Currently the United States disputes the relationship between enforced disappearances and torture, queries the extent to which the Convention prohibits *incommunicado* detention, and argues that Article 3's *non-refoulement* protection does not explicitly prevent return of individuals to countries where they might be disappeared.⁹⁴ This is

91. See RODLEY, *supra* note 3, at 322.

92. For example, the issue of disappearances was very nearly left out of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment during its drafting in the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights. It was only included when quite late in the drafting process, Rodley drew attention to its omission over lunch with MacDermot and the Sri Lankan member of the Sub-Commission, the latter of whom subsequently raised the issue when the Sub-Commission resumed after the lunch-break and thereby secured its inclusion.

93. See generally GUEST, *supra* note 3, for an excellent account of efforts, particularly by Argentina's military government from 1976 to thwart the ability of the U.N. machinery to address disappearances.

94. See, e.g., U.S., REPLY OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO THE REPORT OF THE FIVE UNHCR SPECIAL RAPORTEURS ON DETAINEES IN GUANTANAMO BAY, CUBA, 34 (Mar. 10, 2006) available at <http://www.asil.org/pdfs/ilib0603212.pdf>; U.S., *Response to Comm. Against Torture List of Issues*, *supra* note 4, at 44–5.

despite the fact that the international law prohibiting torture clearly prohibits enforced disappearance and the human rights violations it entails.⁹⁵ It is a perverse outcome that some of the very practices which helped inspire the drafting of the Convention (e.g., disappearances and other violations in Chile and Argentina)⁹⁶ have resurfaced in relation to the U.S. secret detention program for terrorism suspects that it not only admits running, but claims to be lawful.⁹⁷

Looking Back to Look Forward

In many ways, the challenges faced by Amnesty and other NGOs to outlaw torture are the same as those faced by NGOs currently grappling with how to challenge governments' increased resort to illegal coercive interrogations, renditions and disappearances in connection with the "War on Terror." As with the period covered by this Chapter, no government today would seriously dispute that torture is illegal. Instead the more nuanced strategy of governments like the United States has been to simultaneously stress that torture is abhorrent,⁹⁸ while narrowing the very notion of what torture is understood to encompass.⁹⁹ This narrowing has occurred through manipulation of (national) law; but it has also been achieved through attempts to persuade the public by means of legal argument, however specious, that certain measures are exceptional and justified against certain persons in order to protect security and to save lives.

In resisting these attempts, some human rights organizations have not been as vigilant in how they argue against torture as Amnesty was more than thirty years ago. In the post-September 11, 2001 environment, some organizations seek to make the case against torture by arguing both that it is illegal and that it is ineffective. Use of the latter argument is often justified on the basis that it is not enough in the current environment to show that torture is illegal, and that to truly make gains in the eyes of the public and governments, NGOs need to

95. See, e.g., U.N. Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, ¶ 17, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006); Hum. Rts. Committee, *Concluding Observations*, *supra* note 84, at ¶ 12.

96. See *supra* note 3.

97. At least under U.S. law: see, e.g., News Release, White House Office of the Press Sec'y, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

98. See, e.g., Condoleezza Rice, U.S. Sec'y of State, Remarks Upon Her Departure for Europe, *supra* note 82; White House Office of the Press Sec'y, President Discusses Creation of Military Commissions to Try Suspected Terrorists, *supra* note 97.

99. See *supra* note 4.

also show that torture does not work. However, by the very act of engaging in this argument, NGOs lose significant ground and also embark on a slippery slope toward the notion that there are some forms of torture that are justified and legal. This much was clearly stated by Amnesty in 1973:

One argument that has been presented in the past and is often heard today is that torture is inefficient . . . This line of argumentation based on inefficiency is totally inadmissible. To place the debate on such grounds is to give the argument away; in effect it means that if it can be shown to be efficient it is permissible.¹⁰⁰

Such public information elements of Amnesty's Campaign still have clear relevance, as does the second phase of Amnesty's Campaign, the focus on international norms. Indeed, the strategy of nailing down the illegality of torture was, and should continue to be, seen as a way of sidelining the inevitably inconclusive moral-philosophical discussion. Current efforts to entrench the illegality of torture and CID treatment or punishment can also usefully consider Amnesty's practice of advocating principles rather than drafts and text. This approach can help avoid complicity in the drafting of laws, such as those on preventive detention, that purport to resolve "War on Terror" and human rights challenges, but actually do so in ways that violate fundamental human rights guarantees.

However, the overall lesson from the drafting of the Convention and the events that inspired it is that as much as there is history of governments violating rights, there is also one about resistance to such abuses. The story of Amnesty International's influence on the Torture Convention is one piece of that history that advocates can draw upon to help defend the human rights guarantees that are inviolable but often under threat.

100. See AMNESTY INT'L, REPORT ON TORTURE, *supra* note 8, at 24.

