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Enforcement of International Human Rights Law in the Domestic Courts with Special Reference to the United Nations Convention against Torture: The case of Bangladesh.

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Certificate

This is to certify that the dissertation entitled **Enforcement of International Human Rights Law in the Domestic Courts with Special Reference to the United Nations Convention against Torture: The case of Bangladesh** is an original work done by **Md. EkramulKabir**in the Department of Law, University of Rajshahi, for the degree of **Master of Philosophy** in Law under my supervision. It also certified that I have gone through the draft and final version of the dissertation and approved it for submission.

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DECLARATION

I declare that this dissertation entitled "**Enforcement of International Human Rights Law in the Domestic Courts with Special Reference to the United Nations Convention against Torture: The case of Bangladesh"**prepared for submission to the Department of Law, University of Rajshahi for the Degree of Master of Philosophy in Law, is completely a personal work of mine. No part of this dissertation in any form has been submitted to any other University or Institute for the award of any degree or diploma.

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Md. EkramulKabir

Acronyms

AD Appellate Division (of the Supreme Court of Bangladesh)

ASK Ain o Salish Kendro

BDR Bangladesh Rifles

BGB Border Guards of Bangladesh

BLC Bangladesh Law Chronicles

BLD Bangladesh Law Decisions

CAT Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment

CrPC Code of Criminal Procedure

Cruel, Inhuman or Degrading Treatment or

DLR Dhaka Law Reports

DMP Dhaka Metropolitan Police

DB Detective Branch

ECtHR European Court of Human Rights

GA General Assembly

HCD High Court Division (of the Supreme Court of Bangladesh)

HR Human Rights

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

INGO International Non-Governmental Organization

NGO Non-Governmental Organization

NHRC National Human Rights Commission (of Bangladesh)

NPM National Preventive Mechanisms (under the OPCAT)

OP-CAT Optional Protocol to the Convention against Torture, and Other Cruel, Inhuman, and Degrading Treatment or Punishment

PC Penal Code

Punishment of the Committee against Torture

RAB Rapid Action Battalion

SP Superintendent of Police

SPT Subcommittee on Prevention of Torture and Other

UDHR Universal Declaration of Human Rights

UN United Nations

UNDP United Nations Development Program

UPR Universal Periodic Review

Abstract

This study seeks to find out the present practice of the Bangladesh regarding international human rights laws. The approach of the judicial organs of the country for international human rights norm and standard has been realized by the research. Because it is the purpose of the study to show the gap between the international and national standard of the human rights norms by discussing the situation of Bangladesh. To reach near the international standard the journey of a legal system need to go through huge review and discussion work. Comparative and fact finding study like this work has tried to make clear the legal situation and provided suggestion of the problem.

The entire research work will try to meet the objectives of the study by considering the international legal instruments. To highlight the issues the whole research work has been divided into **SEVEN** chapters and each of the chapters contains the details of the subject discussed thereunder**.**

The Frist Chapter is the introductory chapter which discussed the introductory matters to the study. The present literature survey has done here. The methodology, background, scope and limitation of the study are here. The objectives and justification is the chapter.

The Second Chapter provides the definition of the torture with the references to the international legal instruments. There are interpretations of the articles of the convention in accordance with the international human rights standard is here. The regional and international monitoring mechanism to prevent torture and discussion about the various bodies who work for prevention of torture is in this chapter.

The Third Chapter shows the legislative history of the UNCAT with the history of state practice of torture. The existing regional and international instrument to combat torture and the short history of the legislation of the torture related laws are here.

The fourth Chapter discussed the present situation of the Bangladesh regarding torture by the law enforcement agencies. By referring the daily newspaper news and articles and with the reference of the national and international NGOs the chapter tried to provide the state of act regarding torture in Bangladesh.

The Fifth Chapter focuses on the present legal stands and judicial practice of Bangladesh regarding international human rights instruments. The observations of the higher judiciary to the international law, to the custodial torture and violence are discussed here. The duties of the judges and the prosecutors to prevent and combat torture are discussed here.

The Sixth Chapter tried to find out in a very short extend by interviewing the accused persons, police officials, prosecutors and judges, the field and direct knowledge about state of torture practiced in Bangladesh.

The Seventh Chapter draws the general conclusion of the entire research work and provides some recommendation to combat torture for the every organs of the countries system. The suggestions made here is the essence of the legal provisions of the national legislature and landmark decisions of the apex court of the land.

Every chapter tries to keep focus on the topic got for research and tried to provide guidelines to combat against torture. Peace and human rights are linked. This pursuit and preservation of peace and the security of humankind, the first stated purpose of the United Nations, necessitate the protection and implementation of human rights, without which human rights cannot be effectively achieved.

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Contents

Chapter 1

Introduction to Implementation of United Nations Convention AgainstTorture

1.1Introduction

Human rights are those rights of an individual which are inalienable from him or her and those are birth rights. Right to life, right to liberty, right to conscience, right to freedom of movement and speech, right to freedom from torture and inhuman treatment etc. are those concrete human rights which are essential for physical, mental, intellectual, cultural and spiritual development of human person.

The human society in this century concerned about their rights more than ever before in the history of human civilizations. The world community is now not only concerned with their rights and the movement about the rights but also they are very much concern about the legal implementation of these rights. Before a very few yeas the conventional human rights were mainly enjoyed by the developed countries but at the present time it is the reality that human rights are not only subjected to the state's economic condition only. The world is now a global village and no individual state can practice separate legal practice in the national context which goes directly opposite to the international standard.

There are two main legal concerns about the implementation of the human rights. In the national level the municipal laws are concerned to enforce the citizens' rights. In the international level international treaties are mainly concern about the fundamental human rights. There is no doubt that there is no international mechanism by which an individual's rights can be enforced in any territory of the world but international

organizations and bodies are now well equipped to create pressure upon the state parties to enforce the fundamental human rights.

Human dignity has got apex importance in all human rights conventions. Universal Declaration of Human Rights[1] states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 7 of International Covenant on Civil and Political Rights reaffirms that, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation". Bangladesh became a party to the International Covenant on Civil and Political Rights[2] on December 06, 2000.

1.2Approaches to International Human Rights Lawby Bangladesh

Bangladesh inherited the common law system from the British legal system during the British rule in this land. As the British common law system strongly follows the traditions and customs, Bangladesh remain firmly loyal to its traditions, and its lawyers and judges' heretical approach and attitude[3]. For this attitude consideration and enforcement of any international law in domestic jurisdiction is not too easy to do by the judiciary. The application of international human rights law in the domestic jurisdiction is a well-practiced issue in the common law countries. Considering the practice it is important to keep in our mind that all common law countries are not following the same principles in enforcing international human rights law in their domestic jurisdiction. The two main common law system following countries of the world USA and UK theoretically varied in their policy in the questions of

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[1] Hereinafter referred to as UDHR

[2] Hereinafter referred to as ICCPR

[3]Alam M. Shah, Enforcement of International Human Rights Law by Domestic Courts, New Warsi Book Corporation, Dhaka, 2007, p. 100,

implementation of treaties in the domestic courts. International treaties duly signed by the USA are part of the law of the land. In UK international treaties can only be applied by enabling or implementing legislation of the Parliament. In *Foster vs. Neilson* (1829) the US Supreme Court gave the famous thesis of dividing treaties in to self-executing and non-self-executing[4]. But Judiciary, Legislature and Executive have always taken conservative view in drawing the boundary line between self-executing and non-self-executing treaties. The common law countries have dualistic approach in the application of international human rights law in the domestic courts whereas the civil law countries with some exceptions are inclined to monism. In common law countries, in case of application of international law by implementing legislation is the usual practice, reference to international instruments for reading into domestic laws, or where there is no domestic law or the law is not clear, deciding cases in the light of international law is becoming increasingly frequent[5].

In Bangladesh direct application of international law is preconditioned by other factors including legislative approval of international treaties. The higher judiciary of the country has discussed this issue in a very few cases so the discussion in the light of case laws is very hard to be wide.

1.3 Legal Context inBangladesh about Torture

Except in the Constitution of the People's Republic of Bangladesh, no other law mentions the term 'torture' though there are similar actions described in the penal laws. In the Constitution of the Peoples' Republic of Bangladesh Article35. (5) clearly mentioned that 'No person shall be subjected to torture or to cruel, inhuman, or

[4]Foster v Neilson, 27 U.S. (2Pct) 253, 314 (1829)

[5] M.D. Kirby CMG, "The Role of Judge in Advancing Human Rights by Reference to International Human Rights Norms", The Australian Law Journal, vol. 62, July 1988, p.515.

degrading punishment or treatment.'Although Bangladesh ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[6]in 1998, there was no attempt to bring in domestic legislation for more than a decade. Bangladesh can meet the minimum need for this time by the perpetration of acts that amount to torture and the difficulty in implementing the laws, by highlight the need to criminalize 'torture' not through enacting a new law, but by amending the Penal Code and adding a new chapter on 'torture' and the pressing need to enact a law to protect victims and witnesses of all crime, so that they feel and are safe to testify and meet the ends of justice. A Private Member's Bill to comply with the Convention was cast into cold storage. In this time, Bangladesh also ignored its reporting obligations to the United Nations Committee set up to monitor compliance with CAT. The Bangladesh Parliament took the much-awaited step of passing torture prevention legislation in the year 2013.Torture is an issue in Bangladesh that is discussed widely among the human rights community, denied by the government machinery and practiced by the law enforcement agencies.But unlike other nations Bangladesh government is shy to admit this problem let alone address the solutions. Like Bangladesh there are many third-world countries where citizens are often vulnerable to their own law enforcement agencies. The UN CAT entered in to force June 26, 1987. Bangladesh signed the Convention, although very late, only in the 5th October 1998. However having regard to article 5 of the UDHR and article 7 of the ICCPR, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9

[6] Hereinafter referred to as CAT or Torture Convention or Convention Against Torture.

December 1975, this convention is not a new concept but a continuation of United Nations[7] attempt to stop cruelty.

1.4 Background of the Study

Torture is a question which is relevant to measure human dignity and his global assurance of human rights from the very beginning of human civilization for it is the most serious violation of human rights and brutal attack to the human dignity.

Every instrument of international law and the universal conventions' define torture as a crime against humanity. The United Nations since its establishment in the year 1945 made significant efforts to prevent act of torture. Prohibiting and condemning acts which are in the nature of torture is so extensive. Made out a comprehensive list of those instruments is not possible as the catalogue is so extensive. But some international, regional and national instruments are very important for their comparative jurisdictional nature and their significance. In the area of common human rights instruments of international law like UDHR, ICCPR torture, inhuman or degrading treatment or punishment is prohibited. Some other organs of regional human rights mechanisms the said act is prohibited.

The Coatis been got by UN finally after a long voyage through time and interstates and organizational afford. The General Assembly adopted a declaration to prohibit torture and degrading treatment and punishment in the year 1975. The General Assembly adopted another instrument about the principles of medical ethics for the protection of persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman or degrading treatment or punishment in the year 1982. Torture is a serious crime against humanity and worst form of violation of

[7] Hereinafter referred to as UN

human rights. The first two instruments were not sufficient enough to fight against such a serious crime. Finally the General Assembly in the year 1984 adopted the convention. But by adopting a convention the fight does not come to an end but begins. Every international instrument faces the same time consuming process of ratification. Every convention is subject to ratification by the member states which are adopted by the international organizations. The process of ratification is not very easy to go sometimes. Each convention faces the jurisdictional question in the context of national and international perspective. Procedure of international human rights instrument's ratification takes time and sometimes it can be political issue for a state party. Within the framework of any national and international organs the enforcement of international human rights law is hard to ensure for its internal weakness. But after such a long journey in post-world war regime we should consider the good points in favor of international human rights law. The state practice of international human rights law is not in the initial stage. Developing countries with the developed countries enforcing international human rights law instrument i the domestic courts. The state practice of Bangladesh in enforcing human rights law in the domestic courts can be determined by some state steps. The constitution of Bangladesh has adopted UDHR and ICCPR by their main theme. Till now Bangladesh has ratified almost eighteen international human rights treaties and some optional protocol to them. But the ratification and state practice is not very same in Bangladesh as it is well known that after enactment it takes long way to reach in enforcement for any law.

Torture is a widespread practice in the state organs of Bangladesh. Especially the aw enforcing agencies practice for criminal investigation or to get confessional statement. Torture is a weapon which is been used for politically motivated persons.

Bangladesh being a member of international community has some obligations to time to time supervision by the international organizations and important states. The universally accepted human rights situation report prepared by the international important agencies presents an overall situation of torture regarding the country.

So now is the time to have the question answered that how the internationally recognized instrument can be enforced by the state organs. There is no dispute in this point that the conventions are adopted after a long time debate and discussion in the series of sessions by the highest expert and representatives of the state members. So the ethical standard and enter states acceptability of this legal instrument is very high than local instruments. So to fight for human dignity enforcing international human rights instruments are the apex aim for the nations. They hold universally acceptable and commonly enforceable themes.

To find out state status of Bangladesh in enforcing international human rights law with special reference to the UN CATis now the demand of the time. Besides find out the statutory limitations it is essential also to find out the measures to be taken for solutions.

Besides within the present judicial system we have to find the way to enforce the theme of the

1.5 Objectives of the Study

The research will consider the present judicial approach to the international human rights law in the context of Bangladesh. It will also compare the situation with the other leading countries of the world who is pioneer in enforcing international human rights law instruments in national jurisdiction. The study will also consider the countries which same in the sense of socio economic situation to Bangladesh.

Especially the convention is the first priority as the instrument of international human rights law.

To be more specific the followings are the objectives of the study:

1. Find out the present status of the international human rights law in Bangladesh regarding statutory provisions and judicial practice;
2. To study the judicial approach to the international human rights law with especial reference to the United Nations Convention against Torture;
3. To mention the Universal standard of the enforcement mechanism of the convention and the gap between the state practice and international standard;
4. To find out the ways and means that how can the international instruments of human rights and especially the convention can effectively enforced by the domestic courts;

1.6 Methodology of the Study

But in broader sense it will be transdiciplinary. The study will not be multi-disciplinary in its narrower sense. The study will consider the criminal law, public policy, administrative law and functions, constitutional law and policy and to a lesser extent history of Bangladesh state practice regarding international human rights instruments and judicial approach. The study will analyze the judicial precedents of the domestic courts regarding international human rights instruments. The study will be beyond positive in approach. The aim of the work is to typically identify, scrutinize and analyze existing judicial practice on the topic. The thesis is about present practice, the limitations and the need for change, not only in respect to the law itself, but also how it is enacted and how it could be.

1.7 Review of Concerned Literature Related to the Research

The world faced traumatic experience of human degradation in the world war the second. Formation of UN is one of the remarkable positive achievements during the war. After formation of the UN, it starts a journey to adopt the instruments of international human rights law which will be universally ratified and enforced. The scholarly research about international human rights from various aspects took importance from then. Furthermore the question of enforcement of the international human rights law soon comes in front of the national and international organs for its jurisdictional question. For the situation the judges, academic researchers and scholars have taken huge number of research work examining different topic related to international human rights law. A very good number of book and research articles have been published about the discipline. The leading universities and research institutes are undertaking research works and projects about the discipline and international human rights law is the emerging discipline of law in the world context.

Related to my topic, a good number of research works have been published yet. There are some pioneer scholars whose milestone works guiding the fellow students of this field.

Renowned researcher and professor of international law David Sloss in his compiled work **The Role of Domestic Courts in Treaty Enforcement: a Comparative Study**[8] examines the application of treaties by domestic courts in twelve countries. The author and writers examined about the status of treaties in domestic legal system and judicial application of treaties in the countries. The book provides a very well organized comparative study about the considered states in international human rights

[8] David Sloss, The Role of Domestic Courts in Treaty Enforcement: a Comparative Study, Cambridge, 2014.

law enforcement. The authors discussed about how can the domestic courts are transnational actors. The book analyzes the state practice about the interpreting and indirect application of international law, private persons' access to justice, implementing international law instruments. The book discussed about twelve countries among which about India the research focused on the self-executing treaties and domestic legal principles governing judicial remedies. The book did not discussed about the state status of Bangladesh or about any specific international human rights law instrument.

Dr. Sharon Weill in the book **'The Role of National Courts in Applying International Humanitarian Law'**[9]analyzes different national courts judgments of UK, USA, Canada and other countries to investigate and understand their approaches. The book argues that different national courts demonstrate different functional roles in which the normative application, role of courts, the courts apply international humanitarian law in different countries.

Stanislaw Frankowski and Mark Gibney in their book **'Judicial Protection of Human Rights: Myth or Reality?**[10]**'** discussed about the question to which judges have or have not served as protectors of human rights and the degree to which courts have purposely attempted to bring about some change in stemming governmental abuses. The book also focuses on judicial systems that have become involved in addressing human rights issues throughout the world. Its main focus is whether or not judiciaries protect individuals from human rights abuse.

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[9] Sharon Weill, The Role of National Courts in Applying International Law, Oxford, 2014.

[10] Stanislaw Frankowski, Mark Gibney, Judicial Protection of Human Rights: Myth or Reality? Praeger, USA, 1999.

Nigel Rodley and Matt Pollard have done more than a descriptive analysis of the field in their book **'The Treatment of Prisoners under International Law.'**[11] The book focus on the act of torture and cruel, inhuman or degrading treatment or punishment of any person in the period of first detention when the detainees are most at risk of having information or confessions, problems of poor prisoners conditions and of certain extraordinary penalties.

Professor Dr. M Shah Alam in his book **'Enforcement of International Human Rights Law by Domestic Courts.**[12]' examined the domestic courts' practice in enforcing international human rights law by the countries like USA, UK, India, Continental Europe Japan. The important facts to mention about this book are that the author discussed about the case of Bangladesh in implementing international human rights in the domestic courts. The writer focused on the present approach towards domestic implementation by the common law judges, state sovereignty and ministerial responsibility to parliament in treaty ratification. The author made some valuable recommendation in favor of domestic implementation of international human rights law.

John Albert Andrew's edited book **'Human Rights in Criminal Procedure: A Comparative Study'**[13] is a work done before the UN Convention against Torture has adopted by the General Assembly but the book examined the human rights of the accused person in the criminal procedure in the context of European countries which focus on the preventive functions of the judicial organs to protect rights of the accused persons. To understand the background of the convention and justification of the

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[11] Nigel Rodley, Matt Pollard, The Treatment of Prisoners under International Law, Oxford, 2011.

[12] Alam M. Shah, Enforcement of International Human Rights Law by Domestic Courts, New Warsi Book Corporation, Dhaka, 2007.

[13] J. A. Andrews, Human Rights in Criminal Procedure: A Comparative Study, Kluwer Academic Publishers, 1982.

treaty the research in the work is very much important. To be more relevant to the topic AhceneBoulesbaa's book **'The United Nations Convention on Torture and the Prospects for Enforcement.**[14]**'** is an important one to consider for.

Discussion on judicial presidents of courts of different jurisdiction of various countries' wide range of literature, academic professional journal articles, national and international reports including reports from government, unpublished papers, government documents will be the first priority. Judgments reported or not by the domestic courts of Bangladesh will be the important source. But also the departmental seculars and interdepartmental orders of the Bangladesh government and technical documents will be used in the research.

1.8 Scope and Limitation of the Study

The main limitation of this study is data collected from the primary sources. The related works of International Institutions and foreign academies cannot be reached because those are not available in the libraries in the country and access to those resources is highly cost effective for researchers. Access to the data of the ministries of the Bangladesh Government is also limited. Court decisions about international instrument are limited and unreported also. But the fact of torture we can found in the field level and the lower judiciary is concern mainly for the treatment of the accused persons. So there is a vast scope to study the problem from the field level. By the study the overall legal and factual picture will be clear before us. By the study effective suggestion can be brought out. The criminal justice system of Bangladesh is wide enough to have a research like this.

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[14] AhceneBoulesbaa, The United Nations Convention on Torture and the Prospects for Enforcement, MartinusNijhoff Publishers, 1999.

1.9 Justification of the Study

It is possible to make a significant contribution to the concepts of thecombating torture of the accused by the study. It will help the policy makers, legislators and researchers to know about the problems and prospects of the state practice of torturethe accused. The findings of this study are intended to help the government to improve the existing laws relating to the criminal justice in Bangladesh.

As the study is concerned with the torture of the accused and protections thereof, as well as the effectiveness of laws, steps of Government, awareness of people and respect to laws, which are the glaring issues of day, it deserves some inordinate significance. It is a new combination for the researcher, because as far as known, there has been no research work done as yet on this matter in Bangladesh.

It is expected that this recent issue can be treated as an important and valuable source for the workers on this subject. Undoubtedly protection of theaccused from custodial torture and violence has been a burning issue in Bangladesh. Results of this research are of much value in giving some light to the promotion and protection of the accused against any kind of unscrupulous activities like torture or cruel or inhuman treatment or punishment. The findings of the research will be helpful for the people, especially the accused who may be inflicted in a case or detained in custody; further an accused will get encouraged to find ways for establishing his/her rights.

Moreover, it will open wide opportunities for other researchers concerned with this arena. This research work may be helpful for the students of law to enrich their knowledge. Besides, many institutions, agencies and organizations will benefit from this type of new research work.

1.10 Organization of the Study

The entire research work will try to meet the objectives of the study by considering the international legal instruments. To highlight the issues the whole research work has been divided into **SEVEN** chapters and each of the chapters contains the details of the subject discussed thereunder**.**

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The Fifth Chapter focuses on the present legal stands and judicial practice of Bangladesh regarding international human rights instruments. The observations of the higher judiciary to the international law, to the custodial torture and violence are

discussed here. The duties of the judges and the prosecutors to prevent and combat torture are discussed here.

The Sixth Chapter tried to find out in a very short extend by interviewing the accused persons, police officials, prosecutors and judges, the field and direct knowledge about state of torture practiced in Bangladesh.

The Seventh Chapter draws the general conclusion of the entire research work and provides some recommendation to combat torture for the every organs of the countries system. The suggestions made here is the essence of the legal provisions of the national legislature and landmark decisions of the apex court of the land.

Every chapter tries to keep focus on the topic got for research and tried to provide guidelines to combat against torture.

1.11 Conclusion

To summarize the knowledge about the state approaches against torture and to find out the remedies for the victims is the sole purpose of the study. Besides it has cleared that in the legal administration of Bangladesh incidence of torture is a reality.

To establish human rights based criminal justice system in the country considering the international human rights instrument is must. Without that the country will fail to reach the development goal and to ensure human rights based society.

Chapter 2

Conceptual Issues of UN Convention Against Torture

2.1 Introduction

The UN CAT is the most important and specific international instrument to combat torture. The Convention has sixteen substantive clauses. The challenging most task before the international community was to make a definition of torture acceptable by the countries of the world. This was very hard for the drafting personals and the UN bodies. After a long try at last the draft convention was adopted by. This chapter will discuss about the definition of torture in the light of the UNCAT and other international instruments and case laws from the universal context. This chapter will also discuss about the legal and conceptual interpretation of the articles of the UNCAT with the reference of the international human rights norms and case laws.

2.2 The International Legal Context about Torture

Torture by state officials is a practice which can be found in almost every country. Between 1997 and 2000, torture was applied systematically in 70 countries and employed by three quarters of the world's governments. Torture, however, is also commonly recognized as unacceptable. The 1984 UNCAT,for instance, establishes that it is an act that can never be justified. In this context, human rights organizations have promoted campaigns to end torture, and there is a continuing transnational engagement to deal with torture and other violence inflicted by states through mechanisms such as truth commission bodies, ad hoc tribunals and the International Criminal Court. Torture is often rationalized by states as an unpleasant but necessary means to an end, a tool to obtain information or talk about threatening people, events

or organizations. This justification dominates common assumptions, yet torture has other recognized uses, all of which relate to aspects of state control over citizens. Torture can be applied as a means for state officials to obtain ‘confessions’; As a public demonstration to others of state power;Todestroy collective cultural identities and affiliations; As a tool to outwit state opponents; And as a means to ‘turn’ people away from resistance to supportfor the state. It is perhaps not surprising, given such rationalizations, that torture often goes misrecognized since torture engaged in by states is also denied and neutralized by states. As such, torture is euphemistically renamed as ‘crime fighting’, ‘intensive questioning’, ‘challenging conditions’ or ‘counterterrorism’.

In addition, those caught up in torture as perpetrators or victims are also subject to misrecognition. Under the rhetoric of state security and social good, those who are deemed to oppose the state are subject to ideologicalcensure at an official level.The targets for torture are variously denoted as‘terrorists’, ‘subversives’ and the ‘unruly’. Alternatively, they are describedas being outside human existence altogether – as ‘cockroaches’, ‘rats’, ‘worms’ and ‘vermin’. Under such representations, those tortured are seen asbearing some blame for their treatment; in stepping outside state, societal andhuman interests, the victim ‘deserved’ it. Through this misrecognition,torture is engaged in as an ideologicallylegitimate enterprise and a ‘just cause’ within specific political contexts. Assuch, torturers are rarely recognizedas torturers in official discourse. Theytoo become something else – ‘security agents’, ‘crime fighters’, ‘antiterroristagents’. Under notions of “rationality, instrumentalism and science”,torturers are reassignedas professionals deserving of national awards, careerenhancements and standing privileges.Moreover, at a global level, torture and torture survivors tend to go UNrecognized,ignored altogether.

Through an array of international human rights instruments and bodies (including the UNCAT,the UDHR, the ICCPR, three regional mechanisms, a Special Rapporteurand a focused UN Committee), torture is universally condemned. It is one of the few rights that is universally applied and cannot be derogated from. Despite this machinery, "torturers are very rarely punished, and when they are, the punishment rarely corresponds to the severity of the crime". Together with the fact that torture is infrequently reported in the media and is seldom the subject of academic debate or political discussion, survivors of torture are left with limited ideological or pragmatic support; in the wake of their suffering, they receive little recognition for the crimes inflicted against them.

2.3 The Necessity of Defining Torture

The term torture is widely used in international conventions and treaties, as well as laws at the national and local levels. Torture is a universally condemned practice. For an act that is so commonly condemned, there remains no clear understanding of what it actually is. Yet, the meaning of the term torture may not be as clear in the legal context as it is.

Disagreement among nations as to what constitutes torture may create obstacles to preventing and punishing torture, which may explain, in part, why acts that many agree are torture continue to recur. Under customary international law, the prohibition of torture is *jus cogens*—a peremptory norm (Article 53 of the Vienna Convention on the Law of Treaties lists four criteria for peremptory norms: "(1) they are norms of general international law. (2) They have to be accepted by the international community of States as a whole. (3) They permit no derogation. (4)

They can be modified only by new peremptory norms."[1]That is non-derogable under any circumstances. It is binding on all nations.

In 1999, the Israeli Supreme Court issued a decision in*Public Committee Against Torture in Israel v. Israel*, declaring a number of interrogation techniques to be illegal. The Court studiously avoided calling these techniques torture. In fact, the word torture does not appear anywhere in the opinion. Rather, when evaluating the different interrogation methods, the Court described them in detail and then summarily proclaimed each to be unlawful. In its legal analysis, the Court simply provided statements in analyzing the methods, such as:

It harms the suspect's body. . . . It surpasses that which is necessary . . . and does not serve any purpose inherent to interrogation. . . . It is degrading and infringes upon an individual's human dignity. . . . It degrades him. . . . It causes the suspect suffering. . . . They impinge upon the suspect's dignity, his bodily integrity and his basic rights in an excessive manner or beyond what is necessary.[2]

The Court also explained that the necessity defense would be available to an investigator applying physical interrogation methods. If the Court had deemed these acts torture, under the principle of *juscogens*, such a defense would have been unavailable. The avoidance of labeling the illegal acts "torture" in this case illustrates the power of the term— reviled such that courts avoid using it and governments do not want to be guilty of torture.

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[1]LauriHannikainen, Peremptory Norms (JusCogens) in International Law, Finnish Lawyers' Publishing Company, Helsinki, 1988, p.5,

[2]Public Committee Against Torture in Israel v. Israel, 38 L.L.M. 147, HCJ 5100/94 (1999).

The lack of a single definition of torture could cause confusion and disagreement. The absence of a single, precise definition not only affects torture prevention, but bolsters the ability of nations to avoid consequences through dishonesty and hypocrisy. As the 1973 Amnesty International Report on Torture points out, "given that the word 'torture' conveys an idea repugnant to humanity, there is a strong tendency by torturers to call it by another name, such as 'interrogation in depth' or 'civic therapy,' and a tendency of victims to use the word too broadly."[3]In the absence of a universal definition, many governments narrowly define torture, enabling their agents to act however they see fit without crossing the definitional line. Governments are able to continue to condemn torture publicly while employing horrific methods of interrogation and punishment. A single, clear definition of torture limited to the most severe acts, the advocates who overuse the term and the governments who define it too narrowly— creating a space in which claims of torture are taken seriously. Public officials must fully understand the lawful limits of their actions. Without a clear definition of torture, how can the public expect its public officials to stay within the lawful bounds of interrogation? Considering the grave nature of torture, such uncertainty is unacceptable. A well-understood definition of torture would assist both public officials to carry out their duties, and the public to gain confidence that the government is acting properly.

Finally, a single definition would assist the international community in placing pressure on offending governments. U.N. Secretary-General Kofi Annan has explained that torture is an atrocious violation of human dignity. It dehumanizes both the victim and the perpetrator. The pain and terror deliberately inflicted by one human being upon another leave permanent scars. Freedom from torture is a fundamental

[3]Amnesty International, Report On Torture, 1973, p.29-30.

human right that must be protected under all circumstances. Growing awareness of international legal instruments and protection mechanisms gives hope that the wall of silence around this terrible practice is gradually being eroded.[4]

While a difficult task, defining torture is vitally important for the following reasons.

First, governments must be bound by a clear and constant standard that cannot be manipulated in times of crisis.

Second, public officials need guidance as to the lawfulness of their tactics.

Lastly, the international community must be able to hold governments accountable for torturous acts. Without a definition that is both clear and generally agreed upon, all three tasks are hampered.

2.4 International laws about the meaning of torture

The basic definition of torture is that contained in the UN Convention against Torture. According to Article 1(1), the term means:

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

[4]"Freedom from Torture 'Fundamental Right,' Says Secretary-General," SG/SM/7855, OBV/223 (June 26, 2001), *available at* www.unis.unvienna.org/unis/pressrels/2001/sgsm7855.html(last visited July 25, 2005).

From this definition, it is possible to extract three essential elements which constitute torture:

1. The infliction of severe mental or physical pain or suffering
2. By or with the consent or acquiescence of the state authorities
3. For a specific purpose, such as gaining information, punishment or intimidation

From the above definition, torture is characterized and distinguished from other forms of ill-treatment by the severe degree of suffering involved. It is therefore important to reserve the term for the most objectively serious forms of ill-treatment. Cruel treatment, and inhuman or degrading treatment or punishment are also legal terms which refer to ill-treatment causing varying degrees of suffering less severe than in the case of torture. The essential elements which constitute ill-treatment not amounting to torture would therefore be reduced to-

1. Intentional exposure to significant mental or physical pain or suffering
2. By or with the consent or acquiescence of the state authorities

This makes it difficult to identify the exact boundaries between the different forms of ill-treatment, because those circumstances and characteristics will vary. The important point to remember is that all forms of ill-treatment are prohibited under international law. International law gives us two main guidelines to apply in assessing whether or not a set of facts amounts to torture-

1. The essential elements contained in the definition of torture should be supported by the facts.
2. Torture may be distinguished from other forms of ill-treatment by the severe degree of suffering involved and the need for a purposive element.

2.5 Meaning of 'Essential elements'

We will see from the extract of the UN Convention against Torture cited above that the legal definition of torture is quite abstract in nature. It does not refer to specific types of ill-treatment or provide a list of prohibited techniques. Instead, it sets out a number of essential elements which are required for an incident to be considered as a possible case of torture in the legal sense. The elements necessary for treatment to amount to ill-treatment other than torture are similarly abstract. These elements may be as follows-

Severe physical or mental **pain or suffering** has been deliberately inflicted (torture) or intentional exposure to **significant** mental or physical **pain or suffering** has occurred (ill-treatment other than torture).

The **state authorities** inflicted this suffering them, or else knew or ought to have known about it but did not try to prevent it.

The suffering was inflicted for a **specific purpose**, such as gaining information, punishment or intimidation (torture only).

2.6 The Meaning of 'Degree of suffering'

Torture is distinguished from other, lesser, forms of ill-treatment by the severe degree of suffering involved. They may depend on manypersonalcharacteristics of the victim - for example, sex, age, religious or cultural beliefs, health. Inother cases, certain forms of ill-treatment or certain aspects of detention which would not constitute torture on their own may do so in combination with each other. Torture is not, however, limited to such familiar examples - it encompasses many forms of suffering, both physical and psychological in nature. It is particularly important not to forget about psychological forms of ill-treatment - very often these can have the most long-

lasting consequences for victims, who may recover from physical injuries yet continue to suffer from deep psychological scarring. Forms of ill-treatment which have been found to amount to torture, either alone or in combination with other forms of treatment, include:

1. Beatings on the soles of the feet
2. Palestinian hanging: suspension by the arms while these are tied behind the back
3. Severe forms of beatings
4. Electric shocks
5. Rape
6. Mock executions
7. Being buried alive
8. Mock amputations

There are, however, also many *'grey areas'* which do not clearly amount to torture, but which are of great concern to the international community.

Examples include:

1. Corporal punishment imposed as a judicial penalty
2. Some forms of capital punishment and the death-row phenomenon
3. Solitary confinement
4. Certain aspects of poor prison conditions, particularly if combined
5. Disappearances, including their effect on the close relatives of the disappeared person
6. Treatment inflicted on a child which might not be considered torture if inflicted on an adult

2.7 Interpretation of Some Technical Words of the Definition from Article 1 of UNCAT

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

The CAT's definition thus comprises the following elements: (1) anact; (2) severe pain or suffering; (3) physical or mental pain; (4) intent;(5) particular purposes; (6) involvement of a public official; and (7) the absence of pain or suffering from lawful sanctions.

2.7.1 An Act

The CAT definition of torture requires an "act" that causes severe pain or suffering, whether physical or mental. It is important to deter-mine, then, what constitutes an act. If an act is limited to pro-active behavior, thereby excluding omissions that cause severe pain or suffering, the definition of torture would be substantially narrowed. For example, leaving a prisoner in a room for several days and neglecting to provide him with food or water would certainly cause severe pain or suffering, but may be considered an omission rather than an act. However, this restrictive interpretation runs contrary to the purpose of theCAT.In its definition of torture, the United Kingdom

avoids any confusion on the issue by explicitly including both acts and omissions, stating that it is immaterial whether the pain or suffering . . . is caused by an act or an omission. Likewise, Canada defines torture as any act or omission by which severe pain or suffering occurs, leaving no room for uncertainty with regards to the act requirement. Some CAT signatories have enacted laws that do not require an"act "as a necessary element of torture. For instance, Colombia's law against torture requires no act, but rather stipulates that liability shall attach to anyone who *subjects* another person to severe physical or mental pain or suffering. Similarly, the Czech Republic avoids the term "act" in its torture definition: He who shall *cause* to another person physical or mental suffering through torture . . . shall be imprisoned. The use of a verb like "subject" or "cause," instead of the noun "act," may broaden the scope of behaviors that constitute torture, capturing intentional omissions, such as the failure to provide nutrients.[5]

2.7.2 Severe Pain or Suffering

Under the CAT definition, the harm caused to the victim must be "severe pain or suffering" in order to amount to torture.[6] It is, of course, virtually impossible to quantify "severe pain and suffering" or to define it in absolute terms. The CAT itself does not elaborate or provide guidance on the key adjective, "severe."

The CAT contemplates torture as falling at the extreme end of a spectrum of pain-inducing acts. This hierarchy of ill treatment originated in the *Greek Case*, a 1969

[5]Consideration of Reports Submitted By State Parties under Article 19 of the Convention, Czech Rep., U.N. Doc. CAT/C/60/Add.1

[6]United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85

decision of the European Commission on Human Rights[7]Fifty-three individuals, along with three governments on behalf of their citizens, alleged torture and ill-treatment during detention by the Greek government in Athens, Piraeus, Salonicaand Crete. The complainants relied on the European Convention on Human Rights, which prohibits both torture and "inhuman or degrading treatment or punishment," though without defining those terms. In its decision in the case, the Commission elaborated on what distinguished "torture" from "inhuman or degrading treatment":

It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately cause's severe suffering, mental or physical, which, in the particular situation, is unjustifiable. The word "torture" is often used to describe inhuman treatment, which has a purpose, such as obtaining information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.[8]

Since the *Greek Case*, the ECHR has utilized this hierarchy conception a number of decisions. For example, in *The Republic ofIreland v. The United Kingdom*[9], the ECHR gave concrete meaning tothe hierarchy, ruling that five interrogation techniques constituted inhumane and degrading treatment but did not rise to the level of torture.[10]The ECHR reasoned that "the distinction between torture and inhuman or degrading treatment derived principally from a difference in the intensity of the

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[7]*The Greek Case*, YEAR BOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 12 (1969)

[8]Ibid

[9]*Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 5, 66 (1978)

[10]*Republic of Ireland v. The United Kingdom*, 2 E.H.R.R. 25, 36 (1979-80). The five techniques were wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink.

suffering inflicted. The term 'torture' attached a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. The ECHR held that the five techniques "did not occasion suffering of the particular intensity and cruelty implied by the word torture."[11]

Unlike the European Convention, the CAT does define torture, but it too treats it as a particularly egregious subcategory of cruel, inhuman or degrading treatment. The first draft of the CAT defined tortures an "aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."[12] Article 16 of the CAT states that 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 amount to torture as defined in article I, 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.

Under customary international law, torture is *jus cogens*— never permissible or justifiable under any circumstances. The CAT reaffirms this principle, providing that "no exceptional circumstances whatsoever may be invoked as a justification of torture." Other ill-treatment does not hold this special legal status.[13]The element of infliction of severe pain or suffering considers the impact of the act on the particular victim. Presumably, the same act could have different effects on different people depending on their natural susceptibility and threshold for pain. Thus, the victim's physical or mental constitution will become relevant in cases where severity of the ultimate pain is at issue. The U.N. Special Rapporteur on Torture has pointed out that

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[11]Ibid. p. 36-37.

[12]Draft International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, submitted by Sweden, U.N. Doc. No. E/CN.4/1285, Article 1 (1978).

[13]ICCPR, Arts. 4 & 7, G.A. Res. 2200A(XXI), U.N. Doc. A/6316 (1996)

children and pregnant women are particularly vulnerable to torture. For example, children "may suffer graver consequences than similarly ill-treated adults." Going further towards subjectivity than the CAT definition, the ECHR has adopted an expressly subjective standard. The ECHR approaches the severity of the act within the context of the particular case, considering factors such as the physical and mental effects on the person experiencing the harm, the duration of the act, and the age, sex, and culture of the person experiencing the harm.[14]

2.7.3 Defining "severe"

States and transnational bodies have differed in their approach to the severe pain or suffering element by interpreting the term severe in their own way or by replacing it with other terms. Some have attempted to limit the reach of the CAT through narrow interpretations of the "severe pain" element. In *The Republic of Ireland v. The United Kingdom*, the ECHRunanimously ruled that a combination of five interrogation techniques used by the British Security forces in Northern Ireland amounted to inhuman and degrading treatment but not torture under the European Convention on Human Rights. The ECHR reasoned that "the distinction between torture and inhuman or degrading treatment derived principally from a difference in the intensity of the suffering inflicted. The term 'torture' attached a special stigma to deliberate inhuman treatment causing very serious and cruel suffering." The ECHR held that the five techniques "did not occasion suffering of the particular intensity and cruelty implied by the word torture."[15] The absence of a minimum threshold of pain or suffering substantially broadens the definition of torture. The government of Latvia

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[14] *Z and Others v. United Kingdom*, 34 E.H.R.R.3, C90 (ECHR May 10, 2002)

[15] *The Republic of Irelandv. The United Kingdom*, 2 E.H.R.R. 25 (1979-80)

has taken yet another approach, requiring that the acts must "cause *particular*pain or suffering to victims."[16]

2.7.4 Weather the Torture Physical or Mental

The CAT's definition of torture extends to pain or suffering that is either mental or physical. The CAT does not delineate what constitutes mental or physical pain, nor does it draw a boundary between the two. If a torture victim experiences severe physical and mental pain as a result of a single act, such as rape, there is no need to parse out the particular types of pain. Yet, in naming both physical and mental, the CAT acknowledges a difference between the two types of pain or suffering. The most detailed description of the mental harm element can be found in the U.S. definition of torture. As a condition for ratifying the CAT, the United States submitted formal understandings including more precise definition of mental torture: Mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.[17]This understanding defines mental pain and suffering by the source of the pain. Confining mental pain or suffering to a closed set of enumerated actions thereby narrows the definition. In

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[16]Consideration of Reports Submitted By State Parties under Article 19 of the Convention, Lat.,U.N. Doc. CAT/C/21/Add.4

[17]The United States ratified the CAT with reservations, understandings and eclarations.http://www.unhchr.ch/tbs/doc.nsf/0/5d7ce66547377b1f802567fd0056b533

addition, without guidance differentiating between transient mental harm and prolonged mental harm, the understandings' use of the word "prolonged" may prove to further narrow the definition. Must the harm be constant and enduring, or might periodic yet debilitating flashbacks suffice? Just as the word "prolonged" creates difficulties in Latvia's version of the act element, so too does it pose new confusions and hurdles here.Croatia simply failed to prohibit mental torture at all, limiting its definition to physical torture.[18]

2.7.5 Meaning of Intentionally Inflicted

The CAT definition of torture requires that severe pain and suffering be "intentionally inflicted" on a person. In other words, were a victim to suffer severe pain at the hands of a state official, but the official did not intend to cause the severe pain, the act would not amount to torture. This might be the case if, for example, a prisoner experienced severe pain or suffering as a result of poor prison conditions but the officials did not intend the conditions to affect the prisoner so severely.

The requisite intent might also be absent in cases where medical experiments are conducted on prisoners. If experimentation severely harms a prisoner, but the doctors had no intention to harm the prisoner, the state could argue that its behavior, while potentially criminal under other laws, does not amount to torture. The ECHR has made the intent requirement easier to satisfy by shifting the burden of proof from the victim to the government. For example, in *Selmouni v. France*, the ECHR noted that "where an individualist taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide

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[18] *Consideration of Reports Submitted By State Parties under Article 19 of the Convention,* Croat., U.N. Doc. CAT/C/54/Add.3,

plausibleexplanation of how those injuries were caused."[19]Because no such explanation was offered, the ECHR found that the state tortured an individual even absent any evidence of intent or the identity of the perpetrator. The physical evidence of harm while in state custody and the testimony of the victim were sufficient to trigger a presumption of intent.Thus, in *Paniagua Morales v.Guatemala*, the Inter-American Court of Human Rights found that the Guatemalan government tortured individuals in violation of Article 5 of the American Convention on Human Rights.[20]

Often, when analyzing the kind of intent required, lawyers turn to the terms "general intent" and "specific intent." General intent is aless demanding standard, requiring merely that the actor intended to perform the conduct as opposed to intending to create a particular result in violation of the law. Specific intent requires acting with the intent to achieve a result or intending to commit a particular crime. The text of the CAT itself does not expressly require either specific intent or general intent. Regardless of whether the intent is characterized as specific or general, it is important to clarify what satisfies intention this context.

In *Zubeda v. Ashcroft*, the court heldthat the intent requirement merely excludes accidental harm: the CAT "distinguishes between suffering that is the accidental result of unintended act, and suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct."[21]Relying on policy considerations, the court concluded that requiring individuals to establish the specific intent of their persecutors would impose an insuperable obstacle, rendering the CAT ineffective. Recently, in *Auguste v. Ridge*, theThird c Circuit found that the specific intent element under the US understandings to the CAT does not require "proof of specific intent, as that term

[19]*Selmouni v. France*, 29 E.H.R.R. 403, 426 (2000)

[20]*Morales v. Guatemala, Judgment of March* 8, 1998, Inter-Am. Ct. H.R. (Ser. C) NO.37 (1998),

[21]*Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003)

is used in American criminal prosecutions" but rather, "something more than an accidental consequence . . . to establish the probability of torture."[22]

2.7.6 Meaning of "For Such Purposes"

The CAT definition includes a purpose limitation; a particular act constitutes torture only if performed for certain purposes. The act must have been undertaken for such purposes as obtaining from [the victim] or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind. First, it is evident from the text that not just any purpose will do; otherwise the reference to purpose would be meaningless. Indeed, examination of U.N. discussions in drafting the precursor to the CAT, the Declaration Against Torture, confirms that the drafters intended the list of purposes to be significant. During the formal U.N. Congress sessions in 1976, a proposal to add the words "or for any other purpose "to the Declaration failed.[23]Second, the phrase "such purposes as" indicates that the ensuing list is illustrative, not comprehensive. Commenting on the first draft of the CAT, the U.S. explained that the list is "meant to be indicative rather than all-inclusive."89 By contrast, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") takes the position that foran act to constitute torture, one of the enumerated purposes must exist. However, the Tribunal has noted that "there is no requirement that the conduct must be *solely* perpetrated for a prohibited purpose. Thus, in order for this requirement to be met, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the

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[22]*Auguste v. Ridge*, 395 F.3d 123, 144 (3d Cir. 2005)

[23]NIGELS S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 29 (1987), Cited in Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders Report, U.N. Doc. A/CONF.56/10 (1976).

predominating or sole purpose."[24]Third, phrasing the element to require purposes "such as" those listed, rather than "or for any other purpose," implies that relevant purposes not listed must have something in common with those specified.

Fourth, the last listed purpose, "for any reason based on discrimination of any kind," is both conceptually and grammatically distinct from the other purposes. Discrimination is more akin to a reason or motivation as opposed to a goal such as interrogation or punishment. Appropriately, this phrase is set apart from the other enumerated purposes by the phrase "or for." It is thus not illustrative of the sorts of purposes that bring an act within the CAT definition but rather a separate, alternative basis on which to ground a finding of torture. Individual states have varied in implementing the purpose requirement. Some signatories specify particular purposes in their definitions of torture. Narrowing the definition by listing a closed set of purposes creates clear inconsistencies with the CAT. In Indonesia, for example, a torture case requires proof that the actor harmed the victim "in order to obtain a confession or information from someone or a third person, or in order to threaten or coerce that person or a third person, or for any discriminatory reason on any grounds."[25]Abuse for punitive reasons, therefore, would not constitute torture under Indonesian law, no matter how extreme or disproportionate to the crime. Spain's definition states that the pain-inducing act must be "for the purpose of obtaining a confession or information from any person or of punishing him for any act he has committed."[26]

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[24]*Prosecutor v. Delalic*, ICTY, Case No. IT-96-21, Judgment, para.470 (Trial Chamber II, November 16, 1998)

[25]Consideration of Reports Submitted By State Parties under Article 19 of the Convention, Indon., U.N. Doc. CAT/C/47/Add.3

[26]Consideration of Reports Submitted By State Parties under Article 19 of the Convention, Spain, U.N. Doc. CAT/C/55/Add.5, available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.55.Add.5.En

Thus, if a prison guard inflicted severe pain for discriminatory reasons, such as racial or ethnic hatred, such an act would fall outside Spain's definition of torture. On the other hand, lack of purpose requirement may be an attempt to capture all potential forms of extreme violence by public officials. Even the worst abuse or most inhuman treatment of a person will not be considered torture in violation of the CAT unless somehow the state is involved. Because private "torture" is generally criminal under national laws. When a public official personally inflicts severe pain or suffering, the state action requirement is met in all but the exceptional circumstances when the official is acting for purely private reasons. State involvement may also be remote and still satisfy the CAT definition, which reaches private acts consented to, acquiesced in, or instigated bya public official. Thus, state inaction in the face of private violence can constitute torture.

In *Z. v. The United Kingdom*, the ECHR adopted a similarly broad understanding of the acquiescence by a public official that would suffice for a violation of the European Convention on Human Rights.[27]Holding the government responsible for the inhuman anddegrading treatment inflicted on four children by their parents, theECHR found that states must take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge. The Court ruled that as the State knew or should have known that these children were at risk of severe abuse by their parents, the State had an affirmative obligation to prevent torture or inhuman or degrading treatment. Thus

[27]*Z v. The United Kingdom*, 34 E.H.R.R. 3 (ECHR 2001)

under the European Convention on Human Rights, torture may include actions taken by private individuals if the State has an obligation to protect the victims. Such an obligation may arise under domestic law, as was the case in *Z v. The UnitedKingdom*. The definition of torture under the CAT has yet to be stretched to include (in) action by public officials that violate an obligation toprotect. A number of countries have adopted definitions of torture that stray from the CAT language with respect to the public official requirement. For an act to constitute torture in Guatemala, it must have been conducted "with the authorization, support or acquiescence of the state authorities" or have been "committed by the members of groups or organized gangs having terrorist, insurgent or subversive aims or any other wrongful purpose."[28] In Croatia, the connection between the person acting and the government is stated slightly differently. Croatian torture requires an act by "an official or any other person who, acting with the encouragement or the express or tacit approval of an official person."[29] In its torture definition, Iceland eliminated the state actor requirement altogether, simply stating that torture may occur in all situationsregardless of whether the act was performed at the behest of public official. Variations on the public official requirement undoubtedly affect government accountability with regards to individual acts of torture, as well as the characterization of acts as torture.

The United States has taken a slightly different approach. In ratifying the CAT, the United States presented the following understandings concerning the public official requirement:

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[28]Consideration of Reports Submitted By State Parties under Article 19 of the Convention, Guatemala, U.N. Doc. CAT/C/49/Add.2

[29]Consideration of Reports Submitted By State Parties under Article 19 of the Convention, Croatia, U.N. Doc. CAT/C/54/Add.3,

The definition of torture in article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

That with reference to article 1 of the Convention, the United States understands that the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity. While including a concept of custody or physical control, the US understandings also add the new term "offender." However, the understandings do not define the term offender. Therefore, it is unclear whether the offender refers to the person accused of torture or the public official merely involved in the torture. If the government is defined as the offender, the additional requirement that the offender must have custody or physical control of the victim may, in practice, require a closer nexus between the public official and the victim. In*Zheng v. Ashcroft*, in which the petitioner sought relief from deportation on the basis that he was likely to be tortured if returned to China, the petitioner claimed that the Chinese government acquiesced in his torture by third-party smugglers.[30] This case exemplifies how terms used in the CAT definition, even if adopted in individual country laws, may be controversial upon interpretation.

2.7.7Interpretation of the clause 'Does Not Include Pain or Suffering from Lawful Sanctions'

Finally, the CAT provides that "pain or suffering arising only from, inherent in or incidental to lawful sanctions" does not constitute torture. While the CAT prohibits acts that inflict severe harm, pursuant to this provision such acts are allowed and the severe harm deemed acceptable in the proper context. Interpreted broadly, this provision could constitute the exception that swallowed the rule— allowing state to

[30]*Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003)

avoid the prohibition on torture simply by sanctioning methods of punishment that involve extremely harsh treatment. This possibility is currently largely hypothetical, as to date, no country has defended against charges of torture on the grounds that the actions were incidental to lawful sanctions. However, the lawfulsanctions provision has, for example, precluded arguments that capital punishment constitutes torture. The first draft of the CAT did not contain this potential loophole. The draft stated that torture "does not include 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."[31]A number of countries criticized this draft because the Standard Minimum Rules for the Treatment of Prisoners are not internationally legally binding and only concern prison conditions.Some argued the exception had to be broader than just prison conditions and should include other punishment practices. After debate within the Working Group, the provision of consistency with international standards was deleted rather than corrected. As practices that maybe lawful in one state may be unlawful in another, this provision undermines the effort to achieve a uniform definition of torture. Some states have attempted to solve this dilemma by eliminating or clarifying the exemption in their own torture definitions. For example, Croatia's definition of torture has no lawful sanctions exception whatsoever, thereby providing a stricter framework for defining torture.[32]In its understanding, the United States attempted to clarify and cap the lawful sanctions exemption:(c) That with reference to article 1 of the Convention, the United States understands that 'sanctions' includes judicially-imposed sanctions and other

[31]Draft International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, submitted by Sweden, U.N. Doc. E/CN.4/1285 (1978)

[32]Declarations and Reservations, available at http://www.ohchr.org/english/law/cat-reserve.htm (last visited July 25, 2005).

enforcement actions authorized by United States law or by judicial interpretation of such law.

The U.N. Special Rapporteur on Torture, Nigel S. Rodley, recognized the potential slippery slope of the lawful sanctions exemption and has interpreted the provision so that differences in national laws would not affect the strength of the CAT.Rodley concluded that the term "lawful sanctions" refers to practices that the international community widely accepts as permissible sanctions, such as imprisonment. He cited the Standard Minimum Rules for the Treatment of Prisoners as an example of international standards that may guide determinations of acceptable practices.[33]

In particular, Rodney concluded that corporal punishment may amount to torture, 'I cannot accept the notion that the administration of such punishments as stoning to death, flogging and amputation – acts which would be unquestionably unlawful in, say, the context of custodial interrogation – can be deemed lawful simply because the punishment has been authorized in a procedurally legitimate manner, i.e. through the sanction of legislation, administrative rules or judicial order. To accept this view would be to accept that any physical punishment, no matter how torturous and cruel, can be considered lawful, as long as the punishment has been duly promulgated under the domestic law of a State'.[34]

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[33]Report of the Special Rapporteur, Sir Nigel S. Rodley, submitted pursuant to Commission On Human Rights Resolution 1995/37 B, Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment, In Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, E/CN.4/1997/7, 8 (1997)

[34]Human Rights Fact Sheet: No. 4 Combating Torture 33 (May 2002), available at www.unhchr.ch/ html/menu6/2/fs4rev1.pdf .

2.8 Interpretation of the Substantive Provisions of UNCAT

The convention has sixteen articles. The following discussion is about the meaning of the substantive provisions of the articles. The discussion made in the light of the international legal instruments.

Article 1 of the convention stated that-

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

This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Brief interpretation of the substantive provision-

It is possible to extract from three essential factors necessary for an actor qualify as torture:

- •The infliction of severe mental or physical pain or suffering;
- •By or with the consent or acquiescence of the State authorities;
- •For a specific purpose, such as gaining information, punishment or intimidation.

The Act of Torture

The act of torture in the Convention refers to the deliberate inflictionofseverepain or suffering upon a person, which can be either mental or physical in nature and caused by either a single isolated act, or a number of such acts.

The nature and degree of suffering experienced by an individual may be difficult to verify objectively. It may depend on many personal characteristics of the victim—for example sex, age, religious or cultural beliefs, or health. In other cases, certain forms of ill-treatment or certain aspects of detention which would not constitute torture on their own may do so in combination with each other.

For the purpose of determining what constitutes "severe" under the Convention, reference may be made to the above definition. The test to be employed for so doing is a subjective one that takes account of the circumstances of each case.[35]The UN Special Rapporteur on Torture, in his 1986 report, provided a detailed, although not exhaustive, catalogue of those acts which involve the infliction of suffering severe enough to constitute the offence of torture, including: beating; extraction of nails, teeth, etc.; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; administration of drugs in detention or psychiatric institutions; prolonged denial of rest or sleep; pro-longed denial of food; prolonged denial of sufficient hygiene; prolonged denial of medical assistance; total isolation and sensory deprivation; being kept in constant uncertainty in terms of space and time; threats to torture or kill relatives; total abandonment; and simulated executions.[36]

There are also many "grey areas" which either do not clearly amount to torturer about which there is still disagreement. Examples include:

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[35]AhceneBoulesbaa, "The UN Convention on Torture and the Prospects for Enforcement", MartinusNijhoff Publishers, 1999, p. 18.

[36]E/CN.4/1986/15, Para. 119.

•Judicial corporal punishment;

•Some forms of capital punishment and the death-row phenomenon;

•Solitary confinement;

•Certain aspects of poor prison conditions, particularly if experienced in combination;

•Disappearances, including their effect on the close relatives of the disappeared persons;

•Treatment inflicted on a child which might not be considered torture if inflicted on an adult.[37]

Many of these areas may be considered as other forms of ill-treatment, which is distinguished in the Convention from torture by the degree of suffering involved and the need for a purposive element.

The Convention, like other conventions referring to torture, includes the prohibition of "mental torture "within the scope of the prohibition of torture**.**[38]Mental torture has been defined by the European Commission on Human Rights as:

"The infliction of mental suffering through the creation of a state of anguish and stress by means other than bodily assault."[39]The former UN Special Rapporteur on the Torture, Sir Nigel Rodley, has also emphasized that the prohibition of torture relates not only to acts that cause physical pain but also to acts that cause suffering to the victim, such as intimidation and other forms of threats. Article 1 of the Convention does not refer specifically to rapes a form of torture. Rape can be resorted to either by

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[37]Camille Giffard, "The Torture Reporting Handbook", Human Rights Centre, University of Essex, 2000, note.14, p.14.

[38]AhceneBoulesbaa, "The UN Convention on Torture and the Prospects for Enforcement", MartinusNijhoff Publishers, 1999, note28, p. 19

[39]Denmark et al. v. Greece, Report of the European Commission on Human Rights, November 1969.

the interrogator or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing, or humiliating the victim, or obtaining information, or a confession, from the victim or a third person. In human rights law, rape under these circumstances amounts to torture. The International Tribunal for the Former Yugoslavia has formulated the issue of rape in the context of torture as follows:

"…Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered asoccurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation…Accordingly, whenever rape another forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet these criteria."[40]While it is clear that torture can result from an "act", it is not similarly clear from Article 1 whether torture can result from an "omission". There was no reference to this question at any stage in the preparatory work of the Convention.[41]

[40]*Prosecutor v. Delalic et al*., Case No IT-96-21-T, 16 November 1998, paras. 495-496.

[41]AhceneBoulesbaa, "The UN Convention on Torture and the Prospects for Enforcement", MartinusNijhoff Publishers, 1999,note28, p. 9.

The Purpose of the Act of Torture

In order to be prohibited, the conduct must be intentionally inflicted "…for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind…".

The ICTY has distinguished acts of torture from other acts causing physical and mental suffering;

"The offence of willfully causing great suffering or serious injury to body or health is distinguished from torture primarily on the basis that the alleged acts or omissions need not be committed for a prohibited purpose such as is required for the offence of torture."[42]

In other words, the distinction between torture and other related offences is the purpose, if any, for which the suffering or serious injury is caused.[43]

The distinction between acts of torture and acts of assault or cruel, inhuman, or degrading treatment is critical, because under the Convention the State Party is obliged to establish its jurisdiction over acts of torture and either prosecute or extradite those suspected of committing such acts.51

The term "instigation" means incitement, inducement, or solicitation and as such it requires the direct or indirect involvement and participation of a public official in the act of torture in order to give rise to State responsibility and the application of Article1.

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[42] *Prosecutor v. Delalic* et al., ibid. note 45, para. 442.

[43] Background Paper 2, "Aspects of the Definition of Torture in the Regional Human Rights Jurisdictions and the International Criminal Tribunals of the Former Yugoslavia and Rwanda", APT Seminar on the Definition of Torture, Association for the Prevention of Torture, November 2001.

The element of official sanctions stated in very broad terms and extends to officials who take a passive attitude, or who turn a blind eye to torture com-mitted against opponents of the government in power, be it by unofficial groups or by the authorities.[44]

Lawful sanction Pain and suffering arising from, inherent in, or incidental to a lawful sanction falls outside the ambit of torture. In the view of the UN Special Rapporteur on Torture, the "lawful sanctions "exclusion must necessarily refer to those sanctions that constitute practices widely accepted as legitimate by the international community, such as deprivation of liberty through imprisonment, which is common to almost all penal systems. Deprivation of liberty is a lawful sanction, provided that it meets basic internationally accepted standards, such as those set forth in the United Nations Standard Minimum Rules for the Treatment of Prisoners.[45]

Article 2 of the Convention stated that-

"1.Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture."

Interpretation of the article-

[44]Nigel S. Rodley, "The Treatment of Prisoners Under International Law", 2nd ed., Oxford, 1999, p. 100.

[45]Resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

This paragraph imposes a general, but basic obligation on States Parties to take effective measures to prevent torture. The character of these measures is left to the discretion of the States concerned, but it includes making whatever changes are necessary in order to harmonize their internal order with international standards on prevention.

Some States consider that the adaptation of domestic law to comply with inter-national obligations is a condition precedent to becoming a Party to a treaty. This, however, is a minority view and does not represent the prevailing State practice.[46]In other States, a ratified treaty automatically becomes part of the law of the land. According to the general rules of international law, a State is undera duty to execute the provisions of a treaty from the date at which the treaty becomes binding upon it, unless the terms of the treaty itself provide other-wise.[47]

There are no requirements in international law as to the specific manner in which the prescribed measures must be implemented. However, mere adoption of preventive measures by States without any efforts directed toward their implementation is not fulfillment in good faith of the obligations under the Convention. Apolicy of doing nothing to implement the measures taken by the States would undoubtedly prevent the achievement of reasonable results in the prevention of torture, which is one of the objects of the Convention.[48]There is some uncertainty about the point of time by which preventive measures adopted in accordance with Article 2 must be implemented.

Article 3 stated that-

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[46]Boulesbaa, ibid, p.47.

[47]See the Legal Opinion of the Legal Department of the UN, Doc. E/CN.4/116 (1948), p. 4.

[48]Boulesbaa, ibid, p. 67.

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

Interpretation of the article-

Article 3 is confined in its application to cases where there are substantialgroundsfor believing that the person would be subjected to torture as defined in Article 1 of the Convention if expelled.[49]There is a substantial ground for believing that a person would be at risk of torture means a factual one. The risk must be assessed on grounds that go beyond mere theory or suspicion, although it does nothavetomeet the test of being highly likely.[50]The person's family background or political activities and affiliation, any history of detention and torture, as well as indications that the person is at present wanted by the authorities are elements to be taken into account when determining whether substantial grounds exist for believing that he or she is in danger of being subjected to torture.[51]Past torture is another element to be taken into account, although the aim of the examination is to discover whether the person would risk being subjected to torture in the future.**H. Haydin v. Sweden, Communication no. 101/1997, CAT/C/21/D/101/1997.**

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[49]See General Comment no. 1, "Implementation of Article 3 of the Convention in the context of Article 22",CAT, adopted 21 November 1997, A/53/44, para. 258 and annex IX.

[50]*E.A. v. Switzerland*, Communication no. 28/1995, CAT/C/19/D/28/1995.

[51]*P.M. Kisoki v. Sweden* ,Communication no. 41/1996, CAT/C/16/D/41/1996, and K.Y. *Tala v. Sweden,* Communication no. 43/1996, CAT/C/17/D/43/1996. note 91.

Substantial groundsfor believing that return or expulsion would expose theapplicant to the risk of being subjected to torture may be based not only on actscommitted in the country of origin, in other words before a person's flight fromthe country, but also on activities subsequently undertaken by the person in thereceiving country.[52]

Article 4 stated that-

"1.Each State Party shall ensure that all acts of torture are offences under itscriminal law. The same shall apply to an attempt to commit torture andto an act by any person which constitutes complicity or participation intorture.

2.Each State Party shall make these offences punishable by appropriatepenalties which take into account their grave nature."

Interpretation of the article-

Article 4 provides that States Parties must ensure that all forms of torture arepunishable offencesunder their criminal law. The same applies to attemptedtorture and to any act which constitutes complicity or participation in torture.This is also deemed to include giving an order to perpetrate torture.

The obligation in 1 was not extended to include a specific, separate offence innational criminal law which corresponds exactly to the definition of torture laiddown in Article 1 of the Convention.In other words, while it would not seem that the CAT's explicit opinion is thatthe Convention definition of torture should be reproduced exactly in nationalcriminal legislation, States Parties must include a definition of torture whichcovers the Convention definition and make it punishable in national legislation.[53]

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[52]*Elmi v. Australia*, Communication no. 120/1998, CAT/C/22/D/120/1998, para. 6.5.

[53]CAT/C/SR.268, 2, under D, 12 (a) (Committee as a whole).

Article 5 stated that-

"1.Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law."

Interpretation

Article 5 is a cornerstone of the Convention, as it concerns the obligation to establishjurisdiction over the crime of torture. Based upon the recognition that torture was already prohibited under international law.[54]Article 5 requires and facilitates the assertion of jurisdiction by States over acts of torture, including instances involving non-nationals in third States, when the alleged offender is present in their territories—that is, on the basis of so-called universal jurisdiction.

The obligation to establish jurisdiction also applies to cases where the alleged offender is a subject of the State. Thus, even where a State Party is accustomed to

[54]Chris Ingelse, "The UN Committee against Torture—An Assessment", Kluwer Law International, 2001, p.342.

exercising jurisdiction solely on the basis of territoriality, it is required to extend its jurisdiction over persons holding its nationality.[55]

The decision to include universal jurisdiction in the Convention over persons accused of torture was linked to the nature of torture as defined in Article 1 of the Convention. With the involvement of the State being a necessary element of torture, few successful prosecutions of torture offenders before national courts can be expected. The Convention therefore offers other States Parties a basis for filling the gaps left by States which do not act against torture.[56]

Article 6 stated that-

"1.Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such timeas is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph I of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

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[55]J.Herman Burgers & Hans Danelius, "The United Nations Convention against Torture—A Handbook on theConvention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", MartinusNijhoff Publishers, 1988, p. 131.

[56]Burgers &Danelius, ibid.p. 133.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction."

Interpretation of the article-

States Parties are not only obliged to establish jurisdiction for the crime of torture by means of national legislation; they must actually ensure that alleged offenders are handed over to the competent authorities for the purpose of prosecution. Articles 6 and 7 oblige States Parties to take specific measures in that regard. States are required to detain any persons suspected of committing acts of tortureas referred to in Article 4 found in their territories, when they are "satisfied, after an examination of information available to them, that the circumstances so war-rant", or to take other legal measures permitted by law and in the circumstances deemed as necessary to secure the continuing custody of the accused. States have a wide degree of freedom in assessing whether the circumstances justify pretrial detention. This assessment depends in part on the domestic rules concerning evidence.[57]States Parties are obliged immediately to initiate a preliminaryinvestigation into the facts. This obligation applies primarily when the State itself will be prosecuting the suspect. After all, if a suspect is to be extradited, the State requesting the extradition will usually carry out such an investigation.

[57]*Democratic Republic of the Congo v. Belgium*, Judgment of the International Court of Justice, 14 February 2002,

Each detainee must be offered assistance in contacting the nearest authorized representative of the State of which he or she is a citizen. If the person in custody is by legal definition stateless, the State which initiates an investigation has a duty to provide up-to-date information to other States entitled to exercise jurisdiction. It must also provide theseother States with any information pertinent to the case and clearly indicate to other States whether it intends to commence prosecution in its own law courts.

Article 7 stated that-

"1.The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings."

Interpretation of the article

States Parties are obliged to prosecute suspected torturers present in an area under their jurisdiction, unless the suspected torturers are to be extradited to a State which has jurisdiction over the crime under Article 5 and which intends to prosecute them

itself. This is called the principle of *autdedereautjudicare*,meaning "either extradite or prosecute"[58]. As the main purpose of the Convention is to ensure that there are no safe havens for torturers, Article 7 is a key component in achieving the primary aim of the Convention. The Convention does not establish a system of priority among States with jurisdiction. Instead, it leaves the decision of whether to extradite or prosecute with the State under whose jurisdiction a suspect is located.[59]

Article 8 stated that-

"The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between StatesParties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party, with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall besubject to the other conditions provided by the law of the requested State.

States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in

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[58]Lord Browne-Wilkinson, Pinochet (3), ibid. "…it is clear that in all circumstances, if the Article 5 states do not choose to seek extradition or to prosecute the offender, other states must do so.The purpose of the Convention was to introduce the principle autdedereautpunire —either you extradite or you punish." (para. 39)

[59]J. Herman Burgers & Hans Danelius, ibid, p. 7.

the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1."

Interpretation of the article-

The objective of this provision is to prevent there being no possibility of extradition, for example because a State makes extradition dependent on a relevant treaty, and the State requestingextradition is not bound to the other State by an extradition treaty. Article 8 offer solutions for such gaps in extradition law.[60]Article 8 corresponds to similar articles found in other conventions concerned with establishing jurisdiction over international crimes. However, if a State Party does not meet a request to extradite in the context of torture, it would be obliged under the Convention to prosecute the suspect itself. There has not been much practical experience of application of Article 8. The practice of the CAT in respect of Article 8 has therefore mainly been limited to asking whether States Parties consider torture to be an extraditable offence by one of the methods stipulated in Article 8**.**[61]

Article 9 stated that-

"States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

States Parties shall carry out their obligations under paragraph I of this article in conformity with any treaties on mutual judicial assistance that may exist between them."

[60]Chris Ingelse, ibid, p.334.

[61]CAT/C/SR.17

Interpretation of the statute-

States Parties are obliged to co-operate with each other and supply all information to the relevant authorities for the purposes of instituting criminal proceedings against persons accused of torture, an attempt to commit torture or complicity in torture. This includes taking measures which make it easier for witnesses to give testimony. States Parties must also assist in gathering any evidence of which they have knowledge or are aware. Equally, they must assist with the removal of burdensome procedures or obstacles. Members of the CAT have emphasized that the application of Article 9 may notbe made dependent on the existence of "any treaties on mutual judicial assistance that may exist between them". If there are no treaties in place, co-operation is required in the area of prosecution of the offences referred to in Article 4 on the basis of the Convention itself.

Article 10 stated that-

"1.Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person."

Interpretation of the article-

States Parties are obliged to ensure that education and information regarding the prohibition against torture are fully included in the training ofall persons who come into contact with detainees, be they law enforcement personnel, civil or military,

medical personnel, public officials and other persons who may be involved in the custody, interrogation, or treatment of any individuals subjected to any form of arrest, detention, or imprisonment. The effectiveness of the way in which personnel are educated and trained with regard to the consequences of engaging in torture or acquiescence in torture should be regularly assessed. Everyone must know what the rules are, and whatnot to do. The provisions of this article are relevant not only in the context of torture but also, on the basis of Article 16

States are obliged to include the prohibition of torture in the rules or instructions issued in regard to the duties and functions of any such persons, regardless of rank or category. The list of categories of personnel who must be given instruction is not exhaustive. It applies to all other persons involved in the treatment of prisoners and other individuals deprived of their liberty. Instruction and education are not limited to official channels, but must also be given through non-official channels, such as non-governmental organizations.[62]

Article 11 stated that-

"Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to pre-venting any cases of torture."

Interpretation of the article-

Article 11 obliges States to keep under continual systematic review interrogation rules, instructions, methods, and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention, or imprisonment in

[62]Burgers &Danelius, ibid, pp. 141-142.

any territory under its jurisdiction. This must be done with a view to preventing any cases of torture, and also, on the basis of Article 16, any cases of cruel, inhuman, or degrading treatment or punishment. The obligations under Articles 11 and are related to each other. On the basis of Article 11, States must check whether the measures that they have taken on the basis of articles are effective. Moreover, States are obliged to improve the instruction in such provisions in relation to Article 10 if torture or other cruel, inhuman, or degrading treatment or punishment appears to take place.[63]A number of UN standards and principles regulate the area of custodial and on-custodial measures. These instruments provide some guidelines on how to prohibit and prevent torture. Prison inspection must be carried out, preferably without prior notice[64]and the supervision must be separate from police and judiciary.

Article 12 stated that-

"Each State Party shall ensure that its competent authorities proceed to aprompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

Interpretation of the article-

States Parties are obliged to take immediate action when they have reasonable grounds to believe that torture and other acts of cruel, inhuman, and degrading treatment have been committed within their jurisdiction. The decision on whether to conduct an investigation is not discretionary.[65]

[63]Burgers &Danelius, ibid, pp. 143-144.

[64]CAT/C/SR.95, CAT/C/SR.96, 18.

[65]CAT/C/SR.145, 10 and CAT/C/SR.168, 40.

Article 13 stated that-

"Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."

Interpretation of the statute-

States Parties are obliged to ensure that any individual who claims to have been subjected to torture or treated or punished in a cruel, inhuman, or degrading way has a right to lodge a complaint. All persons have right to lodge a complaint without any discrimination. The form of the complaint is not important. According to the CAT, Article 13of the Convention does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of intent to institute and sustain a criminal action. It is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as an implied, but unequivocal expression of the victim's wish that the facts be promptly and impartially investigated.[66]A criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any persons who might have been involved therein. Although forensic medical reports are important as evidence of acts of torture, they are often insufficient and have to be compared with and supplemented by other information.[67]

[66]*E.A. v. Switzerland*, Communication no. 28/1995, CAT/C/19/D/28/1995.

[67] Supra note.

Article 14 stated that-

"1.Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

2.Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

Interpretation of the article-

If the investigation referred to in Articles 12 and 13 forms the start of possible penal (and often also disciplinary) measures, Article 14 provides for civil legal recourse for victims of torture. States Parties are obliged to guarantee in their national laws that a victim of an act of torture obtains redress and also has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.

Members of the Committee have emphasized that the right to compensation and redress is given not only to a person who has the nationality of the State from which compensation and redress are sought or who is resident in that State. Non-residents and non-nationals are also entitled to compensation and redress after being subjected to torture.[68]

Article 15 stated that-

"Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

[68]CAT/C/SR.18 and 29.

Interpretation of the article-

States Parties are obliged to ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings. This also indirectly gives the provision a preventive effect: Declaring that such statements are worthless removes an important motive for the use of torture.[69]

The rule that evidence of this kind cannot be accepted does not apply if the statement is invoked against the alleged torturer in order to prove that the statement was made. Members of the CAT have pointed out to States Parties that a range of supplementary measures must be taken in order to implement Article 15 effectively. For example, Committee members have been critical of judicial procedures based solely or principally on the basis of confessions of witnesses and suspects. Such procedures invite the extortion of crucial statements by force.[70]

The Human Rights Committee has also emphasized the obligations of States Parties to the ICCPR to prohibit the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.[71]

Article 16 stated that

"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 amount to torture as defined in article I, 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 10, 11,

[69]Burgers &Danelius, ibid, pp. 147-148.

[70]A/47/44, § 100.

[71]HRC general comment 20 (Article 7),

12 and13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion."

Interpretation of the article-

The provisions of Article 16 extend the scope of application of the Convention, since they oblige States Parties to take measures to preventnotonly torture, but also cruel, inhuman, or degrading treatment or punishment which does not amount to torture as defined in Article 1. Forms of ill treatment other than torture do not have to be inflicted for a specific purpose, but there does have to be intent to expose individuals to the conditions which amount to or result in ill-treatment. In order to fall within the ambit of Article 16 an act must —like an act of torture under Article 1— be committed by, at the instigation of, or with the consent or acquiescence of a publicofficialor other person acting in an official capacity. In other words, an act of ill-treatment fails to qualify as torture for the purposes of the Convention if it either did not involve a sufficiently severe degree of pain or suffering or because it was not inflicted for a purpose. The essential elements which constitute ill-treatment not amounting to torture are therefore:

•Intentional exposure to significant mental or physical pain or suffering;

•By or with the consent or acquiescence of the State authorities.While some commentators suggest that the victims of acts referred to in Article16 are only those persons who have actually been deprived of their freedom by the authorities.[72]

[72]Burgers &Danelius, ibid, pp. 120-121 and 149-150.

2.9 International supervisory machinery and complaints procedures for the Torture Victims

To supervise the state parties performance in cording to the Convention there are some important international bodies. To get complaints from individuals or state parties the UN has some machinery also. Their function is not limited within advisory steps only. Besides UN bodies there are some nongovernment monitoring bodies and regional mechanisms also.

2.9.1 The Human Rights Committee

The Human Rights Committee is established as a monitoring body by the ICCPR. The Committee comprises 18 independent experts elected by the states parties to the Covenant. It examines reports which states parties are obliged to submit periodically and issues concluding observations that draw attention to points of concern and make specific recommendations to the state. The Committee can also consider communications from individuals who claim to have been the victims of violations of the Covenant by a state party. For this procedure to apply to individuals, the state must also have become a party to the first Optional Protocol to the Covenant. The Committee has also issued a series of General Comments, to elaborate on the meaning of various Articles of the Covenant and the requirements that these place on states parties.

2.9.2 The UN Committee against Torture

The Committee against Torture is a body of ten independent experts established under the Convention against Torture. It considers reports submitted by States Parties regarding their implementation of the provisions of the Convention and issues concluding observations. It may examine communications from individuals, if the

state concerned has agreed to this procedure by making a declaration under Article 22 of the Convention. There is also a procedure, under Article 20, by which the Committee may initiate an investigation if it considers there to be 'well-founded indications that torture is being systematically practiced in the territory of a State Party'.

A new Optional Protocol was adopted by the UN General Assembly in December 2002. This established a complementary dual system of regular visits to places of detention in order to prevent torture and ill-treatment. The first of these is an international visiting mechanism, or a 'Sub- Committee' of ten independent experts who will conduct periodic visits to places of detention. The second involves an obligation on states parties to set up, designate or maintain one or several national visiting mechanisms, which can conduct more regular visits. The international and national mechanisms will make recommendations to the authorities concerned with a view to improving the treatment of persons deprived of their liberty and the conditions of detention.

2.9.3 Regional mechanisms

A number of regional human rights treaties have also been developed within the Council of Europe, the Organization of American States (OAS) and the African Union (AU). The rights protectedby these treaties derive from, and are similar to, those of the Universal Declaration of Human Rights, but each treaty has developed unique approaches when seeking to implement them. The principal instruments referred to here are:

• The European Convention on Human Rights

• The European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment

• The American Convention on Human Rights

• The Inter-American Convention to Prevent and Punish Torture

• The African Charter on Human and Peoples' Rights.

The European Court of Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the African Commission on Human Rights and the, African Court on Human Rights are responsible for monitoring state-compliance with their respective treaties. These bodies examine allegations of torture on the same level as other alleged human rights violations. However, the Council of Europe has also created a specific body for preventing torture in its member states.

The European Committee for the Prevention of Torture (CPT) was set up under the 1987 Council of Europe European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment. It is composed of as many independent and impartial members as there are states parties to the Convention and may be assisted by *ad hoc* experts. Currently all members of the Council of Europe have also ratified the European Convention for the Prevention of Torture. The CPT conducts periodic and *ad hoc* visits in any places under the jurisdiction of a contracting state where persons are deprived of their liberty by a public authority. States parties are obliged to provide the CPT with access to its territory and the right to travel without restriction; full information on the places where persons deprived of their liberty are being held; unlimited access to any place where persons are deprived of their liberty, including the right to move inside such places without restriction; and other information which is necessary for the CPT to carry out its task.[73]The CPT is also entitled to interview in private persons deprived of their liberty and to

[73]Article 8, European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment 1987.

communicate freely with anyone whom it believes can supply relevant information. The report on the visit and detailed recommendations sent to the government are confidential unless the government concerned decides that they can be published. In practice, most reports have been made public.

2.9.4 Other monitoring mechanisms

A number of other mechanisms have been developed by the UN Commission on Human Rights to look at specific types of human rights violations wherever in the world they occur. These country specific and thematic mechanisms include special rapporteurs, representatives and independent experts or working groups. They are created by resolution in response to situations that are considered to be of sufficient concern to require an in-depth study. The procedures report publicly to the Commission on Human Rights each year and some also report to the UN General Assembly.

The main mechanisms are: the Special Rapporteur on Torture, the Special Rapporteur on Violence Against Women, the Special Rapporteur on the Independence of Judges and Lawyers, the Working Group on Enforced or Involuntary Disappearances, and the Working Group on Arbitrary Detention. Numerous of other thematic mechanisms also exist. The work of these bodies is not mutually exclusive and they may make either joint or separate interventions in connection with the same allegation.

2.9.5 The UN Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment

This mandate was established in 1985 by the UN Commission on Human Rights. It is a no treaty,'UN Charter-based' body the purpose of which is to examine international practice relating to torture in any state regardless of any treaty the state may be bound by. On the basis of information received, the Special Rapporteur can communicate

with governments and request their comments oncases that are raised. He or she can also make use of an 'urgent action' procedure, requesting government to ensure that a particular people, or group of persons, are treated humanely. The Special Rapporteur can also conduct visits if invited, or given permission, by a state to do so. The reports of these missions are usually issued as addenda to the main report of the Special Rapporteur to the UNCommission on Human Rights.

The Special Rapporteur reports annually and publicly to the UN Commission on Human Rightsand to the UN General Assembly. The reports to the Commission contain summaries of all correspondence transmitted to governments by the Special Rapporteur and of correspondencereceived from governments. The reports may also include general observations about the problem of torture in specific countries, but do not contain conclusions on individual torture allegations. The reports may address specific issues or developments that influence or are conducive to torture in the world, offering general conclusions and recommendations.

2.9.6 International criminal courts and tribunals

National criminal courts are primarily responsible for the investigation and prosecution of crimes of torture and other criminal forms of ill-treatment. A number of *ad hoc* international criminal tribunals have been established in recent years – including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Crimes of torture as crimes against humanity and war crimes are included in the Statute of ICTY[74], ICTR[75] and the Rome Statute of the International Criminal Court (ICC).[76]The Statute of the ICC

[74]Article 5, ICTY.

[75]Article 3, ICTR.

[76]40 Articles 7 and 8, ICC.

was agreed in 1998 and received the 60 ratifications necessary for it to come into effect in 2002. The ICC will, in future, be able to prosecute some crimes of torture when national courts are unable or unwilling to do so.

2.9.7 The International Committee of the Red Cross (ICRC)

The International Committee of the Red Cross is an independent and impartial humanitarian body with a specific mandate assigned to it under international humanitarian law, particularly the four Geneva Conventions. It is active in providing many forms of protection and assistance to victims of armed conflict, as well as situations of internal strife. In cases of international armed conflict between states party to the Geneva Conventions, the ICRC is authorized to visit all places of internment, imprisonment and labor where prisoners of war or civilian internees are held. In cases of non-international armed conflicts, or situations of internal strife and tensions, it may offer its services to the conflicting parties and, with their consent, be granted access to places of detention. Delegates visit detainees with the aim of assessing and, if necessary, improving the material and psychological conditions of detention and preventing torture and ill-treatment. The visit procedures require access to all detainees and places of detention, that no limit be placed on the duration and frequency of visits, and that the delegates are able to talk freely and without witness to any detainee. Individual follow-up of the detainees' whereabouts is also part of ICRC standard visiting procedures. Visits and the reports made on them are confidential – although the ICRC may publish its own comments if a state publicly comments on a report or visit.

2.10 Conclusion

The developed international human rights instruments and monitoring mechanism is better enough than before to combat torture. The principle policies are developed now and all most every states of the world are in same platform about the issues. This is the sign for the future development of the issues related to the topic. The general comments, case laws and scholarly works show that the world community is positively concern about the act of torture. This state of developments will ensure effective implementation mechanism round the world in near future.

Chapter 3

Development of International Instruments to Combat Torture

3.1 Introduction

The human community of the world has developed the international human rights norms and laws, especially after the Second World War. The development is an ongoing process and the important part of these processes is to develop the internationally recognized instruments of the international human rights law through the initiatives of the international and regional organizations. The most important among these bodies is the United Nations. The United Nations has the organs of its own to develop and implement the international human rights laws through the world. From the very beginning of this world organization land marks instruments of international human rights laws are developed by this organization. The most important is the UDHR. To combat torture the UN is developing international norms from the beginning.The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is the most specific and important international human rights law instrument adopted by this world organization to combat against torture. This chapter will discuss about the history of using torture by the state in judicial administration and history of the legislation of the international and regional instrument to combat torture.

3.2 Brief History about the State's Practice of Torture

It was the Greeks and Romans who use torture as a method systematically and rely on it. To control over the slaves and to get reliable testimony in criminal cases and civil suits the Romans applied torture. But Roman law did not rely upon the testimony got

by torture but to use it as a primary mode of proof. The practice of torture became wide spread by Romans gradually against free citizens charged with high treason. Torture was administered by some principle by the Romans and their practice was a strong reference for them who relied on and justified the practice. The testimony extracted through the use of torture was not fully reliable to the Romans. The famous jurist Ulpian considered the interrogation under torture as "dangerous and deceptive"[1]. False confessions were extracted under torture. In the third century the German tribes adopted some portions of the indigenous legal system which overran Roman territories. They accepted the testimony of the slaves under torture but rejected the torture of freeman. In case of judicial investigation torture was an extraordinary technique but it is use was not very wide spread.

In the course of time the socioeconomic and political pattern of the world was changing. A strong centralized governmental system was developing while the dominance of Church was diminishing. A professional class of judges, prosecutors and defense attorneys displaced and developed in inquisitorial mode of criminal procedure instead of a decentralized accusatorial model[2]**.** By the way of these development or change the Roman law principles were introduced in to European jurisprudence[3].To bring uniformity, predictability and legitimacy in criminal procedure the system of proof needed to develop. To permit convictions the solution was to certain of guilt which could only be possible in the presence of full proof. A confessional through the use of torture could be extract by a judge, upon the presentation of circumstantial evidence, in absence of full proof which amounted to

[1]Malise, Ruthven, Torture: The Grand Conspiracy, Littlehampton Book Services Ltd., p. 31

[2]Edward Peters, Torture, 1985, p. 51.

[3]Ibid, p.43.

half proof[4]. If any suspected person was apprehended by half proof raised upon circumstantial evidences may subjected to interrogate under torture by the order of a judge authorized to do it. As the full proof was very rude to get in Europe from twelfth to the eighteenth century, European jurists relied on confessions extracted through torture in most cases. By this practice in the jurisdiction of the judicial officers an entire jurisprudence of torture developed. The judges was conducted the interrogation and a notary was recorded the proceedings a medical expert was attended as the defendant underwent the torture session. To get official confession made in the court room the accused was present before but if the defendant recanted the judge usually subjected the individual torture once again. The authorities required a repeated confession in the courtroom[5]. The practice of torturing the witnesses who appeared to be offering perjuries or inconsistent testimony was another characteristic of that time.

With the duration of time change must come. Within the development of the humanitarian thoughts the use of torture became increasingly difficult to reconcile. Italian criminologist CesneBeccaria drafted the most comprehensive and influential critique of torture in 1764. When he contended that an individual should not be punished in absence of criminal guilt. Beccaria pointed out that the application of torture runs the risk of harming the innocent and is contrary to the jurisprudential condemnation of self-incrimination and is not like to lend to truthful testimony[6]. He also pointed out that anomalous results may come out by interrogation under torture between weak and strong accused. By the seventeenth century, the judges became concern about circumstantial evidence to inflict punishment on individuals. The

[4] Ibid, pp.47, 57.

[5]Ibid, p.69.

[6]CesareBeccaria, On Crimes and Punishments, Hackett Publishing Company, 1986, p.29.

establishment of the prison, the workhouse and the galley reduced the pressure on the criminal system to achieve certainty of guilt. At present judicial officer of any legal system is rigid of the system of proofs or tolerate the inhumanity of torture[7].In the late eighteenth century the abolition of torture made the end of a long, cruel and inhuman era. But it was the start of the journey not the end.

3.3 Practice of Torture in the Twentieth century

Twentieth century is very much different from the other because technological advancement and political progress, revolution in communication happened and have reached on their apex development. But the time should be divided into two parts for better understanding. Before the Second World War and after the war is never being the same. Militaristic ideologies, fascist, communist and authoritarian governments use torture as central instruments of the government. The communist authority used to arrest and torture anticommunist in the name of combating counter revolution and sabotage. In Germany the Gestapo (secret police) practiced the worsts method of torture against suspected opposition. During the Second World War the world community has the lesson they did not even think of yet. The Europe experienced the worst form of human sufferings and torture than ever before. The arguments on human rights issues and united effort for change actually began from that time.

3.4 International Instruments to Prohibit Torture

The international community has developed standards to protect people from torture that was applied to all legal systems in the world in recent days. The standards take into account the diversity of legal systems that exist and set out minimum guarantees that every system should provide. Judges and prosecutors have a responsibility to

[7]John HLangbein, Torture and The Law of Proof, University of Chicago Press,1977, pp.55-60.

ensure that these standards are adhered to, within the framework of their own legal systems. Even if a country has not ratified a particular treaty prohibiting torture, because the prohibition of torture is so fundamental, the country is in any event bound on the basis of general international law[8].

In many countries, the courts are expected to apply treaties ratified by their states, or general (or customary) international law or both. Failure to do so is a failure of professional duty. Even in those countries where international law may not be directly invoked before the courts it is prudent that the judiciary do not place the state in violation of its international law obligations, including the prohibition of torture. This is because, under international law, no state may invoke its national constitution or laws to justify a breach of international law.

Some are contained in treaties that are legally binding on those states that have signed and ratified or acceded to them. Many of the more detailed safeguards against torture are contained in 'soft law' instruments – such as declarations, resolutions, or bodies of principles – or in the reports of international monitoring bodies and institutions.

While not directly binding these standards have the persuasive power of having been negotiated by governments and/or adopted by political bodies such as the UN General Assembly. Sometimes they affirm principles that are already considered to be legally binding as principles of general or customary international law. They often also spell out in more detail the necessary steps to be taken in order to safeguard the fundamental right of all people to be protected against torture.

[8]Article 38 of the Statute of the International Court of Justice lists the means for determining the rules of international law as: international conventions establishing rules, international custom as evidence of a general practice accepted as law, the general principles of law recognized by civilized nations and judicial decisions and the teaching of eminent publicists. General international law (customary international law) consists of norms that emanate from various combinations of these sources.

A number of UN bodies have been created by particular conventions to monitor compliance with these standards and provide guidance on how they should be interpreted. These bodies generally issue general comments and recommendations, review reports by states parties and issue concluding observations on the compliance of a state with the relevant convention. Some also consider complaints from individuals who claim to have suffered violations. In this way they can provide authoritative interpretations of the treaty provisions and the obligations that these place on states parties.

The UN has also set up a number of extra-conventional mechanisms to examine particular issues of special concern to the international community or the situation in specific countries. These monitor all states, irrespective of whether they have ratified a particular convention, and can draw attention to particular violations.

3.5 Prohibition of Torture in Common Human Rights Instruments

To combat against torture there are good number of regional and international instruments. For the purpose of the research we should consider the international instruments firstly. Torture and other cruel, inhuman or degrading treatment or punishment is prohibited by international humanitarian law, international criminal law and international refugee law. It is prohibited by a number of international human rights treaties also.

The prohibition of torture is found in a number of international human rights and humanitarian treaties and is also regarded as a principle of general international law. The prohibition of torture is also considered to carry a special status in general international law, that of *jus cogens*, which is a 'peremptory norm' of general

international law[9].General international law is binding on all states, even if they have not ratified a particular treaty. Rules of *jus cogens*cannot be contradicted by treaty law or by other rules of international law.

The prohibition of torture is found in Article 5 of the UDHR (1948) and a number of international and regional human rights treaties. The vast majority of states have ratified treaties that contain provisions that prohibit torture and other forms of ill-treatment.

These include the ICCPR (1966), (Article 7 and 10(1)).The European Convention on Human Rights (1950), (ECHR Article 3.)The American Convention on Human Rights (1978) (ACHR Article 5(2)).The African Charter on Human and People's Rights (1981) (African Charter Article 5). The texts of the Articles relating to torture from some of these treaties and a table of country ratifications of selected universal treaties are included in the Appendices to this dissertation.

3.6 The UDHR

The Universal Declaration of Human Rights[10] is the founding document of the international human rights system. While it is not a treaty, it is considered to reflect customary international law and to be binding on all States. Article 5 of UDHR statesthat, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". The Universal Declaration of Human Rights also says that people have the right to "an effective remedy" if their rights are violated.

[9]Human Rights Committee, General Comment 24 (52).

[10]The declaration was proclaimed in Paris on 10 December 1948 by the General Assembly Resolution 217 A (iii).

3.7 The ICCPR

Article 7 of the ICCPR provides that no person *"*shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*"*. In addition, article 10 states that"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person*"*. No derogation is allowed regarding the right not to be subjected to torture and other forms of ill-treatment. The ICCPR also provides for legal and procedural safeguards related to the deprivation of liberty and fair trials (Articles 9, 10, 14, 15)[11].

3.8Convention against Torture

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (Convention against Torture) is the most comprehensive international treaty dealing with torture and contains a series of key provisions for torture prevention[12].

3.9Optional Protocol to the Convention against Torture

An Optional Protocol[13], which was adopted in 2002 and entered into force in 2006. The Optional Protocol of The Convention against Torture is complemented by, does not establish new normative standards. Instead, it reinforces the specific obligations for prevention of torture in articles 2 and 16 of the Convention by establishing a system of regular visits to places of detention by an international body known as the

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[11]Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16December1966 entry into force 23 March 1976)

[12](Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987.

[13] Hereinafter referred to as OPCAT

Subcommittee on Prevention of Torture, and national bodies which is known as National Preventive Mechanisms[14].

3.10 International Convention for the Protection of All Persons from Enforced Disappearance

The CPPED is the most recent international human rights treaty. It prohibits enforced disappearance which has been recognized as a form of torture. It requires State Parties to make enforced disappearance a crime, as well as to implement several legal and procedural safeguards related to the deprivation of liberty. This is the first time many of these legal and procedural safeguards are explicitly included in a treaty text. Therefore, full implementation of the safeguards related to the deprivation of liberty in the CPPED will also help to prevent torture[15].

3.11 Other International Human Rights Treaties have Provisions about Torture

The following treaties contain specific articles on the prohibition of torture-

The Convention on the Rights of Persons with Disabilities (CRPD) prohibits torture and cruel, inhuman or degrading treatment or punishment (Article 15) and requires State Parties to prevent torture and ill-treatment of persons with disabilities, on an equal basis with others. It also requires States Parties to take steps to prevent exploitation, violence and abuse (Article 16)[16].

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[14]Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006.

[15]The above Convention was adopted on 20 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/177.

[16]Adopted by the United Nations General Assembly on 13 December 2006.

The Convention on the Rights of the Child requires States Parties to ensure that no child is subjected to torture or other ill-treatment (Art. 37)[17].

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families prohibits torture and other ill-treatment (Article 10)[18].

3.12 UN Standards to Prohibit Torture

The UN has developed a number of standards that are relevant for the prevention of torture. In addition to international human rights law and the laws of armed conflict, a considerable range of other rules and standards have been developed to safeguard the right of all people to protection against torture and other forms of ill-treatment. Although not of themselves legally binding, they represent agreed principles which should be adhered to by all states and can provide important guidance for judges and prosecutors. These include-

• Standard Minimum Rules for the Treatment of Prisoners (1957 as amended in 1977)

These rules were adopted on 30 August 1955 by the UN at Geneva and approved by the Economic and Social Council in resolutions of 31 July 1957 and 13 May 1977.Although not legally binding, the Minimum Standards provide guidelines for international and domestic law for citizens held in prisons and other forms of custody. The basic principle described in the standards is that "There shall be no discrimination on grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". It contains standards which set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of penal institutions. Specifically, it covers issues

[17]Adopted by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

[18]The Convention adopted by Resolution 45/158[1] of 18 December 1990 at the forty-fifth session of the General Assembly of the United Nations

related to minimum standards of accommodation (rules 9 to 14), personal hygiene (15 and 16), clothing and bedding (17 to 19), food (20), exercise (21), medical services (22 to 26), discipline and punishment (27 to 30), the use of instruments of restraint (33 and 34), complaints (35 and 36), contact with the outside world (37 to 39), the availability of books (40), religion (41 and 42), retention of prisoners' property (43), notification of death, illness, transfer (44), removal of prisoners (45), the quality and training of prison personnel (46 to 54), prison inspections (55).

• Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975)[19]

• Code of Conduct for Law Enforcement Officials (1979)

The General Assembly of the UN in 1979 adopted the Code of Conduct for Law Enforcement Officials (Res. 34/169, December 17). In this resolution, the General Assembly exhorts law enforcement agencies that possess police powers to respect and protect human dignity and maintain human rights. The General Assembly recommended that all UN members adopt the Code of Conduct for Law Enforcement Officials as a framework for legislation and/or as principles for police officers to practice. The potential for abuse by police officers was recognized by the General Assembly. Furthermore, the General Assembly strongly exhorted police officers to diligently uphold human rights. The Code of Conduct emphasized that the use of torture be prohibited by police officers and that the use of physical force be used when absolutely necessary.

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

• 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.[20]

• Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was adopted by the General Assembly on 29 November 1985.The General Assembly accordingly adopted the Declaration as an annex to resolution 40/34 on 29 November 1985.The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power consists of two parts: Part A, on "Victims of Crime", is subdivided into sections concerning "Access to justice and fair treatment", "Restitution", "Compensation", and "Assistance"; and Part B, on "Victims of abuse of power".

• Basic Principles on the Independence of the Judiciary (1985)[21]

• Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (1987)

In 1980, the Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders, meeting in Caracas, Venezuela, set out several basic principles that it felt should be reflected in a set of rules to be developed for the administration of juvenile justice in order to protect the fundamental human rights of juveniles in trouble with

[20]Adopted by General Assembly resolution 37/194 of 18 December 1982

[21]Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

the law. The rules could then serve as a model for UN Member States in the treatment of juvenile offenders.

• Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment (1988)[22]

• Basic Principles for the Treatment of Prisoners (1990)[23]

• Basic Principles on the Role of Lawyers (1990)[24]

• Guidelines on the Role of Prosecutors (1990)[25]

• Rules for the Protection of Juveniles Deprived of their Liberty (1990)[26]

• Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1990)[27]

• Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)[28]

• Principles for the Protection of Persons with Mental Illness and the Improvement of Mental HealthCare (1991)[29]

• Declaration on the Protection of All Persons from Enforced Disappearance (1992)[30]

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[22]Adopted by General Assembly resolution 43/173 of 9 December 1988

[23]Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990

[24]Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

[25]Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

[26]Adopted by General Assembly resolution 45/113 of 14 December 1990

[27]Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989

[28]Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

[29]A/RES/46/119 dated 17 December 1991

[30]Proclaimed by the General Assembly, resolution 47/133, A/RES/47/133, 18 December 1992)

• Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) (1999)[31]

. United Nations Rules for the Treatment of Women Prisoners non-custodial Measures for Women Offenders (Bangkok Rules)

. Basic Principles for the Treatment of Prisoners[32]

. Body of Principles for the Protection of All Persons under Any Form of Detention of Imprisonment.[33]

3.13 Regional Human Rights Treaties and Standards for Combating Torture

There are a number of regional human right treaties and standards:

3.13.1 Instruments of Africa

In Africa, torture is prohibited by Article 5 of the African Charter on Human and Peoples' Rights (1981). In 2002, the African Commission on Human and Peoples' Rights adopted guidelines on torture prohibition and prevention in Africa which is known as the Robben Island Guidelines.

3.13.2 Instruments of Europe

Article 3 of the European Convention on Human Rights (1950) prohibits torture and the European Court of Human Rights has developed important case law on this article. The Council of Europe also adopted a series of relevant standards, in particular the 2006 European Prison Rules. The European Committee for the Prevention of Torture can visit any place of detention in the 47 Member States of the

[31] Became an officialUndocumented in 1999.

[32]General Assembly resolution 43/173, annex.

[33]General Assembly resolution 45/111, annex.

Council of Europe and has developed a series of important standards for the protection of persons deprived of liberty.

3.13.3 Instruments of Americas

In the Americas torture is prohibited by Article 5 of the American Convention on Human Rights (1969) as well as by a specific treaty, the Inter-American Convention to Prevent and Punish Torture (1985). The Inter-American Court of Human Rights has developed case law on torture and detention conditions. TheInter-American Commission on Human Rights has adopted guidelines and principles on the rights of persons deprived of liberty (2008). The Commission and its Office of the Rapporteur on the Rights of Persons Deprived of Liberty in the Americas conduct visits to places of detention.

3.13.4 Instruments of Arab States

In 2004, the League of Arab States adopted the Arab Charter on Human Rights. Article 8 provides for the prohibition and prevention of torture.

3.14 An Introduction to theConvention Against Torture

The UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) is the only legally binding convention at the universal level concerned of torture[34]. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the General Assembly of the United Nations on 10 December 1984.The Convention entered into force on 26 June 1987 after it had been ratified by 20 States. The Torture Convention was the result of many years' work, initiated soon after the adoption of the Declaration on the Protection of All Persons from Being Subjected to Torture and

[34]UN General Assembly Resolution 39/46 of 10 December 1984, entry into force on 26 June 1987.

Other Cruel, Inhuman or Degrading Treatment or Punishment by the General Assembly on 9 December 1975[35].In fact, the Torture Declaration was intended to be the starting-point for further work against torture. In a second resolution, also adopted on 9 December 1975, the General Assembly requested the Commission on Human Rights to study the question of torture and any necessary steps for ensuring the effective observance of the Torture Declaration[36]. Two years later, on 8 December 1977, the General Assembly specifically requested the Commission on Human Rights to draw up a draft convention against torture and other cruel, inhuman or degrading treatment or punishment, in the light of the principles embodied in the Torture Declaration[37].

The Commission on Human Rights began its work on this subject at its session in February-March 1978. A working group was set up to deal with this item, and the main basis for the discussions in the working group was a draft convention presented by Sweden. During each of the subsequent years until 1984 a similar working group was setup to continue the work on the draft convention.

3.15Short History of Legislation of the UNCAT

The General Assembly include the question of torture or other cruel, inhuman or degrading treatment or punishment in the agenda of the twenty-ninth session in 1974, and was submitted for consideration to the Third (Social, Humanitarian and Cultural) Committee. On 22 October 1974, the committee adopted a draft resolution on torture or other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment. In that draft resolution the Fifth United Nations Congress on the

[35]Resolution 3452 (XXX)

[36]Resolution 3453 (XXX)

[37] Resolution 32/62

Prevention of Crime and the Treatment of Offenders was asked to include, in the elaboration of the Standard Minimum Rules for the Treatment of Prisoners, approved by the Economic and Social Council on 31 July 1957, rules for the protection of all persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman or degrading treatment or punishment, and to report thereon to the Assembly in 1975. On 6 November 1974, the draft resolution was submitted to the General Assembly and, on the recommendation of the Third Committee, the Assembly adopted resolution 3218 (XXIX).

In Geneva the above-mentioned Congress was held, from 1 to 12 September 1975. In a report submitted to the General Assembly at its thirtieth session, as also requested by resolution 3218 (XXIX), the Secretary-General summarized the debates and proposals of the Congress and included the text, approved by the Congress, of a Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[38].

In 1975 the matter was on the agenda of the General Assembly at its thirtieth session, and was again allocated to the Third Committee. On 9 December 1975, the General Assembly adopted without a vote resolution 3452 (XXX), to which the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was annexed. On the same date, the General Assembly also adopted resolution 3453 (XXX), in which it expressed its appreciation to the Fifth Congress for the elaboration of the declaration and requested competent bodies to conduct further work for the elaboration of several instruments relating to the question of torture.

"Torture and other cruel, inhuman or degrading treatment or punishment" was again

[38] A/10260.

on the agenda of the General Assembly at its thirty-first and thirty-second sessions. At the latter session, on 8 December 1977, the General Assembly adopted resolution 32/62, in which, expressing its belief that further international efforts were needed to ensure adequate protection for all against torture and other cruel, inhuman or degrading treatment or punishment, and considering that a further significant step would be the adoption of an international convention on the matter, it requested the Commission on Human Rights to draw up a draft convention, in the light of the principles embodied in the Declaration and to submit a progress report to the Assembly at its thirty-third session.

The Commission on Human Rights at its 1978 session, accordingly set up an open-ended working group to consider the alternative drafts for an international convention against torture and other cruel, inhuman or degrading treatment or punishment that had been prepared by Sweden[39]and by the International Association of Penal Law[40]. On 7 March 1978, the Commission adopted resolution 18 (XXXIV), by which it took cognizance of the report of the working group, and requested the Secretary-General to transmit all the relevant documents of the Commission on the topic to Governments of Member States and members of the specialized agencies for their comments and to prepare a summary of the comments received. The Commission on Human Rights further requested the Secretary-General to transmit its resolution to the General Assembly, together with the relevant chapter of the Commission's report to the Economic and Social Council, as constituting the Commission's progress report. At the same session, the Commission also proposed a draft decision for adoption by the Economic and Social Council, by which the Council would authorize the holding of a

[39]E/CN.4/1285

[40]E/CN.4/NGO/213

meeting of a working group, open to all members of the Commission, for one week before the Commission's 1979 session in order to prepare concrete proposals for the draft convention. In addition, the Commission decided that the working group concerned with analyzing alternative approaches and ways and means within the United Nations system for the promotion and encouragement of human rights and fundamental freedoms should combine this, its principal task, with the work on the draft convention[41].

On 5 May 1978, the Economic and Social Council adopted, without a vote, decision 1978/24, by which it approved the Commission on Human Rights' recommendation concerning the pre-session working group meeting. It also decided to request the Secretary-General to transmit to the General Assembly the Commission's resolution concerning the draft convention, together with the relevant chapter of the Commission's report.

At the thirty-third session of the General Assembly, in 1978, the item relating to torture or other cruel, inhuman or degrading treatment or punishment was again referred to the Third Committee for consideration. On 20 December 1978, on the recommendation of the Third Committee, the General Assembly adopted resolution 33/178, in which it took note of the progress report of the Commission on Human Rights and requested it to give high priority, at its following session, to the question of drafting a convention on torture.

In 1979, the Working Group accordingly met prior to the session of the Commission on Human Rights. It continued to meet prior to and during the sessions of the Commission in the following years up to 1984, on the basis of authorizations given annually by the Economic and Social Council, on the recommendation of the

[41] E/1978/34

Commission on Human Rights, for the purpose of completing the drafting of the convention[42]. Also on a yearly basis, the General Assembly took note of the progress in the work of the Commission and renewed its request to the Commission on Human Rights to complete, as a matter of urgency, the drafting of the convention[43].

The Working Group used the draft convention proposed by Sweden[44] as the basis of its work. At its last session, held between 30 January and 16 February 1984, it adopted all articles of the draft convention, except two (articles 19 and 20) concerning reporting by State parties and considerations of the reports by the Committee against Torture and the authorization of the Committee to initiate an inquiry in connection with reliable indications that torture was being systematically practiced in the territory of a State party. The draft convention, as provisionally adopted, was annexed to the Working Group's report[45] and submitted to the Commission on Human Rights. The Commission on Human Rights, having examined the Working Group's report, adopted resolution 1984/21 of 6 March 1984, by which it decided to transmit the draft convention to the General Assembly, through the Economic and Social Council, together with the summary records of the Commission's debate on the item. The Commission recommended that the Assembly consider the draft convention with a view to its early adoption. It also requested the Secretary-General to bring the documents mentioned to the attention of Governments and to obtain their comments, preferably for submission to the Assembly at its following session.

The Economic and Social Council, on 24 May 1984, adopted, without a vote, decision

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[42]Economic and Social Council resolutions 1979/35, 1980/32, 1981/37, 1982/38, and 1983/38

[43]Resolution 34/167 of 17 December 1979, resolution 35/178 of 15 December 1980, resolution 36/60 of 25 November 1981, resolution 37/193 of 18 December 1982, and resolution 38/119 of 16 December 1983.

[44]E/CN.4/1285

[45]E/CN.4/1984/72

1984/134 by which, noting the above-mentioned resolution of the Commission on Human Rights, it decided to transmit to the General Assembly the report of the Working Group, as well as the summary records of the Commission's debate on the question during its fortieth session. The Economic and Social Council further noted the Commission's request to the Secretary-General to submit the comments received from Governments on the draft convention to the General Assembly, and its recommendation that the Assembly consider the draft convention as a matter of priority, with a view to its early adoption.

At the thirty-ninth session of the General Assembly, in 1984, the draft convention, together with the comments submitted by Governments[46] was considered by the Third Committee. Informal consultations on the drafting of articles 19 and 20 took place prior to and contemporaneously with the meetings of the Committee, which were held from 19 to 28 November 1984. The initial draft resolution was amended several times and was finally adopted by the Third Committee on 5 December 1984, without a vote.

On 10 December 1984, the General Assembly, acting on the recommendation of the Third Committee, adopted without a vote resolution 39/46, by which it adopted and opened for signature the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, annexed to the resolution. The Convention entered into force on 26 June 1987, in accordance with its article 27, paragraph 1, following the deposit of the twentieth instrument of ratification.

[46] A/39/499 and Ads. 1 and 2

3.16 Conclusion

It is before us that a good number of International Human Rights treaties, conventions and standards are there in international and regional jurisdiction. The instruments are not directly enforceable in the national context and depend on the state individual's initiative to make effective in national level. The better thing is that the development of the human rights legislation is going faster than before and the world community is giving more concern from day to day about the issues. Besides the national implementation mechanism is developing and the judiciary is concern about the international norms.

Chapter 4

State of Torture in the Context of Bangladesh

4.1 Introduction

Practice of torture by the state officials is common around the world. In the countries like Bangladesh it is alleged to be practiced by the state officials especially by police. The main cause behind this practice is the law and order situation of those countries are always not strongly reviewed by the judicial departments effectively. Where there is lack of check and balance among the organs of the state, politically weak government rule over the county, state forces plays extra role beyond jurisdiction and culture of justice is poor, there the practice of torture is the ultimate reality. The situation of Bangladesh is not better than that. So state practice of torture is not rare here. This chapter will discuss some examples of the practice of torture by state officials like police, RAB and other law enforcing agencies in Bangladesh. There is a short discussion about the national legislation which stated torture as offence is in this chapter also.

4.2Situation of Torture Practice in Bangladesh

In the universal Declaration of Human rights it is stated that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Torture is used by the state official in almost every country from different extents for obtaining information or statements, or a means of punishment or discrimination. Bangladesh parliament passed the torture and custodial death (prevention) bill in November 2013 as a private members bill. The government of Bangladesh always claims zero tolerance on torture. But the real situation is not the same as the government claims.

In Bangladesh likewise many other third world countries, torture by law enforcement agencies is not a recent phenomenon. The organizational structure and all activities of the police force in Bangladesh have long been regulated by the Police Act of 1861 and the Police Regulations. The legislation was prepared and enacted during the British colonial rulers. This law was meant for maintaining law and order situations which existed hundreds of years ago and most importantly, for protecting the vested interests of the colonial power. But after the long sixty years of the British rule the legislations still exists in the country. In independent Bangladesh, the political governments are exercising unrestricted and unauthorized power over law enforcement agencies for political gains. As a result various law enforcement agencies enjoyed opportunities to conduct a series of gross violations of human rights with impunity that amounted to torture and other cruel, inhuman and degrading treatment in violation of the Constitution and other national and international laws.

If we want to know the present situation of the state on torture then we should consider some reports.Frist we can look though the reports of torture done by state officials prepared by different NGOs. There must be arguments about the information but the importance of the report is not avoidable. ASK launched a report titled “Human Rights Situation in Bangladesh 2014: Analysis of Ain O Salish Kendra” on the eve of the New Year at a press briefing in the capital's Dhaka Reporters Unity.

Alongside enforced disappearances and extrajudicial killings, deaths in police custody, communal and gender-based violence, and harassment and killing of journalists continued last year, the report notes.

Throughout 2014, law enforcement agencies allegedly abducted 88 people; 42 of them never returned while bodies of 23 were found later.

The report demonstrates that instances of enforced disappearance were higher last year than the previous two years, the numbers being 53 in 2013 and 56 in 2012.

According to the report, families of the victims mostly pointed fingers at RAB and detectives for these crimes. Serious allegations against RAB had been raised after bodies of seven people were found in Narayanganj in April.

Like in previous years, people fall victim to “crossfire”, another crime frequently committed by law enforcers that violates people's right to justice.

In 2014, as many as 128 people died in “crossfire” and “gunfight” between law enforcers and alleged "criminals", while the number was 72 in 2013. Custodial torture claimed the lives of at least 60 people, according to the report.

ASK also singled out a new trend of rights violation by law enforcers last year, which was shooting in the leg of an “accused”. Instances of this trend were evident especially in Jessore, Satkhira and Dhaka.[1]

Although the Constitution prohibits torture and other cruel, inhuman, or degrading treatment or punishment, security forces including the RAB, and the police frequently employ torture and severe physical and psychological abuse during arrests and interrogations in recent years. Abuse consists of threats, beatings, and the use of electric shock. According to human rights organizations, security forces tortured at least[2]22 persons in 2010. The government rarely charged, convicted, or punished

[1] The Daily Star, January 01, 2015

[2]US Department of States, Annual Human Rights Reports 2010, Bangladesh Chapter (released on April 8, 2011), availableat : <http://www.state.gov/g/drl/rls/hrrpt/2010/sca/154478.htm>.

those responsible, and a climate of impunity allowed such abuses by the RAB and police to continue.[3]

On 30 April, 2014 the above mentioned NGO reported as like as same situation about the human rights violation in Bangladesh. They reported that: The law enforcement agencies were responsible for extrajudicial killings of 72 people in the year, in addition to illegal torture and harassment of countless others, the report says. As many as 335 cases of deaths and torture by Border Security Force were reported last year. Twenty-six people were murdered, 84 tortured and 175 abducted by the Indian BSF, according to the report. Three journalists were killed and at least 280 were subjected to harassment and assault.[4]

A nongovernment organization which specially works on human rights named ODHIKER use to publish annual report on the state of human rights in Bangladesh. On 1 February' 2015 they published monthly human rights monitoring report of January 1-31 of 2015. In the report they reported on two specific themes named Delibarate shooting after arrest and extra judicial killing. In that report they specifically mentioned that totally 17 persons were extra judicially killed in January 2015. The organization collected information from the newspaper reports and specifically mentioned the sources in their report. So it is clear that any person or authority has the positive opportunity to challenge the information as they mentioned the fact in the report. So far the published information concerned no challenge with specific information has done yet. According to the report among the 17 persons, 12 were extra judicially killed in crossfire/encounters/ gun fights. Among them, six were

[3] Ibid.

[4]The Daily Star, April 30, 2014.

killed by RAB; five were killed by the police and one by joint forces. Among the deceased, four were shot and killed by police; one has beaten to death by RAB.[5]

In reporting torture and degrading treatment in custody they reported two specific fact of allegation against the jail and police authority of custodial torture.[6]

Dr. Mohammad Shahabuddin (Department of Law & Justice, Jahangirnagar University) in his publication listed different types of torture method based upon the information gathered in an interview with a police constable in a police station in Sylhet District. There he listed some methods of torture as follows-

• Beating indiscriminately with a baton is known as General Therapy (sa-re-ga-ma).

• In another method of torture, both the hands and legs of arrested persons remain handcuffed, while they are placed like a bat on a piece of rod, put between two tables. In such inhuman condition, victims are then beaten under their feet. This method of torture is known as Bat Therapy (BadurDholai).

• In the Snake Therapy, the prisoners are mercilessly beaten while they are kept hanging with a hook from the ceiling and their wrists are tied up with a rope.

• In the torture methods such as Water Therapy or Water Polish, the prisoner is kept lying on the floor, and then, water is poured into his/her mouth and nostrils, stuffed with a piece of cloth, so that s/he feels suffocated. This process continues for a considerably long period of time with little pauses. In some incidences, the victim falls severely ill, as water enters the lungs during this torturing process.

[5]Human Rights Monitoring Monthly Report, January 2015, ODHIKAR, page 7.

[6]Human Rights Monitoring Monthly Report, January 2015, ODHIKAR, page 8.

• In another method of torture, generally known as the PenisTherapy, a piece of brick is hung from the penis of the victim with a string, and then the victim of torture is asked to walk.

• In another commonly used method of torture in the custody, wired metal rings are put into the fingers of the prisoners to execute electric shocks. This method – known as 'Dancing Torture Method' – is named after the reaction of the victim, receiving such electric shocks.

In the UPR working group session 16, Geneva, 22 April -18 may, 2013 ODHIKAR and the Asian Legal Resource center submitted a report on Bangladesh for consideration as part of Bangladesh second cycle universal periodic review (UPR) covers the period from January 01, 2008 to September 30, 2012. There they claimed that the NGO ODHIKAR documented 284 cases in which persons were allegedly tortured, of which 70 died, allegedly due to torture in custody. The report said:

ODHIKAR reported 767 people killed extra-judicially, while from July 1, 2008 to September 30, 2012 a total of 506 such deaths have been reported. Victims are often picked up by the law enforcement agencies, detained and tortured while in custody, or taken to 'remand' in order to torture and extract information or evidence against themselves, or implicate others; or as directed by the agencies.

During the review period, ODHIKAR documented 284 cases in which persons were allegedly tortured, of which 70 died, allegedly due to torture in custody. Among those 70, 6 were BDR Jawans who were arrested following BDR mutiny. In contrast during the first UPR it was recorded that 65 people were allegedly killed by torture. ODHIKAR has also been monitoring the human rights of the BDR3 members who have been incarcerated after the 25 February 2009 mutiny. Reports show that between

27 February 2009 and 31 August 2012, 53 BDR members died in custody, either by 'heart attack' or suicide.

The police are the main agency responsible for the endemic use of torture. They make use of torture for all manner of situation and operations, particularly at the time of arrest and during arbitrary detention of criminal suspects. Torture is used to extract confessional statements and bribes during investigations into routine criminal cases. The police have turned all of their police stations, barracks, interrogation cells - such as the Task Force for Investigation's (TFI) cells - and other departments, such as the Criminal Investigation Department (CID), Detective Branch (DB) and Special Branch, into an industry that uses torture to generate wealth. This also generates large numbers of victims, who then face stigmatization, social exclusion, medical problems and injustice for the rest of their lives. Torture continues unabated, as complaint mechanisms, which are mostly controlled by the police; do not allow survivors to register formal complaints at police stations.[7]

The report also stated about the RAB as follows:

Beside the police, the Rapid Action Battalion (RAB), a paramilitary force comprising members of the armed forces, border guards and the police, which are regarded by the authorities as an "elite force", is notorious for being a force of "licensed killers" due to its record of extra-judicial killings and torture. It maintains specialized torture cells with sophisticated equipment used to torture detainees. The armed forces and intelligence agencies operate their own secret torture cells, where detainees are kept for indefinite periods, without any access to the outside world. There is also a

[7]SUBMISSION BY ODHIKAR AND THE ALRC TO THE HUMAN RIGHTS COUNCIL'S UNIVERSAL PERIODIC REVIEW OF BANGLADESH, UPR Working Group Session 16, Geneva, 22 April – 03 May 2013.

specialized team called the Joint Interrogation Cell (JIC), who is specialized in using torture as part of investigations.

The report stated about the enforced disappearances that-

The number of enforced disappearance has been increasing in the recent months in Bangladesh. In 2009 there were three cases of enforced disappearance, in 2010 it increased to 18, in 2011 there were 30 and so far 24 persons have disappeared till September 2012. In reality, the number of persons 'disappeared' are probably higher, but to be consistent with the definition of 'enforced disappearance', the reported number by

Odhikar reflects cases when the victim's family or some witness claimed that the person 'disappeared' after being picked up or detained by men claiming to be members of law enforcement agencies, or were in recognized uniform. In the report they also claimed that the police are the main agency responsible for the endemic. The Rapid Action Battalion (RAB) in practice operates above the law and is effectively immune from investigations concerning extrajudicial executions, torture and disappearances. In the last four years there was no visible punishment against any (RAB) perpetrator allegedly involved in extrajudicial executions. The Government extends total immunity to security forces in matters of extrajudicial killings, enforced disappearance, illegal detention and torture.[8]

A grave human rights violation case was reported in the periodic review.

[8]SUBMISSION BY ODHIKAR AND THE ALRC TO THE HUMAN RIGHTS COUNCIL'S UNIVERSAL PERIODIC REVIEW OF BANGLADESH, UPR Working Group Session 16, Geneva, 22 April – 03 May 2013

Case 1

The case of human rights defender Mr. F M A Razzak, 9 the President of Human Rights Development Centre based in Paikgachha of Khulna district illustrates this clearly. On April29, 2011, Razzak suffered an extremely violent physical attack by persons connected to an army officer who had a grievance against Razzak relating to his work in favor of human rights. Razzak was abducted, tortured and had his limbs fractured and his eye severely gouged, before being left for dead. Several members of his family, including the women, were attacked on several occasions before and after the attack on Razzak. The country's public hospitals denied him proper medical treatment even though he was in a critical condition. The perpetrators successfully influenced the entire administration including the local police and judiciary of the Khulna district not to protect him in extremely vulnerable circumstances. Razzak's family was ousted from their village home, which was looted on several occasions. None of the complaints of Razzak or his relatives has been properly investigated to date. On the contrary, fabricated cases ledged by the perpetrators have been taken as a priority by the police for the purpose of harassing Razzak and his relatives. The family has been forced into hiding for almost a year. The criminal justice institutions have clearly failed to administer justice in the case of Razzak and are therefore complicit in the provision of impunity and efforts to create a climate of fear for those who attempt to hold state agents accountable for grave human rights violations.[9]

The human rights NGO Ain o Salish Kendro (ASk) reported in their regular report that during the time frame from January to March 2015, 17 persons died in jail custody among which 7 were convicted and 10 detained.

[9]For further details please see here: http://www.humanrights.asia/campaigns/attack-on-fma-razzak.

Ain o Salish Kendro in their e bulletin reported that in January to April 2015 Police tortured two persons who were not arrested and two persons who were arrested. RAB tortured one person in custody. We should consider that these NGOs basically prepared their reports on the published newspaper reports not on the field works. So many unpublished facts are going without notice.

In the annual report of 2013 ODHIKAR presented a picture which is a negative picture of the human rights situation of the country.

4.3 Torture by police in Bangladesh

Section 54 of the Code of Criminal Procedure (CrPC) empowers the police to arrest any person without any warrant on suspicion of committing an offence. According to Section 167 of the CrPC, a magistrate can remand an arrested into police custody for interrogation to extract information and evidence from the person.

According to the reports published in the daily newspapers we can consider some facts to learn about the state practices of torture.

Case 2

On May 12, 2010 Rabiul Islam Khokon was tortured in remand, under court-ordered investigative custody, by sub-inspector Abdul Mannan of the NoakhaliChatkhil police station. Khokonallegedly was beaten with metal rods, burned with cigarettes, stabbed with needles, and had several of his joints broken. After the torture, officials took Khokon to the hospital where he died of his injuries. Officials arrested Abdul Mannan on the charge of murder, and put under trial.[10]

[10]Source: US Department of States, Human Rights Reports (2010) and ODHIKAR.

Case 3

An incident of custodial rape was recorded by the police in Rajshahi on 9 October against an Assistant Sub-Inspector (ASI) of Boalia Police Station on charges of raping a field worker of an insurance company. According to the FIR, ASI Faruk used to harass the victim over phone and one afternoon he took ASI Abdul

Hamid to the victim's house. The victim lived with her mother. The rapist threatened the victim saying that he is a policeman and raped her. Later, the victim narrated the incident to her mother who with the help of a person named Alam admitted her to the One Stop Crisis Centre (OCC). ASI Abdul Hamid and Faruk whowere named in the first information report (FIR) went into hiding after filing of the case.[11]

Case 4

On July 15, police arrested Dhaka University student Abdul Kader on charges of attempted robbery and possessing firearms, and beat him up mercilessly. Later, he was found innocent even in a departmental investigation into his torture in police custody.

After different media outlets highlighted the incident, a High Court bench of Justice AHM ShamsuddinChowdhury and Justice Gobinda Chandra Tagore, on Thursday, summoned the officers-in-charge of two police stations and also asked them to produce the victim before the court.

After hearing, the court directed the concerned authorities to provide proper medical treatment to Kader, at Bangabandhu Sheikh Mujib Medical University Hospital. Immediately after the court order, Kader was admitted to the hospital on Thursday

[11]"Cop goes into hiding after being charged with rape", The Daily Star, 10 October 2008.

night. The court also directed the inspector-general of police (IGP) to suspend three officials of Khilgaon police station, including its officer-in-charge (OC) HelalUddin, for their alleged involvement in torturing Kader. In accordance with the court's order, DMP suspended sub-inspector AlamBadshah and assistant sub-inspector ShahidurRaman.[12]

4.4 Torture by Other law enforcing agencies

Case 5

ASK investigations in April 2008 regarding allegations of torture on advocate Biman Chandra Basak, Vice President of the Joypurhat Bar Association, revealed that two persons in RAB uniforms, along with six or seven men in plainclothes, caught Biman at around 3:00 am on 3 April, about 200 yards away from his house. They tortured him and interrogated him about two statues. They took him handcuffed in their microbus to a school ground, where they poured water into his mouth and nose. As villagers gathered to protect Biman, the attackers, who introduced themselves as RAB members, threatened the villagers. After about an hour of torture, they left the place and Biman was admitted in Joypurhat hospital with severe injuries including a fractured leg. The commander of the Joypurhat RAB camp claimed that no one from his unit was involved in the incident. He mentioned that the Bogra RAB camp may have conducted the operation. Later, he claimed that the attackers were not members of RAB at all. Although Biman said he could identify the perpetrators, there was no report to date of any such identification having been made, or of any further inquiry into the matter.[13]

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[12]http://www.mediabangladesh.net/en/index.php?option=com-content&v,last visited on 22, July,2012.

[13]ASK Investigation Report. See full report at ASK's web site- http://www.askbd.org/web/wpcontent/uploads/2008/08/Joypurhat_adv_biman_final.pdf.

Case 6

The loss of the left leg of an innocent college student by a RAB shootout baffled the whole nation. The incident was one out of numerous others where we saw political opponents were being victimized and mass arrest took place while in all cases law enforcing agencies took the role of oppressor. Such manipulation of administrative power eventually harms the spirit of democracy and justice. Director General of Rapid Action Battalion MokhlesurRahman said Limon Hossain is the victim of a „shootout□ between RAB and criminals. The college student lost his left leg in RAB „crossfire□ while he was on his way to bring his cows back home at Chhaturia village in Rajapur of the district on March 23, 2011.[14] Limon's mother Henoara Begum's filed case against six members of Rapid Action Battalion (RAB) on charge of maiming Limon. Jhalakathi court issued an order to register the case.[15]Members of the Rapid Action Battalion (RAB) are trying to "brand" college student Limon Hossain as a criminal even after the force's chief told the media that the 16-year-old is not a criminal rather a victim of shootout.[16]Limon, a college student who became disabled in a Rapid Action Battalion shootout, filed a case with a Jhalakathi court against six members of RAB. Henoara Begum filed the petition case with Senior Judicial Magistrate's Court. Earlier, Police failed to register the case even under the order of Court showing the cause that "police officials were so busy". Chairman of Human Rights Commission visited Limon at hospital and demanded justice for him**.**[17]

Home Minister ShaharaKhatun opposed the formation of a parliamentary sub-committee to investigate the shooting of Rajput College student Limon in Jhalokathi

[14]The Daily Star, 11.04.2011

[15]The Daily Star, 17.04.2011

[16]The Daily Star, 23.02.2011

[17]ProthomAlo: 26.4.11, 7.4.11

by the Rapid Action Battalion. At a meeting of the parliamentary standing committee on home ministry, Jatiya party lawmaker MojibulHaqueChunnu proposed that a sub-committee be formed to investigate the incident. But, the home minister opposed the proposal saying that six committees had already been constituted to look into the incident.[18]

4.5 National Legislation of Bangladesh Penalized the Acts of Torture

Bangladesh accessed in to CAT on 5 October 1998. Long before this the Constitution of Bangladesh as the supreme law of the country has guaranteed protection from torture and other cruel, inhuman or degrading punishment or treatment for any individual within its territory. Article 35(5) Of the Constitution specifically states that "no person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment". This protection is guaranteed as one of the fundamental rights under the part iii of the constitution. Though the constitutional guarantees are not absolute in every situation and can be curtail for special situation, which is not permissible under normal circumstances.

The language of this Article is directly influenced from Article 5 of the UDHR. By the provision Bangladesh endorsed an international standard prohibiting torture and exhibited its international commitment to the CAT.

Under Article 4 of the CAT, each State Party to this Convention must ensure not only that all acts of torture as well as attempts to commit torture are offences under its municipal criminal law, but also they are punishable under national criminal justice system. Although in Bangladesh has yet not defined the term 'torture' precisely by

[18]The Independent 22-04-11

prevailing national legislature but there are a number of laws that penalize conduct amounting to torture.

For example

The Police Act of 1861 provides that every police officer who shall offer any unwarrantable personal violence to any person in his custody shall be liable to a penalty not exceeding three months' pay or to imprisonment, with or without hard labor, for a period not exceeding three months or to both.

The Penal Code of 1860 – the principal penal legislation of the country – criminalizeswrongful confinement of a person to extort from him or from another person interested in him any confession, which may lead to the detection of an offence or misconduct. The prescribed punishment for this offence is imprisonment, either simple or rigorous, for a term, which may extend to three years and fine. Herein no limit of fine is prescribed and as such the amount of fine to which the offender is liable is unlimited though it shall not be excessive.

The Penal Code criminalizes acts causing hurt and grievous hurt to any individual. The Code defines 'hurt' as an act, which causes bodily pain, disease or infirmity to any person. According to the same law, some kinds of hurt are designated as 'grievous hurt.' The Penal Code provides that voluntarily causing hurt, unless caused in consequence of grave and sudden provocation, is punishable with imprisonment, either simple or rigorous, for a term which may extend to one year or with fine which may extend to one thousand taka or with both. The punishment of this offence, when caused in consequence of grave and sudden provocation, is imprisonment, either simple or rigorous, for term which may extend to one month or fine which may extend to five hundred taka or both. The punishment of voluntarily causing hurt, when

caused by dangerous weapons or means and not in consequence of grave and sudden provocation, is imprisonment, either simple or rigorous, for a term which may extend to three years or fine orboth. Similarly, the Code penalizes acts of grievous hurt. According to Section 325, voluntarily causing grievous hurt, unless caused in consequence of grave and sudden provocation, is punishable with imprisonment, either simple or rigorous, fora term which may extend to seven years and also with fine.The punishment of this offence, when caused by dangerous weapons or means and not in consequence of grave and sudden provocation, is imprisonment, either simple or rigorous, for a term which may extend to ten years as well as the imposition of fine. Voluntarily causing hurt with the intention to extort property or to constrain to an illegal act is punishable with imprisonment, either simple or rigorous, for a term which may extend to ten years and also with fine. Similarly, voluntarily causing grievous hurt with this intention is punishable with imprisonment for life or with imprisonment, either simple or rigorous, for a term which may extend to ten years and also with fine. Voluntarily causing hurt with the intention to extort confession or to compel restoration of property is punishable with imprisonment for a term which may extend to seven years and also with fine. Similarly, voluntarily causing grievous hurt with this intention is punishable with imprisonment for a term which may extend to ten years and also with fine. Given that the concept of 'torture' includes mental sufferings, acts of 'criminal force,' 'assault,' and 'criminal intimidation' are also criminalized under the Penal Code. Criminal force is defined as an intentional use of force toany person, without that person's consent, in order to commit any offence, or with the intention or knowledge of causing injury, fear or annoyance to that person. The Code provides that the commission of assault or criminal force, unless caused in consequence of grave and sudden provocation, is punishable with imprisonment for a

term which may extend to three months or with fine which may extend to five hundred taka or with both. Assault or criminal force to a person in attempting to wrongfully confine that person is punishable with imprisonment for aterm which may extend to one year or with fine which may extend to one thousand taka or with both. Assault or criminal force on a woman with the intention of violating her modesty is punishable with imprisonment for a term which may extend to two years or with fine or with both.

In criminal jurisprudence, intimidation means threatening a person with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with an intention to cause harm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat. The punishment for criminal intimidation is imprisonment for a term, which may extend to two years and/or fine. When the threat, constituting criminal intimidation, is of causing death or grievous hurt roof causing destruction of any property by fire or of causing an offence punishable with death or imprisonment for life or imprisonment for a term which may extend to seven years roof imputing unchastely to a woman, the offence of criminal intimidation is punishable with imprisonment for a term which may extend to seven years and/ or fine.

4.6 The International Legal Regime and Bangladesh Standard about Torture Legislation

Although the penal provisions, as applicable in Bangladesh, criminalize the acts of torture and other inhuman or degrading punishment and treatment, and provide punishments of various kinds for each category of offence amounting to torture, these provisions are yet to conform to the international standard, as set by the CAT. For

example, if we look at the provisions of the Penal Code, dealing with hurt and grievous hurt, we see that these offences are widely categorized for the purpose of punishments. All these offences may in certain circumstances cover the offence of torture as defined by the CAT. But these cannot exhaustively deal with torture since these penal provisions are not relevant when dealing with torture inflicted by mental pain or suffering. So far as punishment for hurt and grievous hurt. Different categories of hurt and grievous hurt consist of, inter alia, (i)voluntarily causing hurt not in consequence of grave and sudden provocation;(ii) voluntarily causing hurt with dangerous weapons or means; (iii) voluntarily causing hurt in consequence of grave and sudden provocation; (iv) voluntarily causing hurt with the intention to extort property or to constrain to an illegal act; (v) voluntarily causing hurt with the intention to extort confession or to compel restoration of property; (vi) voluntarily causing grievous hurt not inconsequence of grave and sudden provocation; (vii) voluntarily causing grievous hurt with dangerous weapons or means; (viii) voluntarily causing grievous hurt in consequence of grave and sudden provocation; (ix) voluntarily causing grievous hurt with the intention to extort property or to constrain to an illegal act; and (x) voluntarily causing grievous hurt with the intention to extort confession or to compel restoration of property.

4.7 Legal Provisions in Bangladesh Alleged to be Liable for torture

In Bangladesh's national legislations there are some provisions which are questioned for making scope for practicing torture by the law enforcement officials. The apex court of the county in their judgments discusses the issues before.

4.7.1 Legal Provisions on Arrest

By arrest the law enforcing agencies begin to keep someone in the state custody. According to its purposes to made arrest may be classified as; preventive (For

example, in order to terminate a breach of peach of peace), punitive (For example, to take a person before a Magistrate to answer for an offence or to be bound over) and protective (for example, where mentally ill person are arrested for their own protection). An arrest may be followed by a charge or without a charge. An arrest occurs when a police officer states in terms that a person is arrested, when he uses force to restrain the individual concerned or when by words or conduct he makes it clear that he will, if necessary, uses force to prevent the individual from going where he wants to go. Thus the police officer must say before arrest to the person to be arrested: "I am arresting you" The Code of Criminal Procedure Code, 1898[19] has given power to arrest to both general public and police officers. Thus arrest may be made by police officers and also in some circumstances by an individual. Sections 46 to 53 of Carps provide procedure of how an arrest can be made. The whole procedure may be described in the following steps:

(i) In making an arrest the Police-officer or an individual can actually touch or confine the body of the person to be arrested (sec. 46).

(ii) If such person resists the arrest or attempts to evade the arrest, such Police-officer or individual may use all means necessary to affect the arrest (sec. 46).

(iii) By way of affecting the arrest the police officer or an individual cannot cause death of the person to be arrested (sec. 46).

(iv) While making the arrest under warrant or in case of a warrantable case the police officer may ask free ingress to any residence or place where he has reason to believe that the person to "be arrested is hiding or has entered into (sec. 47).

[19]Hereinafter referred to as CrPC.

(v) If ingress to such place cannot be obtained under section 47 it shall be lawful for the police officer to break into the house or residence to affect the arrest (Sec. 48).

(vi) If such a breaking into the house is to be done into a zanana, the police officer must give the women inside the zanana opportunity to withdraw themselves from it (Sec. 48).

(vii) The person arrested shall not be subjected to more restraint than is necessary to prevent his escape (Sec. 49).

4.7.2 Arrest without warrant

Section 54 of the Carps lays down the general power of arrest by police officer. This power is general in the sense that a police officer may arrest a person without warrant or any kind of order from superior authority or court or Magistrate. In nine circumstances a police officer may, without an order from a Magistrate and without a warrant, arrest a person:

(i) Any person who has been concerned in any cognizable offenceor against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;

(ii) Any person having in his possession without lawful excuse any implement of house —breaking;

(iii) Any person who has been proclaimed as an offender either under this Code or by order of the Government;

(iv) Any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing;

(v) Any person who obstructs a Police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody;

(vi)Any person reasonably suspected of being a deserter from the armed forces of Bangladesh;

(vii) Any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received ora reasonable suspicion exists of his having been concerned in, any act committed at any place out of Bangladesh, which, if committed in Bangladesh, would have been punishable as an offence.

(viii) Any released convict committing a breach of any rule made under section 565, sub-section (3);

(ix) Any person for whose arrest a requisition has been received from another police-officer, provided that the requisition specified the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefore that the person might lawfully be arrested without a warrant by the officer -who issued the requisition.

4.7.3 Instances of Special Power of Arrest

(i) Any Officer in charge of a police station may arrest a vagabond, habitual offender without warrant under section 55.

(ii) A police officer may depute a subordinate to cause arrest without warrant and in such a case the subordinate officer can arrest without warrant (sec. 56).

(iii) A police officer may arrest a person who commits a non-cognizable offence in presence of the police and refuses to give his name and address or the name and address given is believed to be false (sec. 57)

(iv) A private person may arrest without warrant any person who is proclaimed offender or who in his view commits a non-bail ableand cognizable offence (sec. 59).

(v) Any Magistrate may at any time arrest or direct the arrest, in his presence, within the local limits of his jurisdiction of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant (sec. 65).

(vi) If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in Bangladesh (sec. 66).

(vii) An Officer in Charge of a Police station may arrest without warrant any member of an unlawful assembly who being commanded to disperse shows determination not to disperse (sec. 128).

(viii) Any police officer may arrest without warrant a person who cannot otherwise be prevented from committing a cognizable offence (sec. 151).

(ix) Any police officer may arrest without warrant a person who fails to fulfill the conditions on which a sentence has been suspended or remitted by the Government (sec. 401(3).

4.8 The Legal Provisions and Practice of Remand in Bangladesh

Put in very simple terms, a remand is another name for an adjournment of a case. However, the criminal justice system knows the remand as having a particular meaning. When a case is adjourned, the court may have the power or duty to remand the accused in police custody or in jail, rather than simply adjourn the case to another day. It would be accurate to say that while all remands are adjournment, not all adjournments are remands. The difference between 'remanding' a defendant and

simply 'adjourning' the case is that when the court remands a defendant, it is under a duty to decide whether the defendant should be released on bail or kept in police custody or in jail custody. Thus remanding the defendant may be of three types: remand on bail, remand in police custody, and remand in prison custody or jail.

In England there is a system of disposing of a criminal case within 24 hours where there is straight forward guilty by the accused. However, in Bangladesh even a simplest criminal case would not be completed in a year let alone a day. And this is mostly because of the corruption by the police in investigation and lack of knowledge and lack of proper guidelines for Magistrates in dispensation of criminal cases.

As mentioned above, remanding means committing the defendant into the custody or placing him on bail. The most objectionable remand in Bangladesh is remanding on police custody since police uses unlawful torture on the defendant on the pretext of extracting information from the accused.

4.8.1 Duration of Remands: At the Stage of Investigation in Bangladesh

Provisions are laid down in section 167 of the CrPC which are as follows:

(i) Not more than 15 days in a whole in police custody or jail custody.

(ii) When the investigation cannot be completed within 120 days from the date of receipt of the information relating to the commission of the offence or the order of the Magistrate for such investigation, the Magistrate empowered to take cognizance of such offence or making the order for investigation may, if the offence is not punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail.

(iii) When the investigation cannot be completed within 120 days from the date of receipt of the information relating to the commission of the offence or the

order of the Magistrate for such investigation, the Court of Session may, if the offence is punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail.

(iv) If the accused is not released on bail under this section, the Magistrate or the Court of Session shall record the reason for it.

(v) Thus there is no maximum period fixed by law for order of detention in police custody by the Magistrate.

(vi) It is to be noted that in England there is provision of remand in police custody for not more than three days in total.

(vii) If the defendant is on bail, there is no statutory time limit for remand.

4.8.2 Remand after Taking Cognizance or Commencement of Trial by the Court

Section 344 deals with the period of remand after cognizance of the offence has been taken or after commencement of the trial in the court.

(i) Any trial court other than Magistrate Court may remand or adjourn an inquiry or trial from time to time for such time as it considers reasonable and as such remand the accused to jail custody.

(ii) Any Magistrate Court as a trial court or court of inquiry may remand an inquiry or trial but in such a case it can remand the accused in jail custody not more than 15 days at a time.

4.8.3 Nature of Remand under section 344 and difference with section 167

(i)The remand and custody referred to in section 344 is different from that of referred to in section 167. The remand under section 167 is to police or judicial custody whereas remand under section 344 is to judicial custody only.

(ii) The remand under section 167 is for the purpose of investigation only whereas the remand under section 344 is for the purpose of absence of witness or any other reasonable cause to trial or inquiry.

(iii) The remand under section 167 is for investigation only whereas remand under section 344 is for under-trial prisoners.[20]

4.9 Conclusion

The laws related to criminal justice system in Bangladesh are more or less inherited from British period. In that time the criminal justice system was established and developed for ruling the natives and controlling the protesters of colonial rulers. The law and order situation was not same at that time. The concepts of international human rights law was not developed at that time. So there are some provisions within which abuse of power and practice of torture by the law enforcement officials can be happened.

[20]Md. Abdul Halim, *Text Book onCode ofCriminal Procedure,* 3rd ed. (Dhaka: CCB Foundation, 2009), p. 63-76.

Chapter 5

Enforcement of International Human Rights Law in the Domestic Courts

5.1 Introduction

Higher judiciary of Bangladesh is in that position to give reference to international instruments which is very limited in practice. The judgments of the Supreme Court give limited and conditional importance to the international human rights laws. In case of lower judiciary give reference to the international instrument is practically not possible. The lower judiciary can follow the observations of the higher courts and bound to follow the orders. Where there is clear relevant national legislations the higher judiciary is bound to follow the same except can use the jurisdiction of interpretation and can give suggestions. In the scope of this situation the Judges and the prosecutors have important roles to play to implement the theme of the UNCAT in the domestic jurisdiction of the national courts of Bangladesh.

5.2 Judicial Approach to the International Law in Bangladesh.

The apex court of Bangladesh declared in *Bangladesh v. UnimarineS.A.*[1]Case that customary international law is binding on the states, and states generally give effect to rules and norms of customary international law. The court cited the rule of immunity of foreign missions, envoys, etc. as good examples of *customary* international law that would be binding on states. In *Bangladesh and Others v. SombonAsavhan*[2] the question of domestic law vis-à-vis international custom was raised in. Bangladesh

[1]29 DLR (1977) p.252.

[2]32 DLR (1980) p.198.

Navy captured three Thai fishing trawlers for illegal entrance and fishing in territorial waters of Bangladesh. The question was whether the trawlers were within the territorial waters or in the exclusive economic zone of Bangladesh. The Supreme Court settled the issue on the basis of Bangladesh Territorial Waters and Maritime Zones Act, 1974, instead of applying existing international law regarding territorial waters. The Appellate Division of the Supreme Court observe, "it is well settled that where there is municipal law on an international subject the national court's function is to enforce the municipal law within the plain meaning of the statute."[3]It appears that in case of conflict between statute and customary international law, the court will give effect to the statute. According to the court Article 13(I)(B) of the Bangladesh Constitution confers upon Parliament full competence to legislate on the boundaries of territorial and maritime zones.

The High Court Division considered the issue of customary international law regarding self-determination vis-à-vis the provision of Bangladesh Constitution in *Saiful Islam Dildar v. Govt. of Bangladesh and Others.*[4]Justice BimalenduBikash Roy Chowdhury made some observations about the applicability of international human rights law by domestic courts in *Hussain Muhammad Ershad v. Bangladesh and Others*[5]**.** He observed that the Universal Human Rights norms, whether given in the Universal Declaration or in the Covenants, are not directly enforceable in national courts. But if their provisions are incorporated into the domestic law, they are enforceable in national courts. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the international instruments. But in the cases where the domestic laws are clear and

[3]Ibid. p.201

[4]50 DLR (1998), p.318

[5]21BLD(AD) (2001), p.69

inconsistent with the international obligations of the state concerned, courts will be obliged to respect the national laws, but shall draw the attention of the law makers to such inconsistencies.

In *State v. Deputy Commissioner, Satkhira*[6] the High Court Division referred to Universal Declaration of Human Rights and Convention on the Rights of the Children not as a source of law but as to illuminate constitutional and statutory rights to free a minor boy from custody and torture. The High Court Division referred to the Convention Against Torture to underline practice of chaining prisoners with bar-fetter as cruel and inhuman, and hence violation of fundamental rights in *Salma Sobhan v. Government of Bangladesh*.[7] In two women's rights related cases *Dalia Parveen v. Bangladesh Biman Corporation*[8] and *Shamima Sultana Seema v. Government of Bangladesh*[9] the High Court Division in upholding women's rights that based its decisions solely on constitutional provision while it had great opportunity to base its decisions, besides the constitution, on the Convention on Elimination of All Forms of Discrimination Against Women as well.

It appears the courts in Bangladesh where references were made to international human rights laws did not take any serious, substantive and doctrinal view of the domestic relevance of these laws to render international human rights as basis for decisions.[10]Although there are very few cases where Bangladesh judiciary experienced occasions to relate international law to its decisions, and there is little

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[6]45 DLR (1993) (HCD) 643

[7]Unreported case as cited in RidwanulHoque and Mostafa Mahmud Naser , Indian Journal of International Law, vol.40, No.2, 2006, p.163

[8]48 (1996) DLR (HCD) 132

[9]57(2005) DLR (HCD) 201

[10]RidwanulHoque and Mostafa Mahmud Naser, "The Judicial Invocation of International Human Rights Law in Bangladesh: Questing a Better Approach", Indian Journal of International Law, Vol. 46, No.2, April-June 2006. P.180

judicial mention of constitutional provisions of international norms are considered part of the law of the land, if they are not contrary to statutes, and on the other hand, treaty laws would require implementing legislation to apply them within domestic jurisdiction.[11]

5.3 The role of judges and prosecutors in combating torture

Judges and prosecutors have a crucial role to play in combating torture. They are pivotal in maintaining any rule of law. Nothing is so corrosive of the rule of law than official lawlessness, especially official criminality. When a state engages in and fails to prevent torture, it is in breach of its obligations under international law. Those responsible for the administration of justice need to be alert to their role in avoiding placing the state in that position. Whereas the executed and legislated branches of government may be tempted to ignore the rule of law and human rights in response to public pressures for increased security from common criminality and, especially since the atrocities of 11 September 2001, transnational terrorism, the judicial branch is better placed to save society from the trap of allowing short-term expedience to trump the long-term institutional stability and fundamental values of society. Combating torture requires judges and prosecutors to wield both the shield and the sword of the law. The shield they must provide involves respecting national and international safeguards to protect those in the hands of law enforcement from being subjected to torture and similar prohibited ill-treatment. The sword they must brandish involves holding the perpetrators of such treatment accountable for their own law breaking. Judges and prosecutors exercise different functions in different legal systems and their

[11]Alam M. Shah, Enforcement of International Human Rights Law by Domestic Courts, New Warsi Book Corporation, Dhaka, 2007, p. 115,

role in deciding on the admissibility of evidence, questioning witnesses and summing up cases will also vary.

5.3.1 The Role of Judges in Combating Torture

The basic role of judges is to uphold national law – including international law when this has been incorporated into domestic legislation – and to preside independently and impartially over the administration of justice. In deciding guilt or innocence, or in weighing the merits of claims between individuals and the state, judges must have reference only to the facts, so far as they can be established; the merits of each party's position; and the relevant law. But justice also requires that judges understand all the factors relevant to the situation they are considering, including those which may affect the way that those present in the courtroom behave, or perceive the trial process. This does not just involve controlling procedures, making rulings on points of law, summing up cases, giving judgments, or passing sentences, but also ensuring that their court proceedings are managed in a way that is fair and is seen to be fair.

It is the responsibility of judges to ensure that defendants, witnesses and victims are treated fairly and that those accused of having committed a criminal offence receive a fair trial. This involves ensuring that their rights are respected at all times, and that only evidence which has been properly obtained should be admissible in court. It also means ensuring that those responsible for upholding the law are themselves bound by its strictures. This may involve taking an assertive role to ensure that all testimony and evidence has been given freely and has not been obtained using coercive means. Judges should at all times be alert to the possibility that defendants and witnesses may have been subject to torture or other ill-treatment. If, for example, a detainee alleges that he or she has been ill-treated when brought before a judge at the end of a period of police custody, it is incumbent upon the judge to record the allegation in writing,

immediately order a forensic medical examination and take all necessary steps to ensure the allegation is fully investigated.[12] This should also be done in the absence of an express complaint or allegation if the person concerned bears visible signs of physical or mental ill-treatment.

While legal systems vary in some respects in different parts of the world, the legal prohibition of torture is universal. The primary role of judges in preventing acts of torture, therefore, is to ensure that the law is upheld at all times.

5.3.2 The Role of Prosecutors in Combating Torture

Judges and prosecutors can play significantly different roles in different criminal justice systems –depending on whether these are based on an adversarial or inquisitorial process. Many of the points regarding the role and responsibilities of judges will also apply to prosecutors in many countries. Prosecutors also have a particular responsibility to ensure that all evidence gathered in the course of a criminal investigation has been properly obtained and that the fundamental rights of the criminal suspect have not been violated in the process. When prosecutors come into possession of evidence against suspects that they know, or believe on reasonable grounds, was obtained through recourse to unlawful methods, notably torture, they should reject such evidence, inform the court accordingly, and take all necessary steps to ensure that those responsible are brought to justice.[13]Any evidence obtained through the use of torture or similar ill-treatment can only be used as evidence against the perpetrators of this abuses.[14]

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[12]CPT/Inf/E (2002) 1, p. 14, para 45.

[13]UN Guidelines on the Role of Prosecutors, Guideline 16

[14]The UNCAT,Article 15.

In some jurisdictions it is necessary for prosecutors to request investigating judges to act before the latter can initiate investigations. It is, therefore, essential that prosecutors take this duty seriously when it involves the possible commission of the crime of torture by law enforcement officials. Almost all jurisdictions oblige prosecutors to pursue the perpetrators of criminal offences and this duty includes the pursuit of law enforcement officials who may be accused of criminal offences, such as committing acts of torture. In many jurisdictions there is no need for prosecutors to receive a formal complaint before they can act to pursue evidence of a crime. Indeed they frequently have a legal duty to take such action if information comes to their attention in any way.

5.4 Ensuring Safeguards during Detention of the Accused Persons

International standards only provide a basic minimum. Many states offer greater protection and these can also be considered as models of good practice. Where these standards have not been adhered to there is a particular risk that detainees may have been subject to torture or other forms of ill-treatment. Failure to adhere to some of these standards may also subsequently make it more difficult to identify and prosecute those responsible for these acts:

5.5 Notifying People about their Rights in Custody

All people deprived of their liberty have the right to be told the reasons for their arrest or detention and what their rights are in detention. They have the right to inform, or have the authorities notify, their family or friends of the fact of the detention and the place where they are being held. If the person is transferred to another place their family or friends must again be informed. This notification should preferably take place immediately or at least without delay. People held in pre-trial detention should

be given all reasonable facilities to communicate with family and friends and to receive visits from them.

5.6 Use of officially recognized places of detention and the maintenance of effective custody records

Everyone deprived of their liberty should be held in places that are officially designated and publicly known. Interrogation should only take place at official centers and any evidence obtained from a detainee in an unofficial place of detention, and not confirmed during interrogation at official locations, should be excluded as evidence in court – unless it is used as evidence against an allegedtorturer. Timely and accurate custody records, held in publicly accessible registers, are an essentialelement in protecting people against torture or ill-treatment. The authorities should keep and maintainup-to-date official registers of all detainees, both at each place of detention and centrally. These recordsshould include the names of detainees, their place of detention and the identity of those responsible fortheir detention. Cells should be numbered and the cell in which the detainee was placed should berecorded. A complete record of all contact with the detainee should also be kept, including requeststhat the detainee has made, responses by the authorities and decisions taken in relation to the detainee. Custody records should be kept using means where any tampering can be easily detected – such as bound books with pre-numbered pages and retained for a substantial period (i.e. several years).

5.7 Avoiding Incommunicado Detention

People are particularly at risk of torture and ill-treatment when they are detained incommunicado – that is when a detainee has no access to the outside world, to their family, lawyers or to independent doctors. This risk increases the longer that they are

held as it allows a longer period for injuries to be inflicted and for the visible marks of these injuries subsequently to fade. Judges should exercise any discretion that they have to ensure restrictions and delays in granting detainees access to the outside world are kept to the minimum.

5.8 Access to a lawyer and respect for the functions of a lawyer

Detainees have the right to access to legal advice without delay. They should be able to consult, in private, with a lawyer while in custody, to have a lawyer present during any interrogations and to have a lawyer represent them when they appear in court. Lawyers should advise and represent their clients in accordance with professional standards, free from intimidation, hindrance, harassment, or improper interference from any quarter.

5.9 Access to a doctor for the Accused Persons

Detainees should be medically examined as soon as possible after they are deprived of their liberty and at all stages of their detention. They have an additional right to be examined by an independent and fully qualified doctor of their choosing. Medical examinations should be conducted out of the hearing, and preferably out of the sight, of police officers. The results of every examination, as well as relevant statements by the detainee and the doctor's own conclusions, should be formally recorded by the doctor and made available to the detainee and his or her lawyer.

5.10 Safeguards for special categories of detainees

All detained people have the right to equal treatment without discrimination on the grounds of race, color, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status. Particular allowances should, however, be made for the rights and needs of vulnerable detainees including

women, juveniles, elderly people, foreigners, ethnic minorities, people with different sexual orientation, people who are sick, people with mental health problems or learning disabilities, and other vulnerable groups or individuals. Some groups may be targeted for discriminatory abuse by the staff of the institution where they are detained. They may also be vulnerable to abuse from other detainees.

5.11 Rights of the Accused Persons during Interrogations

Prosecutors have a responsibility to ensure that they do not participate in interrogations in which coercive methods are used to extract confessions or information. They should also satisfy themselves that such methods are not used by law enforcement officials in order to obtain evidence to bring criminal charges against a suspect. Where a suspect or witness is brought before a prosecutor, the prosecutor should ensure that any information or confession offered is being given freely. The prosecutor should also explore for signs of physical or mental distress, take all allegations of torture or other forms of ill treatment seriously, and refuse to return anyone to custody where he or she is at risk of such treatment.

The risk of torture and ill-treatment under interrogation is all the greater if the legal system base convictions mainly or substantially on confessions and on evidence obtained in pre-trial detention –particularly when interrogations are conducted without a detainee's lawyer being present. In all circumstances, strict procedures should be followed to ensure that interrogations are properly conducted and that abuses are not inflicted while a detainee is being questioned. It is particularly important that the details of all interrogations are recorded and the interrogation itself is transcribed. This information should also be available for the purposes of judicial or administrative proceedings.

Prosecutors and judges should ensure respect for the elements contained within the following check-list of good practice concerning interrogations, which is based on recommendations by the CPTand the UN Special Rapporteur on Torture-[15]

• Interrogation should take place only at official centers and any evidence obtained from a detainee in an unofficial place of detention and not confirmed by the detainee during interrogation at official locations should not be admitted as evidence in court against the detainee;

• The detainee should have the right to have a lawyer present during any interrogation;

• At the outset of each interrogation, the detainee should be informed of the identity (name and/or serial number) of all persons present;

• The identity of all persons present should be noted in a permanent record which details the time at which interrogations start and end and any request made by the detainee during the interrogation;

• The detainee should be informed of the permissible length of an interrogation; the procedure forest periods between interviews and breaks during an interrogation, places in which interrogations may take place; and whether the detainee may be required to stand while being questioned. All such procedures should be laid down by law or regulation and be strictly adhered to;

• Blindfolding or hooding should be forbidden as they can render the subject vulnerable, involve sensory deprivation and may themselves amount to torture or ill-treatment. They may also make prosecutions virtually impossible as it will be more difficult to identify the perpetrators.

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[15]CPT/Inf/E (2002) 1, p.10-16, para 33-50; Report of the Special Rapporteur on Torture, 2001, UN Doc.A/56/156, July 2001, para 39.

• All interrogation sessions should be recorded or transcribed and the detainee or, when provided bylaw, his or her counsel should have access to these records;

• The authorities should have and should regularly review procedures governing the questioning of persons who are under the influence of drugs, alcohol or medicine or who are in a state of shock;

• The situation of particularly vulnerable persons (for example, women, juveniles and people with mental health problems) should be the subject of specific safeguards.

The electronic recording of interviews significantly helps reduce the risk of torture and ill-treatment and can be used by the authorities as a defense against false allegations. As a precaution against tampering with the recordings, one tape should be sealed in the presence of the detainee and another used as a working copy. Adherence to such procedures also helps to ensure that a country's constitutional and legislative prohibition of torture and ill-treatment is respected and verifiable.

The term 'interrogation' does not only refer to the time in which a person is being formally questioned. It may include periods before, during and after the questioning when physical and psychological pressures are applied to individuals to disorient them and coerce them into compliance during formal questioning. All such practices must be absolutely prohibited.

5.12 Independent inspections in the Detention Place

Regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture. The Center for Preventing Torture[16] has stated that it 'attaches particular importance to regular visits to each prison establishment by an independent

[16] Hereinafter referred to as CPT

body (e.g. a board of visitors or supervisory judge), possessing powers to hear (and if necessary, take action on) complaints from prisoners and to inspect the establishment's premises. Such bodies can inter airplay an important role in bridging differences that arise between prison management and a given prisoner or prisoners in general.'[17]It has also welcomed the existence of mechanisms to inspect police premises as 'making an important contribution towards the prevention of ill-treatment of persons held by the police and, more generally, of ensuring satisfactory conditions of detention in police stations'[18].The Special Rapporteur on Torture has stated that 'unannounced visits to police stations, pre-trial detention facilities and penitentiaries' provide one effective safeguard against torture.[19]

National law often requires members of the judiciary and/or prosecutors to carry out inspections. Law enforcement officials, defense lawyers and physicians, as well as independent experts and other representatives of civil society may also be involved in inspections. Ombudsmen and national or human rights institutions, the International Committee of the Red Cross (ICRC) and independent nongovernmental organizations (NGOs) should also be authorized to have full access to all places of detention on request.

Places of detention should be visited regularly – and without prior warning – and every effort must be made to communicate directly and confidentially with people being detained or imprisoned. Places to be visited include police lock-ups, pre-trial detention centers, security service premises, administrative detention areas and

[17]2nd General Report on the CPT's Activities, 1991, para 54.

[18]CPT/Inf/E (99) 1 (REV. 2), para 97.

[19]Report of the Special Rapporteur on Torture, 2001, UN Doc.A/56/156, para 39(c).

prisons. Inspection teams should be free to report publicly on their findings should they choose to do so.

The Association for the Prevention of Torture (APT), which is a non-governmental organization, has produced a report, based on a number of CPT reports and recommendations, concerning national visiting mechanisms. This contains the following basic check-list for judges and prosecutors conducting inspections.[20]

• The visiting body should demonstrate its independence and impartiality, distinct from the staff and administration of the place of detention. It must make it clear that its only concerns to ensure that detention conditions are humane and those detainees are treated justly.

•Those involved in conducting inspections should have specific knowledge and expertise regarding the particular kind of place of detention that which they are involved in inspecting.

•The visiting body should strive to establish direct contact with detainees during visits. Detainees who have not requested an interview with the monitoring body should be chosen at random and interviewed as part of a regular visit. Detainees should also have a right to register complaints, both within and outside of the detention facility.

• The visiting body should be able to communicate with detainees out of sight and hearing of the staff of the place of detention.

• Weekly visits to prisons and other places of detention are most effective. Monthly visits may be an acceptable alternative. Visiting bodies should be provided with

[20]CPT Recommendations Concerning National Visiting Mechanisms, The Association for the Prevention of Torture, June 2000.

adequate time and resources to make visits with regularity sufficient to ensure effectiveness.

• Visiting bodies should have, and exercise, the power to visit any place of detention on any day and at any time that they choose.

• The visiting body should have, and seek, access to all parts of the facility.

• The visiting body should make regular reports of their visits available to relevant national institutions.

As well as talking to detainees and observing their physical condition, overall demeanor and their relationship with the staff in the detention facility, members of the visiting body should also be observant for any equipment or implements that could be used to inflict torture or ill-treatment. The staff of the detention facility should always be questioned about any such items and detainees should also be questioned, separately from the staff.

5.13 Conditions of detention of an Accused

While conditions of detention will vary, the CPT has provided a general check-list[21] of factors that need to be considered when assessing the suitability of a place used for short-term detention:

• Cells should be clean, of a reasonable size for the number of persons they are used to accommodate, and have adequate lighting (sufficient to read by, sleeping periods excluded) and ventilation; preferably, cells should have natural light;

[21]CPT/Inf/E (2002) 1, p.8, para 42.

• Cells should be equipped with a means of rest (a fixed chair or bench), and persons obliged to stay overnight in custody should be provided with a clean mattress and blankets;

• Persons in custody should be allowed to comply with the needs of nature in clean and decent conditions, and be offered adequate washing facilities;

• Persons in custody should have ready access to drinking water and be given food at appropriate times, including at least one full meal every day;

• Those detained for extended periods, 24 hours or more, should be allowed to take outdoor exercise.

These are to be regarded as minimum standards. Any further period in detention should normally be ina facility designed for longer-term detentions where the standards to be expected are more exacting. Deprivation of liberty in conditions which do not meet these standards can amount to inhuman or degrading treatment in contravention of international human rights law.[22]

5.14 Appearance before a judicial authority

All detained persons have the right to challenge the lawfulness of the detention. This is sometimes referred to as a habeas corpus procedure, which means the delivering of the body before the court. This can provide an important safeguard against torture as well as a means to challenge arbitrary detentions – although sometimes judges restrict this procedure to ensuring that the detention itself is lawful without giving sufficient weight as to whether the conditions of the detention also fully comply with the law.

[22] *Peers v Greece*, ECtHR, Judgment 19 April 2001; Kalashnikov v Russia, ECtHR, Judgment 15 July 2002.

The application to challenge a detention may be made by the detainee or by someone acting on his or her behalf. Such procedures must be acted on expeditiously. If it is within their discretion to do so, judges should also require that the detainee is physically brought to court and that, while in court the detainee is able to communicate with his or her lawyer in confidence.

Whenever a detainee is brought before them from custody, judges should be particularly attentive to his or her condition. Where necessary, judges should routinely carry out a visual inspection for any signs of physical injury – or order one to be carried out by a doctor. This could involve a check for physical bruising that may be hidden under clothing. Many forms of torture leave no visible marks and others are inflicted using methods that are difficult to detect. Judges should, therefore, also be alert to other clues, such as the individual's physical and mental condition and overall demeanor, the behavior of the police and guards involved in the case and the detainee's attitude towards them. Judges should actively seek to demonstrate that they will take allegations of torture or ill-treatment seriously and will take action where necessary to protect those at risk.

Where a suspect does not speak the language in which the trial is being conducted, the requirements of a fair trial dictate that he or she must be provided with full interpretation facilities.[23]This is also an important safeguard to ensure that all acts of torture and other forms of ill-treatment are reported.

Those responsible for the security of courts and for guarding detainees during court appearances should always be organizationally separate from, and independent of, those guarding detainees in custody and those conducting investigations into the crime that the detainee is suspected of committing. Remand prisoners are at particular

[23]Article 14 (3)(f) ICCPR

risk if they are being held by, or can be transferred back into, the custody of, the investigating authorities. While in court the detainee should be held in a place that is physically separate from where the police or investigating officers involved in the case are waiting. If there are any suspicions that an individual has been subjected to torture, or other forms of ill-treatment, that individual must be removed from the custody of his or her alleged torturers immediately.

In order to be alert to signs of torture or ill-treatment, judges need to give some consideration to the physical lay-out of their courtrooms.

• Can the judge clearly see and hear the detainee at all times while he or she is in the courtroom, sufficient to detect any visible signs of physical or mental injury?

• Is the level of security in which the detainee is being held appropriate to any real danger that he or she may pose?

• Can the detainee communicate with his or her lawyer in confidence?

• Can the detainee communicate to the court freely without any threat or intimidation?

5.15 Legal assistance for the Accused

Judges should ensure that all defendants are aware of their right to call upon the assistance of lawyer of their choice. Defense lawyers should be able to perform their professional functions without intimidation, hindrance, harassment or improper interference, including the right to consult with their client's freely.[24]They should not be identified with their clients or their clients' causes as a result of discharging their functions. Nor should they suffer, or be threatened with, prosecution or

[24]Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994), para. 9; Basic Principles on the Role of Lawyers, principles 16-18.

administrative, economic or other sanctions for any action taken in accordance with their professional duties, standards and ethics. Where the security of lawyers is threatened as a result of discharging their functions, they should be adequately safeguarded and protected by the authorities.[25]

5.16 Admissibility of evidence regarding Torture

In many jurisdictions, judges play a crucial role in deciding what evidence should be heard in the main trial, or before a jury, and what evidence should be deemed inadmissible. Clearly evidence obtained through torture or other forms of ill-treatment must be deemed inadmissible.[26]

This will usually be specified in the national law – although some forms of physical and mental ill-treatment are not always adequately covered in national legislation. Unless the written law admits no other interpretation, judges should always interpret it in ways that are consistent with international standards and best-practices regarding torture and other forms of ill-treatment.

It is the duty of the court to ensure that evidence produced is admissible. It is, therefore, incumbent on the judge to satisfy herself/himself that any confession or other evidence has not been obtained through torture or other forms of ill-treatment. Even if no complaint is made by the accused, the judge must be prepared to ask the prosecution to prove beyond reasonable doubt that the confession was obtained voluntarily.

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[25] Ibid.

[26] *Kelly v Jamaica*, (253/1987), 8 April 1991, Report of the Human Rights Committee, (A/46/40), 1991; Conterisv Uruguay, (139/1983), 17 July 1985, 2 Sel. Dec. 168; Estrella v Uruguay, (74/1980), 29 March 1983, 2 Sel. Dec. 93.

Evidence may be deemed admissible in a trial even though there is an allegation that it was obtained through coercive means – as not all such claims will necessarily be accepted as genuine. In some cases, judges may hold a separate hearing – or a 'trial within a trial' – into such claims before deciding whether this evidence can be presented before the main court. Where a trial is conducted with a jury, it may be excluded from this part of the proceedings. However, there may also be cases where evidence is heard in the main trial which the defense alleges was obtained through torture or other prohibited forms of ill-treatment. In any case where such an allegation has been made, judges have a particular responsibility to ensure that witnesses are properly examined about the allegation and that sufficient weight is given to this during their deliberations and when summing up the case.

5.17 Examining witnesses in Case of Torture

Particular attention should be paid to any witness who appears to have suffered or witnessed physical injuries or mental trauma while in custody. Such injuries or trauma may not necessarily be the result of torture or other forms of ill-treatment and not all claims of such ill-treatment can be taken at face value. Nevertheless, appropriate allowance should be made for the fact that a witness testifying about such acts may be particularly vulnerable, frightened or disorientated. Care should be taken to ensure that the witness is not re-traumatized during questioning and that the quality of his or her evidence suffers as little as possible because of any particular vulnerability. Allowance should also be made for the fact that the witness may be suffering from post-traumatic stress, or from a mental disability unrelated to the alleged ill-treatment, and that this may affect his or her memory, communication skills, and responses to perceived aggression during questioning.

The following practices should be adhered to during questioning and the reasons for this explained to the court, where necessary:

• Repeating questions.

Questions may need to be repeated or rephrased as some people can take longer to absorb, comprehend and recall information.

• Keeping questions simple.

Questions should be kept simple as some people may experience difficulty in understanding and answering them. They may also have a limited vocabulary and find it difficult to explain things in a way that others find easy to follow.

• Keeping questions non-threatening and open.

Questions should be non-threatening as some people may respond to rough questioning either by excessive aggression or by trying to please the questioner. Questions should also be kept open as some people are prone to repeating information provided to them or suggested by the interviewer.

Judges and prosecutors should also be aware that physical and mental torture and other forms of illtreatmentmay have been carried out within a particular social, cultural or political specificity that the witness might find difficult to explain to the court. An action that might seem trivial or harmless in one context could be deeply demeaning or traumatic in another. A comment that might seem completely innocuous when repeated could easily have been understood – and have been intended to be – dangerous implied threat when it was first made. This might be because of certain cultural sensitivities or taboos, such as ‘honor’ and ‘shame’. It might also be because certain social and political groups believe that the police routinely behave in ways that others might find it very difficult to comprehend.

For example, coded threats may have been made against a witness, or a member of his or her family, bythe police who the witness has difficulty in explaining to the court. The judge should actively draw out such nuances if the lawyers have failed to do so during their own questioning of witnesses.

In many jurisdictions, where a prosecution witness is of doubtful character, there is a duty to disclose this to the defense. In some countries, law enforcement services or agencies may be required to disclose the criminal or disciplinary records of individual officers so that the defense may crossexaminethem where their credibility is an issue. Where it is within their discretion to do so, judges should ensure that the previous disciplinary or criminal offences on the record of a law enforcement officer appearing as a prosecution witness, is disclosed to the defense. This will be particularlyimportant in any case where there is an allegation of torture or ill-treatment if the officer has previouslybeen disciplined of convicted of such behavior. It can also act as a disincentive to individual officers to engage in such practices as their value as prosecution witnesses in subsequent cases will be undermined.

When a judge sums up, concludes a trial or delivers his or her reasoning it is important to ensure that adequate weight has been given to allegations of torture and ill-treatment and to the testimony of those who allege that it has taken place. Where the trial is being held before a jury, it should be carefully explained why all forms of torture and ill-treatment are prohibited, irrespective of the nature of the person alleging that they have been subjected to this, or any crime that he or she may be suspected of committing. This will be particularly important in cases where the person making the allegation is of different race, sex, sexual orientation, or nationality, has a different political or religious belief, or comes from a different social, cultural or ethnic background from the majority of the jurors. It will also be important if the

person making the allegation is accused of a particularly serious or obnoxious crime. In societies where a particular social group is generally perceived negatively, or where members of this group are identified with particular types of crime, juries must be discouraged from following their prejudices that lead them to conclude that the victim 'deserved' the torture or ill-treatment that he or she is alleged to have suffered. Equally where other evidence in the trial points to the guilt of aparticular defendant, juries must be dissuaded from regarding allegations of torture or other forms of ill-treatment in a less serious light – or concluding that the police were merely trying to 'improve' their case. In providing direction as to the law to jurors, judges must always point out the total unacceptability of torture and other forms of ill-treatment under all circumstances.

Judges should, however, also instruct the jury to give due weight to 'cultural' factors when applying their 'common sense' to such allegations. While not applying prejudicial stereotypes to particular groups – or instinctively finding the evidence of some more credible than that of others – jurors should be guided towards attempting to understand the impact that various forms of physical and mental ill treatment might have on a victim from a different background to their own.

5.18 Duty to protect in cases of expulsion

Judges may also, on occasion, be required to make decisions regarding the sending or return of an individual to a situation where he or she faces a real risk of being tortured. This might arise, for example, because of an extradition request or a challenge to a decision regarding an impending deportation.

The right of a person not to be sent to a country where there are substantial grounds for believing that he or she would face a real risk of being subject to treatment that

amounts to torture or cruel, inhuman or degrading treatment or punishment is also well established in human rights law. This right applies to all people and at all times. This right is recognized as forming a part of the right to be protected against acts of torture and other prohibited forms of ill-treatment contained in the International Covenant on Civil and Political Rights 1966, the European Convention on Human Rights1950, the American Convention on Human Rights 1978, the African Charter on Human and People's Rights 1981, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 and the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment 1987.

Both the Human Rights Committee and the European Court have stated that exposing someone toa 'real risk' of suffering inhuman or degrading treatment would violate their right to protection against such acts.[27]The Human Rights Committee has stated that 'States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.' [28]The European Court has stated that the absolute prohibition of torture and other forms of ill-treatment applies irrespective of the victim's conduct and cannot be overridden by a state's national interest or in dealing with suspected terrorists.[29]Even if the threat emanates from private groups, such as armed insurgents or criminals, if the state concerned is unable or unwilling to protect the individual from such treatment this would amount to a violation.[30]In exceptional circumstances, the European Court has also found that the lack

[27]*Soering v UK*, 1989, ECtHR, Series A, No. 161.

[28]Human Rights Committee, General Comment 20, para 9.

[29]*Chahal v UK,*ECtHR, 1996, Judgment 15 November.

[30]*Ahmed v Austria*, ECtHR, Judgment 17 December 1996; H.L.R. v France, ECtHR, Judgment 29 April 1997.

ofadequate medical facilities in the country to which someone is threatened with return could amount to a violation of Article 3[31]

The Committee against Torture has also requested states party to the Convention not to expel someone who can show a 'real and personal risk' of being exposed to such treatment.[32]The Committee has stressed that this protection is absolute, 'irrespective of whether the individual concerned has committed crimes and the seriousness of these crimes.'[33]

The Convention Relating to the Status of Refugees 1951 and the 1967 Protocol make specific provision for refugees and these principles should also be upheld by domestic courts. The most essential component of refugee status and of asylum is protection against return to a country where a person has reason to fear persecution. This protection has found expression in the principle of non-refoulement– the right of a person not to be returned to a country where his or her life or freedom would be threatened –which is widely accepted by states. The principle of non-refoulementhas been set out in a number of international instruments relating to refugees, both at the universal and regional levels.

The Convention Relating to the Status of Refugees provides, in Article 33(1), that: 'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' The principle of non-refoulementconstitutes one of

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[31]. *D. v UK*, ECtHR, Judgment 2 May 1997.

[32] The Reports of the Committee Against Torture, Mutambo v Switzerland, (13/1993) GAOR, 49th Session Supplement No.44 (1994) Khan v Canada, (15/1994), GAOR, 50th Session, Supplement No.44 (1995).)

[33] ibid

thebasic Articles of the 1951 Convention. It is also an obligation under the 1967 Protocol to this Convention. Unlike various other provisions in the Convention, its application is not dependent on the lawful residence of a refugee in the territory of a contracting state. The principle also applies irrespective of whether or not the person concerned has been formally recognized as a refugee – if this status has yet to be determined. Because of its wide acceptance at universal level, it is being increasingly considered as a principle of general or customary international law, and even jus covens, and so is binding on all states. Therefore no government should expel a person in these circumstances.

5.19 Judicial decisions on Arrest, Detention and Torture of Bangladesh

Despite the legal and constitutional provisions against arbitrary arrest and detention, the practice of arbitrary arrest, detention and torture is rampant in Bangladesh. Fortunately, the higher judiciary in Bangladesh has taken proactive stand in prevention of arbitrary arrest and detention and protection of people from torture. The most important judicial decision in this regard in recent years is the BLAST case[34]**.**In *BLAST(Bangladesh legal Aid and Services Trust) vs.Bangladesh*[35]**,** Shamim Reza Rubel, a university student was picked up by the Detective Branch (DB) of the police on 23July 1998 from in front of his house on Siddeswari Road in Dhaka at 4.30 p.m. and he was severely beaten. Shamim was pronounced dead at the emergency section of DMCH by doctors at 9-45 p. m. on the same day. He was brought by a group of plain clothes men who identified themselves as members of the DB. A hospital official said the dead body was not registered. The witnesses also said police were asking Shamim to say that he had illegal arms in his possession. The killing of

[34]55 DLR (HCD) (2003) 363

[35]Hereinafter referred to as the BLAST case.

Shamim by the DB of the police caused a public outcry and got huge media coverage. As a result of wide publicity of the death of Shamim, there was an investigation. There was a post-mortem and after investigation, charges were brought against the accused persons under section 302 of the Penal Code. It was found that AC Akram, an officer of the Detective Branch, in association with some other officers, brutally tortured thevictim, which caused his death. After the trial, the accused was convicted and sentenced to imprisonment for life. The High Court Division also provided interpretation of several provisions of the Cr. P. C. relating to arrest and detention and issued some guidelines. The court held that the word 'concerned' is a vague word, which gives unhindered power to a police officer to arrest any person. The Court observed that in order to safeguard the life and liberty and to limit the power of the police, the word 'concerned' is to be substituted by any other appropriate word. The Court developed a list of guidelines on the use of arrest and detention that are discussed later. In*ASK (Ain 0 Salish Kendra) vs. Bangladesh and others*[36], the unlawful detention of the prisoners languishing in Dhaka Central Jail, despite having served out their terms of conviction, was challenged. According to law, after pronouncing conviction, the court will send the conviction warrant to the jail authority. But due to negligence of court staff and jail authorities, the said conviction warrants did not reach the jail and many prisoners could not be released from jail, even after serving out their terms of conviction. The Court issued a rule nisi upon the respondents on April 16, 2005 to show cause as to why the continued detention of the persons in Dhaka Central Jail, in violation of their fundamental rights as guaranteed under Articles 31, 32, 35(1) and 36 of the Constitution, and in spite of serving out the terms of their respective sentences, should not be declared to be without lawful

[36]57 DLR (HCD)

authority and why an independent commission should not be appointed to conduct an inquiry into the matter. The Court also directed the respondents to submit a list of such prisoners. The Jail authority submitted the report and the case is still pending for final hearing. Inthe case of **ASK** and **BLAST** the court issued a Rule Nisi returnable within four weeks on 29.06.2009 calling upon the respondents to showcase as to why the extra-judicial killing, in the name of cross-fire/encounter by the law enforcing agencies, should not be declared to be illegal and without lawful authority and why the respondents should not be directed to take departmental and criminal action against persons responsible for such killing. The High Court Division directed the law enforcing agencies, especially the RAB, to follow the Cr. P.C.provisions in the case of the arrest of any citizen. In another instance, on the basis of a public interest writ petition filed by Human Rights and Peace for Bangladesh (HRPB), the High Court Division issued a Rule against the RAB to show cause as to why they should not be directed to ensure the safety and14 security of persons detained in the RAB's custody. Despite the High Court's ruling, the use of torture in custody of the RAB continues unabated as most of the incidents are not challenged in court due to the official impunity they enjoy. The survey of this case and other judicial decisions reveals that the following broad issues can be identified:

5.20 Courts Observation about Reasonable suspicion

Under section 54of Cr. P. C., a police officer can arrest any person who has been concerned in any cognizable offence, against whom credible information has been received or against whom a reasonable suspicion exists of having been so concerned in anycognizable offence. Here the words 'concerned' and 'credible' or 'reasonable' information under section 54 of theory. P.C. is frequently invoked as grounds for police arrest without warrant. But in the absence of guidelines as to what

constitutes‘concerned; ‘credible’ or ‘reasonable information’, the section provides ample scope for misuse. The judiciary scrutinized the meaning of ‘concerned ’‘credible’ or ‘reasonable information’ in severalpronouncements.In *Saifuzzaman vs. State*[37]the Supreme Court held that what is a “reasonable suspicion” must depend upon the circumstances of each particular case, but it should be at least founded on some definite fact tending to throw suspicion on the person arrested and not on a mere vaguesurmise.The court also observed:

“The ‘reasonable suspicion’ and ‘credible information ‘must relate to definite averments, which must be considered by the police officer himself before hearrests a person under this provision. What is a ‘reasonable suspicion’ must depend upon the circumstances of each particular case, but it should be at least founded on some definite fact tending to throw suspicion on the person arrested and not on a mere vaguesurmise. The words ‘credible’ and ‘reasonable’ used in the first clause of Section 54 must have reference to the mind of' the person receiving the information which must afford sufficient materials for the exercise of an independent judgment at the time of making the arrest. In other words, the police officer upon receipt of such information must have definite and bonafidebelief that an offence has been committed or is about to be committed, necessitating the arrest of the person concerned. A bare assertion without anything more cannot form the material for the exercise of an independent judgment and will not therefore amount to credible information.”

In *Alhaj Md. Yusuf Ali vs. The State*[38] **,** the High Court Division interpreted ‘reasonable suspicion’ in exercising power under section 54, as a bona fide belief on the part of the police officer that an offence has already been committed or is about to

[37]56 DLR 324

[38] 22 BLD (2002) 231

be committed. The Court further held that a police officer arresting a person unjustifiably or otherwise than on reasonable grounds and bona fide belief renders himself liable for prosecution under section 220 of the Penal Code. In BLAST vs. Bangladesh, the court held: "...Use of the expression 'reasonable suspicion' implies that the suspicion must be based on reasons and reasons are based on existence of some fact which is within the knowledge of that person. So when the police officer arrests a person without warrant, he must have some knowledge of some definite facts on the basis of which he can have reasonable suspicion."

5.21 Courts Observation about Remand

Considering the fact that torture is a routine matter in police remand of accused, the judiciary has ruled against frequently ordering remand by police, to prevent its abuse. In a recent case of*Ain-o-Salish Kendra vs Bangladesh*[39]**,** the accused ShaibalSahaPartha was apprehended by plain clothes police, and after four days he was produced at a police station. The accused was taken on remand by the police on two occasions but no confession could be recorded from him. Thereafter, Partha was also shown arrested in a bomb blast case and in connection with that case; the accused was once again taken on police remand. The court held that the accused had already been remanded in custody twice, by the police, yet there is nothing before the court to show the outcome of such remand. The court directed respondents not to go for further remand of the accused and in the case of the ongoing remand; he should not be subjected to physical torture of any kind. In the case of *Hafizuddin vs. the State*[40]*,* the Magistrate did not issue warnings before recording confessions and did not give time for reflection. In this case, the Magistrate was held liable for failing to inform the

[39]56 DLR (2004) (HCD) p. 620.

[40]42 DLR (1990) (HCD)p. 397

accused that they would not be sent to police custody after making confessional statements. In the case of *State vsAbulHashem*[41] the court held that when the accused was kept in police custody for two days, it was the duty of the Magistrate, who recorded their confession, to put questions as to how they were treated in the police station, why they were making confessions and that if they made a confession or not, whether they would be remanded in police custody. Further, it is found in the record that the Magistrate did not inform the accused persons that he was not a police officer but a Magistrate. The Court held: "Onscrutiny, we find in the record that magistrate sent the accused persons to the police custody after recording their confessional statements. Therefore, we find the Magistrate had no idea or acumen that it washis legal duty to remove the other, inducement and influence of the police completely from the mind of the accused before recording their confession. So therefore, we hold that the confessions made by the accused cannot be considered either against the maker or against their co-accused."

5.22 The Burden of Proof

Since, in most cases, acts of torture by police are carried out as far as possible without any evidence, it is very difficult to hold the offending police officer accountable due to lack of witnesses. The High Court Division in *BLAST*case observed that if death takes place in police custody or jail, it is difficult for the relation of the victim to prove who caused the death. Therefore, the High Court Division recommended a change in the burden of proof in cases of torture in police custody, by amending the relevant provisions of the Evidence Act, 1872.The High Court Division drew an analogy from its decisions on wife killing cases. In the last couple of years, in wife-killing cases, the higher judiciary of Bangladesh took the position that the burden of

[41] 50 DLR (1998)(HCD) p 17.

proof can be shifted onto the accused husband to prove the circumstances of his wife's death, if at the time of her death, she was in the custody of the husband.[42]

5.23 Prevention ofArbitrary Arrest, Detention and Torture

Over the last years, the High Court Division delivered several judgments where the Government has been directed to amend legislation facilitating torture and follow guidelines in dealing with arrested persons to restrain police power. Thejudgments in *BLAST vs. Bangladesh and Saifuzzamanvs. State* is the most important judicial pronouncements, which provide some important recommendations for amendments of relevant laws, and contain directions to reduce the scope and possibility of the abuse of police power. Although the guidelines and recommendations are not binding on the government, they indicate the potential areas for making necessary legal reform to address arbitrary use of arrest and detention. The directions given in *BLAST vs Bangladesh* broadlycover three important aspects of criminal proceedings:

- No police officer shall arrest a person under Section 54of the Cr. P.C. for the purpose of detaining him under Section 3 of the Special Powers Act, 1974.

- A Police officer shall disclose his identity and if demanded, shall show his identity card to the person arrested and to the persons present at the time of arrest.

- He shall record the reasons for the arrest and other particulars in a separate register till a special diary is prescribed.

- A police officer shall furnish reasons of arrest to the detained person within three hours of bringing him to the police station.

[42] *State vs. KhandhkerZillul Bari*57 (2005) DLR(AD) 29

- An arrested person should be allowed to consult a lawyer of his choice or meet his relatives.

- If a police officer finds any marks of injury on the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital or Government doctor for treatment and shall obtain certificate from the attending doctor.

- If the person is not arrested from his residence or place of business he shall inform a relation of the person over the phone, or through a messenger, within one hour of bringing him to the police station.

- When a detained person is produced before the nearest Magistrate under section 61, the police officer shall state in his forwarding letter under section 167 (1)of the Code as to why the investigation could not be completed within twenty four hours and why he considers that the accusation or the information against that person is well-founded.

- If the Magistrate releases a person on the grounds that the accusation or the information against the person produced before him is not well-founded and there are no materials in the case diary against that person, he shall proceed under section 190(1) (c) of the Code against that police officer who arrested the person without warrant for committing offence under section220 of the Penal Code.

If the Magistrate is satisfied on consideration of the reasons stated in the forwarding letter as to whether the accusation or the information is well-founded and that there are materials in the case diary for detaining the person in custody, the Magistrate shall pass an order for further detention in jail. Otherwise, he shall release the person forthwith.

- If the Magistrate passes an order for further detention in jail, the Investigating officer shall interrogate the accused, if necessary for the purpose of investigation, in a room in the jail till the room as mentioned in recommendation B(2)(b) is constructed.

- In the application for taking the accused into police custody for interrogation, the investigating officer shall state reasons as mentioned in recommendation B(2)(c).

- If the Magistrate authorizes detention in police custody he shall follow the recommendation contained in recommendation B (2) (c) (d) andB (3) (b) (c) (d).

- The police officer of the police station who arrests a person under Section 54 or the Investigating officer who takes a person in police custody or the jailor of the jail as the case may be, shall at once inform the nearest Magistrate as recommended in recommendationB(3)(e) of the death of any person who dies in custody.

- A Magistrate shall inquire into the death of a person in police custody or in jail immediately after receiving information of such death.

The court directed the Government to implement the recommendations made above within six months from the date of the judgment.

This judgment made detailed recommendations for the necessary amendments to the relevant sections of the Code of Criminal Procedure, 1898, the Penal Code, 1860 and the Evidence Act, 1908 to ensure that the directions, guidelines and safeguards enunciated in the judgment are strictly followed as a matter of law. The judgment made a total of seven sets of recommendations In*Saifuzzaman vs. State*, the High Court Division took notice of the severe violation of the fundamental rights of the Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh citizens by police, and failure of the Magistrate in acting in accordance with the law.

SK Sinha J. observed that: “There are complaints about violation of human rights because of indiscriminate arrest of innocent persons bylaw enforcing agencies in exercise of power under section 54 of the Code and put them in preventive detention on their prayer by the authority and sometimes they are remanded to custody of the police under order of the Magistrate under section 167 of the Code and they are subjected to third degree methods with a view to extract confession. This is what is termed by the Supreme Court of India as 'state terrorism ‘which is no answer to combat terrorism. “The Division Bench in this case issued eleven guidelines to the police and magistrates as to arrest, detention and remand of suspects. However, these guidelines are not binding on the relevant authorities.

- The police officer making the arrest of any person shall prepare a memorandum of arrest immediately after the arrest and such officer shall obtain the signature of the arrestee with the date and time of arrest in the said memorandum.

- The police officer who arrested the person must intimate to a nearest relative of the arrestee and in the absence of the relative, to a friend to be suggested by the arrestee, as soon as practicable but not later than6(six) hours of such arrest notifying the time and place of arrest and the place of custody.

- An entry must be made in the diary as to the grounds of arrest and name of the person who informed the police to arrest the person or made the complaint along with his address and shall also disclose the names and particulars of the relative or the friend, as the case may be, to whom information is given about the arrest and the particulars of the police officer in whose custody the arrestee is staying.

- Copies of all the documents including the memorandum of arrest, a copy of the information or complaint relating to the commission of cognizable offence and a copy

of the entries in the diary should be sent to the Magistrate at the time of production of the arrestee for making the order of the Magistrate under section 167 of the Code.

- The Magistrate shall not make an order of detention ofa person in judicial custody if the police forwarding the report disclose that the arrest has been made for the purpose of putting the arrestee in preventive detention

- If the arrested person is taken on police remand, he must be produced before the Magistrate after the expiry of the period of such remand and in no case shall he be sent to the judicial custody after the period of such remand without producing him before the Magistrate.

- Registration of a case against the arrested person is sine-qua-non for seeking the detention of the arrestee either to the police custody or in the judicial custody under section 167(2) of the Code.

- If a person is produced before a Magistrate with aprayerfor his detention in any custody, without producing a copy of the entries in the diary as per item No (IV) above, the Magistrate shall release him in accordance with section 169 of the Code on taking a bond from him.

- If a police officer seeks an arrested person to be shown arrested in a particular case who is already in custody, the Magistrate shall not allow such a prayer unless the accused/arrestee is produced before him with a copy of the entries in the diary relating to such case.

- If the investigation of the case cannot be concluded within 15 days of the detention of the accused under section 167(2), the Magistrate having jurisdiction to takecognizance of the case or with the prior permission of the Judge or Tribunal

having such power can send such accused person on remand under section 344 of the Code for a term not exceeding 15days at a time.

- It shall be the duty of the Magistrate, before whom the accused person is produced, to satisfy that these requirements have been complied with before making any order relating to such accused under section 167of the Code.

The court ordered that these guidelines should be forwarded to the Secretary, Ministry of Home Affairs, Chief Metropolitan Magistrates and District Magistrates and ordered that every police station should comply within 3months from that date. The Registrar, Supreme Court of Bangladesh, was directed to circulate the requirements as per direction made above. The court also directed that if the concerned police officers and the Magistrates fail to comply with the above requirements, within the prescribed time, they will be rendered liable to be punished for contempt of Court, if any application is made by the aggrieved person in theCourt. In this case, the High Court Division Bench also suggested amendments of the relevant sections, but unlike the *BLAST*case, it refrained from formulating its own amendments of the relevant provisions of law. The court clearly recognized that it could not direct the Legislature to amend the relevant laws without declaring the existing laws unconstitutional. According to Dr.Shahdeen Malik, "These judgments, it needs to be emphasized, directed major changes in the way the police act. The police power of arrest and remand had never been scrutinized before and neither had the constitutional safeguards regarding arrest and detention of the Constitution been brought to bear upon these powers of police. In such a long-standing practice of unfettered power, these two judgments laid down very exacting details regarding what police can and must do in effecting arrest and23 asking for remand."

Women and children - their position in the class hierarchy coupled with their economic condition categorizes them as one of the most vulnerable sections of society. Women fall victim to torture in different ways. Women are manifestly subjected to discrimination and exploitation of various forms. Prevailing discriminatory practices and cultural attitudes perpetuate gender based violence against women.

It is now recognized that the gender specific violence falls within the definition of torture. Custodial rape and death has been a serious problem that has been brought to people's attention by the media. The stigma attached to rape another forms of sexual harassment inhibits many women from making complaints against the police. Children in custody are also sometimes subjected to various forms of institutional violence.[43]Section 6 of the Children Act, 1974provides that no child shall be charged with, or tried for any offence together with an adult.

If a child is accused along with an adult of having committed an offence, the case shall be separated and transferred to the Juvenile Court or the court empowered to exercise the powers of a Juvenile Court. In violation of the provisions of the Children Act1974, children are often put in cells with adults and common criminals.

The Prevention of oppression of women and children Act, 2000 deals with particular offences relating to violence against women and children. It is perhaps the only law which has a separate provision for custodial offences, in the form of a separate penal section and vicarious criminal liability when Section 9(v) there is custodial rape. Strangely, there is no separate provision on custodial violence against children. Offences Section 20 and 25 of Prevention of Oppression of Women and Children Act

[43]Our Children in Jail, Violence against children: the scenario in Bangladesh, A Report of Odhikar, 2001.

2000under this law are tried by a Special Tribunal. Significantly, this Act also recognizes the vicarious liability of other officials responsible for the woman in custody. The Special Tribunal, established under this Act, awarded the death penalty to the three policemen accused of raping and killing YasminAkter in *MoinulHaque (Md.) and other vs.State*[44]this decision of the Special Tribunal was upheld by the High Court Division and subsequently by the Appellate Division of the Supreme Court. However, in another case,ShimaChowdhury, an 18 year old victim of an alleged rape in police custody in October 1996, died in Chittagong Jail where Section 31 of Prevention of Oppression of Women and Children Act, 2000she was being held in "safe custody" during an investigation in February 1997. In July 1997, four police officers accused of raping ShimaChowdhury were acquitted by a trial court in Chittagong. The prosecution was reportedly criticized by the Judge for presenting a weak case. Recent years witnessed significant judicial intervention in order to mitigate the plight of juvenile offenders. In the case of*State vs. Md. RoushanMondaleliasHashem*[45]**,** the higher judiciary was dismayed over the way the lower courts deal with juvenile offenders. The higher court emphasizedthat young offenders should be at all times kept separate from the adult offenders from the time of their apprehension, during the trial and during confinement. Having considered relevant international instruments on child rights and juvenile justice, the court observed that the thrust of the International Declaration, Rules, Covenants and other instruments is towards the reformation and rehabilitation of youthful offenders and for the establishment of facilities for proper education and upbringing of youth. In the event that a child or juvenile does come into conflict with the law, the aim is to provide a system of justice which is child-friendly. Regarding juveniles who are

[44]56DLR (AD) (2004) 81**.**

[45]26 BLD (HCD) 2006

accused of offences against or infringement of penal laws, recourse must be had to Article40 of the Convention on the Rights of the Child, 1989. The juvenile justice system must take into account the need to respect the child's rights and the desirability of promoting the child's reintegration in society. It was noted by the court that although the Children Act of 1974 is a forward thinking piece of legislation, it falls short of international standards laid down by the relevant international instruments including the CRC. The court observed that Bangladesh, which ratified the Convention in 1990, is duty bound to reflect the provisions of the CRC in national legislation and as such it should enact a new law in conformity with the provisions of the CRC.In 2008, the High Court Division in the case of *State vs.Metropolitan Police Commissioner, Khulna* and others issued the following directions:

- It is the duty of this Court and all other courts as well as other state departments, functionaries and agencies dealing with children, to keep in mind that the best interests of the child must be considered first and foremost in dealing with all aspects concerning that child. - The parents of the children who are brought before the police under arrest or otherwise, must be informed without delay

- A probation officer must be appointed immediately to report to the Court with regard to matters concerning the child.

- Bail should be considered as a matter of course and detention/confinement should ensue only as the exception in unavoidable scenarios.

- In dealing with the child, its custody, care, protection and wellbeing, the views of the child, its parents, guardians, extended family members as well as social welfare agencies must be considered.

- When dealing with children, detention and imprisonment shall be used only as a measure of last resort and for the shortest period of time, particularly keeping in view the age and gender of the child.

- Every effort must be made at all stages for reintegration of the child within the family and so as to enable him/her to assume a constructive role in society.

The Court acted *suomotu* following publication of a DailyStar report "8-year old sued, sent to jail for drug trade" on 24April 2008. The court criticized the police for not considering granting bail themselves, for not attempting to find the girl's guardians, and not informing the Probation Officer so that they could prepare a Social Enquiry Report, all of which they are required to do under the Children Act. Very recently, the High Court Division in the case of *BLAST vs.Bangladesh*banned corporal punishment in educational institutions in Bangladesh considering the severe effect of the corporal punishment on the mental and physical state31 and stature of the Child. The Court observed that laws which allow corporal punishment, including whipping under the Penal Code, Code of Criminal Procedure, Railways Act, Cantonment Pure Food Act, Whipping Act, Suppression of Immoral Traffic Act, Children Rules, 1976 and any other law which provides for whipping or caning of children and another person's, should be repealed immediately by appropriate legislation as being cruel and degrading punishment contrary to the fundamental rights guaranteed by the Constitution.

5.24 Conclusion

The higher judiciary of Bangladesh has made some valuable observations regarding arrest remand and detention. Though the direct application of the CAT is now hard in the national jurisdiction by following the observations the domestic courts can implement the theme of the convention. By this way the national courts can protect accused from the custodial torture and death. In absence of direct application the observations and directions are very important to ensure human rights of the accused persons in the criminal administration system of Bangladesh.

CHAPTER 6

Interviews with the Victims of Torture and with the Different Officials

6.1 INTRODUCTION

I have interviewed fifty persons totally among whom five persons are the members of the police force of Bangladesh; thirty five persons are accused and victims of torture according to them and their relatives, five judicial officers acting as Judicial Magistrates in the district stations, and five lawyers. I have conducted the interview in the Rajshahi district only because the overall situation of the country's other district is almost same.

6.2 Interviews with the Victims of Custodial Torture

Victims of violation of human rights both by the Law Enforcing Agencies and by others and tortured by their time period of custody are interviewed. Table shows the percentage of the tortured person in custody by the law enforcement officials and by the others.

6.2.1 Table Number 1

Victim of Torture by the Law Enforcement Agencies.	Victim of Torture by the Others.	Not Responding.	Total
5(14.29%)	5(14.29%)	25(71.43%)	35 (100%)

Thirty five persons were interviewed in person and among them twenty five persons were silent about the question of any kind of torture of them in the custody. Five persons told that they were tortured by the police after arrest and five persons told that

they were tortured physically after arrest during custody by the persons in plain dress or by the persons without any uniform.

6.2.1.1 Table No. 1(1)

Torture has been divided into two categories, physical and mental. Table shows these two types of torture experienced by the accused persons.

Physical Torture	Mental Torture	Total
9 (90%)	1(10%)	10 (100%)

Among ten persons nine persons were tortured physically and one person was tortured mentally.

6.2.1.2 Tables No. 1(2)

The following table shows the place where torture has been happened.

Police Custody	Jail Custody	Both Police and Jail Custody	Total
8(80%)	2(20%)	0	10(100%)

6.2.2 Table No. 1

Arrested persons taken under remand for interrogation.

Arrested person taken under remand	Arrested person not taken under remand	Not applicable	Total
4(11.43%)	26 (74.29%)	5 (14.29 %)	35 (100%)

Out of thirty five persons four persons were taken under remand by police for interrogation by the order granted by the magistrate. Five persons not fall in any category.

6.2.3 Table No. 1(2)

Persons tortured in the police custody during interrogation

Tortured in the custody	Not tortured in the custody	Total
3(75%)	1(25%)	4(100%)

Among four persons three persons are tortured during interrogation.

Case No-1

A local fruit seller of Charghat police station named Abdul Khaleq was arrested by police on 25 Feb, 2014 from the Charghat Thana market area. The police officer demanded bribe during his arrest but the arrestee refused to give. After arrest he was send to the court and the police officer applied for five days remand in connection with a case of narcotics and the learned Magistrate grand two days remand of interrogation. The police officer again demand bribe from the arrestee. The accused failed to give the demanded money. The police officer tortured physically the accused and asked no question about the alleged fact of the case.

6.3. Table No. 1

Legal foundation of torture under remand. Opinion of lawyers about granting remand.

Legal foundation	No legal foundation	Total
0	5(100%)	5(100%)

Among five lawyers all gave opinion that there is no legal basis of granting remand.

6.4 INTERVIEWS WITH JUDICIAL OFFICERS

We interviewed 5 judicial officers of Rajshahi,in order to get idea regarding the state of torture of the accused during or in course of trial upon the accused/detainees or Convicts.

6.4.1 Table No. 1

Where any accused became the victim of torture during trial or after arrest.

Victim of torture	No torture	Total
5(100%)	0	5(100%)

Among the five judicial magistrates all answered that they have found victims of torture in the accused persons produced before them at least more than five times during their office.

6.5 INTERVIEWS WITH POLICE OFFICERS

Five Police Officers were interviewed in order to receive their opinion aboutremand, detention, physical and mental torture of the accused or detainees during remand.

6.5.1 Table No. 1

In favor of remand	Not in favor of remand	Total
4(80%)	1(20%)	5(100%)

Among the five police officers four are in favor of remand for interrogation and only one officer is not in favor of this.

6.6 CONCLUSION

In this study it was attempted to take interview of a good number of police and judicial officers. But the interview was made in very short range. Though the number of Interviewed persons is not fulfilled but from my five years judicial experience I think that the overall situation of Bangladesh is almost same. Therefore opinion of them consciously reflects the original picture of the matter concerned.

In this empirical study for assessing the actual situation of the custodial torture of the accused, reliance was made on interviews of the victims or accused along with

different personnel mentioned above. Though there exists a dissenting opinion among their views, the study reveals a clear picture of violation of human rights in the country.

Since the provisions of Sections 54 and 167 of the Cr. P. C. and the SPA are the necessary evils in the context of Bangladesh, some of the interviews suggest for repeal whereas some other prescribe for bringing reform in those laws and fair application thereof.

Chapter 7

Conclusion

7.1 Introduction to Conclusion

By the discussion of the very few number of judicial instances of the apex court of Bangladesh in the previous chapters it is clear to us that the judicial enforcement of the United Nations Convention against Torture by the domestic courts is now very hard to reach of its maximum limit. Specially after passing the act (1) the entire judiciary will take reluctant view to any instrument of international human rights law for direct enforcement regarding the convention. The act regarding custodial violence and torture is not sufficient enough to ensure the remedies available in the convention.

7.2 Some Important Provisions to Combat Torture in National Legislature

If we take into our consideration, the present practice of the Bangladesh judiciary then I think if we can ensure to the maximum level of some statutory obligation, enforcement of the theme of the convention can be possible. The judicial administration and the judges should take into consideration those provisions which are already exists in the present statutes. The followings are the discussions about those statutory provisions:

7.2.1 Inspection of Police Station

The inspection of a police station by the Chief Judicial Magistrate or Chief Metropolitan Magistrate is an important duty and necessary for judicial knowledge about the concern police station practice about arrest and investigation. The Criminal Rules and Orders of 2009 in rules 85(3) provides that, to examine the state of act of concern police station about the prompt and duly service of process, to examine the

state of the Magistrate's order, the concern Chief Judicial or Chief Metropolitan Magistrate will inspect the police stations under their jurisdiction and send the report with their comments and forward a copy to the session judge. Section 4A(2)(a) of CrPCand Regulation 19 of Police Regulation-1943also sanctioned the authority to inspect the police station.

7.2.2 Post Inspection Functions

There are some functions should be done after inspection. The functions are important to ensure carrying out the court's order promptly and effectively.

1. An inspection report with comments on the performance of the concerned police officers should be send to the Superintendent of Police and forwarded to the concerned Sessions Judge of the district.[1]
2. If any gross negligence in compliance with the court's order on the basis of the report found, the Superintendent of Police after taking necessary disciplinary action shall inform the reporter as to the action taken.[2]
3. The reporting authority can independently take action for the said gross negligence or violation of the court's order.[3]
4. The reporters can report to the IGP as to the officers above inspector.[4]

By the regular effective inspections the compliance of the judicial order and getting direct knowledge of any human rights violation of the arrested persons or of the people.

7.2.3 Verification to Confession by the Judges

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[1] Rule 85(4) of Criminal Rules and Order-2009

[2] Rule 66(2) of Criminal Rules and Order-2009

[3] Section 29 of Police Act 1861

[4] Regulation 20(b) of Police Regulations-1943

The sole purpose of the police remand in the present context is to get confessional statements from the accused persons. I have discussed about the High Court observations about the issue in the earlier chapter. The Magistrates have some legal liability to follow in recording the judicial confessions. If the provisions can be followed the practice of torture in the name of interrogation in the police custody can be reduced effectively. Regulation 283 of the Police Regulations, 1943 discussed elaborately about the procedure and give important guidelines for the police officers who investigate and produce with application before the Magistrate to record the judicial confession. The main features in sort are-

1. The investigating officer should first record the statement of confession carefully in his diary.
2. After recording the statement the investigating officer will try to ascertain if there is any evidence corroborating of any point in the confession.
3. After recording the statement, if it appears to be true to him, shall take immediate steps for verification.
4. After verification and necessary search the officer shall send him before the Magistrate.

The Magistrate can take decision to not to record the confessional statement if it appears to him or her after scrutiny the officers report that the prescribed procedure has not been followed properly. Careful maintenance of these provisions will reduce the present practice of torturing tendency by the investigating authorities of the accused persons.

7.2.4 The High Court Orders Regarding Remands

The High Court have issued orders regarding remand which are part of the Police regulations and there the honorable court has clearly mentioned the guide lines to be

followed for police remand.[5] Long before the pronouncement of the judgment of the BLAST case these guide lines stated the safeguard from torture of the accused persons which are almost same to the observations to the said case made later and discussed in the previous chapter.

7.2.5 Suggestions for Legal Reform

To implement the main theme of the CAT the judiciary of Bangladesh may consider some suggestions and some reform should be made. The following suggestions are made under the light of the High Court observations in the relevant cases.

- In order to ensure transparency and accountability of actions of the police authorities, it is imperative that the directives of the Supreme Court in *BLAST vs. Bangladesh and Saifuzzaman vs. State*should be implemented as soon as possible.

- Legislative reform should be initiated in line with the recommendations and guidelines of these judgments.

- Bangladesh should implement obligations under the Convention against Torture through adopting necessary legislative and administrative measures and institutional reform.

- The government should repeal all provisions on impunities of law enforcement agencies and securities agencies for committing torture.

- Take urgent steps to ensure access to detainees, especially during periods of custodial interrogation. Relatives, doctors and lawyers should have access to detainees without delay and regularly thereafter.

[5] Regulation 324 of Police Regulations-1943

- Witnesses including family members and human rights defenders should be protected against possible reprisal by the perpetrators of torture or other human rights violations.

- Interrogation should take place only at official centers and any evidence obtained from a detainee in an unofficial place of detention and not confirmed by the detainee during interrogation at official locations should not be admitted as evidence in court against 32 the detainee;

- The detainee should have the right to have a lawyer present during any interrogation;

- The police officer responsible for arbitrary arrest, detention, and torture should be accountable to the law for his/her criminal wrongdoing in 'like manner' as the citizen.

- Section 24 of the Evidence Act 1872 should be amended to include the terms 'coercion', 'torture' and 'violence' along with the terms 'inducement, threat or promise' as conditions that make a confession irrelevant and thus inadmissible.

- Modern methods of investigation should be introduced and more forensic facilities should be put in place to detect crime and gather evidence of crime.

- Adequate training should be given to the investigating officers about modern scientific methods of investigation.

7.2.6 The Judicial Responsibility

The judiciary has a duty to carry out, within their realm of jurisdiction, the international obligations to investigate, bring to justice and punish the perpetrators of crimes of torture. No one should be allowed to claim exemption from this because of their official capacity. Amnesties and other similar measures which prevent the perpetrators of gross human rights violations, such as torture, from being brought before the courts, tried and sentenced are incompatible with state obligations under

international human rights law, including the obligations to investigate, bring to justice and punish those responsible for gross human rights violations.

Punishment for crimes of torture will be determined by domestic law. However, the Convention against Torture states that states parties 'shall make these offences punishable by appropriate penalties which take into account their grave nature.'[6] As well as involving acts of physical or mental violence, these crimes are often an abuse of authority and a betrayal of public trust. Where it is in their discretion to do so, judges and prosecutors should, therefore, ensure that acts of torture are treated as such. If the law has no crime by that name, or the facts cannot fit within a national definition that is narrower than the international definition, then the next most serious category of crime covering the facts should be invoked. This is so as to ensure that the court hands down a sentence commensuratewith the gravity of the facts and to ensure that the premature application of periods of prescription (statutes of limitation) is avoided.

Judges and prosecutors should, to the maximum extent allowed by national law, also ensure that everyone who has suffered torture and other unlawful acts is aware of their right to claim compensation for moral and physical suffering and help to create the necessary conditions for them actually to benefit from this right. Victims of torture and ill-treatment have the right to know the truth about what happened to them, to see those responsible being brought to justice and to have reparations awarded forthe harm done to them.

[6]UN CAT, Article 4.

Bangladesh Parliament has passed the act recently to combat torture recently.[7]The act provides the legal remedies for custodial torture allegations but there are no provisions for special consideration of evidences. At present The Evidence Act is not perfect for proving torture allegation by an accused in present criminal justice system. The Indian Law Commission has made valuable recommendation[8] for that purposes which can also be considered by Bangladesh. A national prevention mechanism for the torture is also necessary to establish by the government.

I think though the direct application is not possible now by the domestic courts to implement the convention but by following the positive laws the judiciary can indirectly implement the theme. The most important issues now are to sign and ratify the OPCAT by the Bangladesh authority. To stop torture is not possible but to reduce it in minimum length is positively possible.

[7]Nirjaton o Hefajote Mritto (Nibaron) Ain, 2013.

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Appendix

Selected international instruments

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Adopted and opened for signature, ratification and accession by General Assembly

Resolution 39/46 of 10 December 1984

Article 1

1. For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as

obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph I of this article shall be assisted incommunicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred toin article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph I of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement

personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, hisdependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which mayexist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result oftorture shall not be invoked as evidence in any proceedings, except against a person accused of tortureas evidence that the statement was made.

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 amount to torture as defined in article I, 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 articles10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assemblyresolution 2200A (XXI) of 16 December 1966

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 10(1)

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

European Convention for the Protection of Human Rights and Fundamental FreedomsSigned at Rome 4 November 1950

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

American Convention on Human Rights

Signed at the Inter-American Specialized Conference on Human Rights, San José, CostaRica, 22 November 1969

Article 5

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

3. Punishment shall not be extended to any person other than the criminal.

4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.

5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and socialreadaptation of the prisoners.

African Charter on Human and Peoples' Rights

Adopted by the Organization of African Unity in Banjul on 27 June 1981

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Common Article 3 to the four Geneva Conventions 1949

Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of

International Conventions for the Protection of Victims of War, held in Geneva, from April21 to August 12, 1949

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199.

Protocol is available for signature, ratification and accession as from 4 February 2003 (i.e. the date upon which the original of the Protocol was established) at United Nations Headquarters in New York.

PREAMBLE

The States Parties to the present Protocol, Reaffirming that torture and other cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights, Convinced that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment, Recalling that articles 2 and 16 of the Convention oblige each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction, Recognizing that States have the primary responsibility for implementing those articles, that strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common responsibility shared by all and that international implementing bodies complement and strengthen national measures,

Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures,

Recalling also that the World Conference on Human Rights firmly declared that efforts to eradicate torture should first and foremost be concentrated on prevention and called for the adoption of an optional protocol to the Convention, intended to establish a preventive system of regular visits to places of detention,

Convinced that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention, Have agreed as follows:

PART I

General principles

Article 1

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Article 2

1. A Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment of the Committee against Torture (hereinafter referred to as the

Subcommittee on Prevention) shall be established and shall carry out the functions laid down in the present Protocol.

2. The Subcommittee on Prevention shall carry out its work within the framework of the

Charter of the United Nations and shall be guided by the purposes and principles thereof, as well as the norms of the United Nations concerning the treatment of people deprived of their liberty.

3. Equally, the Subcommittee on Prevention shall be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.

4. The Subcommittee on Prevention and the States Parties shall cooperate in the implementation of the present Protocol.

Article 3

Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).

Article 4

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred toas places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.

2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

PART II

Subcommittee on Prevention

Article 5

1. The Subcommittee on Prevention shall consist of ten members. After the fiftieth ratification of or accession to the present Protocol, the number of the members of the Subcommittee on

Prevention shall increase to twenty-five.

2. The members of the Subcommittee on Prevention shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty.

3. In the composition of the Subcommittee on Prevention due consideration shall be given to equitable geographic distribution and to the representation of different forms of civilization and legal systems of the States Parties.

4. In this composition consideration shall also be given to balanced gender representation on the basis of the principles of equality and non-discrimination.

5. No two members of the Subcommittee on Prevention may be nationals of the same State.

6. The members of the Subcommittee on Prevention shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee on Prevention efficiently.

Article 6

1. Each State Party may nominate, in accordance with paragraph 2 of the present article, up to two candidates possessing the qualifications and meeting the requirements set out in article

5, and in doing so shall provide detailed information on the qualifications of the nominees.

(a) The nominees shall have the nationality of a State Party to the present Protocol;

(b) At least one of the two candidates shall have the nationality of the nominating State Party;

(c) No more than two nationals of a State Party shall be nominated;

(d) Before a State Party nominates a national of another State Party, it shall seek and obtain the consent of that State Party.

3. At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the

States Parties inviting them to submit their nominations within three months. The Secretary-

General shall submit a list, in alphabetical order, of all persons thus nominated, indicating the

States Parties that have nominated them.

Article 7

1. The members of the Subcommittee on Prevention shall be elected in the following manner:

(a) Primary consideration shall be given to the fulfillment of the requirements and criteria of article 5 of the present Protocol;

(b) The initial election shall be held no later than six months after the entry into force of the present Protocol;

(c) The States Parties shall elect the members of the Subcommittee on Prevention by secret ballot;

(d) Elections of the members of the Subcommittee on Prevention shall be held at biennial meetings of the States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee on Prevention shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.

2. If during the election process two nationals of a State Party have become eligible to serve as members of the Subcommittee on Prevention, the candidate receiving the higher number of votes shall serve as the member of the Subcommittee on Prevention. Where nationals have received the same number of votes, the following procedure applies:

(a) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Subcommittee on Prevention;

(b) Where both candidates have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall become the member;

(c) Where neither candidate has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which candidate shall be the member.

Article 8

If a member of the Subcommittee on Prevention dies or resigns, or for any cause can no longer perform his or her duties, the State Party that nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 5, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

Article 9

The members of the Subcommittee on Prevention shall be elected for a term of four years.

They shall be eligible for re-election once if denominated. The term of half the members elected at the first election shall expire at the end of two years; immediately after the first election the names of those members shall be chosen by lot by the Chairman of the meeting referred to in article 7, paragraph 1 (d).

Article 10

1. The Subcommittee on Prevention shall elect its officers for a term of two years. They may be re-elected.

2. The Subcommittee on Prevention shall establish its own rules of procedure. These rules shall provide, inter alia, that:

(a) Half the members plus one shall constitute a quorum;

(b) Decisions of the Subcommittee on Prevention shall be made by a majority vote of the members present;

(c) The Subcommittee on Prevention shall meet in camera.

3. The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee on Prevention. After its initial meeting, the Subcommittee on Prevention shall meet at such times as shall be provided by its rules of procedure. The Subcommittee on

Prevention and the Committee against Torture shall hold their sessions simultaneously at least once a year.

PART III

Mandate of the Subcommittee on Prevention

Article 11

1. The Subcommittee on Prevention shall:

(a) Visit the places referred to in article 4 and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

(b) In regard to the national preventive mechanisms:

(i) Advise and assist States Parties, when necessary, in their establishment;

(ii) Maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities;

(iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

(iv)Make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment;

(c) Cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.

Article 12

In order to enable the Subcommittee on Prevention to comply with its mandate as laid down in article 11, the States Parties undertake:

(a) To receive the Subcommittee on Prevention in their territory and grant it access to the places of detention as defined in article 4 of the present Protocol;

(b) To provide all relevant information the Subcommittee on Prevention may request to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

(c) To encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms;

(d) To examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures.

Article 13

1. The Subcommittee on Prevention shall establish, at first by lot, a programme of regular visits to the States Parties in order to fulfill its mandate as established in article 11.

2. After consultations, the Subcommittee on Prevention shall notify the States Parties of its

programme in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted.

3. The visits shall be conducted by at least two members of the Subcommittee on Prevention.

These members may be accompanied, if needed, by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol who shall be selected from a roster of experts prepared on the basis of proposals made by the States Parties, the

Office of the United Nations High Commissioner for Human Rights and the United Nations

Centre for International Crime Prevention. In preparing the roster, the States Parties concerned shall propose no more than five national experts. The State Party concerned may oppose the inclusion of a specific expert in the visit, whereupon the Subcommittee on Prevention shall propose another expert.

4. If the Subcommittee on Prevention considers it appropriate, it may propose a short follow-up visit after a regular visit.

Article 14

1. In order to enable the Subcommittee on Prevention to fulfill its mandate, the States Parties to the present Protocol undertake to grant it:

(a) Unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;

(b) Unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention;

(c) Subject to paragraph 2 below, unrestricted access to all places of detention and their installations and facilities;

(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the Subcommittee on Prevention believes may supply relevant information;

(e) The liberty to choose the places it wants to visit and the persons it wants to interview.

2. Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defense, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.

Article 15

No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee on Prevention

or to its delegates any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

Article 16

1. The Subcommittee on Prevention shall communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national preventive mechanism.

2. The Subcommittee on Prevention shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party. If the State Party makes part of the report public, the Subcommittee on Prevention may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned.

3. The Subcommittee on Prevention shall present a public annual report on its activities to the Committee against Torture.

4. If the State Party refuses to cooperate with the Subcommittee on Prevention according to articles 12 and 14, or to take steps to improve the situation in the light of the recommendations of the Subcommittee on Prevention, the Committee against Torture may, at the request of the Subcommittee on Prevention, decide, by a majority of its members, after the State Party has had an opportunity to make its views known, to make a public statement on the matter or to publish the report of the Subcommittee on Prevention.

PART IV

National preventive mechanisms

Article 17

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level.

Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

Article 18

1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.

2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge.

They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.

3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.

4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.

Article 19

The national preventive mechanisms shall be granted at a minimum the power:

(a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;

(b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;

(c) To submit proposals and observations concerning existing or draft legislation.

Article 20

In order to enable the national preventive mechanisms to fulfill their mandate, the States

Parties to the present Protocol undertake to grant them:

(a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;

(b) Access to all information referring to the treatment of those persons as well as their conditions of detention;

(c) Access to all places of detention and their installations and facilities;

(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;

(e) The liberty to choose the places they want to visit and the persons they want to interview;

(f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

Article 21

1. No authority or official shall order, apply, permit or tolerate any sanction against any person

Or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

2. Confidential information collected by the national preventive mechanism shall be privileged.

No personal data shall be published without the express consent of the person concerned.

Article 22

The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.

Article 23

The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.

PART V

Declaration

Article 24

1. Upon ratification, States Parties may make a declaration postponing the implementation of their obligations under either part III or part IV of the present Protocol.

2. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the

Committee against Torture may extend that period for an additional two years.

PART VI

Financial provisions

Article 25

1. The expenditure incurred by the Subcommittee on Prevention in the implementation of the present Protocol shall be borne by the United Nations.

2. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee on Prevention under the present Protocol.

Article 26

1. A Special Fund shall be set up in accordance with the relevant procedures of the General

Assembly, to be administered in accordance with the financial regulations and rules of theUnited Nations, to help finance the implementation of the recommendations made

by the Subcommittee on Prevention after a visit to a State Party, as well as education programmesof the national preventive mechanisms.

2. The Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.

PART VII

Final provisions

Article 27

1. The present Protocol is open for signature by any State that has signed the Convention.

2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 28

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit with the

Secretary-General of the United Nations of the twentieth instrument of ratification or accession, the present Protocol shall enter into force on the thirtieth day after the date of deposit of its own instrument of ratification or accession.

Article 29

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 30

No reservations shall be made to the present Protocol.

Article 31

The provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention instituting a system of visits to places of detention. The Subcommittee on Prevention and the bodies established under such regional conventions are encouraged to consult and cooperate with a view to avoiding duplication and promoting effectively the objectives of the present Protocol.

Article 32

The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June

1977, nor the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Article 33

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the St ate Party from its obligations under the present Protocol in regard to any act or situation that may occur prior to the date on which the denunciation becomes effective, or to the actions that

the Subcommittee on Prevention has decided or may decide to take with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter already under consideration by the Subcommittee on Prevention prior to the date on which the denunciation becomes effective.

3. Following the date on which the denunciation of the State Party becomes effective, the

Subcommittee on Prevention shall not commence consideration of any new matter regarding that State.

Article 34

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favor a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favor such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two -thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment that they have accepted.

Article 35

Members of the Subcommittee on Prevention and of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. Members of the Subcommittee on Prevention shall be accorded the privileges and immunities specified in section 22 of the

Convention on the Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

Article 36

When visiting a State Party, the members of the Subcommittee on Prevention shall, without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

(a) Respect the laws and regulations of the visited State;

(b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

Article 37

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.