CHAPTER 2
INTERNATIONAL CONVENTIONS ON CUSTODIAL TORTURE

Torture is an international phenomenon and has been the concern of the international community, because the problem is universal and the challenge is almost global. The internationalization of human rights is a relatively new phenomenon. An elaborate regime of international human rights law came into existence, seeking to protect the individual against the acts and omissions of his own Government. Human rights treaties are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction\(^1\).

When the Charter of the United Nations imposed a binding obligation on signatory States to respect the human rights and fundamental freedoms of individuals, it recognized that individuals enjoyed such rights and freedoms under International Law. It was a recognition explicitly made by the State parties of the Charter from being solely a matter of domestic concerns a Government’s treatment of its own nationals became the legitimate concern of the international community\(^2\).

The prohibition of torture is considered to carry as special status in international law that of *jus cogens*, which is peremptory norm of International Law – endowed with special legal force, which is valid for all without exception and from which no opting out or derogation is possible. The result of this development is that States can no longer hide behind the principle of sovereignty and refuse scrutiny of the way they deal with human

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rights issues, for example, how they treat their own nationals or non-nationals, measured by the standards and yardsticks accepted by the community of nations\textsuperscript{3}.

The prohibition of torture is found in all major international and regional human rights treaties. There is an international consensus that the abuse like custodial torture violates the inherent dignity of the human being and is not justified under any circumstances. At the international level a number of significant efforts have been made which can act as important tool to fight against custodial torture\textsuperscript{4}.

The law relating to the protection of persons from torture has evolved with intensive involvement of the international community through the United Nations as well as regional organizations in the form of adoption of various human rights and humanitarian law treaties.

**The United Nations International Instruments Containing Torture Prohibiting Clauses**

The notion of ‘laws of humanity’ was not specific enough to indicate what kinds of acts were prohibited. A first attempt at clarification was made in the 1929 Geneva Convention concerning the treatment of prisoners of war, where it was stated that all kinds of corporal punishment, incarceration in localities without natural light and generally, all forms of cruelty were prohibited. In 1943, three Allied powers (UK, USA and Soviet Union) issued the so-called Moscow Declaration on account of evidence from many quarters of German atrocities, massacres and cold blooded mass executions, declaring that the perpetrators would be sent back to the scene of their crime and judged on the spot. As regards major war criminals whose offences had no particular ‘geographical localization’, to be punished by the joint judgment of the Allied Governments. This foreshadowed the Constitution of the Nuremberg Tribunal which in its charter was given jurisdiction over ‘war crimes’, including ‘ill-treatment’ of civilian populations, as well as ‘crimes against humanity’ murder, extermination and other inhumane acts’ committed on political, racial or religious grounds\textsuperscript{5}.

\textsuperscript{4} Ashirbani Dutte, “Custodial Torture: a shameless truth behind the bars”, 2006 Cri LJ (Jour) 242.
\textsuperscript{5} Supra note 3 at 6.
The Universal Declaration of Human Rights, 1948

On 10 December 1948, the United Nations General Assembly proclaimed the Universal Declaration of Human Rights (UDHR). It was adopted without a dissenting vote. The UDHR was ‘a Common Understanding’ of those rights which the member States had pledged to respect and observe, i.e. the first comprehensive statement of human rights of Universal applicability. Its preamble states that it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

Universal Declaration is acknowledged today as the legitimate aid to the interpretation of the expression of ‘human rights and fundamental freedoms’ in the Charter of the United Nations.

Article 3 of the Declaration provides that ‘Everyone has the right to life, liberty and security of person’.

Article 5 of the Declaration provides that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.

Article 7 of the Declaration states that, ‘All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination’.

Article 8 of Declaration provides that, ‘Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law’.

Article 9 of the Declaration states that, ‘No one shall be subjected to arbitrary arrest, detention or exile’.

Article 10 of Declaration provides that, ‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him’.

Article 11 (1) provides that, ‘Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence’.

Article 11(2) declares that, ‘No one shall be held guilty of any penal offence on account of any act or omission, which did not constitute a penal offence, under national or

6 UN General Assembly Resolutions No.217A (111) of 10 December 1948.
international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was, applicable at the time the penal offence was committed’.

Sir Humphrey, Waldock expressed his opinion that the constant and widespread recognition of UDHR clothes in it the character of the customary law\(^7\). International Court of Justice in the *Tehran Hostage Case*\(^8\) states that, ‘wrongfully to deprive human being of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles enunciated in the UDHR. Nowhere in the Charter, wrongful deprivation of liberty or the imposition of hardship on persons subjected to physical constraint expressly prohibited. That prohibition is contained in the right to liberty and security of person and in the right to freedom from torture, which are articulated in the UDHR.

The various rights of an accused accepted under the UDHR can be categorized as\(^9\):

1. Right of accused to life, liberty and security
2. Right of accused to equality before law
3. Right of accused against torture or inhuman punishment
4. Right of accused to have a fair and public trial
5. Right of accused to be protected against ex-post facto laws
6. Right of accused to be presumed innocent.

The above rights of accused persons have been recognized at the world level. At the national level, the UDHR has been cited in numerous legal proceedings. United States federal Court of Appeals in the case of *Filartiya v Pena-Irala* held, in 1980, that ‘official torture is now prohibited by the laws of nations’. The Court noted that the Charter of the United Nations obliges all member States to take action to promote ‘respect for the observance of human rights and fundamental freedoms for all’. The subsequent United Nations Declaration, which ‘specify with great precision the obligations of members States under the Charter’, expressly prohibit any State from permitting the dastardly and totally inhuman act of torture’. The Court further noted that the prohibition of torture is incorporated in human rights treaties and prohibited by the Constitutions of


\(^8\) Diplomatic and Consular Staff in Tehran Case, *ICJ Reports*, 42(1980).

\(^9\) *Supra* note 6.
many States and the diplomatic sources report that no Government, even those reported to use torture, asserts a right to torture\textsuperscript{10}.

**Geneva Conventions**

With the sweeping development of the wider concept of human rights, certain notions – in particular that regard to acts prohibited under international law- are used interchangeably in human rights instruments as well as in humanitarian law instruments. Prohibition of the said acts is absolute, that is, non-derogable and therefore applicable also in wartime.

The Geneva Convention of 1949 on the Protection of War Victims, and the Additional Protocols of 1977, consider ‘torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health’ to be grave breaches. The States are under an obligation to search for the perpetrators of such crimes regardless of their nationality and to bring them before their Courts or hand over to another High Contracting Party for trial\textsuperscript{11}.

In 1991 an optional ‘International fact-finding Commission’ was established under Article 90 of the first Additional Protocol, and granted the competence to enquire into alleged grave breaches or other serious violations of the Conventions and Protocols.

Inspection of places of detention where persons affected by the events of war are being held can be carried out \textit{inter alia} by the International Committee of Red Cross in accordance with the 1949 Geneva Convention and the Additional Protocol of 1977. Red Cross has the right to visit all places of detention in cases of international armed conflicts and may, in cases of non-international armed conflicts, based on its right of initiative, propose to the conflicting parties that it visits such places\textsuperscript{12}.

Article 3 of Geneva Conventions, 1949 provides that\textsuperscript{13} 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, colour, 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.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{10} 630 F.2d 876 (2D Cir.1980).
\item \textsuperscript{11} Supra note 3 at 39.
\item \textsuperscript{12} Ibid.
\item \textsuperscript{13} Article 3 of Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949.
\end{enumerate}
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1. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.

2. Outrages upon personal dignity, in particular, humiliating and degrading treatment.

**Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949**

Article 31 of the fourth Geneva Convention specifically prohibited the use of force to obtain information. It states that no physical or moral coercion shall be exercised against protected persons in particular to obtain information from them or from third parties. Article 32 provided that protected persons had the right to protection from murder, torture, corporal punishments, mutilation and medical or scientific experiments but also to any other measures of brutality whether applied by non-combatant or military agents\textsuperscript{14}.

**Geneva Convention relative to the Treatment of Prisoners of War, 1949**

The treatment of prisoners of war in an international armed conflict is covered by Geneva Convention III. Article 17 provided that no physical or mental torture, nor any other form of coercion, might be inflicted on prisoners of war to secure from them information, prisoners of war who refuse to answer may not be treated, insulted or exposed to unpleasant or disadvantageous treatment of any kind. Under Articles 13 and 14 of the Convention, prisoners of war are entitled to respect for their persons and their honour and must at all time be protected, particularly against acts of violence or intimidation and against curiosity in all circumstances\textsuperscript{15}.

**Protocol I, relating to the Protection of Victims of International Armed Conflicts, 1977**

Article 75 of the protocol provides that ‘torture of all kinds, whether physical or mental’ against persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the Geneva Convention ‘shall’ remain prohibited at any time and in any place whatsoever, ‘whether committed by civilian or military agents’. Article 75 is recognized as restating customary International Law\textsuperscript{16}.

\textsuperscript{14} Geneva Convention (iv) relative to the protection of Civilian persons in Time of war, 1949.
\textsuperscript{15} Geneva Convention(111) relative to the Treatment of Prisoners of War, 1949.
\textsuperscript{16} Protocol additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol 1)1977.
Protocol II, relating to the Protection of Victims of Non-International Armed Conflicts, 1977

Article 4 of the Protocol provides that all persons who do not take a direct part or who have ceased to take part in hostilities are entitled to respect for their person and honour. State parties are prohibited to inflict violence to the life, health and physical or mental well being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment, outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault.17

The International Covenant on Civil and Political Rights, 1966

The General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) on 16 December 1966 to ensure that

1. any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
2. any person claiming such a remedy shall have rights thereto determined by competent judicial, administrative or legislative authorities;
3. competent authorities shall enforce such remedies when granted.18

Article 7 provides that, ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected to medical or scientific experimentation without his free consent’.

Article 10(1) lays down that, ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’.

The two Articles have notable differences – first, whereas Article 7 is of general application, Article 10 targets only persons in detention. Second, Article 7 is non-derogable, that is, States must comply with it even in times of public emergency. Article 10 is not protected from infringement in times of crises.

The Human Rights Committee emphasized that Article 7 allows of no limitation, that no derogation is allowed at any time, and that no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 for any reason, including

receipt of an order from a superior officer or public authority. UN Convention against Torture of 1984 is one of notable exception, which permits the infliction of pain and suffering as part of the imposition of lawful sanctions.  

The Covenant does not contain any definition of the concepts covered by Article 7, the Committee noted that whether particular treatment constitutes a violation of Article 7 ‘depends on all circumstances of the case, such as the duration and manner of the treatment, its physical or mental effect as well as the sex, age and state of health of victim’. Violation of Article 7 in respect of a person deprived of liberty automatically entails a violation of Article 10(1). In *Linton v Jamaica*, the Committee considered that, ‘the physical abuse inflicted on the author, the mock execution set up by prison wardens and the denial of adequate medical care after the injuries sustained in the aborted escape attempt, constitutes cruel and inhuman treatment within the meaning of Article 7 and therefore, also entail a violation of Article 10 of the Covenant’.

It is submitted that ICCPR is the only international instrument drafted within the UN that contains a specific reference to ‘medical and scientific experiments’ as being prohibited if performed without a person’s free consent. Further, special protection in regard to such experiments is required in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. State 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.

The First Optional Protocol to the International Covenant on Civil and Political Rights, 1966

The First Optional Protocol to the International Covenant on Civil and Political Rights, 1966 was adopted by the UN General Assembly on 16 December 1966 and entered into force on 23 March 1976. It gives the option of recognizing the Human Rights Committee qualified to receive and examine communication from individual people. When people or groups of people have exhausted local remedies, the Protocol allows them to petition the Committee directly about their Government’s alleged violations of the Covenant.  

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19 Human Rights Committee, “General Comments”, General Comment No.07.  
Article 2 and 3 provides that complainants must have exhausted all domestic remedies and anonymous complaints are not permitted. The Human Rights Committee recognized its competence to hear complaints and imposed an obligation on State parties not to hinder the access of the victims to the Committee and prevented any retaliation against complainants. It is submitted that as India has signed and ratified the Universal Declaration of Human Rights (1948) and International Covenant on Civil and Political Rights (1966); it is the duty of State to provide special safeguards against violations. India should also ratify the Optional Protocol to provide a mechanism for the enforcement of rights.

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975

The United Nations developed guidelines to ensure that torture and degrading treatments to human beings are eradicated from the world. On the recommendations of the fifth Congress on the Prevention of Crime and the Treatment of Offenders, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the General Assembly22.

Article 7 of the Declaration to protect persons provides that each State will ensure that torture or other similar treatment or punishments are offences under its Criminal Law. Each State should take effective measures to protect the persons who allege that they have been subjected to torture or similar treatment. The rights to complain and to have their cases impartially examined by the competent authorities are concerns of the State (Article 10).

Article 11 provides that the State shall ensure that victim shall be afforded redress and compensation in accordance with law. Article 11 prohibits the State from using as evidence any statement made as a result of torture or of other cruel, inhuman or degrading treatment or punishment.

It is submitted that although this Declaration lacks legally binding force, but it has moral and political impact in the formulation of three United Nations instruments, first, the Principles of Medical Ethics relevant to the Role of Health Personnel, second, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the Assembly and third, the Body of Principles for the Protection

22 UN General Assembly Resolution No.3452 (xxx) of 9 December 1975.
of All Persons Under Any form of Detention or Imprisonment, adopted by the General Assembly.

Standard Minimum Rules for the Treatment of Prisoners, 1977


Rule 31 of the United Nations Standard Minimum Rules for the Treatment of Prisoners prohibits corporal punishment. According to Rule 33 except for the necessary limitation, instrument of restraint, such as handcuffs, chains, irons and strait – jackets shall never be applied as a punishment. It further provides that chains or irons shall not be used as restraints.

Standard Minimum Rules provides that all prisoners have certain fundamental rights and they should be treated with due respect to their inherent dignity and value as human beings without discrimination of any kind.

Code of Conduct for Law Enforcement Officials, 1979

The General Assembly considering the importance of the task that the law enforcement officials are performing and being aware of the potential abuse of power by the officials while discharging their duties adopted Code of Conduct on 17 December 1979. The Code prohibits torture by providing that law enforcement officials shall respect and protect human dignity and shall maintain and uphold human rights of all persons24.

Article 5 prohibits the use of ‘torture or other cruel, inhuman or degrading treatment or punishment’, which is derived from the Declaration against Torture in 1975. Article 5 also prohibits the use, in defence, of the ‘superior order’ plea, which is missing in the 1975 Declaration but was included in the Convention against Torture in 1984. Article 8 lays down the duty for law-enforcement officials not only to prevent but also rigorously to oppose any violations of the Code as well as to report these, if they believe

23 Economic and Social Council Resolution No.663 CI (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.
24 General Assembly Resolution No.34/169 of 17 December 1979.
have occurred or are about to occur, both to their superior and to other higher authorities, external to police force, invested with the power to review grievances and complaints.

The term ‘Code’ may suggest that this set of rules is legally binding on its target group, namely police officers, but the rules set standards of professional practice and behaviour which have a strong morally binding force without being a local code unless they are incorporated into national legislation. It is submitted that it was the first step at the international level to ensure equal standards of justice to all, both nationally and internationally. It has also become the guiding maxim for the European Committee on Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

**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, 1982**

The role of health personnel, particularly physicians, is recognized by the international community in protection of prisoners against torture and other cruel, inhuman or degrading treatment or punishment. The United Nations General Assembly on 18 December 1982 adopted the following principles:

**Principle 1** - Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained.

**Principle 2** - It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.

**Principle 3** - It is a contravention of medical ethics for health personnel, particularly physicians, to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health.

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**Principle 4**- It is a contravention of medical ethics for health personnel, particularly physicians;

(a) To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical and mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments.

(b) To certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments.

**Principle 5**- It is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoner or detainee himself, of his fellow prisoners or detainees, or of his guardians and presents no hazard to his physical or mental health.

**Principal 6**- There may be no derogation from the foregoing principles on any ground whatsoever, including public emergency.

Medical Personnel particularly physician can play important role in prevention of torture. Before 1975, health care of victims of torture and special needs of such victims were rarely recognized. There are now numerous declarations on the ethics of human rights abuses from national and international professional organizations and from other medical associations actively working in more than 30 countries on human rights issues.

**United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984**

The United Nations Convention against Torture was adopted by the United Nations General Assembly in 1984. It sets out internationally accepted definitions of torture and ill-treatment, establishes the responsibility of States for preventing these abuses and provides for the creation of the Committee against Torture (CAT). Convention against Torture both criminalizes torture (in Article 1) and cruel, inhuman or degrading treatment
or punishment (CIDTP) (in Article 16) and seeks to prevent them. Article 1 defines that 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’.

Under Article 16 State parties are required to prevent ‘other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1 when such acts are committed by or at the instigation of or with the consent or acquiescence a public official or other person acting in an official capacity’.

The Committee against Torture has itself recognized that definitional difference between torture and CIDPT is often not clear. But according to UN Special Reapporteur on Torture decisive criteria for distinguishing between two is the purpose of the conduct and the powerlessness of the victim. The prohibition of CIDTP under Article 16 is less strict than the prohibition of torture under Article 1. In particular Article 16 is not subject to universal jurisdiction and is obliged only to prevent CIDTP in their own jurisdiction, whereas under Articles 6, 7 and 8, States may exercise jurisdiction over acts of torture even when they did not occur under the State’s own jurisdiction. One common element between both is that all must involve a public official or someone acting in an official capacity. Definition of Torture in Article 1 has two parts.

1. ‘Intentional’ infliction of severe pain or suffering: The CAT definition of torture covers not only positive acts, but also omissions. Many authors have concluded that recklessness, but not negligence would suffice for the intention element, where the State agent inflicting pain or suffering is aware of that the victim is

particularly sensitive, it is possible that acts would not otherwise reach the threshold of severity to constitute torture may do so\textsuperscript{31}.

2. Purpose: The words ‘such purposes as’ mentioned in Article 1 indicate that other similar purposes may be included. Severe pain or suffering inflicted by a public official purely sadistically, but for no other purposes would, therefore, appear to be excluded from the definition of Torture\textsuperscript{32}.

State Parties Obligations under the UNCAT

I. Duty to protect from ill-treatment by private actors

The UNCAT specifies that, to qualify as torture or other cruel, inhuman or degrading treatment, the pain or suffering must be inflicted at the instigation or with the consent or acquiescence, of a public official or other person acting in an official capacity. It means that States are not generally responsible for acts beyond their control. However, they can be held responsible for acts of torture by private individuals if they fail to take general and specific measures to prevent them.

The prohibition or torture and ill treatment in the ICCPR applies regardless whether the acts were committed by ‘public officials’ or ‘other persons acting on behalf of the State’, or ‘private persons’ and ‘whether by encouraging, ordering, tolerating or perpetrating prohibited acts’.

In the case of \textit{Dzemojil and Others v Yugoslavia}\textsuperscript{33}, the question of the failure of a State party to respond adequately to private tortures amounts to ‘acquiescence’ under UNCAT was considered. In this case, the police though present at the scene, failed to intervene to prevent the destruction of a Roma settlement. The Committee considered that this lack of action constituted acquiescence in the sense of Article 16 of the Convention.

The Committee recognizing that indifference or inaction by the State can provide encouragement or \textit{de facto} permission for torture and ill-treatment, stated that, “where State authorities or other acting in official capacity or color of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention; the State bears responsibility and its officials shall be considered as

authors, complicit or otherwise responsible under the Convention for consenting or acquiescing in such impermissible acts.” The Committee drew particular attention to the application of this principle as regards to gender based violence, including rape, domestic violence and female genital mutilation and trafficking.

II. Duty to investigate

Article 12 of the UNCAT provides, ‘Each 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’.

This obligation to investigate is complemented by Article 13, which provides that individual shall have the right to complain to the competent authorities and the State shall take steps to protect the complainant and witnesses against reprisal.

The Committee has given no specific guidance on the maximum time which may elapse between grounds of suspicion of ill treatment having arisen and commencing or completing an investigation. In case of Blanco Abad v Spain, Committee considered that a period of 18 days between the initial report of ill-treatment and the initiation of an investigation is too long. Committee stressed that, “promptness is essential both to ensure that the victim cannot continue to be subjected to such acts and also in general, the physical traces of torture, and especially of cruel inhuman or degrading treatments, soon disappear”.

The State obligation to ensure a prompt and impartial investigation does not depend on the submission of formal complaint. Furthermore, the investigation must be effective, carried out by appropriately qualified individuals.

III. Duty to enact and enforce legislation criminalizing torture

Article 4 of the UNCAT provides:

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.

The CAT asks State parties about domestic Criminal Law and has repeatedly emphasized that Article 4 requires States to ‘incorporate into domestic law the crime of torture and adopt a definition of torture that covers all the elements contained in Article 1

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34 Supra note 28.
of the convention. Where such a law has been adopted, the Committee will consider both its compatibility with the definition in Article 1 of the UNCAT and its enforcement in practice. Those exercising authority must not be permitted to ‘avoid accountability or escape responsibility for torture or ill-treatment committed by subordinates’ where they knew or should have known that such conduct was likely to occur.

The CAT has not specified a minimum penalty that would appropriately reflect the gravity of the crime of torture. In *Urra Guridi v Spain*, the Committee found that the imposition of light penalties on three Civil Guards who had been found guilty of torture were incompatible with the duty to impose appropriate punishment and therefore constituted a violation of Article 4(2). The pardons later granted to the Civil Guards had the practical effect of allowing torture to go unpunished and encouraging its repetition. The pardons therefore constituted a violation of Article 2 (1) of the Convention, which requires that State parties take effective measures to prevent torture. The Committee has stated, ‘In order to ensure that perpetrators of torture do not enjoy impunity, ensure the investigation, where appropriate, the prosecution of those accused of having committed the crime of torture, and ensure that amnesty laws exclude torture from their reach.’ No statute of limitation should apply to the crime of torture.

Article 5 of the UNCAT provides:

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 or 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.

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37 CAT, “Concluding Observations on Italy”, UN Doc. CAT/C/ITA/Col, 18 May 2007
38 *Supra* note 28.
In *Roitman Rosenmann v Spain*[^40], a case concerning Spain’s unsuccessful request that the UK Government extradites former Chilean dictator Augusto Pinochet to face prosecution in Spain for the torture of Spanish citizens in Chile during his rule. The Committee observed that, ‘the Convention imposes an obligation on a State party to bring to trial a person, alleged to have committed torture, who is found in its territory, when the State refuses to extradite the person’[^41]. Where the State on whose territory the suspect is present does not prosecute him and refuse to comply with an extradition request, it will itself amount to a breach of its obligation under UNCAT.

**IV. Duty to exclude statements obtained by torture or other ill-treatment**

Article 15 of the UNCAT provides: ‘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’.

The effective prevention of torture and ill-treatment requires that any incentive to use such abuse to assist investigations need to be eliminated. The prohibition is absolute, as the statements made under such treatment, which are in any case inherently unreliable, must therefore be prohibited by law.

The prohibition applies to statements made by the victim of ill treatment concerning himself, as well as statements made about third parties[^42]. Article 12 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was the principal basis for drafting the Convention, specifically provided that ‘any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against person concerned or against any other person in any proceedings’.

**V. Duty to train personnel and provide procedural safeguards**

Article 10 of the UNCAT provides:

‘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

[^41]: Ibid.
[^42]: Supra note 28.
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 persons’.

Article 11 of the UNCAT requires 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 preventing any case of torture’.

The CAT considers that Article 11 requires compliances with international standards including the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under any form of Detention or imprisonment\(^{43}\). In *Barakat v Tunisia*\(^{44}\), the CAT considered that, in a case of torture in custody leading to death, Tunisia has failed to meet its obligation under Article 11 of Convention against Torture. The CAT recommended to the States to, ‘establish a systematic and independent system to monitor the treatment in practice of persons arrested, detained or imprisoned’\(^{45}\).

The Human Rights Committee recognized that procedural safeguards can provide effective means of preventing ill treatment. Human Rights Committee stated that, ‘provisions should be made for detainees to be held in places officially recognized as places of detention and for the record of their names and places of detention, as well as for the names of persons responsible for their detention. That record be kept available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purpose of judicial or administrative proceedings’\(^{46}\).

Furthermore, the Committee also considers that States must implement a system of impartial supervision of penitentiary establishments to ensure the effective application of rules regarding the treatment of persons deprived of their liberty\(^{47}\).


\(^{44}\) CAT Communication No. 60/1996, 10 November 1999.

\(^{45}\) CAT, “Concluding observations on Brazil”, UN Doc. A/56/44, 2001

\(^{46}\) HRC, General Comment No. 20, 1992.

\(^{47}\) HRC, General Comment No. 21, 1992.
VI. Duty to grant redress and compensate victims
UNCAT imposes an obligation on State parties to grant redress and provide adequate compensation to victims of torture or ill-treatment.

Article 14 of the UNCAT provides that, ‘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 of full rehabilitation as possible. In the event of the death of victim as a result of an act of torture, his dependants shall be entitled to compensation’. The CAT considers that, ‘the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory’. Committee observed that State is to provide redress and compensation to victims of all forms of prohibited ill-treatment. In some cases the Convention itself sets out a remedy for particular breeches, but where it does not, the committee will interpret a substantive provision to contain within it a remedy for its breach.

In *Urra Guridi v Spain*, the Committee found that State, “should cover all the damages suffered by victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case”.

Human Rights Committee in case of *Rodriquez v Uruguay* reiterated that the right to redress could not include a right to demand the criminal prosecution of particular individuals. However, in order to ensure the applicant’s right to redress, the State party should take effective measures (a) to carry out an official investigation into the author’s allegations of torture, in order to identify the persons responsible for torture and ill-treatment and to enable the author to seek civil redress, (b) to grant appropriate compensation to victim and (c) to ensure that similar violations do not occur in the future.

**Scope of UNCAT**

No derogation is possible to any of the provisions of the UNCAT, Article 2 (2) of which provides:

‘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’.

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49 *Ibid*.
50 *Supra* note 39.
Article 2(3) also provides that order from superior cannot be invoked to justify torture. The offence of torture cannot be the subject of defence, a statute of limitations, or an amnesty. The prohibition is therefore absolute, efforts by some States to justify torture and ill treatment as a means to protect public safety or avert emergencies, the CAT emphasized that ‘the Convention’s protections are absolute, even in the context of national security concerns’. CAT stressed that the provisions of UNCAT apply whether a State party exercises de jure or de facto control\(^{52}\).

The exception for ‘lawful sanctions’ is explicit in UNCAT, where the definition of torture specifically excludes ‘pain or suffering arising from inherently in or incidental to lawful sanctions.’ Unlike the earlier Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975, the 1984 UNCAT did not elaborate the concept of lawful sanctions. The text in the Declaration, on which the UNCAT language was based, specifically referred to ‘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, which prohibit, among other things, corporal punishment of detainees.

Article 20 of UNCAT provides the power to CAT to request a State party to allow a visit where there is ‘reliable information which appears to it to contain well-founded indications that torture is being systematically practiced in the territory of a State party’. CAT after its visit to Turkish prisons called on the authorities ‘to demolish immediately and systematically all the solitary confinement cells known as ‘coffins’, which in themselves constitute a kind of torture. These cells measure approximately 60 by 80 centimeters, they have no light and have inadequate ventilation, and the inmate can only stand or crouch\(^{53}\).

The CAT has expressed concern about conditions such as overcrowding, violence among prisoners, lack of separation of different categories of detainees, excessive period of detention in facilities equipped only for short-term detention, lack of natural light or ventilation, unhygienic conditions, inadequate medical services or undue delays in the provisions of medical services and lack of recreation or educational facilities\(^{54}\). Extradition or expulsion of an individual who risks being subjected to torture if returned to another State is explicitly prohibited under the UNCAT.

\(^{52}\) Supra note 48.
\(^{53}\) CAT, “Summary account of the result of the proceedings concerning the inquiry on Turkey”, UN Doc. A/48/44/Add. 1, 1993.
Article 3 of UNCAT states:

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.

According to CAT Article 3 applies only to a danger of torture, as defined in Article 1 of UNCAT, and does not apply to other forms of ill-treatment. Only human rights violations by, at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity will be considered as relevant under Article 3.

The CAT has developed substantial jurisprudence on the requirement that the risk of torture be ‘foreseeable, real and personal’. Thus ‘the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country, additional grounds must exist that indicate that the individual concerned would be personally at risk.

A number of States attempt to respond to the prohibition on deporting individuals to States where they may face torture or ill-treatment by seeking diplomatic assurances from the receiving State that a particular individual will not be subjected to torture or other ill-treatment.

The Committee held that Government should ‘only rely on ‘diplomatic assurances’ in regard to States which do not systematically violate the Convention’s provisions, and after a thorough examination of the merits of each individual case’.

In Agiza v Sweden, author was suspected of involvement in terrorist activities, and had been removed by Sweden in Egypt on 8 December 2001. He was ill-treated by foreign agents immediately preceding his expulsion, while still on Sweden territory. The Committee found that this ill-treatment had taken place with the acquiescence of the Swedish police. The State party had enough information at its disposal at the time of removal to draw the ‘natural conclusion’ that the complainant was at the real risk of torture. When diplomatic assurance may not be inherently incompatible with a State’s

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58 Supra note 48.
obligation under Article 3 of UNCAT, they must include provisions of both enforcement and rigorous monitoring.

**The Optional Protocol to the Convention against Torture, 2002**

The Optional Protocol was adopted in the General Assembly on 18 December 2002. The Optional Protocol to the Convention against Torture is the first instrument in international human rights, with universal application, that has preventive mechanisms built into it. The international element to this structure is the international Sub-Committee for the Prevention of Torture and the National Preventive Mechanisms give the Optional Protocol to the Convention against Torture its ‘local’ dimension. These two systems are complementary and proactive in nature. This is a system which is entirely focused on prevention. There is no element of ‘naming and shaming’ and as such it should not be considered in any way threatening by States considering signing\(^\text{59}\).

The Sub-Committee is mandated to carry out regular visits to State party to any place of detention where people may or can be deprived of their liberty under the jurisdiction and control of the State party. ‘Places of detention’ is broadly defined in Article 12 so that the Sub-Committee can visit a wide range of places, including police stations, all pre-trial centers, remand centers, prisons, psychiatric institutions, hospitals, immigration detention centers and places of administrative detention. The Sub-Committee must also be afforded full access to all information concerning the number of people deprived of their liberty and where they are and all information concerning their treatment. Further, no one should in any way be prejudiced by contact with the Sub-Committee, to encourage the free flow of information\(^\text{60}\).

The Optional Protocol to the Convention against Torture offers a constantly working national system of monitoring called National Preventive Mechanism (NPM) in addition to an efficient International Sub-Committee. No particular form of NPM is prescribed in the Optional Protocol to the Convention against Torture itself. However, some parameters are firmly stated. The first is that an NPM must be independent\(^\text{61}\). This applies both to the institutions and their personnel. The possibility of designating National Human Rights institutions such as Ombudsmen bodies is acknowledged\(^\text{62}\) and States

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\(^{60}\) Article 14 of the Optional Protocol to the Convention against Torture.

\(^{61}\) Articles 17 and 18 (1) of the Optional Protocol to the Convention against Torture.

\(^{62}\) Article 18(4) of the Optional Protocol to the Convention against Torture.
should give consideration to the Paris Principles. The NPM must examine places of detention regularly and make recommendations including proposals concerning draft or existing legislation. NPM have the same powers as the Sub-Committee concerning freedom of access both to detainees and place of detention. Anyone should be able to communicate with the NPM without prejudice in any way. Indeed States are bound by the Optional Protocol to the Convention against Torture to publish the annual reports of the NPMs.

It is submitted that although its effectiveness clearly depends on the will of its constituent States, yet Optional Protocol to the Convention against Torture is a real step forward in the global prevention of the crime of torture.

**United Nations Instruments relating to the Special Rights of Juvenile Accused**

1. **United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) 1985** - The General Assembly adopted the Beijing Rules on 29 November 1985. These rules deal with fundamental perspectives of Juvenile Justice, aims of Juvenile Justice, age of criminal responsibility, scope of discretion at all levels of juvenile justice administration, investigation and prosecution, detention pending trial, adjudication and disposition, legal counsel, parents and guardians, guiding principles in adjudication and disposition, various disposition measures, avoidance of unnecessary delay, need for professionalism and training and non-institutional.


   Rule I states that; ‘The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort’.

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64 Article 19 of the Optional Protocol to the Convention against Torture.
65 Article 19(b) (C) of the Optional Protocol to the Convention against Torture.
66 Article 21 of the Optional Protocol to the Convention against Torture.
67 Article 23 of the Optional Protocol to the Convention against Torture.
68 UN General Assembly Resolution No.40/33 of 29 November 1985.
The Rule 3 provides objective of these rules as ‘The Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms and with a view counteracting the detrimental effects of all types of detention and to foster integration in society’.

Rule 17 provides the following rights to juveniles who are under arrest or awaiting trial:

(i) They shall be presumed innocent;
(ii) Only in exceptional cases or circumstances, detention before the trial shall be made;
(iii) All efforts should be made to apply alternative measures;
(iv) In cases there are unavoidable circumstances regarding the detention of untried juvenile, the Court shall give priority to speedy process to insure the shortest possible duration of detention; and
(v) Untried detained juveniles should be separated from convicted juveniles.

United Nations Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1985

A Special Rapporteur on Torture was appointed by the Commission on Human Rights in 1985 to examine questions relevant to torture. He was empowered to seek and receive credible and reliable information on such questions and to respond to such information without delay. The Special Rapporteur corresponds with Governments on measures they have taken or plan to take to prevent or combat torture. Requests for urgent action received by him are brought to the attention of the Government concerned to ensure protection of the individual’s right to physical and mental integrity. The Special Rapporteur visits countries where torture occurs or is alleged to occur, and submits its annual report to the Commission of Human Rights. Special Rapporteur on Torture has repeatedly stressed that procedural safeguards include the prohibition of incommunicado detention. It has shown that the risk of torture significantly increase if the apprehended person is isolated from the outside world. Measures against incommunicado detention should therefore be enforced, since these are designed to make the treatment of all detainees as transparent as possible.70

The Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, 1988

On 18 December 1988, the General Assembly adopted the Body of Principles which may be considered as the beginning of a founding charter on prisoners’ rights. According to Principle 1, ‘all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person’.

Principles 2 and 4 of the Body of Principles provide that arrest, detention and imprisonment shall be carried out in accordance with law and by competent officials or persons authorized for the purpose and the measures affecting the human rights of detained or imprisoned persons shall be ordered by or be subject to the effective control of a judicial or other authority. Torture and cruel, inhuman or degrading treatment or punishment is prohibited under Principle 6, which is as follows;

(i) All persons under any form of detention or imprisonment be treated in a humane manner and with respect for the inherent dignity of the human person.

(ii) Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

(iii) Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

(iv) No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstances whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

(v) The authorities who arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subjected to recourse to a judicial or other authority.

71 UN General Assembly Resolution No. 43/173 of December 1988.
(vi) Anyone who is arrested shall be informed at the time of his arrest of the reasons for his arrest and shall be promptly informed of any charges against him.

(vii) Any person shall, at the moment of arrest and of the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on an explanation of his rights and how to avail himself of such rights.

(viii) Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice about his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

If a detained or imprisoned person is a juvenile or is incapable of understanding the entitlement; the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

(ix) A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

(x) It shall be prohibited to take undue advantage of the status of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

(xi) The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogation and other persons present shall be recorded and certified in such form as may be prescribed by law.

(xii) Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case.

(xiii) A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest.
It is submitted that Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment has no binding effect; it is a document annexed to General Assembly Resolution and is not a treaty. But it can serve as guidelines for the shaping of national legislation and domestic practice. It can also serve as statement of basic international legal and human concepts up to which everyone can refer.

**World Conference on Human Rights Vienna Declaration, 1993**

The World Conference on Human Rights welcome the ratification by many member States of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and encouraged its speedy ratification by all other member States.

The World Conference on Human Rights emphasized that one of the most atrocious violations against human dignity is the act of torture, the result of which destroys the dignity and impairs the capability of victims to continue their lives and their activities. The World Conference on Human Rights reaffirmed that under human rights law and international humanitarian law, freedom from torture is a right which must be protected under all circumstances, including in times of internal or international disturbance or armed conflicts. The World Conference on Human Rights therefore urged all States to put an immediate end to the practice of torture and eradicate this evil forever through full implementation of the Universal Declaration of Human Rights as well as the relevant Conventions and, where necessary, strengthening of existing mechanisms. It called all States to cooperate fully with the Special Rapporteur on the question of torture in the fulfillment of his mandate. Special attention should be given to ensure universal respect for and effective implementation of, the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations.

The World Conference on Human Rights stressed the importance of further concrete action within the framework of the United Nations with the view to providing assistance to victims of torture and ensuring more effective remedies for their physical, psychological and social rehabilitation. Providing the necessary resources for this purpose should be given high priority, *inter alia*, by additional contributions to the United Nations.

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72 Available at: www.orcha.org/EN/ABOUTS/Pages/Vienna WC.aspx9 (visited on 23 July 2012).
Voluntary Fund for Victims of Torture. States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law. It reaffirmed that efforts to eradicate torture should, first and foremost, be concentrated on prevention and therefore, calls for the early adoption of an Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which is intended to establish a preventive system of regular visits to places of detention

The Istanbul Protocol in the UN System, 1999

The Istanbul Protocol was submitted to the UN High Commission for Human Rights on 9 August 1999. It is the first set of international guidelines for the effective psychological, physical or legal investigation and documentation of allegations of torture and ill-treatment based upon the needs of daily life. The protocol provides comprehensive and practical guidelines that describe in detail the steps to be taken by States, investigators, legal and medical experts to ensure the prompt and impartial investigation and documentation of complaints and reports of torture. The initial steps to work on a manual for effective investigation and documentation of torture and other forms of ill-treatment were taken during an international meeting organized by Turkish Medical Association in 1996. All organizing efforts were initiated and coordinated by Human Rights foundation of Turkey and Physicians for Human Rights, USA.

The Istanbul Protocol is not a binding document and does not include any sanctions. However, the Istanbul Protocol has started to be taken into consideration by regional Courts and Commissions. They are then urged to follow the Principles in the Protocol during the investigation and documentations of torture and other forms of ill-treatment.

(i) The member States will take quick and prompt steps to cause investigation into all cases or complaints of torture or ill-treatment. In case of Bati and Others v Turkey fifteen persons complained that they were tortured during their period in custody. During the pre trial investigation and Court proceedings the incriminated police officers remained on duty. The investigatory procedures

73 Ibid.
75 ECHR Nos. 33097/96 and 57834/00, 3 June 2004.
had begun in March, 1996 and the applicants’ representatives asked the domestic Court to speed the proceedings, as there was a danger that the prosecution of the offences would become statute barred in October, 2002. The demands of the applicants were not taken into account. Thus, defendants, except for one, could not be sentenced due to the statute of limitations that had expired in February, 2003. The European Court of Human Rights, having adopted the standards derived from the European Convention on Human Rights and the Istanbul Protocol, concluded that the investigations conducted by Turkish authorities was ineffective.

(ii) Even in the absence of a complaint, action to cause investigation is necessary where there are reasonable indications or clues about the commission or existence of such instances or incidents.

(iii) As a matter of general rule, the persons who investigate into such complaints must be drawn from sources other than the one from which the culprit or culprits of such abuse come from; in other words, persons drawn from some other agency or organization would be better suited to deal with such complaints and only such an arrangement would also be able to evoke the confidence of the victims as well as sustain public credibility.

(iv) Persons conducting such an investigation or verification should be impartial as well as capable and competent. The investigating officials or authority should be vested with the power to have access to medical or other experts.

The European Court of Human Rights in case of *Mehmet Emin Yuksel v Turkey* referred to the Istanbul Protocol which states that ‘an opinion by medical experts on a possible relationship between physical findings and ill-treatment is a requirement for the effective investigation of ill-treatment’.

(v) The professional standards that such investigators exhibit must be a very high order and should be not less than the minimum accepted international standards.

(vi) The methods must reflect highest professional standards relatable.

(vii) The investigating authority should have the legal capacity and power as well as the obligation to secure all relevant facts and information. Furthermore the authority must have at its disposal the needed financial and other resources to enable it to fulfil the objectives of its work.

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*76 Mehmet Emin Yuksel v Turkey*, ECHR No. 40154/98, 20 July 2004.
The authority should also have the legal potential to summon and get the persons alleged or suspected to have caused or committed the abuse in question to testify before and towards that end must have the authority for summoning witnesses and others connected and also be vested with the potential to seek the production of documents and other evidentiary materials.

The proceedings of that body should be made available for the public by its authentic publication on a periodical basis.

It shall also be ensured that victims of all such torture or ill-treatment and the witnesses are protected from any kind of vengeful action by anyone, including the suspected or accused persons and they shall also be protected from violence, threats or any other form of intimidation that may arise pursuant to investigation of such cases. Similarly those who are accused of such abuse should not be, as a rule, allowed to continue in office or position of power or influence, whether direct or indirect, over the victim or witnesses or their families.

It must also be arranged to make available all relevant information to the alleged victims of torture or ill treatment or their legal representatives about the status of their complaint and its progress so far as the investigation is concerned.

The body or institution so designed by the member states should be in a position to seek and obtain all information necessary in the inquiry and shall conduct the inquiry as suggested in this international standard pattern.

It must also be designed as a part of the procedure normally that a written report is made in each case of complaint referred to or received by it or acted on by it *suo moto*, and that should also be made public as a matter of course.

The follow up of the report and its recommendation must be made systematic and well established so that the message should go that Human Rights abuses will not be tolerated and if the abuse is established then consequences are sure to follow.

It should also be ensured that the experts and other medical personnel, who assist all such investigations, should behave in the highest form of ethical behaviour and all other standard ethical behaviour codes accepted, as they shall follow the current international ethical policy.
The Inter-American Commission of Human Rights in case of Perez v Mexico\textsuperscript{77} observed that conduct of medical examination in accordance with the Istanbul Principles that means the conduct of doctors should, at all times, be in line with the strictest ethical guidelines.

(xvi) Normal procedures where secrecy is necessary for the purposes of examination of the victim etc., to be ensured and it should be done outside the presence of the security agents and other Government officials.

(xvii) International standards for medical examinations connected with such investigations also warrant that the medical experts conducting such examinations will file a prompt and accurate written report.

(xviii) It should also be arranged, so as to ensure that the medical report is kept confidential and at the same time be communicated to the subject or his or her nominated representative. The views of the subject and his or her representative about the examination process should be solicited and recorded in the report. It should also be provided in writing, where appropriate, to the authority responsible for investigating the allegation of torture or ill-treatment. It is the responsibility of the State to ensure that it is delivered securely to these persons. The report should not be made available to any other person, except with the consent of the subject or on the authorization of a Court empowered to enforce such transfer.

**United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005**

The General Assembly recalling the provisions providing a right to remedy for victims of violations of international human rights law found in numerous international instruments, in particular Article 8 of the Universal Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political Rights, Article 6 of the International Convention on the Elimination of All forms of Racial Discrimination, Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 39 of the Convention on the Rights of the Child, and of International humanitarian law as found in Article 3 of the Hague Convention respecting the Laws and Customs of War or Land of 18 October 1907, Article 91 of the Protocol Additional to the

\textsuperscript{77} IACHR No.53/01, Annual Report 2000.
Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed conflicts of 8 June 1977, and Articles 68 and 75 of the Rome Statute of the International Criminal Court\textsuperscript{78}. Recalling the provisions providing a right to remedy for victims of violations of international human rights found in regional conventions, in particular Article 7 of the African Charter of Human and People Rights, Article 25 of the American Convention on Human Rights and Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The General Assembly of the United Nations has laid down the Principles and Guidelines for Remedies and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violation of International Humanitarian Law. Remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

(i) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;

(ii) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;

(iii) Provide proper assistance to victims seeking access to justice;

(iv) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law\textsuperscript{79}.

\textsuperscript{78} UN General Assembly Resolution No.60/147 of 16 December 2005.

\textsuperscript{79} Ibid.
European Regional Instruments Containing Torture Prohibiting Clauses

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950

Article 3 of the ECHR provides that, ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. Article 3 of ECHR does not define torture, nor inhuman or degrading treatment or punishment.

As in the case with the corresponding Article 7 of the ICCPR, the rule is absolute in the sense that no degradation may be made from it. The dropping in the word ‘cruel’ does not signify any difference in substance.

Articles 3 and 15 (2) together clearly suggest that the drafters of the Convention intended the rights enshrined in Article 3 to be superior in that they are not subject to exception or derogation, even in time of war or other public emergency threatening the life of the nation.\(^8^0\). The newly constituted European Court of Human Rights is able to receive individual applications from any member state of the Council of Europe claiming to be a victim of a breach of the Convention. Its judgments are legally binding.

The Council of Europe Declaration on the Police 1979

On 8 May 1979, a Declaration on the Police was adopted by the Parliament Assembly of Council of Europe. It covers all individuals and organizations, including such bodies as secret services military police forces, armed forces or military performing police duties that are responsible for enforcing the law, investigating offences and maintaining public order and State security. It declares that ‘torture and other form of inhuman or degrading treatment or punishment remain prohibited in all circumstances’. A police officer is under obligation to disobey or disregard any order or instructions involving such measures. Article 3 of the Declaration prohibits summary execution of torture and other ill treatment in all circumstances.\(^8^1\).

\(^8^0\) Aksoy v Turkey, ECHR (Ser.A)1997.

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987

The European Convention for Human Rights has been complemented by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which establishes the Committee for the Prevention of Torture (CPT). It is procedural Convention with no substantive provisions, setting up a Committee with vide supervisory powers. Committee performs its mandate through inspection visits to States which have rectified it.

The European Convention neither defines torture, nor inhuman or degrading treatment or punishment. The European Court and Commission have defined the word torture. According to European Commission in the Greek case, torture is not necessarily the nature and severity of the act, but rather the purpose for which it was perpetrated. European Commission further held that, “Torture has a purpose, such as the obtaining of information or confession, or the infliction of punishment and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or derives him to act against his will or conscience.”

However in case of Ireland v UK, the Court drew a distinction between torture, inhuman treatment and degrading treatment. An act must cause “serious and cruel suffering” to constitute torture.

Inhuman treatment is such a treatment as is not sufficiently severe, or without the purposive element, to constituent torture, but yet which crosses the upper ‘severity threshold’ of degrading treatment.

Threat to use, corporal punishment which did not in fact took place in case of Campbell and Cosans v UK, Court stated that ‘real and immediate threat of conduct prohibited by Article 3 might be in some circumstances constitute at least ‘inhuman treatment’.

In the Greek case, the Commission considered degrading treatment as, ‘a treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience’. The

84 Nos 7511/76 and 7743/76, ECHR No.48, Judgment of 25 February 1982.
85 Supra note 82.
Commission and Court further expanded this definition in *East African Asians v UK*[^86], case and stated that an action, which lowers a person in rank, position, reputation or character, can only be regarded as degrading treatment, where it reaches a certain level of severity. This definition of degrading treatment further explained in case of *Tyrer v UK*[^87], in which the court observed that, ‘in order for punishment to be degrading, the humiliation must attain a particular level’.

There is both an objective and a subjective element to the assessment of whether the treatment reaches a minimum level of severity. In *Campbell and Cosans v UK*[^88], Court stated that, the treatment itself will not be degrading unless the person has undergone either in eyes of others or in his own eyes humiliated, attaining a minimum level of severity.

The absence of an intention did not bar consideration of the alleged violation of Article 3. In case of *V v UK*[^89], Court considered that, the absence of purpose cannot conclusively rule out the finding of a violation. However in case of *Price v UK*[^90], the Court took the absence of intent into account when considering the amount of compensation to be awarded.

Article 3 imposes a negative obligation upon State not to subject people to torture, inhuman and degrading treatment or punishment. The Court and Commission considered that State has positive duties to protect individuals from these forms of abuse.

1. **Duty to protect from ill-treatment by private actors** - Article 1 of the Convention imposes an obligation on State parties to secure everyone within their jurisdiction the rights and freedoms defined in the Convention. Article 3 requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment by private actors. Considering these two provisions Court in case of *A v UK*[^91] held that State has a duty to take measures to ensure that individuals are not subjected to ill-treatment by private actors. State obligation arose out of the necessity for the removal or mitigation of harm, for instance, preventing any ill-treatment by public bodies or private individuals or providing improved conditions or care.

[^87]: No.5856/72, ECHR No. 26, Judgment of 25 April 1978.
[^88]: Supra note 84.
[^89]: No. 24888/94, ECHR No.9, Judgment of 16 December 1999.
2. **Duty to investigate**- Article 3 imposes an obligation on State parties to conduct an effective investigation into the allegation of ill-treatment. In the *Greek Case* and *Ireland v UK*, the Commission and Court held that burden of proof into the allegation of ill-treatment was beyond reasonable doubt. But when a person is in the custody or control of State authorities and they have exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. In case of *Assenov and Others v Bulgaria*[^92], Court extended the State obligation and noted that without such a duty to investigate, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity[^93].

3. **Duty to exclude evidence obtained by torture or other ill-treatment**: Any use of evidence obtained by torture violates Article 6(1) as well as Article 3 of the convention. Article 6(1) provides that, ‘in the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. The European Court held that incriminating evidence obtained as a result of torture should never be relied on as proof of the victim’s guilt, irrespective of its probative value. If such evidence is allowed it would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe[^94].

4. **Duty to train personnel and provide procedural safeguards**- Article 5 of the Convention provides that every detention must be in accordance with a procedure prescribed by law, that everyone who is arrested must be informed promptly of the reasons for the arrest and all arrestees and detainees must be brought promptly before a judge.

   Article 6(2) provides that everyone shall be considered innocent until proven guilty, while the elements of a fair trial are laid down in Article 6(3), which provides:

   ‘Everyone charged with a criminal offence has the following minimum rights:

   a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

   b) to have adequate time and facilities for the preparation of his defence;

[^93]: *Ibid*
[^94]: *Jalloh v Germany*, No. 54810/00, Judgment of 11 July 2006.
c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e) to have the free assistance of an interpreter if he cannot understand or speak the language used in Court."

The European Court further explained that proper medical examinations are an essential safeguard against ill-treatments of persons in custody. Such examination must be carried out by a properly qualified doctors, without any police officer being present and the report of the examination must include not only the detail of any injuries found, but the explanations given by the patient as to how they occurred and the opinion of the doctor as to whether the injuries are consistent with those explanations.\(^\text{95}\)

5. **Duty to grant redress and compensate victims** - Article 46 imposes an obligation on State to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. Article 41 empowers the Court, if national law does not allow or allows only partial reparation to be made for the consequences of the breach, to afford the injured party such satisfaction as appears to it to be appropriate.

The Court if finds a violation of the Convention or its Protocol imposes legal obligation on State party not only to pay compensation, if appropriate, individual measures to be adopted to put an end to the violation found and make all feasible reparation for its consequences in such a way so as to restore as far as possible the situation existing before the breach.\(^\text{96}\)

6. **The absolute nature of the prohibition of torture and other ill-treatment** - Article 15 of the Convention provides that the State may never derogate from its obligations under Article 3, even in times of ‘war or other public emergency threatening the life of the nation’. In *Ireland v UK*, the Commission holding that the prohibition was ‘an absolute one and that there can never be under the Convention or under international law, a justification for acts in breach of the provision prohibiting torture or other ill-treatment’.\(^\text{97}\)


\(^{97}\) Supra note 83.
The conduct of victim at the time of detention is not necessarily a defence to inhuman or degrading treatment. The Court further explained that, ‘Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in event of a public emergency threatening the life of the nation’.

The European Committee for the Prevention of Torture (CPT)
CPT was set up under the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, 1987. It is composed of as many independent and impartial members as there are State parties to the Convention and may be assisted by ad hoc experts. 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. State parties are obliged to provide the CPT with access to its territory and the right to travel without restrictions, 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. The CPT is also entitled to interview in private persons deprived of their liberty and to communicate freely with anyone whom it believes can supply relevant information. Article 10(1) provides that the report on the visit and detail of recommendations sent to the Government are confidential unless the Government concerned decides that they can be published.

Unlike the Commission and the Court, the Committee for the Prevention of Torture is not a judicial body empowered to settle legal disputes or redress legal wrongs. The CPT is a mechanism intended first and foremost to prevent ill-treatment from occurring, in special cases intervene after the event. Its activities aim at ‘conflict avoidance’ on the practical level, where as the Commission and the Court aim at ‘conflict solution’ on the legal level. In other words, the Commission and the Court can only intervene after having been petitioned by individuals or States, which also have to conform to certain procedural criteria, the CPT intervenes ex officio through periodic follow-up and ad hoc visits.

This is submitted that this new approach to fight against the scourge of torture is worthy of being tried out in other parts of the world. In 1993, World Conference on Human Rights reaffirmed that the efforts to eradicate torture should, first and foremost, be concentrated on prevention and to this end called for the early adoption of an Optional Protocol to the Convention against Torture, to establish a preventive system of regular visits to places of detention.

The Inter-American Regional System Containing Provisions Relating to Torture

American Convention on Human Rights, 1978

The Charter of the Organization of American States (OAS) was signed on 30 April 1948 at the Ninth International Conferences of American States convened in Bogota. The Charter reaffirmed and proclaimed the principle of the OAS ‘the fundamental rights of the individual without distinction as to race, nationality, creed or sex’. At the same conference, the American Declaration of the Rights and Duties of Man was adopted in the form of a resolution101.

In 1959 in Santiago, the fifth meeting of consultation of Minister of Foreign Affairs adopted a resolution creating the Inter-American Commission on Human Rights and in the following year the OAS Council adopted the Statute of the Commission and elected its seven members. The Statute described the Commission as an autonomous entity of the Organization of American States, the function of which is to promote respect for human beings102.

The American Convention on Human Rights (ACHR) drafted by the Inter-American Council of Jurists was adopted in 1969 at an Inter Governmental Conference convened by the OAS in San Jose, Costa Rica. It entered into force in July, 1978. Preamble of the Convention states that purpose of Convention is to ‘consolidate in this hemisphere, within the framework of democratic institution, system of personal liberty and social justice based on respect for the essential rights of man’103.

Article 5 of the Convention provides:

102 Ibid.
103 Ibid.
1. Every person has the right to have the 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, 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 of the reform and social re-adaptation of the prisoners.

The American Convention does not define the types of conduct which constitute torture or cruel, inhuman or degrading treatment, nor does it differentiate between the prohibited acts.

**Inter-American Convention to Prevent and Punish Torture, 1985**

Inter-American convention to prevent and punish torture 1985, (IACPPT) is an international instrument, created within the American States and intended to prevent torture and other similar activities.

Article 2(1) of the IACPPT defines torture as

‘Any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this Article.’

Definition of torture given under IACPPT is more explanatory than given under UNCAT. As the definition given under IACPPT does not require that the pain or suffering be ‘severe’ makes reference ‘to any other purpose’ rather than such purposes as
in the UNCAT and includes methods intended to obliterate the personality of the victim or diminish his capacities, independently of whether such methods cause pain or suffering.

The Inter-American Court gave wider definition of torture as in case of *Tibi v Ecuador*\(^{104}\). The Court found that the aim of repetitive execution of these violent acts was to diminish the physical and mental abilities of the victim and annul his personality for him to plead guilty of a crime. The Court further observed that acts that have been planned and inflicted deliberately upon the victim to wear down his psychological resistance and force him to incriminate himself or to confess to certain illegal activities, or to subject him to other types of punishment, in addition to imprisonment itself can be classified as physical or psychological torture.

The Inter-American Commission became the first international adjudicatory body to recognize rape as torture in *Requel Martide Mejia v Peru*\(^{105}\).

**Cruel, inhuman or degrading treatment or punishment**

The IACPPT does not provide definition of such conduct or indicate difference between torture and ill-treatment. The Inter-American Court and Commission considered that whether an act or practice constitutes torture or other ill-treatment can be classified on the basis of peculiarities of the case, the duration of the suffering and physical and mental effects of the victim and the personal circumstances of the victim.

The Inter-American Court held that the distinction between torture and other prohibited acts is not rigid, but rather evolves in light of growing demands for protection of fundamental rights and freedoms. Thus, an act which in the past may have been deemed cruel, inhuman and degrading treatment or punishment, could in the future constitute torture\(^{106}\).

Article 16 of IACPPT provides that the State parties shall take effective measures to prevent and punish torture within their jurisdiction.

Article 3 of Convention provides that, the following shall be held guilty of the crime of torture:

a) A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.

\(^{104}\) IACHR No.114, Judgment of 7 September 2004.

\(^{105}\) IACHR No. 197, Judgment of 1996.

b) A person, who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

Convention provides that State parties will be responsible for the act which violates human rights and which is initially not directly imputable to State can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

State responsibility for acts of violence in the private sphere is further extended in the Inter-American Convention to Prevent, Punish and Eradicate violence against women. Article 1 of the Convention defines violence against women as, ‘any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to woman, whether in the public or the private sphere’.

Article 8 of the Convention imposes an obligation on the State parties relating duty to investigate when there is allegation of torture. It provides that,

‘The State parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.
Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the State parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.
After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.’

The Inter-American Court imposes a compulsory obligation on State parties and reaffirmed that, ‘the duty to investigate is a compulsory obligation of the State embodied in international law, which cannot be mitigated by any domestic legislation or act whatsoever.’ It further considered that at time of investigation the State, ‘should take into consideration the international rules for documenting and interpreting forensic evidence elements regarding the commission of acts of torture and particularly those defined in the Istanbul Protocol’. The aims of conducting such investigations include avoiding repetition, fighting impunity, and respecting the right of the victim to know the truth as well as the society as a whole has a right to know the truth about the events.

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The Convention under Article 6 provides that to prevent torture the state parties shall ensure that all acts of torture and attempts to commit torture are offences under domestic law. State parties shall also take effective measures to prevent and punish other cruel, inhuman or degrading treatment or punishment within their jurisdiction.

Article 12 of the Convention provides that every State shall take the necessary measures to establish its jurisdiction over the crime described in this Convention in the following cases:

a) Where torture has been committed within its jurisdiction.

b) When the alleged criminal is a national of that State or

c) When the victim is a national of that State and it so deems appropriate.

Each State party shall also take the necessary measures to establish its jurisdiction over the crime described in the Convention when the alleged criminal is within the area under its jurisdiction and it is not appropriate to extradite him in accordance with Article 11. Convention further provides that the State parties undertake to include the crime of torture as an extraditable offence in every extradition treaty to be concluded between them.

Article 14 of the Convention provides that when a State party does not grant the extradition, the case shall be submitted to its competent authorities as if the crime had been committed within its jurisdiction for purposes of investigation and when appropriate, for criminal action, in accordance with national law. Convention provides that State parties shall ensure that any statement obtained through torture shall not be admissible as evidence except in legal action taken against a person or persons accused of torture and only as evidence that the accused obtained such statement by such means. American Convention of Human Rights also provides that every person has the right not to be compelled to be a witness against himself or to be pleaded guilty. It further provides that a confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

The IACPPT provides that State parties shall take measures, in the training of police officers and other public officials responsible for the custody of persons temporarily or definitively deprived of their freedom, special emphasis shall be put on the prohibition of torture in interrogation, detention, or arrest.

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108 Article 10 of Inter American Convention to Prevent and Punish Torture.
109 Article 8 of the American Convention of Human Rights.
110 Article 7 of Inter-American Convention to Prevent and Punish Torture.
The State parties likewise shall take similar measures to prevent other cruel, inhuman or degrading treatment or punishment. Convention provides that right to a hearing, the presumption of innocence, the right to be assisted by an interpreter, the right to be notified in detail of all charges and the right to defence and free communication with counsel is essential for protection of rights to personal integrity and liberty.

The State has the obligation to provide regular medical examinations and care of prisoners and also adequate treatment when this is required. The State must allow and facilitate prisoners being treated by the physician chosen by themselves or by those who exercise their legal representation and guardianship. Convention provides that State parties shall take measures to pay suitable compensation to victims of torture. The State can fix the manner in which this right can be exercised but that cannot invoke domestic legal provisions to modify or breach their obligation to provide redress, which is regulated by international law.\(^{111}\)

Inter-American Court ordered in case of *Vargas Areco v Paraguay* that the State will apologise to the victim’s relative, prepare audiovisual presentation on the case for elementary and secondary schools to illustrate the risks of compulsory military service and name the street after the victim.\(^{112}\)

The IACPPT reinforced this absolute prohibition as regards to individual criminal liability for torture at the domestic level by providing that the fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability. The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbances or strife, suspension of constitutional guarantees, domestic political instability or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture. Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.\(^{113}\)

The absolute prohibition applies not only to torture but also to cruel, inhuman or degrading treatment or punishment.

Convention provides that this Convention shall not limit the provisions of the American Convention on Human Rights, other Conventions on this subject or the Statutes of the Inter-American Commission on Human Rights with respect to the crime of torture.

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\(^{111}\) Article 9 of the Inter-American Convention to Prevent and Punish Torture.

\(^{112}\) *Supra* note 107.

\(^{113}\) Articles 4 and 5 of the Inter American Convention to Prevent and Punish Torture.
Convention provides that the State parties undertake to inform the Inter-American Commission on Human Rights of any legislation, judicial, administrative or other measures they adopted in application of the Convention in regard to prevention and elimination of torture.

This is submitted that Inter American Court and Commission did not only expand the definition of torture and ill-treatment but also the State obligations. Court and Commission in spite of giving compensation to the victims of torture, gave order to name the street after the victim, erection of monuments and introduction of items in school curricula so that society remember them about what has done in their name.

**African Regional System Containing Provision Relating Torture**

**African Charter on Human and Peoples’ Rights, 1981**

The initiative for an African Human Rights Charter was taken at a meeting of African Jurists – the African Conference on the Rule of Law convened by the International Commission of Jurists (ICJ) in Lagos in 1961. The idea was developed at number of UN seminars and ICJ Conferences held in the following years. At a UN seminar in Monrovia which was attended by the representatives of thirty African States, several specific proposals relating to the establishment of a regional commission in Africa were floated. The draft proposed by African experts was considered at two sessions of the Conference of the Organization of Africa Unity (OAU) Ministers of Justice held in the Gambia in 1980 and 1981. The African Charter on Human and Peoples’ Rights (AFCHPR) were unanimously adopted at Nairobi Assembly of Heads of State and Government of the OAU. It became operative in October, 1986 and an African Commission began functioning in that continent on 2 November 1987114.

An eleven-member Commission has the task of promoting the rights ensuring their protection and interpreting the AFCHPR. The Commission is mandated to collect documents, undertake studies and researches on African problem in the field of human and peoples’ rights, organize seminars, conferences, disseminate information and encourage national and local institutions concerned with human and peoples’ rights115.

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In 1998 the thirty-fourth Summit of Heads of State and Government of the OAU adopted a Protocol to the AFCHPR for the establishment of an African Court on Human and Peoples’ Rights116.

Article 5 of the African Charter provides that:

‘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’. Article 5 prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him to act against his will or conscience. Chapter II of the Charter specifically enumerates the duties of State parties.

The African Commission has held that human dignity is an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right. But in case of Zimbabwe Human Rights NGO Forum v Zimbabwe117, the Commission observed that, the State had investigated allegations of torture bought to its attention and the complainant had not adduced evidence to show that State organs were responsible for and had acquiesced in specific acts of torture, so there was no violation of Articles of the Charter.

Article 1 of the Charter provides that, the member States of the Organization of Affairs Unity, parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them. The African Charter provides that, every individual shall have-

- Right to an appeal to competent authority against acts of violation of fundamental rights.
- Right to be presumed innocent until proved guilty.
- Right to be defended by Counsel of his choice.
- Right to be tried within a reasonable time.

The African charter imposes an obligation on State parties to take effective and enforceable remedies in case of human rights violations118. The Robber Island Guidelines provide that this obligation exists independently of whether a criminal prosecution has or

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116 Ibid.
can be brought. It extends to victims and their dependents and covers medical care, social and medical rehabilitation, compensation and support\textsuperscript{119}.

It is submitted that African Commission has no mechanism for enforcing its decisions and recommendations. Procedure before the Commission is amicable resolution between the complainant and the State concerned. A pre-requisite for amicable resolution is the good faith of the parties concerned, including their willingness to participate in a dialogue.

**International Tribunals Containing Provisions Relating Torture**

**Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of former Yugoslavia (ICTY) (1993), Tribunal on Rwanda, 1994 (ICTR)**

The prohibition of torture is embodied in several international human rights instruments. These instruments have the same characteristic and they are concerned with the right to be free from torture as a human right to be guaranteed by the State and a State responsibility. Under the statutes of the ICTY and ICTR, torture is considered as a war crime and as a crime against humanity.

Article 21 the Statute of ICTY gives the Tribunal jurisdiction over grave breaches of the Geneva Conventions of 1949 and other violations of the laws or customs of war. On the other hand, the statute of ICTR covers violations of Article 3 common to the Geneva Conventions and Additional Protocol II of 1997, both of which apply to internal armed conflict.

The definition in the ICTR statutes provides that the Tribunal shall have the power to prosecute persons for the crimes of murder, extermination, enslavement, deportation, imprisonment, torture, rape, prosecution and other inhuman acts, when committed as a part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds\textsuperscript{120}.

The ICTY statute requires that crime be, ‘committed in armed conflict, whether international or internal in character’ rather than as a part of a widespread or systematic attack\textsuperscript{121}.

\textsuperscript{119} Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002).

\textsuperscript{120} Article 3 of the Statute of the International Criminal Tribunal for Rawanda.

\textsuperscript{121} Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia.
Trial Chamber I of the ICTR adopted the UNCAT definition of torture and held that, to qualify as torture, the infliction of pain or suffering must be for one of the following purposes

a) to obtain information or a confession from the victim or a third person,
b) to punish the victim or a third person for an act committed or suspected of having been committed by either of them,
c) for the purpose of intimidating or coercing the victim or the third person,
d) for any reason based on discrimination of any kind.\footnote{Prosecution v Akayesu, Case No. ICTR-96-4, Trial Chamber I, Judgment of 2 September 1998.}

However the ICTR does not consider this list to be exhaustive. Degrading, humiliation and control or destruction of a person also came within the prohibited purposes for the offence of torture under the jurisdiction of the ICTR.\footnote{Ibid.}

Trial Chamber II of ICTY emphasized that the purpose is one of the elements that sets torture apart from other forms of mistreatment. In the absence of purpose or goal, even very severe infliction of pain would not qualify as torture pursuant to Article 3 or Article 5 of the Tribunal’s Statute. It must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose.\footnote{Prosecution v Kronjelac, Case No. IT-97-25, Trial Chamber II, Judgment of 15 March 2002.}

Article 7 of ICTY Statute and Article 6 of the ICTR Statute provide that, a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in the present Statute, shall be individually responsible for the crime.

The Trial Chamber of ICTR expressed that the essential element of torture is that the perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity.\footnote{Supra note 124.} But the Trial Chamber of ICTY is of the view that the presence of a State official or if any other authority wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law. Thus, for the ICTY at least, there is no ‘official capacity’ requirement for the crime of torture.\footnote{Prosecutor v Kunaroc, Kovac and Vukovic, Case Nos. IT-96-23 and IT-96-23/1, Trial Chamber II, Judgment of 22 February 2001.}

The Tribunals under the Statutes of the ICTR and ICTY consider that the distinction between torture and other offences of ill-treatment lies in the purpose of the act and its gravity. The existence of a prohibited purpose will allow the Tribunals to
qualify acts as ‘torture’ but where such a purpose is lacking; the acts will fall under the other categories of ill-treatment.

The ICTY has defined inhuman treatment as ‘an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity’\textsuperscript{127}.

All acts of torture constitute inhuman treatment but inhuman treatment is a wider offence which also includes ‘treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture’\textsuperscript{128}.

**Rome Statute of International Criminal Court, 1998**

In 1998, the United Nations Diplomatic conference of Plenipotentiaries was held in Rome, Italy, to adopt a Convention on the establishment of an International Criminal Court. The Rome conference culminated in the approval, by majority vote, on the text of the Statute of the International Criminal Court (ICC). The statute became effective on 1 July 2002\textsuperscript{129}.

Jurisdiction of the ICC has been confined to the crime of genocide, crimes against humanity, war crimes and crimes of aggression. Its jurisdiction \textit{ratione personae} and jurisdiction \textit{ratione territorium}, in cases other then Security Council referrals, are based on the principles of nationality and territoriality. In cases other than Security Council referrals, the ICC can only exercise jurisdiction if the State of which the suspect is a national or the State on whose territory the crime was committed has either ratified the ICC Statute or has, on an \textit{ad hoc} basis, accepted the exercise of jurisdiction by the ICC in the particular case to be prosecuted. Torture has been listed in the ICC Statute as both a crime against humanity and a war crime\textsuperscript{130}.

The ICC has defined torture for the purposes of crime against humanity as, ‘the infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused except the torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions’\textsuperscript{131}.

\textsuperscript{127} *Prosecutor v Delalic and Others*, Case No. IT-96-21, Trial Chamber II, Judgment of 16 November 1988.
\textsuperscript{128} *Ibid*.
\textsuperscript{129} Rome Statute of International Criminal Court.
\textsuperscript{130} Article 12 of Rome Statute of International Criminal Court.
\textsuperscript{131} Article 7(2) (e) of Rome Statute of International Criminal Court.
The main difference between ‘torture’ as defined in the Torture Convention and ‘torture’ as defined for purposes of ICC jurisdiction over crimes against humanity is that the culprit in the latter is not confined to persons acting as, or with the consent or acquiescence of a public official or in official capacity. Torture as a crime against humanity includes any infliction of severe pain or suffering pursuant to a Government or organizational policy. Members of Liberation movement, who inflict pain or suffering in order to provoke confessions from, or to punish, suspected Government spies who may have infiltrated the movement will not be liable under the Torture Convention. However, they could potentially come within the jurisdiction of ICC if the application of torture was widespread or systematic in furtherance of the policies of the movement and if the person or persons tortured were civilians\(^{132}\).

Statute of the ICC provides that in order for torture to qualify as a crime against humanity, the person or persons upon whom severe physical or mental pain or suffering has been inflicted must be members of the civilian population. The decision to limit potential torture victims in this way has been criticized\(^{133}\). In \textit{Prosecutor v Kupreskic}\(^{134}\), the ICTY stated that crimes against humanity are intended to safeguard basic human values by banning atrocities directed against human dignity. Why only civilians and not also combatants should be protected by these rules. However, the Tribunal has to abide by the language of the statute that it was called upon to implement.

The distinction between torture and inhuman treatment is based on the severity of the suffering inflicted as well as the purpose for which it is inflicted. The inhuman treatment also extends to ‘acts which violate the basic principles of humane treatment, particularly the respect for human dignity’\(^{135}\).

The conclusion seems inevitable that torture as a crime under customary international law is wider in scope than torture as defined in the Torture Convention. The other side is that the Torture Convention applies to all instances of torture that fall within the definition including isolated cases while the ICC jurisdiction is confined to instances of torture which are widespread or have been systematically applied as part of the policy of a Government or of an organization\(^{136}\).


\(^{133}\) Article 7 (1) of Rome Statute of International Criminal Court.

\(^{134}\) Case No. IT-95-15, Trial Chamber II, Judgment of 14 January 2000.

\(^{135}\) \textit{Ibid.}

\(^{136}\) Articles 7(1) and 7(2) (a) of the Rome Statute of International Criminal Court.
It is submitted that torture is listed as one of the crimes in the Statutes of International Criminal Tribunals. It ‘has evolved into a peremptory norm or *jus cognes*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ordinary customary rules’.

Torture and CIDTP are banned as a matter of customary international law and this prohibition is enshrined in a number of international legal instruments and by a variety of international and regional Courts and institutions. However, enforcement mechanisms at the international and regional level remain relatively weak or altogether lacking, so non-legal measures are required to backup and consolidate progress. State obligations to investigate, to exclude evidence obtained by torture or ill-treatment, and to grant compensation to victims apply at this stage. The judges and prosecutors have a responsibility to ensure that the standards to protect people against torture 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.