CHAPTER 1

GENERAL INTRODUCTION

1.1 Background to the Study

Torture has been recognized as one of the worst violations of human right. States have a duty, under international law, to take all necessary measures to prevent and punish it as well as afford effective remedies to the victims. Any serious violation of human rights represents a debasement of the political process, as well as a deprivation for those whose rights are violated. When violation of human rights becomes part of a systematic pattern of governance, it undermines the prospect of humane relations between government and its citizenry. At present, in a large number of states the systematic and deliberate violation of the fundamental human right not to be subjected to torture is an integral part of the governing process. Indicative of this pervasive phenomenon is the Amnesty International report which concludes that “torture or ill-treatment by state officials appears to be occurring in more than 150 countries. In more than 70 countries, torture was widespread or persisted. In more than 80 countries, people reportedly died as a result.”

State responsibility arises from the breach of an international obligation. Responsibility has become a general principle of international law, including the principle of state responsibility. Any act or omission which produces a result which


3 Amnesty International, Take a Step to Stamp out Torture, 18, October, 2000.

is on its face a breach of a legal obligation gives rise to responsibility in international law.\textsuperscript{6} This is the same whether the breach is committed by an individual or by a state organ.\textsuperscript{7} In practice, the acts of torture are often perpetrated by members of the armed forces, paramilitary or law enforcement officials.\textsuperscript{8} The question is whether responsibility should only be attributed to the state or also to all those who commit such acts, whether they act as individuals or as state officials.

In principle, the police represent public authority. It is one of the main lines of contact between the citizen and the state, which has the prerogative and monopoly in the use of legitimate force. As such, the function of the police officer is carried out in a context of intrinsic tension between, on the one hand, the need to maintain public order, which is necessary for the protection of human rights, and, on the other hand, the obligation of absolute respect for the person. While the police are one of the agents of protection of citizens' rights and peace, it is also exposed to the danger of violating human rights. This dichotomy places the police in a delicate situation. The manner in which it fulfils this role and operates in this field is crucial, as the proper functioning of the police is an essential element in the full implementation of human rights. Indeed, while a poorly trained, badly organised and 'ill-defined' police force is liable to violate human rights, one which operates with objectives adapted to societal needs and with clear values is more likely to give better service to society and to consolidate access to human rights for all citizens.\textsuperscript{9}

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6 Ibid., p. 439.


8 Daniela Baro, Children Witnessing Atrocities against Parents or Caregivers, a Human Rights Perspective, Torture, Journal on rehabilitation of torture victims and prevention of torture, n. 1 above, p. 205.

Beyond state responsibility, the question is whether or not the author of crimes committed deliberately or recklessly should be held responsible for the act. The answer is obvious. The author must be held accountable.\textsuperscript{10} Individual accountability affirms the normative value of life and upholds respect for human dignity.\textsuperscript{11} Torture and other forms of persecution are antithetical to these values, and impunity further undermines them.\textsuperscript{12} Promoting accountability by bringing the culprits to justice not only deters them from repeating their crimes, but also makes it clear to others that torture and ill-treatment will not be tolerated.\textsuperscript{13} Similarly, promoting accountability encourages the search for truth.\textsuperscript{14} By pursuing cases against torturers, a public record is created that describes the human rights abuses committed by the perpetrators and the injustices suffered by the victims.\textsuperscript{15} However, when institutions responsible for upholding the law routinely flout it, even when dealing with their own members, they undermine the whole criminal justice system.\textsuperscript{16} Combating impunity means striking at the very heart of this institutional malaise.\textsuperscript{17}

States that pursue cases against torturers also perform the crucial function of distinguishing individual responsibility from group responsibility.\textsuperscript{18} Groups identified by certain shared characteristics often receive public blame, both at home and

\begin{itemize}
\item \textsuperscript{10} Baro, n. 8 above, p. 205.
\item \textsuperscript{11} Williams J. Aceves, United States of America: A Safe Haven for Torturers, Amnesty International USA Publications, 2002, p. 6.
\item \textsuperscript{12} Ibid.
\item \textsuperscript{13} Take a Step to Stamp out Torture, n. 3 above.
\item \textsuperscript{14} Aceves, n. 11 above, p. 7.
\item \textsuperscript{15} Mark Andrew Sherman, Some Thoughts on Restoration, Reintegration, and Justice in the Transnational Context, 23 Fordham international Law Journal (2000), p. 1397.
\item \textsuperscript{16} Take a Step to Stamp out Torture, n. 3 above.
\item \textsuperscript{17} Ibid.
\item \textsuperscript{18} Aceves, n. 11 above, pp. 6-7.
\end{itemize}
abroad, for the crimes of relatively few offenders. Judge Richard Goldstone, the first prosecutor of the International Criminal Tribunal for the former Yugoslavia, explained this phenomenon in the context of regional human rights abuses: “Too many people in the former Yugoslavia still blame Serbs or Croats or Muslims for their suffering. The Tribunal’s mandate is to help reverse this destructive legacy.”

Legal proceedings against torturers focus blame where it belongs, calling individuals to account for their crimes and absolving communal blame.

Torture is a serious violation of human rights and is strictly prohibited by a number of international, regional and national human rights instruments, including the laws of war. The general aim of torture is to destroy a human being, destroy his/her dignity and self esteem. Torture is not only intended to extract information or obtain a confession; its aim is the deliberate destruction of bodily and physical integrity in order to stifle dissent, intimidate opposition and strengthen the forces of tyranny. Torture aims to disorientate people to such a degree that their


20 Aceves, n. 11 above, p. 7.


23 The Constitution of the Federal Republic of Nigeria 1999, section 1 of the Constitution provides: “Every individual is entitled to respect for the dignity of his person and accordingly- (a) no person shall be subjected to torture or to inhuman or degrading treatment.”


26 Miller, n. 7 above, p. 229.
personalities and identities are destroyed. Central to the practice of torture is the intention to inflict cruelty and destruction. It is perhaps best summarized by a Berber proverb: “whoever wants to hurt never misses his/her target.” Torture is often used to punish, obtain information or confession, destroy the individual, destroy the family, terrorize or cause fear within the community or population and in most recent times, torture has been part of ethnic cleansing.

The prohibition of torture enshrines one of the most fundamental values of democratic society. Its prohibition in a national constitution commits the country, and specifically its law enforcement officers, to performing their duties with due regard to the essential dignity of every human being. Constitutional provisions are binding on all the citizens, and must be obeyed by all; be they government officials or non-governmental officials. In the same vein, various international, regional and national human rights instruments prohibiting torture must be complied with, particularly those that relate to the protection of fundamental human rights. Violation of prohibited acts of torture must be penalised through the invocation of various enforcement mechanisms.

Torture has been practised in time and space, as a method of obtaining evidence for judicial proceedings. The practice of torture became very rampant in Europe in the latter part of the Middle Ages. During this period, confession was regarded as the ‘queen of proofs’. One of the remarkable accomplishments of the

28 Ibid.
32 Ibid., p. 298.
Enlightenment period was the abolition of torture as a routine element of criminal procedure. As Edward Peters observes:

“...a large literature condemning torture on both legal and moral grounds grew up and was circulated widely. Its best-known example was Cesare Beccaria’s immensely influential treatise on Crimes and Punishment of 1764....After the end of the eighteenth century torture acquired a universally pejorative association and came to be considered the antithesis of rights.”\(^\text{34}\)

Unlike slavery which is still practised but affects relatively few people,\(^\text{35}\) torture is widespread and growing.\(^\text{36}\) Scores of governments, among them governments which are widely viewed as fairly civilized, are now using acts of torture.\(^\text{37}\)

The prohibition of torture or other cruel, inhuman or degrading treatment or punishment is a universal norm that has acquired the status of a peremptory norm of both conventional and customary international law.\(^\text{38}\) Because of the importance of the values it protects, this principle has evolved into a peremptory norm; that is, a norm that enjoys a higher place in the hierarchy of norms. A norm of this high order cannot be derogated from by states through international treaties or customary law unless endowed with the same normative force.\(^\text{39}\) It is against this background that the prohibition of all such practices was explicitly included in 1948


\(^{36}\) Ibid.

\(^{37}\) Ibid.

\(^{38}\) The prohibition against torture has become a norm of international law. A norm of international law is one which is generally considered binding on all states, regardless of their signing a convention or actually practicing in accordance with the norm. This view has been endorsed by decisions in a number of domestic jurisdictions, including the landmark US case of Filartiga v Pena-Irala 630 F 2d 876 (2d Cir 1980), 77 ILR 169 Kadic v Karadzic, 70 F 3d 232 (2d Cir 1995), 104 ILR 136.

\(^{39}\) William Schabas, Prohibition of Torture, Prohibition of Death Penalty and Life Imprisonment (Article 37(a) in Jayawickrama (ed.), n. 31 above, p. 3.
Universal Declaration of Human Rights (UDHR).\textsuperscript{40} Article 5 of the Declaration reads: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

In 1966 the prohibition was included in the International Covenant on Civil and Political Rights (ICCPR).\textsuperscript{41} Article 7 of the Covenant states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

In similar wording, the phrase is echoed in the two other regional human rights conventions. Article 3 of The European Convention on Human Rights and Fundamental Freedoms (1950) provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. This Convention has been supplemented by the European Convention for the Prevention of Torture or Degrading Treatment or Punishment (1987) (ECPT)\textsuperscript{42} which has been ratified by all member states of the Council of Europe. Article 5, paragraph 2, of the America Convention on Human Rights (ACHR.)\textsuperscript{43} reads: “No one shall be subjected to torture or to inhuman or degrading treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.” This Convention has been reinforced by the Inter-American Convention to Prevent and Punish Torture, 1985 (Inter-American Convention).\textsuperscript{44}


\textsuperscript{41}(1996) United Nations, Treaty series, Vol. 999, p. 171. Entered into force on 23 March 1976. This was the first universal and general human rights treaty that contained a provision devoted to a ban on torture.

\textsuperscript{42} Council of Europe, Treaty Series No. 126. Entered into force on 1 February 1989.


\textsuperscript{44} OAS Treaty Series, No. 67. Entered into force 28 February 1987.
The African Charter on Human and Peoples’ Rights of 1981 provides in Article 5: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man (sic), particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

The prohibition of torture has also been included in the Universal Islamic Declaration of Human Rights of 1981. Article VII reads: “No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him.”

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (CAT) is celebrated as one of the most successful international human rights treaties. Its adoption by the United Nations (UN) in 1984 was the culmination of an effort to outlaw torture that began in the aftermath of the atrocities of World War II. States that ratified the Convention consented not to intentionally inflict ‘severe pain or suffering, whether physical or mental’, on any person to obtain information or a confession, to punish that person or to intimidate or coerce him/her or a third person. As of May 2006, 141 states had ratified

45 The point must be made that while other instruments banning torture provide for non-derogations from the obligations enshrined in the instruments, the Africa Charter does not contain any provisions relating to derogation or suspension.

46 Universal Islamic Declaration of Human Rights, 21 Dhul Qaidah 1401, 19 September, 1981.


48 Oona A. Hathway, The Promise and Limits of the International Law of Torture, in Torture A Collection, Sanford Levinson, (ed.), 2004, p. 199. The Convention and its regional counterparts are indisputable remarkable achievements. Apart from outlawing torture, the instruments set various standards for achieving the goals and aspirations of the instruments. Appropriate monitoring and enforcement mechanisms are also spelt out in the instruments.

49 Ibid.
CAT. The latter stands as a symbol of the triumph of international order over disorder, of human rights over sovereign privilege and impunity.\textsuperscript{50}

In order to protect persons deprived of their liberty from being subjected to torture, the UN came up with the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).\textsuperscript{51} Article 1 states: “The objective of this Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.”\textsuperscript{52}

It is worth mentioning that the inclusion of prohibitions on torture in human rights laws should not overshadow the important contributions to banning torture made by international humanitarian law over the last century.\textsuperscript{53} At the time of the adoption of the Geneva conventions and the Universal Declaration of Human Rights, the literature relating to the law of wars sometimes made reference to human rights.\textsuperscript{54} However, it never failed to stress the continuing cleavage between the two branches of the law, although the similarity of their aims gives the impression of their being closely related.\textsuperscript{55} The ‘right not to be subjected to torture’ is an area where human rights law and humanitarian law clearly converge and

\textsuperscript{50} Ibid.


\textsuperscript{52} Article 4 of the Protocol is very significant. It imposes responsibility on Each State party. Each State Party must allow visits to any place under their jurisdiction and control where persons are or may be deprived of their liberty by virtue of any order whether formal or informal.


\textsuperscript{54} Ibid., p. 416.

\textsuperscript{55} Ibid., pp. 416-417.
where the two sets of norms reinforce each other. According to Kalin, “the different provisions on torture are a good example of how norms for the protection of human beings today are often based on unified concepts that underlie different institutional frameworks.”57 Such is the case for the rules contained in the (Fourth) Geneva Convention Relative to the Protection of Civilian Persons in Time of War.58 Commentaries, including the most recent, place these rules close to human rights because they concern the protection of individuals who do not have any military status.59

Various discreet references to human rights appear in the commentaries on the four Geneva conventions published under the editorship of Jean Pictet between 1952 and 1960.60 They relate mostly to areas in which the protection afforded by the conventions is similar to safeguards that the law places on the category of human rights or public freedoms.61 Examples are the inalienability of rights,62 the treatment of protected persons in general,63 the prohibition of torture and corporal

56 Walter Kalin, The struggle against torture, International Review of the Red Cross, Special 1948-1998, Human Rights and International Humanitarian Law. Published by the International Committee of the Red Cross for the International Red Cross and Red Crescent Movement September 1998. No. 324, p. 434. Reiterated the point and said that today, there can no longer be any doubt: international humanitarian law and international human rights law are near relations. This oft-repeated observation must now be accepted by all. Many believe that the close relationship between these two areas existed and was perceived “from the outset”. Formerly assigned to separate legal categories, it was only under the present scrutiny of modern analysts that they revealed the common attributes which would seem to promise many fruitful exchanges in the future.

57 Ibid., p. 434-435.

58 Ibid.

59 Kolb, n. 53 above, p. 417.


61 Kolb, n. 53 above, pp. 417-418.

62 Article 7 and Commentary on the First Geneva Convention, p. 82; Article 7 and Commentary on the Third Geneva Convention, p. 91; Article 8 and Commentary on the Fourth Geneva Convention, p. 78.

63 Article 27 and Commentary on the Fourth Geneva Convention, p. 200.
punishment,\textsuperscript{64} penal procedure,\textsuperscript{65} civil capacity\textsuperscript{66} and complaints and petitions from internees.\textsuperscript{67}

Without referring explicitly to ‘torture’, Article 4 of the Hague Convention on the Laws and Customs of War on Land of 1889 and 1970 states that prisoners of war must be humanely treated, clearly excluding torture from being an acceptable treatment.\textsuperscript{68} Article 3 common to the four Geneva conventions of 1949, includes on the list of minimum standards to be observed by all parties (even in non-international armed conflicts) a prohibition on violence to life and person; in particular, mutilation, cruel treatment and torture. Similarly, Protocol II prohibits violence to the life, health and physical or mental well-being of persons, in particular murder of all kinds, cruel treatment such as torture, mutilation or any form of corporal punishment. The Third Geneva Convention obliges State Parties and their authorities to treat prisoners of war in international armed conflicts humanely at all times and to respect their person in all circumstances.\textsuperscript{69} The Fourth Convention prohibits acts of violence and torture against civilians in time of war.\textsuperscript{70} Finally, Article 75 of Protocol I extends this prohibition to all persons in such situations and clarifies that ‘torture of all kinds, whether physical or mental’ is absolutely prohibited.\textsuperscript{71}

\textsuperscript{64} Ibid., Article 32, p. 223.

\textsuperscript{65} Article 99 and Commentary on the Third Convention, p. 470; Article 71 and Commentary on the Fourth Convention, p. 353.

\textsuperscript{66} Article 80 and Commentary on the Fourth Geneva Convention, p. 374.

\textsuperscript{67} Article 101 and Commentary on the Fourth Geneva Convention, p. 436.

\textsuperscript{68} A prohibition of torture can also be deduced from other Articles, including 44 and 46. Kalin, n. 56 above, p. 434.

\textsuperscript{69} Article 13 and 14 of the Third Geneva Convention relative to the treatment of prisoners of war of 12 August 1949.

Despite being stringently outlawed, torture continues to be practised in many countries throughout the world.\textsuperscript{72} The underlying assumption is that, although the prohibition of torture has become part of customary international law, the practice of torture remains widespread.\textsuperscript{73} Torturers and those who order or encourage torturers to ply their trade or acquiesce in their doing so, enjoy virtual impunity from prosecution within their own jurisdictions. In many cases, the majority of the torturers go unpunished because they are, most often than not, agents or officials of the state.\textsuperscript{74} For this reason, failure to prosecute torturers casts aspersion on the state because it has failed to discharge its responsibility. A question that needs to be asked is why is it that those who have been entrusted with special responsibility for the protection and promotion of fundamental human rights are the major violators of these rights?

In addition to the prohibition contained in Article 5 of the UDHR, Article 7 of the ICCPR and the 1975 UN Declaration on the Protection of all Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Declaration),\textsuperscript{75} there is CAT and OPCAT. The former, CAT, obliges states parties to take effective legislative, administrative, judicial and other measures to prevent acts of torture.\textsuperscript{76} Such measures include making torture punishable as a crime of a ‘grave nature’, extraditing alleged torturers or instituting criminal proceedings against them regardless of their nationality or where the

\textsuperscript{71} Article 75, paragraph 2(a) (ii) of the 1977 Protocol Additional to The Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of international armed conflicts (Protocol I).


\textsuperscript{74} Amnesty International USA, Amnesty International Report Highlights Ongoing Jailing, Torture and Murders of Suspected Political Opponents of President Kabila in Congo, Press Release October 24, 2007.

\textsuperscript{75} Declaration on the Protection of all Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Resolution 3452 (XXX) of 9 December 1975, the Assembly adopted the Declaration.

\textsuperscript{76} Article 2 of CAT.
crime is committed.\textsuperscript{77} The purport of these articles is to give the responsibility of promoting and protecting human rights and dignity to states. Since the development of democracy and the rule of law, the states have proved to be instruments for protecting the human rights and dignity of the individuals. In sum, human rights instruments and treaties are consistent in their absolute prohibition of torture and ill-treatment of individuals.\textsuperscript{78}

However, States have breached the trust reposed in them and failed to discharge their responsibility. Rather than taking effective measures to prevent acts of torture and other cruel practices, States have been fingered out as the major violators. With regard to this assertion, the observation made by Ingelse is pertinent:

“\textit{The state can also degenerate from protector (the constitutional State) to violator (a lawless state). State power is, after all, wielded by people. And while these persons may be equipped with state-sanctioned authority and the means of power in the interest of citizens, they occasionally use state power in a way that seriously violates human dignity of citizens whom these rules are specifically intended to protect. Torture is one example of this. When this problem is not solved within the state, the state degenerates into a source of violations, no longer complying with the conditions for exercising sovereignty.}”\textsuperscript{79}

Ingelse observed further that “this means that there are grounds for holding such a state accountable and if necessary, even to intervene to restore a constitutional state. This can be done by the citizens themselves, against whom the power is

\textsuperscript{77} Articles 4 and 5-7.


\textsuperscript{79} Ingelse, n. 21 above, p. 16.
being wielded improperly, but also by other bodies.\textsuperscript{80} The American Declaration of Independence\textsuperscript{81} supports this assertion by stating that, “whenever any form of Government becomes destructive of these ends, it is the right of the people to alter or abolish it.”\textsuperscript{82}

Policing is one of the means by which states can meet or fail to meet their obligations under international law; namely, to ensure respect for, and protection of, the rights and freedom of individuals within their jurisdiction.\textsuperscript{83} The extent to which some of these obligations are met depends, therefore, on the attitude and behavior of police officials towards those individuals and groups with whom they interact in the process of policing at a personal level and on a daily basis.\textsuperscript{84}

It is therefore trite to examine the activities of the police, and crucially those of other law enforcement agencies. This is because human rights law protects the rights and freedoms of individuals and groups within the society. Towards this end, police officials are uniquely placed to ensure respect for, and secure the protection of those rights and freedoms. Those who exercise power on behalf of the people they serve need to be aware of the human rights standards they are required to meet, and conform to the best practice in their fields of activity.\textsuperscript{85} In addition, the activities of persons that are not involved in law enforcement would also be examined, including areas that can give rise to torture: during wars, within the domestic sphere, and at the workplace.

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\textsuperscript{80} Ibid.
\textsuperscript{81} In Congress, 4th July 1776, USHistory.org. (last visited September 15th 2007).
\textsuperscript{82} Ingelse, n. 21 above, p. 16.
\textsuperscript{84} Ibid.
\end{flushright}
1.2 Persons or Officials with Special Responsibility for Protecting Human Rights

To list all persons with special responsibility for protecting human rights is a daunting task. However, we can single out the following: police personnel, penitentiary or correctional personnel, security forces, soldiers, peace keepers, paramilitary groups, civil defence forces and other forces other armed groups, individuals and foreign soldiers operating within the State Party’s territory, doctors, scientists, judges, lawyers, civil servants, politicians, private security companies, multinational corporations etc. It must be mentioned that the above is not exhaustive.

1.3 Research Problem

The research will investigate the problem of torture, especially when committed by persons with special responsibility for protecting human rights.

Firstly, with the widely subscribed human rights instruments prohibiting torture, obligations are placed on states and other agencies to ensure that torture is prohibited. This assertion is strengthened by various preventive mechanisms that are designed to ensure compliance with obligations enshrined in international instruments and national laws. The extent to which states discharge their obligations leaves much to be desired. States have been fingered out as the major violators of the right not to be subjected to torture.

Secondly, torturers must be sanctioned and punished otherwise those who participate in torture or acquiesce in preventing it would enjoy virtual freedom from prosecution and this may motivate other perpetrators.
Thirdly, the problem of mindset and attitude conceived over time makes it imperative for torturers to believe that the only means by which they can realize their objectives or desires is through the use of torture.

1.4 Basic Assumptions

The following are underlying assumptions of the study:

Firstly, although the prohibition of torture has become part of customary international law, the practice of torture remains widespread.\(^{86}\)

Secondly, CAT and other related human rights instruments banning torture and other cruel practices have the potential to totally eradicate torture if their provisions are effectively invoked.

Thirdly, the international legal regime against torture can be strengthened if states ensure that torture is a criminal offence under their domestic laws.

1.5 Limitations of the Study

The sensitivity of the research topic, bureaucracy, geographical spread and, in particular, financial constraints inhibited the execution of an in-depth exposition of torture as originally conceived. This research will therefore rely on a review of the literature and review of judicial decisions from different jurisdictions.

It is possible to ascertain that physical violence has been employed most times to inflict torture because its application sometimes will leave behind scars and bruises. However, it is not so easy to ascertain mental, psychological or emotional torture except with the aid of an expert.

Footnote:
86 Malcolm Evans et al, (n. 73 above), p. 5.
Practices of torture in the open can easily be seen. However, this may not be so apparent about torture perpetrated behind closed doors, in secrecy or in a custodial arena.

1.6 The Significance of the Research

1.6.1 Aims

It is an irony that persons that have been entrusted with responsibility for promoting and protecting fundamental human rights are the major violators. The violation of the right not to be subjected to torture continues to be infringed on a daily basis despite various human rights instruments prohibiting it. The argument is that the culture of impunity regarding torture must be attacked and that this is best done by proscribing and condemning the practice, and by widening the opportunities for bringing torturers to book.\(^{87}\) If the prospects of detecting, arresting and punishing those who commit torture are increased, then the likelihood of recidivism will be reduced and potential torturers will be deterred.\(^{88}\)

1.6.2 Objectives

This study will examine CAT and other related human rights instruments that outlaw torture. These instruments qualify as sources of conventional and customary international law. The jurisprudence built on these instruments and State practice will also be examined. Their strengths and weaknesses of the legal regime established to combat torture will be critically examined.

The standards set out in various international human rights instruments banning torture and other cruel treatments will be used as the yardstick to ascertain

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87 Malcolm Evans et al, n. 73 above p. 137.

88 Ibid.
whether state parties and individuals have taken the necessary measures to ensure compliance.

In particular, the study will also examine international norms and standards that have been applied or enforced within national jurisdictions and identify gaps where they exist.

1.7 Rationale and Justification for the Study

Human rights jurisprudence has developed rapidly, and with it, human dignity has come to be accepted as a core value of this jurisprudence. This assertion has been attested to by Oscar Schachter in the following words:

“Political leaders, jurists and philosophers have increasingly alluded to the dignity of human persons as a basic ideal so generally recognized as to require no independent support. It has acquired a resonance that leads it to be invoked widely as a legal and moral ground for protest against degrading and abusive treatment. No other idea seems as clearly accepted as a universal social good.”

The question is how far have we achieved this universal good? The answer is ‘not far’. There have been various abuses and violations of human rights in the world. The practice of torture is one of the means employed by people in positions of authority to infringe upon the citizen’s rights.

A question that cannot be ignored is how this happens when the nations of the world have pledged themselves to promote human rights, social progress and better standards of life? Why does torture continue to happen, if respect for human

dignity is indeed a universal social good?\textsuperscript{90} The answer to these questions is that, even though human rights are protected by law, and any limitations which can be placed on rights and freedoms are set in law, officials who are responsible for ensuring the promotion and protection of human rights break the very law designed to protect these rights.\textsuperscript{91} This is sometimes a paradox because when such officials act in this way they turn themselves into violators.

In aiming at an effective elimination of torture and other forms of cruel inhuman, or degrading treatment or punishment, CAT pays particular attention to influencing the behaviour of persons who may become involved in situations in which such practices might occur. In all these aspects, CAT was inspired primarily by the Declaration on the same subject matter.\textsuperscript{92} The Declaration, in Article 5 provides that: “The prohibition of these practices shall be included in the training of public officials who may be responsible for persons deprived of their liberty, as well as in the general rules or instructions relevant to the custody and treatment of such persons.”

Suffice it to say that the idea of human rights developed as a defence against despotism in the exercise of government power. It was based upon the recognition that the human being does not exist for the benefit of the State, but that the state exists for the benefit and for the protection, of the human being.\textsuperscript{93} The principal objective of human rights is to provide a set of rules for the relationship between the individual and the government, bearing in mind the fundamental inequality of power relations between the two.\textsuperscript{94} Therefore one may in many cases call a

\textsuperscript{90} Ibid.

\textsuperscript{91} Ralph Crawshaw et al, n. 83 above, p. 23.


\textsuperscript{93} Ibid., p. 5.

\textsuperscript{94} Ibid.
government to account by invoking the standards contained in the instruments prohibiting torture.

It should be noted that high levels of ‘obedience’ to authority are associated with high levels of violence to victims, and thus in situations where abuse is made legitimate a certain proportion of people can become violent and destructive towards others.95

What this means is that globally, while certain types of police behaviour which are contrary to respect for human dignity may be the result of a deliberate policy,96 many such abuses are also due to lack of adequate training both at professional level and in respect of human rights and professional ethics.97 For example, many police officials still believe an investigation is successful only if a confession has been obtained. They are led to this conviction by a certain ‘culture’ which is prevalent in judicial circles, where many courts consider a confession to be the principal evidence of a suspect’s guilt.98

Moreover, the lack of such training, at least in countries that have ratified CAT, constitutes a breach of Article 10 which states that:

“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

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96 Niyizurugero n. 9 above, p. 23.
97 Ibid.
98 Ibid.
the custody, interrogation or treatment of any individual subjected to
any form of arrest, detention or imprisonment.”

It further emphasises that when police personnel receive instruction on the subject
of human rights, it appears to be dissociated from the rest of their training, and
such instruction is not integrated into their day-to-day operations.

It is pertinent to point out that in the career management of police officials,
promotion in the service is often contingent on the number of arrests made by the
police official during the year, the ostensible purpose being to reduce crime or
delinquency. This system of promotion associated with nepotism or other
quantitative rather than qualitative criteria is not likely to give priority to professional
experience. Such experience, on the other hand, is normally the concrete
expression of the basic or further training received. It combines theory with the
everyday realities of the profession and should be accorded preference.

However, in some cases of violation of human rights, potential abusers may not
always perceive that their act violates a norm. Torturers do what they do because
they lack a proper understanding of what they are doing or conversely, what they
are doing is inherently wrong. Torturers are held by some ideology that keeps them
from recognizing torture for what it is. It is a silly example, but confusion of this
sort is exceedingly common in the case of torture. For example, just because the

99 Article 10 of CAT.

100 Niyizurugero n. 9 above, p. 23.

101 Ibid.

102 Human Rights Watch, Police Brutality in Urban Brazil (1997). For example, in Brazil, from 1995 to
1998, the authority increased the salaries of and promoted officers engaged in acts of ‘bravery’ (which often
involved torture and killing of suspects), and allowed police to carry additional weapons (a practice that
facilitated covering up summary executions by enabling police to plant their second weapons on dead
victims).

103 Niyizurugero, n. 9 above, p. 24.

state’s function is to ensure internal security does not mean that a particular type of torture was originally used because it made the situation more secure. There is no reason to assume this, although the temptation to do so is overwhelming.\(^{105}\) Often confusion results from society’s mixed messages: national security or the need to restore order, for example, may be invoked to justify what would otherwise be clearly punishable acts such as torture or murder.\(^{106}\) Because government and society may justify or condone certain abuses, human rights abusers may not see their acts as ones that need to be discouraged.

The intervention of the military in the area of domestic security has resulted in the application of ‘counter-insurgency techniques’ against political dissidents. Special military interrogation techniques are now being used. As a result, techniques previously applied in warfare or against colonial populations now are being used against domestic populations.\(^{107}\) In Nigeria, official response to crime has prioritized militarized sweeps into poorer communities. Soldiers have been deployed to quell civil unrest.\(^{108}\) Authorities have also given security agencies sophisticated weapons and reintroduced \textit{ad hoc} security taskforces, such as the Rapid Response Squad and Operation Fire-for-Fire.\(^{109}\) The expressed aim was to combat rising crime and armed banditry, but such militarized sweeps have instead produced torture and massive human rights violations.\(^{110}\)

\(^{105}\) Ibid., p. 3.

\(^{106}\) Naomi Roht-Arriaza, Sources in International Treaties of an Obligation to Investigate, Prosecute and Provide Redress, Impunity and Human Rights in International Law and Practice, p. 14.

\(^{107}\) Lipman, (n. 72 above), p. 28.


\(^{110}\) James Cavallaro et al, n. 108 above.
The argument is that the culture of impunity regarding torture must be attacked and this is best done by condemning the practice and widening the scope of bringing perpetrators to justice. Overall, modern trends with respect to international criminal law show a positive movement from permissive to mandatory jurisdiction and from the idea of an international tribunal to reliance on national legal system to prosecute offenders.\textsuperscript{111}

1.8 Research Method

In view of the nature of the limitation of the research stated in the study above,\textsuperscript{112} legal doctrine, jurisprudence and legal precedent, international instruments and national legislations on torture will be examined.

The nature of the research problem further necessitates a historical research component. However, the point must be made that the historical component will merely consist of an historical overview and not an in-depth legal historical approach. The historical overview has the main purpose of tracing the practice of torture in time and space. It will be argued that torture was practised in the past and it has now re-emerged and has become widespread and ruthless.

In view of the fact that this study concentrates on the observation and systematic processing of knowledge, the legal positivist research method is used.\textsuperscript{113} Relevant legislations, commission reports and government initiations are analysed, critiqued and inconsistencies and shortcomings pointed out. Areas that can form the basis of a reformed system of eradication of torture are also emphasized.

\textsuperscript{111} Lipman, (n. 72 above), p. 28.
\textsuperscript{112} Chapter 1, subtopic 1.5, p. 16 above.
\textsuperscript{113} Johanna Margaretha Kruger, Judicial Interference with Parental Authority. Submitted in terms of the requirements of the degree Doctor Legum, at the University of South Africa 2003, p. 4.
A legal comparative research method stimulates thought on legal research and can lead to new insight and significantly contribute to new knowledge.\textsuperscript{114} This research method plays an important role in this thesis.

\textbf{1.9 Outline of the Chapters}

In order to achieve the aim and envisaged research result, the thesis will be organised into nine Chapters. Chapter 1 provides the introduction and setting of the thesis, its rationale, the objective of the study and methodology.

Chapter 2 consists of the historical perspectives of torture. Its aim is to articulate the practice of torture through the ages and the re-emergence of the phenomenon in recent times.

Chapter 3 will be devoted to definitions, explanation, analysis and evaluation of terminologies. The term ‘torture’ and other related terms will be examined and analysed. This will expose various horrifying modes of torture being used by torturers to dehumanize their victims. In addition, justification and defences for torture will be articulated. Perpetrators have various reasons for justifying why torture is desirable and in most cases, used for purposes of obtaining confessions. In other instances, torture is used as a method of dehumanising and debasing its victims. Various human rights instruments prohibiting torture clearly stipulate that in no circumstances should torture be used. Reference will be made to these instruments and relevant case laws and Committee reports.

Chapter 4 will consider all types of instruments of torture and the way and manner perpetrators have put them to use for purposes of inflicting pain and suffering on their victims. It will be canvassed that most of these deadly instruments are manufactured in many of the so called democratic liberal countries. The irony is

\textsuperscript{114} Ibid.
that these countries usually profess to champion and embrace human rights ideals and condemn torture elsewhere. Meanwhile, they are the major manufacturers and exporters of these instruments to third world countries and countries that engage in acts of torture. Because these countries earn a lot of income through the sale of torture instruments, no major domestic legislation has been put in place to prohibit their manufacture or sale. On the other hand, there are sufficient human rights instruments that could be invoked against these states.

Chapter 5 will focus on the perpetrators of acts of torture. It will seek to find out why most of the people who are entrusted with human rights protection are the major violators. Both state’s and individual’s responsibility for acts of torture will be examined. It will be argued that both criminal and civil liabilities against perpetrators are to be explored and sanctions imposed accordingly. This could serve as deterrent and prevent future violations.

Chapter 6 examines the issues of prevention, prohibition, responsibility to protect against torture and other ill-treatments. CAT and other relevant human rights instruments will be examined together with mechanisms put in place for purposes of preventing and prohibiting torture. It will be argued that these instruments impose responsibility on State Parties to ensure that torture is not practised or condoned in their respective countries.

Chapter 7 will spell out the reasons why acts of torture should attract criminal responsibility. It will be emphasised that States and individuals who violate prohibited norms in CAT and other related human rights instrument should be brought to justice and be held accountable. It will also argue that States have responsibility to protect their citizens and other citizens in their country against torture. Where a state fails to discharge its responsibility, as provided for by CAT and other human rights instruments, such a state will be made accountable.
Chapter 8 will be devoted to victims of torture. It must be stressed that victims are on the receiving end of any acts of torture. The UN and other bodies have reiterated times without number that victims of torture should seek redress and where such an allegation is successfully established, adequate compensation should be paid to the victims. However, most of the victims are unable to seek redress because they are not aware of such possibilities. Where they are aware of their right to seek redress, they may not have the financial means to prosecute their claims. In some cases, the complaints procedure may be too cumbersome and the victim is denied the right to pursue his/her right to compensation.

Chapter 9 is the concluding part of the thesis. Reforms and recommendations to improve the right not to be subjected to torture will be considered. It will also be canvassed that where the human rights instruments banning torture have not been complied with by any states parties, such a state should be enjoined to comply, and where it fails, appropriate sanctions should be imposed. The reason for this is that the norms contained in CAT and other related human rights instruments have attained the status peremptory norms and therefore bind governments as a matter of customary international law, even in the absence of a treaty.

It will be recommended that since perpetrators of torture are human beings they are susceptible to changes and can be reoriented. This can be achieved through training and education.
CHAPTER 2

TORTURE: HISTORICAL PERSPECTIVES

2.1 Introduction

Through the ages, people have been organizing themselves into associations of an ever-increasing size to nurture common individual interests.\(^{115}\) Within these associations, the people surrendered themselves to the authority of the ruler whom they choose. To this end, because of the authority and legitimacy bestowed on such a ruler by the people, he/she is able to administer the territory by ensuring that law and order are maintained. The ruler is therefore under both moral and legal obligation to ensure adequate protection for the people.\(^ {116}\)

The people, by coming together, formed a formidable and unified entity with various attributes; for instance, guarding against any external aggression, maintaining law and order within the society and ensuring a conducive atmosphere for peace and harmony and common good. Terry Nardin specified the common good as having to do with peace, justice, protected liberty and guaranteed rights, authority clearly defined and circumscribed by law.\(^{117}\) This assertion was strongly supported by Freedman, who said:

“now, since men can by no means engender new powers, but can only unite and control those of which they are already possessed, there is no way in which they can maintain themselves save by coming together and pooling their strength in a way that will enable them to withstand any resistance exerted upon them from without.

\(^{115}\) Ingelse, n. 21 above, p. 21.

\(^{116}\) Ibid.

They must develop some sort of central direction and learn to act in concert.”\textsuperscript{118}

In order to continue to maintain this common good, the whole strength of the community will be enlisted for the protection of the person and property of each constituent member. This union will create harmony and obedience to the authority. These associations are entities which we currently refer to as States.\textsuperscript{119} International law has been described as one of the possible sets of laws for ordering the world being based on the wills of all or many nations.\textsuperscript{120} Largely as a result of its very nature that is, the fact that it comprises of many sovereign States co-existing together, the international community is characterized by the absence of any defined sovereign or formal structure comparable to that present within national jurisdictions.

It has often been recognized by liberals as well as others that the common good of an association of free individuals may require that the associates be educated not only to respect the laws but also in honesty, tolerance, self-knowledge, fraternity, and other moral values.\textsuperscript{121} In addition to state actors, other organizational frameworks are gaining importance. One example of it is the United Nations.\textsuperscript{122} It is however clear that States have become more and more dependant on each other, a phenomenon perhaps largely attributable to the growing ‘institutionalization’ of the international community and the phenomenon of globalization. This has resulted in an inter-dependent global village.\textsuperscript{123}

\begin{flushright}
\textsuperscript{118} Ibid., p. 161. \\
\textsuperscript{119} Ingelse, n. 21 above, p. 21. \\
\textsuperscript{121} Ingelse, n. 21 above, p. 21. \\
\textsuperscript{122} Ibid. \\
\end{flushright}
Interdependence requires regulation. Although this is sometimes achieved by way of agreements reached between individual States the lacuna is also filled through the recognition by individual States of a so called international ‘conscience’ which imposes legal regulation on the actions of States and in so doing ensures international respect for basic social values.\(^{124}\) Similarly, this is reflected in the so called international moral infrastructure\(^{125}\) which itself is subject to normative principles and disciplines.\(^{126}\) These principles were eventually also accepted as common standards for interstate relations.\(^{127}\)

These standards have been universally accepted by States in the form of the principles enshrined in the Charter of the United Nations and the Universal Declaration of Human Rights.\(^{128}\) As a result of the regulation of States by international law, the concept of ‘national sovereignty’ has undergone an evolution and today States are regulated by both their own national rules together with the continually developing laws of the international community.\(^{129}\) These laws were developed or were created not by an international legislator or sovereign, but generally through the consensus of States which have recognized that certain ‘values’ amount to valid legal norms which must be respected among States.\(^{130}\) It may be plausible to suggest that the prohibition and prevention of torture and ill-treatments are part of the standards that have been universally accepted by the international community.

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124 Rafael Nieto-Navia, International Peremptory Norms (Jus Cogens) and International Humanitarian Law, in: Man’s inhumanity to man, 2003.

125 Ibid.


128 Ingelse, n. 21 above, p. 21.


2.2 Torture: A Legitimate Practice in the Past

2.2.1 Introduction

There is the need to know about the past when it gives rise to serious a of human rights abuses, particularly the use of torture by persons against their fellow human beings.

In a presentation before the Truth and Reconciliation Commission in South Africa, Archbishop Desmond Tutu, the renowned human rights activist and Nobel laureate made the following comment about the past:

"Those who forgot the past are doomed to repeat it, are the words emblazoned at the entrance to the museum in the former concentration camp of Dachau. They are words we would do well to keep ever in mind. However painful the experience, the wounds of the past must not be allowed to fester... We also need to know about the past so that we can renew our resolve and commitments that never again will such violations take place. We need to know the past in order to establish a culture of respect for human rights. It is only by accounting for the past that we can become accountable for the future."  

At different times in history, for example in the primitive periods and during the time of the slave trade, torture was considered an acceptable practice. It was legally recognized and regularly carried out for specific purposes: as a method of capital punishment and as a discipline for recalcitrant slaves. The use of torture in the


courts persisted in most of Europe until laws abolishing it were passed in the eighteenth century.\textsuperscript{134}

History also revealed that torture within prescribed limits was an accepted practice in several ancient civilizations and in late medieval Europe. With the possible exception of Christian Europe torture appears to have been fully compatible with the underlying moral codes of those communities.\textsuperscript{135} It is difficult to believe that people who inflicted torture in such communities did nothing wrong, but rather, those communities themselves were deeply mistaken about the morality of torture. In this regard, it is right to say that the values of one’s community can be a misleading moral guide.\textsuperscript{136}

In fact, the history of torture can be quite specific. However, it seems that it is possible to begin to narrate it from accounts of torture in Greece, the reason being that some of their laws seemed to have influenced those of Rome, and in turn those of medieval and modern Europe.\textsuperscript{137}

However, at a point in time, the power of state agents escaped routine judicial control and review especially in areas that were relatively new, such as military information, espionage, police work and political supervision. New state powers were developed in those areas in which European states had always been especially sensitive; those that touched upon the safety and security of the state.

The European system developed a system whereby crimes were categorized into dangerous and non-dangerous crimes. Torture applied to dangerous crimes alone

\textsuperscript{133} Malcolm D. Evans and Rod Morgan, Preventing Torture, A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1998, Oxford University Press, p. 5.

\textsuperscript{134} Ibid., p. 7.

\textsuperscript{135} Mayerfeld, n. 132 above, p. 5.

\textsuperscript{136} Ibid.

\textsuperscript{137} Peters, n. 34 above, p. 6.
because dangerous crimes were considered as extraordinary situations,\textsuperscript{138} and in order to deal with these situations, governments were obliged to put in place extraordinary measures to protect their citizens.\textsuperscript{139}

Paradoxically, in an age where states are powerful, with the ability to mobilize resources and possess virtually infinite means of coercion, much of the states’ policy has been based upon the concept of extreme state vulnerability to its enemies, external or internal.\textsuperscript{140} This unsettling combination of vast power and infinite vulnerability has made many contemporary states, extremely ambivalent in their approach to human rights and their own willingness to employ procedures that they would otherwise ostensibly never dream of.\textsuperscript{141} It is in this sense that torture may be considered as having a history; its history is part of legal procedure as well as governmental exercise of power.\textsuperscript{142}

The purpose of highlighting the history of torture is to emphasize its public dimension and reveal the practices of torture in the twentieth century as a continuum and in a wider context. By focusing on the public character of torture we may be able to regard torture in the twentieth century, no longer in the simplistic terms of a personality disorder, ethnic or racial brutality, residual primitivism, or the secularization of ecclesiastical theories of coercion.\textsuperscript{143} Instead, we will be able to view torture as an incident of public life, no longer restricted to formal criminal legal process, but occurring in other areas under state authority less regulated than the legal procedure, less observed, but no less essential to the state’s notion of order.\textsuperscript{144}

\textsuperscript{138} Ibid.
\textsuperscript{139} Ibid.
\textsuperscript{140} Amnesty International USA, n. 74 above.
\textsuperscript{142} Peters, n. 34 above, p. 7.
\textsuperscript{143} Ibid.
Torture had long been used universally in criminal trials when necessary; no jurist conceived that the truth could be elicited in doubtful cases without it. As a result of persistent application of torture, the criminal usually made a confession to the judge; and knew that the confession once made, doomed him/her, and that a retraction, instead of saving him/her, would only bring a renewal and prolongation of his/her sufferings.\textsuperscript{145} An accused who confessed under torture, recanted, and then found himself/herself tortured anew, learned quickly enough that only a ‘voluntary’ confession at the ratification hearing would save him/her from further agony in the torture chamber.\textsuperscript{146}

Accordingly, the Italian glossators who designed the system developed and entrenched the rule that conviction had to be based upon the testimony of two unimpeachable eyewitnesses. Without these two eyewitnesses, a criminal court could not convict an accused who contested the charges against him/her. This is considered a superior source of evidence against the accused as it gives a better view of how the neighbour views it.\textsuperscript{147} Only if the accused voluntarily confessed the offense could the court convict him/her without the eyewitness testimony.\textsuperscript{148}

Another way to appreciate the purpose of these rules is to understand their corollary: conviction could not be based upon circumstantial evidence, because circumstantial evidence depends for its efficacy upon the subjective persuasion of the trier who decides whether to draw the inference of guilt from the evidence of circumstance.\textsuperscript{149} Thus, for example, it would not have mattered in this system that the suspect was seen running away from the murdered person’s house and that

\begin{footnotes}
\item[144] Ibid.
\item[146] Ibid.
\item[148] Langbein, n. 145 above, p. 5.
\item[149] Ibid.
\end{footnotes}
the bloody dagger and the stolen loot were found in the suspect’s possession. Since no eyewitness saw the suspect actually plunge the weapon into the victim, the court could not convict the suspect of the crime.\textsuperscript{150}

Most often, an accused person would be subjected to torture in order to extract a confession.\textsuperscript{151} But the efficacy of this method to produce the desired result has been a subject of a series of debates. In most cases, torture would not produce the desired result. And no accurate account of what really happened could be obtained because the confession made under torture or the threat of torture, provided a better indication of what judges and inquisitors wanted the accused to say than what the accused had actually done.\textsuperscript{152}

The description of how torture was applied to elicit confession and test the veracity of the statement of the accused as narrated by Peters was based on the scene from Aristophanes Xanthus, servant of Bacchus, accompany his master to the underworld:

“Aecus: ‘How am I to torture him?’

Xanthus: ‘In every way, by tying him to a ladder, by suspending him, by scouring him with a whip, by cudgeling him, by racking him and further, by pouring vinegar into his nostrils, by heaping bricks on him and every other way…’\textsuperscript{153}

Torture was applied on the assumption that slaves would tell the truth if tortured.\textsuperscript{154} However, the point must be made that in all these instances, torture did not

\textsuperscript{150} Ibid.

\textsuperscript{151} Malcolm D. Evans et al, n. 133 above, p. 4.


\textsuperscript{153} Malcolm Evans et al, n. 133 above, p. 1.

\textsuperscript{154} Ibid.
produce the truth. The victim merely renders a confession in order for the application of torture to be discontinued.\textsuperscript{155} The shortcoming of this process became very critical to the extent that it was actually recognised by the Roman lawyers. In fact, the latter acknowledged that torture could result in precisely the opposite of what it intended to achieve.\textsuperscript{156}

Moreover, the evidence obtained through this means is unreliable and very dangerous.\textsuperscript{157} The nature of the unreliability of the evidence in criminal trial is observed thus:

“While confidence should not always be reposed in torture, it ought to be rejected as absolutely unworthy of it, as the evidence is weak and dangerous, and inimical to the truths; for most persons, either through their power of endurance, or through the severity of the torment, so despise suffering that the truth can in no way be extorted from them. Others are so little able to suffer that they prefer to lie rather than to endure the question, and hence it happens that they make confessions of different kinds and they implicate not only themselves, but others as well.”\textsuperscript{158}

No one could be said to have been exempted from torture during the era of the Roman Empire. The idea of a citizen’s exemption from torture was eroded with time. By the late Roman Empire anyone, free or unfree persons, could be tortured, and lower classes of free persons could be tortured alongside slaves if suspected of relatively mundane offences. The application of torture was even extended to

\textsuperscript{155} Lea, n. 152 above, p. 25.
\textsuperscript{156} Ingelse, n. 21 above, p. 24.
\textsuperscript{158} Peters, n. 34 above, p. 34.
witnesses in cases judged sufficiently serious.\textsuperscript{159} However, this depended on the severity of the offence. If the charge was serious, or if the accused was ill-reputed, the truth might be established by combat or by ordeal.\textsuperscript{160} The latter is a judicial practice by which the guilt of the accused is determined by subjecting the accused to an act of torture.\textsuperscript{161} The idea being that justice is determined by divine intervention, if the accused survived, it is victory, and it confirms the veracity of the truthfulness of the accused statement.\textsuperscript{162}

However, it is worth mentioning that from the twelfth century onwards, trial by ordeal was condemned and abolished because it was regarded as an irrational and barbarous practice.\textsuperscript{163} Its abolition was very significant because it laid a positive foundation towards outright abolition of torture. In this regard, decision makers were made to adopt alternate mechanisms for resolving uncertainty. One device was to set a stringent standard for proof which limited the exercise of discretion.\textsuperscript{164}

\textbf{2.3 Judicial Torture and Roman Canon Law}

It will be argued that judicial torture\textsuperscript{165} is the only kind of torture, whether administered by an official judiciary or by other instruments of the state.\textsuperscript{166} Judicial

\begin{footnotesize}
\begin{enumerate}
\item Malcolm D. Evans and Rod Morgan, Preventing Torture, n. 133 above, p. 3.
\item Malcolm D. Evans and Rod Morgan, n. 133 above, p. 3.
\item Schwikkard, n. 161 above.
\item The major proponents of judicial torture are Ulpian, Buler, Lagbein and Heath. These scholars looked at the historical dimension of torture and they implicitly or explicitly based their studies on what they referred to as judicial torture. Peters, n. 34 above, p. 7.
\item Ibid.
\end{enumerate}
\end{footnotesize}
torture, as it emerged during the twelfth and subsequent centuries came from two sources that influenced one another. First, the indigenous legal system from the moment a central state like authority presented itself, and second, Roman canon law, at the start of the inquisition.\footnote{167}

Developments in government, procedural changes in the secular law, and the campaign of the Christian Church against heresy under canon law were important because they greatly influenced the legal system and administration of the criminal justice system.\footnote{168} The secular and canon legal system became fused and torture was retained, and as Ruthven puts it, “the worst of both was retained.”\footnote{169}

Condemnations were only issued pursuant to ‘full proof’ in which the judge was bound by a legal system of evidence. For instance, two identical testimonies issued by two different individuals constituted ‘full proof’.\footnote{170} Whenever there was only half proof—clues instead of ‘full proof’, it became the task of the judge to try to obtain a confession in order to achieve ‘full proof’.\footnote{171} In the event that a confession was not given voluntarily, it could be achieved with the aid of torture.\footnote{172} The confession under torture was referred to as the ‘queen of proofs’. Consequently, torture was a facilitator to obtain evidence, namely the confession.\footnote{173} It must be mentioned that confessions elicited under torture were not valid as evidence. The confession had to be repeated away from the place of torture, though if the

\footnote{167}{Ingelse, (n. 21 above), p. 25.}
\footnote{168}{Malcolm D. Evans et al, n. 133 above, p. 3.}
\footnote{170}{R .C. Van Caenegem, La Preuve dans l’ancien Droit Belge des origins a la Fir. Du XVIIIe Siecle, Rescuils de la Societe Jean Boden 17, 1965, p. 394.}
\footnote{171}{Peters, n. 34 above, pp. 47 and 57.}
\footnote{172}{Ingelse, n. 21 above, p. 26.}
\footnote{173}{Peters, n. 34 above, p. 40.}
accused subsequently recanted the confession under torture, it was an indictment.174

From the thirteen to the eighteenth centuries torture was part of the ordinary criminal procedure of most states in Europe.175 There developed an elaborate jurisprudence of judicial torture.176 The extraordinary elaboration of this jurisprudence was interpreted by eighteenth-century reformers as evidence of the inhumanity of judges during the Middle Ages.177 But the reverse is arguably the case.178 The codification and institutionalisation of judicial torture represented an attempt by lawyers and legislators to put an end to the practice of torture. However, this attempt failed to control the reckless use of torture and torture methods. As soon as criminal prosecution became a government task, torture was applied in criminal proceedings, due to the importance of asserting the substantive truth.179

Remarkable innovations were introduced into the criminal justice system. Once a judge established that a crime had taken place and an accused had been identified, the judge could embark on a particular inquiry. By the fourteenth century a public prosecutor had emerged to manage the case against the accused. Accused persons had to be told of the charge against them and could cross-examine witnesses.180

174 Malcolm Evans et al, n. 133 above, p. 5.
175 Ibid., p. 4.
176 Ibid.
177 Malcolm Evans et al, n. 73 above, p. 4.
178 Ruthven, n. 169 above, p. 66.
179 Van Caenegem, n. 170 above, pp. 392-403.
Sadly, in the middle of the thirteenth century, torture re-emerged. Pope Innocentius III granted official permission for torture to be used on apostates of the church.\textsuperscript{181} The church gradually usurped an increasing number of criminal legal powers by classifying them as church matters.\textsuperscript{182} Canon law greatly influenced criminal proceedings. Canon law was a system of written law in which Roman law was incorporated. This was fully introduced and entrenched in the legal system. It was taught in the universities and professional class of jurists, judges, prosecutors and lawyers were trained in the universities.\textsuperscript{183}

The prosecuting, trial and legal evidentiary system were also founded on Roman canon law. Judicial torture was founded on both indigenous and Roman-canon law.\textsuperscript{184} It must be pointed out that some people were exempted from torture; for instance, children, pregnant women, persons of high status generally and the wealthy middle class.\textsuperscript{185} In addition, cities arranged for collective exemptions for their citizens who resided elsewhere and began to recognise each other’s exemptions.\textsuperscript{186} It should be noted that exemptions initially applied to cruel practices such as the judicial duel and the trial by fire and water. Later, when torture became a more prominent practice, the exceptions also applied to torture.\textsuperscript{187} The point must be clearly made that there was never any intention to institute a general ban on torture.\textsuperscript{188} The practice of torture continued to be used on foreigners; and

\textbf{References:}


\textsuperscript{182} Ibid.

\textsuperscript{183} Ingelse, n. 21 above, p. 27.

\textsuperscript{184} Drenth, n. 181 above, pp. 43-51.

\textsuperscript{185} Malcolm Evans et al, n. 133 above, p. 5.

\textsuperscript{186} Ingelse, n. 21 above, p. 28.

\textsuperscript{187} Ibid.

\textsuperscript{188} Ibid.
anybody who came from outside the city walls was quickly regarded as a foreigner.¹⁸⁹

At a point in time, some positive ingenuities found their ways into the criminal justice systems and a lot of reforms were introduced. In the late seventeenth century, the legal evidentiary system of which torture occupied the centre stage started to lose its importance.¹⁹⁰ The judge’s discretion based on the facts of the case became the underlying factor whether the accused should be pronounced guilty or not. As a result, the necessity to apply torture was no longer equally predominant because, in the event that there were clues, a suspect could be convicted on the basis of such clues.¹⁹¹ It has been observed that it was “as a result of this watershed in the law of evidence that allowed the humanists to organize their attack on the cruel practice of torture.” ¹⁹² This represented the catalyst for the later abolition of torture.¹⁹³

Be that as it may, the point must be stressed that the practice of coercing evidence from suspects did not need to be invented by Greek, Roman, or medieval lawyers; it is a method so obvious that it is difficult to imagine an age or place where it would not have been known or done.¹⁹⁴ Accordingly, any confessional statements elicited through torture represent a seemingly direct indication of human intentions and actions, and therefore information derived from torture is always likely to be attractive to the lazy, simple, or ill-equipped investigator.¹⁹⁵

¹⁸⁹ Van Caenegem, n. 170 above, pp. 400-423.
¹⁹⁰ Langbein, n. 180 above, p. 47.
¹⁹¹ Ibid., pp. 28-44.
¹⁹² Ingelse, n. 21 above, p. 28.
¹⁹⁴ Langbein, n. 180 above, p. 47.
To this end, the jurists were well aware of the shortcomings of criminal procedure because torture was apparently an integral part of criminal proceedings. The jurist maintained this position and the reason for this is the importance attached to obtaining confessions from accused persons. However, it must be pointed out that the extent to which torture was actually employed is little known and many forms of torture were much wilder than those indicated by the theatres of horror so lovingly reproduced in the late twentieth-century museums.

2.4 The Period of Inquisition

There is also a good historical reason why physical punishment is popularly equated with torture. During the height of the Holy Inquisition, when torture became high art, there was no clear distinction between the investigatory process, the punishment, and the judgment. The offender was ‘put to the question’, interrogated, tried and punished all in one as the following statement attests:

“We, by the Grace of God...Having carefully considered the proceedings against you, and that there is nevertheless much evidence against you, sufficient to expose you to torture and torment in order that the truth may be had from your mouth and that you should cease to offend the ears of the judges declare, judge and sentence you by an interlocutory order at such-and-such a time and day, to undergo torment and torture ...”

The Inquisitors applied a carefully planned routine; they began by asking the accused simple questions, and then proceeded to questions that would call for

196 Ibid.
197 Ibid.
199 Ibid.
200 Ruthven, n. 169 above.
admission of the less serious offenses. The accused would then be shown the various contraptions of torture, and warned that he/she would be subject to them if he/she did not tell the whole truth. As a result, the majority succumbed quite easily. However, there were many for whom this was not the case, and many whose confessions were not believed and this is the strange paradox of torture.\(^{201}\)

It must be stressed that the main purpose of torture has been to obtain confessions, to purge the lies of the accused, and supposedly get at the truth. This is why, in ancient times, testimony by slaves as witnesses, not as accused was inadmissible unless obtained under torture, since it was thought that there was no way they could be believed, given their low position in society, except if the information were obtained under torture.\(^{202}\) This difficulty was clearly recognized by the inquisitors who wrote handbooks on how to distinguish between genuine and false confessions. People under torture were likely to say anything to spare themselves from further pain, which means that they could not be assumed to be telling the truth.\(^{203}\) This is why the death penalty applied by the inquisitors was reserved for those who, having confessed to a particular crime under torture, later recanted their confession.\(^{204}\)

In most cases, the torturer, in his/her mind, created the crime and adjudged the accused person guilty of the crime. The torturer only used torture to make the accused person say what the torturer wanted him/her to say. The point is that, the confession rendered may be lies and thereby making the evidence unreliable. The use of torture displays the lie underlying the torturer's claim of justice.\(^{205}\) He/she

\(^{201}\) Ruthven, n. 198 above.


\(^{203}\) Ibid.

\(^{204}\) Ibid.

must treat the confessor’s lies as truth. It is as if there were strange pacts between the torturer and the tortured that this lie must be maintained. In a situation where the accused would not break down under torture, it would appear that the torturer could suffer a severe mental breakdown, because he/she had such a desperate need to have the justice of his/her own position as torturer underwritten by the tortured.\textsuperscript{206}

It is apparent that torture has been used to obtain confessions, to make a show of the inherent criminality of the accused, and to underwrite the morality and justice of the torturer. This process has been documented for the ancient Romans and Greeks and the modern Greeks. Perhaps the most sophisticated example of the extraction of justificatory confessions is their use under various regimes in Africa and in Latin America.\textsuperscript{207}

It is not only himself/herself that the accused must betray by confession whether false or otherwise. It is pertinent to say in times when torture has reached its height, he/she must give the names of accomplices.\textsuperscript{208} This is probably the most serious consequence of torture, since it is the ultimate betrayal, it destroys what is social in the accused, destroys the relations between individuals. This means that torture necessarily dehumanizes its victims, takes away their honour and dignity, and makes them into something less than human. The tortured becomes the object of an obsession; his/her soul and his/her body must be completely subjected to the purpose of justifying the torture.

\textsuperscript{206} Ibid.

\textsuperscript{207} Ibid.

\textsuperscript{208} Peters, n. 34 above, p. 34.
2.5 The Enlightenment and Modern Times

In 1764, Cesare Beccaria wrote an influential critique.\textsuperscript{209} His main argument against torture in criminal proceedings was more technical than strictly humanitarian.\textsuperscript{210} Beccaria was of the view that torture would not lead to accurate statements.\textsuperscript{211} Because, the victim, mindful of the severity of the torture that would be applied and the enormous pain to be suffered would be ready to do anything just for the torturer to discontinue the torture. The harsher the punishment, the worse the evil he/she faces, the more anxious the criminal is to avoid it, and it makes him/her commit other crimes to escape the punishment of the fist. It seems from all indications that torturers must not be allowed to ply their trade because their acts are injurious to humanity. Accordingly, Beccaria was of the opinion that even if tyrants were murdered, in most cases, the experience has always been that new ones would be created.\textsuperscript{212} This is also applicable to the torturers. If guilt had already been established with certainty, question under torture would become redundant. If guilt had not been firmly established, the use of torture would bear the inherent risk of afflicting the innocent with torture. In Beccaria’s view, torture violated the principle of non-self incrimination and of the principle that a person cannot be punished without the presence of guilt.\textsuperscript{213}

What is clear from this account of ancient and medieval institutions of torture, however, is that their use was considered on largely utilitarian grounds. Aristotle advocated its use in order to benefit the legal system,\textsuperscript{214} and Augustus defended its use as a useful tool in the defence of the state. Its use spread as its perceived

\begin{flushleft}
\textsuperscript{210} Ingelse, n. 21 above, p. 29.
\textsuperscript{211} Malcolm Evans et al, n. 133 above, p. 7.
\textsuperscript{212} Ibid.
\textsuperscript{213} Ingelse, n. 21 above, p. 29.
\end{flushleft}
value grew, and the questions surrounding torture were not concerned with whether it was morally right to torture people, but whether the benefits of torture outweighed the costs of the practice.

2.6 Abolition of Torture

2.6.1 Introduction

In the 18th and 19th centuries, the medieval practice of state sponsored torture was rejected and eventually abolished. Beccaria’s groundbreaking treatise ‘Crimes and Punishments’, published in 1764, opened the first real intellectual debate on the ethics of torture.215 Beginning with a condemnation of the institution of torture on utilitarian grounds, Beccaria argued that torture was inhuman and unreliable as a way of ascertaining the truth in a trial.216 For Beccaria, the medieval institution of torture had no real practical value because its ‘strange and necessary consequence’ was that it punished the innocent man more than the guilty.217 For the guilty person, torture either provides acquittal through endurance of the procedure or condemnation.218 The argument against torture made the enlightenment rulers abolish it.219 Because, in most cases, the pain inflicted in judicial torture was of no use and the confession obtained through it was inefficient in identifying the guilt or innocence of the accused.220

215 Ibid., p. 5.
217 John Dewey, n. 214 above, p. 5.
218 Ibid.
219 Asad, n. 216 above.
220 Becaria, n. 209 above.
2.6.2 Abolition of torture in Europe and elsewhere

In Europe and elsewhere, torture was under attack everywhere, and by the end of the eighteenth century that attack had nearly everywhere proved successful. A large body of literature condemning torture on both legal and moral grounds appeared and was circulated widely. Torture came to bear the brunt, and in many instances became the focal point of much enlightenment criticism of the *ancien regime*, and early European world.\textsuperscript{221}

Although, these changes had not occurred overnight the rapid rate of these changes of both mind and institutions puzzled contemporaries, and they have since perplexed historians who tried to account for them. The most widely accepted and influential line of interpretation stemmed from the convergence of moral outrage and judicial reforms.\textsuperscript{222} After the end of the eighteenth century, torture acquired a universally pejorative association and came to be considered as the institutional antithesis of human rights, the supreme enemy of humanitarian jurisprudence and of liberalism, and the greatest threat to law and reason that the nineteenth century could imagine.\textsuperscript{223} The American historian of torture, Lea, summed up an emerging humanitarian interpretation:

“For the first time in the history of man the universal love and charity...recognized as elements on which human society should be based...by comparing distant periods that we can mark our progress; but progress nevertheless exists, and future generations, perhaps, may be able to emancipate themselves wholly from the cruel and arbitrary domination of superstition and force.”\textsuperscript{224}

\textsuperscript{221} Peters, n. 34 above, p. 74.

\textsuperscript{222} Rosemary Foot, Torture: The Struggle over a Peremptory Norm in a Counter-Terrorist Era International Relations 2006 Sage Publications, p. 135.

\textsuperscript{223} Ibid., p. 75.
From the late eighteenth century on, the abolition of torture was regarded as one of the great landmarks of this change. Yet several of Lea’s ‘future generations’ have seen not the permanent abolition of torture, nor the steady improvement of mankind, but more hideous manifestations of superstition and force than all of Lea’s research had revealed in the past. Nevertheless, it must be stressed that there was a remarkable achievement in the area of abolition of torture during this period.\textsuperscript{225}

2.6.2.1 The contributions of the revisionist legal historians

It is important to narrate the contributions of the revisionist to the abolition of torture. They attributed the abolition of torture to changes in the law of evidence and the emergence of new criminal sanctions.\textsuperscript{226} The latter have been linked to economic changes, the development of the state, and legitimating theories of the state.\textsuperscript{227} The law of evidence was now founded on reason, intuition and common sense of the judge.\textsuperscript{228} As a result of this development, each allegation of crime was examined critically without recourse to torture. The accused was not pronounced guilty from the outset but given the opportunity to defend himself/herself. The revisionists found this method very remarkable because it preserved human dignity. It is pertinent to mention that it is absurd to pronounce the accused’s guilty based on a mere allegation which is not verified through evidence adduced by credible witnesses.

Beccaria’s ideas on torture found an enthusiastic audience in the philosophies of the French Enlightenment and in particular Voltaire, the 18\textsuperscript{th} century Europe’s leading torture abolitionist.\textsuperscript{229} Driven to the cause by the public torture and

\textsuperscript{224} Ibid.
\textsuperscript{225} Ibid.
\textsuperscript{226} Foot, n. 222 above.
\textsuperscript{227} Foucault, M, Discipline and Punishment: The Birth of the Prison, 1977.
\textsuperscript{228} Langbein, n. 180 above, pp. 55-60.
execution of Jean Calas in 1762, Voltaire waged his fight against torture on both practical and humanist grounds. He suggested that England, as a result of banning torture achieved a lot of successes. The English example was sufficient for the rest of the world.\textsuperscript{230} Voltaire used his influence with European royalty to pursue progress on the torture problem, and he achieved a lot of success.\textsuperscript{231} Frederick the Great, abolished torture in Prussia by 1740. By 1789, when the French Revolution’s Declaration of the Rights of Man banished torture on largely rights-based grounds, much of Western Europe had followed suit. Indeed, it was this era that caused Victor Hugo to claim in 1874 that ‘torture has ceased to exist’.\textsuperscript{232}

The Enlightenment accounts for abolition of torture, believed in a natural human dignity, that is, one should not torture people because they are people and are endowed with natural rights. They were also of the view that torture was not a fool proof method of inquiry because it was often inaccurate and misleading, to Beccaria, it was ‘irrational’.\textsuperscript{233}

Several other aspects of late eighteenth-century legal thought and culture may also illuminate the process of the abolition of torture. These are: the case of England, the doctrine of infamy; the movement to separate and define more sharply legislative and judicial powers, particularly on the Continent; and the increasing articulation and importance of theories of the rule of law and natural law.\textsuperscript{234} For instance, in England, the relatively low place in the hierarchy of proofs occupied by a confession was replaced by pre-trial investigatory institutions, and the remarkable liberty of the jury to convict on evidence instead of confession obtained

\begin{itemize}
\item 229 John Dewey et al, n. 222 above, p. 6.
\item 230 Ibid.
\item 231 Ruthven, n. 198 above, pp. 11-14.
\item 232 John Dewey et al, n. 222 above, p. 7.
\item 233 Ibid.
\item 234 Peters, n. 34 above, p. 85.
\end{itemize}
by torture. In addition, the development of the office of state prosecutor worked to keep torture out of English criminal procedure.235

The theories of natural law advanced in the 17-18th centuries focused on torture as violating their most essential tenets; namely, that of the natural dignity of humans and that of the individual natural right of humans to decide upon the means of preservation of their dignity.236 Torture violates the natural right of the individual not to accuse himself/herself and to be able to defend himself/herself. This is a natural right which no treaty or social contract can remove from the individual and which remains for the individual an essential prerogative, in the sense put forward by Thomas Hobbes: “whatever the criminal answers under the effects of torture, whether true, false, or whether he remains silent, he has the right to do in this matter that which seems to him to be just.”237

In addition to the great drive to accommodate existing law to the principles of the Revolution, France and other countries also adopted two earlier eighteenth-century notions: that of the separation of powers and that of natural law. In the work of Montesquieu and later writers, the fear of the arbitrariness of the judiciary of the ancien regime led to the argument that judicial and legislative powers should be separated, with the supremacy going to the legislative side. This reduced the individual authority of the judge to that of a simple implementer of statute law and deprived the judiciary of the power of review over the legality or applicability of statutes. In the civil law tradition such separation actually took place in the early nineteenth century.238 The status of the judge was drastically diminished and that of the legislator drastically enhanced. As the legal historian John Merryman puts it:

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235 Ibid., pp. 63-64.
236 Ibid.
237 Van Caenegem, n. 170 above, p. 188.
238 Peters, n. 34 above, p. 86.
“With the rise of the modern nation-state, the administration of justice was taken out of ecclesiastical, local, and private hands and was nationalised, the ordinary courts became the principal instrument of the state’s monopoly on the administration of justice. The legislature was given a monopoly on the nationalized process of lawmaking. The ordinary judiciary was given a monopoly on the nationalized process of adjudication.”

2.6.2.2 The contributions of contemporary legal historians

The emergent view of contemporary historians is that the decline of torture and its prohibition was intimately bound up with the growth of the state, the establishment of a more professional judiciary, the emergence of incarceration as punishment and subtle changes in the law of evidence.

Almost beyond doubt is the fact that the legal abolition of torture was celebrated as a landmark achievement of a progressive civilizing reform; it was celebrated alongside the decline in and abolition, at least in public, of corporal and capital punishments. It was no longer deemed sensible to inflict punishment on the body or sensible to establish truth by testing the body. Whereas the body of the accused had previously been viewed also as an important aspect of the offence, and was thus the appropriate object of vengeance, evidence and punishment were now matters of the mind, calculated, refined, and, allegedly, rational.

It is pertinent to mention that the British, for example, displayed a high moral tone about the use of force and torture in Europe, but was willing, as were other

239 Ibid.
240 Foot, n. 222 above.
241 Malcolm Evans et al, 133 above, p. 11.
242 Ibid., p. 11-12.
European colonial powers, to rely on those same methods in their new found possessions in Africa, Australasia, and Asia.\textsuperscript{243} This view which is expressed by Malcolm and Rod, is duly subscribed to by this researcher. The reason for this subscription is that in their bid to establish their influence and power in Africa, European countries annexed and colonized Africa. One of the methods used to achieve this end was the use of torture in various forms. The European colonial masters used torture and other cruel treatments to subdue their captured nations. The citizens of Africa were seriously affected. Not only did the Europeans torture citizens in the colonies, they also stole the wealth found in the colonies.\textsuperscript{244} It must also be emphasised that, in Europe the captured slaves worked under very harsh conditions. An account of the severity of torture inflicted and the pain suffered were better imagined than experienced.\textsuperscript{245}

Despite all these horrifying tales of torture, steps taken toward the abolition of torture were extremely commendable. The good news is that, there was a sharp turn-around, a departure from the old primitive practices. It herald beginning of a new civilized way of treating offenders based on a new criminal justice system. Respect for the rights of human beings ‘not to be subjected to torture’ was put in place. It is in this regard that torture was considered an institutional antithesis of human rights.\textsuperscript{246}

By the closing decades of the nineteenth century, the general thinking was that torture had ceased. However, it must be stressed that it was not yet \textit{uhuru!} The time was not ripe to engage in jubilation. The crystal truth is that torture which was considered barbaric and had disappeared as a result of various measures taken toward its eradication, has now reappeared. The fact is that torture has not gone

\textsuperscript{243} Ibid.

\textsuperscript{244} Ibid., p. 12.


\textsuperscript{246} Peters, n. 34 above, p. 75.
away. In many parts of the world torture is being practised in prisons and detention centres. It is used as a weapon against ethnic or social groups, it is also used to suppress opposition; it is applied in civil war and armed conflict, and it is used as a weapon in the hands of the unscrupulous. According to the UN Special Rapporteur on Torture, reports of acts of torture occur from more than sixty countries every year and there are indications that government sanctioned torture is committed in more than 130 countries.

2.7 The Return of Torture

2.7.1 Emergence of different manifestations of torture

The practice of torture considered to have disappeared has now reappeared. At the beginning of the twentieth century, torture was widely used. For instance, in Russia, torture was used by the Okhrana, the Czars’ secret police. Opponents of the Czars’ regime were reported to have suffered torture right up to the 1917 Revolution. In Italy and Austria, revolutionary opponents of the authorities suffered the same fate after 1848. According to an Amnesty International report produced in 1975, state-sponsored torture was ‘widespread’ and, by all indications, increasing. Amnesty’s extensive report detailed institutionalized torture in every part of the world, from horrors in Uganda to covert counter insurgency tactics of the

248 Ibid., p. 827.
249 Ibid., p. 808.
251 Malcolm Evans et al, n. 133 above, p. 16.
252 Ibid.
French military. From the third world to the first world, it seemed everyone was bending the rules prohibiting torture bit by bit.\textsuperscript{254}

It is now known that the Israeli government practised systematic and widespread torture against Palestinian civilians during the late 1980’s and early 1990’s, and also in the 2000’s. Torture has played a large role in the Israel-Palestine conflict for a much longer period.\textsuperscript{255} From accounts written since the US–Vietnam War, it has become increasingly clear that American forces were also involved in systematic use of torture during the conflict in Southeast Asia.\textsuperscript{256} In recent times, there have been a series of allegations of torture practices leveled against the US Examples are the Guantanamo Bay and Bagram\textsuperscript{257} torture of the so called terror suspects and non combatants, and the Abu Ghraib torture of Iraqi prisoners.

A number of commissions have investigated the events at Abu Ghraib, Guantanamo Bay, and Bagram and several members of the American armed forces have been court-martialed. As a result, a one-star general has been demoted one rank to full colonel. The pictures from detention centers have been disturbing and distressing. The US President has termed the perpetrators as ‘a few bad apples’.\textsuperscript{258} The President’s often repeated comment that America is a nation of laws and those involved in Abu Ghraib are ‘bad apples’, is disingenuous.\textsuperscript{259} The conduct of Private Charles Graner, Jr., Private First Class Lynndie England, Specialist Sabrina Harman, among others, is inexcusable, criminal, and sadistic.\textsuperscript{260}

\textsuperscript{255} Ibid.
\textsuperscript{256} Ibid.
\textsuperscript{259} Ibid., p. 441.
However, the environment that allowed for the horrific abuses at Abu Ghraib, Guantanamo Bay, and Bagram was created by the US administration’s own manipulation of the definition of torture.\footnote{261}{Amos N. Guiora et al, n. 258 above, p. 427.}

It is clear from all these accounts that torture continues to be employed by many of the nations previously believed to have abolished its use. One can see that torture’s resurgence has been a result of newly perceived benefits of its use in fighting new kinds of war.\footnote{262}{Ibid.}

At the final stages of colonial rule in different overseas colonies, allegations and accusations of torture were levelled against the colonial administrators. An example was an account of what happened in Palestine during the Arab revolt of 1936-9. The ‘emergence of black and tan tendencies’ among the British section of the Palestine police was largely recruited from the disbanded ranks of the Royal Irish Constabulary.\footnote{263}{Ruthven, n. 198 above, p. 276.} Suspects were arrested for interrogation and held in police stations and were tortured as a matter of course. ‘Bastinado’, the practice of suspending suspects upside down and urinating in their nostrils, extracting fingernails and pumping water into suspects before stamping on them, became commonplace.

Totalitarian regimes such as the Hitler regime not only used torture on members of the opposition but even on the entire population. Moreover, people were used as guinea pigs in cruel medical experiments.\footnote{264}{Malcolm Evans et al, n. 133 above, p. 20.} Torture was legalised and extensively used as these regimes faced the real prospects of defeat during the period of the Second World War. Interrogation methods termed ‘the third degree’, which
included flogging to get information were officially sanctioned.265 The Nuremberg trials revealed that in 1942, Hitler ordered that:

“The troops have the rights and duty to use, in this struggle any and unlimited means, even against women and children, if only conducive to success. Scruples of any sort whatsoever are a crime against the German people and against the front-line soldier who bears the consequences of attacks by guerrillas and their associates.”266

Similarly, the Stalin regime used torture as a technique to subdue the people in order to maintain a firm grasp on power. The security agencies were officially instructed to apply torture.267 A memorandum was issued by Stalin which contained an averment that:

“The Party Central Committee considers that physical pressure should still be used as obligatory, as an exemption applied to known and obstinate enemies of the people, as a method both justifiable and appropriate.”268

After the Second World War, torture and other gross brutalities were perpetrated in the name of Nazism. Fascism and Bolshevik Communism during the 1920s, 1930s and 1940s have been matched by numerous totalitarian or authoritarian regimes throughout the globe.269 Examples are numerous. In China and elsewhere in Asia, violence was used against the citizens in the name of Communism. In South


266 Peters, Chapters 3 and 4.

267 Malcolm Evans et al, n.133 above, p. 21.

268 Ibid.

269 Irwin M. Cohen et al, n. 4 above, p. 104.
America it has been done in the name of anticommunism. In pre-1994 South Africa it was done in the name of apartheid. In the Middle East it has been done in the name of Islam, and elsewhere in the name of secularism or moderation against alleged Islamic extremism or fundamentalist.\textsuperscript{270} In other parts of the world, it has been done in the name of national unity or identity.\textsuperscript{271}

As soon as the Second World War abated, the international community came together and entered into an international agreement in which they agreed that human rights be proclaimed and that torture be denounced. It was also proclaimed that torture was morally unacceptable and, consequently, not in accordance with international law. National law could no longer be invoked to justify the use of torture, in whatever form.

With the Nuremberg and Tokyo war crime trials, international criminal law entered a new phase. These trials exposed modern war crimes on an international level. Apart from the recognition of the principles of individual responsibility for international crimes, the Nuremberg trial was a breakthrough in that it did away with immunity of government officials and ended the act of state doctrine. No one can escape liability for international crimes of which torture is one, not even the Head of State.\textsuperscript{272}

\textbf{2.7.2 Contemporary torture}

Inevitably, much of the discussion about torture’s contemporary return has to focus on developments in the US action since 11 September 2001.\textsuperscript{273} Today, classical

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\textsuperscript{270} Malcolm Evans et al, n. 133 above, p. 21.


\textsuperscript{273} Foot, n. 222 above, p. 132.
torture no longer exists, the purpose of torture is no longer ‘truth’ but social display for the purposes of domination. Modern torture is private, not public. It takes place in the basements of prisons and detention centers. Modern torture is clinical because it relies on the control of the mind rather than the body, not ritual torture. The torturer operates on his/her patient. The methods and instruments are drawn from different disciplines and professions such as medicine, engineering, psychology, and physiology. Modern torture is guided by a new punitive principle: do not seek to punish the criminal act of the body, punish instead the delinquent life of the person. These days, punishment is directed at a point slightly beyond the body; the target is a human life.

Under the gaze of the torturer, human life emerged as an object for research. The victim was grasped from within, through electric shocks, injections, internal pressure, and sensory deprivation. The marks of punishment were seen not merely on the body but also in the eyes, which become frenzied out of fear, morbid dread and insomnia. This was not, as Muhammad Reza Shah put it:

"Torture in the old sense of torturing people, twisting their arms and doing this and that. This was a more intelligent punishment, one designed to persist long after the moment of its application. The objective was not to scar the flesh with marks of infamy, but to locate, isolate, and cripple the prisoner's soul."

History also reveals that insofar as European societies became disciplinary societies, torture became unnecessary as a means of government. The shift


275 Ibid.

276 Malcolm Evans et al, n. 133 above, p. 23.

277 Mayerfeld, n. 132 above, Chapters, 1-2.

278 Ibid.
toward discipline facilitated economic development and violent forms of power, fell into disuse and were superseded by a subtle, calculated technology of subjection.\footnote{279} Foucault believes that over the past few centuries, there has been a process at work that has rendered torture superfluous to the general exercise of power. Towards this end, Foucault asserts that the world is becoming a more disciplinary place. If this is so, the question is: why did so many disciplinary governments, including Western ones, torture their citizens? Foucault’s argument is flawed because of the existence of various practices of torture that are rampant in the world today. The point must be made that the majority of governments are not disciplined, many of them are reckless to the extent that they torture their victims through their agents and with impunity.\footnote{280}

No one can advance a satisfactory explanation for the return to torture, much less the features that characterize it. All major accounts of punishment subscribe to the view that as societies modernise, torture will become superfluous to the exercise of power. For humanists, this modernising force is progress. For Foucault, it is discipline.\footnote{281} For Marxists, it is the mode of production, although socialism shows no less a propensity for torture than capitalism. For Weberians, it is rationalization, which will render us more conscientious, specialized, and non-ideological. Strangely enough, torturers seem to be rather conscientious, specialized, and non-ideological fellows.\footnote{282}

All these accounts treat modern torture too unproblematically. Does the practice of modern torture today indicate a return to the past? One might be tempted to believe this because modern torture is so severely corporal. But it would be a mistake to let corporal violence be the sole basis for one’s judgment. Modern torture is not a mere atavism. It belongs to the present moment and arises out of

\footnote{279 Foot, n. 222 above, p. 135.}
\footnote{280 Peters, n. 34 above, Chapters, 3-4.}
\footnote{281 Ibid.}
\footnote{282 Ibid.}
the same notions of rationality, government, and conduct that characterize modernity as such.

2.7.3 Torture by liberal democratic nations

The attacks of 9/11 and the subsequent ‘War on Terror’ have introduced a new American mindset for rethinking about the ethics of war and torture. Regardless of previous American attitudes and policies, the US is now a torture practising state. The Bush administration has intentionally blurred the lines on questions of torture and terrorist detainees, and US agencies frequently outsource detainee interrogation to countries with less scrupulous torture standards. The Abu Ghraib scandal in Iraq and the furor surrounding the Guantanamo Bay detainees have brought the question of torture to US door.

Alan Dershowitz has urged a public reconsideration of the philosophy of torture. Reinvigorating the specter of the ticking-bomb terrorist, he has called for a re-examination of the benefits to be gained through torturing terrorist perpetrators and the moral ground previously held to be lost through such means. He describes a public institution of torture that can function like any other government agency. In the same vein, Richard Posner advocates torture for the ticking-bomb terrorist, suggesting that, in this new age of terror, one should ‘fight fire with fire’. The point must be made that notwithstanding the argument advanced to justify the use

283 Asad, n. 216 above.
284 Peters, n. 34 above.
286 Dana Priest and Barton Gellman, The Washington Post's in December 2002, "We don't kick the shit out of them. We send them to other countries so they can kick the shit out of them."
287 Ibid.
289 Dana Priest et al, n. 286 above, p. 13.
290 Ibid.
of torture for the ticking-bomb terrorist, moral thought, international agreements, and public opinion remain ideologically opposed to any form of torture.\textsuperscript{291}

Although there are diverse opinions on torture, and while many support a universal ban on its practice, it continues to exist and to find intellectual and popular support for its circumstantial use.\textsuperscript{292} This suggests that the contemporary debate on torture, like that of the past, has two veins. Even if there are diverse opinions on torture, the opinion to be preferred is that based on the universal ban on torture. Moreover, virtually all States have ratified specific and germane human rights instruments against torture. Consequently, any opinion so expressed must be towards its total eradication.

According to the Israeli High Court of Justice, liberal democratic regimes must have self imposed restraints. These restraints result in what Barak has termed fighting terrorism with ‘one hand tied behind’ the back.\textsuperscript{293} Liberal democratic regimes must be vigilant at all times, not only regarding the rule of law, but also to a finely tuned moral compass. It must be pointed out that these two principles were disregarded with respect to interrogation torture in Abu Ghraib, Guantanamo Bay and Bagram.\textsuperscript{294}

The fight against crime under its various shapes translates into the abduction of alleged criminals from other states. Such conduct threatens international peace and security. It also violates the most basic notions of human rights to which one would expect to apply to every human being, not only to nationals.\textsuperscript{295} The war

\textsuperscript{291} Ibid.

\textsuperscript{292} Amos N. Guirora et al, n. 258 above, p. 438.


\textsuperscript{294} Golden, n. 257 above.

\textsuperscript{295} Alberto Costi, Problems with Current International and National Practices Concerning Extraterritorial Abductions, 9 RJP/NZACL Yearbook 8, p. 98.
against terrorism and the more comprehensive fight against impunity do not create a special category of crimes demanding that alleged offenders be prosecuted at any cost.\textsuperscript{296}

The problem encountered by the recognition of an international protection of the rights of an alleged criminal rests, in the end, on an ethical or philosophical choice. The international community has an interest in bringing to justice those responsible for horrendous crimes, in preserving individual rights and the territorial integrity of the state and in maintaining the rule of law. Granting rights to individuals who commit horrendous crimes might be perceived as acting against the interests of the international community and as being morally wrong.\textsuperscript{297} The use of illegal methods to obtain custody of a person who has breached the law could also be counterproductive and serve as an incentive to act outside the law. The latter view suggests that where the rule of law prevails, it is better to let a criminal walk free than legitimising a wrongful exercise of jurisdiction.\textsuperscript{298} The respect for the basic principles underlying the common interests of the international community, sovereignty, territorial integrity, equality, and fundamental human rights - demands that states, no matter how powerful, act within the realm of the law.\textsuperscript{299}

\textbf{2.7.4 Rendition}

Rendition is one of those words that bureaucracies craft to hide official monstrosities. As an artistic term, rendition means a performance of a dramatic role. Webster's 1913 dictionary defines rendition as the act of surrendering

\textsuperscript{296} Ibid.

\textsuperscript{297} Ibid., pp. 98-99.

\textsuperscript{298} Ibid.

\textsuperscript{299} Text of President Robert Mugabe's speech at 62nd Session of UN General Assembly, Statement by His Excellency the President of the Republic of Zimbabwe, Comrade R. G. Mugabe, on the occasion of the 62nd Session of the United Nations General Assembly, New York, 26 September, 2007, newzimbabwe.com (last visited, 28th September, 2007).
fugitives from justice at the claim of a foreign government. In its brand new usage, rendition has come to mean surrender of aliens.\textsuperscript{300}

In the same vein, extraordinary rendition is a hybrid human rights violation, combining elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials and denial of impartial tribunals.\textsuperscript{301} It involves state sponsored abduction of a person in one country, with or without the cooperation of the government of that country without any form of judicial or administrative process such as extradition\textsuperscript{302} and the subsequent transfer of that person to another country for the purpose of detention and interrogation.\textsuperscript{303} These practices, usually carried out in secret, include transferring ‘war on terror’ detainees into the custody of other states, assuming custody of individuals from foreign authorities and abducting suspects on foreign soil.\textsuperscript{304}

Extraordinary rendition constitutes an attempt to avoid international condemnation of the use of torture and other forms of ill-treatment as interrogation techniques.\textsuperscript{305} Countries such as Russia, Sweden, and the US have used extraordinary renditions at one time or another.\textsuperscript{306} Bosnia, Canada, Croatia, Georgia, Indonesia, Macedonia, Malawi, Pakistan, and the United Kingdom have facilitated extraordinary renditions either by providing intelligence or by conducting the initial


\textsuperscript{303}David Weissbrodt et al, n. 301 above, p. 127.

\textsuperscript{304} Amnesty International, Rendition, n. 302 above.

\textsuperscript{305} David Weissbrodt et al, n. 301 above, p. 127.

\textsuperscript{306} Ibid., p. 128.
seizure. In the same vein, countries including Afghanistan, Egypt, Jordan, Morocco, Saudi Arabia, Syria, and Uzbekistan have assisted by taking custody of suspects after they are transferred out of the state where they were abducted. Usually, in most cases, the receiving states reportedly engage in torture and other forms of ill-treatment of detainees on a systematic basis.

While legal rendition has been used by the US increasingly since the 1980s as a method for dealing with foreign defendants, extraordinary rendition is a wholly extra legal process that differs in its nature and usage as a tool in the US led ‘war on terror’. Because the modern methods of rendition include a form where suspects are taken into US custody but delivered to a third party state, often without ever being on American soil, and without involving the rendering country’s judiciary, they have been termed ‘extraordinary rendition’. The Central Intelligence Agency was granted permission to use rendition in a presidential directive signed by President Bill Clinton in 1995 and the practice has grown sharply since the 9/11 terrorist attacks.

It is worth mentioning that over time, new types of human rights violation, such as extraordinary rendition, have emerged. Nowak observes that these new human rights violations include violations committed by non-state actors and intergovernmental organisations. While international human rights instruments

307 Ibid., pp. 128-129.
309 Amnesty International, n. 304 above.
312 Ibid., p. 126.
may not mention these new offences by name,\textsuperscript{314} various provisions within existing instruments address and prohibit the offences.\textsuperscript{315} It is suggested that inspiration will be drawn from the existing human rights instruments to address the issues of the novel offences: rendition and extraordinary rendition.

Article 16 of CAT requires every State Party to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture....” In a situation where the receiving country tortures the detainee or subjects the detainee to other forms of ill-treatment, that country is violating CAT.\textsuperscript{316} Article 3 of CAT is very germane with regard to other countries participating in rendition because it prohibits \textit{refoulement} to a state where there are substantial grounds to believe that a person would be in danger of being tortured.\textsuperscript{317}

Irregular methods of rendition usually involve violation of personal liberty and security, degrading treatment, or some other irregularities in the judicial process. Such situations gave rise to international claims even before the emergence of modern human rights law.\textsuperscript{318} The Universal Declaration of Human Rights and many other non-binding instruments have since developed the scope of individual procedural and substantive rights. Articles 3, 5, 8, 9 and 10 of the Universal Declaration relate to the right to liberty and security of the person, protection against inhuman treatment, arbitrary arrest and the fairness of the judicial procedures to be brought against the accused. Article 25 of the American

\begin{flushright}
\textsuperscript{314} David Weissbrodt et al, n. 301 above, p. 126.
\textsuperscript{315} Ibid.
\textsuperscript{316} Ibid., p. 142.
\textsuperscript{317} Articles 3(1) CAT.
\textsuperscript{318} Quintanilla v United States of America (Mexico/United States) IV RIAA 101, 102-103 (1926), holding the state liable for the cruel and unlawful treatment of an individual in custody.
\end{flushright}
Declaration of the Rights and Duties of Man also guarantees the right to protection from arbitrary arrest.\textsuperscript{319}

The Committee against Torture has published two findings that are particularly relevant to the practice of extraordinary rendition. In \textit{Khan v. Canada},\textsuperscript{320} the Committee determined that by transferring a person to a country that was not party to CAT, Canada had violated Article 3, both because the transfer would subject the person to a danger of torture and because the transfer would make it impossible for the person to apply for protection under CAT. It is worth mentioning that even if the receiving country is a party to CAT, it can still violates Article 3.

Similarly, in \textit{Agiza V. Sweden},\textsuperscript{321} the Committee against Torture determined that Sweden’s use of extraordinary rendition violated Article 3.\textsuperscript{322} With cooperation and assistance rendered by the US, the government of Sweden seized Egyptian refugee Ahmed Agiza and transported him to Egypt. The Committee found that:

\begin{quote}
“it was known, or should have been known, to Swedish authorities at the time of Agiza removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons.”\textsuperscript{323}
\end{quote}

Extraordinary rendition may also constitute a conspiracy to commit torture in violation of CAT.\textsuperscript{324} Countries not directly committing acts of torture, but facilitating

\begin{flushright}
\textsuperscript{319} Resolution XXX, Final Act, Ninth International Conference of American States, OAS Off Rec OEA/Series.L/V/II.23/Doc.21/Rev. 6 (1948).
\textsuperscript{322} Ibid.
\textsuperscript{323} Ibid.
\end{flushright}
the practice by providing intelligence or material assistance, may violate the prohibition on state ‘consent or acquiescence’\textsuperscript{325} to torture in terms of Article 1.\textsuperscript{326} They may also violate domestic laws enacted in compliance with Article 4 of CAT, which criminalise torture.\textsuperscript{327}

US officials have admitted to being directly involved in extraordinary rendition and very much aware that the transfers of suspects to countries known for practices of torture were likely to result in torture.\textsuperscript{328} It has been suggested that the administration was ‘turning a blind eye’ to that likelihood. In some cases, officials from the country conducting the extraordinary rendition directly participate in the interrogation process after the detainee is delivered to the receiving country.\textsuperscript{329} El Masri, for instance, reported that his interrogators in Afghanistan were US officials using an interpreter.\textsuperscript{330} At the very least, these reports suggest ‘consent or acquiescence’ to torture in violation of Article 1 of CAT.

Additionally, Article 1 is violated when countries such as Sweden attempt to obtain diplomatic assurances that receiving countries will not subject transferred detainees to torture, particularly when the receiving countries systematically practice torture\textsuperscript{331} or demonstrate a pattern of denying the existence of torture.\textsuperscript{332} The Special Rapporteur on Torture has expressly stated that when a receiving state engages in a systematic practice of torture, ‘the principle of non-refoulement

\textsuperscript{324} David Weissbrodt et al, n. 301 above, p. 144.

\textsuperscript{325} Articles 1(1) CAT.

\textsuperscript{326} David Weissbrodt et al, n. 301 above, p. 144.

\textsuperscript{327} Amos N. Guiora et al, n. 258 above, p. 230. The U.S. Code makes it a criminal offense for any person outside the U.S. to commit or attempt to commit torture, 18 U.S.C. § 2340A (1994).

\textsuperscript{328} David Weissbrodt et al, n. 301 above, p. 144.

\textsuperscript{329} Ibid.

\textsuperscript{330} Ibid.

\textsuperscript{331} Ibid., p. 145.

\textsuperscript{332} Amnesty International, n. 302 above.
must be strictly observed and diplomatic assurances should not be resorted to. These comments directly implicated Sweden’s transfer of Agiza to Egypt.

2.8 Torture: To Remain or not to Remain

Peters gave a vivid account of the historical evolution of the standards that are relevant to human dignity and the ban on torture. He also emphasised the right not to be subjected to torture either by the state or an individual. This researcher subscribes to the views expressed by Peters and other scholars. Consequently, it is on this premise that reliance is placed on the works of Peters for purposes of highlighting the need to have a new enlightenment.

In that brief and hopeful interlude between the end of the Second World War and the revelations at the Twentieth Party Congress in Moscow in 1956 and the events in Algeria of 1954-62, a number of international organizations and congresses undertook in all seriousness and with a genuine optimism to ensure that the horrors of the previous two decades should never recur. In doing so, they invoked the most inspired and universal claims of the political revolutions of 1776 and 1789, which, although they had been legislated for individual nations, had claimed that their legislation had a valid universal basis. The subsequent influence of these universality claims were manifest in the years immediately following 1945 and subsequently.

The heinous crimes committed before and during the Second World War and the trial of the perpetrators that followed immediately reinforced the need for a sense of belonging and collective effort by the international community that never again would they allow the acts of violence and flagrant violations of human rights to

333 David Weissbrod et al, n. 301 above, p. 145.

334 Ibid.

335 Peters, n. 34 above, p. 141.

336 Ibid.
occur or allowed to be perpetrated. In spite of the experience of the Cold War, the
of universal protection for human rights had not had unremitting triumphs. However, it did provide grounds, particularly in the wake of the Nuremberg trials and the world's reaction to the internal history of the Axis states during the Second World War, for a real hope that international agreements, democratically reached and ratified, might prevent those horrors from happening again.

In order to ensure that there was total eradication of torture, and where it was suspected or alleged to have been committed, various international human rights detecting and monitoring bodies and agencies were put in place by the UN. Most of these agencies have assisted tremendously to ensure that States and individual perpetrators are closely monitored and in most cases sanctioned. \(^{337}\) The International Red Cross, the International Labour Organization, the League Mandates Commission, and Anti-Slavery League represent the early twentieth-century attempts to create a universally recognized convention of basic human rights that might be placed, by states themselves, ahead of individual state policy. \(^{338}\) Such ambitions, which Peters refers to as 'humanitarian diplomacy', brought sharp relief through the revelations of the internal history of the Third Reich and other Axis powers as the Second World War drew to a close. \(^{339}\)

The Charter of the United Nations of 1945 attempted to restore concern for universal rights to the forefront of the post-war world. Article 55 of the UN Charter contains the first post-war assertion of a universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, language, or religion. In this regard, all nations were later enjoined to accept the principles inherent in the Universal Declaration as ‘a common standard of achievement’ in their inter state relationships. Henceforth, the way and manner in

\(^{337}\) Ibid.

\(^{338}\) Ibid., p. 142.

\(^{339}\) Ibid.
which a state treats its citizen is no longer only the business of the state alone, but also the concern of other member states.

In 1948 the Universal Declaration of Human Rights expanded upon Articles 1 and 55 of the Charter, of which Article 5 stated that: “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.” This Declaration proved to be the main source of inspiration for international human rights law. The Universal Declaration was unique, being the first instrument to contain a catalogue of universally proclaimed values and standards. In that sense this also implied for the first time the existence of a universal, international community.340 This community had declared that every individual enjoyed certain minimum rights that transcended borders, ideology, race, religion and sex.341 From this moment, the international community recognized that the observance of human rights was not solely a matter for the States themselves but also constituted a collective responsibility of the States in the framework of, among other things, the United Nations.342

From all indications, one can confidently conclude that at no period in the evolution of mankind, be it primitive or modern periods that torture has not been used. The saving grace out of the so called heinous act known as torture is that human rights are a matter of international concern. The purpose of CAT was to make more effective the struggle to remove torture and other cruel, inhuman or degrading treatment or punishment from the world. However, recent experience points to the fact that fine words in international and national instruments mean nothing unless

340 Ingelse, n. 21 above, p. 44.
341 Ibid.
342 Ibid.
there is a will to respect them. Those who do not care about international opinion are not deterred by them. In the words of Dershowitz:

“Torture is a staple in tyrannical regimes. Enemies are tortured mercilessly for information and then killed. Political opponents are tortured to death to send a powerful deterrent message. For understandable reasons, torture has become a symbol of tyranny.”

2.9 Final Considerations

In the primitive period, torture was permitted and acceptable. Then, the use of torture was not considered as wrong; rather, it was a legitimate practice. Consequently, there was no reason to hold the perpetrators accountable because there was no rule, custom or law banning torture. It is an understatement to say that perpetrators were acting with impunity because practices of torture were the normal way of life and had the sanction of rulers. Perpetrators were usually dignified rather than damned. However, there have been various positive developments, particularly during the enlightenment periods, towards total eradication of torture. One of the numerous reasons advanced for its eradication is that torture should not be inflicted in any circumstances. As Henry Shue wrote in his classic essay of 1978: “No other practice except slavery is so universally and unanimously condemned in law and human convention.”

While the practice of torture has been widespread, until recently it had come to be understood that no representatives of the state could openly admit that they would

343 Hope, n. 247 above, p. 827.
344 Ibid.
346 Article 2 (2) of CAT.
use torture for fear of being removed from office and of having their state ostracized by ‘civilized’ nations.\textsuperscript{348}

Nowadays, there are various international human rights instruments prohibiting torture. Violations of the provisions of these instruments by states or individuals will attract necessary and appropriate sanction. The erring state or individual will be held accountable and if found liable, sanctions as contained in the instruments banning torture will be invoked accordingly. It must be stressed that condemnation of torture is universal and its prohibition forms not only part of customary international law, but has joined that narrow category of crimes so egregious\textsuperscript{349} as to attract universal criminal jurisdiction. There is no safe haven for perpetrators because the various mechanisms and adjudicating bodies of state parties and the United Nations have competent jurisdictions to right the wrong.

\textsuperscript{348} The various forms of denial used in reference to uses of torture, and many instances of the use of denial, are discussed in Stanley Cohen, States of Denial: Knowing about Atrocities and Suffering (Cambridge: Polity Press, 2001).

\textsuperscript{349} John Dugard, International Law, A South African Perspectives, 2005, third edition, Juta and co Ltd, p. 36.
CHAPTER 3

TERMINOLOGIES AND DEFINITIONS OF TORTURE

3.1 Introduction

Torture constitutes a human rights violation under various human rights treaties. It is, however, one of the most challenging and most controversial. Its scope depends so much on the meaning of words:

“When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean neither more nor less.’
‘The question is, ’said Alice,’ ‘Whether you can make words mean so many different things.’
‘The question is,’ said Humpty Dumpty,’ which is to be master- that's all.”350

Different meanings and different interpretations have been given to the word ‘torture’ and this has generated a lot of controversy. In order to resolve these controversies, it is possible to find some guidance in various treaties banning torture. The starting point is the provisions of CAT, which is considered the benchmark on torture.351 Additional international documents covering torture and other cruel, inhuman or degrading treatment include: the Geneva Conventions; the International Covenant on Civil and Political Rights; the Convention on the Prevention and Punishment of Genocide; The International Convention on the Elimination of All forms of Racial Discrimination; and the CRC. Regional treaties include the European Convention for the Protection of Human Rights and Fundamental Freedom; (ECHR) the Africa Charter on Human and Peoples’ Rights;

350 Through the looking Glass, Chapter VI, quoted by John Cooper, Cruelty- an analysis of Article 3, 2003, Sweet and Maxwell Ltd, p. V.

(African Charter); the American Convention on Human Rights; the Inter-American Convention on Human Rights; and the Inter-American Convention to Prevent and Punish Torture.\textsuperscript{352} The Statute of the International Criminal Court (Rome Statute) which recently created the International Criminal Court prohibits torture which is described as a crime against humanity and a war crime.\textsuperscript{353}

It must be pointed out from the outset that the ban on torture and other cruel, inhuman or degrading treatment or punishment has not been particularly controversial. The fact that the Convention reappeared in every draft, and was adopted unanimously in the UN General Assembly shows the universal nature and level of support for the Convention. This applied not only to the ban on torture, but also to the prohibition of other acts of inflicting cruel, inhuman or degrading treatment and punishment.\textsuperscript{354}

However, the controversy over both torture and cruel, inhuman treatment or punishment is based on the different interpretations given to these words by the courts and different bodies conferred with the responsibility to adjudicate on breaches of fundamental human rights. Notwithstanding, it has been observed that “the definitions or distinguishing characteristics were provided only sporadically.”\textsuperscript{355}

To some extent, what torture is and the distinction between torture and cruel, inhuman or degrading treatment or punishment was clarified in the jurisprudence of the Commission and the Court of Human Rights under the ECHR in the Greek case. In this case, the Commission established that the difference between the prohibited acts described in Article 3 of the ECHR was only a matter of degree: “all

\begin{itemize}
\item \textsuperscript{352} Ibid., pp. 10-11.
\item \textsuperscript{354} Ingelse, n. 21 above, p. 49.
\item \textsuperscript{355} Ibid., p. 58.
\end{itemize}
torture must be inhuman and degrading treatment, and inhuman treatment is also degrading.”\textsuperscript{356}

Similarly, it is possible to find some guidance in the decisions of the European Court of Human Rights as to the scope of the Article. Cooper observed that it is easier to understand the word torture but not ill-treatment:

“We all think that we know what is meant by ‘torture’, as for ‘ill-treatment’, the conduct which is complained of must attain a minimum level of severity if it is to fall within the scope of the article. The absolute prohibition which it contains is not capable of modification. Where a positive obligation is to be implied issues of proportionality can arise. But at the root of the whole matter is the question of what the words really mean.” \textsuperscript{357}

\section*{3.2 The Legal Regime against Torture and Inhuman Treatment}

Although a number of treaties prohibit torture and inhuman treatments, the basic formula for prohibition stems from Article 5 of the Universal Declaration of Human Rights, which declares: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Other regional human rights treaties notably, the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights largely reproduce the Declaration’s prohibition although their relative scope of protection varies.

Likewise, Article 7 of the International Convention on Civil and Political Rights. (ICCPR) states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The ICCPR does not contain any definition of


\textsuperscript{357} Cooper, n. 350 above, p. IV.
these concepts and neither does the Human Rights Committee consider it necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment.\textsuperscript{358} In a 1982 General Comment (later updated in 1992), the Committee stated that such distinctions “depend on the nature, purpose and severity of the treatment applied.”\textsuperscript{359} Similarly, Nigel Rodley, a former UN Special Rapporteur on Torture, identifies a three-part test applied by regional human rights bodies in defining torture. Firstly, the relative intensity of the pain or suffering inflicted; secondly, the purpose for inflicting it; and thirdly, the status of the perpetrator, i.e., whether he/she acted in a public capacity.\textsuperscript{360} Where the threshold between torture and inhuman treatment is concerned, two human rights bodies (the ECHR and Committee against Torture) have addressed in particular detail the first and second tests.

3.3 What is ‘Torture’?

An attempt to define torture will focus on international law, and in particular, international human rights and various human rights instruments prohibiting torture where the definition of torture is most developed and where the prohibition against torture is the strongest. In addition, the case laws of bodies set up under human rights treaties prohibiting torture offer assistance. Although these treaties prohibit torture and ill-treatments in clear language, none of them contains a practise definition of torture. As a matter of fact, their decisions and observations have influenced the content of definitions which, in turn, have influenced case law.\textsuperscript{361}

\textsuperscript{358} Ibid.

\textsuperscript{359} Rights Committee, General Comment No. 20 on Prohibition of torture, or other cruel, inhuman, or degrading treatment or punishment, 4, U.N. Doc. HRI/GEN1/Rev.7 (2004).

\textsuperscript{360} Nigel Rodley, The Definition(s) of Torture in International Law, in Michael Freeman, (ed.), Current Legal Problems (Oxford University Press, 2002), p. 469.

\textsuperscript{361} Ibid.
What justifies revisiting the issue of the definition of torture is that new definitions have emerged in international criminal law instruments and new case law from international penal tribunals, especially the International Tribunal for the Former Yugoslavia (ICTY), which operate under statutes that do not define the offences.

Is there any coherent notion of torture under general international law? It is apparent that different definitions be applicable: on the one hand to the prohibition of torture under international human rights law (which involves the establishment of state responsibility), and, on the other hand, to the offence of torture under international criminal law (which involves the establishment of individual penal responsibility). Rodley observes:

“such differences might have to do with questions like appropriate burdens of proof required of an alleged victim of a violation of international human rights law, as opposed to a prosecutor seeking to establish individual liability for an offence under international criminal law; or the permissibility of making inferences of mental elements from the facts; or the possibility that a violation of one branch of the law may not always appropriately entail a violation of the other branch.”


363 Rodley, n. 360 above.

364 Ibid.

365 Case Concerning the Barcelona Traction, Light and Power Company Limited, p. 32.

366 The jurisprudence of the ICTY and the ICTR in which the individual criminal culpability of defendants has been determined: Prosecutor v Tadic, Case No IT-94-1-T (7 May 1997), 36 ILM 913; Prosecutor v Tadic, Case No IT-94-1-T (15 July 1999), 38 ILM 1518; ‘Judgement’, Prosecutor v Akayesu, Case No ICTR-96-4-T (2 September 1998); 37 ILM 1399; Prosecutor v Furundzija, Case No IT-95-17/1-T (10 December 1998), 38 ILM 317.

367 For example, the right to life was breached because of inadequate planning of a security action against suspected terrorists who were killed, in circumstances where those who carried out the killing believed they acted (erroneously, as it turned out) in self-defence. Accordingly, the normal requirement of an investigation
In 1975, the UN General Assembly adopted the Declaration\textsuperscript{368} and CAT\textsuperscript{369} by consensus. Torture is defined in Article 1 of CAT as follows:

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or a third person information or a confession, punishing him for an act he or a third party has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent of 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”.\textsuperscript{370}

CAT also requires state parties to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1.”\textsuperscript{371} Moreover, Article 2 provides that: “No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”\textsuperscript{372}

It is worth mentioning that when dealing with punishments sanctioned by law, such as corporal punishment, death penalties and terrorism, ambiguities may arise in capable of leading to prosecution of the perpetrators was inappropriate: McCann et al. v. United Kingdom (1995), European Court of Human Rights, Series A, No. 324.

\textsuperscript{368} The Declaration, n. 75 above.

\textsuperscript{369} CAT, n. 47 above.

\textsuperscript{370} Ibid.

\textsuperscript{371} Ibid., Article 16.

\textsuperscript{372} Ibid., Article 2(2).
relation to the second sentence in Article 1(1) CAT, which stipulates that an act will not amount to torture, if it merely consists of “pain or suffering arising only from, inherent in, or incidental to lawful sanctions.” Thus, could States permitting corporal punishments, death penalties and anti-terrorism within their legislation not argue that these are perfectly compatible with Article 1 of CAT? Rodley, however, does not:

“[…]accept the notion that the administration of such punishments as stoning to death, flogging and amputation, acts which would be unquestionably unlawful in say, the context of custodial interrogation can be deemed lawful simply because the punishment has been authorised in a procedurally legitimate manner i.e. through the sanction of legislation, administrative rules or judicial order.”

“[…] To accept this view would be to accept that any physical punishment, no matter how torturous and cruel, can be considered lawful, as long as the punishment had been duly promulgated under the domestic law of a State. Punishment is after all one of the prohibited purposes of torture.”

3.3.1 Human Rights Committee’s pronouncements on the definition of torture

3.3.2 Introduction

The Human Rights Committee’s (HRC) views and pronouncements concerning the definition of torture as related to Article 7 of the ICCPR also serves as a guide for proper consideration and analysis of torture and other inhuman treatments. The


375 Nejad, n. 373 above, p. 97.
HRC has never provided a theoretical definition of torture, but instead has referred to the definition given by CAT and has urged all States to ratify CAT. The HRC has had occasions to consider the definition of torture in its General Comments, Concluding Observations and jurisprudence or case law provided by the individual communications procedure.376

It is pertinent to mention that the jurisprudence of the HRC concerning torture has evolved over time. Before now, the HRC in many cases they presided over, concluded that torture had been committed; however, in recent cases, there has been no reference to torture. These days, the HRC has consistently pronounced that other inhuman treatments have been committed as it considers the prohibition in Article 7 of the ICCPR as a hole and does not distinguish between the different acts mentioned in the provision.377 The reason for this is that if an allegation of torture was unsuccessful because it fails to meet the required severity or threshold, lesser inhuman treatments like cruel treatments will suffice to generate responsibility. This approach has proven to be preferred because it has encouraged victims to lodge complaints unlike before when they did not have confidence in the authorities.378

3.3.2 Elements in the definition of torture

The literature is replete with analyses of the meaning, in international human rights law, of the notion of torture, as found in the prohibition of ‘torture or cruel, inhuman or degrading treatment or punishment’.379 The effect of this is to consider three key and, to a lesser extent, other forms of ill-treatment. These elements are most vividly depicted in the available case law of the HRC, the Concluding


377 Ibid.

378 Ibid., p. 79.

379 Rodley, n. 360 above, p. 77.
Observations, General Comments that underline the three elements mostly referred to when considering the definition of torture.\textsuperscript{380} These three components are presented below.

3.3.2.1 The relative intensity of pain or suffering inflicted

The HRC has never theoretically distinguished between torture and other inhuman treatments. The HRC has continuously exercised its discretion to qualify or not to qualify the act committed as torture.\textsuperscript{381} In many cases, the severity of the treatment plays an important role in holding whether the act constituted torture or ill-treatment. One of the commonest and modern practices is the use of electric shocks and this has been considered in many jurisprudence to be severe enough to amount to torture.

Similarly, in America, the Bybee memo was a ‘formal legal opinion of the Office of Legal Counsel’ which interpreted CAT and the corresponding US Code.\textsuperscript{382} The American armed forces prior to the Bybee memo used the definition of torture from the US Code.\textsuperscript{383} Based on the Bybee memo analysis, American armed forces narrowed the definition by stating that ‘severe’ means that the physical or mental pain ‘must be of such a high level of intensity that the pain is difficult for the subject to endure.’\textsuperscript{384}

\textsuperscript{380} Wendland, n. 376 above, p. 77.

\textsuperscript{381} Ibid.


\textsuperscript{383} Human Rights First, U.S. Law for Prosecuting Torture and Other Serious Abuses Committed by Civilians Abroad, Human Rights First, http://humanrightsfirst.org/us_law/detainees/us_torture_laws.htm (discussing military law and U.S. Code provisions that are applicable to members of the U.S. armed forces).

The point must be made that what practices will amount to torture should not be trivialized, and it will not suffice to say that because certain pain or treatment has not attained a certain threshold of severity, it will not amount to torture. This is a misconception because any means that is used, provided it makes the victim suffer will definitely amount to torture. This approach is preferable because it will make the perpetrator of torture accountable. Consequently, the relative intensity of pain or suffering inflicted must not only be severe, it will suffice if it falls within the purview of an aggravated form of already prohibited acts, whether defined or undefined, such as cruel, inhuman or degrading treatment or punishment.

### 3.3.2.2 The act and purpose of torture

The act of torture in CAT refers to the deliberate infliction of severe pain or suffering upon a person for a reason or reasons, which can be either mental or physical in nature and caused by either a single isolated act, or a number of such acts.\(^\text{385}\) The extent to which an individual could endure pain or suffering is subjective and it depends on the characteristics of the victim and the circumstances of each case.\(^\text{386}\) The drafting history of CAT reveals that the list of purposes was meant to be indicative rather than all-inclusive.\(^\text{387}\) The use of the words ‘for such purposes’ do not constitute an exhaustive list, and should be regarded as merely illustrative.\(^\text{388}\)

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\(^\text{385}\) Wendland, n. 376 above, p. 24.


\(^\text{387}\) Ibid., p. 21.

\(^\text{388}\) Wendland, n. 376 above, p. 28.
3.3.2.3 The perpetrators

Perpetrators of torture need not be persons acting in an official capacity, but also groups and individuals acting within the jurisdiction of the State Party with its open or tacit consent.\textsuperscript{389} The HRC has distinguished among perpetrators acting in their official capacity, outside their official capacity, or in a private capacity.\textsuperscript{390} This includes law enforcement personnel, medical personnel, police officers, and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment.\textsuperscript{391}

It will satisfy the requirement of the definition of torture when committed by the police, security forces\textsuperscript{392} and members of the army\textsuperscript{393} as well as by paramilitary and other armed groups. In the decision of \textit{Elmi v. Australia}\textsuperscript{394}, the Committee against Torture found that warring factions operating in Somalia, which had set up quasi-governmental institutions and which exercised certain prerogatives that are comparable to those normally exercised by legitimate governments, can fall within the phrase ‘public officials or other persons acting in an official capacity’ contained in Article 1 of CAT.\textsuperscript{395} It also includes private persons\textsuperscript{396} and foreign soldiers operating within the State Party’s territory.\textsuperscript{397} In its early jurisprudence, the HRC

\begin{footnotesize}
\begin{enumerate}
\item Irwin M. Cohen et al, n. 4 above, p. 105.
\item Dean, n. 382 above, p. 75.
\item Ibid.
\item CO: CCPR/C/79/Add. 23.
\item CO: CCPR/C/79/Add. 36.
\item The HRC has interpreted the scope of Article 7 of the ICCPR to extend to acts committed by private persons. HRC General Comment 20 of 10 April 1992 (replaces General Comment 7 of 30 July 1982), paragraph 2.
\item Dean, n. 382 above, p. 75.
\end{enumerate}
\end{footnotesize}
had included bi-national commandos in the definition of authors of acts of torture.\textsuperscript{398}

From the jurisprudence of the HRC, it seems apparent that in order for any act to amount to torture, all the three elements must be present. A person who is severely ill-treated is not tortured if the perpetrators do not have a specific intention when they inflict pain on the victim.\textsuperscript{399} In addition, a person who is ill-treated for political reasons but who is not subjected to severe ill-treatment is not considered to have been tortured.\textsuperscript{400} This researcher is of the view that the HRC should exercise caution especially when invoking ‘intention’ to consider whether there was torture or not. Apparently, the perpetrator will have a leeway to inflict torture and if called upon to account, will easily invoke and rely lack of ‘intention’, to torture as a defence. If the invocation is successful, the perpetrator will go unpunished hence creating room for impunity. While the HRC has not firmly established any firm rules regarding elements of torture, the jurisprudence on torture by the Committee against Torture is more predictable.\textsuperscript{401}

\textbf{3.3.3 Inter-linked terms}

It has been observed by Cooper that the terms ‘torture’, ‘inhuman’ and ‘degrading treatment’ or ‘punishment’ are often considered to be in a hierarchy.\textsuperscript{402} Firstly, torture is the most severe; followed by inhuman treatment or punishment; and then degrading treatment or punishment. The protection of physical integrity offered

\begin{small}
\textsuperscript{398} Communication no. 110/1981 Uruguay.

\textsuperscript{399} CCPR/C/59/D/481, 1991 Ecuador.

\textsuperscript{400} Communication no. R 9/37.

\textsuperscript{401} Wendland, n. 376 above, p. 79.

\textsuperscript{402} Cooper, n. 350 above, p. IV.
\end{small}
under Article 8 of the European Convention on Human Rights performs a sort of ‘mopping up’ exercise.\(^{403}\)

However, Cooper critique the concepts and relied on the approach of the Committee; namely, that the expression torture, inhuman and degrading treatment or punishment reflects not so much a hierarchy of severity of ill-treatment as different types of ill-treatment, more or less closely linked.\(^{404}\) The jurisprudence of the Committee only revealed the current understanding of the key terms in Article 3 of the ECHR but it did not, and cannot, point to their limits.\(^{405}\) The courts remain free to test these limits by exploring and revealing the range of circumstances which potentially might be considered as within its ambit. The point must be stressed that domestic courts have commented that it will not serve the cause of human rights to set such demanding standards that breaches were commonplace.\(^{406}\)

At this point, it is appropriate to consider the controversies surrounding the key terms in CAT and other related human rights instruments on torture. The focus will be the way and manner in which the courts, commissions and other relevant adjudicating authorities on human rights have considered and interpreted the key terms. Some of the difficulties inherent in the interpretations and approaches adopted will be highlighted. It must be mentioned that the approaches and the principles developed by various courts now permeate the entire international yearnings to the outlawry of torture.\(^{407}\)

\(^{403}\) Ibid., p. 7.

\(^{404}\) Ibid., p. 8.

\(^{405}\) Malcolm Evans et al, n. 133 above, p. 73.

\(^{406}\) Thomas v. Baptiste [2000] 2 A.C. 1, p. 27.

\(^{407}\) Malcolm Evans et al, n. 133 above, p. 74.
For instance, a succinct examination of Article 3 of the ECHR reveals that it is normally broken down into three parts and ‘torture’, ‘inhuman’, and ‘degrading’, are each invested with their own significance. Apart from the distinction between ‘torture’, and ‘inhuman’, and ‘degrading’, treatment, the distinction between ‘treatment’ and ‘punishment’ was also drawn with regard to each other. From all indications, it will be right to say that though various distinctions and interpretations of the key terms have resulted in a complex jurisprudence, it has influenced the subsequent development of the 1975 UN Declaration and subsequently, CAT. 408

It must be noted that at the earlier stages of exercising its adjudicating authority, the Commission was unable to avoid the controversy as to what constitutes torture, inhuman or degrading treatment. An example of this is Ireland v United Kingdom 409 where, the five interrogation techniques instituted by the security forces were categorized as torture by the Commission but somewhat downgraded by the court. 410 In the case of Tomasi v France 411 the court observed that counter-terrorist activities are important measures to protect society. But violations of Article 3 will not even be condoned when the excuse given is the suppression of terrorism or to counter violent crime.

Judicial activism requires that the court be proactive whenever there is an allegation of torture. The court must look at all the entire circumstances of the case under consideration before it proceeds to make pronouncement on whether the facts amount to torture, inhuman or degrading treatment. 412

408 Ibid.


410 Cooper, n. 350 above, p. 8.


3.3.4 The definition of torture in the African Charter

3.3.4.1 Introduction

The African Charter defines torture and other forms of inhuman treatment. The Charter also guarantees the right to life and the integrity of the human person. Article 5 of the African Charter guarantees human dignity and prohibits torture in the following words:

“All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

It should be noted that a right to human dignity is guaranteed separately from the prohibition of torture. The right to human dignity is the positive dimension of the obligations contained in Article 5. When the State or its agents breach this obligation, the prohibition against torture, cruel, inhuman and degrading treatment or punishment is almost invariably also breached. The expression ‘all forms of’, casts the net of Article 5 wide enough to include a prohibition of both State and non-State conduct. Article 5 is reinforced and supplemented by other Charter provisions, such as guarantees of equal protection of the law, the right to life


414 Ibid.

415 Ibid.

416 Uzoukwu v. Ezeonu II, (1991) 6 Nigerian Weekly Law Reports (Pt. 200), p. 708, in which the Supreme Court of Nigeria held that the prohibition against slavery and other forms of inhuman and degrading punishment or treatment was not limited to acts of the State but also extended to slavery in private arrangements.
and integrity, including the guarantee against ‘arbitrary deprivation’ of that right,\textsuperscript{418} the right to personal liberty and security and fair trial and due process guarantees.\textsuperscript{419}

3.3.4.2 Compliance regarding Article 5 of the African Charter

Article 5 of the African Charter incorporates two disparate though interrelated aspects: respect for dignity and the prohibition of exploitation and degradation.\textsuperscript{420} Slavery, slave trade, torture, cruel, inhuman and degrading treatment and punishment are listed as ‘examples’ of exploitation and degradation.\textsuperscript{421}

In order to interpret Article 5, it has always been problematic for the Commission to draw clear distinctions between ‘torture’ and other forms of ill-treatment, such as ‘inhuman’ and ‘degrading’ treatment.\textsuperscript{422} The problems that have been attributed to the facts presented in communications before the Commission are usually very crude and cumulative, and clearly reveal excessive ill-treatment or punishment, such that a careful judicial analysis is rendered redundant.\textsuperscript{423} For example, in the earliest interpretation of Article 5 of the African Charter, the Commission considered conditions of detention\textsuperscript{424} and summary and arbitrary executions. Thus the Commission had no difficulty in finding that ‘the deaths of citizens who were shot or tortured to death’ by law enforcement agents violated Article 5 of the

\begin{itemize}
\item Article 4, African Charter.
\item Ibid., Article 6.
\item Ibid., Article 7.
\item Frans Viljoen et al, n. 413 above, p. 36.
\item Ibid.
\item Ibid.
\item Ibid., p. 37.
\item Krishna Achutan (on behalf of Aleke Banda) v. Malawi, Communication 64/92, Seventh Activity Report, (2000) AHRLR 143 (ACHPR 1994).
\end{itemize}
Charter.425 Also, in the *Commission Nationale des Droits de l'Homme* case,426 the Commission affirmed that Article 5 prohibits summary, arbitrary and extra-judicial executions.427

Similarly, it has also been further observed that at the beginning of its adjudication on matters brought by complainants, the Commission did not elaborate on its findings, but merely stated the essential facts and the applicable provision, and then concluded that a violation of the provision had occurred without attempting to show how the particular legal provisions relate or are applied to the specific facts.428 Although later findings are more expansive and more rigorously substantiated, the depth of analysis can often be improved considerably. When the four forms of ill-treatment ‘torture’, ‘cruelty’, ‘inhuman treatment’ and ‘degradation’ are used disjunctively, at least to some extent, no clear categorisation and careful distinction is elaborated in the case-law. However, in *John D. Ouko v Kenya*,429 a distinction was drawn between ‘dignity and freedom from inhuman or degrading treatment’ on the one hand, and ‘freedom from torture’ on the other.430 After finding that the evidence revealed no specific instances of ‘physical and mental torture’, the Commission declined to conclude that the ‘right to freedom from torture’ was violated.431

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427 Ibid.


430 Ibid., paragraph 25.

431 Ibid., paragraph 26.
The Commission provided its clearest explanation of Article 5 in *International Pen, Constitutional Rights Project, Interights (on behalf of Ken Saro-Wiwa Jr.) and Civil Liberties Organisation v. Nigeria.* Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his/her will or conscience.

### 3.5 Torture and other forms of Inhuman Treatments

#### 3.5.1 Introduction

It will be assumed that torture is to be differentiated from other forms of inhuman treatments which may be described variously as lesser, serious, severe, and so on. It must be stressed that the distinction between torture and inhuman or degrading treatment or punishment was in the intensity of the suffering caused. It has also been observed that the qualification ‘torture’ could only be applied to deliberate inhuman treatment resulting in extremely serious suffering. It must be pointed out from the outset that suffering is dependent on the subjective experience of each individual and, in most cases, it is difficult for the court to assess the extent of the sufferings. Consequently, in an attempt to classify a practice as torture or other ill-treatment, the courts usually inquire into the extent and in which combination such acts would have to occur for the treatment to be deemed torture.

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433 Rod Morgan and Malcolm Evans, Combating Torture in Europe, Council of Europe Publishing, p. 35.

434 Ingelse, n. 21 above, p. 59.

435 Ibid.

436 Ibid.
However, Malcolm has expressed the view that what served to differentiate torture from other inhuman treatment was not the degree of suffering involved but the fact that it was inflicted in order to achieve a purpose.\textsuperscript{438} Torture was often an aggravated form of inhuman treatment; also, torture was the purposive use of inhuman treatment.\textsuperscript{439} The \textit{Greek} case established that torture must be both purposive and aggravated and this understanding was ultimately reflected in Article I of the 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture or other Cruel, Inhuman or Degrading Treatment or Punishment (the Declaration against Torture), Article 1 reads:

\begin{quote}
“1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such a purpose as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”
\end{quote}

Malcolm criticised the argument put forward by Fawcett\textsuperscript{440} to the effect that it is difficult to see how treatment which is inhuman can be aggravated and that torture can be considered a form of treatment or punishment even more inhuman than the inhuman treatment itself. The former rather believed that torture and inhuman treatment could be seen as co-existing on the same plane, distinguished only by

\textsuperscript{437} Ibid., p. 60.

\textsuperscript{438} Rod Morgan et al, n. 433 above, p. 76.

\textsuperscript{439} Ibid., p. 77.

\textsuperscript{440} Fawcett, (1987), pp. 45-46.
the purposive element. The use of the word ‘torture’ would be reserved for forms of inhuman treatments deliberately employed to achieve certain purposes. It is against this background that CAT has veered towards examining the totality of circumstances in which ill-treatment may occur, and states do not seem to object to CAT probing matters which do not relate to torture.\textsuperscript{441}

More importantly, the technique used to perpetrate torture will continue to play an important role in determining whether the practice amounts to torture or not and this is highlighted in the Commission’s decision in the \textit{Ireland} case. Judge Zekia who delivered a dissenting judgment reminded the court that the Commission was unanimously of the opinion that the effect of the combined application of the five techniques detailed in the \textit{Ireland} case amounted to torture. \textsuperscript{442} However, the majority view of the European Court of Human Rights was that the five techniques could not be categorized as torture but amounted only to inhuman and degrading treatment. This indicates the high threshold which has to be reached to establish the most serious strand of Article 3; namely, torture.\textsuperscript{443}

Notwithstanding the decision of the court in the \textit{Ireland} case, the European Court had held that other treatments qualified as torture. For instance, in the case of \textit{Aydin v Turkey}\textsuperscript{444} the applicant, a Turkish citizen of Kurdish origin, alleged that she had been arrested by the Turkish security forces and that during a period of detention lasting three days she was beaten, tortured and raped. At the request of the Public Prosecutor she was examined by three doctors, each of whom confirmed that she had recently lost her virginity. The court held that Article 3 prohibited in absolute terms torture and inhuman or degrading treatment. The court emphasized that the

\textsuperscript{441} Rod Morgan et al, n. 433 above, p. 78.

\textsuperscript{442} Cooper, n. 350 above, p. 11.

\textsuperscript{443} Ibid.

special stigma of torture attached only to deliberate acts of inhuman and degrading treatment causing very serious and cruel suffering. Applying the principles in the *Ireland* case, the court also observed that the accumulation of acts of physical and mental violence inflicted upon the applicant, and especially the act of rape, amounted to torture sufficient to violate Article 3.

### 3.5.2 CAT and other human rights instruments

It is very important to mention that torture or other forms of ill-treatments could take any form. There is a considerable dynamic between the definitions of torture, inhuman or degrading treatment by the courts. Changing standards within society mean for example, that what was not considered torture twenty years ago will be considered so now because the human rights instruments banning torture and other ill-treatments, particularly CAT are all living instruments, and they serve the time and society in which they operate.\(^{445}\) The protection of human rights has come to achieve greater prominence and acts that were formerly seen as inhuman and degrading in whatever form are becoming classifiable as torture.

More importantly, the changing attitudes of society towards the basic respects of individual integrity and fundamental human rights have had the effect of widening the categories of each example of torture and other ill-treatments in Article 1 of CAT and corresponding provisions in other instruments. The court observed:

> “the Convention is a ‘living instrument’, which must be interpreted in the light of present day conditions... the court considers that certain acts which were classified in the past as ‘inhuman and degrading’ as opposed to ‘torture’ could be classified differently in the future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties

\(^{445}\) Cooper, n. 350 above, p. 13.
correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.”446

The dynamic nature of the Convention prohibiting torture is succinctly illustrated and analysed in the cases of 

*Cakici v. Turkey*447 and *Selmouni v. France*.448 In *Cakici’s* case, while the appellant was in detention, he was beaten and one of his ribs broken, his head was split open and he had received electric shock treatment in the course of his interrogation. The court held that the use of electric shocks to be within the range of treatment constituting ‘torture and ill-treatment’ since the treatment was for the purpose of obtaining information or to punish.

In the case of *Selmouni*, one of the allegations concerned the insertion of a small truncheon into the applicant’s anus. The latter was made to kneel down while the officer pulled him by the hair, the second hit him repeatedly with something like a baseball bat and others kicked him and, standing on his feet. One officer showed his penis, asking him to suck it, and then urinated over him. The applicant was threatened with a blow lamp and a syringe. While the French national courts accepted that he had been assaulted and regarded the act as a very serious wrong. However, it viewed it as ‘particularly degrading treatment’ and not torture. However, the ECHR was of the opinion that torture still required very serious and cruel suffering, and concluded that the pain and suffering were sufficiently severe to constitute torture because the torture inflicted was for the purpose of making him confess.

In order to establish whether a treatment constitutes torture, the court usually relied on three factors; that is, the intensity of the blows would cause substantial pain; the repetition of treatment over a number of days; and the need for greater firmness in assessing breaches of the fundamental values of democratic societies because of

446 Ibid., pp. 13-14.
447 July 8, 1999.
the increasingly high standard being required in the area of the protection of human rights. The last of the three factors narrated by the court seems to be the basis upon which the court recognized the Convention as a living instrument. This enabled the court to assert that certain acts not previously classified as torture could now be viewed in that light. In the same vein, the European Committee for the Prevention of Torture (CPT) were of the view that:

“...the ruling may, of course, be a recognition that in the past suspects were expected to tolerate too much physical pain but this point to the test perhaps not previously being applied with sufficient rigour rather than a dilution of the test itself. Moreover, although the repetition and duration of particular treatment will undoubtedly reinforce its unacceptable character.”

It is pertinent to mention that even during times of war torture is prohibited. Consequently, the use of rape to extract information or to punish or humiliate, was recognized by the Yugoslavia and Rwanda tribunals as amounting to torture. The severe mental and physical pain and suffering caused by rape and sexual assault led the trial chambers of both ad hoc tribunals to hold that rape and sexual assault can constitute torture. In Akayesu, the Rwanda trial chamber called upon CAT to draw comparisons between torture and rape, noting that:

“Like torture, rape is used for such purposes as intimidation, degradation, humiliation, punishment, control or destruction of a


452 Ibid.
person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when 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.\textsuperscript{453}

The same thinking has informed the jurisprudence of the ICTY. For example, in the celebrated \textit{Celebici} case, the ICTY dealt with some atrocities committed in early May 1992 when Bosnian Muslims and Croats took control of Bosnia Serb villages in the Konjic municipality.\textsuperscript{454} Men and women were taken to a facility that came to be known as Celibici camp. Aside from other atrocities committed, the deputy commander of the camp, Hazim Delic, was indicted by the Yugoslav tribunal for having tortured by way of rape two Serb female prisoners. The tribunal found that:

> “Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting.”\textsuperscript{455}

It must be stressed that it is difficult to envisage circumstances in which rape, by or at the instigation of a public official, or consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation.

Similarly, in the case of \textit{Celibici} the tribunal was of the view that this purpose, which is classically associated with the crime of torture, is inherent in situations of armed conflict.\textsuperscript{456} In respect of the first victim, for instance, Delic was found guilty

\begin{flushright}
\textsuperscript{453} Ibid., Article 1, CAT.
\textsuperscript{455} Max Du Plessis, et al, n. 450 above, pp. 26-27.
\textsuperscript{456} Ibid., p. 27.
\end{flushright}
of torture by rape inasmuch as he committed the rapes: to obtain information about the whereabouts of the victim’s husband who was considered an armed rebel; to punish her for her inability to provide information about her husband; to coerce or intimidate her into providing such information; and to punish her for the acts of her husband.\textsuperscript{457} In addition, the violence suffered by the victim in the form of rape was inflicted upon her by Delic because she is a woman. According to the tribunal: “this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.”\textsuperscript{458}

3.5.3 Determination of the thresholds of suffering

The word torture has so far been reserved for what are perhaps best described as specialized, or exotic forms of violence purposefully employed to gain a confession or information, or generally intended to intimidate or humiliate. Physical ill-treatment has been described as torture when, for example, evidence has been found of the use of specialized techniques such as the suspension of the victim, beating of the soles of the feet often referred to as \textit{falaka}, hosing with pressurized water, the placing of a metal bucket on the head and then striking it with metal or wooden instruments, and so on.

Notwithstanding the examples of physical torture enumerated above, the concern is that a number of practices which are certainly to be regarded as amounting to torture often leave few traces. In most cases, the victim suffers mental suffering and torture. Arguably, the fact that torture and inhuman or degrading treatment or punishment can involve not just the infliction of physical suffering, but also the infliction of mental suffering, has already been established in European jurisprudence.\textsuperscript{459}

\textsuperscript{457} Ibid.

\textsuperscript{458} Ibid.

\textsuperscript{459} \textit{Greek case}, supra, n. 356 above, p. 461.
One of the essential features of torture is the effect it has on the state of mind of the individual as well as his/her physical well-being.\footnote{R. v. Secretary of State for Home Department ex p. Singh (Sarbjit) [1999] Immigration Appeals Report 445.} As Judge O’ Donoghue stated in \textit{Ireland v. the United Kingdom}:\footnote{Ibid., p. 116.}

“One is not bound to regard torture as only present in a medieval dungeon where the appliances of rack and thumb screw or similar devices were employed. Indeed, in the present day world there can be little doubt that torture may be inflicted in the mental sphere.”\footnote{\textit{Ireland v. United Kingdom} (1978) 2 E.H.R.R. 25, paragraph 159.}

In order to determine whether a degrading act had taken place, the seriousness, cruelty or suffering was of less importance than the sense of humiliation and debasement of the victim, which had to reach a certain level. To this end, Nowak rightly points out that an extra criterion must be brought into play in order to assess whether there has been a breach of a ban on inhuman or degrading punishment in view of the fact that every punishment involves a certain element of degradation. Even a prison sentence is degrading.\footnote{Ingelse, n. 21 above, p. 61.}

One of the objectives of CAT is to prohibit all forms of ill-treatments. The key terms of CAT are torture, other cruel, inhuman or degrading treatment or punishment. Each of these terms is regarded as having one thing or another to do with violations and abuses of the fundamental right not to be subjected to torture. Any act or practice considered to have amounted to any of the stated terms will be viewed as a violation of the human right not to be tortured.
The meaning and the reason for the key terms have been analyzed with reference to the European Human Rights jurisprudence. The rationale for this is that the Commission and the Court under the European system have had several opportunities to adjudicate on cases pertaining to violation of the right not to be tortured or subjected to other cruel, inhuman, degrading punishments. Below are analyses of some of the other terms in CAT.

3.5.4 The term ‘other cruel’

The term ‘other cruel’, envisages or assumes that the act or practice complained of could not be described, or that such act was not mentioned, in the instrument. But from all indications and the facts available, if it is established that the act led to severe pain or suffering, such an act would be regarded as amounting to cruelty and a violation of Article 1 of CAT. This confirms the dynamic nature of CAT and other human rights instruments prohibiting torture and other ill-treatments.

The main purport of all human rights instruments banning torture is to ensure that torture in whatever form is eliminated from society. For instance, the word ‘cruelty’ is not a precise legal definition of prohibited treatment or punishment under the European Convention. Nevertheless, it encapsulates what it is that the European jurisprudence endeavours to eliminate from civilized society.

3.5.5 Inhuman or degrading treatment or punishment

The terms ‘inhuman’ or ‘degrading treatment’ or ‘punishment’ will be so classified if the ill-treatment causes ‘intense physical and mental suffering’. The treatment can fall short of actual bodily injury and may include ‘acute psychiatric


465 Cooper, p. n. 350 above, [iv].

disturbances'.\textsuperscript{467} In the case of \textit{X & Y v. Netherlands},\textsuperscript{468} the Commission were of the view that mental suffering leading to acute psychiatric disturbances falls into the category of treatment prohibited by Article 3 of the Convention.\textsuperscript{469} The fact that torture and inhuman or degrading treatment or punishment can involve not just the infliction of physical suffering but also the infliction of mental suffering was established in the \textit{Greek case}.\textsuperscript{470}

One of the yardsticks that can be used to establish whether a treatment was in violation of the ban on inhuman or degrading treatment or punishment was the prevalence of such acts in a society, and even within distinct sections of that society. Arguably, in defining the concept of torture, vague references are made to norms and standards in different societies implying a sliding scale of the prohibition are out of the question. The ban on torture was and is an absolute and universal norm.\textsuperscript{471} In order to ensure that justice is seen to be done, the court, in most cases would apply a degree of qualification and look at what is the acceptable standard in other States.\textsuperscript{472} Ingelse stressed that “the application of the various human rights treaties in practice revealed a number of elements for determining whether or not a treatment falls under torture or cruel, inhuman or degrading treatment or punishment.”\textsuperscript{473} These elements, if invoked and applied to the situation under consideration at any point in time, will be useful in order to ascertain whether or not the treatment falls under torture or other forms of deliberate ill-treatments.

\begin{flushright}
\textsuperscript{467} Ibid.
\textsuperscript{469} Cooper, n. 350 above, p. 21.
\textsuperscript{470} \textit{Greek case}, supra, n. 356, p. 461.
\textsuperscript{471} Ingelse, n. 21 above, p. 61.
\textsuperscript{472} Ibid.
\textsuperscript{473} Ibid., p. 62.
\end{flushright}
It seems that the terms ‘inhuman and degrading treatments’ have been, so far, reserved to describe aspects of custodial living conditions and more recently, to a number of grey or hybrid areas in which prisoners are treated as a matter of organizational practice.\(^{474}\) For example, the combination of overcrowding, lack of integral sanitation, almost unalleviated cellular confinement and lack of outdoor exercise have on several occasions been judged to amount to inhuman and degrading treatment.\(^ {475}\)

### 3.5.6 Rape as a form of torture

The Inter-American Commission of Human Rights has consistently found that rape is a form of torture.\(^ {476}\) In *Martín de Mejía*,\(^ {477}\) the Commission stated that rape is a physical and mental abuse that is perpetrated as a result of an act of violence. Moreover, rape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community.\(^ {478}\) Rape survivors generally suffer psychological trauma as a result of being humiliated and victimized. For some, this trauma may be aggravated by “the condemnation of the members of their community if they report that they have been raped or sexually assaulted.”\(^ {479}\)

The Commission found that the facts satisfied all the elements required for an act to constitute torture under the definition in the Inter-American Torture

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474 Rod Morgan et al, n. 436 above, pp. 35-36.

475 Ibid.


478 Diego Rodríguez-Pinzón et al, n. 476 above, p. 113.

479 Ibid.
Convention. First, the rape had caused the victim physical and mental pain and suffering. Second, the rape was committed intentionally to intimidate the victim and punish her for her husband’s political views. Finally, the rape was perpetrated by a member of the security forces accompanied by a group of soldiers, which satisfied the State involvement or acquiescence element. The Commission also stated that “sexual abuse, besides being a violation of the victims’ physical and mental integrity, implies a deliberate outrage to their dignity, in violation of Article 11 of the American Convention.”

More recently, in González Pérez the Commission found that sexual violence against civilians committed by members of the security forces constituted a serious violation of the rights protected under Articles 5 and 11 of the American Convention. To support its finding, the Commission cited the International Criminal Tribunal for the Former Yugoslavia’s decisions in Celebici and Furundzija. In these decisions the tribunal declared that rape and other forms of sexual assault constitute torture and are prohibited by international law. The Commission also quoted the United Nations Special Rapporteur on Violence against Women, who had reported that “the consequences of sexual violence are physically, emotionally and psychologically devastating for women victims.” In addition, rape can be used as a method to punish, intimidate and humiliate.

480 Raquel Martín de Mejía v. Peru, n. 477 above.
481 Ibid.
482 Ibid.
484 Ibid., paragraphs 45, 49.
485 Ibid., paragraph 45.
486 Ibid., paragraph 48.
3.5.7 Findings of Ill-treatments

3.5.7.1 Police custody

When an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent upon the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue will arise under Article 3 of the Convention. The totality of the allegations need not be proved. In the case of Tomasi v. France, the appellant alleged that while in police custody he was beaten and ill-treated, slapped, kicked and punched by police officers. The medical evidence did not fully support these allegations; nevertheless the medical reports confirmed that blows of considerable force were inflicted upon the applicant. The court was of the view that such treatment was sufficiently serious to be categorized as inhuman and degrading as defined by Article 3. In Dikme v. Turkey, the court reiterated that the burden was upon the State to provide a plausible explanation for injuries caused while the applicant was in police custody.

Usually, the infliction of ill-treatment was for the purpose of extracting admissions or confessions during interrogations. In Aksoy v. Turkey, the court held that the ill-treatment inflicted upon Aksoy was so severe as to be categorized as torture because, among other things, it was administered during the course of interrogation with the aim of extracting admissions and confessions.

487 Cooper, n. 350 above, p. 41.
488 Ibid., p. 42.
490 Application No. 2086/92.
3.5.7.2 Treatment of prisoners

In the case of *Dougoz v. Greece*, the applicant was confined in a cell with inadequate sanitation, insufficient sleeping accommodation, deprived of fresh air, daylight, hot water and exercise. The European Court held that the condition of the applicant; in particular, the serious overcrowding and lack of sleeping facilities, together with the amount of time he was detained in those conditions, amounted to degrading treatment and a violation of Article 3. Similarly, the European Court has ruled against prolonged solitary confinement. In the same vein, lack of proper medical treatment and care have been held to amount to a violation of Article 3 in a prison context. However, according to the European decision, solitary confinement and other harsh measures were only in breach of Article 3 of the Convention if there was evidence available showing a direct link between the prison conditions and deteriorating health on the part of the complainant in question. It must be stressed that the complaint had to be of such a nature as to cause or threaten to cause the complainant serious mental and physical suffering.

3.5.7.3 Corporal punishment

The European case law abhors the use of corporal punishment. Corporal punishment is unacceptable because it could be considered degrading punishment. In order to determine whether corporal punishment amounts to degrading treatment, the court usually will look at and consider the nature and

493 Cooper, n. 350 above, p. 60.
495 Ingelse, n. 21 above, p. 62.
496 Ibid.
context of the punishment itself and the manner and method of its execution.\textsuperscript{497} This would be the case, for example, where the punishment was administered by a person who was not known to the victim.\textsuperscript{498} However, the court had clearly indicated that such a decision should be based on current attitudes on the matter, and not necessarily on attitudes that were prevalent at the time the Convention was drawn up.\textsuperscript{499} At different periods, corporal punishment has been used by various societies. For instance, the court stated that though corporal punishment was approved and has been used for a long time, this was not determinative of whether it was degrading punishment or not.\textsuperscript{500} The mere threat of corporal punishment was also deemed to involve inhuman treatment under certain circumstances.\textsuperscript{501}

At the early part of 1982, the Human Rights Committee under the ICCPR condemned in absolute terms the imposition of corporal punishment and stressed that the excessive corporal punishment used as an educational or disciplinary measure formed a degrading punishment.\textsuperscript{502} It must be pointed out that the Human Rights Committee did not exclude all corporal punishment, only its excessive use. Ingelse, quoting Nowak, emphatically stated that: “severe corporal punishment as is recognized particularly under Islamic criminal law (amputation, castration, sterilization, blinding, etc.) without doubt qualifies as inhuman and/or cruel punishment.”\textsuperscript{503}

\begin{itemize}
\item \textsuperscript{498} Ingelse, n. 21 above, p. 63.
\item \textsuperscript{499} Ibid.
\item \textsuperscript{500} Ibid.
\item \textsuperscript{502} General Comment 7, HRI/GEN/I/Rev.1 (1994).
\item \textsuperscript{503} Ingelse, n. 21 above, p. 63.
\end{itemize}
3.5.7.4 The death penalty and the treatment of persons on death row

The idea that the death penalty should be abolished is based on the sanctity of the right to life as enshrined in various human rights treaties and constitutions. It is trite that where the death penalty has been abolished, the state may not reintroduce it, and where the death penalty has not been abolished, the state is enjoined to take all appropriate measures to actualise its abolition.\(^{504}\)

With regard to death row, such as the length of detention,\(^{505}\) the strict and harsh conditions on death row and the applicant’s age and mental state can violate Article 3. Such conditions are usually referred to as death row phenomenon.\(^{506}\) The ‘death row phenomenon’ was held to be inhuman and degrading in the case of *Soering v. United Kingdom*.\(^{507}\) The ‘death row phenomenon’ usually occurs in cases of immigration, asylum, extradition and deportation.\(^{508}\) In most cases, officers entrusted with such custodial sites violate and abuse human rights.

3.5.7.5 Scope and meaning of ‘official capacity’

A broadening of what falls within the scope of an ‘act of a public official’ has taken place and is now largely accepted. It certainly includes being ill-treated by a police officer or prison warden and other related law enforcement agencies. But, there is an increased tendency to focus on what the State can legitimately be held responsible for and to present its reasoning through the lens of State responsibility. Some authors and jurists still cling to the notion that in order to amount to a violation of the prohibition of torture and ill-treatment, an act must have been


\(^{505}\) Cooper, n. 350 above, p. 50.


\(^{507}\) Ibid.

\(^{508}\) Cooper, n. 350 above, Chapter 5.
meted out by state actors themselves. However, it is now quite clear that a State may in certain circumstances be in breach of its obligation when it fails to prevent forms of ill-treatment that attain the requisite degree of seriousness from occurring. This conclusion ensues from Article 1 of CAT Article 1 which incriminates violations resulting from actions committed with the consent or acquiescence of the State. Thus, the mere fact that the perpetrator is a private individual rather than a State official does not lead to the exclusion of this violation from the scope of CAT.\footnote{509}

The UN Human Rights Committee, in its General Comment No. 20, stated that Article 7 of the ICCPR applies to the acts prohibited “whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”\footnote{510} Many other human rights instruments do not discriminate between the private or public status of the perpetrator to incur responsibility as they criminalize acts whether they are committed by private or public individuals. This is evident from Article 7(2)(e) of the Rome Statute; Article, 4(c) of the UN Declaration on the Elimination of Violence against Women; Article 19(1) of the Convention on the Rights of the Child (CRC); Article 1 and 2 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.

The same conclusion arises from the examination of the jurisprudence of international human rights jurisdictions. In the \textit{Velasquez Rodriguez v. Honduras} case, the Inter-American Court of Human Rights took the view that the State can also be responsible for acts by private persons:

“an illegal act which violates human rights and which is initially not directly imputable to a State, for example because it is an act of a private person or because the person responsible has not been identified can lead to international

\footnote{509}{\textit{U.N. Doc. E/CN.4/2001/66/Add.1, Civil and Political Rights, Including the Questions of Torture and Detention.}}

\footnote{510}{Kersty McCourt and Manuel Lambert, Interpretation of the Definition of Torture Cruel, Inhuman or Degrading Treatment or Punishment in the light of European and International Case Law. A report presented to the Eu Network of Independence Experts in Fundamental Human Rights 30 October 2004, p. 9.}
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 is required by CAT.\textsuperscript{511}

In the same vein, this is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised by CAT.\textsuperscript{512} On the other hand, in \textit{Selmouni v. France}, the ECHR made an unprecedented reference to the CAT definition, which holds such a divide between public and private spheres.\textsuperscript{513} The fact that these precedents can coexist in the ECHR case law may suggest that the court has accepted that the definition of torture and ill-treatment must be interpreted in a way that will permit a more efficient fight against this kind of criminal misconduct. As the Court stated, “the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.”\textsuperscript{514} In that sense, the court has allowed itself a degree of flexibility when considering the prohibited acts and concluded that the Convention should be regarded as a “living instrument which must be interpreted in the light of present day conditions.”\textsuperscript{515} Therefore, this jurisprudence strengthens CAT definition as a point of consequence in the struggle against torture and ill-treatment and highlights the need for a broader interpretation of its components.

Last but not least, the International Criminal Tribunal for the Former Yugoslavia, in \textit{Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic}, has ruled that the characteristic of the offence of torture was “to be found in the nature of the act committed rather than in the status of the person who committed it.”\textsuperscript{516}

\begin{flushright}
512 Ibid., p. 176.
514 Ibid.
515 Ibid.
\end{flushright}
3.5.7.6 The elements

Except in respect of crimes against humanity as defined in article 7 of the Rome Statute for the ICC, the notion of purpose seems to be central to the understanding in international law of the concept of torture, regardless of whether one is considering state responsibility under international human rights law or individual responsibility under international criminal law.517

Every instrument defining torture contains a reference to a purposive element: Article 1 of the UN Declaration and Convention against Torture, Article 2 of the Inter-American Torture Convention. This is also evident in the elements of crimes concerning torture as a war crime under the ICC Statute in respect of international armed conflict Article 8 (2)(a)(ii)(1) and non-international armed conflict Article 8 (2)(c)(i)4).

3.6 International Human Rights Law

It may be recalled that in the Greek case, the European Commission of Human Rights opined that torture was inhuman treatment ‘which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment’, and generally being an aggravated form of inhuman treatment. However, in Selmouni, Commission member Mr Herndl dissented from the finding of torture, not like the other dissenters who did so on the basis of relative severity of treatment, but on the grounds that the purposive element had not been proven. The court, having bought in to CAT definition, also invoked a purposive element in recent cases. Indeed, in two cases against Cyprus, it seems that the court located its finding of an Article 3 violation of inhuman or degrading treatment, substantially on the basis

516 Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, ICTY, 22 February 2001, Case No. IT-96-23-T, § 495. This statement was made, however, in the context of a humanitarian law case.

517 Rodley, n. 360 above.
that the treatment in question was not sufficiently closely linked to the relevant purpose, namely, extracting a confession.\textsuperscript{518}

In respect of purpose, as of relative intensity of suffering, the Human Rights Committee has refrained from articulating a basis for any distinction it may make between torture and other ill-treatment.\textsuperscript{519} This could have been the deciding factor because, conditions in some detention centres are sufficiently inhuman to be described as ‘torturous’.\textsuperscript{520}

\section*{3.7 International Criminal Law}

A purposive element has also been central to the notion of torture as understood by the ICTY, whether applying its Statute Article 3 violations of the laws and customs of war or Article 5 (crimes against humanity). Although there may have been varying approaches concerning the importance of CAT definition applicable with appropriate contextual modifications are some variation as to exactly which purposes are relevant,\textsuperscript{521} the trial chambers have been consistent in requiring the element.\textsuperscript{522} Indeed, for the trial chamber in \textit{Furundzija}, where more than one person may have been involved in the acts that constituted torture, the distinction between being guilty as a perpetrator or as an aider or abetter resided, precisely in whether the person shared in the purpose of the activity, and if not, then the person could only be an accomplice, not a co-perpetrator.\textsuperscript{523} The elements of

\begin{itemize}
\item \textsuperscript{519} Rodley. n. 360 above.
\item \textsuperscript{520} UN doc. E/CN.4/1995/34/Add.1, paragraph 98.
\item \textsuperscript{521} Rodley. n. 360 above.
\item \textsuperscript{522} \textit{Delalic case}, pararaphs 470-72.
\item \textsuperscript{523} \textit{Prosecutor v. Furundzija}, Case No. IT-96-21, Judgment, 10 Dec. 1998, pp. 250-257.
\end{itemize}
crime for the ICC probably put the matter to rest by prescribing ‘such purposes’ as those actually referred to in CAT Article 1.\textsuperscript{524}

\section*{3.8 Final Considerations}

All said and done, the analysis rendered above regarding the definition of torture and other inhuman treatments is not to argue for the moral rightness or wrongness of any of these distinctions. Categorizing levels of ill-treatment and their respective criminality is a work of legal fiction that can confuse as often as it clarifies.\textsuperscript{525} However, these distinctions exist in law and if they are to serve any purpose, it should not be to permit states or individual perpetrators to evade criminal responsibility through artifice and technicality. The normative effect of which exceptionalizes torture when, in fact, it remains distressingly common.\textsuperscript{526} Any justification for torture will dignify the offence and degrade the victim. Donald Rumsfeld has once said that if he could stand for eight to ten hours a day, the detainees in the detention centres should not be restricted to four hours.\textsuperscript{527} These statements suggest that, severity alone risks becoming an increasingly arbitrary standard by which to define torture, one whose threshold is set ever higher by those least at risk of experiencing it. In order to combat this risk, the notion that severity alone distinguishes or should principally distinguish torture and other inhuman treatments or that the criminalization of the former is somehow a license to commit the latter, must be rejected. This is the approach of international human rights law and humanitarian law alike,\textsuperscript{528} and it ought to be the position of all governments and state parties, American or otherwise.

\begin{flushright}
\footnotesize
\textsuperscript{524} Rodley, n. 360 above.
\textsuperscript{525} Christian M. De Vos, Mind the Gap: Purpose, Pain, and the Difference between Torture and Inhuman Treatment, p. 8.
\textsuperscript{526} Ibid.
\textsuperscript{527} Ibid.
\textsuperscript{528} Prosecutor v. Furundzija Case n. 366 above.
\end{flushright}
It is therefore right to say that the definition of torture is relevant for the following reasons; firstly, to determine individual responsibility for the crime of torture; secondly, state responsibility for violations of the prohibition of torture, thirdly, the prevention of torture, and fourthly, reparation for and rehabilitation of torture victims.\(^\text{529}\) Despite there being a common core meaning, there are differences in how this definition of torture is used and understood in these different contexts. There is a need for caution when using approaches developed in one context as compared to another.\(^\text{530}\) Moreover, the obligation under international human rights law prohibits torture and other forms of cruel or degrading treatment or punishment; and the relationship between these concepts needs to be borne in mind.\(^\text{531}\)


\(^{530}\) Ibid.

\(^{531}\) Ibid.
CHAPTER 4

AN APPRAISAL OF TECHNIQUES AND INSTRUMENTS OF TORTURE

4.1 Introduction

Torture does not happen in a vacuum. The social and political context and the supply of tools and techniques for inflicting pain rely on a failure of political will to prohibit and punish the act. If governments had the political will to stop torture they could do so. Manufacturing, trading and promoting equipment which is used to torture people is a money-making business. The parallel trade in providing training in the techniques of physical and mental torture can be equally profitable. Companies and individuals around the world are involved in providing devices and expertise which are ostensibly designed for security or crime control purposes, but which in reality lend themselves to serious abuse. This is a thriving global trade involving countries on every continent and it involves governments in every region.

Some of the equipment used for torture has changed little over the years. Leg irons and shackles, for example, are reminiscent of the cruelty and inhumanity of the slave trade. However, modern technologies, such as electro-shock devices, are an increasing part of the torturer’s armoury. All these devices and weapons, no matter how different they are, have in common the potential to inflict severe pain and injury. There is also lack of official controls on their manufacture and sale.

534 Stopping the Torture Trade, n. 532 above, p. 1.
535 Ibid.
This section on techniques and Instruments of Torture looks at the relevant human rights instruments banning techniques and tools used in torture, ranging from some of the earliest known historical instances of the practice right up to the present time and covering some practices used throughout the world. It also examines the continuing trade in older tools of torture as well as the growing trade in electro-shock technology. It looks at the increasing use of the so-called ‘non-lethal’ weapons, such as tear gas and chemical irritants, and how these can facilitate torture.\(^{537}\) It also shows how the unscrupulous transfer of military and security training and expertise helps train torturers.\(^{538}\) The different methods of inflicting pain are grouped by type. Torture is being used in the Middle East, China, Guantanamo bay, Afghanistan, Iraq etc. Even in the last few years, such democratic countries as the US, UK etc have constantly used torture in the ongoing war on terror.

It is pertinent to mention from the outset that the use of torture is prevalent and common at the point of arrest and during the detention of suspects. This is usually carried out by the law enforcement officers who have the responsibility to protect life and property. In order to effect an arrest, cohesive methods are usually resorted to and torture instruments employed to suppress, brutalize, intimidate, and inflict physical and non-physical pain and suffering on suspects or perceived law breakers.

### 4.2 Types and Purpose of Torture

There are different types, goals and purposes for which torture may be used by the torturers. Henry Shue categorised them into three types which are mentioned and explained below.

\(^{537}\) Stopping the Torture Trade, n. 532 above, p. 2.

\(^{538}\) Ibid.
4.2.1 Deterrent torture

The goal of deterrent torture is to intimidate people other than the victim. This type of torture is inflicted to intimidate and deter potential or actual opponents from expressing opposition or dissent. The duration and intensity of the physical pain or psychological distress inflicted is determined by the torturer without reference to the responses of the victim. The essence of using this type of torture is the likely impact of the news of the torture on those whom the torturer is aiming to discourage. The victim has no possible act of compliance available that could lessen or end the torture, because the torturer seeks a response from people to be discouraged other than the victim. Torture inflicted on political dissidents by the South African security police during apartheid serves as an example since its primary purpose was to suppress and intimidate opposition rather than to interrogate.

4.2.2 Interrogational torture

This type of torture is inflicted for the purpose of eliciting information. It is the response of the victim that the torturer seeks. In theory, this type of torture satisfies what Shue refers to as ‘the constraint of possible compliance’. The victim may bring the torture to an end by providing the information that the torturer seeks to ascertain. However, in practice, the victim could offer false information just for the torturer to stop the torture. In this regard, the essence of torture is defeated.


540 Ibid.


542 Lenta, n. 539 above.

543 Conroy, n. 541 above, p. 3.

544 Lenta, n. 539 above.
because the information offered is usually false. Sometimes, a hint that torture would be applied can disorganise the victim. Assuming the victim is in possession of the information, and intends to tell the truth, the hint that torture would be applied troubles the victim's mind, and makes him/her jittery and unable to recall or convey the information. In such cases, the constraint of possible compliance simply evaporates.

4.2.3 Sadistic torture

A third purpose for which torture is inflicted is to gratify the torturer's sadism. The torturer's pleasure is derived not only from the torment that the victim experiences, but also from his experience of unfettered domination. The torturer has no incentive to limit the duration and intensity of the pain. Indeed, the greater the victim's suffering, the more pleasure the torturer is likely to derive. Typical example are the practices in Abu Ghraib prison. The absence of shame and the presence of glee on the faces of the Abu Ghraib guards in the photographs taken of them standing over prisoners with women's underwear over their heads, or piled in pyramids, or cringing in subjection, clearly indicate that the guards derived considerable entertainment from torturing their victims.\textsuperscript{545} In a sense, all torture is dehumanising. In the words of Tindale, “dehumanising torture is not intended to deter people other than its victims, but rather to break the resistance of its victims and to make them docile.”\textsuperscript{546}

\textsuperscript{545} Ibid., p. 50.

\textsuperscript{546} Conroy, n. 541 above, p. 3.
4.3 Aims of Torture

4.3.1 Introduction

The use of torture is abhorrent because it inflicts suffering and pain to its victims. David Luban identified five major aims of torture.\textsuperscript{547} They are specified and explained below.

4.3.2 Victor’s pleasure

One of the motivating factors in embarking on torture is military victory. The victor captures the enemy and tortures him/her. An example of this is narrated by Luban: “I recently saw some spectacular Mayan murals depicting defeated enemies from a rival city-state having their fingernails torn out before being executed in a ritual reenactment of the battle.”\textsuperscript{548} Underneath whatever significance that attaches to torturing the vanquished, the victor tortures captives for the simplest of motives: to relive the victory, to demonstrate the absoluteness of his/her mastery, to rub the loser’s face in it, and to humiliate the loser by making him/her scream and beg.\textsuperscript{549}

Liberals abhor torture but strongly believe in active human beings possessing an inherent dignity regardless of their social station. The victim of torture is in every respect the opposite of this vision. The torture victim is isolated and reduced instead of being engaged, terrified instead of being active, humiliated instead of being dignified.


\textsuperscript{548} Ibid.

\textsuperscript{549} Ibid.
4.3.3 Terror

Torture can be used for the purpose of terrorizing people into submission; however, dictators from Hitler, Pinochet to Saddam Hussein tortured their political prisoners so that their enemies, knowing that they might face a fate far worse than death, would be afraid to oppose them. Terror is a force-magnifier that permits a relatively small number of police to subdue a far larger population than they could if the would-be rebels were confident that they would be treated humanely upon capture. But of course, a practice that exists to make it easier to subdue and tyrannize people is fundamentally hostile to the rule of law of liberal democratic societies.

4.3.4 Punishment

History has revealed that until the last two centuries, torture was used as a form of criminal punishment. Beccaria condemns punishments that are more cruel than is absolutely necessary to deter crime, arguing on classical-liberal grounds that people in the state of nature will surrender only the smallest quantum of liberty necessary to secure society. The aggregate of these smallest possible portions of individual liberty constitutes the right to punish; everything beyond that is an abuse and not justice, a fact but scarcely a right.\(^550\)

Beccaria makes it clear that torture would turn society into a herd of slaves who constantly exchange timid cruelties with one another. Such punishments, he adds, would also be contrary to justice and to the nature of the social contract itself, presumably because turning society into a herd of slaves undermines the liberal understanding of the ends of society. With the growth of liberal democracy, the ideology of popular sovereignty deflated the purpose of punitive torture. If the people rule, then the responsibility of torture would fall on the people and the need

\(^{550}\) Ibid.
for a spectacle of suffering by which the people could impress themselves seemed pointless.\textsuperscript{551}

\textbf{4.3.5 Extracting confessions}

Curiously, when Beccaria writes explicitly about the subject of torture, he does not mention torture as punishment. Rather, he polemizes against judicial torture in order to extract confessions from criminal suspects. This is the third historically significant use of torture, distinct from punishment, even though judges administer both. The French language has different words to describe them: \textit{le supplice}, (torture as punishment), and \textit{la question}, (torture to extract confessions).

As Langbein observes, pre-modern legal rules required either multiple eyewitnesses or confessions for criminal convictions. At first glance, these were important rights of the accused, but they had the perverse effect of legitimating judicial torture in order to make convictions possible.\textsuperscript{552} But once it was accepted that the criminal justice system could base guilty verdicts on various types of evidence that rationally establish facts rather than insisting on the ritual of confession, then the need for torture to secure convictions vanished.\textsuperscript{553} Furthermore, the only crimes for which the primary evidence is the perpetrator’s own words are crimes of heretical or seditious belief of which liberalism rejects their criminalization.

\begin{flushright}
\textsuperscript{551} Ibid.
\textsuperscript{552} Langbein, n. 180 above.
\textsuperscript{553} Alan Donagan, The Right Not to Incriminate Oneself, 1 Social Philosophy & Policy (1984), p. 137.
\end{flushright}
4.3.6 Intelligence gathering

Torture is used as a technique of intelligence gathering from captives who will not talk. This may seem indistinguishable from torture to extract confessions because both practices equate torture with interrogation. The crucial difference lies in the fact that the confession is backward-looking in that it aims to document and ratify the past for purposes of retribution, while intelligence gathering is forward-looking because it aims to gain information to forestall future evils like terrorist attacks.

It is striking, and in obvious ways reassuring, that this is the only rationale for torture that liberal political culture admits could possibly be legitimate. In a paradoxical way governments that exercise their power only for instrumental and pragmatic purposes create the possibility of seeing torture as a civilized, not as an atavistic practice, provided that its sole purpose is preventing future harm.

Rejecting torture as victor’s spoils, as terror, as punishment, and as a device to force confession drastically limits the amount of torture that a liberal society might conceivably accept. But more importantly, the liberal rationale for torture as intelligence gathering in gravely dangerous situations transforms and rationalizes the motivation for torture. It becomes possible to think of torture as a last resort of men and women who are profoundly reluctant to torture. And in that way, liberals can for the first time think of torture dissociated from cruelty; torture authorized and administered by decent human beings who abhor what circumstances force them to do.

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554 Foot, n. 222 above, p. 134.

555 Conroy, n. 541 above, pp. 3-4.
4.4 Techniques and Instruments of Torture

The word instrument may mean different things.\textsuperscript{556} However, an instrument in this context, means, what Article 1 of CAT describes as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person as obtaining from him or a third person information or a confession…”\textsuperscript{557} The operative words are ‘any act’. Provided the act employed will result in pain and suffering, it could definitely qualify as torture by virtue of Article 1 of CAT. Consequently, it is right to say that anything that discomforts or harms would qualify as an instrument of torture. As the president of Nova Product said, almost anything can be used to inflict pain, including ‘fists and feet’.\textsuperscript{558}

The point must be made from the outset that pain and suffering could be physical or mental. Usually, physical pain and suffering would leave behind scars and marks from the injuries sustained. But in situation where mental pain and suffering is experienced, no visible scars or marks are left. Only the victim who has been inflicted with mental pain knows where the shoe pinches.

However, it must be mentioned that the consequences of torture reach far beyond the immediate pain. Many victims suffer from post-traumatic stress disorder, which includes symptoms such as flashbacks, severe anxiety, insomnia, nightmares, depression and memory lapses.\textsuperscript{559} Towards this end, states have been enjoined to

\textsuperscript{556} For instance, to a human rights activist or a lawyer, instruments connotes the various treaties and conventions and protocols enacted by various national and international bodies. Whereas, to an automobile mechanic, it means tools with which he carries on his mechanical jobs, such as spanners, screw drivers etc. To a torturer, it means whatever objects; tools, devises, apparatus, equipment, weapons, chemical, gas and even invisible substances. Provided if employed, it will cause pains and sufferings, whether physical or non physical pains.

\textsuperscript{557} Article 7 of ICCPR.


prohibit and prevent the use and production of any torture instrument. Consequently, Article 14 of the Roben Island Guidelines provides that: “states should prohibit and prevent the use, production and trade of equipment or substances designed to inflict torture or ill-treatment and the abuse of any other equipment or substance to these ends.”

The prohibition on torture and other cruel, inhuman or degrading treatment or punishment extends to all circumstances, even during the time of war. The right to freedom from torture is absolute and it cannot be restricted. Torture is always, in every situation, unacceptable and no reason can be canvassed to justify the use of torture. Article 5 of the UN Code for Law Enforcement Officials contains an absolute prohibition of torture and ill-treatment. The official commentary to Article 5 states that the term cruel, inhuman or degrading treatment or punishment “should be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental.” In addition, Article 4 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials states that “Law enforcement officials in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms.” It stipulates that “whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall... [m]inimize damage and injury, and respect and preserve human life.”

4.5 Modern instruments of Torture and Technique

4.5.1 Introduction

All over the world, law enforcement agencies and security services use equipment that ranges from the simplest technology such as batons and sticks, handcuffs,
tear gas, water cannon and ‘stun-guns’ to control crowds and restrain people alleged to have broken the law or to be posing an imminent threat to others. However, most of these equipment which are ostensibly designed for purposes of security and crime control are regularly being abused and sometimes employed to violate fundamental rights not to be subjected to torture and ill-treatment.\textsuperscript{562}

While methods of torture are often quite crude, a number of new technologies of control have been used by torturers in recent years. For example, in South American countries, the US has introduced new, more sophisticated apparatus since torture ‘equipment’ in these countries was considered to be extremely primitive or outdated.\textsuperscript{563}

4.5.2 Deployment of shocking practices and techniques

US government officials have commended the interrogation techniques being used in the interrogation of detainees in Iraq and other detention centres. One of the American interrogators has given impetus to techniques as something worth applying in the circumstance.\textsuperscript{564} The interrogator stated:

\begin{quote}
Well hypothermia was a widespread technique. I haven't heard a lot of people talking about that, and I never saw anything in writing prohibiting it or making it illegal. But almost everyone was using it when they had a chance, when the weather permitted...That was a pretty common technique.
\end{quote}\textsuperscript{565}

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\textsuperscript{562} Ibid.
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\textsuperscript{565} Ibid.
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Furthermore, he also cited as an example how the people were being beaten and burnt by the army and when the units would go out into people’s homes to raid, other soldiers usually stayed in the house and tortured the victims.\textsuperscript{566}

\textbf{4.5.3 Electric-shock devices}

Electric torture is one of the most violent weapons used by torturers. The advantage of electricity is that, unlike flesh-and-blood, the electro shock machine is indefatigable; electric shocks can be applied to the most intimate bodily parts—genitals, breasts, lips, ear lobes—resulting into both mental and physical injuries. The efficiency of electro-shock devices have been attested to by the torturers. These instruments are regularly used because “The main thing is not to leave any marks. It is efficient and gives us pleasure.”\textsuperscript{567}

The electric torture industry has registered a variety of devices: electrodes, introduced in teeth cavities or other orifices; the electro-shock machine; electric truncheons inserted in the mouth or the anus; electrified shields and handcuffs; electric cables,\textsuperscript{568} etc. The device considered to be most perverse and dubbed Apollo was used in Iran; it sends electric shocks to the victims whose heads are covered with steel helmets so that their screams could be amplified. The terms used for torture instruments demonstrate the ritualistic humanization of the objects, as if they were relatives or friends of the torturer.\textsuperscript{569}

Cruelty could be without limits. For instance, an Argentinean doctor, nicknamed Mengele, was rather adept at using a teaspoon in an abominable manner: he would insert it into the wombs of pregnant detainees up to the point where the

\textsuperscript{566} Ibid.
\textsuperscript{567} Hunsinger, n. 564 above, p. 14.
\textsuperscript{568} Cesereanu, n. 563 above, p.1.
\textsuperscript{569} Ibid., p. 2.
foetuses were reached; he would then connect the teaspoon to power and send electric shocks to his victims.\textsuperscript{570}

### 4.5.4 The use of chemicals and irritants

Tear gas is a popular name for a family of irritant chemicals whose domestic use by police and security services in crowd control and public order situations is allowed in most countries.\textsuperscript{571} Irritants create pain and tear gas is often misused to inflict injuries on individuals and suppress the rights of peaceful protest.\textsuperscript{572}

Amnesty International reported the misuse of tear gas by security agents and law enforcement agents in some countries.\textsuperscript{573} These practices described above are contrary to international standards because “Spraying large quantities of chemical substances into non-violent crowds is clearly incompatible with international standards requiring that law enforcement officials use force only as a last resort, in proportion to the threat posed, and in a way to minimize damage or injury.”\textsuperscript{574} This observation is consistent with Article 5 of The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.\textsuperscript{575}

Despite the unambiguous provisions of the above principles, it is apparent that none of these instruments appear to have been respected by overzealous security agents. Specific international standards for the legitimate use of tear gas by law

\textsuperscript{570} Cesereanu, n. 563 above, p. 2.

\textsuperscript{571} Hunsinger, n. 564 above, p. 23.

\textsuperscript{572} Ibid.

\textsuperscript{573} Ibid, For instance, in Jordan, tear gas and batons were used against anti-war demonstrators and caused a burning sensation in the eyes, severe irritation of the respiratory tract, burning pain in the nose, sneezing, soreness and tightness of the chest.

\textsuperscript{574} Ibid., p. 24.

enforcers do not exist,\textsuperscript{576} but many states claim that police are trained to use tear gas only to disperse a crowd that is becoming violent.\textsuperscript{577} However, it has been observed that tear gas was being used in confined spaces\textsuperscript{578} where the targeted persons cannot disperse thus resulting in serious injuries and even deaths.\textsuperscript{579} More pertinently, the effective regulation of the chemical safety of different types is also lacking, since chemical contents and mixtures can vary greatly between countries. The argument is that, the manufacturers’ claims are often not subject to independent analysis\textsuperscript{580} and there are few mechanisms for monitoring the possibility of delayed long-term injury.\textsuperscript{581} It must further be stressed that the criteria which governments apply to decide on the export of tear gas is not stringent and it is relatively easy for law enforcement agencies that persistently abuse tear gas to obtain new supplies.\textsuperscript{582}

4.5.5 Truth serum and other drugs

Truth serum i.e. sodium pentothal is one of the pressure techniques often used by interrogators to elicit confessions.\textsuperscript{583} Truth serum is considered to be something less than torture.\textsuperscript{584} Justifying why truth serum should be used because it is less than torture, Linda referred to the statement credited to Jonathan Alter where he

\textsuperscript{576} Hunsinger, n. 564 above, p. 23.

\textsuperscript{577} Ibid.

\textsuperscript{578} Asad, n. 216 above.

\textsuperscript{579} Hunsinger, n. 564 above, p. 23.

\textsuperscript{580} Nick Lewer and Neil Davison, Non-Lethal Technologies-an overview, Science, Technology and the CBW Regimes, 2005, p. 41.

\textsuperscript{581} Hunsinger, n. 564 above, p. 23.

\textsuperscript{582} Ibid.

\textsuperscript{583} Keller, n. 351 above, p. 4.

\textsuperscript{584} Ibid.
said that “America could not legalize physical torture even in a ticking bomb scenario because it is contrary to American values...Short of physical torture, there’s always sodium pentothal ‘truth serum’. The FBI is eager to try it, and deserves the chance.”\textsuperscript{585} This conclusion is flawed in view of the fact that the ban on torture is absolute irrespective of the form used.\textsuperscript{586} Consequently, the administration of the truth serum constitutes torture, particularly when used on an involuntary subject to prevent a terrorist attack.\textsuperscript{587} For instance, in the aftermath of the devastating terrorist attacks against the US targets on September 11, 2001, securities agencies in the US expressed frustration as a result of terror suspects protracted silence and considering more extreme methods, including truth serum.\textsuperscript{588} Similarly, former director of the CIA and FBI, William Webster, urged the Pentagon to administer truth serum drugs to defiant Taliban and al-Qaeda prisoners if needed to obtain information that could save lives or prevent fresh terrorist attacks.\textsuperscript{589} To this end, the claim by the former detainees that interrogators used unspecified drugs; tablets that made them senseless is sustainable.\textsuperscript{590}

The shortcoming of the administration of the truth serum is that the sodium pentothal does not force the subject to tell the truth. Rather they make the subject more talkative.\textsuperscript{591} Information elicited through this process is not likely to be accurate. If this is so, why then its use should continue since the result it seeks to uncover will not materialize? What about the subsequent effect on the victim?


\textsuperscript{587} Strauss, n. 585 above.

\textsuperscript{588} Keller, n. 351 above, p. 4.

\textsuperscript{589} Ibid.

\textsuperscript{590} Ibid., p. 3.

\textsuperscript{591} Ibid., p. 6.
Experimenting with truth serum could result into the death of the subject.\textsuperscript{592} This alone is a potential argument to ban the use of truth serum and other related drugs.\textsuperscript{593}

\textbf{4.5.6 Liquids, solids and stinging powder}

It has been observed that hot wax, poured onto pregnant women’s bellies would amount to torture.\textsuperscript{594} Sand-filled sacks could be used for beating victims because it was well known that this method left no traces.\textsuperscript{595} Also, water, either boiling hot freezing cold or salty, was most frequently used. For instance, in Latin America, boiled water would often be poured into the victims’ vaginas or anuses. Burns were inflicted through the use of cigarettes, as well as candles, soldering lamps, fire launchers; open fire, ovens, etc; these are all effective torture instruments. Exposure to the sun or to freezing temperatures could also function as an indirect instrument of torture.\textsuperscript{596}

\textbf{4.5.7 Animals, Insects and Reptiles as Instruments of Torture}

Animals are used as torture ‘instruments’. As Cesereanu eloquently puts it:

\begin{quote}
“Torture inflicted by animals had a broad scope. Most frequently used were dogs that had been trained to maim and rape. Snakes; especially cobras and boas were used mostly for psychological effect, insects like ants and bed bugs were left to crawl on the victim’s body or inserted into various bodily orifices such as the anus,
\end{quote}

\textsuperscript{592} Ibid., p. 7.
\textsuperscript{593} Ibid.
\textsuperscript{594} Cesereanu, n. 563 above, p. 5.
\textsuperscript{595} Ibid.
\textsuperscript{596} Ibid., p. 6.
chameleons and other lizards were introduced in the victims’ trousers so as to scratch and bite them, mice and rats forcefully introduced into victims’ mouths. Sometimes having their tails set on fire, such rodents were pumped through hoses inside the victim’s larynx. Another method is the insertion of live rats inside pipes: since at one end, the pipes were burning, the rodents would have had to dig their way to salvation through the victims’ chests.\textsuperscript{597}

4.5.8 Music and noise

Music can sometimes be used to serve as a means of torture. The Landau Commission in Israel held that loud music as an interrogational method was legal.\textsuperscript{598} The court also held that loud music when combined with an impermissible method is forbidden.\textsuperscript{599} Victims would be exposed to shrill and aggressive sounds which were bound to cause deafness.\textsuperscript{600} This technique was called the music of terror.\textsuperscript{601} The victim’s own voice sometimes acquired the paradoxical function of brainwashing the individual at sound level.\textsuperscript{602}

4.5.9 Time as an instrument of torture

The emotional and suspenseful part of the processing of an offender is not at the trial stage, but the finding of ‘guilty’ by the court.\textsuperscript{603} This has usually been decided in a mundane and bureaucratic manner by haggling among the police, prosecutors

\textsuperscript{597} Ibid., pp. 6-7.


\textsuperscript{599} Ibid., p. 29.

\textsuperscript{600} Cesereanu, n. 563 above, p. 5.

\textsuperscript{601} Ibid.

\textsuperscript{602} Ibid., p. 7.

\textsuperscript{603} Ruthven, n. 198 above.
and the defense.\textsuperscript{604} Rather, the big cliff hanger is the sentencing, for often the offender literally does not know whether he/she will walk out of the court on probation, or be carried off to prison for whatever period.

In most jurisdictions, separate sentencing hearings are held, often weeks and months after the finding of guilt.\textsuperscript{605} In this circumstance, what is at work here is the torturous use of time in the administration of the punishment. The capriciousness of sentencing is similar to the process of torture, where it is the ‘judicious’ use of time that is the essential ingredient of the pain to be administered. The convicted offender may be released on probation or fined. On the other hand, he/she may find himself/herself sentenced to torture by time, a ‘stretch’ in prison instead of being stretched on the rack as was practised in the primitive period.\textsuperscript{606}

Another important element in the use of time as torture is to lure the accused to see the instruments of torture, so that the accused will quake in fear of the anticipation of pain. This is, of course, a way of producing mental anguish, but it also amounts to expert use of time as a way of aggravating the physical application of pain. The necessity to control time makes it abundantly clear that the expert use of torture requires as its base a prison system. Prisons not only provide the possibility of manipulating time, but also the necessary secrecy for the administration of torture.\textsuperscript{607} This is examined below.

**4.5.10 Prison as instrument torture**

Clearly, prison is a form of torture;\textsuperscript{608} it seeks to place the whole of the person his/her body and soul in complete submission. It is no mistake that the inmates of

\textsuperscript{604} Ibid.

\textsuperscript{605} Ibid.

\textsuperscript{606} Ibid.

\textsuperscript{607} Asad, n. 219 above, p. 1094.

\textsuperscript{608} Ruthven, n. 197 above.
such prisons are often referred to as creeps, scum and animals.\textsuperscript{609} The process is just as dehumanizing as are the better known forms of physical torture.

Indeed, prisoners are subjected to precarious conditions by not knowing when or whether they will be released, since the decisions of parole boards are just as capricious as those of sentencing judges. This situation is even worse for those under arbitrary arrest and detention.

It is trite that convicts are put in prison because they have been found guilty of a crime. They cannot be released until it is clear that they have ‘paid for their crime’. Today this is often measured in terms of the duration of suffering which is analogous to the process of torture. In the primitive period, it was quite common for those tortured to be released at the end of the drawn out process of torture, provided that they confessed. This is not applicable to convicts. The sentence must be served except if there is amnesty.\textsuperscript{610}

\section*{4.6 Expanding Methods of Torture and Torture Equipment}

Methods of torture have expanded as the trade in torture equipment becomes more globalized. In some cases, torture is now more high-tech with the manufacture, export and use of devices designed specifically for use on human beings.\textsuperscript{611} The use of these devices by the torturer on the victim may result in physical or mental pains. Explanations on physical and psychological torture are discussed below.

\subsection*{4.6.1 Physical torture}

The instrument of torture and the techniques often employed have been highlighted above. It is equally important to examine various methods of torture as

\textsuperscript{609} Ibid.

\textsuperscript{610} Ibid.

\textsuperscript{611} Amnesty International Report, n. 558 above.
observed by some adjudicating bodies in their decisions. Torture takes many forms because men/women have applied their ingenuity assiduously and creatively to that end.\footnote{612} Simple beating with fists or boots is the most favoured form of torture.\footnote{613} Sometimes various implements such as bags or plastic tubes filled with sand, and whips are used. Indeed, with the additional possibilities made available through modern technology, forms of torture are almost unlimited.\footnote{614}

Certain methods of interrogation may constitute torture and inhuman treatment. For example, the European Commission said that “where a person being interrogated is slapped on his ears, beaten on his chest and stomach, and then kicked, such treatment would be inhuman.”\footnote{615} Similarly, the Constitutional Court of Australia said that “To keep a suspect chained during his interrogation would also constitute inhuman treatment.”\footnote{616} In the same vein, the rape of a detainee by an official of the state is an especially grave and abhorrent form of ill-treatment, particularly given the ease with which the offender can exploit the vulnerability and weakened resistance of his/her victim.\footnote{617} In the \textit{Ireland} case, Frowein is of the opinion that The European Commission of Human Rights viewed the so-called five techniques as torture.\footnote{618}

It has also been observed that in most cases, the persons concerned alleged various physical assaults by police officers. In a number of cases, the allegations made were supported by medical evidence.\footnote{619} In order to sustain an allegation of

\begin{footnotes}
\item[612] Ralph Crawshaw et al, n. 83 above, p. 137.
\item[613] Ibid.
\item[614] Ibid.
\item[615] \textit{Ireland v. United Kingdom}, European Commission, (1976) 19 Yearbook 82.
\item[617] \textit{Aydin v. Turkey}, European Court, (1997) 25 EHRR p. 251.
\end{footnotes}
infliction of torture, medical examination is usually resorted to because it would reveal infliction of torture even if no traces of physical marks were found. However, the Court has held that even if the complainant is unable to prove allegation of torture vide medical evidence, other forms of ill-treatment can be sustained if proved.\textsuperscript{620}

4.6.2. Psychological torture

The inclusion of psychological torture recognises that many of the most barbaric and damaging forms of tortures are psychological.\textsuperscript{621} Psychological torture includes mock executions, hearing or seeing others being tortured or executed, deprivation of food, water, or sleep, and prolonged isolation or prolonged stays in darkness, physical abuse, intimidation, humiliation, and threats to family and friends were all forms of torture.\textsuperscript{622}

CAT puts particular emphasis on mental torture.\textsuperscript{623} The characteristics of psychological torture requires that it must be prolonged and arise from one of three situations: the infliction or threatened infliction of severe pain; the administration of mind-altering substances or procedures; and the threat of imminent death, or the threat that another person will imminently be subjected to death, severe pain or suffering,\textsuperscript{624} or the administration of mind-altering substances.\textsuperscript{625} These restrictions, as stated, encompass virtually all claims to mental or psychological

\textsuperscript{619} Ibid.

\textsuperscript{620} Tomasi v. France 1993 15 EHRR 1.

\textsuperscript{621} Miller, n. 7 above, p. 320.

\textsuperscript{622} Ibid.

\textsuperscript{623} Ibid.

\textsuperscript{624} Riggs et al, n. 586 above p. 268.

\textsuperscript{625} Miller, n. 7 above, p. 320.
torture.\textsuperscript{626} Other instances of blissfully sublimating torture and effects were the use of towels, scarves and clothes for blindfolds which caused mental breakdown.\textsuperscript{627}

The litany of the humiliations and degradations inflicted by American soldiers in Iraq, Afghanistan, and Guantanamo Bay is literally mind boggling:\textsuperscript{628} building naked human pyramids, staging menstruation, forcing detainees to masturbate, service women fondling themselves in the presence of detainees, forcing the detainees to walk while leashed to a chain as if they were dogs, and mishandling of the Koran.\textsuperscript{629} While Mr. Bybee and others in the Bush Administration may argue that the above actions did not cause physical pain,\textsuperscript{630} it is contended that the mental pain and suffering inflicted is no less severe than physical pain for all are tantamount to profound violations of Islamic belief.\textsuperscript{631} Even if the pain and suffering were mental rather than physical, they constitute torture because of their severity and therefore fall under the definitions of torture.\textsuperscript{632}

\textbf{4.7 Justification for Torture}

Torture is morally a wrongful and illegal act.\textsuperscript{633} But sometimes we feel justified in doing what we know is wrong because the stakes are high. So the next question is:

\begin{itemize}
\item \textsuperscript{626} Riggs et al, n. 586 above p. 273.
\item \textsuperscript{627} Cesereanu, n. 563 above, P. 7.
\item \textsuperscript{630} Riggs et al, n. 586 above, p. 264
\item \textsuperscript{631} Islam 101, http://www.islam101.com/rights/hrM2.htm (last visited Mar. 3, 2006). Important aspects of the Charter of Human Rights granted by Islam is respect and protection for a woman’s chastity, an individual’s right to freedom or the right not to be a slave, equality of men, and the right to safety of life. Homosexuality and sexual promiscuity are also forbidden. Many of the actions performed by Private Graner et al., showed fundamental and mind-boggling disrespect and disregard for these aspects of the Islamic faith.
\item \textsuperscript{632} Amos N. Guirora et al, n. 258 above, p. 444.
\item \textsuperscript{633} David Sussman, Defining Torture, 37 Case Western Reserve Journal of International Law. (2006).
\end{itemize}
is torture so wrong that it is inexcusable no matter how high the stakes are?\textsuperscript{634} It is contended that all actual arrangements for torture are inexcusable, in spite of the fact that we can imagine hypothetical cases, like the notorious ticking-bomb cases in which it seems excusable.\textsuperscript{635}

Torture, in any form, is abhorrent and universally outlawed. To this end, no cogent reason can be adduced to justify the use of torture by security agents and law enforcement officers. William. F. Shuitz,\textsuperscript{636} has warned:

“For a society to start providing its imprimatur to criminal acts because they are common or may appear to provide a shortcut to admirable ends is an invitation to chaos; that the first thing wrong with the act of torture is that it is universally condemned and inherently abhorrent....Under international law, torturers are considered enemies of all humanity, and that is why all countries have jurisdiction to prosecute them, regardless of where the torture took place.”\textsuperscript{637}

In order to consider reasons not to torture it is appropriate to address the argument which is usually advanced as the most cogent justification for torture the ‘ticking time bomb’ argument.\textsuperscript{638} This thesis supposes that a bomb primed to explode within a short time has been hidden in a city centre and that, unless its

\textsuperscript{634} Henry Shue, Torture in Dreamland: Disposing of the Ticking Bomb, Case W. Res. Journal of International Law Vol. 37, p. 231.

\textsuperscript{635} David Luban, Torture, American-Style: This Debate Comes Down to Words vs. Deeds, Washington. Post, Nov. 27, 2005, p. B1 (illustrating what a serious distraction from reality ticking-bomb cases are in the current U.S. debates).


\textsuperscript{637} Ibid.

\textsuperscript{638} Ralph Crawshaw et al, n. 83 above, p. 139.
whereabouts are discovered, there will be massive loss of life when it explodes. The person responsible for planting the bomb has been arrested but refuses to disclose its whereabouts. Under these circumstances, it is argued that it is justifiable to torture that person to force him or her to give the necessary information because failure to do so renders the authorities co-responsible for any deaths arising out of the explosion. In this situation, torture is justified on the ground that when faced with an imminent threat by a terrorist, almost any method is justified, even torture.

Other countries also have allowed the use of torture or interrogation methods that harm the suspect, in order to stop a ‘ticking bomb.’ One example of this occurred in the Philippines in 1994-1995 when the authorities received information that Ramzi Yousef, one of the masterminds of the 1993 World Trade Center bombing, planned to blow up a dozen jumbo jets over the Pacific Ocean. The Philippine authorities were able to foil the plan after they tortured a suspected terrorist for sixty-seven days. Therefore, in that instance, torture successfully stopped a ‘ticking bomb.’

The question is whether the officials responsible for discovering the location of the bomb realised they were committing a crime by torturing the person who had planted the bomb. If so, how are they to be dealt with subsequently by the criminal justice system? Alternatively, is torture to be legalised? For instance, in Nepal, torture as a means of punishment is widely justified because the use of illegal

639 Ibid.
642 Ibid.
643 Amos N. Guiora et al, n. 258 above, p. 435.
force purportedly for solving crimes is looked on with favour not only by the officials but also by the victims of crime. Victims expect the police to deliver quick justice and urge that the offender be given summary punishment.\textsuperscript{645} In this regard, it could be argued that torture is and always has been a factor not of brute sadism but of the willingness to view one’s enemies as something less than human. Under such a circumstance torture appears to be favourable due to the convenience it may seem to provide.\textsuperscript{646}

The assimilation of human rights violations in several realms of a society, therefore, is not acceptable by states or political forces; the justification often needs to be re-packaged as something reasonable and humane; perhaps even heroic.\textsuperscript{647} Thus, the metaphor of a ticking time bomb is essentially used to describe a situation where the extraction of information from a captive by any means could possibly save the lives of many, on the ground that the war against terrorism is a new kind of war,\textsuperscript{648} hence justifying physical or psychological pressure, i.e. torture. Yet after extensive torture, none of the hooded detainees were charged with any crime.\textsuperscript{649}

Sadly, Andre Rosenthal once said concerning Israel: "No enlightened nation would agree that hundreds of people should lose their lives because of a rule saying torture is forbidden."\textsuperscript{650} Consequently, whenever the issue of violent interrogation has come up in Israel, people of practical wisdom maintain that the use of force is

\textsuperscript{644}\textsuperscript{Sarahana, n. 636 above, p. 2.}
\textsuperscript{645}\textsuperscript{Ibid.}
\textsuperscript{646}\textsuperscript{Ibid.}
\textsuperscript{647}\textsuperscript{Conroy, n. 541 above, p. 2.}
\textsuperscript{648}\textsuperscript{John Barry et al, n. 260 above, pp. 2-3.}
\textsuperscript{649}\textsuperscript{Ibid.}
necessary to extract information about terrorist activities that will in the end save the lives of many potential victims.\textsuperscript{651} Similarly, Rosenthal fulminated:

"That is the most immoral and extreme position I have heard in my life... [A] thousand people are about to be killed and... we don't do anything....when you have someone in custody who may be able to tell you the whereabouts of a bomb that is ticking toward the loss of many innocent lives, it is the moral obligation of the state to do anything necessary to make him speak."\textsuperscript{652}

Thus, it has been contended that Israel has the right and obligation to defend its citizens.\textsuperscript{653} It is a ‘defensive democracy’ reacting to attacks.\textsuperscript{654} This reasoning holds not only for Israel but for other democratic countries that now face the same situation.\textsuperscript{655} Barak sees no difference between the prolonged Israeli occupation, torture of the Palestinians and the situation of Western democracies.\textsuperscript{656}

It has also been observed that the use of torture can also be justified on the ground of national policy.\textsuperscript{657} The example of how the US soldiers tortured one Ali Abbas in Abu Ghraib prison in Iraq confirms this: “We will take you to Guantanamo...our aim is to put you in hell so you’ll tell the truth. These are our orders...to turn your life into hell....”\textsuperscript{658} Torture was also institutionalized by the US in Abu Ghraib prison in

\textsuperscript{651} Ibid.
\textsuperscript{652} Ibid.
\textsuperscript{654} Ibid.
\textsuperscript{656} Nimer Sultany, n. 653 above.
\textsuperscript{657} John Barry et al n, 260 above, p. 2.
Iraq. The revelations were appalling: a laundry list of harsher techniques in interrogation to include specific use of dogs and muzzled dogs were used in order to dehumanise the prisoners.659

It has also been reported that governments use fear as a method of torture and justify same on the ground that their power and privileges means it will not happen to them.660 Torture, in this sense, becomes an abuse of power.661 Governments continue to allow torture and ill-treatment to go on, often turning a blind eye or using it to hold on to power.662

It must be stressed that there can be no justification for torture because CAT and other important international human rights instruments assume increasing importance as a tool which has realistic prospects for eliminating torture as a state policy. It must also be stressed that if arrested persons have been brought under control, there can be no justification for them being struck or tortured by law enforcement agents.663 It is also clear that coercive force has no legitimate place in the interrogation room and so there is no defensible reason for officers having in their possession or using a device designed to inflict torture.664 Nor is the presence and use of equipment designed to suspend or strap down a suspect during an interrogation appropriate. Such physical ill-treatment can scarcely be interpreted in terms other than torture.665


659 Ibid., pp. 2-3.

660 Brown, n. 141 above.

661 Ibid.

662 Amnesty International Report, n. 533 above.

663 Rod Morgan et al, n. 433 above, Chapter 3.

664 Ibid.

665 Ibid.

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4.8 Pursuit of Torture as a National Policy

Policy, domestic or foreign, must not only be legal, but will ultimately be judged by its effectiveness. Policy advisors, be they generalists or specialists such as legal counsel, must be confident that their policy recommendations serve not only the short term political interests of a particular superior but also national strategic goals. The question as it relates to the issue at hand is whether the liberal democratic governments are going to ‘throw caution to the wind’ and adopt a philosophy reflective of ‘a la guerre comme a la guerre’. It must however be argued that such an approach is in violation of international law and international human rights law, especially as CAT explicitly states that there are no exceptions that would allow for the use of torture, but just as importantly, it violates principles of ‘morality in armed conflict’.

The discussion of why government and people in the modern world practice torture can be started from what is currently happening in the US and elsewhere. The Bush administration’s use of torture and inhumane treatment has undermined one of the most basic global standards governing how governments can treat people under their control. It has been asserted that available information and evidence indicate and demonstrate that these abuses reflect policy decisions taken at the highest levels of the US government. It is apparent that Washington’s new willingness to contemplate torture is not just theoretical. The abuse of prisoners has flourished in the gulag of offshore detention centers that the Bush

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666 Amos N. Guiora et al, n. 258 above, p. 441.

667 Ibid.

668 Article 2 of CAT.

669 Amos N. Guiora et al, n. 258 above, p. 441.


671 John Barry et al, n. 260 above.
administration now maintains in Guantanamo, Iraq, Afghanistan, and the secret dungeons where the US government’s ‘disappeared’ prisoners are held.\textsuperscript{672} The activities of the interrogators are hidden from public scrutiny and shielded from legal accountability. The interrogators in these facilities have been allowed to flout the most basic rules for the decent and humane treatment of detainees.\textsuperscript{673}

The repeated use of certain techniques at Abu Ghraib, such as those that mocked Islamic beliefs, belies the Bush administration’s claim that this was the work of a few ‘bad apples’,\textsuperscript{674} who were poorly supervised.\textsuperscript{675} At least one of the methods used is ‘an arcane torture method known only to veterans of the interrogation trade’.\textsuperscript{676} Although most of the soldiers hastily drafted into the war could probably realize that Koranic abuse would hurt and offend religious Muslims,\textsuperscript{677} the repeated use of methods that go to the detainees’ religious beliefs, for example their sexual morality and attitudes about dogs, suggests that people higher in the chain of command with some knowledge of Islamic culture allowed the creation of the environment in which the abuses occurred.\textsuperscript{678}

Repairing the damage done to global standards will require acknowledging this policy role and launching a genuinely independent investigation to identify those responsible and hold them accountable.\textsuperscript{679} To this end, the creation of regulated exceptions to the absolute prohibition of torture and mistreatment,\textsuperscript{680} will not

\textsuperscript{672} Rothh, n. 670 above.
\textsuperscript{673} Ibid.
\textsuperscript{674} Amos N. Guiora et al, n. 258 above, p. 443.
\textsuperscript{675} John Barry et al, n. 260 above, p. 1.
\textsuperscript{676} Ibid., p. 1.
\textsuperscript{677} Amos N. Guiora et al, n. 258 above, p. 443.
\textsuperscript{679} Rothh, n. 670 above.
\textsuperscript{680} John Barry et al, n. 260 above, p. 2.
redeem the tarnished reputation of the US or restore the global standards that the Bush administration has so severely damaged.\textsuperscript{681}

Arguably, there are always some governments that use torture, but they do it clandestinely. Torture is inherently shameful, it is something that, if practised, is done in the shadows. In the system of international human rights law and institutions that have been constructed since World War II, there is no more basic prohibition than the ban on torture. Even the right to life admits exceptions, such as the killing of combatants allowed in wartime.\textsuperscript{682} But torture is forbidden unconditionally, whether in time of peace or war, whether at the local police precinct or in the face of a major security threat.\textsuperscript{683}

Yet torture remains the despicable practice it has always been. It dehumanizes people by treating them as pawns to be manipulated through their pain. It harnesses the awesome power of the state and applies it to human beings at their most vulnerable circumstances and subjects the victim to abuses that the perpetrator would never want to suffer.\textsuperscript{684}

The prohibition of torture in various international human rights law is universal and is a peremptory norm,\textsuperscript{685} meaning that it binds governments as a matter of customary international law, even in the absence of a treaty.\textsuperscript{686} A breach of these prohibitions gives rise to a crime of universal jurisdiction, allowing the perpetrator

\begin{itemize}
\item \textsuperscript{681} Rothh, n. 670 above.
\item \textsuperscript{682} Ibid.
\item \textsuperscript{683} David Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories 68-71 (2002), p. 162.
\item \textsuperscript{684} Rothh, n. 670 above.
\item \textsuperscript{686} Rothh, n. 670 above.
\end{itemize}
to be prosecuted in any competent tribunal anywhere in the world. It is precisely because of the fundamental character of the prohibition that the Bush administration’s deliberate disregard for it is so damaging. If this basic human rights protection can be cast aside, no right is secured.

Moreover, the Bush administration is not just any government. When most governments breach international human rights law, they commit a violation, the breach is condemned or prosecuted, but the rule remains firm. Yet when a government as dominant and influential as the US openly defies that law and seeks to create a bold legal framework to justify its defiance, it also undermines the law itself, and invites others to do the same. That shakes the very foundations of the edifice of the international system for the protection of human rights that has been so painfully constructed over the past sixty years.

It is worth mentioning that this unlawful conduct has also damaged Washington's credibility as a proponent of human rights and a leader of the campaign against terrorism. The US government's record of promoting human rights has always been mixed. For every offender it berated for human rights transgressions, there was another whose abuses it ignored, excused, or even supported. Yet despite these inconsistencies, the US historically has played a key role in defending human rights. Its embrace of coercive interrogation as part of a broader betrayal of

687 Roth-Arriaza, n. 106 above, p. 25.
688 Roth, n. 670 above.
689 Noah Feldman, Ugly Americans, New Republic, May 30, 2005, at 23 (“[I]f the United States aimed to demand accountability with international norms, it had better begin by actively and visibly upholding those norms itself.”).
690 Rothh, n. 670 above.
691 John Barry et al, n. 258 above, p. 2.
692 Rothh, n. 670 above.
693 Ibid.
694 Ibid.
human rights principles in the name of combating terrorism has significantly impaired its ability to mount that defense.

While indeed the perpetrators of torture in US detention centers must be punished, the issue at hand goes far beyond the actions of a ‘few bad apples’. The question that must truly be addressed is how policymakers construct policy reflective both of operational reality i.e. counter-terrorism and the rule of law while striking a balance between legitimate national security concerns and equally legitimate rights of the individual. The Bybee memorandum has done the US a great disservice; untrained and unsupervised individuals seemingly with their own sadistic agenda acted in its spirit. Ultimately, according to many US military sources, intelligence that could form the basis for counterterrorism measures was not received.

4.8.1 US policy invoked by other repressive governments

As a result, governments facing human rights pressure from the US now find it increasingly easy to turn the tables, to challenge Washington's stand to uphold principles that it violates itself. Egypt justified torture by reference to US practice; Malaysia defended administrative detention by invoking Guantanamo; Russia cited Abu Ghraib to blame abuses in Chechnya solely on low-level soldiers; Nepal

695 Human rights are universal legal guarantees which protect individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity. The full spectrum of human rights involve the respect for, and protection and fulfillment of, civil, cultural, economic, political and social rights, as well as the right to development. Human rights are universal, which means that they belong inherently to all human beings, as well as inter-dependent and indivisible, the Vienna Declaration and Plan of Action (Vienna World Conference on Human Rights 1993); the Universal Declaration on Human Rights, adopted under General Assembly resolution 217(III) (1948), Article 2; and the Charter of the United Nations, Article 55(c).

696 Rothh, n. 670 above.


698 Ibid., p. 446.

699 Tom Malinowski, Wash. Advocacy Dir., Hudson Inst., America’s Mission: Debating Strategies for the Promotion of Democracy and Human Rights, State Department Briefing, Federal News Service (June 20, 2005) (reporting that when the Prime Minister of Egypt was confronted with allegations of torture, he responded, “Well, you know, we do what we have to, just like the United States”).
explained a coup by reference to America’s post-September 11 excesses, while Cuba claimed the Bush administration had no moral authority to accuse it of human rights violations. Repressive governments find it easier to deflect US pressure because of Washington’s own sorry counter terrorism record on human rights. Widespread reports of the United States’ use of torture now serve as a justification for other countries seeking to adopt the same tactics. Countries with poor human rights records that have been enlisted to receive suspects may react with hostility when their partners in torture persist in criticizing their human rights practices.

If the struggle against terror is being conducted as part of a larger effort to win people’s heart and mind all over the world, government must uphold international human rights standards in order to maintain legitimacy in that effort. Terrorists use abduction and kidnapping to instill fear. Governments who pay lip service to the rule of law should not themselves resort to tactics employed by the very terrorists they battle. By using such reprehensible tactics, countries risk alienating valuable allies and open the door to further human rights abuses by other governments. The practice of torture can subvert the rule of law and, hence, undermine essential international solidarity and cooperation in law enforcement.

703 Ibid.
705 Ibid., p. 154.
4.9 Effects of Torture

The effects of torture are complex. Although wounds, bruises and broken bones heal over time, the deeper psychological trauma often lasts for a lifetime. Some of the most common symptoms of mental torture are: anxiety, depression, insomnia, nightmares, memory difficulties, social withdrawal, irritability, feelings of helplessness, affective numbing, flashbacks, shame, mistrust, ruminations, unexplained pain, the feeling of being permanently injured and changed, many medical complaints, and digestive and sexual difficulties. All these, especially the feeling of being permanently changed, are part of the contemporary torture's objective to destroy the victim's humanity through a systemic infliction of severe pain and extreme psychological humiliation.

According to Amnesty International's medical groups, three things were discovered after collecting and analyzing the findings of twenty five years of works with survivors of torture. The finding showed that:

“Firstly, torture continued to persecute the survivors many years later with its physical and mental sequelae. Secondly, in modern times it is not aimed primarily at the extraction of information, its real aim is to break down the victim’s personality and identity. Thirdly, torture is aimed at strong personalities, people who have stood up against repressive regimes. Breaking down these persons effectively cows the rest of the community into silence.”

Similarly, survivors of torture frequently have difficulties in trusting themselves and others and in building relationships. Survivors usually experienced


707 Ibid.

708 Ibid., pp. 2-3.
disempowerment and disconnection from others which are expressed through
depression, fear, feelings of isolation and powerlessness. Thus torture affects not
only the individuals, but the family and the entire community. 709

4.10 Commercial Trade in Torture Equipment

The international commercial trade in torture equipment is thriving. 710
Manufacturers and makers of law enforcement equipment are deriving commercial
benefit from the sales of their equipment as a result of patronage from countries
that turn the equipment into instruments of torture. An Amnesty International report
indicates that there have been numerous examples of US products being used by
torturers overseas, as well as in the US. 711 Similarly, the handcuffs used to
suspend detainees from an electricity pylon where they were doused with water
and given electric shocks were clearly marked ‘The Peerless Handcuff Co.
Springfield, Mass. Made in USA’. 712 The company maintained that they usually sell
their products to legitimate law enforcement authorities who are not known
torturers. However, it must be mentioned that these were mere denials as there
was no independent body to investigate and verify the veracity of the defence put
up by the company.

Amnesty International has warned that the manufacture, use and transfer of
security and police technologies needs more than ever before to be strictly
regulated by governments using common criteria based on international human

709 Ibid.

710 Security equipment is a growing international business. In 2003 the Omega Foundation in the United
Kingdom identified some 856 companies in 47 countries which were active in the manufacture or making of
less than lethal weapons. Pain Merchant, n. 570 above, p. 2.


712 Ibid. Interestingly, the company had denied that its products were used in Khiam prison, stating, and that
Peerless Handcuff Company cannot condone or support the use of their products for torture or for any other
human rights abuse.
rights and humanitarian standards.\textsuperscript{713} To this end, Amnesty International calls for laws and regulations to: Firstly, ban outright from use, manufacture transfer and promotion all equipment the primary use of which is to commit human rights violation and violations of humanitarian standards.\textsuperscript{714} Secondly, suspend the use, manufacture, transfer and promotion of any type of equipment where credible evidence has shown that it may inherently lend itself to human rights abuse, pending the outcome of a rigorous, independent and impartial inquiry into the use and effects of the type of equipment.\textsuperscript{715} Thirdly, prohibit the transfer and use of any type of equipment where credible evidence has shown that it may inherently lend itself to human rights abuse unless the receiving party has established rules and mechanisms which enable the effective monitoring and observance of the eventual legitimate use of such equipment based upon international human rights and humanitarian law standards.\textsuperscript{716}

The observation and warning issued by Amnesty International led the General Assembly of the United Nations to pass a resolution on 19\textsuperscript{th} of December 2001, calling on all governments to “take appropriate, effective, legislative, administrative, judicial or other measures to prevent and prohibit the production, trade, export and use of equipment that is specifically designed to inflict torture or other cruel, inhuman or degrading treatment.”\textsuperscript{717}

The campaign to ban the manufacture and sale of torture equipment seems to be accepted by some countries. For instance, following the concerns expressed by

\begin{footnotesize}
\begin{enumerate}
\item Pain Merchants, n. 558 above, p. 2.
\item Stopping the torture trade, n. 532 above.
\item Pain Merchants, n. 558 above, p. 2.
\item Ibid.
\item Ibid. It must be mentioned that the idea of the EU had been emulated by the UN. For instance, the UN Special Rappoteur on Torture, Van Boven, was mandated by the United Nations Commission on Human Rights in 2001 to investigate the trade and production of equipment designed for torture with a view to prohibition. He announced in his preliminary report in January that he intended to propose to all UN Member States a trade ban and control system on such equipment similar to that of the EC Trade Regulation.
\end{enumerate}
\end{footnotesize}
the European Parliament and government officials in the European Union (EU), the European Commission proposed a council Trade Regulation which would institute a ban on trading of equipment which has no practical use other than for the purpose of capital punishment or torture, from member states to countries outside the EU.\footnote{David Clark, The ethics of Export: Landmines and Torture Devices No Longer Leave Our Shores, but Arms Policy Needs to Be More Transparent to Get Public Support, Magazine article by; New Statesman, Vol. 131, July 8, 2002.} The proposed Trade Regulation makes a distinction between such equipment and other security equipment that could be used for the purpose of torture but which also has legitimate uses.\footnote{Ibid.} To this end, it proposes that trade in a commonly agreed list of such equipment should be strictly controlled by EU governments, taking into account reports of occurrence of torture in the country of destination.\footnote{Ibid.}

It seems apparent that accusing fingers have been pointed at the US and other liberal democracies regarding the manufacture and sale of torture equipment. The view has been expressed that the U.S. has led the way in the development of new technologies used in torture, such as electro-shock devices. After export, they have quickly been replicated and spread around the world.\footnote{Weissman, n. 711 above, p. 3.}

Ultimately, however, as a result of campaigning, it is crucially important that the US act immediately in these areas. Consequently, the latter now also has a regulation which prohibits the export of crime control items to a country in which the government engages in a consistent pattern of gross violations of internationally recognized human rights. \footnote{Pain Merchant, n. 558 above, pp. 2-3.}
4.10.1 The display of torture weapons at arms trade fairs

It has been observed in Britain that despite the ban on instrument of torture and other equipment some companies still displayed their wares in arms trade fair organised to the knowledge of government.\textsuperscript{723} The report by the Commons Committee on Export Controls says the issue arose again at a security industry exhibition in Birmingham. For instance, it was observed that a Chinese company had electro-shock items on display and the person in charge of the stall offered to show participants the stun weapons and displayed them in the fair. It was also observed that customs officers were not there to stop the company from the exhibition and sale of the torture equipments.\textsuperscript{724} Ironically, although the Chinese company was near the Association of Chief Police Officers stall the latter did not notice what was going on.\textsuperscript{725}

It must be mentioned that some governments have taken steps to tighten controls and the most obvious example of this is the ban on the export of whole categories of torture equipment.\textsuperscript{726} Currently, the concern is failure to enforce the law and close loopholes which enable British weapons, military vehicles and components, to be sold to violent and repressive regimes. It has also been observed that when there are prosecutions, the fines are well below the value of the products seized.\textsuperscript{727}

4.10.2 Private security companies and vigilante groups

In many societies, public dissatisfaction with state efforts to deal with rising crime has gone hand-in-hand with increased tolerance for repressive approaches to
crime control, and, in extreme cases, resort to self-help measures that frequently violate basic human rights.\textsuperscript{728} In the absence of a capable state, citizens seek alternative forms of protection such as vigilantism; for the wealthy and the business sector, privatized policing.\textsuperscript{729}

Though the term private security company is in use in many countries, it does not exist within any existing international convention.\textsuperscript{730} In a general way, private security companies may be defined as “a registered civilian company that specializes in providing contract commercial services to domestic and foreign entities with the intent to protect personnel and humanitarian and industrial assets within the rule of applicable domestic law”.\textsuperscript{731}

Nowadays, private security services are another growing market that has largely evaded proper regulation and monitoring by governments, especially when such services have been transferred internationally.\textsuperscript{732} These security services have the potential to facilitate torture in the recipient country. If this risk is to be minimized it is vital that private security companies and agents operate within the rule of law and are properly registered. In addition, international transfers of such services be subject to stringent export controls based upon international human rights and humanitarian law.\textsuperscript{733} At the regional level, it has surpassed in number and capacity the public law enforcement contingent.\textsuperscript{734} These private forces range from

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\textsuperscript{729} James Cavallaro, et al, n. 108 above, p. 156.


\textsuperscript{732} Stopping the Torture Trade, n. 532 above, p. 46.

\textsuperscript{733} Ibid.

\textsuperscript{734} Teresa P. R. Caldeira, City of Walls: Crime, Segregation and Citizenship in São Paulo 205–06 (2001). Caldeira, for example, has documented the relationship between the Brazilian illegal market in security
\end{flushleft}
uniformed guards regulated by law to loosely joined bands of thugs. Even where they are formally legal, private security firms often operate at the margin of the law, engaging in practices that differ only minimally from those of vigilante groups.\textsuperscript{735}

In Nigeria, rising crime has led to an explosion in the private security industry. Such is the demand for private guards there that businesses requiring private security forces have hired men directly from the streets and posted them as uniformed security personnel the next day.\textsuperscript{736} There, too, vigilante groups have surfaced. These include groups such as the O’dua People’s Congress (“OPC”) in the southwest and the Bakassi Boys in the southeast, as well as smaller, less conspicuous groups.\textsuperscript{737} The Bakassi Boys are known globally for their brutal methods (e.g., hacking suspected criminals to death) due to vast international media coverage. The record of these groups has become well known to human rights activists well beyond Nigeria’s borders, even as, in a number of places in Nigeria, vigilante groups have been legalized and are supported by the government.\textsuperscript{738}

4.10.3 Torture skills

It must be mentioned that torturers are not usually nurtured, trained and supported. In many countries they rely on the willingness of foreign governments to provide not only equipment but also personnel, training and know-how. Combating torture service and uniformed security guards in private condominiums, where policemen or ex-policemen (who have their own guns) are paid to “clean up any major problem.” This market interacts with many of the same personnel who act as justicieros (literally ‘justice makers’), but who are more accurately described as death squads engaged in torture and summary executions.

\textsuperscript{735} Ibid.

\textsuperscript{736} Kole Shettima et al, n. 109 above, p. 156.

\textsuperscript{737} James Cavallaro et al, n. 108 above. p. 156.

\textsuperscript{738} Ibid.
must involve not only stopping the trade in equipment, but also putting an end to
the trade which helps create ‘professional torturers’.\textsuperscript{739} An Amnesty International report indicates that the US, China, France, Russia, and
the UK are among the main providers of training worldwide to the military, security
and police forces of foreign states.\textsuperscript{740} Some of this training may have the potential
to benefit recipient communities by providing better skilled military, security and
police forces, who respect the rule of law and seek to promote and protect the
rights of the civilian population.\textsuperscript{741} However, unless such training is stringently
controlled and independently monitored, there is a danger that it will be used to
facilitate human rights violations. However, unfortunately much of this training
occurs in secret so that the public and legislatures of the countries involved rarely
discover who is being trained, what skills are being transferred, and who is doing
the training. Both recipient and donor states often go to great lengths to conceal
the transfer of expertise which is used to facilitate serious human rights
violations.\textsuperscript{742}

\textbf{4.10.4 Reasons to end commercial trade in torture}

The importance of banning the torture weapons trade is informed by the role
played by private companies in leading industrialized countries.\textsuperscript{743}

While few people today would defend the use of torture, every year, thousands of
people beat, rape, and electrocute other human beings.\textsuperscript{744} Companies from

\textsuperscript{739} Stopping the Torture Trade, n. 532 above, p. 46.

\textsuperscript{740} Ibid.

\textsuperscript{741} Ibid.

\textsuperscript{742} Amnesty International, Canada, n. 533 above.

\textsuperscript{743} Cesar Chelala, The Will to End Torture Trade, Magazine Article, Americas (English Edition), Vol. 53,
several countries are involved in the manufacture, marketing, and exporting of torture items.\textsuperscript{745} This proliferation is an indication of the institutionalization of torture, since individual police are not buying these instruments themselves or paying for them out of their own pockets.\textsuperscript{746}

These devices have been used for torture or ill-treatment in prisons, detention centers, or police stations in every region of the world. It seems that for many people, torture is what happens to political prisoners under brutal dictatorships.\textsuperscript{747} While this is so, it is also what happens in liberal democracies, especially to members of groups which have been silenced or marginalized by wider social discrimination.\textsuperscript{748} It has been observed that most victims of torture and ill-treatments by state agents are convicted criminals, criminal suspects from the poorest or most marginalised sectors of society.\textsuperscript{749}

4.11 Final Considerations

Several devices could be used for legitimate law-enforcement reasons, such as to restrain or subdue detainees. However, some of them such as the flesh-tearing thumb cuffs and belts that emit electric shocks are ‘inherently cruel’ and their manufacture and export should be banned outrightly. The circumstances and limits

\textsuperscript{744} Ibid.

\textsuperscript{745} David Walker, The Chinese Military – Industrial Complex Goes Global, Multinational Monitor, June 1997, vol. 18 No. 6, noting for example that China is the major arms exporting power that has not entered into any multilateral agreement which sets out criteria, including respect for human rights, to guide arms export licensing decisions. Many of the companies involved in the arms trade were established under the control of China’s People’s Liberation Army (PLA) and the police state agency. The flow of arms is often to countries where there are real risks that the arms are used to commit serious abuses.

\textsuperscript{746} Chelala, n. 743 above.

\textsuperscript{747} Clark, n. 718 above.

\textsuperscript{748} Chelala, n. 743 above.

\textsuperscript{749} Stopping the torture trade, n. 532 above.
within which restraining devices are used should be consistent with international human rights standards.\textsuperscript{750}

In addition to manufacturing torture weapons, some countries provide training to military, police and security forces of foreign states. Because those forces are the main users of torture equipment, stopping torture means stopping also the trade and the training that helps create those ‘professional torturers’.\textsuperscript{751} Perhaps all countries should follow the steps of Mexican president Vicente Fox, who has given human rights special prominence. In a speech at Mexico's National Commission on Human Rights he declared, "We are going to eradicate torture forever."\textsuperscript{752}

It is worth mentioning that the problem of torture is of considerable magnitude, and it is necessary to build great public will to eliminate it because torture does not happen in a vacuum. The fact is that torture can be stopped but it is allowed to persist. Only public pressure can force governments to take action to stop torture.\textsuperscript{753} The task is to turn public indifference into outrage and courage into action.\textsuperscript{754} If the governments of the world have the political will to stop torture, they can do so.\textsuperscript{755}

\begin{footnotesize}
\textsuperscript{750} Chelala, n. 743 above.

\textsuperscript{751} Amnesty International, Canada, n. 544 above. Amnesty International is opposed to transfers of military, security or police equipment, technology, personnel or training – and logistical or financial support for such transfers – that can reasonably be assumed to contribute to serious violations of international human rights law or international humanitarian law (the Geneva Conventions and other laws of war). Such violations include genocide, targeting of civilians and civilian objects, indiscriminate attacks, deportations, and other breaches of international humanitarian law, as well as arbitrary killings, disappearances, torture or other ill-treatment.

\textsuperscript{752} Chelala, n. 743 above.

\textsuperscript{753} Stopping the torture trade, n. 532 above.

\textsuperscript{754} Ibid.

\textsuperscript{755} Chelala, n. 743 above.
\end{footnotesize}
CHAPTER 5

PERPETRATORS OF TORTURE

5.1 Introduction

In modern democratic societies, the mechanisms of management of public affairs and governance are fairly precise and somewhat definitive.\textsuperscript{756} Three main organs of state are vested primarily with the power to administer the government.\textsuperscript{757} These are the executive, the legislature and the judiciary.

The executive power is vested in the head of state, usually the president or the prime minister as the case may be. For instance, section 130(2) of the 1999 Nigerian constitution provides that: “the President shall be head of state and chief executive of the Federation.”\textsuperscript{758} The executive executes government policies. The overwhelming responsibilities and the complex nature of government businesses presuppose that the chief executive may delegate executive power to lower officials. Through delegation, the executive is able to maintain law and order in the society. The executive also ensures that there is peace and tranquillity in the country, hence an attempt to cause a breakdown of law and order by any person or persons is usually promptly controlled by the security agents put in place by the government.

The irony is that the law enforcement officials and the security agents who are entrusted with the responsibility of maintaining law and order in the society sometimes breach the law which they have been sworn to uphold. For instance,

\textsuperscript{756} Akintude Emiola, Remedies in Administrative Law, 2000, Emiola Publishers Limited, Ogbomosho, Nigeria, p. 5.

\textsuperscript{757} Ibid.

officials may be too overzealous and in the process violate the rights of the citizens by subjecting victims to torture or other cruel, inhuman and degrading punishment.

It is pertinent to mention that most of the perpetrators of acts of torture are usually those in positions of State power. However, other persons who wield other forms of authority or influence also perpetrate acts of torture. Perpetrators are either officials or persons acting in unofficial capacity. One of the major elements in torture is the infliction of serious physical and/or mental pain by ‘persons’ whether they are policemen, state agents, soldiers, civil servants, other civilians who hold or believe they do hold positions of authority over their victims.\textsuperscript{759} It must also be stressed that there is also a growing acceptance of the importance of safeguarding people from similar treatment carried out by private groups or individuals against persons under the effective control of those groups or individuals.\textsuperscript{760} Toward this end, States are responsible for safeguarding the rights of individuals within their jurisdictions and could be held accountable for acts carried out by private individuals if it supports or tolerates them or fails to provide effective protection in law against them.\textsuperscript{761}

It is also pertinent to point out that sometimes the use of torture may be intentional, unintentional or inadvertent. The germane point is that the act or the use of torture emanated from and is inflicted either at the instance of the public official or person acting in official or unofficial capacity. Torture is absolutely prohibited by CAT. This prohibition is succinctly echoed in Article 1 of CAT, which provides \textit{inter alia}:

\begin{quote}
“…when such pain or suffering is inflicted by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity.”
\end{quote}

\textsuperscript{759} Jason Barber, Less than Human, Torture in Cambodia, A Licadho Project Against Torture Report, 2000, Cambodian League for the Promotion and Defence of Human Rights, (LICADHO).

\textsuperscript{760} Ibid.

\textsuperscript{761} Velásquez Rodríguez Case, Judgment 29 July 1988, Inter-America Court of Human Rights Series C, No. 4.
5.2 Status of Perpetrators

Article 1 of CAT defines the perpetrator as a ‘public official or other person acting in an official capacity’. In the context of giving legal form to human rights principles, the state violates the right through its agents.\textsuperscript{762} Human rights are the normative articulation of the fundamental rules mediating the relationship of the organs of organized society, typically the state and the individual members of the society. This fits neatly with the basic approach of international law which identifies legal obligations as a matter of state responsibility and violations of those obligations as breaches of state responsibility. It is no accident that the purposive element of torture reflects precisely state purposes or, at any rate, the purposes of an organized political entity exercising effective political power.\textsuperscript{763}

The question then arises as to what is expected of a state when an act capable of violating its obligations occurs. Normally, reparation involving some form of material compensation and/or some form of satisfaction will be called for. This is the case also in respect of acts that may breach most human rights norms. Indeed, while this is not the place to pursue this matter, it can be viewed that the existence of the rule of exhaustion of domestic remedies is explicable as reflecting the idea that, ultimately, the human rights violation arises not as a result of the immediate act causing the initial harm, but as a result of the failure of the state to redress it.

However, some acts require a further form of reparation; namely, the subjection of those who have committed the act to criminal liability.\textsuperscript{764} This is especially likely to

\textsuperscript{762} Rodley, n. 360 above.

\textsuperscript{763} It is significant that the General Assembly resolution containing the Declaration against Torture adopted it as a ‘guideline for all States and other entities exercising effective power’: UNGA res. 3452 (XXX), 9 Dec. 1975.

\textsuperscript{764} The International Law Commission gives as examples the requests for action against the individuals guilty of the 1948 killing of UN envoy Count Bernadotte and of the killing of U.S. consular officials in Tehran: International Law Commission, Draft Articles on State Responsibility, Report of the Work of its 53\textsuperscript{rd} Session, GAOR, 55\textsuperscript{th} Session, Supp. No. 10 (A/56/10) (2001), paragraph 77. Article, 37 (‘satisfaction’), Commentary, paragraph (5), The Draft Articles do not cover the responsibility of states to individuals.

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be the case when individuals invested with special powers by the state, notably powers of physical coercion, abuse that power to commit serious crimes with impunity.

A typical torturer will be a law enforcement official or member of the security or intelligence services, precisely seeking to obtain, in the course of and in furtherance of his/her duties, information or confessions. It may also be someone with no official status acting in collusion with, and to advance the purposes of, public officialdom, often to shroud the responsibility of members of that officialdom. Conversely, the direct perpetrator of the torture may be acting in collusion with, and to advance the purposes of, civilian political authorities who prefer to turn a blind eye to the ‘excesses’ of law enforcement or security officials.\textsuperscript{765} That is why the CAT definition describes the perpetrator not only as the official who directly inflicts the torture, but also the official who instigates, consents to or acquiesces in it.\textsuperscript{766}

Even this broad notion of the perpetrator will not necessarily solve problems of proof. All those involved in what may be understood as human rights violations involving the commission of a serious crime and thus in principle requiring the state to pursue those responsible through the criminal law prosecution for torture, may be able to conceal their responsibility, particularly in the light of their public functions. Torture is usually committed in the dark and secret reaches of state power. Accordingly, case law has assigned state responsibility for acts or omissions where there may be, deliberately or otherwise, insufficient information to pursue or even identify those who have committed the acts or omissions in question.

\begin{footnotes}
\item[766] Article 1, CAT.
\end{footnotes}
5.3 Becoming a Torturer: Recruiting and Initiation Rites

In order to make someone a torturer, the first task is to recruit and commence the training and process of initiation rites which will make the recruit formidable and prepare him/her for the challenges to be encountered thereafter. \(^{767}\) The initial screening for torturers was primarily based on physical strength and ‘appropriate’ political beliefs, which simply meant that the recruits have absolute allegiance to the recruiters. This ensured that those enlisted had hostile attitudes toward potential victims from the very beginning. \(^{768}\) The recruits were also screened for other attributes. These attributes were dutifully explained by a former torturer Michaelis Petrou thus:

"The most important criterion was that you had to keep your mouth shut. Second, you had to show aggression. Third, you had to be intelligent and strong. Fourth, you had to be ‘their man,’ which meant that you would report on the others serving with you, that [the officers] could trust you and that you would follow their orders blindly.\(^{769}\)

In order to make the recruits very outstanding and mean torturers, during training the recruits were usually made to undergo physically brutal initiation rites. Recruits themselves were cursed, punched, kicked and flogged and forced to run until they collapsed and prevented from relieving themselves for long stretches of time. While being harassed and beaten by their officers, recruits were repeatedly told how fortunate they were to have been recruited to be trained as would-be torturers.


\(^{769}\) Ibid.
They were brainwashed and also told that the action of torturers is never questioned and these words of encouragements have helped the recruits to develop elitist attitudes.\textsuperscript{770} It has been observed in Sudan that a few perpetrators have confessed that they had been intensively trained in specific courses to torture state opponents as a part of the security’s task to protect the state and leaders of the state.\textsuperscript{771}

It is also pertinent to point out that in order to lure recruits to take up the job and become torturers, trainers exhibit various benefits, accolade of office, and displayed their influence and affluence to justify that the job is something to be proud of and justify the respects they enjoyed as successful torturers.\textsuperscript{772} The benefits and rewards are numerous for instance, torturers were frequently given leave of absence after they forced a confession from a prisoner. They had many economic benefits as well, including free bus rides, restaurant meals and job placement when military service was over.\textsuperscript{773} These rewards were the carrots that a would-be or an aspiring torturer would consider as something worth emulating hence, the urge to join, be trained and become a successful torturer.

Suspicion within the rank and file was a common phenomenon. Each torturer’s aim was to outdo the others, this gave room to a ‘dog eats dog’ attitude. It is in this regard that Gibson \textit{et al} expressed the view about the hypocritical attitudes of the torturers.\textsuperscript{774}

\begin{flushright}
\textsuperscript{770} Ibid.
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\textsuperscript{771} Kelman, n. 765 above, p. 132.
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\textsuperscript{772} Ibid.
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\textsuperscript{773} Janice T. Gibson \textit{et al}, n. 768 above.
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\begin{flushright}
\textsuperscript{774} Ibid.
\end{flushright}
5.4 Who are the Torturers?

Torture for whatever purpose and in whatever name requires a torturer, an individual responsible for planning and causing pain to others. What kind of a person can behave so monstrously to another human being? Could it be a sadist or a sexual deviant or someone with an authoritarian upbringing or who was abused by parents? Could it be a disturbed personality affected somehow by hereditary characteristics? These are important questions that quickly come to one’s mind whenever there is a report of an allegation of torture.

Those who have in one way or another participated in the practices of torture have variously been referred to as perpetrators, torturers, participators, facilitators, violators etc. One prominent characteristic of these people is that they all possess the potential to inflict pain and suffering for certain purposes and in particular to elicit confession and to punish their victims.

We should not lose sight of the fact that most of the perpetrators are those who, in the course of their official duties, interact with human beings on a daily basis. Some of these people are police officers, custom officials, immigration officers, asylum officers, prison warders, peace keepers, court personnel, the military, public officials, civilian leaders, the guerilla warlords, individuals, medical personnel, the judiciary etc.

775 Ibid.

776 E Van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law, Published by T.M.C. Asser Press, 2003, pp. 41 and 68.
5.5 Types of Torturers

Different types of torturers have been classified based on the accounts from people who participated in the practice. Creslínsten and Schmid identified three basic, distinctive types of torturers. These are sadists, zealots and professionals.\footnote{777}{Leonard Watchekon et al, The Journal of Conflict Resolution, Vol., 43, No. 5 (Oct, 199), p. 600.}

5.5.1 Sadists

Sadists derive pleasure from causing their victims pain because of either personal disposition or some element of revenge.\footnote{778}{Ibid., p. 601.} The sadists realize a benefit from torture regardless of his/her successes at fulfilling the state’s objective of uncovering information.\footnote{779}{Ibid., p. 602.} For example, in the military trial of Specialist Charles A. Graner Jr. for alleged prisoner abuse at Abu Ghraib in Iraq, the prosecutors, “tried to portray the soldier accused as the ringleader of the abuse scandal there as a sadistic thug who punched detainees for sport, posed smiling next to the bloody face of a detainee and bragged about forcing an Iraqi woman to let him photograph her naked.”\footnote{781}{Kate Zernike, Central Figure in Iraq Abuse Goes on Trial, New York Times, 11 January 2005, available from <http://www.nytimes.com/2005/01/11/national/11abuse.html?th> (last visited on 30 September 2007).}

5.5.2 Zealots

Zealots carry out orders, feeling little remorse for torturing but also having no incentive toward instigating the actions. Their goal is to obtain, at all costs, the
information that the state seeks. As soon as the information is sought, it seems apparent that there is no need to continue with the application of torture because there is no longer an incentive to motivate its continued application. If there are problems in obtaining the information, then the zealot will continue to torture, having separated himself/herself from the victim’s feelings.

5.5.3 Professionals

Professionals prefer not to torture and do so only when they believe that their actions are likely to produce the information sought for. The problem of this type of torturers is that they cannot achieve the detachment of the zealot and they are usually disturbed by the nature of the profession. The professionals consider various options and by so doing, weigh the pain that is caused to victim against the utility that will be obtained from the torturing. If they are convinced that the use of force can extract the desired information which will ultimately achieve the desired or envisaged result, the professional will rather exercise the option not to torture.

5.6 Why do People undertake to become Torturers?

There is a certain degree of self selection of individuals who gravitate to the role of torturer. Moreover, those operating within the role vary in the amount of enthusiasm, diligence and innovativeness that they bring to the task. Differences in personality and background doubtless play an important part in determining who becomes a torturer and who acts out that role eagerly and with evident enjoyment. But a focus on structural factors helps us understand why most,

782 Conroy, n. 541 above, p. 3.
783 Watchekon et al, n. 777 above, p. 601.
784 Ibid.
785 Ibid., pp. 601-602.
786 Ibid.
torturers are not sadists but ordinary people, doing what they understand to be their jobs. Individual differences in readiness to engage in torture may be related as much to people’s orientation toward authority as they are to their propensity toward aggression or their sense of compassion.788

Cultural differences, particularly differences in political culture, certainly also play an important role. Thus, Berto Jongman789 shows that human rights violations, including torture, are much more likely to occur in non-democratic than in democratic societies, and in countries at low levels rather than high levels of development. Democratic countries are less likely to practise torture precisely because of the nature of their policy process and authority structure. But torture does occur even in highly developed democratic societies, usually in the context of counter-terrorist activities or armed conflict, as the experiences of Guantánamo Bay and Abu Ghraib well illustrate.790 There are social conditions under which democratic cultures that ordinarily respect human rights may sanction torture, just as there are social conditions under which ordinary, decent individuals may be induced to take part in it. Thus, while individual and cultural factors are important determinants of torture, they operate in interaction with the policy process and the authority structure that ultimately give rise to the practice.

5.6.1 Trained torturers

Various reasons have been attributed to the willingness of human being to take up the profession of torturer. John Conroy791 narrated some of the reasons that turned him to a torturer, namely that he:

787 Kelman, n. 765 above, p. 127.

788 Ibid.


790 Kelman, n. 765 above, pp. 127-128.
“...attended a boarding school, run on a British model, which imparted a colonial mentality and exerted a certain rigid discipline and subjected to various abuses...was also subjected to strenuous and violent training as part of the military training. Having gone through these ordeals was certified fit and successful and became one of the best torturers.”

It can be argued that, torturers, if they are to be effective, efficient and be the best, must feel nothing bad about what they are doing. They should not bother or worry about the pain and suffering of their victims as they are expected to develop the right attitude towards their job; they need to be able to torture with a minimum of emotional engagement. 792

5.6.2 Training culminating in professionalism

Just like any vocation or job, in order to become a successful torturer, the would-be torturer is expected to go through some basic training which will expose him/her to various techniques of torture and transform him/her into a professional torturer. 793

Some of the numerous training includes: interrogation training survival skills, reconnaissance, rescue operations, jungle training as well as counter-terrorism and counter-insurgency training, capture survival skills like for instance how to evade or resist. The aim of this kind of training is to give trainees the skill to survive and evade capture or, if captured, to resist interrogation or exploitation and plan their escape.

791 John Conroy, Up for it, Monsters or ordinary people-who are the torturers? Third World Traveller, New Internationalist magazine, September 2000, p. 1.


793 Kelman, n. 765 above, pp. 131-132.
The five torture techniques\textsuperscript{794} used by the British in Ireland in 1971 were considered as torture because these techniques met the definition of torture in accordance with Article 3 of the ECHR. These techniques are also used during training by the Green Beret course instructors at the John F. Kennedy Special Warfare Center have denied that such training constitutes torture.\textsuperscript{795} On the contrary when these techniques are applied to others they clearly do constitute torture.

It is noteworthy to mention that torture requires more than practical skills; it requires immense strength of mind. Torturers need to be trained to manage the psychological stress associated with torturing.\textsuperscript{796} In addition, other common unofficial training techniques involve the brutalization and humiliation of trainees. According to Jessica:

"the training process also involves intense, highly stressful, and often brutal exercises...trainees are subjected to the techniques of psychological torture, a process which is extremely distressing and humiliating and can result in dissociation and deep anxiety...New trainees become desensitized to their own suffering, and when they in their turn play the "torturer"...they learn to be desensitized to the infliction of pain. This desensitization reduces...empathetic reaction to physical suffering and thereby makes the infliction of pain and humiliation on the enemy psychologically easier."\textsuperscript{797}

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\textsuperscript{794} Wolfendale. 792 above.
\textsuperscript{795} Wolfendale, n. 792 above.
\textsuperscript{796} Ibid.
\textsuperscript{797} Ibid.
\end{flushright}
Similarly, trainees are taught how to be steadfast and believe in the task, and are expected to make decisions without any supervision.\textsuperscript{798} Trainees must be firm and must not hesitate to use torture in order to get the required answers from suspects. Trainees are also taught to be resolute torturers who can take a stance on any issue and should not be half hearted or hesitant.\textsuperscript{799}

The basic training described above is only part of the process. However, despite the brutality of the training, torturers still need time to get used to their work. To be the master of the act, a torturer must continually put in practice and use various training techniques received during training. Gradually, the whole act of torture would be mastered and it would become a normal routine. Professionalism is therefore automatically entrenched.\textsuperscript{800}

Generally speaking, the point must be made that the aim of the torture and the constraints on the kind of torture that may be used determine the type of particular torturer required to do the job. For instance, the training required to do the job in interrogational torture in the ticking bomb scenario is quite different from the training required to do the job in dehumanized torture or deterrent torture. Interrogational torturers are more professional because of the nature of the people or crimes they deal with.

\textbf{5.6.3 Training for interrogation torturers}

In order to become a successful interrogation torturer, a lot of self control, discipline and maturity are required. The attributes of a good and outstanding interrogation torturer are explained thus: “The good interrogation torturer needs to


\textsuperscript{799} Wolfendale, n. 892 above.

\textsuperscript{800} Radtke, n. 767 above, 1990, pp. 77-88.
be entirely in control of the process of torture, must be able to torture whoever is placed in front of him/her without flinching and without hesitation. 801

It is pertinent to point out that sadism and a lack of discipline undermine the effectiveness of torture. Sadism merely results in the infliction of physical violence without any useful result. The end result of any interrogation torture is to extract the desired information. Interrogation torture is result oriented and not aggressive infliction of violence. In interrogation torture, if information is not extracted, the whole exercise becomes futile.

5.6.3.1 Reasons for training interrogation torturers

In the ticking bomb scenario, time is of essence and the torturer must be able to promptly extract the desired information in order to foil the plan of the terrorist or the suspects that planted the bomb. The torturer must be very efficient and articulate. The job must be perfectly done so that all the information required would be extracted from the suspect with dispatch. In the process, no gap or loophole should exist. The task must result in a complete success and it must be fully accomplished in all respects. Training is desirable for a successful ticking bomb torturer. The reason is that the time constraints on the ticking bomb scenario mean that the torturer cannot be concerned about the suspect's guilt or the moral justifications for the use of torture because any hesitation could have devastating consequences. 802

5.6.4 Policemen as the most potent torturers

In most countries of the world, including the liberal democratic countries, policing has so degenerated that it has become manifest threat to the rule of law. 803

801 Wolfendale, n. 792 above.

802 Ibid.

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In this regard, Ferdinaldo and Cheesman have asserted that:

“that police force is in trouble is no revelation. There is hardly anyone who would openly deny this. There is no point in talking about it because nothing will come from it, as things have degenerated too far. A sense of helplessness has given rise to a sense of resignation. But for a great many people...the situation has become unbearable, and it is in this condition that hope for a solution to the problem lies.”\textsuperscript{804}

5.6.5 Training torturers to dehumanise and deter

Torture is sometimes used to make a statement. The purpose of torture in this situation is to dehumanize and deter.\textsuperscript{805} This method is usually used against political opponents by dictatorial regimes or regimes that do not believe in any diverse opinion or opposition. It is equally employed by police or prison officials against suspects and inmates to deter and dehumanize.

In order to deter opposition in a political setting, the government in power can use torture against its opponents. Torture is used through the instrumentality and machinery of the state i.e. law enforcement or security officers. The use of torture to the knowledge of associates of the victims could sometimes make the associates jettison their opposition postures. The reason for this is that the associates might not want to suffer similar pain and suffering hence they would make a turn around. What would make the associates to abandon their opposing postures against the regime is either the scene of the torture of their associates or what they have heard about the effects of the torture used against the victims. This could sometimes make the opponents denounce their political dissension or stop

\textsuperscript{803} Brasi Ferdinaldo, Nick Cheesman, Bruce Van Voorhis, Sanjeewa Liyanage, Kwak Nohyum, Lin Chew, Philip Setunga. article 2, Wong Kai Shing (ed.), published by the Asian Legal Resource Center (ALRC), in conjunction with Human Rights Solidarity, a publication of the Asian Human Rights Commission, p. 3.

\textsuperscript{804} Ibid.

\textsuperscript{805} Dahr Jamail, n. 658 above.
outrightly the opposition ideology and join the government in power. In this scenario, torture becomes effective because the dehumanization of the opponents serves as deterrent to others.

Abusive and vulgar words are usually uttered by the torturer against the victims and by so doing, the victim is reduced to a contemptible object in the eyes of the torturer. It also encourages the torturer to feel less morally responsible for harming the victims. The incident which happened in the Iraqi prison shows that torturers usually believe that the victims deserve their own suffering. This belief is evident in the following quote from a US soldier involved in the abuse of prisoners in Iraq. While watching two prisoners being forced to masturbate and simulate oral sex, this soldier commented: "Look what these animals do when you leave them alone for two seconds."  

5.6.6 Untrained torturers

A vivid account of trained torturers was given above. What about those who do not receive any formal training but thrive on the practice of torture. How do they become torturers? What motivated their thirst for practising torture? Answers to these questions can be found in the outcome of the interview granted to John by Don Dzagulones, an American who served as an interrogator in Vietnam. Dzagulones did not receive any special training, torture was simply the milieu. Rather than going through the rigour of training, Dzagulones learnt how to torture by observing how established torturers apply torture.

“...Dzagulones was assigned to observe other interrogators before he did it himself. One of the first interrogations he witnessed was the questioning of a suspect whose leg had been blown off by an artillery

806 Brasi Ferdinaldo et al, n. 803 above.
807 Ibid.
808 Conroy, n. 791 above, p. 2.
The brigade intelligence officer became frustrated at the interrogators’ lack of progress and took over, prodding the man’s wounds with a pencil as he posed his questions... he was surrounded by captains, lieutenants, doctors, nurses. Nobody showed any concern. Torturing prisoners was wholesome, rampant, at every level.\textsuperscript{809}

It is in this regard that Wolfendale asserted emphatically that: “It is true that ordinary people have the capacity to commit horrendous acts of violence without any particular training.”\textsuperscript{810} This researcher subscribes to this view. In the same vein, there are people who became terrible torturers especially when the order to torture was from a legitimate authority. In order to carry out the instruction, no special training is required. The mere fact that instruction to torture came from legitimate authority or person in position of authority will suffice. As a result of obedience to authority they harm others and became torturers in the process. It is in this regard that Wolfendale expressed the view that:

“There are numerous examples of ordinary people who have massacred, tortured, raped, and committed other atrocities without any special training.... obedience to authority demonstrated clearly that many of us will obey orders to harm another if those orders are given by a legitimate authority.”\textsuperscript{811}

\textbf{5.6.7 Full fledged torturers}

We have considered various training processes that successful torturers must pass through before becoming certified and full fledged torturers. Torturers put the training and skills acquired to work. Torturers acquire a new status. They are now

\textsuperscript{809} Ibid., p. 3.

\textsuperscript{810} Wolfendale, n. 792 above.

\textsuperscript{811} Ibid.
full blown certified torturers willing to justify their acquired skills by inflicting pains and sufferings on the victims. At this stage, they are independent and only need to receive instruction to torture from superiors or persons in position of authority. Successes achieved by the torturers are usually measured from the results achieved through the use of torture.

Torturers who execute these violent projects are people we see on daily basis; they are professionals, scientists, highly skilled intellectuals, public officials, non–public officials, judges, doctors, medical professionals, lawyers etc. As Lippmann rightly observes:

“policemen, solicitors, doctors, scientists, judges, civil servants, politicians are involved in torture whether in direct beatings, examining, inventing new devices and sentencing prisoners on extorted false confessions, officially denying the existence of torture, or using torture as a means of maintaining their power.”

5.6.8 Medical doctors as perpetrators

The medical profession has, in general, a duty to serve humanity, and doctors are duty bound to restore bodily and mental health without distinction among the persons they serve. In spite of this, professional medical personnel have been involved in the practice of torture. This involvement seems to be caused and dictated by doctors’ responsibilities and what is expected of them during torture sessions. These expectations are:

“Firstly, to perform medical examinations on subjects before they are subjected to forms of interrogation which might include torture. Secondly, to attend torture sessions in order to intervene, as in a boxing ring, when the victim’s life is in danger. Thirdly, to treat the

812 Lipman, n. 72 above, p. 46.
direct physical effects of torture, and often to ‘patch up’ a seriously injured torture victim temporarily so that later on the interrogation can be continued. Fourthly, to develop, techniques and methods which produce the results desired by the supervisors.”

Medical torture describes the involvement and sometimes active participation of medical professionals in acts of torture, either to judge what victims can endure, to apply treatments which will enhance torture, or as torturers in their own right. Medical torture may involve the use of expert medical knowledge to facilitate interrogation or corporal punishment, in the conduct of torturous human experimentation or in providing professional medical sanction and approval for the torture of victims. The term ‘medical torture’, also covers torturous scientific experimentation upon unwilling human subjects.

Lippman, relying on Amnesty International report, cited as an example how in Chile the medical profession was implicated in having encouraged the use of torture.

“[t]he most serious claim is that doctors have attended torture sessions, advising on the physical state of the interrogated, and have applied the ‘truth drug’ pentothal and other drugs during interrogations…leading members of the medical profession have been aware that the torture of political prisoners has taken place within the military hospitals themselves, and have at times had the opportunity to visit those prisoners who also have been subjected to torture.”

813 Ibid., pp. 46-47.


815 Ibid.

816 Lipman, n. 72 above, p. 47.
In Israel, the use of torture was usually accompanied by a system of medical checks. Medical personnel and officials have designed a ‘medical fitness form’ to be used in interrogation centres.\textsuperscript{817} The form requires doctors to certify whether a detainee could withstand methods of interrogation including solitary confinement, tying up, hooding and prolonged standing.\textsuperscript{818} After protests (led by local human rights groups), the Israeli Medical Association instructed physicians not to use the form. The Israeli authorities suggested that the form had been a mistake. However, detainees continued to be checked by medical staff on arrival and torture was modified according to the state of their health.\textsuperscript{819}

5.6.9 Minimising the involvement of the medical profession in torture.

The World Medical Assembly in its twenty ninth session unanimously adopted the Declaration of Tokyo. Paragraph 1 of the Declaration declares that doctors shall not “countenance, condone or participate in the practice of torture, or other forms of cruel, inhuman or degrading procedures, in all situations, including armed conflict and even civil strife.”\textsuperscript{820} This obligation is further refined in subsequent paragraphs of the Declaration.

A doctor must have complete clinical independence in deciding upon the case of a person for whom he/she is medically responsible. The doctor’s fundamental role is to alleviate the distress of his/her fellow men/women, and no motive—whether personal, collective or political—shall prevail against his/her higher purpose.\textsuperscript{821}

\textsuperscript{818} Ibid.
\textsuperscript{819} Ibid.
\textsuperscript{820} Lipman, n. 72 above, p. 47.
\textsuperscript{821} Ibid.
It is worth mentioning that various supports have been given to doctors by The World Medical Association in order for doctors to be able to perform their duties without fear. To this end, paragraph 6 of the Declaration serves as a shield and protection and it makes provision 'to support' and 'encourage' national medical associations and fellow doctors and their families in the face of threats or reprisals resulting from a refusal to condone the use of torture or other forms of cruel, inhuman or degrading treatment.

Lippman criticized in depth paragraph 4 of the Declaration. Lippman is of the opinion that doctors need not be present, countenance, condone or participate where interrogators are applying torture to extract confession or information. Nevertheless, a doctor’s obligation to preserve and restore bodily and mental health also may require that a doctor be present during the practice of torture so as to safeguard the victim against torturers going dangerously beyond the victim’s threshold of pain. It has been contended that if ‘well intentioned’ doctors do not attend the torture sessions, the victim will either receive no medical care or be placed at the mercy of medical personnel unconcerned with the victim’s well-being. This is a dilemma.

However, from the perspectives of the researcher, the arguments and reasons advanced by Lippman to support his critique of paragraph 4 of the Declaration cannot be sustained by any national or international human rights instruments or laws. Lippman’s idea that doctors should be present where torture is being practised is flawed because the doctor’s mere presence in a place where torture is being inflicted on a victim is tantamount to countenance, condonation or participation as the case may be. The doctor’s presence automatically enlists the doctor’s support and encouragement to torture. Since the aim and purpose of application of torture is to inflict pain and suffering what duty or function is the

822 Faraone, n. 814 above.

823 Lipman, n. 72 above, p. 47.
doctor who is apparently present at the scene of torture expected to perform? Is the presence of the doctor aimed at stopping the application of torture or allowing the torture and thereafter apply medical treatment to the victim?

The researcher’s view is that the mere presence of a medical doctor at the scene or place where torture is being practiced suffices to suggest that the doctor is equally a facilitator, co-conspirator, or a participant. The reason for this position is the fact that from the outset, before the commencement of the use of torture, the support of all the participants is enlisted and they are all well informed as to the purpose for which they have been gathered together i.e. to inflict torture for a purpose.

Professionally and ethically, no situation or reason should compel a medical doctor to engage in the illicit and unethical practice of torture. Medical ethics and doctor’s allegiance should discourage the use of torture. Moreover, the Declaration explicitly spells out the duties, obligations and responsibilities of medical personnel. No provision is made for the use of torture by medical personnel. No justification can therefore be given for a doctor’s presence during torture sessions because it is contrary to a doctor’s professional calling and responsibility. More importantly, CAT which serves as a mirror through which other instruments are viewed states categorically that torture can never be justified in any circumstances; in peace time, during war or emergency situations.

5.6.10 Judges as torturers

It is a trite law that the duty of a judge is to interpret laws. In doing so the judge must not only act judicially but must also act judiciously and make sure that justice is not only seen to be done but manifestly seen to been done. Judges have both inherent and discretionary powers in respect of matters before them. They must aim at ensuring that suspects appearing and standing criminal trials before them have not been, and will not be tortured through their pronouncements or ruling. In
this connection, judges should not allow themselves to be used to violate the right not to be subjected to torture. This issue was obliquely raised in *Price v. United Kingdom*,\(^\text{824}\) where a four-limb deficient Thalidomide victim was detained in a police cell and in a prison and kept in degrading conditions. It was observed that the judge in committing the applicant to prison without ascertaining whether there was adequate facilities for her was following ‘English law and practice’ at the time. However, this is no longer in accordance with the law, as section 6 of the Human Rights Act 1998 requires the court, as well as other public authorities, to act in a manner that is compatible with the rights in the Convention.

Consequently, the act of a judge will amount to torture if he/she commits the applicant to prison without first ascertaining that there were adequate facilities to look after the special needs of that detainee.\(^\text{825}\) This is expected of a judge especially if the applicant’s disabilities are apparent.\(^\text{826}\) In the *Price* case, the court issued a separate statement which laid responsibility firmly upon the judge:

“No justification for the decision to commit the applicant to an immediate term of imprisonment without at the very least ensuring in advance that there existed both adequate facilities for detaining her and conditions of detention in which her special needs could be met.”\(^\text{827}\)

Similarly, the UK Court of Appeal has held that where fundamental rights are an issue, the court must reach an ‘independent’ view of the merits of the case.\(^\text{828}\) Sometimes, this will mean that the court can invoke its discretionary power in the

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824 (200) 34 E.H.R.R. p. 53.
825 Cooper, n. 350 above, p. 38.
826 Ibid.
827 Ibid.
828 Ibid., p. 33.
circumstance and by so doing, depart from normal court practices in order to ensure that justice is done. This is illustrated in *R. v. Responsible Medical Officer Broadmoor and Mental Hospital and Mental Health Act Commission Second Opinion Doctor, ex parte. Wilkinson and Secretary of State for Health (Interested Party)*. In this case, a detainee mental health patient sought by way of judicial review to challenge the administration of medical treatment without his consent. The Court of Appeal emphasized that taking an independent approach to the merits of the medical decision to treat should include the disputed issues of fact. The former directed that the court should depart from the usual practices inherent within judicial review by ordering the attendance of the medical personnel concerned with the administration of the proposed medical treatment so that they could be cross-examined. If this was done, the court would have discharged its duty.

### 5.6.11 Lawyers as torturers

It is extremely appalling to note that lawyers who have been licensed to offer professional advice concerning any legal matter, for instance, not to subject a person to torture have abdicated their exalted position and even assisted in encouraging the breach of the law. Like all attorneys, lawyers working for government or any organization or self are bound by the constitution and the law, and also by the professional and ethical rules of the country in which they are licensed to practice. Lawyers are required to provide competent representation to their clients. Importantly, professional and ethical rules prohibit lawyers from knowingly counselling or assisting a client to violate the law.

In the US, reports of how attorneys had directly been involved in drawing up legal memoranda seeking to justify coercive interrogation of detainees confirms the fact

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829 Ibid.

that some lawyers could be so mean and insensitive as to allow themselves to be used to violate the law. Attorneys have also, through legal memoranda advised administration officials, among other things that: the Geneva Conventions were inapplicable to Taliban or persons suspected of having links with Al Qaeda or terrorism. CAT and other treaties barring torture and cruel, inhuman, or degrading treatment, as well as U.S. law implementing such treaties, prohibit only the most extreme methods of torture and did not apply to interrogations conducted at Guantanamo Bay, Cuba, because the U.S. naval station there was within the definition of the special marine and territorial jurisdiction of the U.S. and thus outside the scope of the statute. The President as commander in chief has constitutional authority to disregard treaty or statutory prohibitions on the use of torture or other coercive interrogation techniques in conducting the ‘war on terror’. More worrisome is the fact that the White House counsel in the US had dismissed relevant prohibitions of the Geneva Conventions as ‘obsolete’.831 It is pertinent to mention that a lawyer may give an honest opinion about the consequences that are likely to result from a client’s conduct, and may counsel or assist the client in good faith to determine the validity, scope, meaning, or application of the law.833 The client’s refusal to take the advice given by lawyers should not deter a lawyer from giving an honest assessment. To this end, it is proper for a lawyer to conform to relevant moral and ethical considerations in giving such advice, since these considerations may impinge upon most legal questions and may decisively influence how the law should be applied. Lawyers are expected to take certain steps to inform an erring member of an organization or government the consequences of violating a legal obligation. It must be stated that

831 Ibid., pp. 689-690.
832 Ibid., p. 690.
833 Ibid.
government attorneys have a particular obligation to act responsibly in formulating advice or arguments regarding constitutional or international legal questions.  

5.6.12 Individuals as torturers

CAT and other human rights instruments banning torture make adequate provisions against the use of torture by a public official or other persons acting in an official capacity. It seems apparent that from all indications, the practice of torture by individuals was never envisaged by CAT. However, the European jurisprudence and in particular, case law and academic opinions canvassed by scholars have clarified this vexing issue. The obligation to protect and to ensure that people are not subjected to torture rests solely on states. If an individual at the instance of public authority uses his/her abode to assist in detaining people for the purposes of torture, the state has the responsibility to classify such abode as a detention center. In Europe, the CPT has the right of access to such private abode for the purpose of investigating and reporting on practices of torture. Rod Morgan and Malcolmn Evans used the right of access by the CPT to the place of private detention site as hypothetical example to establish the fact that the CPT right of visit is not limited to the detention sites as envisaged by the ECHR, but also covered private homes and (by extension) prisons of all forms, secure units, holding centers for asylum seekers or for illegal immigrants, military detention units and psychiatric hospitals where persons are detained involuntarily by public order. The key lies in the nature of the detaining authority. By virtue of a public authority, the CPT enjoys a right of access even if the place of detention is in fact private. Thus it may extend to private hospitals and even to private homes where, for example, a person may be under house arrest. It is also the de facto nature of the detention rather than its legal standing, that is critical.

834 Ibid.
835 ECPT, n. 42 above.
836 Rod Morgan et al, N. 433 above, Chapter 1.
States are also under an obligation to ensure that they take preventive measures to protect a person who is at risk from another individual. In the case of *Z v. United Kingdom* \(^{837}\) it was held that:

“Article 3 enshrined one of the most fundamental values a democratic society, prohibiting in absolute terms torture or inhuman or degrading treatment or punishment. States that had ratified the Convention were bound to ensure that individuals within their jurisdiction were not subjected to inhuman or degrading treatment, including such ill-treatment administered by private individuals.”

### 5.6.13 States and governments as torturers

States are required to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or other cruel, inhuman or degrading treatment or punishment. This includes keeping vigilance on various public officials, law enforcement officers, states and government security agents and people responsible for those who are in protective custody in police stations, prisons, juvenile detention centers, immigrant holding centers, closed psychiatric hospitals. This also includes those who participate in protest against the policies of the government or who embark on civil unrest to press for certain demands. There is a positive obligation on States and governments to take the necessary steps which they know or ought to have had knowledge about that could reasonably be expected of them to avoid a real and immediate risk of torture or other cruel, inhuman or degrading treatment or punishment. However, it is extremely appalling to know that states are the major perpetrators of acts of torture. According to Amnesty International, there were reports of torture or ill-treatment by state officials in most parts of the world. \(^{838}\)

\(^{837}\) (200) 34 E.H.R.R. 3.

\(^{838}\) Amnesty International USA. Action for Human Rights. Hope for Humanity.
5.7 Torture as National Policy

State torture is the infliction of physical or mental pain, or both, as a political act implemented with the consent or tolerance of the state. This may be implemented as part of a national policy to respond to real or perceived internal threats and political conditions that influence a state’s decision to implement a policy of torture against its own citizens to combat such internal threats to its security.\(^{839}\) State torture is a method of governance that creates an infrastructure, complete with trained torturers, torture chambers with standard operating procedures, and detention centers that practice torture.\(^{840}\)

A government adopts and implements a ‘policy of torture’ to control and terrorize its people. In this regard, the overarching purpose of state torture is to maintain the status quo or to destroy internal or external political, ideological, or military threats, real or imagined, against the state.\(^{841}\) The occurrence or perceived threat of violence against the State is central to the rationale for a policy of torture.\(^{842}\) However, in those instances where the state legitimizes an otherwise objective act of torture and thereby denies the intent of CAT, it is contended that the act should still be considered torture. For instance, Israel has authorized the use of ‘shaking’\(^{843}\) during the interrogation of suspected terrorists. However, the practice of ‘shaking’ of suspects does not constitute torture in terms of Israeli national law.

\(^{839}\) Wolfgang S. Heinz, The military, torture and human rights: Experiences from Argentina, Brazil, Chile and Uruguay, in Ronald D. Crelinsten and Alex P. Schmid (eds.), The Politics of Pain: Torturers and their Masters, COMT, University of Leiden, Leiden, The Netherlands, 1993, pp. 73-108.

\(^{840}\) Irwin M. Cohen et al, n. 4 above, p. 105.

\(^{841}\) Ibid.

\(^{842}\) Heinz, n. 838 above.

\(^{843}\) Amos N. Guiora et al, n. 258 above, Shaking has been defined by the HCJ as “the forceful shaking of the suspect’s upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly.” HCJ 5100/94 Public Comm. Against Torture in Israel v. Israel [1999] IsrSC 46(2), ¶ 24, available at http://www.derechos.org/human-rights/mena/doc/torture.html.
However, many victims of shaking claim that this act is torture.\textsuperscript{844} This position is important because it prevents the individual state from defining techniques that have been categorized by international political organizations as constituting torture as an acceptable form of punishment.\textsuperscript{845}

Public authorities may also support policies and practices that foster torture and human rights violation by law enforcements officials and security forces. In Brazil State Security Secretary Nilton Cerqueira repeatedly called on police in public statements to inflict physical torture in encounters with criminals.\textsuperscript{846} In the same vein, in 2002, authorities widely praised the police after an incident in which twelve suspects were tortured and killed. However, evidence revealed later that the victims had been wrongly executed.\textsuperscript{847} Similarly, in Nigeria, the government policy aimed at crime control had led to massive human rights violations by the security officials entrusted with the responsibility for crime control.\textsuperscript{848}

\textbf{5.7.1 Reasons why governments condone the use of torture}

To legitimize the use of torture, governments frequently point to a history of focused violence against the state.\textsuperscript{849} This violence often takes the form of insurgency, guerrilla operations, or terrorist acts against the state.\textsuperscript{850} For example, in the US of America, Israel and the UK, the prolonged and unsuccessful history of government policies to stop terrorist attacks was used to justify both of these liberal-democratic states implementation of torture as a state policy, whether covert or not.

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\textsuperscript{844} Irwin M Cohen et al, n.4, p. 106.
\textsuperscript{845} Ibid.
\textsuperscript{846} Amnesty International, Fear for Safety/Medical Concern 2, AI Index AMR 19/03/98 (1998).
\textsuperscript{847} The Global Justice Center, Human Rights in Brazil 2002.
\textsuperscript{848} Kole Shettima et al, n. 109 above.
\textsuperscript{849} James Cavallaro et al, n. 108 above, p. 140.
\textsuperscript{850} Irwin M. Cohen et al, n. 4 above, p. 106.
\end{flushleft}
In certain countries where actual attacks did not occur, the government exaggerated the potential of individuals or groups to threaten the state. In China, for example, there have been accusations by human rights organizations that state torture is used against religious and national groups, even though there is no evidence that any anti-state terrorist acts emanate from either group. As such, a systematic policy of state torture typically involves subjecting citizens to torture not because of any criminal acts that they may have performed or are planning, but because they hold political or religious beliefs deemed dangerous to the authority of the government.

In effect, state torture can escalate into a general state policy under the guise of national security. In other words, torture is practised by the state against a wide variety of people for a constantly expanding range of reasons. In Chile, for example, the Augusto Pinochet military dictatorship maintained state torture apparatus even though the actual threat of revolutionary terrorism had long ceased to exist.

5.8 Making Perpetrators Responsible and Accountable

One of the great mysteries in the ‘war on terror’ is why so few people have been held responsible for torture and cruel, inhuman and degrading treatment inflicted on prisoners. Reports of human rights violations and abuses are so numerous that one cannot help concluding that the problem is systemic. There have been

852 Ibid.
853 James Cavallaro et al, n. 109 above, p. 140. Noting that where crime is a problem, authorities turn easily to hard line law and order policies that attract public support. With greater frequency, civilian governments and their security forces propose and implement punitive and authoritarian methods of control and punishment with little public opposition.
854 Amnesty International, n. 817 above.
reports of various human rights abuses\textsuperscript{856} These abuses have reportedly taken place at Guantanamo, Abu Ghraib, Bagram Air Force Base in Afghanistan, undisclosed CIA detention centers and, with US concurrence,\textsuperscript{857} in foreign prisons to which America has ‘rendered’ suspects on a CIA plane.\textsuperscript{858} Memos have been leaked linking these practices to policies developed at the highest levels of the Justice Department and the Pentagon.\textsuperscript{859} There have been a series of denials and no one has been held responsible or accountable.\textsuperscript{860}

Despite the public outcry, the US government has refused to appoint an independent commission to investigate these abuses. The irony is that, other government institutions that have been implicated in the practices are now entrusted with the responsibility of investigating these abuses. It seems apparent that these institutions are likely to be biased. Accordingly, it is right to say that the person who pays the piper dictates the tune.

Atrocities committed in the past which are now generating responsibility and accountability should serve as lessons to others who are willing to follow the path of construction instead of destruction. The indictment of General Augusto Pinochet should serve as a lesson to prospective tyrants. Pinochet sanctioned torture similar to the various practices currently perpetrated by US in the so–called war on terror. It must be noted that Pinochet was brought to book after thirty years. However, the political and judicial institutions of the US seem to be failing spectacularly in dealing with torture. Most of the reports of investigations are either classified as official secrets or not released.\textsuperscript{861}

\textsuperscript{856} Kelman, n. 765 above, pp. 123-124.

\textsuperscript{857} Ibid., p. 123.

\textsuperscript{858} Cole, n. 855 above.

\textsuperscript{859} Ibid.

\textsuperscript{860} Conroy, n. 791 above, p. 4.
It is worth mentioning that as a legal doctrine, universal jurisdiction is not without problems. It can easily be manipulated as a tool for imposing US policies.\textsuperscript{862} But in this case, the abuses of the US military prisons are so systemic, severe and corrosive that transnational legal intervention is amply justified. Europe’s rapidly evolving human rights law may offer a precedent to hold the US to ‘evolving standards of decency’. It must be recalled that when Chilean politicians maintained General Pinochet’s immunity, his victims appealed through Spanish law, leading to his 1998 arrest in London and paving the way for Chile to finally make its leaders accountable, under its own constitution, for atrocities.\textsuperscript{863} This is a warning and reminder to contemporary government that torture will not be condoned. Since the provisions of CAT and other related human rights instruments are explicit, perpetrators should not escape liability. The indictment of Pinochet has taught us and laid a precedent that if the crime is of a grave nature, it will continue to generate responsibility and the perpetrator will be held accountable however long it takes.

5.9 Final Considerations

From all indications and analysis made above, it is trite to say that all humans are capable of committing torture and other ‘acts of great evil’.\textsuperscript{864} Many forms of behaviour, including acts of cruelty, are influenced as much by persons in authority, peer pressure and other social interactions as by the psychology of the individual.\textsuperscript{865} We must understand the importance of social context and accept that almost anybody could commit acts of torture under certain circumstances.\textsuperscript{866}

\textsuperscript{862} Ibid.
\textsuperscript{863} Ibid.
\textsuperscript{865} Ibid.
\textsuperscript{866} Kelman, n. 765 above, p. 132.
Certainly, acts of torture can be committed by almost everyone and not just psychopaths.\textsuperscript{867}

More often than not, a process of 'grooming' occurs, whereby the perpetrator is introduced to small acts of abuse perhaps an occasional slap and then over time these acts of abuse are built up to levels of extreme torture.\textsuperscript{868} All this is carried out in a social context of acceptability, where the perpetrator is made to feel special for carrying out the abuse.\textsuperscript{869} Likewise, cohesive social populations such as the military can either encourage prejudice as in the case of the treatment of Iraqi prisoners or actively discourage it.\textsuperscript{870}

All these analyses show that, with the right training and adequate environment, ordinary persons can be transformed into torturers.\textsuperscript{871} Notwithstanding this, there are sufficient provisions in various human rights instruments prohibiting torture. These provisions explicitly impose obligation on states and individuals to prevent torture and where it has been perpetrated, whoever is responsible is to be sanctioned according to the law. There is no safe haven for perpetrators, because most of the human rights instruments are living instruments that can be invoked to call an erring perpetrator to order. Similarly, the special tribunals trying war crimes have held that torture committed during the period of war generates responsibility and accountability.

\textsuperscript{867} Vince, n. 864 above.

\textsuperscript{868} Ibid.

\textsuperscript{869} Kelman, n. 765 above, p. 132.

\textsuperscript{870} Vince, n. 864 above.

CHAPTER 6

THE RESPONSIBILITY TO PREVENT AND PROTECT AGAINST TORTURE

6.1 Introduction

It is pertinent to stress from the outset that CAT is the only legally binding
convention at the international level that deals exclusively with the eradication of
torture.\(^\text{872}\) It obliges state parties to take specific and general measures to prevent
torture and other cruel, inhuman or degrading treatment or punishment.\(^\text{873}\) CAT
became the first binding international instrument exclusively dedicated to the
struggle against one of the most serious and pervasive human rights violations of
our time.\(^\text{874}\) Today, most general human rights conventions, at both regional and
global levels, address the issue of torture and ill-treatment of persons.\(^\text{875}\) They
declare that torture is prohibited absolutely even during emergencies or armed
conflicts. The dedication of international human rights law to outlawing such acts is
also evidenced by the existence of instruments focusing on the prevention of
torture.\(^\text{876}\) To this end, CAT imposes significant obligations on states to take
measures to prevent and to facilitate redress to victims and survivors\(^\text{877}\)

With regard to the responsibility to protect against torture and other cruel practices,
the international community has developed standards to protect people against
torture that apply to all legal systems.\(^\text{878}\) The standards take into account the

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872 Wendland, n. 376 above, p. 7.
873 Ingelse, n. 21 above, p. 4.
874 Kalin, n. 56 above, p. 433.
875 Ibid., p. 433.
876 Like, for instance, European Convention for the prevention of torture and inhuman or degrading
treatment or punishment, 26 November 1987; Inter-American Convention to prevent and punish torture, 9
December 1985.
877 Wendland, n. 376 above, p. 7.
diversity of legal systems that exist and set out minimum guarantees that every system should provide. Government and people responsible for the administration of the criminal justice systems have a responsibility to ensure that these standards are adhered to, within the framework of their own national legal system.\textsuperscript{879} Because the prohibition of torture is so fundamental, even if a state has not ratified a particular treaty prohibiting torture, it is in any event bound on the basis of general international customary law.\textsuperscript{880}

6. 2 Why Prevent Torture?

According to many religious belief systems, all human beings are created by God, and have attributes that are different from other animals. Every inch of the human body and every aspect of the human spirit comes from God and bear witness to his handiwork.\textsuperscript{881} Human dignity, value and worth are a permanent and ineradicable endowment of the Creator, to every person.\textsuperscript{882}

Recognition of the intrinsic dignity of the human being requires a corresponding restraint in our behavior toward fellow human beings. This should create in us a sense of reverence or even sacredness. Even the detainees in various custodial sites and people who have been subjected to torture at one time or another are all human beings and are entitled to fundamental human rights, in the dignity and worth of the human person.\textsuperscript{883}

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879 Ibid.
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880 Ibid.
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881 We are made in the image of God (Gen. 1:26-28), Holy Bible, King James Version.
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882 Foley, n. 878 above.
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A moral commitment to the dignity of the human person is sometimes fleshed out in terms of human rights. Just because they are human, people have rights to many things, including the right not to be tortured. No one is ever ‘subhuman’ or ‘human debris’. However, it is trite to say that the understanding of human dignity is the existence of a set of human rights. Among the most widely recognized of these rights in both legal and moral theory is the right to bodily integrity; that is, the right not to have intentional physical and psychological harm inflicted upon oneself by others. The ban on torture is one expression of the right to bodily integrity.

Whether we open the door to torture, or keep it firmly shut as an absolute ban, the principle of human dignity and its correlative rights remains an important reason to resist the turn toward torture. Because rights correspond with obligations, all those who recognize the human right not to be tortured have an obligation to protect this right. This is an obligation that should be upheld by all and sundry, be it states, governments, security officials, military, civilian and individuals alike.

6.3 Prevention of Torture

Because of its far reaching psychological effects, the harm inflicted by torture on the victim cannot be undone. Therefore, prevention is of primary importance. States are enjoined to take effective legislative, administrative, judicial or other measures to prevent acts of torture. Such measures include not only those that clearly outlaw acts of torture, but also training police and security personnel, implementing precise guidelines on the treatment of persons deprived of their liberty, implementing domestic inspection and supervision mechanisms and/or

884 Article 5 of UDHR.

885 Foley, n. 878 above.

886 Ibid.

887 Kalin, n. 56 above p. 435.

888 Article 2, paragraph 2 of CAT.
introducing machinery for the effective investigation of complaints regarding ill-treatment. The observation of Peter Kooijmans, former Special Rapporteur on Torture of the UN Human Rights Commission reveals the horrifying nature of torture. He lamented that torture is never an isolated phenomenon. It exposes the very terrible acts and practices of torture in the past and in the present. He expressed the view that:

“It does not start in the torture chambers of this world. It begins much earlier, whenever respect for the dignity of all fellow human beings and the right to have this inherent dignity recognised are absent.”

Preventive measures and safeguards are therefore of immense importance to protect detainees in custodial sites and also others who are not in any detention site, but under the belief that they might likely be subjected to torture in whatever form. The duty to prevent torture is of paramount importance as violations are often hidden. Kooijmans described torture in a hidden or isolated place as: “the most intimate human rights violations, as it takes place in isolation and is very often inflicted by a torturer who remains anonymous to the victim and who regards the victim as a faceless object.”

Periodic visits to places of detention help to eliminate this anonymity and are therefore very effective in preventing torture. Such visits also make it possible to identify situations conducive to torture and initiate appropriate measures to reduce the risk of such acts. It is worth mentioning that the right of initiative is recognised in situations of tension and internal disturbances. Measures put in place allow visits with the consent of the state concerned to persons detained for


891 Kalin, n. 56 above, p. 436.
reasons related to that particular situation, i.e. ‘political’ or ‘security’ prisoners.\textsuperscript{892} The mere physical presence of persons from outside the place of detention can often effectively prevent torture and ill-treatment and ultimately lead to improvements in the conditions of detention.\textsuperscript{893}

Jean-Jacques Gautier, who devoted himself fully to the struggle against torture was firmly convinced that the only effective safeguard against torture would be a system of inspection through regular visits to all places of detention.\textsuperscript{894} Consequently, he founded the Geneva-based Swiss Committee Against Torture (now named the Association for the Prevention of Torture).\textsuperscript{895} At the request of this committee a group of experts prepared in May 1997 a first draft of a Convention Concerning the Treatment of Persons Deprived of their Liberty.\textsuperscript{896} According to this draft, the State Parties to the convention would establish a supervisory commission which would be empowered to send to the territories of these States on a regular basis delegates authorized to visit, without prior notification, any centre for interrogation, detention or imprisonment. It is pertinent to mention that such a system of routine inspection visits, which by themselves would not imply any accusation or suspicion, would have a preventive effect.\textsuperscript{897}

6. 4 Consideration of Models of Torture Prevention

In crime prevention, it has become an orthodox and usual practice to distinguish three prevention initiatives; namely,\textsuperscript{898} primary prevention, secondary prevention

\textsuperscript{892} Ibid.
\textsuperscript{893} Ibid., p. 437.
\textsuperscript{895} Kalin, n. 56 above, p. 437.
\textsuperscript{896} J Herman Burgers et al, n. 92 above, p. 27.
\textsuperscript{897} Ibid.
\textsuperscript{898} Malcolm D. Evans and Rod Morgan, Tort as torture, p. 136.
and tertiary prevention. These models of general crime prevention are extremely important and they can be applied to the prevention of torture.

Primary Prevention focuses on the general environment within which offences may occur without reference to criminals or potential criminals. It seeks generally to reduce both the opportunities for offending and motivating factors. This covers an infinite range of activities such as improving the security of property and citing vulnerable targets in places where they are more readily observable. This increases the difficulty and hence reduces the likelihood that they will be subject to illegal activity. 899

Secondary prevention focuses on changing people, particularly those at risk of embarking on a criminal career. Most of the affected are children growing up in deprived circumstances in high crime neighbourhoods. They could be made the subject of positive discriminatory interventions. 900

The last model is tertiary prevention which focuses on the traditional preoccupation of the criminal justice system. Its aim is to truncate and frustrate criminal careers already in progress. This involves policing, prosecution, sentencing, and penal policy geared toward incapacitation. This model physically prevents offenders from repeating their offences, usually by means of incarceration; punish them with a view to deterrence; institute interventions designed to rehabilitate or redress social or psychological deficits in order to reduce the likelihood of recidivism. 901

It seems apparent from the torture prevention debate that the focus is on tertiary initiatives. In this regard, torture prevention discourse and activity is similar to that of crime prevention. Evans stressed that:

899 Ibid.

900 Ibid.

901 Ibid.
“Crime prevention, expenditure and effort are overwhelmingly devoted to catching criminals, prosecuting them, convicting them and punishing them, remarkably little thought, effort and public expenditure has, until very recently, been devoted to preventing crime from happening in the first place.”

Although, in some cases, most of the offenders go unpunished and get away with their offences, some would be caught and convicted. The concern however is that those convicted still go back to the crimes with which they were convicted and punished. Be that as it may, the institution of the criminal justice system will not fold its hands and allow criminality to be entrenched or thrive. It will continue to truncate criminal career in progress and bring perpetrators to justice. In the words of Evans: “the culture of impunity regarding torture must be attacked and that this is best done by proscribing and condemning the practice, and by widening the opportunities for bringing torturers to book. If the prospects of torture being punished are increased, then the likelihood of recidivism will be reduced and potential torturers will be deterred.”

Interestingly, it is right to mention with all sense of responsibility that these tertiary model elements have been prominent in successive campaigns by various human rights non-governmental organizations working against torture. They have continued to agitate for official condemnation of torture and also expressed the view that torture in whatever form must be officially condemned. Amnesty International has emphasised that torture must be defined and prohibited in law, reports of torture must be independently investigated and torturers must be prosecuted. There should also be parallel efforts within the UN and at a regional level to bring pressure to bear on states accused of sponsoring torture.

902 Ibid.
903 Ibid., p. 137.
In recent times, there has been growing interest in primary and secondary preventive initiatives. Increasing of pressure as well as campaigns to create safeguards for persons most vulnerable to torture, namely suspects in police custody and other custodial sites yielded some positive results. Accordingly, international standards for the treatment of suspects and others in custodial centres have been promulgated, and suspects putative rights have been laid out in various instruments.\textsuperscript{905} For instance, incommunicado detention has been widely prohibited, and access to lawyers\textsuperscript{906} and legal advice\textsuperscript{907} for persons in police custody has been made mandatory in many jurisdictions.\textsuperscript{908}

It is pertinent to mention that frameworks of accountability have been adopted so that the victims can have their complaints investigated and thereby be able to seek redress. Further, it has been possible to ensure that police stations and other places of custody are independently inspected and supervised.\textsuperscript{909} Attention has also been given to the recruitment, training, management and defining more clearly the terms of service of custodial staff so as to reduce the likelihood that they will resort to ill-treatment.\textsuperscript{910}

There have been in existence initiatives designed to have primary and secondary preventive impact on the practice of torture such as, ECPT.\textsuperscript{911} The latter creates an outright body, the Committee for the Prevention of Torture (the CPT). The

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\item[906] Foley, n. 878 above.
\item[907] Article 14 of ICCPR.
\item[908] Malcolm Evans, n. 133 above et al, p. 138.
\item[909] Ibid.
\item[910] Ibid.
\item[911] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted 26 November 1987, entered into force on 1 February, 1989, ETS No. 126.
\end{itemize}
\end{footnotesize}
Committee against Torture\textsuperscript{912} is the supervisory body established under CAT and consists of ten independent experts. This body monitors compliance with the obligations contained in CAT by means of four procedures, three of which are comparable to those of the UN human rights treaties: the state complaints procedure,\textsuperscript{913} the individual complaints procedure,\textsuperscript{914} and periodic reporting by State Parties.\textsuperscript{915} The fourth procedure is new in human rights treaties. This procedure authorises the Committee to carry out an independent investigation at its own initiative into the systematic occurrence of torture in a state party’s territory.\textsuperscript{916} Such an investigation may be carried out on site.\textsuperscript{917}

The OPCAT specifically provides for various preventive measures. The general principles of OPCAT are succinctly spelt out in Articles 1 to 4. The first objective of the principle is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.\textsuperscript{918} The sub-committee is enjoined to carry out its work within the framework of the UN Charter and will be guided by the norms of the United Nations concerning the treatment of people deprived of their liberty,\textsuperscript{919} as well as by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.\textsuperscript{920}

\textsuperscript{912} Established on the basis of Article 17 of CAT.

\textsuperscript{913} Article 21 ECPT.

\textsuperscript{914} Ibid.

\textsuperscript{915} Article 19 ECPT.

\textsuperscript{916} Ingelse, n. 21 above, p. 4.

\textsuperscript{917} Article 20 ECPT.

\textsuperscript{918} Article 1 of OPCAT.

\textsuperscript{919} Article 2 (2) of OPCAT.

\textsuperscript{920} Ibid.
Both the sub-committee and States parties are enjoined to cooperate in the implementation of the protocol. According to Article 3, each state party is mandated to set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment. In article 4(1), states are enjoined to allow visits to any place under their jurisdictions and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence. The aims of these visits are to strengthen, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment. More importantly, Article 4(2) specifically defines the meaning of deprivation of liberty as ‘any form of detention or imprisonment or placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will by order of any judicial, administrative or other authority.’

In Africa, the first step towards the prevention and prohibition of torture culminated in the formulation of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines). The preamble of the Robben Island Guidelines encapsulates the general principles, aims and objectives of the guidelines; namely, universal condemnation of torture, recognition of the prevalence of such acts, the need to address the problem in all its dimensions, the need to take positive steps to further the implementation of the existing provisions on the prohibition of torture, the importance of preventive measures. Consequently, each African state is enjoined in accordance with Article 2(1) and 16(1) of CAT to take effective measures to prevent torture and other acts of cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction.
In other jurisdictions, the judiciary has been proactive in ensuring that there is an outright outlaw of torture. In the Indian case of *D. K Basu v State of West Bengal; Ashok K Johri v State of Uttar Pradesh*, the court held as follows:

“torture is prohibited and perpetrators must be brought to justice, despite the existence of constitutional and procedural protections to safeguard individuals' rights, instances have come to its notice where these have been routinely ignored, the prosecution of offences of torture and custodial death was hampered by an exaggerated adherence to, and insistence upon, establishing proof beyond every reasonable doubt and this ignores the reality and the peculiar circumstances of a given case and often results in a miscarriage of justice.”

The court also held that where an infringement of fundamental rights is established, the court must award compensation for the wrong done due to a breach of public duty by the State for not protecting the fundamental right not to be subjected to torture. The State's vicarious liability for the acts of public servants in infringing such rights is now well accepted in most jurisdictions. This is consistent with international human rights law which recognises that a state can be responsible for human rights violations even where they are perpetrated by non-state actors.

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922 Ibid.

923 Ibid.


925 Miller, n. 7 above, p. 305.
6.5 CAT Provisions on Prevention of Torture: An Analysis

6. 5. 1 General measures against torture

CAT spells out general measures against torture and the obligation that state parties undertook. These are spelt out in Article 2(1)-(3):

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

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

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

The main features of the above provision are: prevention, non–derogability, and non–justification on the basis of superior orders. State Parties are obliged to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under their jurisdiction. The provisions cover the general positive obligation to achieve the objectives of CAT and thereby prevent violations of the individual’s right to be protected from torture, a right that is also provided in other human rights treaties. The provisions in CAT can be considered as an umbrella Article.\(^{926}\) A number of other provisions in CAT are an elaboration of Article 2 particularly paragraph 1, which obliges states to take measures to prevent torture.\(^{927}\)

Article 2 paragraph 1 imposes a general obligation on States Parties to take effective measures to prevent torture. The character of these measures is left to the discretion of the States concerned, but it includes effecting whatever changes

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926 Ingelse, n. 21 above, p. 242.

927 Ibid.
that are necessary in order to harmonize their internal policy and legal order with international standards on prevention.\textsuperscript{928}

Article 2 raises the question of whether States are required to adopt these measures before or upon ratification, or whether they are allowed a certain period of time during which they may invoke their national law against CAT. The question was not discussed in the preparatory work and therefore must be answered by reference to State practice and general principles of international law.\textsuperscript{929} The international legal system is grounded on a fundamental principle, \textit{pacta sunt servanda}, that is, treaties must be observed in good faith.\textsuperscript{930} No state can be forced to accept a treaty without its consent, nor can it be compelled to join an inter-governmental organization against its will. Once a state has assented to a treaty and has successfully shepherded it through its national approval process, it must observe its treaty commitments in good faith.\textsuperscript{931} A ratified treaty\textsuperscript{932} automatically becomes part of the law of the land if the treaty is self-executing or norm creating.\textsuperscript{933}

This principle of international law was considered and affirmed by the Supreme Court of Nigeria. In the case of \textit{Abacha v. Fawehinmi},\textsuperscript{934} the court held that where an international treaty entered into by Nigeria is enacted into the law by the National Assembly, as was the case with the African Charter on Human and

\textsuperscript{928}Wendland, n. 376 above p. 30.

\textsuperscript{929}Ibid.


\textsuperscript{931}Laurence R. Helfer Existing Treaties, Virginia Law Review Vol. 91, p. 102.


\textsuperscript{933}Wendland, n. 376 above, p. 32.

\textsuperscript{934}Abacha v. Fawehinmi, n. 932 above. p. 248.
Peoples’ Right which is incorporated into the domestic law by the Africa Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, it becomes binding and the courts must give effect to it like all other laws falling within the judicial powers of the courts. Consequently, according to the general rules of international law, a state is under a duty to execute the provisions of a treaty from the date at which the treaty becomes binding upon it, unless the terms of the treaty itself provide otherwise.\(^\text{935}\)

States are not allowed to plead their own domestic law against implementing the provisions of CAT. Thus, if a State Party to CAT fails to adopt the measures called for to execute CAT after its ratification, such State party may not cite its own laws to justify its policy of torture or its failure to prevent it.\(^\text{936}\)

The question that begs for an answer is, how firm the drafters of CAT intended to make the obligation of Article 2 paragraph 1. During its negotiations it became clear that the wording that States ‘undertake to ensure that torture or other cruel, inhuman or degrading treatment does not take place’ went too far.\(^\text{937}\) It was felt that there was only an obligation to make an effort to prevent torture, and that States are simply unable to guarantee that torture does not occur.\(^\text{938}\) It must be mentioned that this did not go as far as the ICCPR. Under Article 2 paragraph 1 of the ICCPR, State Parties are obliged to ensure that the rights of individuals under CAT are realised?\(^\text{939}\)

Wendland argued that the obligation of States is not absolute, i.e. they have no obligation to prevent absolutely or to ensure or guarantee the prevention of torture. The obligation is rather to take reasonable steps to prevent torture. Nevertheless, if

\(^\text{935}\) Wendland, n. 376 above, p. 31.

\(^\text{936}\) Ibid., pp. 31-32.

\(^\text{937}\) Ingelse, n. 21 above, p. 242.

\(^\text{938}\) Ibid.

\(^\text{939}\) Ibid.
such acts occur, other obligations under CAT become applicable and the State may then be obliged under Article 2 paragraph 1, to take further effective measures in order to prevent a repetition. Such measures may include changes of personnel in a certain unit, stricter supervision, establishing new institutions etc.\textsuperscript{940} They may also include, proper training, education and information regarding the prohibition of torture.\textsuperscript{941}

State Parties are enjoined to keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons under arrest, detention or imprisonment, with a view to preventing torture or related acts.\textsuperscript{942} State Parties are also required to ensure that competent authorities proceed to institute prompt and impartial investigation wherever there is reasonable ground to believe that any act of torture has been committed on its territory.\textsuperscript{943} Competent authorities are enjoined to be vigilant, so that any individuals who allege that they have been subjected to torture or other cruel treatments shall have their case promptly and impartially examined.\textsuperscript{944}

Another preventive measure which is considered most potent is the general right of those who have been arrested and detained to have access to legal advice as recognised in Article 14 of ICCPR and a variety of other instruments relating to the right to a fair trial.\textsuperscript{945} Equally significant is the promptness of access to a lawyer from the point of view of preventing torture and ill-treatment. The Human Rights Committee has stressed that the protection of detainee requires that prompt and regular access be given to doctors and lawyers\textsuperscript{946} and that 'all persons arrested

\textsuperscript{940} Wendland, n. 376 above, p. 31.

\textsuperscript{941} Article 10, paragraph 1 of the CAT.

\textsuperscript{942} Article 11 of the CAT.

\textsuperscript{943} Article 12 of the CAT.

\textsuperscript{944} Article 13 of the CAT.

\textsuperscript{945} Foley, n. 878 above.
must have immediate access to counsel’ for the more general protection of their rights. During consultation with an accused in custody, counsel must communicate with the accused in conditions that give full respect for the confidentiality of their communications. The authorities must also ensure that lawyers advise and represent their clients in accordance with professional standards, free from intimidation, hindrance, harassment, or improper interference from any quarter.

The Inter-American Commission on Human Rights considers that in order to safeguard the right not to be compelled to confess guilt and to freedom from torture, a person should be interrogated only in the presence of his or her lawyer and a judge. It has also concluded that the right to counsel applies on the first interrogation. The CPT considers that this is a right which must exist from the very outset of detention, that is, from the first moment that a person is obliged to remain with the police. This includes in principle, the right for the person concerned to have the lawyer present during interrogation.

The UN Special Rapporteur on the Independence of Judges and Lawyers has recommended that “it is desirable to have the presence of an attorney during police interrogation as an important safeguard to protect the rights of the

946 Ibid.
949 Ibid.
952 CPT/Inf/E (2002) 1, p. 6, paragraph 38.
accused. The absence of legal counsel has the potential for abuse.\(^{953}\) In the same vein, the Special Rapporteur on Torture stated that:

“In exceptional circumstances, under which it is contended that prompt contact with a detainee’s lawyer might raise genuine security concerns, and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association.”\(^{954}\)

For purposes of effective prevention and prohibition of torture, Article 2 paragraph 1, if read together with Article 10 paragraph 2, gives an elaborate meaning to the measures that are expected to be put in place to prevent acts of torture. These measures are sometimes contained in the rules or instructions of the law enforcement officials or state security agencies. Consequently, in addition to each State Party undertaking to prevent any acts in any territory under its jurisdiction, it shall also include the prohibition of all such acts in the rules or instructions issued with regard to the duties and function of both civil and military law enforcement personnel as well as medical personnel, public officials, and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

Wendland argued further that any test of the effectiveness of the measures required to be adopted by States under Article 2 paragraph 1 seems to be left to the discretion of the States themselves.\(^{955}\) However, a declaration by a State Party’s declaration that it has fulfilled its obligation under Article 2 of CAT is subject to supervision by the Committee Against Torture.\(^{956}\) The obligation to prevent

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\(^{955}\) Wendland, n. 376 above, p. 31.
torture is absolute\textsuperscript{957} and measures must be taken to prevent torture, can eventually be prevented, among other things, by means of prohibitory provisions.\textsuperscript{958}

However, Ingelse submitted emphatically that: “the fact that torture occurs is in itself not a violation of Article 2 paragraph 1, but the lack of measures against torture certainly is.”\textsuperscript{959} As suggested by Wendland, measures against torture may include changes of personnel in a certain unit, stricter supervision, the establishment of new institutions etc.\textsuperscript{960} Other measures include improvement of legislation in response to new problems as they emerge in practice.\textsuperscript{961} And States are obliged to take steps to achieve results in the prevention of torture.\textsuperscript{962}

6.5.2 The prohibition of torture as absolute and non-derogable

Article 2 paragraph 2 of CAT provides that no exceptional circumstances, irrespective of whether it involves a state of war, a threat of war, internal political unrest or any other situations of public emergency whatsoever, may be invoked as a justification for torture.\textsuperscript{963} While a large number of international instruments contain provisions that the exercise and enjoyment of the rights and freedoms can be limited or restricted by States on specific grounds.\textsuperscript{964} This Article allows for no

\textsuperscript{956} Ibid.

\textsuperscript{957} Phillips, n. 78 above, p. 25.

\textsuperscript{958} Ingelse, n. 21 above, p. 242.

\textsuperscript{959} Ibid.

\textsuperscript{960} Wendland, n. 876 above, p. 31.

\textsuperscript{961} Ibid., p. 31.

\textsuperscript{962} Ibid.

\textsuperscript{963} J. Herman Burgers et al, n. 92 above, p. 3.

\textsuperscript{964} For example Article 4 (2) of the ICCPR.
justification of torture in any circumstance;\textsuperscript{965} reinforcing the absolute ban on torture.\textsuperscript{966}

The international community has at the same time recognised that even in emergencies, there is need for the non-derogation of certain rights and freedoms such as the right to life, the right to be free from torture, the right to be free from slavery, and the right of thought, conscience and religion. These rights and freedoms are considered so fundamental that their exercise does not constitute a burden on states in coping with war or political instability.\textsuperscript{967} Accordingly, there can be no justification whatsoever for their violation.\textsuperscript{968}

The expression ‘no exceptional circumstances whatsoever’ was used to preclude states from justifying torture\textsuperscript{969} by pleading, for example, that this is not an ordinary situation or war. It is in such exceptional circumstances that torture and other violations of human rights are most likely to take place due to the breakdown of governance and legal institutions.\textsuperscript{970} The rejection of the justification of ‘exceptional circumstances’ in Article 2(2) of CAT is, therefore, of great importance as it is intended to fulfil this function.

It is pertinent to mention that the list of exceptional circumstances referred to in the paragraph is not exhaustive. The drafters of CAT used the word ‘whatsoever’ to close the doors to any construction of the Article which could lead to an interpretation that the exceptional circumstances referred therein are exhaustive. What the drafters tried to say is that torture is not allowed even in time of ‘public emergency’, and therefore merely only listed examples of circumstances which

\textsuperscript{965} Wendland, n. 876 above, p. 32.
\textsuperscript{966} Ingelse, n. 21 above, p. 245.
\textsuperscript{967} Boulesbaa, n. 386 above, p. 83.
\textsuperscript{968} Article 2 (2) of CAT.
\textsuperscript{969} Boulesbaa, n. 386 above, p. 83.
\textsuperscript{970} Ibid.
might otherwise give rise to it. This conclusion has support in the wording of Article 4(1) of the (ICCPR) which provides:

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

Article 4(1) of the ICCPR has been criticised on the ground that the public emergency includes war and all other circumstances that give rise to the right to deviate from internationally protected rights. Similarly, the European and Inter-American jurisprudence seems to lend support for this conclusion, although both refer to war in Articles 15(1) and 27(1) respectively equating it with public or other emergency. The language of Article 2 of CAT also includes the phrase ‘other public emergency’.

States sometimes rely on the phrase ‘public emergency’ to perpetrate torture. But CAT in clear terms absolutely rejects the use of this phrase as an excuse to perpetrate torture. This public emergency exception is recognised both in the laws of individual states and in international law. The recognition is limited to other purposes but not for torture.

971 Wendland, n. 376 above, p. 32.
972 Boulesbaa, n. 386 above, p. 85.
973 As an example, Section 199(6) of the constitution of the Republic of South Africa, 1996, Act 108 of 1996.
974 Boulesbaa, n. 386 above, p. 85.
Apart from international instruments prohibiting torture, the practice of the states is also essential for ascertaining the existence of certain norms of international law.\textsuperscript{975} Boulesbaa stressed that State practice can be active, passive or negative in requiring the abstention from a given conduct such as torture.\textsuperscript{976} The case of \textit{Nuclear Tests Case (Australian v. France)} is cited to buttress this point;\textsuperscript{977} The separate opinion of Judge Petren stated that:

“If a state which does not possess nuclear arms refrains from carrying out the atmosphere test which would enable it to acquire them and if that abstention is motivated not by political or economic considerations but by conviction that such test are prohibited by customary international law, the attitude of that state would constitute an element in the formation of such a custom.”\textsuperscript{978}

Be that as it may, on the national plane, state practice comprises legislation, administrative practices, and decisions of national tribunals.\textsuperscript{979} Accordingly, Boulesbaa took the pain to list the names of countries where legislation has been enacted specifically to prohibit torture even if there is a state of emergency or public emergency. These include, among others, Belgium, Ecuador, India, Pakistan, Spain and the United Kingdom.

\textbf{6.5.3 The Prohibition of torture and ill-treatment in international law}

It is of utmost importance to reiterate that the prohibition of torture and other forms of ill-treatment has achieved the status of a peremptory norm of international law.

\textsuperscript{975} Ibid.
\textsuperscript{976} Ibid.
\textsuperscript{977} 1974, j.c.j 253, 305-306 (judgment of 20 Dec. 1974.).
\textsuperscript{978} Ibid.
\textsuperscript{979} Boulesbaa, n. 386 above, p. 87.
law.\textsuperscript{980} The latter is a non-derogable norm of international law which holds the highest hierarchy among other norms and principle.\textsuperscript{981}

Despite the total ban on torture as enshrined in various international human rights instruments, it seems apparent that a country like US would rather embark on the banned practice and sometimes advanced argument to justify that the use of torture to fight terror is legitimate. One of the arguments advance subsequent to the September 11 attacks on the US has been that torture and ill-treatment is desirable in the fight against terrorism.\textsuperscript{982} Thus the state bears no criminal responsibility if torture or ill-treatment are used on the grounds that such actions are necessary to prevent a greater harm to human life.

Consequently, some States have relied on ‘national security interests’ to suggest that this can override human rights protection including the prohibition against torture and cruel, inhuman or degrading treatment or punishment.\textsuperscript{983} For example, in the view of the European Commission, there is room for a ‘balancing act’ between the interests of national security and that of an individual to be free from torture and ill-treatment, despite the status of the prohibition of torture in international law.\textsuperscript{984}

The argument that there is a need to violate human rights while countering terrorism is fundamentally flawed. As explained by Mary Robinson, former UN High Commissioner for Human Rights, “the only long-term guarantor of security is

\begin{itemize}
\item \textsuperscript{980} Phillips, n. 78 above, p. 32.
\item \textsuperscript{981} Al Adsani v The United Kingdom, Eur. Ct. H.R., Judgement of 21 November 2001, pp. 60-61.
\end{itemize}
through ensuring respect for human rights and humanitarian law."\textsuperscript{985} Therefore, any fight against terrorism that does not maintain scrupulous respect for human rights cannot achieve national security, but instead undermines it.\textsuperscript{986} While recognising the need for effective measures to fight against crime, such measures must fully respect the rights and fundamental freedoms of the individuals concerned.\textsuperscript{987} Furthermore, following the September 11 attacks the Committee Against Torture issued a statement where it reminded States parties to CAT of the non-derogable nature of the obligations contained in CAT.\textsuperscript{988}

The jurisprudence of the European Court of Human Rights has similarly ruled out the possibility of a balancing act between the interests of national security and the interest of the individual to be protected against torture or cruel, inhuman or degrading treatment and punishment.\textsuperscript{989} In the case of \textit{Soering v. The United Kingdom}, the court established that:

"[the] absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe."\textsuperscript{990}

Furthermore, the court held that the requirements of investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to

\textsuperscript{985} M. Robinson, statement at 59th session of UNHRC, 20 March 2002, in Redress, Terrorism, counterterrorism and torture, July 2004, p. 3.

\textsuperscript{986} Ibid.


\textsuperscript{990} Ibid.
terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.\footnote{Tomasi \textit{v.} France, Eur. Ct. H.R., Judgment of 27 August 1992, p. 115.}

Therefore, it must be constantly kept in mind that the prohibition of torture is a norm that cannot be derogated from or limited under any circumstance. It is a norm that is widely regarded as \textit{jus cogens} and as such, cannot be altered by a treaty or by a subsequent customary rule unless it is regarded as having the same character.\footnote{McCourt, et al, p.12.}

\textbf{6.5.4 Prohibition of superior orders as justification of torture}

In line with the absolute character of the ban on torture, an order from a superior or a public authority may not be invoked as a justification for torture.\footnote{Wendland, n. 876 above, p. 32.} This is a general rule of international law. This rule has also found expression in municipal laws. The South African Constitution, for example provides for this in section 199(1), (5) and (6). Section 199(5) is specific: “The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.” Moreover section 199(6) provides: “No member of any security service may obey a manifestly illegal order.”

The Nuremberg Principles had already established that obeying superior order was no justification for the perpetration of serious international crimes, among them torture.\footnote{The principles in the Charter of the International Military Tribunals of Nuremberg prescribes in Article 8 “The fact that the Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility.”} The principles are well established and were affirmed by the United

\begin{flushleft}
\begin{itemize}
\item[992] McCourt, et al, p.12.
\item[993] Wendland, n. 876 above, p. 32.
\item[994] The principles in the Charter of the International Military Tribunals of Nuremberg prescribes in Article 8 “The fact that the Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility.”
\end{itemize}
\end{flushleft}
Nations General Assembly in its Resolution 177(II). The principles were recognised in the Charter of the Nuremberg Tribunals and in the judgment of the tribunal. The practice of some states, however, presents a serious challenge to these principles and also to those established under CAT. An example that quickly comes to mind is the practice of Chile which somehow attempted to frustrate the principles and CAT.

Upon its ratification of CAT on 30 September 1998, Chile attached a condition to the application of this principle by its competent authorities. It made a reservation to the effect that it would apply the provisions of this norm to subordinate personnel governed by the code of military justice, provided that the order patently intended to lead to the perpetration of torture is not insisted on by the superior officer after being challenged by the subordinates. This presupposes that if the order was reiterated by the superior officers, it may be invoked as a justification of torture by the subordinate which is another way of undermining and defeating the purport of CAT.

The same principles are found in the Statute of the International Criminal Tribunal for Rwanda. Article 6 paragraph 4 of the Statute reads:

“The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigating of punishment if the Tribunal for Rwanda determines that justice so requires.”

Similar provision is also contained in the Statute of the International Criminal Court for the Yugoslavia. Article 7 paragraph 4 of the statute is essentially identical to the

995 Wendland, n. 876 above, p. 32.
996 2nd Session, UN Doc. A/519 pp. 111-112.
997 Boulesbaa, 386 above, p. 91.
998 Ibid.
text of Article 6 paragraph 4 of the International Tribunal for Rwanda.\textsuperscript{999} Pertaining to the issues of mitigation and responsibility contained in the statues under consideration, Wendland argued that:

“In contrast, the Rome Statute of the ICC deviates somewhat from the well established principles by relieving a person acting pursuant to orders to commit a crime as defined in the Statute from criminal responsibility, when the person was under a legal obligation to obey orders of the government or a superior, or when the person did not know that the order was unlawful when the order was not manifestly unlawful.”\textsuperscript{1000}

It must be stressed that Article 33(2) does not provide for mitigation. The accused is considered guilty of the offence even if the defence of superior order to commit a crime is raised. To this end, Article 33(2) clarifies that orders to commit genocide or crimes against humanity, among them torture, are manifestly unlawful.\textsuperscript{1001}

In the same way that the principle of command responsibility recognises that individuals occupying a relationship of superiority are as responsible as the perpetrators that pulled the trigger or physically committed the acts,\textsuperscript{1002} the state possesses the ultimate position of authority which must be addressed in order to fully combat impunity.

The scope of crimes against humanity is not limited to international or internal armed conflict; it extends to torture committed as a result of superior order irrespective of the circumstances or situations. This is regarded as infringement of serious international crime and violates international law. The Rome Statute

\begin{footnotesize}
999 Wendland, n. 876 above, p. 32.

1000 Article 33 paragraph 1 of the Rome Statute of the International Criminal Court.

1001 Wendland, n. 876 above, p. 32.

\end{footnotesize}
contains a commendably clear and comprehensive definition of crimes against humanity and settles the discrepancies between the general definition of the offence in the Statutes of the two existing International Criminal Tribunals.\textsuperscript{1003} Whereas the Yugoslavia Tribunal has jurisdiction to prosecute persons responsible for the specified crimes when committed in an international or internal armed conflict, the Statute for the Rwanda Tribunal makes no reference to armed conflict, with the implication that such crimes may also be committed outside armed conflict.\textsuperscript{1004} Reference to armed conflict is excluded in the Rome Statute, with the effect that the International Criminal Court will have jurisdiction over such crimes committed in internal or international armed conflict and also in peacetime.\textsuperscript{1005}

It therefore lends weight to the findings of the Appeal Chambers in the \textit{Tadic} case that it is now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict and that customary international law may not require a connection between crimes against humanity and any conflict at all.\textsuperscript{1006}

\textbf{6.5.5 Non-refoulement}

Article 3 of CAT provides that:

1. No State Party shall expel, return (\textit{‘refoulement’} 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


\textsuperscript{1004} Ibid.

\textsuperscript{1005} Ibid.

\textsuperscript{1006} \textit{Prosecutor v. Dusko Tadic} (Jurisdiction), Case No. IT-94-1AR72, 2 October 1995, paragraph 134.
applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

*Refoulement* refers to the expulsion, deportation, removal, extradition, sending back, return or rejection of a person from a country to the frontiers of a territory where there exists a danger of ill-treatment, i.e. persecution, torture or inhuman treatment. Protection against *refoulement* is thus closely related to the protection against torture and inhuman or degrading treatment.

The right of an individual to protection against torture and other prohibited forms of ill-treatment includes the right not to be returned to a country where there are substantial grounds for believing that he or she is at risk of suffering such treatment. People have a right not to be forcibly returned where they are at risk of suffering torture even if they have not yet been recognised as refugees. A state responding to an extradition request also needs to ensure that the other country is complying with its obligations under international law in respect of torture and ill-treatment before it may hand over someone to that jurisdiction.

States are obliged to refrain from transferring persons to another state where they would be at personal risk of torture. The provision was inspired by the case law of the European Commission of Human Rights with regard to Article 3 of the Convention. The principle is also well developed in the 1951 UN Convention on Refugees.

1007 Ibid.
1011 Wendland, n. 876 above, p. 33.
1012 Ibid.
6.5.6 Alternative approaches to prevent torture

In December 1972, Amnesty International launched a ‘Campaign for the Abolition of Torture’. As part of this campaign, Amnesty International called upon various professional groups and international organizations to formulate and subscribe to codes of conduct designed to "prevent the perversion of their professional skills in the service of torture. Amnesty observed that policemen, soldiers, doctors, scientists, judges, civil servants, politicians are involved in torture, whether in direct beatings, examining victims, inventing new devices and techniques, sentencing prisoners on extorted false confessions, officially denying the existence of torture, or using torture as a means of maintaining their power.  

In accordance with Amnesty International's recommendations, various intergovernmental and non-governmental organizations have initiated the drafting of professional codes of conduct. In December 1995, it requested that the United Nations Committee on Crime Prevention and Control formulate a code of conduct for law enforcement officials. In August 1975 the International Council of Nurses adopted a resolution outlining the responsibility of nurses in regard to torture, and in October 1975 the World Medical Association adopted guidelines on torture for medical doctors. As a result of these initiatives, the United Nations General Assembly invited the World Health Organization to elaborate principles of medical ethics relevant to the protection of persons subjected to torture.

The rationale underlying the formulation of codes of professional ethics in regard to torture is that groups such as doctors and lawyers have codes of professional ethics that are governed by social responsibilities which transcend their national and political loyalties and obligations. Such professionals would be held to have violated these professional norms by their involvement in the practice of torture.

1013 Lipman, n. 72 above, p. 45.
1014 Ibid.
This attempt to control the use of torture through professional codes of conduct formulated and enforced by professional associations is also premised upon the recognition that reliance only on accepted international mechanisms to control the use of torture is not likely to be successful. States have been reluctant to criticize the ‘domestic policies’ of other states fearing that they would strain their diplomatic relations and threaten their national security interests.1015

The codes of professional conduct are a unique attempt to overcome the tolerance shown by states toward the practice of torture in the world by mobilizing the prestige and moral suasion of organized groups of professionals against the use of torture. It is hoped that such professional associations are able to monitor and evaluate the conduct of professional members and apply such sanctions, for example: refusing to hold conventions in countries where professionals are violating the code of ethics; censuring their members who are violating the code; and excluding such individuals from professional associations. At the same time, such professional associations also may be able to exert pressure on governments to prevent the prosecution of their members who refuse to engage in or condone the practice of torture.

On the other hand, international professional associations are often influenced by political considerations in their decision making. This is well illustrated by the difficulties encountered in persuading the World Psychiatric Association to condemn the abuse of psychiatry in the Soviet Union. Professionals also may view themselves as ‘above politics’ and may be reluctant to place themselves in the position of possibly evaluating by implication the merits of a particular intellectual approach or activity. Association members may, in addition, fear that censure or criticism of their colleagues will unduly politicize the organization, impede scholarly interchange, and undermine the integrity of their profession. Ultimately, it is not clear that a person’s ethical responsibility is fully dictated by his or her professional

1015 Ibid.
role. Arguably, individuals may justifiably view themselves primarily as citizens of a state and view their professional obligations as being qualified by political loyalties, by a commitment to public order, or by the political context in which they function.

6.6 Responsibility for Acts of Torture

6.6.1 State responsibility

There is a strong legal argument to be made for an emerging principle in international law that states have affirmative obligations in response to massive and systematic violations of fundamental rights. The duty to ensure means that states are obliged to take steps to redress the wrong committed by each violation of a right.

Despite numerous state responsibilities under international law, states are often depicted as abstract entities which only become real through their individual officials. In the enforcement of the prohibition of torture, the focus on the individual without acknowledgment of the overall state involvement only serves to sustain impunity through the exceptionalisation of the actions of an individual perpetrator as distinct from the state itself.

Moreover, while holding individual officials civilly and criminally responsible presents an essential component of the prohibition of torture, it cannot substitute or suffice for the accountability of the state itself. Actions against individual


1017 Méndez, (n. 1032 above).


perpetrators rarely expose the broader patterns of abuse underlying the acts of the individual by anything more than implication, unless the case involves specific crimes such as crimes against humanity. By definition, the latter require that the acts be committed as “part of a widespread or systematic attack”\(^{1020}\) and may therefore bring out the broader patterns of abuse in the course of the proceedings in the individual case.\(^ {1021}\)

In 2001, the International Law Commission rightly pointed out that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”\(^ {1022}\) Liability arises where the violation is attributable to the state, meaning that the individual official must have been acting in an official capacity or holding themselves out to be acting in an official capacity, even if their acts were (ultra vires), that is, beyond their authorised powers.\(^ {1023}\) The state may also be held responsible if it fails to provide an effective remedy for the violation as required by international law.

The nature of States’ obligations under international human rights law obliges States to do certain things and prevents them from doing others. States have a duty to respect, protect and fulfil human rights. Respect for human rights involves not interfering with their enjoyment. Protection entails taking steps to ensure that others do not interfere with the enjoyment of rights. The fulfilment of human rights requires that States adopt positive appropriate measures, including legislative,

\(^{1020}\) Article 7 Rome Statute, supra note 1.

\(^{1021}\) Hegarty, n. 781 above, 1148.


\(^{1023}\) French-Mexican Claims Commission, Caire claim 5 RIAA (1929).
judicial, administrative or educative measures in order to fulfil their legal obligations.\(^{1024}\)

A State party may be held responsible for attacks by private persons or entities upon the enjoyment of human rights. For example, under the ICCPR, State parties have an obligation to take positive measures to ensure that private persons or entities do no inflict torture or cruel, inhuman degrading treatment or punishment on others within their power.\(^{1025}\)

Human rights law also places a certain responsibility upon States to provide effective remedies in the event of violations.\(^{1026}\) Those human rights that are part of customary international law are applicable to all States.\(^{1027}\) In the case of human rights treaties, those States that are party to a particular treaty have obligations under that treaty.\(^{1028}\)

There are various mechanisms for the enforcement of international human rights obligations, including the evaluation by treaty-monitoring bodies of a State’s compliance with their treaty obligations, and the ability of individuals to complain about the violation of their rights to international bodies.

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\(^{1025}\) General Comment 31 paragraph 8.

\(^{1026}\) General Comment 31 paragraphs 15 and 16. In the case of the International Covenant on Civil and Political Rights, this obligation is set out in Article 2(3) (a).

\(^{1027}\) Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits (1986) ICJ Reports, paragraphs 172-201.

6.6.2 Individual responsibility

The reluctance to make determinations of individual responsibility for wrongdoing flows from the legal structure of international human rights law. Under international law principles, the nation state as a whole and not individual government official is liable for a violation of its citizens' human rights. This aspect of human rights law reflects its legal origins as a subset of the general international law of state responsibility. This branch of public international law provides rules of the liability according to which states may be found in violation of their substantive international legal obligations. Consonant with the rules of state responsibility, in international human rights law the identity of the official actor who actually violates the victim’s human rights is irrelevant. The mental state of the offending individual, if known, is similarly immaterial. The Inter-American Court of Human Rights has declared that a human rights violation can be found "even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government . . . ."


1033 Ibid., p. 617.

1034 Velasquez Rodriguez Case, Judgement, Inter-American Court Human Right. (Series C), No. 4, 173 (1988).
6.6.3 Available forums in which States and individual may be held responsible

As the legal responsibility of states for torture and other serious international crimes is well established, the challenges to hold states to account relate more to the available forums in which to institute proceedings.\textsuperscript{1035} The courts of the state in which the torture took place would appear to be the most obvious judicial arena. In reality, however, these courts may be inaccessible for a variety of legal and/or practical reasons, including the existence of domestic immunities or amnesties, de facto impunity and security risks.

Part III to the Commentaries on the Draft Articles on State Responsibility acknowledges the possibility for individuals to invoke claims against states. Article 33(2) notes that the issue may be addressed elsewhere.\textsuperscript{1036} However, UN treaty mechanisms such as the Committee against Torture and the Human Rights Committee provide for individual complaints. Moreover, even if a UN treaty mechanism finds against the state, it can only issue recommendations.

Some regional judicial institutions, such as the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights and the newly established African Court on Human and Peoples’ Rights, allow individuals to bring claims against states parties once they have exhausted domestic remedies; and the courts can issue ‘binding’ decisions. Furthermore, the decisions of related bodies such as the African Commission on Human Rights and the Inter-American Commission on Human Rights may also be resorted to.\textsuperscript{1037}


\textsuperscript{1037} Redress, n. 1035, p. 9.
6.6.4 Corporation’s Obligation to Uphold Human Rights

Multinational corporations are essentially profit-making ventures without established moral obligations beyond their duties to uphold the interests of their shareholders.\textsuperscript{1038} Since profit making is the main aim of multinational corporations, they are ready to do everything to ensure that nothing stands in the way of their business concerns and profit making. The drives for profit maximization and market forces have often made businesses insensitive to fundamental human rights.

Almost all human rights regulation of corporate actors are based on national laws and their implementation. Some countries, especially the US have tried to extend their domestic standards to the foreign operations of corporations headquartered in their countries, but usually in the context of business activity such as bribes, monopolies rather than human rights.\textsuperscript{1039} For instance, efforts by US state courts to ban business deals in response to severe human rights abuses in places such as Burma have been rejected by the US Supreme Court as an interference with the foreign affairs powers of the executive branch. However, in the US corporations are legally restricted from dealing with certain foreign countries for human rights reasons, such as Cuba. This has been criticised on the ground that the restriction is based on politics, reflecting ideological hostility between the two countries. After all, why not restrict business with other countries that engage in severe human rights violations, such as Saudi Arabia and Pakistan?\textsuperscript{1040} Civil society leaders can organize boycotts against corporations with high-profile links to human rights violations, as has occurred with Shell, Nestle and others.

\textsuperscript{1038} Richard Falk, Magazine article, Foreign Policy, No. 141, March-April 2004.

\textsuperscript{1039} Ibid.

\textsuperscript{1040} Ibid.
The voluntary initiatives such as the United Nations’ recently established ‘Global Compact’, which certifies corporations as good global citizens if they agree to abide by a checklist of standards that benchmark human rights in any country they operate their business may be a step towards the right direction. And if such voluntary processes go on for a long time and are widely practiced, they could ripen into a moral obligation at some point, but that is a long way off.\textsuperscript{1041}

\subsection*{6.6.5 Inter- and intra- countries’ responsibility to uphold human rights}

These are responsibilities to encourage and assist countries in their efforts to respect and uphold human rights, to pressurise governments that violate rights to cease doing so, and to assist the victims of rights violations. One key idea here is that a morally justified right does not just disappear, or cease to direct behavior, when it is systematically violated. In such a case, the right's capacity to generate obligations may shift so as to increase the responsibilities of the secondary addressees. In addition to their standing obligations to encourage and assist, these addressees may now have obligations or responsibilities to use diplomatic and economic means to compel the country to cease its violations.\textsuperscript{1042}

These responsibilities will fall on those countries with the capacity to make a difference. Having this capacity may depend on location. For example, Mexico has often been in a good position to provide refuge and assistance to torture victims and those fleeing repression in Guatemala. It may also depend on resources and power. For example, developed countries rightfully played a substantial role in assisting the victims of the extended conflict in third world countries. These responsibilities may also derive from special ties. Universal rights may be partly supported by duties that depend on special relations of consent, reciprocity, or role. Reciprocal relations based on extensive trade or cooperation for purposes of

\textsuperscript{1041} Ibid.

\textsuperscript{1042} Nickel, p. 83.
international security may also give governments of different countries responsibilities for assisting those with whom they reciprocate. In an increasingly interdependent world, where cooperation for mutual benefit is widespread, countries can acquire responsibilities to assist their ‘partners’ in developing the institutions and capacities needed to uphold human rights. Special ties can give one country the role of assisting the promotion of rights in other countries.\textsuperscript{1043}

6.7 Final Considerations

Torture and ill-treatment are still practised worldwide despite the institutional and normative proliferation of the prohibition against torture, the identification of relevant measures and a strong mobilisation of civil society.\textsuperscript{1044} When, some twenty years ago the Special Rapporteur on Torture, the Committee Against Torture and the CPT started their activities, the cooperation of governments was not always forthcoming. Today it is rare to see a government refusing to cooperate with these mechanisms.\textsuperscript{1045} While the shift in attitudes is to be welcomed and constitutes a positive step towards the prevention of torture and ill-treatment, the practical effect of international and regional mechanisms cannot be assessed solely on the basis of whether a spirit of goodwill prevails during presentation of a report or hosting of a visit. Such goodwill and openness have little actual impact if recommendations of international bodies are not linked with effective and efficient implementation at the national level.\textsuperscript{1046} Consequently, international institutions are beginning to establish follow-up with states after recommendations have been made.

\textsuperscript{1043} Ibid.


\textsuperscript{1045} Ibid.

\textsuperscript{1046} Ibid.
The worst aspects of torture and many of the other crimes under international law is that the State that is entrusted with responsibility to prevent torture and protect the rights of individuals has abused its position of power and is itself been responsible for the perpetration of serious crimes.\textsuperscript{1047} The fight to combat the practice of, and impunity for, torture will be frustrated if the state is not also held to account. Despite the existence of norms governing state responsibility under international law, states are often depicted as abstract entities which only become real through their individual officials.\textsuperscript{1048} In the enforcement of the prohibition of torture, the focus on the individual without acknowledgment of the overall state involvement only serves to sustain impunity through the exceptionalisation of the actions of an individual perpetrator as distinct from the state itself.\textsuperscript{1049}

It is now the duty of governments and courts in every civilized State, to exercise vigilance to guard against the fundamental right not to be tortured.\textsuperscript{1050} Judges, prosecutors and defence lawyers can also play an active role in the prevention of torture.\textsuperscript{1051} Though judges and prosecutors may not traditionally have been considered as playing a proactive role in the prevention of torture, they are uniquely positioned to play a preventive role if sensitised and educated with respect to international standards and practical indicators of torture and ill-treatment.\textsuperscript{1052} Both the prosecutor and judge will be concerned with the admissibility of evidence and, thus, both should actively satisfy themselves that all evidence has been collected without torture or other ill-treatment.\textsuperscript{1053}

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\textsuperscript{1047} Redress, n. 1035 above, p. 5.
\textsuperscript{1048} James Crawford et al, n 1037 above, p. 454.
\textsuperscript{1049} Stanley Cohen, n. 1037 above, p. 103.
\textsuperscript{1050} Hope, n. 252 above, p. 824.
\textsuperscript{1051} Edouard Delaplace et al, n. 1044 above, p. 237.
\textsuperscript{1052} Ibid.
\textsuperscript{1053} Ibid., pp. 237-238.
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Recent years have seen a shift in strategy and techniques for the prevention of torture. An earlier phase focused primarily on establishing the universal, non-derogable and fundamental nature of the prohibition against torture, under both treaty based and customary international law, and identifying and legislating international standards to that end. However, there has been general recognition that action must also be taken now to advance the implementation of international standards. Some of the implementation techniques have been developed at regional contexts, such as the Robben Island Guidelines and the European Union’s Guidelines on Torture.  

1054 Ibid., p. 232.
1055 Ibid.
1056 Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment, Adopted by General Affairs Council – Luxembourg 09/04/01.
CHAPTER 7

CRIMINALISATION OF TORTURE

7.1 Introduction

The crime of torture is an international crime. It has been condemned by the international community and prohibited by international criminal law and the international law of armed conflict. Its condemnation has been further accelerated by the judgments of international and ad hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia,\(^{1057}\) and by criminal prosecutions undertaken by individual states in their domestic courts acting under international universal jurisdiction.\(^{1058}\)

7.2 What is a Crime?

An acceptable definition of ‘crime’ is hard to find. Different authors have sought to define it differently, for example, by reference to the act.\(^{1059}\) Gilbert suggested two camps on the definition of crime. On the one hand, the traditional legal analysis typified by the writings of Kenny, Smith and Hogan, Glanville Williams which is somewhat more prolific in its published output.\(^{1060}\) Reliance would be placed on the analysis done by Gilbert, as it has solved most of the inherent problems in the definition of a crime.

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1057 *Furundžija*, IT-95-17/1, judgment of the Trial Chamber of the International Tribunal for the Former Yugoslavia, 10 December 1998, paragraphs 134.


1060 Ibid.
7.3 What are human rights?

Human rights are universal legal guarantees which protect individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity. The full spectrum of human rights involve the respect for, and protection and fulfilment of, civil, cultural, economic, political and social rights, as well as the right to development. Human rights are universal, which means that they belong inherently to all human beings, as they are inter-dependent and indivisible.

7.3.1 International human rights law

International human rights law is made up of what is known as the ‘International Bill of Rights’, together with a number of further subject specific human rights treaties, as well as customary international law. The International Bill of Rights is not one treaty, but refers to five documents: the UNDHR, the International Covenant on Economic, Social and Cultural Rights, (ICESCR) the ICCPR, and its two Optional Protocols. Added to these are the following core universal human rights treaties of universal application: the Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); CAT; the Convention on the Rights of the Child (CRC); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CPRMWM). Recently adopted are the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED), and the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (ICPRDPD). There is a growing body of subject-specific treaties and protocols, as well as various regional treaties on the protection of human rights and fundamental freedoms.
7.3.2 Criminal law and human rights law

While criminal law is law at its most coercive,\textsuperscript{1061} international human rights law has been law at its most gentle.\textsuperscript{1062} Institutions responsible for interpreting and adjudicating human rights violations do not have the authority to imprison offenders; typically their most intrusive remedy is to provide “just satisfaction” for the injured party in the form of monetary compensation or some other remedy.\textsuperscript{1063} Human rights law relies on civil and administrative mechanisms for its domestic enforcement.\textsuperscript{1064} States may also be required to change domestic laws to respond to the rulings of human rights tribunals. For most human rights litigation, however, the largely symbolic finding of state wrongdoing represents the most far-reaching goal of the litigation.\textsuperscript{1065} Much of international human rights practice does not involve litigation at all; non-binding reports are a staple of many international human rights bodies.

Beyond the power of their distinct sanctions, human rights and criminal law differ widely in other respects. Although criminal law serves collective social goals such as deterrence, retribution, and rehabilitation, its central focus is on individual wrongdoing.\textsuperscript{1066} Whatever broader social trends the crime may grow out of and whatever ripple effects the criminal trial might have, the legal focus of the trial is

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\textsuperscript{1065} Allison M. Danner et al, 1029 above, p. 10.

\textsuperscript{1066} Ibid.
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narrow: determining the past acts and the fate of the individual defendant.\textsuperscript{1067} By contrast, human rights law is largely victim, rather than the perpetrator centered. It concentrates on establishing the veracity of allegations that individuals' human rights have been violated and, to that end, often focuses on fact-finding related to broad social phenomena.

The Inter-American Court of Human Rights has succinctly captured the distinction between a human rights proceeding and a criminal trial:

“The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in criminal action. The objective of international human rights law is to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.”\textsuperscript{1068}

While both human rights law and criminal law share the deterrence of violations as a major goal,\textsuperscript{1069} they implement this goal differently. Unlike criminal law which relies heavily on the threat of punishment for its deterrent effect, human rights practice rests more heavily on the indirect punishment of public shaming and perhaps, even more importantly, on forward-looking remedies like capacity building.\textsuperscript{1070}

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\textsuperscript{1067} In civil law systems, the criminal defendant may also be required to pay compensation to the victims at the end of the trial.

\textsuperscript{1068} Velasquez Rodriguez case, p. 134. Similarly, the ICTY has underscored firstly, the role and position of the state as an actor is completely different in both regimes. . . . secondly, that part of the international criminal law applied by the Tribunal is a penal regime. It sets one party, the prosecutor, against another, the defendant. In the field of international human rights, the respondent is the State. Structurally, this has been expressed by the fact that human rights law establishes lists of protected rights while international criminal law establishes lists of offences. Prosecutor v. Kunarac, Trial Judgement, Case No. IT-96-23-T, IT-96-23/1-T, ¶ 470 (Feb. 22, 2001).


\textsuperscript{1070} Allison M. Danner et al, 1029 above, p. 11.
major part of its mission as setting standards and helping national governments implement those standards. These goals are accomplished through reporting mechanisms aimed at improving state practice by exposing them to public scrutiny. In addition, this is also accomplished through expert advice, human rights seminars, national and regional training courses and workshops, fellowships and scholarships, and other activities aimed at strengthening national capacities for the protection and promotion of human rights.\textsuperscript{1071} Rehabilitation of the nation state offender rather than its punishment constitutes the principal focus of human rights law.

Despite these differences there are some overlap between criminal law and human rights law. For example, human rights law includes specific provisions governing criminal trials.\textsuperscript{1072} In certain legal systems, the defendant-centered tendencies of the criminal trial are moderated by mechanisms allowing for participation in the trial by the victim.\textsuperscript{1073} In several fundamental ways, however, the working presumptions of human rights law and criminal law present mirror images of each other. In a criminal proceeding, the focus is on the defendant and the burden of proof is on the prosecuting authority to prove that the individual before the court has committed a crime. Ambiguity about that assertion is to be construed in favor of the criminal defendant, and the trier of fact is charged with a view to determine what the defendant did and what his mental state was toward the acts constituting the crime. In human rights proceedings, by contrast, the focus is on the harms that have befallen the victim and on the human rights norm that has been violated.


One consequence of this focus is that the substantive norms of international human rights law are generally broadly interpreted to ensure that harm is recognized and remedied, and that, over time, there is progressively greater realization of respect for human dignity and freedom.\textsuperscript{1074} The analogous rules of domestic criminal law, by contrast are supposed to be strictly construed in favor of the defendant. While criminal law tends toward the specific and the absolute, human rights law embraces some contingent, aspirational norms.\textsuperscript{1075}

7.3.3 Crimes defined in International Conventions

There are several international conventions that clearly provide for a duty to prosecute crimes against international law. Of particular note are the Geneva Conventions of 1949, the Genocide Convention, and CAT. When these conventions are applicable, the granting of amnesty to persons responsible for committing the crimes defined therein would constitute a breach of a treaty obligation for which there can be no excuse or exception.\textsuperscript{1076}

The prerogative of a state to issue an amnesty for an offense can be circumscribed by treaties to which the state is a party.\textsuperscript{1077} As Article 27 of the Vienna Convention on the Law of Treaties provides: "[a] party may not invoke the provisions of its internal law as justification for failure to perform a treaty obligation."\textsuperscript{1078} Towards this end, punishment under these international conventions, particularly CAT, are discussed and analysed hereinafter.


\textsuperscript{1075} Article 2 of ICESCR.


\textsuperscript{1077} Ibid.

7.3.4 Definition and punishment under CAT

Article 4 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 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.

Torture is a gross offence to human dignity, justice and the rule of law. Article 4 of CAT provides that State Parties must ensure that all forms of torture are punishable offences under their criminal law. The provision also covers attempted torture and any act which constitutes complicity or participation in torture. This is also deemed to include giving an order to perpetrate torture. It is worth mentioning that Article 4 was inspired by similar provisions in other conventions concerning hijacking, sabotage against aircraft, attacks on diplomats, and taking of hostages.

There are no exceptional circumstances that may be invoked to justify the use of torture, nor can, orders from a superior officer or a public authority be invoked as a justification for torture. The Human Rights Committee has stated that:

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1081 Wendland, n. 376 above, p. 35.

1082 Article 2 of CAT.
“States Parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons.”

Those who violate Article 4, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible. Consequently, those who have refused to obey orders must not be punished or subjected to adverse treatment.1083

Similarly, The Inter-American Convention to Prevent and Punish Torture of 1985 provide in Article 3 that: “The States Parties shall ensure that all acts of torture and attempts to commit torture are offences under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.” It also states in Article 3 that:

“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 will be held guilty of the crime of torture. A person who, at the instigation of a public servant or employee, orders, instigates, or induces the use of torture, directly commits it or is an accomplice to such acts will also be held guilty of the crime.”

The obligation in Article 4(1) does not extend to include specific, separate offences in national criminal law which correspond exactly to the definition of torture laid down in Article 1 of CAT.1084 However, state parties which do not define torture or

1083 Foley, n. 878 above.
do not recognise the offence of torture in national legal systems are confronted with the problem of the classification of a crime over which they need to establish jurisdiction, and on the grounds of which they can institute prosecutions of persons who have perpetrated torture elsewhere. In this regard, in its consideration of initial and periodic reports from states parties, the Human Rights Committee frequently includes in its list of recommendations that a definition of torture in conformity with the definition appearing in Article 1 of CAT be inserted in domestic law as a separate type of crime. In its more recent report, the Committee has deemed the inclusion of torture as an offence defined at least precisely as Article 1 of CAT definition to be a requirement of CAT.

Article 4 paragraph 2 obliges states parties to make these offences punishable by appropriate penalties. The punishment for torture provided for under the domestic law of a state party must not be trivial or disproportionate, but must take into account the grave nature of the offence. This means that torture must be punishable by severe penalties.

The point must be made that CAT provides no direction as to the expected length of sentences. However, this must be calculated in the same way as other serious offences under national law; for example, offences which seriously threaten human health or life, such as torture and murder. This is to say that penalties must be in proportion to the grave nature of the crime, but also in proportion to other penalties imposed under national legislation for similar crimes. Invocation of CAT for justification of the death penalty would definitely be confronted by strong

1084 Wendland, n. 376 above, p. 35.
1085 Ibid.
1086 Edouard Delaplace et al, n. 1044 above, p. 228.
1087 Wendland, n. 376 above, p. 35.
1088 Ibid.
1089 Article 4 (2) of CAT; Ingelse, n. 21 above, pp. 341-342.
opposition by advocates of the right to life, more so, as CAT itself is a human rights instrument that bans torture. Various interpretations of CAT have suggested also that the imposition of the death penalty can constitute torture. The committee also expressed the opinion that torture should receive the heaviest sentence of all crimes.\(^{1090}\)

Although CAT as a whole has not commented on the appropriate level of sentence for torture, it is possible on the basis of the individual opinions of members to establish a range within which such sentences should fall.\(^{1091}\) Criminal charges will usually need to be brought against identified individuals. However, this may prove difficult in cases of torture, or other forms of ill-treatment, as those responsible may have concealed their identity from the victim and rely on either a protective 'wall of silence' from their colleagues, or even their active collusion in concocting a false story. Even if the victim has identified them, perpetrators may argue that it is 'one person's word against another' and that this is insufficient to prove guilt.\(^{1092}\)

Where an individual officer has been identified by name, by physical description, or through a serial or personal identification number, it should be possible to trace the officer through the official records. If the victim has been held at an officially recognised place of detention then the custody records should identify those responsible for the torture. Other records held at police stations and detention facilities may also contain relevant information which may lead to identification of individuals accused of torture. It may also help to corroborate or disprove a particular allegation.\(^{1093}\)

The assumption that a law enforcement officer accused of committing a crime in the course of his/her duties may stand a better chance of subsequently being

\(^{1090}\) Ibid.

\(^{1091}\) Wendland, n. 376 above, p. 35.

\(^{1092}\) Foley, n. 878 above.

\(^{1093}\) Ibid.
acquitted than the average criminal defendant may also make some prosecutors reluctant to pursue a case. However, these factors need to be balanced against the public interest served in order to ensure that those in positions of authority do not abuse it. This may justify bringing a prosecution even in cases where there is a greater likelihood of acquittal than would otherwise be the case.\textsuperscript{1094}

Where there is strong evidence that someone has suffered prohibited forms of ill-treatment while in custody, and strong evidence that an identified officer, or group of officers, mere presence at the time of this ill-treatment, they could either be charged jointly for carrying out or aiding and abetting the ill-treatment or individually for failing to protect someone in their care.

Although the laws governing the use of force on detainees may vary in different countries, the prohibition of torture is absolute. Neither the dangerous character of a detainee, nor the lack of security in a detention facility can be used to justify torture.\textsuperscript{1095} According to international standards, force may only be used on people in custody when it is strictly necessary for the maintenance of security and order within the institution, in cases of attempted escape, when there is resistance to a lawful order, or when personal safety is threatened. In any event, force may be used only if other non–violent means have proved ineffective.\textsuperscript{1096}

Criminal charges should also be brought against those in positions of responsibility who either knew or consciously disregarded information which indicated that their subordinates were committing crimes of torture or ill-treatment and failed to take reasonable measures to prevent or report it. Where patterns of torture or ill-treatment emerge or there is systematic failure to prevent them or hold the

\begin{flushright}
\textsuperscript{1094} Ibid.
\textsuperscript{1095} Article 2, CAT.
\textsuperscript{1096} Rule 54, Standard Minimum Rules for the Treatment of Prisoners; Principles 4, 5 and 9, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.
\end{flushright}
perpetrators to account, this could be taken as evidence that those in authority are effectively condoning such practices.\textsuperscript{1097}

In a famous passage in the \textit{Velásquez Rodríguez} and \textit{Godínez Cruz} cases, the Inter-American Court of Human Rights\textsuperscript{1098} stated:

> “The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violation committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.”

The case of \textit{R v Fryer, Nichol, Lawrie}\textsuperscript{1099} illustrates and supports the position that persons who are entrusted with and in position of responsibility must act responsibly and should not abuse their position to the extent of violating the right not to be subjected to torture.\textsuperscript{1100} In this case, a prisoner was subjected to torture by three prison officers. A number of other prisoners complained of similar ill-treatment at around the same time and criminal charges were eventually brought against 27 prison officers in connection with 13 separate complainants of ill-treatment and assaults, some of which were said to amount to torture. The three officers were convicted in relation to the above case and received sentences of three and a half to four years imprisonment. The court also held that prisoners are entitled to the protection of the law from assaults on them by prison officers.\textsuperscript{1101}

\textsuperscript{1097} Foley, n. 878 above.

\textsuperscript{1098} Velásquez Rodríguez case (1988), Inter-American Court Human Rights, Series. C, No. 4 (Honduras), paragraph. 174.

\textsuperscript{1099} EWCA Crim 825 Court of Appeal Criminal Division, Royal Courts of Justice, Tuesday 19th March 2002 (United Kingdom).

\textsuperscript{1100} Ibid.

\textsuperscript{1101} Ibid.
7.4 Domestic Criminal Jurisdiction and Universal Jurisdiction

Article 5 of CAT 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 a ship or aircraft registered in that State;

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

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

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

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

It further obliges states to take such measures as may be necessary to establish jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction, if it does not extradite the person to another state.\(^ {1102} \) The state is subject to this obligation if the offences are committed under its jurisdiction or on board of a ship or aircraft registered in the State in question, or if the suspect is a subject of the State.\(^ {1103} \) In the latter case, the State must


\(^{1103}\) Ingelse, n. 21 above, p. 320.
establish its jurisdiction, if the State deems this to be suitable. The state has jurisdiction not only over the territorial State within its borders, but also over occupied and overseas territories.\textsuperscript{1104} This obligation is regardless of where the crime was committed, the nationality of the victim and the nationality of the alleged perpetrator.\textsuperscript{1105} These principles have been recognized by various courts and tribunals from the International Criminal Tribunal for the former Yugoslavia to the House of Lords.\textsuperscript{1106}

Article 7 of CAT requires states under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite the person, submit the case to its competent authorities for the purpose of prosecution.\textsuperscript{1107} Article 5 paragraph 2 forms the cornerstone of universal reaction under criminal law against torture.\textsuperscript{1108} The provision obliges each State Party to establish universal jurisdiction for the offence of torture in its legislation for situation in which a suspect is present within its territory and the State does not extradite the suspects on the ground of Article 8 to one of the States referred to in the first section of Article 5.

According to Ingelse, the idea that universal jurisdiction should be included in CAT is linked to the nature of torture.\textsuperscript{1109} He stressed that torture in Article 1 of CAT is unthinkable without the involvement of the State itself and observed that due to state involvement, few prosecutions of torture offenders before national court are

\begin{itemize}
\item \textsuperscript{1104} Ibid.
\item \textsuperscript{1105} J. H. Burgers et al, n. 92 above, pp. 131-138.
\item \textsuperscript{1107} Ibid.
\item \textsuperscript{1108} Ingelse, n. 21 above, p. 320.
\item \textsuperscript{1109} Ibid.
\end{itemize}
to be expected.\textsuperscript{1110} If a State tolerates torture, there must be methods available for tackling torture. CAT offers other State Parties a basis for filling the gaps left by States who do not act against torture. State Parties are permitted to prosecute torture suspects who enter their territory.\textsuperscript{1111}

Article 5(2) provides that whether or not any of the grounds of jurisdiction dealt with in paragraph 1 exist, a State Party shall have jurisdiction over offences of torture in all cases where the alleged offender is present in a territory under its jurisdiction and it does extradite the offenders to a State which has jurisdiction under paragraph 1.\textsuperscript{1112} The term ‘any territory under its jurisdiction’ should be read broadly. It applies to alleged offenders present in any ‘territories over which a State has factual control’, the actual area of its territory or its technical extension.\textsuperscript{1113}

The phrase ‘take such measures as may be necessary to establish its jurisdiction in cases where the alleged offender is present’ includes legislative measures, but it is not limited to such measures. It includes executive and judicial steps to arrest, investigate, prosecute, or extradite. Therefore, even if CAT does not expressly state what measures must be taken to establish jurisdiction, the state parties must have intended that all measures be taken.\textsuperscript{1114}

Some observers have expressed the view that States may have the authority under international law to establish universal jurisdiction over the crimes of torture because one justification of universal jurisdiction is that violations of international law injure all states.\textsuperscript{1115} In support of this assertion, Sir Nigel Rodley stated in 1999:

\textsuperscript{1110} Ibid.
\textsuperscript{1111} Scharf, n. 1076 above, p. 46.
\textsuperscript{1112} Wendland, n. 376 above, p. 38.
\textsuperscript{1113} Ibid.
\textsuperscript{1114} Ibid., p. 39.
\textsuperscript{1115} The importance of establishing universal jurisdiction for certain violations of international law was indicated in the final report Question of the Impunity of Perpetrators of Human Rights Violations submitted
"It is now hard to imagine a convincing objection to any state's unilateral choice to exercise jurisdiction over torture on a universal basis. Thus permissive universality of jurisdiction is probably already achieved under general international law." \(^{1116}\)

However, this view is disputed by the President of the International Court of Justice, who, in his separate opinion in the *Congo v. Belgium* \(^{1117}\) case wrote:

"States primarily exercise their criminal jurisdiction on their own territory. In classic international law they normally have jurisdiction in respect of an offence committed abroad only if the offender, or at least the victim, is of their nationality, or if the crime threatens their internal or external security. Additionally, they may exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. But apart from these cases, international law does not accept universal jurisdiction…"

Nevertheless, Article 5(2) imposes an obligation on States to establish jurisdiction over all crimes of torture, irrespective of the status of the alleged offenders. The rationale of CAT is that suspects of torture must not be able to find a safe haven and escape responsibility for their acts. \(^{1118}\) Any suspect of torture must therefore fear prosecution always and everywhere. \(^{1119}\) The Committee against Torture has expressed the view that the States' obligations to bring alleged torturers to justice

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\(^{1118}\) J. H. Burgers et al, n. 92 above, p. 131.

\(^{1119}\) Wendland, n. 376 above, p. 38.
extend to the highest officials. In direct reference to the case involving the former President of Chile, Pinochet Ugarte, whom the United Kingdom had been requested to extradite to Spain on charges of, inter alia, complicity in the torture of Spanish citizens, the Committee against Torture expressed the view that Article 5(2) of CAT "conferred on States Parties universal jurisdiction over torturers present in their territory, whether former heads of state or not, in cases where it was unable or unwilling to extradite them." 1120

Developments in other areas of international criminal law seem to suggest a trend towards establishing jurisdiction over international crimes, even when they are alleged to have been committed by the highest officials and heads of States. This is implicit in the Rome Statute1121 and the Statute of the International Tribunal for the Former Yugoslavia. Article 27 of the former provides:

"This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence."

And the Statute of the International Tribunal for Rwanda; Article 7(1): "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment." As noted by Lord Hope in the Pinochet case, the international prohibition against torture "compels all states to refrain from


1121 CAT/C/SR.354, paragraph 39.
such conduct under any circumstances and imposes an obligation *erga omnes* to punish such conduct.\textsuperscript{1122}

### 7.5 Immunity and torture

The Spanish authorities took advantage of Pinochet's presence in the United Kingdom to seek his extradition to Spain to stand trial on a range of charges associated with his repressive regime in Chile.\textsuperscript{1123} After his arrest at a London clinic, an international warrant was issued accusing Pinochet of torture and conspiracy to torture.\textsuperscript{1124} The House of Lords held that Pinochet was not immune from prosecution in United Kingdom courts for crimes under international law.\textsuperscript{1125} The Home Secretary subsequently authorized the magistrate to proceed with extradition under section 7(4) of the Extradition Act 1989.

However, the House of Lords subsequently set aside its decision because the Appellate Committee had been improperly constituted.\textsuperscript{1126} The reconstituted and expanded Appellate Committee upheld the appeal in part so as to permit extradition proceedings to take place. These proceedings related to allegation of torture committed pursuant to a conspiracy to commit torture and the single act of torture allegedly committed after December 8, 1988, when Pinochet was deemed to have lost his immunity from prosecution for such acts.\textsuperscript{1127}

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\textsuperscript{1122} *In re Pinochet*, United Kingdom House of Lords, (Spanish request for extradition), *Regina v Bow Street Stipendiary Magistrate Exparte Pinochet Ugarte* (N O.3). [1999] 2 WLR 827.

\textsuperscript{1123} Christine M. Chinkin, The American Journal of International Law, Vol. 93, No. 3. (July, 1999), p. 703.

\textsuperscript{1124} Ibid.

\textsuperscript{1125} *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugalte* (No.1) (Amnesty International and Others Intervening) [1998] 3 WLR 1456.

\textsuperscript{1126} Lord Hoffmann had failed to disclose that he was a Director of Amnesty International Charitable Trust Ltd. *R. v. Bow St. Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (NO 2), [1999] 2 WLR 272 [PinochetII].

\textsuperscript{1127} Chinkin, n. 1123 above, p. 705.
The question was therefore whether international crimes in the highest sense, such as torture, can ever be deemed to be official acts of a head of state.\textsuperscript{1128} This question required consideration of the parallel strands of the substance of international crimes and jurisdiction for their prosecution, and, in particular, the obligations undertaken by the parties to CAT.\textsuperscript{1129}

The court observed that torture had become accepted as an international crime.\textsuperscript{1130} The purpose of CAT was not to create the offense of torture but to extend it and to deny a torturer a safe haven by providing a form of universal jurisdiction to extradite or prosecute through the principle of \textit{aut dedere aut judicare}.\textsuperscript{1131} The majority of the Law Lords found that torture cannot constitute an official act of a head of state. Accordingly, a former head of state cannot successfully claim immunity irrespective of any purported waiver by the state.\textsuperscript{1132}

It is the first time that a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes.\textsuperscript{1133} The ruling has been welcomed, especially by human rights activists and victims of human rights abuses, as a significant step in the process of making those who commit such crimes, answerable for their actions before a court of law.\textsuperscript{1134} Its implications for

\begin{footnotes}
\begin{enumerate}
\item Pinochet III, n. 1126 above, p. 853.
\item Ibid.
\item Amous N. Guirora et al, n. 258 above, p. 3.
\item Chinkin, n. 1123 above, p. 705.
\item Ibid.
\item Nick Hopkins et al., The Pinochet case represents a milestone for the international human rights law. Not even a self-proclaimed president like General Pinochet can claim immunity for torture, or give himself amnesty for his crimes. (Advocacy Director, Human Rights Watch).
\end{enumerate}
\end{footnotes}
international law are considerable and will inevitably be the subject of much detailed analysis and debate for many years ahead.

The United Kingdom authorization of extradition proceedings on the basis of the remaining charges is important. Insisting on widespread and massive violations of human rights, for example, as the requirement of torture and crimes against humanity,\textsuperscript{1135} can minimize the gravity of a single abuse or a single instance of torture. It was emphasized in the House of Lords that CAT prohibits a single act of torture against a single person and that torture does not become an international crime only when it is committed or instigated on a massive scale.\textsuperscript{1136} The International Criminal Court is complementary to national courts and it is, in any case, envisaged only for the most serious crimes.\textsuperscript{1137} The jurisdictional limitation serves to remind us that international crimes need not be on that massive scale in order to warrant criminal proceedings.\textsuperscript{1138}

The decisions of the courts show a remarkable willingness by courts to explore a number of sources in order to have informed understanding of concepts such as torture, \textit{jus cogens} and universal jurisdiction. This included treaties and their \textit{travaux préparatoires}, UN resolutions, draft articles of the International Law Commission, and the Statutes and jurisprudence of the International Criminal Tribunals for Former Yugoslavia and Rwanda.\textsuperscript{1139}

The impact of this enhanced understanding may be seen as the denial of the immunity \textit{ratione materiae} claimed for a former head of state for official acts of torture, and represents a choice between two visions of international law: a

\textsuperscript{1135} Statute for the International Criminal Tribunal for Former Yugoslavia, Article 5.

\textsuperscript{1136} Pinochet III, n. 1126 above, p. 901.

\textsuperscript{1137} Ibid.

\textsuperscript{1138} Chenkin, n. 1123 above, p. 710.

\textsuperscript{1139} Ibid.
horizontal system based upon the sovereign equality of states and a vertical system that upholds norms of *jus cogens* such as those guaranteeing fundamental human rights.\(^{1140}\) Lord Hope emphasized the *jus cogens* character of the immunity enjoyed by serving heads of state which made it far from self-evident that it should be removed from former holders of such office.\(^{1141}\)

In the light of such valid concerns the decision goes a long way. It represents the globalization of human rights law through the affirmation that the consequences of, and jurisdiction over, gross violations are not limited to the state in which they occur, or of the nationality of the majority of the victims. It validates the assertion that torture is always unacceptable and unjustifiable on any grounds and provides a memorial to the thousands who did not survive. Further, obligations incurred by human rights treaties, such as CAT can be enforced extraterritorially. This is a blow to those regimes such as that of Pinochet that cynically became bound by these treaties with contemptuous disregard for their requirements.\(^{1142}\)

These remain opposable before the courts of a foreign State, even where those courts exercise such jurisdiction under these conventions.\(^{1143}\) In other words, the absolute nature of the obligation to establish jurisdiction over the crime of torture in Article 5(2) which is meant to apply irrespective of the status of the alleged offender is superseded by jurisdictional immunities in customary international law enjoyed by certain representatives of States.

\(^{1140}\) Ibid., p. 711.

\(^{1141}\) Ibid.

\(^{1142}\) In the contrary, a judgment by the International Court of Justice in February 2002 upheld the immunity from jurisdiction of an incumbent minister of foreign affairs for alleged crimes against humanity and war crimes. The majority of the Court observed that in international law it is firmly established that, similar to diplomatic and consular agents, certain holders of high ranking office in a State, such as the head of State, head of government and minister of foreign affairs, enjoy immunity from jurisdiction in other States, both civil and criminal. According to the report of the International Law Commission, forty eight session, July 1996, A/51/10.

\(^{1143}\) *Democratic Republic of Congo v. Belgium*. n. 1117 above.
The manifest intent of both conventions was to ensure that persons convicted of genocide or torture serve harsh sentences. In the view of CAT's drafters, in applying Article 4, which requires states to make torture punishable by appropriate penalties which take into account their grave nature, it seems reasonable to require that the punishment for torture be closely related to the penalties applied to the most serious offenses under the domestic legal system. Thus, this wording of CAT should not be construed to suggest the permissibility of amnesties or pardons. Even if a State is not party to CAT, this does not relieve the State of the responsibility contained in CAT.

The four Geneva Conventions also require states to exercise universal jurisdiction in respect of 'grave breaches' of the Convention and bring cases before their own national courts. They also require state parties to search for people alleged to have committed or ordered grave breaches of the Conventions, such as torture and inhuman treatment, or those who have failed in their duties as commanding officers to prevent such grave breaches occurring. The 'search and try' obligation is without frontiers under the Geneva Conventions. States which are not bound by any of these Conventions are still permitted to exercise universal jurisdiction if an alleged foreign perpetrator of torture is found on their territory as general or customary international law permits the exercise of universal jurisdiction over torture. Judges and prosecutors have a particularly important role to play in ensuring that these obligations are fulfilled with respect to the prosecution of people suspected of committing acts of torture or ancillary crimes. The underlying assumption is that the crimes of torture are offenses against the law of nations or against humanity and in this regard, the prosecuting nation is acting for

1144 Ibid.
1146 Ibid.
1148 Foley, n. 878 above.
all nations.\textsuperscript{1149} In these cases, perpetrators of human rights violations are considered \textit{hostis humani generis} that is, enemies of all humanity.\textsuperscript{1150}

7.6 Exposition of State Responsibility through the Teheran Hostage’s Case

The clearest statement on the juridical nature of human rights\textsuperscript{1151} is to be found in the 1980 judgment in the \textit{Tehran Hostages} case. The court found that Iran had incurred responsibility towards the United States as a result of the continued detention of United States diplomatic and consular staff in Tehran, mainly in the premises of the United States embassy. The court stated that it was wrong to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship. This in itself, is manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. The United States, in its memorial, invoked human rights relating to the applicability of the Treaty of Amity claiming that Iran violated her obligation under the treaty to provide the most constant protection, security, humane and reasonable treatment to United States nationals.

The United States argued that one measure of that standard was represented by international human rights.\textsuperscript{1152} The court also stated that the Universal Declaration of Human Rights is a document of sufficient legal status to justify its invocation by the court in the context of a State’s obligations under general international law. The court further stated that the Declaration as a whole propounds fundamental

\textsuperscript{1149} \textit{Demjanjuk v. Petrovsky}, 776 F.2d 571, 582-83 (6th Cir. 1985).


principles recognised by general international law which are the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment and the right to liberty and security of the person.

In recent years there has been an impressive development in the array of intergovernmental machinery available to investigate alleged human rights violations and even intercede on behalf of victims. However, criminal violations of human rights, such implementation mechanisms established by treaty are a useful means of promoting respect for human rights.\(^{1153}\)

**7.7 Holding Perpetrators Accountable for Crime of Torture**

The current prominence of accountability, and its emergence as a significant element of international relations, is a reflection of a desire for justice, as well as long term prevention of torture and mass violence.\(^{1154}\)

Impunity is often a recipe for continued violence and instability. The examples of the former Yugoslavia, Rwanda, Sierra Leone, and other transitional situations demonstrate how hard it is becoming even for the realpolik observers and die hard cynics to deny the preventive effects of prosecuting murderous rulers.\(^{1155}\)

Indeed, the rules of legitimacy in international relations have so dramatically changed since the inception of CAT the ICTY, the ICTR, and the ICC that accountability is arguably a reflection of a new ‘realism’. The past view of policy based on principles of justice as naive and unrealistic has been seriously challenged by the convergence of realities and ideals in post-conflict peace building and reconciliation.\(^{1156}\) However, it is pertinent to mention that justice

\(^{1153}\) Ibid., p. 329.


\(^{1155}\) Ibid.

\(^{1156}\) Ibid.
without a corresponding commitment of the leaders significantly dilutes the message of accountability and undermines its long term viability in preventing torture.\textsuperscript{1157}

Criminal justice cannot enjoy long term credibility if it becomes an instrument of hegemony for powerful states.\textsuperscript{1158} The United States considers itself as a nation of law, yet over the past several years, it has engaged in the systematic use of torture.\textsuperscript{1159} This is disturbing when considering various crimes being committed on a daily basis by US in the war against terror.\textsuperscript{1160} It seems apparent that while crimes of torture committed in the Dafur region of Sudan and Rwanda generate responsibility and accountability, those of the US do not seem to. This manifested itself in selectivity and arbitrariness.\textsuperscript{1161}

The question arises as to why there have been so few instances of prosecution and accountability. The answer is that justice is all too frequently bartered away for political settlements.\textsuperscript{1162} Whether in international, non-international, or purely internal conflicts the practice of impunity has become the political price paid to secure an end to the violence of ongoing conflicts or as a means to ensure tyrannical regime change.\textsuperscript{1163} In these bartered settlements, the victims’ rights

\textsuperscript{1157} Ibid.
\textsuperscript{1158} David Weissbrodt et al, n. 301 above, p. 153.
\textsuperscript{1160} Ibid.
\textsuperscript{1161} Akhavan, n. 1154 above.
become the object of political trade-offs; justice depends upon one’s perspective; and, the victim is caught up in political power struggle.\textsuperscript{1164}

It is reasonable to assume that the progressive internalization of international criminal justice will gradually spread from the periphery to the center and give rise to a more inclusive universal framework, possibly through a widely ratified CAT and ICC statute together with vigilant and invigorated implementation by national or foreign courts. If the international community is to move beyond the currently fragmented assortment of jurisdictions to a coherent system of justice, a great burden falls on the shoulders of influential states to set a fitting moral example.\textsuperscript{1165}

No one should entertain the illusion that the relative success of CAT, ICTY, ICTR, and ICC process, or the engagement of national and foreign courts, has somehow exorcised the specter of genocide and other massive crimes, and in particular the crime of torture from our midst. The reality of widespread atrocities in Africa and elsewhere leaves little room for judicial romanticism and even less for moral triumphalism.\textsuperscript{1166}

Achieving effective prevention against an entrenched culture of impunity, and fostering inhibitions against widespread torture, rape, pillage, and murder in a context of habitual violence cannot be realized through the efforts of a few \textit{ad hoc} tribunals and national trials. The establishment of a permanent international criminal court would certainly contribute to the enhancement of international enforcement. But the court will have to be considered as being on the same continuum as national criminal courts and all these legal systems will have to work

\begin{footnotes}
\textsuperscript{1164} Bassiouni, n. 1162 above, p. 20.
\textsuperscript{1165} Ibid.
\textsuperscript{1166} Ibid., p. 31.
\end{footnotes}
in a complementary way to reinforce one another in order to achieve effective deterrence.\textsuperscript{1167}

The pursuit of prosecution and other accountability measures in the effort to eradicate torture will serve as deterrence, and thus prevent future victimization.\textsuperscript{1168}

7.8 The Relationship between CAT and other Instruments of International Criminal Law

Rather than being a norm setting human rights treaty along the lines of, for example, ICCPR, CAT belongs primarily to the category of international criminal law instruments. One may therefore ask how CAT relates to other bodies of international criminal law which have jurisdiction over the crime of torture. The following section aims to provide a brief overview of the relationship between CAT and other international criminal law instruments with jurisdiction over the crimes torture.

7.8.1 CAT and the ICC

The International Criminal Court (ICC) is a permanent court which tries individuals accused of committing genocide, war crimes, crimes against humanity, and, possibly in the future, the crime of aggression. The definition in the Rome Statute of the ICC crimes is broadly consistent with those elaborated by international law, though the statute also reflects some progressive development in defining certain crimes, notably gender related offences.\textsuperscript{1169} The crime of torture falls within the jurisdiction of the ICC when it is committed in the context of crimes against humanity, i.e. when it is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.\textsuperscript{1170}

\begin{flushright}
\textsuperscript{1167} Ibid., p.18
\textsuperscript{1168} Ibid.
\textsuperscript{1169} Wendland, n. 376 above, p. 68.
\textsuperscript{1170} Article 7, Rome Statute n. 358 above.
\end{flushright}
The term ‘war crimes’ denotes grave breaches of the Geneva Conventions, namely, torture or inhuman treatment of, including biological experiments upon, persons protected under the provisions of the relevant Geneva Convention in the context of armed conflict. Contrary to this definition of torture in the ICC Statute, the definition in CAT is not concerned with the context in which torture as defined in Article 1 of CAT occurs. While CAT is concerned with the establishment and exercise of jurisdiction over torture in national laws, the ICC will be an independent international body with jurisdiction over a range of the most serious international crimes.

However, a central attribute of the ICC is that it will be complementary to national criminal jurisdictions. Thus, national tribunals will continue to have primary jurisdiction over criminal offences falling under the Statute, and the ICC will hear cases only where national tribunals are unable or unwilling to do so.

It is possible to imagine a situation where torture committed in the context of a conflict also falls within the definition of torture in both CAT and international humanitarian law. In such a case, national tribunals could have a choice between prosecuting a suspect according to laws establishing jurisdiction under CAT or according to the norms of individual criminal responsibility under international humanitarian law. Article 25 of the ICC Statute establishes individual criminal responsibility for any person who commits a crime within the jurisdiction of the ICC. The Statute also addresses command responsibility and the full range of possible defenses.

1171 Ibid., Article 8 paragraph 2(2).
1172 Ibid., preamble, Article 1.
1173 Ibid., Articles 26-39 and 31-33.
7.8.2 CAT and ICTY/ICTR

Since the prosecution of war criminals after the end of the Second World War, no prosecutions before international tribunals occurred until the advent of the respective tribunals for the Former Yugoslavia and Rwanda in the 1990s. Both the ICTY and ICTR were created by the UN Security Council resolutions. The Statute of the ICTY (the ICTY Statute) limits the Tribunal's jurisdiction to serious violations of international humanitarian law committed in the Former Yugoslavia since 01 January 1991.\textsuperscript{1174} Articles 2 through 5 set forth the crimes over which the Tribunal has jurisdiction: war crimes, genocide, and other crimes against humanity. The Statute's rules concerning individual responsibility and defences are generally consistent with the Nuremberg principles and the 1949 Geneva Conventions and Protocol I.\textsuperscript{1175} Importantly it enjoys primacy and may request that a national court in its jurisdiction preside over a case.\textsuperscript{1176}

Torture is a crime under the ICTY Statute in the context of grave breaches of the Geneva Conventions\textsuperscript{1177} and crimes against humanity.\textsuperscript{1178} The Rwanda Tribunal is similar to the Yugoslavia Tribunal, and its Statute (the ‘ICTR Statute’) is based closely on the ICTY’s. The ICTR’s jurisdiction is limited to serious violations of international humanitarian law committed in Rwanda or committed by Rwandan nationals in neighbouring States between 1 April and 31 December 1994.\textsuperscript{1179}

As with the ICTY, the Rwanda Tribunal’s jurisdiction extends to genocide, crimes against humanity, and war crimes, with adjustments to reflect the particular

\begin{flushleft}
\textsuperscript{1174} ICTY Statutes, Articles 1 and 8.
\textsuperscript{1175} Ibid., Articles 6 and 7.
\textsuperscript{1176} Ibid., Article 15.
\textsuperscript{1177} Ibid., Article 2 (b).
\textsuperscript{1178} Ibid., Article 5 (f).
\textsuperscript{1179} Ibid., Articles 1.
\end{flushleft}
circumstances of the conflict, such as its internal character. Like the ICTY, the ICTR’s personal jurisdiction extends only to natural persons. In addition, its jurisdiction is concurrent with national courts, with the Tribunal enjoying primacy. The Statute’s provisions on individual responsibility, defences, immunities, and double jeopardy are identical to those in the ICTY Statute.\textsuperscript{1180}

The point must be made that the jurisdiction over the crime of torture as defined in CAT is not subject to the geographic and time limitations set forth in the ICTY and ICTR Statutes. Furthermore, the definition of torture in Article 1 of CAT does not correspond exactly to torture as defined in international humanitarian law.

More importantly, the broader impact of the ICTY and the ICTR on transforming a culture of impunity should not be overlooked. These institutions have ‘mainstreamed’ accountability in international relations and thus instilled long term inhibitions against international crimes in the global community.\textsuperscript{1181}

\section*{7.9 International Criminal Law and the role of Domestic Courts}

The proper role of domestic courts in cases involving international crimes has been hotly debated, some arguing in favor of domestic prosecution,\textsuperscript{1182} and others in favor of international prosecution.\textsuperscript{1183} Scholars in the latter group believe that domestic courts or other procedures cannot be trusted with the effective prosecution of grave international crimes.\textsuperscript{1184} Unlike the Statutes of ICTY and

\begin{footnotesize}
\begin{itemize}
\item 1180 Ibid., Articles 5, 6, 8 and 9.
\item 1181 Akhavan, n. 1154 above, p. 27.
\item 1184 Charney, n. 1182 above.
\end{itemize}
\end{footnotesize}
ICTR, the statutes of the ICC seeks to bridge this gap by giving preference to domestic procedures if they have been conducted in a *bona fide* way.

After the termination of the Tokyo and Nuremberg tribunals, domestic courts rarely attempted to prosecute Nazi fugitives for international crimes they had committed during World War II. Still more rarely did domestic courts prosecute other persons who had committed international crimes subsequent to World War II. Until the establishment of the ICTY and the ICTR, opinion generally characterized prosecutions of international crimes merely as victors' vengeance and a historical anomaly. Yet suddenly an enormous number of prosecutions for such crimes are taking place in the domestic courts of Rwanda, Darfur etc. Similar cases have been reported in South Africa. The Spanish court's indictment of Augusto Pinochet led not only to proceedings in the domestic courts of Spain, but also to extradition proceedings in England, as well as indictments in Belgium, France, and Switzerland. While Pinochet was ultimately released to return to Chile, his homecoming was not to the safe haven he had enjoyed in the past. Rather, the courts revoked his immunity and that of others and, despite earlier resistance even under democratically elected governments, civil and criminal actions were taken for the international crimes Pinochet's regime is alleged to have committed.


1186 Charney, n. 1182 above.


1188 Charney, n. 1182 above.

1189 Bruce W. Nelan, Facing up to a Violent Past; Powerful Members of the Old Guard Are Indicted for 1987.

1190 Charney, n. 1182 above, p. 121.
As a consequence of the developments along these lines, including the indictment and arrest by Senegal of Chad’s ex-President Hissein Habre and similar efforts in Cambodia, Sierra Leone, Togo, and East Timor,\textsuperscript{1191} persons who have committed international crimes other than current heads of state or accredited diplomats, are no longer generally seen as safe from prosecution either in their home countries, with or without immunity, or during travels to other countries.\textsuperscript{1192} Indeed, these developments may reflect the entry of a new era in which domestic prosecutions for international crimes will flourish assuming that such crimes continue to be committed.

The developments recounted above appear to have had a reciprocal influence on the international environment. The ICTY and the ICTR have legitimated the prosecution of international crimes to the international community and have elaborated on the pertinent law through their statutes, rules, and judgments. They have thus created a substantial and tangible body of jurisprudence which was lacking in the past.\textsuperscript{1193}

Many of these developments have been prominently reported in the popular press and have spawned a growing body of scholarship. Through these advances governments have become accustomed to the idea that international criminal law constitutes a real and operative body of law, which in turn has facilitated domestic prosecutions of persons accused of these crimes.\textsuperscript{1194}

In some circumstances, a state may find it in its interest to allow a prosecution to go forward before the ICC, considering the matter too dangerous to be handled domestically and preferring trial before a distant international tribunal.\textsuperscript{1195} In other

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item Ibid.
\item Ibid.
\end{enumerate}
\end{footnotesize}
situations, the state may not be capable of properly prosecuting an international criminal matter. In most cases, however, the state may well wish to retain control over such prosecutions. To allow its own nationals or aliens charged with the commission of crimes on its territory to be prosecuted by a distant international tribunal would deprive the state of control and suggest the inadequacy of its domestic legal system.\footnote{1196}{Charney, n. 1182 above, p. 122.}

Furthermore, the state may not wish to have an international court find that its procedures in dealing with persons accused of such crimes are deficient. States rarely submit matters to international tribunals that could be resolved through diplomatic negotiations controlled by the states concerned. As a rule, states may wish to manage issues themselves and voluntarily refer matters to international tribunals only when no other choice presents itself or when the procedure enables the resolution of international disputes arising from domestic difficulties of limited national concern.\footnote{1197}{Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 Yale Law Journal 273, 285-86 (1997).} In most situations, states find it more desirable to resolve a matter domestically than to surrender responsibility to an international body.\footnote{1198}{George A. Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 Columbia Law Review, (1994), p. 331.}

Similar motivations may be involved in the context of cases that might be cognizable before the ICC. Furthermore, the design of Article 17 of the ICC Statute, which deals with issues of admissibility in the light of the rule of complementarity, makes it even more likely that state parties will seek to retain jurisdiction over prosecutions that may be within the court's authority. As prosecutions of the specified crimes increase internationally, before either the ICC or domestic courts, one can expect barriers to domestic pursuit of such cases to continue to fall, as they did after the establishment of the ICTY and the ICTR.
States risk the possibility that the ICC might take on prosecutions that could have been brought domestically.

In such situations the ICC might determine that prior domestic proceedings had not met the standards set out in Article 17. As a consequence, it is believed that states will feel impelled to try persons accused of such crimes and to pursue those cases in a *bona fide* way. If they are successful, it may result in few cases actually reaching the ICC for prosecution. This development will have an effect on all states not only parties to the ICC but also states that do not become parties to the ICC, including the United States. As the ICC Statute now stands, nationals of the United States or other third parties who commit specified crimes abroad could be subject to ICC jurisdiction. Domestic investigations and prosecutions by third parties however, may serve as grounds for the admissibility defense under Article 17.

For instance, a state could be placed under substantial pressure to prosecute persons accused of international crimes or to surrender them for trial by other states or the ICC. A case in point concerns Libya and various initiatives to prosecute the persons accused of the Lockerbie bombing. At first Libya refused to cooperate, then it sought to prosecute the accused domestically but such prosecution did not attract international credibility. For example, the Security Council, by its resolution 731 [1992], demanded immediate compliance by Libya to the requests made to it by France, the United Kingdom and the United States to cooperate fully in establishing responsibility for the terrorist acts against the two airliners. Acting under Chapter VII of the Charter, the Council by resolutions 748 [1992] and 883 [1992] repeated those demands. Resolution 883 also required Libya to ensure that the two accused in the bombing of Pan Am flight 103


1200 Charney, n. 1182 above, p. 123.

1201 Ibid.
appeared for trial in the appropriate courts in the United Kingdom or United States.\footnote{1202}

Ultimately, Libya was forced to hand over the accused for foreign prosecution.\footnote{1203} While this case may be unique, the situation demonstrates the growing pressure on states to conduct \textit{bona fide} criminal proceedings regarding alleged offenders or to turn them over to others who will.

Many supporters of the International Criminal Court consider that an active ICC docket would constitute a major step toward the suppression of international crimes. To this end, it is believed that the real and more effective success will reside in the active dockets of many domestic courts around the world. The ICC having served first as a catalyst, and then as a monitoring and supporting institution. This is perhaps the best outcome, for the purpose of establishing the ICC is to eliminate impunity for international crimes. A single international court can accomplish little, especially if its fundamental purpose is to promote international mores that discourage impunity. Success will be realized when the aversion to impunity is internalized by the domestic legal systems of all states. The test of that success is not a large docket of cases before the ICC, but persistent and comprehensive domestic criminal proceedings worldwide, facilitated by progress in a variety of contexts toward discouraging international crimes and avoiding impunity.\footnote{1204}

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\textbf{1204} Ibid.

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7. 10 Impunity: Meaning and Definition

Impunity means ‘exemption from punishment or loss’. In the international law of human rights, impunity refers to the failure to bring perpetrators of human rights violations to justice and, as such, itself constitutes a denial of the victims' right to justice and redress. Impunity exists at several levels. It exists at the individual level, when perpetrators refuse to acknowledge the wrongfulness of their conduct. It exists at the societal level, when states refuse to accept responsibility for the acts of government agents. It also exists at the international level, when the international community does not respond to human rights abuses.

Impunity is especially common in countries that lack a tradition of the rule of law; where fundamental human rights are violated; in countries that suffer from corruption or those that have entrenched systems of patronage; or where the judiciary is weak and members of the security forces are protected by special jurisdictions or immunities.

Every day, and in every region of the world, men, women and children are subjected to torture. In the great majority of cases, there is no investigation of these crimes and no one is prosecuted for them. This creates an enabling environment for torturers to commit torture with impunity. Impunity sends the message to torturers that they will get away with torture. Impunity denies the victims and their relatives the right to have the truth established, the right to see

1205 Aceves, n. 11 above, p. 5.
1208 Aceves, n. 11 above, p. 5.
1209 Bassiouni, n. 1162 above, p. 9.
justice done and the right to reparation.\textsuperscript{1211} It is pertinent to point out the shameful fact that most torturers commit their crimes safe in the knowledge that they will never face arrest, prosecution or punishment. However, the tide is turning. Public awareness is greater than ever before. More and more governments are willing to bring torturers to justice.\textsuperscript{1212}

The amended Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, submitted to the United Nations Commission on Human Rights, defines impunity as:

"the impossibility, \textit{de jure or de facto}, of bringing the perpetrators of violations to account whether in criminal, civil, administrative or disciplinary proceedings since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."\textsuperscript{1213}

The First Principle of that same document states that:

"Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations."

\textsuperscript{1211} Ibid.

\textsuperscript{1212} Ibid.

\textsuperscript{1213} The Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity of 8 February 2005.
7. 10.1 Impunity: An antithesis of accountability

Accountability mechanisms appear to focus on events after the fact, and may appear to be solely punitive. However, they are also designed to be preventive through enhancing commonly shared values and through deterrence. Accountability therefore has a necessary punitive aspect. However it is also integrally linked to prevention and deterrence.1214 The weakness in the accountability argument is that it is after the fact, but its strength is that it has a crucial role to play in the formation and strengthening of values and the future prevention of the practice of torture in the society.1215

One of the hindrances against accountability is impunity. The act of promoting or condoning impunity by those who are supposed to stop it can be illegal and immoral. Impunity is counter-productive to the ultimate goal of eradication of torture. Victims need to have their victimization acknowledged, the wrongs committed against them decried, and the criminal perpetrators punished, and compensation provided for the survivors. Above all, the lessons of the past must instruct the future in order to avoid repeating the same mistakes, and to ensure prevention and deterrence against similar occurrences.1216 Impunity for international crimes and for systematic and widespread violations of fundamental human rights is a betrayal of our human solidarity with the victims of torture to whom we owe a duty of justice, remembrance, and compensation. To remember and to bring perpetrators to justice is a duty we also owe to our own humanity and to the prevention of future victimization.1217

1214 Bassiouni, n. 1162 above, p. 27.
1215 Ibid.
1216 Ibid., pp. 27-28.
1217 Ibid., p. 28.
7.10.2 International guidelines for combating impunity

It must be stressed that impunity for international crimes and serious violations of human rights should be overcome through justice and perhaps a hope for deterrence.\footnote{1218} Notwithstanding various steps that have been taken to establish a regime of accountability, impunity remains a recurrent pattern. Where an effort at accountability is undertaken at all, it is consistently approached upon.\footnote{1219}

That ideal of full accountability for crimes of torture and serious human rights abuses is never, in practice, attained. National and international efforts at achieving accountability for such offenses typically resort to means designed to render something less than full accountability. This occurs for three identifiable reasons.\footnote{1220} First, political constraints may limit the extent to which accountability is pursued.\footnote{1221} Such constraints arise from the need to continue to live with or even to work toward reconciliation with the perpetrator population or constituency. Argentina and South Africa exemplify two faces of this phenomenon.\footnote{1222}

In Argentina, threats of military insurrection halted the Alfonsin government’s prosecutorial efforts to hold accountable perpetrators of human rights abuses committed under the former military regime.\footnote{1223} In South Africa’s transition from apartheid, a negotiated settlement to a political conflict that had already involved bloodshed, and had the potential to involve much more, included a rather robust


\footnote{1219} Ibid.

\footnote{1220} Martha Minow, Between Vengeance and Forgiveness (1998); Aryehneier, War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice (1998).

\footnote{1221} Aceves, n. 11 above, p. 5.

\footnote{1222} Morris, n. 1218 above, p. 29.

amnesty provision.\textsuperscript{1224} Thus, precarious balances of power sometimes involving military threats often place political constraints upon the degree of accountability that is sought.\textsuperscript{1225} Perpetrators flee their countries seeking anonymity and absolution in foreign lands.\textsuperscript{1226}

Second, the resources required to achieve full accountability are often prohibitive. The offenses might involve large numbers of perpetrators and victims. Prosecutions and other accountability mechanisms as well as victim compensation schemes. All these measures demand extensive financial, physical, and human resources.\textsuperscript{1227} Often, these demands arise in post conflict contexts in which the affected states suffer from a dearth of resources. Rwanda provides perhaps the most extreme example there, tens of thousands are suspected of having participated in genocide and torture.\textsuperscript{1228}

Third, accountability fails for lack of will at national and/or international levels. In such cases, there may be a denial that the offenses were committed. This is typical where the regime responsible for the offenses is still in power.\textsuperscript{1229} Alternatively, offenses may be acknowledged but resource limitations or political constraints such as those discussed above may be used as a pretext for inaction that is actually born of a lack of will. Failures of will at the international level clearly have impeded the efficacy of the ICTY and ICTR\textsuperscript{1230} since their inception.

\textsuperscript{1224} Morris, n. 1218 above, p. 30.
\textsuperscript{1225} Ibid.
\textsuperscript{1227} Morris, n. 1218 above, p. 30.
\textsuperscript{1229} Morris, n. 1218 above, p. 30.
\textsuperscript{1230} Ibid.
Because of political constraints, resource limitations, or lack of will or some combination of the three, national and international bodies charged with the handling of international crimes and serious human rights violations typically adopt a compromise or second best approach. That approach generally comprises some or all of the following elements.

First, a decision may be made to pursue accountability only for some subset of the individuals responsible for the crimes.\textsuperscript{1231} For instance, in South Africa, amnesty was made available under specified conditions to all perpetrators of the relevant crimes\textsuperscript{1232} except a few perpetrators whom the amnesty granting authority determined that the crimes committed were disproportionate to their political purpose.\textsuperscript{1233}

Second, some form of plea bargaining may be utilized. Rwanda, for example, has passed specialized legislation offering all but the most culpable category of perpetrators in the Rwandan genocide, murder and torture, a substantial sentence reduction in return for a full confession, a guilty plea, and an apology to the victims.\textsuperscript{1234}

Third, a sentence reduction may be provided for all perpetrators without the requirement of any plea bargain. This may be done to relieve the state of the long-term burden of supporting a massive prison population and/or in the interests of reconciliation. Rwanda once again provides an example. Except for the most culpable category of perpetrators, the maximum penalty for murders committed in connection with the Rwandan genocide has been reduced from the death penalty

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  \item \textsuperscript{1231} Ibid.
  \item \textsuperscript{1232} To qualify for amnesty under the South African Promotion of National Unity and Reconciliation Act, the crimes must have been politically motivated and have been committed during the period March 1, 1960 through May 10, 1994.
  \item \textsuperscript{1233} Morris, n. 1218 above, p. 31.
  \item \textsuperscript{1234} Ibid.
\end{itemize}
to life imprisonment.\textsuperscript{1235} This allows the Rwandan government to pursue mass level accountability without being obliged to carry out thousands of executions which would exacerbate rather than ameliorate national tensions.\textsuperscript{1236}

A fourth second best approach is to take legal action against perpetrators for lesser offenses than torture, crimes against humanity, or other serious human rights violations actually committed. One version of this is prosecution for ‘ordinary crimes’ such as assault, assault occasioning bodily injury etc. where national legislation provides only for such offenses and not for the greater, international crimes.\textsuperscript{1237}

Second best approaches are taken not only in place of full criminal prosecution but also in place of civil reparations from perpetrators to victims. One such compromise is the award of an unenforceable or probably unenforceable civil judgment. Examples include many of the judgments made under the US Alien Tort Claims Act which a court grants a victim of human rights violations an award against a perpetrator whose assets are outside of the US and inaccessible for satisfaction of the award.\textsuperscript{1238} Another compromise approach to reparations is where a successor government or the international community provides reparations or assistance to victims rather than the perpetrators being made to do so.\textsuperscript{1239} While often indispensable for purposes of acknowledgement and rehabilitation of victims, this approach makes no inroads against the impunity of perpetrators.

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\end{flushright} \textsuperscript{1236} Morris, n. 1228 above, p. 32.

\begin{flushright}
\textsuperscript{1237} Ibid.
\end{flushright} \textsuperscript{1238} Beth Stephen and Michael Rantner, International Human Rights Litigation in U.S. Courts 168, 218 (1996).

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\textsuperscript{1239} Morris, n. 1228 above, p. 33.
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Finally, there are approaches to accountability that are not inherently compromises but are second best when adopted in lieu of, rather than in conjunction with, other mechanisms for accountability. These include lustration and truth commissions. International sanctions might also be viewed as a mechanism that is not inherently second best but becomes so if used in lieu of other mechanisms for accountability. However, sanctions are used to create pressure for change and are removed when change is achieved rather than to attain accountability for wrongs committed.\(^{1240}\)

Lustration disqualifies certain categories of officials or collaborators of the former regime from holding certain offices within the new regime.\(^{1241}\) While lustration has been controversial because of its lack of individualization of liability and its potential for abuse, a form of lustration with adequate due process and without excesses may be appropriate for purposes of both accountability and of political transition and reform. But lustration alone obviously does not fully achieve the purposes of accountability.

Truth commissions in many contexts can perform an important function in providing a comprehensive overview and historical record of the offenses in question and the context in which they occurred. This will be particularly important where the offenses were committed covertly and might otherwise remain shrouded in secrecy or ambiguity.\(^{1242}\)

A truth commission can provide a comprehensive and integrated account such as cannot be gleaned from a patchwork of trial records. A truth commission also will often have credibility and authority that a private historian's account would lack. For these reasons, truth commissions may be of considerable value when

\(^{1240}\) Ibid.


\(^{1242}\) Morris, n. 1228 above, p. 33.
employed in conjunction with other accountability mechanisms. Often, however, truth commissions have been used instead of other approaches.\textsuperscript{1243} Even where fully successful in their own terms, truth commissions alone which provide neither for criminal liability nor for reparations cannot provide anything approaching full accountability.\textsuperscript{1244}

An array of compromise approaches to accountability has been employed over the years, by international as well as national entities. Each compromise renders an outcome of partial accountability and, correlativeiy, partial impunity. In sum, there is a spectrum of possible outcomes between complete impunity and full accountability. As discussed earlier, outcomes that fall short of full accountability often are attributable to political constraints and resource limitations as well as to a lack of will.\textsuperscript{1245}

Having considered various factors that have been major obstacles to combat impunity, it is apt to consider the potential value of developing guidelines against impunity.

\textbf{7.10.3 Guidelines against impunity}

The guidelines might provide that the type and extent of accountability that states are obliged to establish would vary depending upon specified factors. They could also very usefully include a set of ‘facilitative provisions’ that would delineate responsibilities of member states to provide facilitation to the states bearing the primary responsibilities for accountability and redress, in order to assist them in overcoming the predictable obstacles to accountability. Finally, the guidelines might also specify that international proceedings, for instance, before an ICC would

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\textsuperscript{1244} Morris, n. 1228 above, p. 33.

\textsuperscript{1245} Ibid.
\end{flushleft}
serve as a backup to ensure that accountability and redress would be attained in cases where the relevant national authorities are unable or unwilling to do so.\textsuperscript{1246}

Several factors would be relevant in determining in each context the type of accountability and redress mechanisms required of states and the extent of their scope. The most obvious of these factors would be the nature of the offenses committed. Presumably, genocide, crimes against humanity of which torture is one and grave breaches of the Geneva Conventions would give rise to the strictest accountability and redress requirements in Guidelines that address a range of international crimes and human rights violations. The first line of response should be the provision of international facilitation in overcoming those obstacles in order to achieve the greatest possible measure of accountability and redress.\textsuperscript{1247}

\textbf{7.11 Final Considerations}

The involvement of the state in the practice of torture underlines the egregiousness of the crime, making it qualitatively different from an ‘ordinary’ crime.\textsuperscript{1248} Specific attention should be paid to the question of ‘superior orders’, which cannot be used as an excuse to commit torture.\textsuperscript{1249} In fact, officials are under a duty to disobey orders from a superior to commit torture. In many instances, this duty to refrain from torture despite an order to the contrary may be inconsistent with the general duty of officials, particularly those within strict hierarchical structures such as the police or the military, and will be most difficult to implement in protectionist, insular command structures. The implementation of this provision will not only require law reform in most cases, it will usually also require clear general directives to be

\begin{verbatim}
\textsuperscript{1246} Ibid.
\textsuperscript{1247} Ibid.
\textsuperscript{1249} Ibid., p. 42.
\end{verbatim}
issues coupled with effective independent oversight mechanisms so that junior officials have places to go when faced with this dilemma.\footnote{1250}

By portraying individual officials who commit torture as exceptional, states manage to distance themselves from their own responsibility. They can still point to their support for international standards on the prohibition of torture but may continue to engage in the abuse or sustain a culture of impunity. Moreover, while holding individual officials civilly and criminally responsible presents an essential component of the prohibition of torture, it cannot substitute or suffice for the accountability of the state itself. The point must be made that it is unacceptable for states to condemn human rights abuses that take place abroad and yet allow the perpetrators of those abuses to reside in their territory with impunity. The struggle to protect and preserve human rights should always begin at home.\footnote{1251}

The creation of a worldwide net of criminal responsibility is an important practical measure for the prevention of torture.\footnote{1252} Individuals will be less likely to commit acts of torture the greater the certainty that they will ultimately be publicly and severely held responsible for such acts.\footnote{1253} Even if they are act under authorisation or under orders by a regime that currently permits torture, a rigorous international and domestic criminalization of torture establishes a deterrent through the constant possibility of criminal prosecution by a subsequent regime, or in the course of travelling to another state.\footnote{1254}

\footnote{1250} Ibid.
\footnote{1251} Aceves, n. 11 above, p. 10.
\footnote{1252} Edouard Delaplace et al, n. 1044 above, p. 228.
\footnote{1253} Ibid.
\footnote{1254} Ibid., pp. 228-229.
CHAPTER 8

VICTIMS OF TORTURE

8.1 Introduction

Society must question and comment on the choices made in the past, rather than leave it to those who suffered to confront the consequences of those wrongs.\(^{1255}\) It is pertinent to mention from the outset that prevention is better than cure. If torture is already inflicted and the victim had suffered pain, in this situation, the damage has already been done hence there is need to ensure that the victim is given adequate compensation. In this regard, the observation made by Manfred Nowak is worth quoting in full.

“Each act of torture and ill-treatment, inflicted by one human being upon another, permanently scars all those touched by it and destroys our sense of common humanity. The practice of torture is so fundamentally at odds with the notion of civilized life that its legal prohibition is absolute. There exist no circumstances whatsoever which justify its use. It is one of those few norms under international law that has attained the status of jus cogens...Despite the absolute nature of the prohibition, it is a sad fact that torture and other forms of cruel, inhuman or degrading treatment continue to occur in various places around the world. Sometimes ill-treatment occurs openly, but most often it is deliberately hidden from public scrutiny, and perpetrators are readily able to control and eliminate the evidence of their misdeeds. Indeed, one of the purposes of torture and ill-treatment is to terrorise victims into silence so that the crime never emerges into the open. This implies that all those who struggle to end practices of torture, to ensure

the rights to a remedy for victims and to ensure that perpetrators are punished often face especially difficult challenges. Notwithstanding these obstacles, the fight against torture and ill-treatment is fuelled and strengthened by the courage of those who speak out against it. These voices are critical to the struggle against torture and other forms of ill-treatment because they remove acts of torture from the darkness and bring them into the light, exposing them for what they are and seeking to hold those who perpetrate them accountable.”

Effective and enforceable remedies for torture be they criminal sanctions, civil awards for restitution and compensation, administrative sanctions or other guarantees of non-repetition, are an essential precondition to the eradication of the odious ill that is torture once and for all. Equally, such measures serve to quell survivors’ feeling of powerlessness and disenfranchisement and acknowledge that what was done to them was wrong and deserving of punishment.

8.2 Redress to Victims of Torture

Torture is a crime, a serious human rights violation with traumatic physical and psychological consequences. For those who have suffered torture, and for their families, finding ways to move forward with their lives and forget about the trauma inflicted on them is a life long challenge. Broken bones take time to heal but it is the shattered spirits that are often the most difficult to repair. The deliberate abuse


1258 Ibid.

of individual’s physical and psychological integrity, in a way that is designed specifically to undermine their dignity, is devastating and disorienting to victims particularly when perpetrated by someone with the responsibility to protect rights.\textsuperscript{1260}

The process of seeking justice and reparation is, for some survivors, an essential part of their recovery process and a critical means by which they regain their dignity and sense of control. It may contribute substantially to the re-establishment of the victims’ quality of value, power, dignity and esteem, relieve the victims’ stigmatisation and separation from society and, ultimately restore confidence and legitimacy in the fairness of the justice system.\textsuperscript{1261}

Making perpetrators accountable recognises the seriousness of the offence of torture and serves to publicly acknowledge that a wrong has been committed and that such a wrong should not be tolerated. The revelation of the practice of torture and the investigation and punishment of perpetrators will also have a deterrent effect against the would-be perpetrators and the more institutionalised forms of torture. The universal prohibition of torture also strengthens the rule of law.\textsuperscript{1262}

The importance of justice and reparation is recognised as a right of victims.\textsuperscript{1263} The multiple individual and societal purposes that reparation serves have also been recognised in the seminal Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law.\textsuperscript{1264} These principles and

\textsuperscript{1260} Ibid.


\textsuperscript{1262} Redress, n. 1259 above.

\textsuperscript{1263} Article 14, CAT.
guidelines recognise that reparation can take the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. They are not limited to pecuniary damages but can also include measures with longer-term restorative objectives, verification of the facts and full and public disclosure of the truth, apology, including public acknowledgement of the facts and acceptance of responsibility, and judicial and administrative sanctions against those responsible.

8.2.1 Rights of the complainant and protection of the witnesses

A ‘complaint’ about torture is an important right for victims because it provides them with the opportunity to express dissatisfaction and disapproval of their treatment. This may contribute substantially to the re-establishment of their sense of control and dignity. It is also a means to an end, in that it gives notice to the competent authorities of the alleged commission of a crime. In this respect, the complaint serves as a basis for the competent authorities to begin an investigation as part of criminal or administrative proceedings into the alleged acts with a view to holding the perpetrators accountable.

Complaint against torture could also serve as a catalyst to obtain reparation. Consequently, the availability of effective complaint mechanisms will have wide implications for the prevention and punishment of torture as well as for obtaining remedies and reparation. As the Inter-American Court of Human Rights observed, failure to investigate allegations and complaints “has led to a situation of grave


1266 Redress, n. 1259 above, p. 5.

1267 Ibid.
impunity…[i]t is injurious to the victims, their next of kin and society as a whole, and fosters chronic recidivism of the human rights violations involved.”1268

It must be stressed that when victims of torture lodge complaints on torture, it serves as an indicator of the nature and extent of the practice in the country concerned. This may assist authorities to identify necessary reforms measures or to counter systemic problems.

Article 13 of CAT provides that:

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

State Parties are obliged to ensure that any individual who claims to have been subjected to torture or treated or punished in a cruel, inhuman, or degrading way has a right to lodge a complaint.1269 The individual's right under Article 13 is two-fold: it consists of the right to lodge a complaint to the competent authorities, and of the right to have the complaint investigated by the authorities promptly and impartially.1270

It must be mentioned that the form of the complaint is not important. According to Article 13 of CAT, it does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of

1268 Ibid.
1269 Wendland, n. 376 above, p. 53.
1270 Ibid.
intent to institute and sustain a criminal action.\textsuperscript{1271} It is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as an implied, but unequivocal expression of the victim's wish that the facts be promptly and impartially investigated.\textsuperscript{1272} A person making such a complaint has a right to have the complaint examined thoroughly and seriously, which means undertaking a formal investigation of the facts.\textsuperscript{1273} The investigation must take place irrespective of whether the suspect is known or present.\textsuperscript{1274}

It is possible for somebody to be a victim of a human rights abuse in an act perpetrated upon another. In such cases, the former individual might be termed the ‘indirect victim’ while the latter is the ‘direct’ victim.\textsuperscript{1275} For example, in \textit{Quinteros v. Uruguay}\textsuperscript{1276} the complaint arose out of the kidnap, torture, and continued detention by the Uruguayan security forces. A violation was also found in regard to the woman’s mother, who submitted the complaint on behalf of her daughter and herself. Due to the anguish, stress, and uncertainty caused by her daughter’s continued disappearance, that mental trauma was found to constitute ill-treatment contrary to Article 7 ICCPR.\textsuperscript{1277} In \textit{Schedko v. Belarus}\textsuperscript{1278} a similar violation of Article 7 was found in respect of the mother of a man who had been executed by the authorities, as those authorities failed to inform her of the date, hour and place of execution, and site of burial.\textsuperscript{1279}

\textsuperscript{1271} Ibid.


\textsuperscript{1273} Wendland, n. 376 above, p. 53.

\textsuperscript{1274} Ibid.


\textsuperscript{1277} Sarah Joseph et al, n. 1275 above, p. 55.


\textsuperscript{1279} Ibid.
8.2.2 Factors hindering submissions of complaints

In some circumstances, a victim is simply unable to submit or authorise the submission of a complaint. For example, the victim may be dead or may be incarcerated incommunicado detention and unable to make contact with the outside world.\footnote{1280}{Sarah Joseph et al, n. 1275 above, p. 56.} If this is the case, another person has \textit{locus standi} to bring the complaint if he/she can establish that the victim would likely have consented to his/her representation before the relevant Committee.\footnote{1281}{Ibid.} A close family connection will normally suffice in this regard. It is less likely that the Committees will recognise the standing of people who are not family members in such a situation.\footnote{1282}{Ibid.}

In \textit{Mbenge v. Zaire}\footnote{1283}{Comm.. No. 16/1977, Human Rights Committee, (25 March 1983).} for example, the HRC held that the author of the complaint could represent his relatives but he could not represent either his driver or his pharmacist. If circumstances change so that a victim who has been unable to authorise a complaint becomes able to authorise it, then that victim must give his/her or her authorisation for the consideration of the complaint to continue. For example, in \textit{Mpandanjila et al v. Zaire}\footnote{1284}{Comm.. No. 138/1983, Human Rights Committee, (26 March, 1986).} the complaint was originally submitted on behalf of 13 people detained incommunicado. These people were released while the HRC’s decision was pending. The complaint continued only in respect of 9 of the 13 people, as four people did not explicitly give any authorization for the complaint to continue on their behalf.\footnote{1285}{Sarah Joseph et al, n. 1275 above, p. 56.}
If a complaint is in the process of being considered by the relevant Committee and the author dies, an heir of the author may proceed with the complaint.\textsuperscript{1286} If no heir instructs that Committee, the case will be discontinued.\textsuperscript{1287}

A criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any persons who might have been involved therein. Although forensic medical reports are important as evidence of acts of torture, they are often insufficient and have to be compared with and supplemented by other information.\textsuperscript{1288}

States Parties should protect the complainant and prevent any victimization and reprisals. Authorities should be made sensitive to the consequences of making a complaint and the vulnerable situation of the complainant. Therefore, States should eliminate the risk of victimisation by ensuring that the complainant is in a safe place, which could include changing the personnel in contact with him/her, moving the individual to a different place, or ensuring the presence of a witness during further interrogations. In case the complainant is a detainee, the individual should be moved to a safer place of detention.

States are further required to protect any witnesses that give evidence to the investigation. In the case of \textit{Baraket v. Tunisia},\textsuperscript{1289} CAT considered that the magistrate, by failing to investigate the complaint of torture more thoroughly, committed a breach of the duty of impartiality imposed on him. This required that equal weight be given to both accusation and defence during the investigation. As a consequence, HRC held that the State had breached its obligation under Articles

\textsuperscript{1286} \textit{Croes v. The Netherlands} (164/84); Hopu and Bessert v. France 549/1993); Arenz v. German (1138/02).

\textsuperscript{1287} \textit{Wallen v. Trinidad and Tobago} (576/94), § 6.2.

\textsuperscript{1288} Wendland, n. 376 above, p. 53.

\textsuperscript{1289} Comm. No. 60/1996, Committee against Torture, (10 November 1999).
12 and 14 to proceed to an impartial investigation whenever there is reasonable ground to believe that an act of torture has been committed.\textsuperscript{1290}

**8.3 Duty to Compensate Victims**

If the investigation referred to in Articles 12 and 13 forms the start of possible penal and often also disciplinary measures, Article 14 provides for civil legal recourse for victims of torture. States Parties are obliged to guarantee in their national laws that a victim of an act of torture obtains redress and also has an enforceable right to a fair and adequate compensation, including the means for as full rehabilitation as possible.\textsuperscript{1291}

In 1989, Professor Theo van Boven was entrusted by the United Nations with a study on the right to restitution, compensation, and rehabilitation for victims of gross human rights violations. This resulted in Draft Basic Principles and Guidelines (1997), in which he concluded that reparation is the only appropriate response to such victims. The study outlined four main forms of reparation, namely restitution; compensation; rehabilitation; satisfaction and guarantees of non-repetition.\textsuperscript{1292}

Professor M. Cherif Bassiouni, continued the work of Professor van Boven and submitted to the UN Commission on Human Rights (2000) a set of Draft Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law. These Guidelines aim to provide guidelines for the concept of redress and reparations for victims of, \textit{inter alia}, torture.\textsuperscript{1293}

\textsuperscript{1290} Ibid.

\textsuperscript{1291} Gabriela Echeverria, n. 1261 above, pp. 153 and 159.

\textsuperscript{1292} Wendland, n. 376 above, p. 53.

\textsuperscript{1293} Ibid.
8.3.1 Compensation and rehabilitation

It is pertinent to mention that redress involves recognition that harm has been done to the person. Compensation generally, but not always, takes the form of payment of an amount of money. However, Sir Nigel Rodley, the former Special Rapporteur on Torture, pointed out that financial compensation will not always be the appropriate remedy [for human rights violations], and where it is, its measure will be uncertain. The obligation of Article 14 involves not only the provisions of material compensation and redress, but also physical, mental, and social rehabilitation.

Any amount paid in compensation must be fair and adequate and therefore not symbolic. The State is left to decide what is fair and adequate. Non-material damage must also be compensated. However, the Committee against Torture has called various States to account on inadequate provisions for compensation and rehabilitation of torture victims. Article 14 of CAT requires States to ensure that victims of torture are able to obtain redress and fair and adequate compensation, including the means for as full rehabilitation as possible. If the victim should die, his/her heirs have a right to compensation. Spouses and children are normally considered as next of kin. However, the next of kin can also include other relatives, if they can show that they depended upon the financial support of the deceased.

A number of cases before the Committee against Torture illustrate how the Committee has approached the issue of compensation and others. In *Urra Guridi v.* [1294] Nigel Rodley, The International Legal Consequences of Torture, Extra-Legal Execution, and Disappearance, in Lutz, Hannum and Burke (eds.), New Directions in Human Rights, University of Pennsylvania Press, May 1989, p. 172.

[1295] Gabriela Echeverria, n. 1261 above, p. 153. Noting that rehabilitation (medical/psychological) services may be provided ‘in kind’ or the costs may form part of a monetary award.


Spain 1299 the Committee against Torture found that the light penalties and pardons conferred on civil guards, who had tortured the complainant, along with an absence of disciplinary proceedings against those guards, constituted breaches of Article 14. The victim had in fact received monetary compensation for the relevant acts of torture, but the Committee against Torture found that the lack of punishment for the perpetrators was incompatible with the State’s duty to guarantee the non-repetition of the violations. 1300 Thus, Article 14 provides not only for civil remedies for torture victims, but, according to this case, a right to restitution, compensation, and rehabilitation of the victim, as well as a guarantee of non-repetition of the relevant violations, and punishment of perpetrators found guilty.

In its concluding observations on Turkey, the Committee Against Torture stated that relevant types of compensation for the purposes of Article 14 should include financial indemnification, rehabilitation and medical and psychological treatment. 1301 States should also consider establishing a compensation fund. 1302

In a number of cases against Serbia and Montenegro, Article 14 violations have been entailed in the State party’s refusal to conduct a proper criminal investigation into allegations of torture, thus effectively depriving the victim of a realistic chance of launching successful civil proceedings. 1303 The right under Article 14 rights do not explicitly extend to victims of violations of Article 16.

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1299 (CAT 212/02), paragraph 68.

1300 Ibid.

1301 Sarah Joseph et al, n. 1275 above p. 234.

1302 Ibid.

1303 Dimitrijevic v. Serbia and Montenegro (CAT 172/00).

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However, in *Dzemajl et al v. Yugoslavia*, the Committee against Torture found that the positive obligations that flow from the first sentence of Article 16 of the CAT include an obligation to grant redress and compensate the victims of an act in breach of that provision. Thus failure by the State to provide ‘fair and adequate’ compensation where a person has suffered cruel, inhuman or degrading treatment or punishment, is in violation of its obligations under Article 16.

In its concluding observations on the US, the Committee against Torture was concerned that civil actions against federal prison authorities were only available if there is ‘a prior showing of physical injury’. It recommended that legislation be amended to remove any limitation on the right to bring such civil actions.

In its concluding observations on Nepal, the Committee against Torture confirmed that there should be no statute of limitations for the registering of complaint regarding torture, and that civil action for compensation should be able to be brought within two years of the publication of the conclusions of relevant inquiries.

Existing domestic laws may have a better system of compensation, for example, by awarding larger amounts of compensation than those implied by CAT. Domestic laws may also entitle a wider range of persons to be considered as victims and thus enabled them to sue for compensation. There is no strict definition of who is considered as victims and thus enabled them to sue for compensation. There is no strict definition of who is considered a victim, but by reading Article 14 in conjunction with Article 1, a victim should be any person who has suffered physically or mentally as a result of any act of torture.

1304 (CAT 161/00), § 9.6
1305 Ibid.
1306 Sarah Joseph et al, n. 1275 above, p. 234.
1307 Ibid., p. 235.
Article 14 is not expressly applicable in cases of cruel, inhuman, or degrading treatment or punishment. This does not mean, however, that States may not be bound under other instruments to offer compensation in the case of a cruel act that is not considered to be torture. The ICCPR provides in Article 7 (3) for a comparable, but more generally worded provision on the issue of redress, which is equally applicable to crimes of torture and to crimes of cruel, inhuman, or degrading treatment of punishment. Despite the wording of the provision, the Committee against Torture has also considered Article 14 to be applicable in cases of cruel, inhuman, or degrading treatment or punishment:

“In all situations where reasonable grounds exist to believe that these amounted either to torture or to other forms of cruel, inhuman or degrading treatment, the dependants of the deceased victims should, according to Article 14 of the Convention, be afforded fair and adequate compensation.”¹³⁰₈

8.4 Inter-American Jurisprudence on Reparation

Article 63(1) of the American Convention on Human Rights establishes that if the court finds a violation of the rights protected by this treaty, the Court must provide, where appropriate, for adequate reparation to the victim.¹³⁰⁹ The Court ruled that the duty to ensure entails an obligation to make adequate reparations.¹³¹₀ As regards torture, Article 9 of the Inter-America Convention on Torture obliges States to incorporate into their domestic laws the duty to provide suitable compensation for torture victims. This provision, however, appears not to include an obligation to make reparations for other cruel, inhuman or degrading treatment or punishment.

¹³⁰₈ CAT/C/SR.294/Add.1§ 23, under E, 7.
¹³⁰⁹ Rodríguez-Pinzón et al, n. 476 above, p. 144.
¹³¹₀ Ibid.
The court has consistently stated that it is a principle of international law, and ‘even a general concept of law’, that every violation of an international obligation that results in damage triggers a duty to make adequate reparation.\(^{1311}\) Each aspect of this obligation, scope, nature and determination of beneficiaries is regulated by international law and therefore cannot be modified by a State’s domestic legislation.\(^{1312}\) The court stated in its initial jurisprudence that compensation was the most common form of redress for human rights violations,\(^{1313}\) However, in recent years, the court has expanded the non-pecuniary measures awarded to victims of human rights violations.\(^{1314}\)

The court has determined that reparation for violations of international obligations must take the form, if possible, of full restitution which consists in the restoration of the situation prior to the violation, the reparation of the consequences of the violation and monetary compensation for material and non-material damages, including emotional harm.\(^{1315}\)

Where full restitution is not possible it is for the court to determine a set of measures, in addition to ensuring the rights abridged, to address the consequences of the infractions, as well as ordering payment of compensation for the damage caused.\(^{1316}\) The guiding principle is that reparation must seek to remove the effects of the violation.\(^{1317}\) The nature and amount of compensation

\(^{1311}\) Ibid., p. 145.

\(^{1312}\) Ibid.

\(^{1313}\) Ibid.


\(^{1315}\) Rodríguez-Pinzón et al, n. 476 above, p. 145.

\(^{1316}\) Ibid.

depend on the damage inflicted and therefore are directly related to the specific violation found by the court.\textsuperscript{1318}

According to the practice of the court, adequate reparation includes pecuniary and non-pecuniary damages as well as legal costs and expenses. Pecuniary damages include the victim’s loss of or reduction in income, lost earnings as well as expenses incurred by the victim or his/her family as a result of the human rights violation and consequential damages.\textsuperscript{1319} In recent decisions, the court has included in its pecuniary damages orders for the restoration of the loss of family assets resulting from the human rights violation.\textsuperscript{1320}

Generally, the amount of pecuniary damages awarded is based on the victim’s particular profession or economic situation.\textsuperscript{1321} The court has decided cases in which the victims had no established profession because they were deprived of their liberty,\textsuperscript{1322} or were children.\textsuperscript{1323} The court has also awarded material damages to internally displaced victims who lacked documentation of their assets or earnings.\textsuperscript{1324} In all these cases, the court assessed pecuniary damages on the basis of equity\textsuperscript{1325} and, in some circumstances, on the basis of the minimum wage in the country.\textsuperscript{1326}

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\textsuperscript{1318} Ibid.  \\
\textsuperscript{1319} Rodríguez-Pinzón et al, n. 476, p. 146.  \\
\textsuperscript{1320} Gutiérrez-Soler v. Colombia, Judgment of September 12, 2005, Inter- American Court of Human Rights, (Ser. C) No. 132, paragraphs 77-78.  \\
\textsuperscript{1323} Street Children v. Guatemala (Villagrán-Morales et al.), Reparations (Article 63(1) American Convention on Human Rights), Judgment of May 26, 2001, Inter- American Court of Human Rights, (Series. C) No. 77.  \\
\textsuperscript{1324} Pueblo Bello, n. 1317 above, paragraphs 247-248.
\end{flushright}
On the other hand, non-pecuniary damages include both the sufferings and affliction caused to the direct victims and their next of kin, the impairment of highly significant personal values and also the changes of a non-pecuniary nature in the lives of the victim or his family. As it is not possible to assign a precise monetary equivalent to non-pecuniary damage, there are only two ways in which it can be compensated. Firstly, by the payment of an amount of money or the delivery of goods or services of a significant financial value, which the court determines by the reasonable application of legal discretion and fairness. Secondly, by the execution of acts or civil works of a public nature or with public impact that have effects such as the recovery of the victims’ memory, acknowledgement of their dignity, consolation of their next of kin, or dissemination of a message of official disapproval of the respective human rights violations and of commitment to efforts to ensure that they do not happen again.  

In general, with regard to material or pecuniary damages, the court awards monetary payment. In some cases, however, the court has found that the decision recognizing the violation of the victim’s rights constitutes sufficient reparation.

With regard to non-pecuniary damages, the court has developed an innovative approach to the scope of measures of redress ordered from States. For example, the court in recent cases has ordered States to adopt stricter measures to protect persons deprived of their physical liberty from being subjected to mistreatment. In Sánchez, the court ordered Honduras to create a national record of detainees in order to monitor the legality of arrests carried out by State agents and also to

1325 Ibid., paragraph 248.
1326 Street Children v. Guatemala, n. 1323 above.
1327 Trujillo-Oroza v. Bolivia, paragraph 77.
1328 Ibid., paragraph 79.
1329 Cantos v. Argentina, Judgment of November 28, 2002, Inter- American Court of Human Rights, (Series C) No. 97, paragraph 71.
prevent violations of the right not to be tortured or subjected to other forms of cruel, inhuman or degrading treatment.\textsuperscript{1330} The registry must include the name of the person arrested, the reasons for his/her detention, the authority ordering the detention, the date and time of the detention and release, as well as information regarding the applicable warrant.\textsuperscript{1331}

For that reason, the court ordered the State to amend its domestic legislation to ensure respect for these rights in the future.\textsuperscript{1332} Furthermore, in \textit{Gutiérrez Soler}, the court ordered the State to implement a program to train doctors, judges and prosecutors on the United Nations Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol") in order to prevent future acts of torture.\textsuperscript{1333} The Court also ordered the State to strengthen the existing monitoring mechanisms in its national detention centers.\textsuperscript{1334} The State must perform a medical examination of the detainee immediately upon detention, periodically assess the mental health of the detention center’s personnel and authorize regular access to detention centers for representatives of official human right institutions.\textsuperscript{1335}

In cases where a violation of the right not to be tortured or subjected to cruel, inhuman or degrading treatment was found, the court has, as a form of reparation, ordered the State to carry out an effective investigation to identify the perpetrators and where warranted, to punish them according to domestic law.\textsuperscript{1336} In this regard, victims and their families must have full access to and participation in criminal

\begin{flushright}
\textsuperscript{1330} Juan Humberto Sánchez, paragraph 189.
\textsuperscript{1331} Ibid.
\textsuperscript{1332} Ibid., paragraph. 144.
\textsuperscript{1333} Gutiérrez Soler, paragraph 110.
\textsuperscript{1334} Ibid., paragraph. 111.
\textsuperscript{1335} Ibid., paragraph. 112.
\textsuperscript{1336} Tibi, p. 258.
\end{flushright}
proceedings and investigation results must be publicly available.\textsuperscript{1337} In \textit{Tibi}, the court ordered the State to publish the relevant parts of its decision in the State official publication, in another national Ecuadorian newspaper and in a widely circulated French newspaper.\textsuperscript{1338} In addition, the State was ordered to acknowledge its international responsibility for the events that transpired in the case through a written declaration published in Ecuadorian and French newspapers.\textsuperscript{1339}

With respect to legal costs and expenses, the court has held that it is for the court to assess the scope of reimbursement, including expenses incurred before the authorities under domestic jurisdiction and those incurred in the course of the proceeding before the inter-American system, bearing in mind the circumstances of the specific case and the nature of international jurisdiction for the protection of human rights. This should be based on the principle of fairness and take into account the expenses stated by the parties, insofar as their quantum is reasonable.\textsuperscript{1340} Based on its findings of violations to the American Convention, the Inter-American Commission recommends to the responsible State that it make appropriate reparations to redress these violations. However, the Commission does not specify in its public reports the scope or nature of those reparations.\textsuperscript{1341}

\textbf{8.5 Non Use of Statements Obtained form a Breach of CAT}

The non use of statements obtained through torture or other prohibited treatment in judicial proceedings is guaranteed by Article 15 of CAT. This duty is absolute, and there are no exceptions. This issue has become topical during the ‘war on terror’,

\begin{itemize}
\item \textsuperscript{1337} Juan Humberto Sánchez, paragraph. 186.
\item \textsuperscript{1338} Ibid., paragraph 260.
\item \textsuperscript{1339} Ibid., paragraph 261.
\item \textsuperscript{1340} Myrna Mack-Chang, paragraph 290.
\item \textsuperscript{1341} Corumbiara Massacre, paragraph 307.
\end{itemize}
with the question arising as to the extent, if at all, such evidence can be used to prosecute terrorist suspects. Regardless of the dangers posed by terrorism, it is necessary that such statements ought not to be admitted in evidence.\textsuperscript{1342}

Article 15 applies to statements made by a tortured person about him/herself, as well as statements made about third parties. In \textit{P.E v. France},\textsuperscript{1343} the complainant argued that her proposed extradition from France to Spain was based on statements that had been extracted from a third party under torture. The CAT Committee confirmed that each State party must “ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture.”\textsuperscript{1344} However, the claim was found to be unsubstantiated so no violation was found.

In its concluding observations on the UK, the Committee against Torture expressed concern over a lower test of admittance of confessions in terrorism cases in Northern Ireland, as well as the permissibility of derivative evidence.\textsuperscript{1345} It is paramount that those who are responsible for committing torture and subjecting individuals to forms of ill-treatment are held to account and are properly punished, no matter who they are.\textsuperscript{1346}

However, taking action against those who are responsible for such acts, and holding States to account for such actions when they themselves are or become responsible, is simply not enough to adequately address the problem. What must

\begin{flushright}
1343 (CAT193/01), § 6.3.
1344 Ibid.
1345 Concluding Observations on the UK, (1999) UN doc. A/54/44, § 76; Concluding Observations on UK, (2004) UN doc. CAT/C/CR/33/3, § 5. Direct use of compelled evidence arises when that evidence is itself used to incriminate a person in legal proceedings. ‘Derivative’ use arises when the compelled evidence is indirectly used to uncover further evidence, and that latter evidence is used to incriminate a person.
\end{flushright}
be sought is not only to outlaw the practice, but also to prevent the practice. States should live up to their international obligations, both legally, and ethically, by punishing those who commit acts of torture or treat others in an inhuman or degrading fashion. It is often less easy for States to accept that it is necessary to respond to the needs of those who have been the victims of such ill-treatment in an appropriate manner.

8.6 Final Considerations

The HRC usually interprets Articles 14 and 15 which stipulates torture only to include cruel, inhuman and degrading treatment or punishment. This is a wider interpretation than the text of CAT suggests.1347 This approach enables the HRC to free itself of the limitations of CAT. A victim of torture who lodged complaint to the HRC, if such complaint is successful will be entitled to redress and compensation even if the allegation borders on ill-treatment. The HRC does not consider the degree of severity, threshold etc in order to hold whether the act amounts to torture or not.1348

The ends of justice would be met if the government accepts responsibility for rehabilitation and compensation for victims of torture where individual responsibility for torture cannot be clearly established.1349 Ingelse suggests that:

“It would be better if victims did not have to go through a judicial procedure, but that they would have an automatic right to compensation, redress and rehabilitation by the authorities.”

1347 Ingelse, n. 21 above, p. 383.

1348 Ibid.

Moreover, it was this view that established the important link between impunity and the lack of redress. A consequence of impunity was that victims could not make use of their right to an investigation into complaints of torture and of their right to redress. The Committee against torture expressly rejected this impunity.\textsuperscript{1350}

This researcher subscribed to the above view. More importantly is the issue to prosecute. Both Articles 7 and 14 of CAT should form the basis of criminal responsibility. This will limit or reduce impunity. If this is not done, it would seem to suggest that impunity is being condoned. It is trite that impunity means that the victim will not obtain redress.\textsuperscript{1351}

Torture by its very nature can be state sanctioned and is often allowed to thrive in an environment where the rule of law and the independence of the judiciary is markedly absent.\textsuperscript{1352} This may render illusory national prospects for accountability and redress. The difficulty of survivors to seek redress in location where torture took place,\textsuperscript{1353} coupled with few opportunities to bring a case at the international level, often makes national courts of other states the only other prospects for some measure of justice.\textsuperscript{1354}

The issue of rendition is a contemporary phenomenon. Some states are engaging in rendition and extra-ordinary rendition. The U.S. has been singled out as the main perpetrator of these acts. It seems apparent that most of the UN organs have not vigorously spoken out against this newly reintroduced mode of torture.

\textsuperscript{1350} Ingelse, n. 21 above, pp. 3-4.

\textsuperscript{1351} Ibid., p. 4.

\textsuperscript{1352} Ferstman, n. 1257, p. 182.

\textsuperscript{1353} Gabriela Echeverria, n. 1261 above, p. 152.

\textsuperscript{1354} Ferstman, n. 1257 above, p. 182.
CAT certainly offers the basis as procedure for bringing perpetrators to justice and provides redress for the victims. It will be a welcome idea if those who are fighting torture and other ill-treatments can utilize same to obtain redress for the victims. It is suggested that the HRC and other adjudicating bodies make use of this procedure and ensure that perpetrators are brought to justice.

With regard to the principle of universal jurisdiction, it is pertinent to stress that the principle is not limited to criminal prosecution. Some states have extended the application of universal jurisdiction to civil proceedings. For example, universal jurisdiction has been used to authorize tort remedies for victims of human rights violations. As indicated by the U.S. Senate:

“[s]tates have the option, under international law, to decide whether they will allow a private right of action in their courts for violations of human rights that take place abroad.”

This interpretation is consistent with CAT, which requires states to ensure that their legal systems provide redress and an enforceable right to fair and adequate compensation for torture victims.


1356 Restatement (Third), § 404.


1358 Article 14 of CAT.
9.1 Conclusions

The most important thing to do to help stop torture is simply to speak out against it. This applies especially in countries in which it occurs, but outsiders can do a lot as well. Campaigns by Amnesty International and other human rights groups do have an impact. Unfortunately, most people are simply bystanders. Many have an unconscious belief that if people are tortured, then they must be guilty of something. This is certainly not the case. Many victims who are caught up in torture systems do not even know what they did and why they are there. In any case, torture can never be justified in any humane society. Remedies and sanctions thus affirm, reinforce, and reify the fundamental values of society.

More often than not, governments officially renounce torture but this is not the reason to be complacent because in most cases, the renouncement is a mere lip service. Torture is unpleasant even to think about, but it deserves much more attention. Systemic torture is fostered and perpetuated by actors and organizations inside and outside the torture environment. For instance, the


1360 Conroy, n. 541 above, p. 4. Noting that the indifference demonstrated by bystanders in the face of other people’s suffering has been widely studied, particularly since the murder of twenty eight year old Kitty Genovese on March 13, 1964, in Queens, New York. It took the killer about thirty minutes to kill the victim, yet, not one of those persons who witnessed the murder called the police or came to the victim rescue.

1361 Martin, n. 1359 above.


1363 Martin, n. 1359 above, p. 29.

direct perpetrators of Abu Ghraib torture guards and some interrogators, government and private persons could not have serially tortured without a range of facilitators who provided organizational, technical, legal, and financial support for their violence.\footnote{1365} In the immediate torture environment, facilitators included translators, medical doctors, nurses, medics, guards, and dog handlers, among others. In addition, the torturers include heads of state, their ministers, ambassadors, lawyers, and heads of departments, to name a few. It must be emphasized that facilitators are even more essential to the long term stability of a torture system than its more visible direct perpetrators. For instance, Martha K et al assert that “torture during Brazil’s military period could not have persisted for over twenty years without the active and passive complicity of facilitators.” This is as true for the US and other liberal democracies.\footnote{1366}

One of the numerous steps to stop torture is for the State to accept that it needs to take upon itself the task of prevention.\footnote{1367} Effective prevention requires intervention to protect those at risk. Rarely can this be done on an individualised basis, though if a specific risk is known, that risk can be averted. The key to preventing torture lies in accepting the need to put in place mechanisms that can lessen the likelihood of torture and ill-treatment from occurring.\footnote{1368} All law enforcement officials must be accountable to independent judicial and disciplinary authorities.\footnote{1369} This must be coupled with a combination of independent and internal oversight and complaint mechanisms that undertake regular visits to places of detention.\footnote{1370} At times these mechanisms and procedures can appear

\footnote{1365 Ibid.}
\footnote{1366 Ibid.}
\footnote{1367 Evans, n. 1346 above, p. 65.}
\footnote{1368 Ibid.}
\footnote{1369 Edouard Delaplace et al, n. 1044 above, p. 226.}
\footnote{1370 Ibid.}
onerous, and, may hamper the work of law enforcement agencies in doing their
difficult but vital tasks.\textsuperscript{1371}

The ultimate test of a State’s commitment to ensure that ‘no one shall be subjected
to torture or to cruel, inhuman or degrading treatment or punishment’ is the extent
to which it is willing to accept limitations upon the powers of its own officials. It
requires readiness to interfere with their powers in the interests of extending
protection to those who are in a position of weakness and vulnerability, irrespective
of who they are or of what they might be suspected of.\textsuperscript{1372} It is only when States
can be seen to be addressing torture and ill-treatment that it can truly claimed that
they are working towards the realisation of this most fundamental of human right.

There are opportunities for the various human rights bodies with responsibility to
adjudicate on any allegation of torture and deliver a decision based on the case
brought before them. Often, these bodies are not courts,\textsuperscript{1373} but ‘quasi-judicial’
bodies. Their decisions and views may lack the force of being legally binding.
However, the provisions of the ICCPR and CAT are legally binding. As both
Committees authoritative interpreters of their respective treaties, rejection of their
recommendations may be evidence of bad faith by a State towards its human
rights treaty obligations.\textsuperscript{1374}

The human rights bodies serve numerous significant purposes. First, the views,
recommendations, and other jurisprudence of the Committees have had the effect
of changing the behaviour of States on a number of occasions.\textsuperscript{1375} Such changes
may occur immediately, or much later, for example, after a State has undergone a

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1371} Evans, n. 1346 above, p. 65.
\item \textsuperscript{1372} Ibid.
\item \textsuperscript{1373} Sarah Joseph et al, n. 1275 above, p. 49.
\item \textsuperscript{1374} S. Joseph, \textit{Toonen v Australia: Gay Rights under the ICCP’}, (1994) 13 University of Tasmania Law
Review 392, p. 401.
\item \textsuperscript{1375} Sarah Joseph et al, n. 1275 above, p. 49.
\end{enumerate}
\end{footnotesize}
transition from dictatorial to democratic government. It could be gradual as
governments slowly reform themselves. There may be strong opposition against
an abusive government both at home and abroad. In order to show that a State is
willing to uphold its international obligation to outlaw torture, the State can inject
human rights issues into domestic debates and provide indicators for future
reform. 1376

One must not underestimate the effect that ‘naming’1377 and ‘shaming’ can have on
a delinquent state and individual perpetrators. It exposes the lackadaisical attitudes
of those involved in torture and this, is in itself, is an important form of
accountability. 1378 One traditional tool for preventing or discouraging human rights
violations is embarrassment. 1379 States would not want to be embarrassed by
adverse human rights findings. It is therefore mortifying for a State to be labelled a
torturer. Adverse findings of torture or other human rights violations help to build
pressure upon a State which may eventually bear fruit by prompting that State to
abandon torture as a policy. 1380 National and international human rights concerns
can operate in tandem to expose violations and spark criticism of government
involvement in torture and other inhuman treatment. 1381 International attention can
also lay the groundwork for encouraging formal enforcement and prosecution of
individual perpetrators. 1382 It may even bear more immediate fruits by leading to
the provision of a remedy for the victims. 1383

1376 Ibid., p. 50.
1377 Méndez, (n. 1033 above.
1378 Sarah Joseph et al, n. 1275 above, p. 50.
1379 Robert Kent, Julie A. Mertus’ Bait and Switch: Human Rights and U.S. Foreign Policy, 18 Harvard
1381 Ralph Steinhardt, The Role of Domestic Courts in Enforcing International Human Rights Law, in Guide
1382 Kathryn Sikkink, A Typology of Relationships Between Social Movements and International
Jurisprudence of all the human rights bodies serve functions beyond enforcement. It provides important indicators of the meaning of the various rights in the human rights instruments banning torture. For example, jurisprudence helps to identify the practices which can be classified as torture, or cruel inhuman or degrading treatment, and which can not.\footnote{1384 Jurisprudence helps to determine the human rights status of certain phenomena, such as amnesty laws or corporal punishment. Such interpretations are of use to all States, rather than only the State or individual concerned in a particular case. It is crucial to understand and recognise the contexts in which torture occurs in order to combat it.\footnote{1385 In this respect, the decisions of the human rights bodies influence national courts and governments all over the world.}} Jurisprudence helps to determine the human rights status of certain phenomena, such as amnesty laws or corporal punishment. Finally, the jurisprudence developed under various treaties reinforce the crucial message that all acts of torture are simply unacceptable in all circumstances.\footnote{1386 The uniform recognition by States that torture is in fact intolerable is an important step forward for human rights recognition and enforcement.\footnote{1387 A primary issue preventing implementation against torture may relate to lack of a process and understanding, within a State, of how to implement the recommendations. For example, de Zayas suggests that:}}

\begin{quote}
“[t]he main obstacle to implementation is not the unwillingness of state parties to cooperate but the lack of a mechanism in domestic law to receive and implement
\end{quote}

\footnote{1383 Sarah Joseph et al, n. 1275 above, p. 49.}
\footnote{1384 Ibid., p. 50.}
\footnote{1385 Ibid., pp. 50-51.}
\footnote{1386 General Comment 29 on States of Emergency (Article 4) of the UN Human Rights Committee, CCPR/C/21/Rev.1/Add.11, 31 August 2001, at paragraph 14.}
\footnote{1387 Sarah Joseph et al, n. 1275 above, p. 49, p. 51.
decisions emanating from a foreign entity. In such situations, the follow-up process is an invaluable means of rendering a State accountable.\(^{1388}\)

9.2 Recommendations

The prohibition of torture and ill-treatment is now deeply embedded in customary international law and binding upon all States.\(^{1389}\) Therefore, it is necessary that State practice conform to international law. But States should do more than this. They should be seen to reflect the prohibition within their domestic legal order at the highest level, for example, through constitutional guarantees and domestic bills of rights.\(^{1390}\) However, such proclamations are insufficient, as the international community has recognised.\(^{1391}\) In consequence, it has developed two separate but complimentary approaches: the development of mechanisms for considering allegations of human rights violations at the international level and for requiring the criminalization of torture at the national level.

It is recommended that States should reflect this in their own practice and ensure that acts which fall within the definition of torture under Article 1 of CAT are offences within their national legal systems.\(^{1392}\) In addition, the offence must also cover acts constituting complicity or participation in torture, not solely the individual who directly causes pain or suffering.\(^{1393}\) The seriousness of the offence also requires that a sufficiently severe penalty be applied in all cases of torture.\(^{1394}\)

More importantly, they should ensure that their courts have jurisdiction and the


\(^{1389}\) Evans, n. 1346 above, p. 164.


\(^{1391}\) Ibid.

\(^{1392}\) Edouard Delaplace et al, n. 1044, pp. 227-228.

\(^{1393}\) Article 4 (1) of CAT.

\(^{1394}\) Ibid., Ingelse, n. 21 above, pp. 9341-342.
competence to hear cases concerning allegations of torture irrespective of where the alleged torture took place, the nationality of the alleged torturer or the of the victim.1395

It is also important that national legislation should be purged of exceptions based on notions such as ‘necessity’, ‘national emergency’, ‘public order’ or ‘superior orders’ or other purported justifications.1396 These are the cracks through which torture and ill-treatment seeps into. More importantly, persons who refuse to obey orders to commit torture and ill-treatments should not to be intimidated or subjected to punishment.

It must also be mentioned that even if the most well constructed domestic law criminalizing torture and ill-treatment is legislated, it is practically worthless if it is not used.1397 What are torturers to think if they know that what they are doing has been expressly outlawed and is subject to severe criminal penalties but in practice the legislation is not used. Such a failure could itself be considered evidence for non condemnation of ill-treatment.

Readily accessible and fully independent mechanisms should be in place to which all persons, irrespective of whether they are currently in detention or not can bring their allegations of torture. Firstly, an investigation must be initiated whenever a person claims to have been or appear to have been ill-treated so that he/she can appear before judicial authorities. Where prosecutions are brought, it is important that alleged victims, witnesses and those giving evidence are made to feel sufficiently secure so that they may contribute towards the prosecution of the case without fear.1398

1395 Evans, n. 1346 above, p. 164.
1396 Dinah Shelton, n. 1362 above, p. 98.
1397 Evans, n. 1346 above, p. 68.
1398 Edouard Delaplace et al, n. 1044 above, p. 238.
In States which have developed a practice of bringing criminal prosecutions against those who are suspected of committing acts of torture, there may be a reluctance to prosecute in certain circumstances. In some cases, this reluctance may be quite justifiable but even where this is so there are usually other possibilities which need to be explored.\textsuperscript{1399} For example, those with operational or political responsibility for acts of ill-treatment should be susceptible to legal process. Consequently, military commanders and superiors can be held criminally liable if they order, induce, instigate, aid, or abet in the commission of a crime. This is a principle recognized under international law. In addition, the doctrine of ‘command responsibility’ or ‘superior responsibility’, holds that individuals who are in civilian or military authority may, under certain circumstances, be criminally liable not only for their actions, but for the crimes of those under their command.\textsuperscript{1400}

In most states, there will be a requirement to place specific attention to the question of ‘superior orders’ cannot be used as an excuse to commit torture. In fact, officials are under a duty to disobey orders from a superior to commit torture. In many instances, this duty to refrain from torture despite an order to the contrary may be inconsistent with the general duty of officials, particularly those within strict hierarchical structures such as the police or the military, and will be most difficult to implement in protectionist, insular command structures. The implementation of this provision will not only require law reform in most cases, it will usually also require clear general directives to be issues coupled with effective independent oversight mechanisms so that junior officials have places to go to when faced with this dilemma.\textsuperscript{1401}

\textsuperscript{1399} Ibid., p. 69.


\textsuperscript{1401} Redress, Bringing the International Prohibition of Torture Home, National Implementation Guide for the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, January 2006, p. 38.
There should be no *de jure* or *de facto* immunity from prosecution for nationals suspected of torture, and the scope of immunities for foreign nationals should be as restrictive as possible under contemporary international law. Prompt consideration should be made of extradition requests from third States in accordance with international standards. Rules of evidence properly reflect the difficulties of substantiating allegations of ill-treatment in custody. Other appropriate action, civil, disciplinary or administrative must be taken where criminal charges are unlikely to be sustained because of the high standard of proof required.

The prosecution and punishment of those responsible for torture and ill-treatment is a vital component of the realisation of human rights. Where the human right ‘not to be subjected to torture or ill-treatment’ has been breached, it can also form an important part of the response of the State to the wrong done to the victim, his/her family and community. Full reparation for the wrong identified and punishment of the offender remains the responsibility of the State. The obligation upon the State to offer reparation to victims exists irrespective of whether a successful criminal prosecution can or has been brought. This flows from the very fact that there has been a breach of the State’s obligation to ensure that no one shall be subjected to torture or ill-treatment as a matter of international and human rights law.\(^\text{1402}\)

It must not be forgotten that those who are expected to enforce the law are themselves in need of assistance in carrying out the difficult and often dangerous tasks that are expected of them. It is unrealistic to expect those who are entrusted with the policing of society to do so in a manner which fully reflects these requirements unless they are given proper professional training and resources, and their operations undertaken against a properly constructed set of assumptions. Human rights approaches to torture prevention therefore should also indicate the importance of ensuring that law enforcement officers receive appropriate

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\(^\text{1402}\) deZayas, n. 1388 above, p. 70.
training, and law enforcement agencies are properly resourced. More importantly, policing functions should be separated from military functions. With this regard, codes of conduct and ethics should be established and promoted to inform, guide and underwrite best practice in the realisation of these functions.

Furthermore, those entrusted with special responsibility should be targeted for recruitment and throughout their career by a package of measures that involve training and sensitization on torture. For instance, integrate human rights, create awareness that in protecting human rights they are actually facilitating effective and fair enforcement, and in return, they will gain respect, efficiency, professionalism and effectiveness.

The South African Human Rights Commission, Lawyers for Human Rights, and the National Consortium for Refugee Affairs have launched one law enforcement training program that focuses on respecting the rights of refugees, asylum-seekers, and migrants. The object of the training is to assist the police in enforcing legislation relevant to migrants, asylum-seekers, and refugees, while recognizing constitutional rights and human rights norms. Technikon South Africa, one of the largest tertiary institutions in the country, offers a police training course that provides practical guidance on policing in the context of a democratic society.

1403 James Cavallaro et al, n. 108 above, p. 161. Noting that political reform processes ought to encourage state security agents to work collaboratively with civil society representatives. One area of intense collaboration has been police training and instruction in human rights norms, which has required something more than mere abstract literacy in human rights law. To be successful, police training requires sensitivity to the harsh realities of everyday policing. Reciting articles of international conventions to police officers is utterly ineffective. Law enforcement agents must be convinced of the practical benefits of a police approach based on the rule of law.

1404 deZayas, n. 1388 above, p. 73.

1405 Edouard Delaplace et al, n. 1044 above, p. 239.


1408 Narandran Kollapen et al, n 1406 above.
The objective of the training is to demonstrate that police compliance with the law actually advances the prospect of criminal convictions by minimizing challenges to the admissibility of evidence and ensuring procedural fairness.\textsuperscript{1409} Non-compliance, on the other hand, makes it more likely that

Torture should be designated and defined as a specific crime of the utmost gravity in national legislation.\textsuperscript{1410} The offence of torture should be characterised as a specific and separate offence. To subsume torture within a broader, more generic offence e.g., assault causing grievous bodily harm; abuse of power fails to recognise the particularly odious nature of the crime and makes it more difficult for states to track, report upon, and respond effectively to the prevalence of torture. Therefore States must provide appropriate penalties that reflect the grave nature of torture.\textsuperscript{1411}

It is commendable that people who opt out of practice of torture often have a strong sense of moral values and conviction that allows them to override their natural inclination to obey their superiors or follow their peer group.\textsuperscript{1412} It must be pointed out that situations that could foster an atmosphere of abuse must be eradicated. Hence, any processes involving detaining and interrogation need to be open to public scrutiny and not carried out by the police or the military in secret.\textsuperscript{1413}

\textsuperscript{1409} Ibid.

\textsuperscript{1410} Redress, n. 1401 above, p. 38.

\textsuperscript{1411} Ibid., Article 4 (2) CAT, Ingelse, n. 21 above, pp. 341-342.


\textsuperscript{1413} Ibid.
9.2.1 Final recommendations

Finally, the effort to eradicate torture and other related manifestation cannot succeed if an environment to foster democracy and human rights does not exist within states. Democracy opens space for accountability and transparency of governmental institution’s and processes. It nurtures an environment in which respect for individual human rights and the rule of law can flourish. If this environment exist in a large measure, both national and international efforts to combat torture can be realized.
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