

## Faculty of Shariah and Law

### Approval Sheet

This is certified that we evaluated the thesis titled "United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, its Implementation in Pakistan, Problems and Prospects" submitted by Saira Siddique, Registration No. 58-FSL/LLMHRL/F10 in partial fulfillment of the award of the degree of LLM Human Rights Law. The thesis fulfills the requirements in its core and quality for the award of the degree.

### Viva Voce Examination Committee:

#### Supervisor

Afzal Ahmad

Head of Department

Faculty of Law, FSL

#### Internal Examiner

Attaullah Khan Mahmood

Assistant Professor

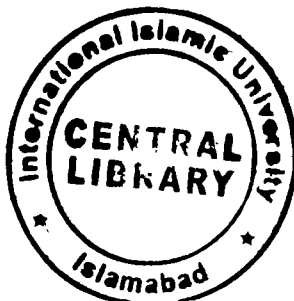
Department of Law, FSL

#### External Examiner

Dr. Ijaz Ali Chishti

Assistant Professor

Federal Urdu University, Islamabad



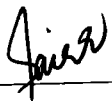
Accession No TH-16561  
K  
M. Mil

MS  
341.483  
SAU

## **DECLARATION**

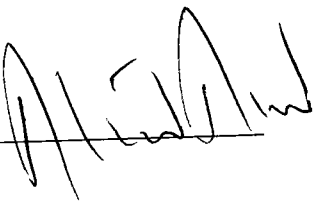
I, **Saira Siddique**, hereby declare that this dissertation is original and has never been presented in any other institute. I, moreover, declare that any secondary information used hereby has been duly acknowledged.

**Student: Saira Siddique**

Signature:  \_\_\_\_\_

Date: \_\_\_\_\_

**Supervisor: Afzal Ahmad**

Signature:  \_\_\_\_\_

Date: \_\_\_\_\_

SairaSiddique

© \_\_\_\_\_ 2016

All rights reserved

## **DEDICATION**

**To my beloved Abu G and Ammi G**

## **ACKNOWLEDGMENT**

Alhamdulillah and His blessings are upon Muhammad, the last Messenger.

First of all I would like to thanks Almighty ALLAH who gave me capabilities and patience at times when I almost loosed it and gave me strength to complete this thesis.

This research work gave me an opportunity to expand my knowledge in comparative studies related to my topic, as a student of law it has been a pleasure for me to write my thesis on my topic of interest.

I wouldn't have been able to complete my thesis if it wasn't for the co-operation of my supervisor who helped me and was source of my guidance and strength every time I was about to give up and would encourage me to start all over again with a new spirit throughout my research work,

I am really thankful to my family specially my mom and my father for their continuous support, comfort and help in the completion of my thesis. My family members have been very supportive and encouraging. I do not have words to express my gratitude to my parents and my brothers, their prayers are earning of my life. My siblings, they have the strength in every problem that I have encountered, I am standing here today simply because of their dua and encouragement.

**SAIRA SIDDIQUE**

# TABLE OF CONTENT

List of Cases .....	v
List of Acronyms .....	viii
Abstract .....	x

## Chapter 1: History and Evolution of Torture

Introduction .....	1
1.1. History of Torture .....	3
1.2. Defining Torture: Meaning and scope .....	10
1.2.1. Meaning and Scope of Inhuman and Degrading Treatment or Punishment .....	15
1.3. Universal Legal Regimes for Prohibition of Torture .....	18
1.3.1. International Human Right Law Instruments for Elimination of Torture .....	18
1.3.1.1. Universal Declaration of Human Rights, 1948 .....	18
1.3.1.2. International Covenant on Civil and Political Rights, 1966... ..	19
1.3.1.3. Declaration on the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1975 .....	20
1.3.2. Prohibition of Torture and International Humanitarian Law .....	21
1.3.3. Regional Conventions on the Prohibition of Torture .....	24
1.3.3.1. American Declaration of the Rights and Duties of Man.....	24
1.3.3.2. American Convention on Human Rights, 1969 .....	24
1.3.3.3. Inter-American Convention to Prevent and Punish .....	25

1.3.3.4. European Convention for the Protection of Human Rights and Fundamental Freedoms .....	25
1.3.3.5. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987.....	26
1.3.3.6. African Charter on Human and Peoples' Right, 1981 .....	26
1.3.3.7. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 1974 .....	27
1.3.3.8. Declaration on the Elimination of Violence Against Women, 1993 .....	27
1.3.3.9. Islamic Declaration of Human Rights, 1981 .....	28
1.3.3.10. Cairo Declaration .....	28
1.3.4. Other Important Documents and International Organization Instruments on Prohibition of Torture .....	29

## **Chapter 2: United Nations Convention Against Torture**

Introduction .....	32
2.1. Substantive provisions of CAT .....	34
2.2. Provisions regarding implementation of CAT .....	41
2.3. Procedure to become a party to the Convention .....	44
2.4. The Committee Against Torture .....	47
2.5. The optional protocol to Convention against torture and other cruel, inhuman or degrading treatment or punishment, 2002 .....	50
2.6. Sub-Committee on prevention of Torture, 2002 .....	51



## **Chapter 3: National Legal Framework and Prohibition of Torture**

Introduction .....	53
3.1. The Constitution of Pakistan, 1973 .....	54
3.2. Pakistan Penal Code, 1860 .....	63
3.3. The Code of Criminal Procedure, 1898 .....	72
3.4. The Police Order, 2002 .....	73
3.4.1. National public safety commission .....	76
3.4.2. Federal police complaint authority .....	77
3.4.3. Public safety and police complaint commission .....	77
3.4.4. Public safety fund .....	78
3.4.5. Citizens police liaison committee .....	78
3.4.6. Other professional Bodies .....	78
3.4.7. Suit against police officers involved in wrongdoings .....	79
3.5. Anti-Terrorism Act, 1997 .....	80
3.6. Confession to police admissible evidence or not? .....	82
3.7. Protection of Pakistan Ordinance, 2013 .....	83

## **Chapter 4: Analysis of CAT and National laws of Pakistan**

4.1. GAP Analysis .....	85
4.2. Major State obligations after ratification of UNCAT .....	87
4.2.1. Pakistan as dualist State .....	88
4.3. Mechanism to implement CAT .....	88
4.4. Best practices of the World .....	92
4.5. Case study .....	93

## **Conclusion and Recommendations**

Conclusion .....	101
Recommendations .....	104
Bibliography .....	108

## LIST OF CASES

Ireland v. United Kingdom (Appl. No. 5310/71), Judgment of 18 January 1978, Rep. 1978-25	
.....	12, 17 and 93
Selmouni v. France (Appl. No. 25803/94), Judgment of 28 July 1999, Rep. 1999-V	
.....	17 and 94
Prosecutor v. AntoFurundzija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal	
for the former Yugoslavia (ICTY), 10 Decmber 1998	
.....	29 and 94
Shaukat Ali Mian vs. Federation of Pakistan (1999 CLC 607)	
.....	55
MstRashidaBibi vs. Border Area Committee through its Board of Revenue etc (PLJ 2004 Lah	
459).....	55
Muhammad vs. Pakistan Railways (2004 YLR 521) .....	55
Haji GhulamZamin vs. A.B. Khondkar (PLD 1965 Dacca 156) .....	56
M. D. Tahir Advocate vs. Federal Government (PLD 2000 Lah. 251) .....	56
Muhammad Afzal vs. Sessions Judge Multan (PLD 2008 Lah 479) .....	56
Mazhar Husain vs. Province of Punjab (PLD 1985 Lah. 394) .....	56
Muhabbat Khan vs. Atta Muhammad (1985 P.Cr.L.J 360) .....	56
Noor Muhammad vs SHO, Police Station KlurKot, District Bhakkar (2000 YLR 85)	
.....	56
Malka Jan vs. Inspector General of Police N.W.F.P (2000 P.Cr.L.J. 320) .....	57
Ch. Muhammad Anwar vs. Province of Punjab through secretary Housing and others (1996	
MLD 961) .....	57
Ishugaiji vs. Government of Nigeria (1931) 35 CWN 755 (PC) .....	58

Mohammad Yaqub vs. State (1992 SCMR 1983) .....	58
Amir ullah vs. the state (2004 P.Cr.L.J. 821) .....	58
Allah Jewaya vs. Muhammad Baksh (PLD 1998 S.C 388 + PLD 1994 S.C. 693) .....	59, 60 and 61
Hakim Khan vs. State (PLD 1975 SCMR 1) .....	60
SakhiDaler Khan vs. Superintendent in charge, recovery of abducted Women (PLD 1957 Lah. 813) .....	60
Maqbol Ahmad Shah vs. the State (NLR 1992 criminal Kra 384) .....	60
Sher Ali vs. Zahoor Ahmed (PLD 1977 S.C. 545) .....	61
Muhammad Fazal vs. Kaura 1994 SCMR 1783 .....	62
In Re: SuoMotu Constitutional Petition (1994 SCMR 1028).....	62
Muhammad Aslam Khan vs. Government of Punjab (PLD 1973 Lah. 120).....	62
SulemanDaud vs. development authority (2008 CLC 1251) .....	63
Miss ShaziaBatoool vs. Government of Balochistan (2007 SCMR 410) .....	63
Dr. Mobashir Hassan etc. v. Federation of Pakistan (PLD 2010 SC 265 .....	80
Mehram Ali v. Federation of Pakistan (PLD 1998 SC. 1445) .....	81
Liaqat Ali vs. State (1999 P.Cr.L.J. 1469) .....	82
AsifMahmood vs. the State (2005 SCMR 515) .....	83
Sajjad Ali etc. vs. the State (PLD 2005 Kar.213) .....	83
Mehram Ali v. Federation of Pakistan, (PLD 1998 SC 1449) .....	83
Labita v. Italy (Appl. No. 26772/95), judgment of 6 April 2000, Rep. 2000-IV, 119 .....	94
Dikme v. Turkey (Application no. 20869/92) Judgment Strasbourg 11 July 2000 .....	95
Aksoy v. Turkey, ECHR (100/1995/606/694) 18 Decmber 1996 .....	96

Hamdan v. Rumsfeld. 126 S.Ct.2749 (2006) .....	96
------------------------------------------------	----

## LIST OF ACRONYMS

ACHR	American Convention on Human Rights, 1978
ATA	Anti-terrorism Act, 1997
CA-3	Common Article 3
CAT / UNCAT	United Convention against Torture, 1984
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women, 1979
C.I.A	Central Investigation Agency
CID	Central Investigation Department
CRC	Convention on the Rights of Child
Cr.P.C	Code of Criminal Procedure, 1898
CPLC	Citizen Police Liaison Committee
DPSPCC	District Public Safety and Police Complaints Commission
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
ECPT	European Committee for the Prevention of Torture, 1987

FPCA	Federal Police Complaint Authority
HRCP	Human Rights Commission of Pakistan
IAC	International Armed Conflict
ICCPR	International Covenant on the Civil and Political Rights, 1966
ICTY	International Criminal Tribunal for former Yugoslavia
IHL	International Humanitarian Law
NPSC	National Public Safety Commission
PPSPCC	Provincial Public Safety and Police Complaints Commission
PPC	Pakistan Penal Code, 1860
SERE	Survival, Evasion, Resistance and Escape
SPT	Sub-Committee on Prevention of Torture, 2002
UDHR	Universal Declaration on Human Rights, 1948

## ABSTARCT

As per section 38(1)(b) of the Statute of the International Court of Justice “international custom, as evidence of general practice accepted as law”. With the help of this statement it is easy to understand that international customs get a place amongst the primary source of international law and equally acceptable as other international sources of law by International Court of Justice, United Nations and member States. Customary International Law (CIL) is ordinarily resolute through two aspects that are: common practice of States and what these States accepted as law. While in the case of prohibition of torture we find that it not only attains the status of customary international law but also recognized as *jus cogens*. It is also observed by the UNGA Resolution that “freedom from torture is no more an ordinary principle but has attained the status of a norm of Customary International Law”.

In case of Pakistan it is observed that the ‘Constitution of Islamic Republic of Pakistan, 1973,’ protects its citizens against any form of torture specially used to extract confession or admission under Article 14(2). Pakistan is also a signatory of United Nations Convention Against Torture, 1984, and ratified the same in year 2010. Hence government of Pakistan is under international as well as constitutional obligation to protect its citizens against all forms of torture. Unfortunately Pakistan fails to comply with such obligations and to criminalize torturous acts as per its



commitment under United Nations Convention Against Torture, 1984. Pakistan fails to amend its domestic law in accordance with the provisions of above said convention.

This dissertation appraises that Pakistani laws need reformation in order to penalize torture as required by the international law. Non-compliance of these obligations amounts to violation of fundamental human rights. Protection against torture is now an absolute and non-derogable right and its State responsibility to protect its citizens against any torturous act.

This dissertation also highlights history of torture and gives brief introduction of international and regional treaties regarding torture in its first chapter. Second chapter of my thesis provides a detailed discussion of United Nations Convention against Torture and other cruel, inhuman or degrading treatment or punishment, 1984. A through study of Pakistani law is provided in third chapter. Further an analysis between Pakistani law and international obligations is given in chapter four. This dissertation is to provide better understanding of international human right law and domestic obligation of all States to protect its citizens against torture.

Hence a through study of Pakistani laws proves that in order to meet the Challenges of international law Pakistan needs domestic legislation against torture and

implementation mechanism as required under United Nations Convention Against Torture, 1984.

# CHAPTER 1

## HISTORY AND EVOLUTION OF TORTURE

### INTRODUCTION

The concept of torture is neither new nor some centuries old. The notion of torture is as old as humanity itself. It instigated with the origin of mankind and exist throughout the history in different forms. Throughout the history it was particularly used as a technique for extracting evidence or confession in judicial proceedings. During later Middle Ages it w assumed that torture was practiced rapidly to extract confession when confession came to be regarded as the 'Queen of Proof'. The term torture itself is very vague in the sense that an act done by a person is just an act that harms others or can we call any such act as torturous act.

The word prohibition first comes in the English Bill of Rights 1688. After reciting a catalogue of grievances, including that of late years illegal and cruel punishments have been inflicted, that statute goes on to declare, 'for the vindicating and asserting of Parliament's ancient rights and liberties', inter alia that 'cruel and unusual punishment ought not to be inflicted. Later on the same subject was discussed in the French declaration of 1789 which provides that 'the law should impose only such penalties as are absolutely and evidently necessary'. Statutory obligation of torture in criminal law swept virtually all of Europe during the eighteenth and early

nineteenth centuries, to the extent that Victor Hugo could announce in 1874 that 'torture has ceased to exist'.<sup>1</sup>

Torture and Cruelty are the most appalling violation of Human Rights and the prohibition of torture and inhuman or degrading treatment or punishment is probably the best attested form of right in the entire human rights catalogue. Torture is a serious breach of Human Rights and is sternly forbidden by International Law. Also torture is included in the list of '*Jus Cogens*'<sup>2</sup> which are not possible to be disregarded or ignored.

Since the Second World War a considerable number of international instruments have been adopted which formally prohibit torture and inhuman or degrading treatment or punishment. However, in practice these instruments lack machinery capable of effectively complying with the obligations they create; even where such machinery exists, the controlled exercise of such machinery tends to be of a post facto nature. Under these circumstances, attention has increasingly been focused on methods of preventive nature, capable of attacking the phenomenon of torture at its roots.

---

<sup>1</sup> J. Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, International Studies in Human Rights, Martinus Nijhoff Publishers, p. 10.

<sup>2</sup> Certain norms under international law are deemed to be *jus cogens*, or "compelling law which is binding on parties regardless of their will and that does not yield to other laws." As such, *jus cogens* norms should be, and usually are, accorded greater protection than other rights.

## 1.1. History of Torture

The origins of torture dated back to 530AD, when the great Roman jurists espoused the virtues of torture as '*the highest form of truth*'.<sup>3</sup> The Romans, Jews, Egyptians and many other cultures in history accepted torture as part of their justice system.<sup>4</sup> 'Romans used crucifixion,'<sup>5</sup> 'Jews used the method of stoning and Egyptians had 'desert-sun death'<sup>6</sup>. Greek legal orator Demosthenes believed that 'no statements made as a result of torture have ever been proved untrue'.<sup>7</sup> All these acts of torture were considered necessary (as to deter others) or good (as to punish the immoral).<sup>8</sup>

In the 12<sup>th</sup> Century, Roman Law was revived by officials in Italy and France, to become a source of authority in civil law systems. In criminal proceedings, the accusatorial process was replaced with a structure of prosecution, which required the testimony of two witnesses or the confession of the accused as 'proof' for a conviction. In this way interrogation and torture to extract such confessions became enshrined in the civil law system (the law of the United States incorporates civil procedure).<sup>9</sup> It is of great importance to discuss Roman era because it provides fundamentals of the modern jurisprudence and judicial system. The Romans famously used torture, but they limited its use to judicial proceedings. Free Romans could not be tortured except

---

<sup>3</sup> James Ross, 'A History of Torture', *Torture: A Human Rights Perspective* (Human Rights Watch, 2005), p. 4; See Roman Digests, *De Quaestionibus* 'On Torture' Book 48, Chapter 18.

<sup>4</sup><http://phrtoolkits.org/toolkits/istanbul-protocol-model-medical-curriculum/module-1-international-legal-standards-overview/torture/history-of-torture/> (Last accessed on 01-11-2013).

<sup>5</sup> Crucifixion is a method of deliberately slow and painful execution in which the condemned person is tied or nailed to a large wooden cross and left to hang until dead.

<sup>6</sup> Desert-sun death is when a person was left out in the desert to die from the searing sun as a form of torture.

<sup>7</sup> Demosthenes 30.37, quoted in Page du Bois, *Torture and Truth* (New York: Routledge, 1991), pp. 49-50, quoted in James Ross, 'A History of Torture'.

<sup>8</sup><http://phrtoolkits.org/toolkits/istanbul-protocol-model-medical-curriculum/module-1-international-legal-standards-overview/torture/history-of-torture/> (Last accessed on 01-11-2013).

<sup>9</sup> [http://thejusticecampaign.org/?page\\_id=175#i](http://thejusticecampaign.org/?page_id=175#i) (accessed on 01-11-2013).

for very serious crimes.<sup>10</sup> Mostly Romans used to torture people in order to defend their State. It was always permitted as punishment for treason or attempt to commit treason. It was also used to preserve the virtue and honor of the Roman family. Although free men could be tortured only when they plotted treason, slaves could be tortured to uncover the sexual crimes of their mistresses, as well as for other crimes.<sup>11</sup>

Medieval and early modern European courts used torture, depending on the accused's crime and social status. Torture was deemed to be a legitimate means to extract confessions or to obtain the names of accomplices or other information about a crime. Often, defendants already sentenced to death would be tortured to force them to disclose the names of accomplices. Torture in the Medieval Inquisition began in 1252 and ended in 1816 when a papal bull (formal statement by the Pope) forbade its use.<sup>12</sup>

In the first half of the thirteenth century, Italian City States began to regulate torture in their courts. By the year 1220, some jurists had become sharply critical of judges who indiscriminately and unlawfully used torture in their courts without strictly observing the rules governing the how, when and subjects of torture. In the Italian City States, jurists were particularly concerned to exempt citizens from torture and to define who could be tortured.<sup>13</sup>

Cyprian did not doubt torture, he rather despised it. St. Augustine expanded upon Ulpian's Qualms about torture. In *The City of God*, Augustine emphasized the danger that innocent people would be tortured. The Roman Jurists thought that torture was a resort but only to be

---

<sup>10</sup> Peters, *Torture* 18-36 and Fiorelli, *Latortura* 16-25 both discuss the classes of Roman society that were subject to and exempt from torture.

<sup>11</sup> <http://phrtoolkits.org/toolkits/istanbul-protocol-model-medical-curriculum/module-1-international-legal-standards-overview/torture/history-of-torture/> (Last accessed on 01-11-2013).

<sup>12</sup> Ibid.

<sup>13</sup> Pennington, *Prince and the Law*, 42-44.

used against slaves or for particularly heinous crimes like treason; and could be gauged by the amount of fear it produced. Torture was of uncertain value as an instrument for producing evidence. Cyprian and Augustine agreed that torture was fallible, immoral, and punished the innocent which led to even more evil.<sup>14</sup>

In Northern France, Claude Gauvard's examination of fifteenth-century court records of the Parliament of Paris and the Chatelet of Paris revealed that torture was used twenty times in 600 cases.<sup>15</sup> Langbein has listed 81 cases of torture in England between 1540 and 1640.<sup>16</sup> Now world very out rightly started denouncing the use of torture but it is still prevalent in one form or the other. We do have evidence of use of torture by many in the same old fashion. By the year 1600, many jurists started asking question about the morality and legality of torture. But its use continued, especially in military campaigns. In 1776, complaining of atrocities committed by the British troops, 'General Washington',<sup>17</sup> suggested that he might retaliate in kind, however abhorrent and disagreeable to our natures in cases of Torture and Capital Punishments.<sup>18</sup>

In 17th century, the number of incidents of judicial torture decreased in the European region. Johann Graefe in 1624 published Tribunal Reformation, a case against torture. Cesare Beccaria, an Italian lawyer, published in 1764 "an Essay on Crimes and Punishments" in which he argued that torture unjustly punished the innocent and should be unnecessary in proving guilt. Voltaire

---

<sup>14</sup> Ibid.

<sup>15</sup> <http://faculty.cua.edu/pennigton/PinningtonTortureEssay.htm>. (Last accessed on 09-11-2013)

<sup>16</sup> Ibid.

<sup>17</sup> In March 1776 General Washington ended the British siege of Boston, and quickly moved to face General Howe in New York. New York offered the opportunity for the British to separate the northern and southern colonies. Also, control of New York would place the strategic Hudson River under the control of the British. As a result, Washington knew victory in New York would be essential for the survival of the American cause.

<sup>18</sup> Ibid.

(1694-1778) also fiercely condemned torture in some of his essays.<sup>19</sup> Even outside Europe, torture was now being denounced, in 1798, Napoleon Bonapart wrote to Major-General Berthier that the barbarous custom of whipping men suspected of having important secrets to reveal must be abolished in Egypt. It has been recognized that this method of interrogation, by putting man to the torture, is useless. The wretches say whatever comes into their heads and whatever they think one wants to believe. Consequently, the Commander-in-Chief forbade the use of a method which was, considered by them, contrary to reason and humanity.<sup>20</sup>

Moreover, the London Cage, Kensington Palace Gardens in London witnessed its fair share of war crimes during the Second World War. The Cage was essentially a set of cells and rooms used to hold and interrogate captured members of the Schutzstaffel and Gestapo.<sup>21</sup> Everything from starvation and sleep deprivation to brutal beating was practiced within its walls, to extract information and, in some cases, confessions.<sup>22</sup> During May of 1945, the Kocovski Rog Massacre disrobes the systematic murder of members of the repatriated Slovene Home Guard and their families by Allied Yugoslav Partisans. During this period, up to 12,000 people were thrown into pits, caves and crevices which were subsequently sealed using explosives. No one ever faced prosecution for these atrocities.<sup>23</sup>

Claim to be the largest mass rape in history, many unfortunate victims were assaulted up to hundred times, and often could not resist in the face of overwhelming Soviet numbers.<sup>24</sup> It was not only the Soviets who were accused of this crime, however it is believed that the United States

---

<sup>19</sup> <http://faculty.cua.edu/pennigton/PinningtonTortureEssay.htm>. (Last accessed on 09-11-2013)

<sup>20</sup> <http://www.historyworld.net/wrldhis/plaintexthistories.asp?historyid=aa57>. (Last accessed on 09-11-2013)

<sup>21</sup> The Gestapo was the official secret police of Nazi Germany and German-occupied Europe.

<sup>22</sup> <http://newpol.org/content/torture-and-historical-memory>. (Last accessed on 09-11-2013)

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.



was responsible for 11000 rapes, while the French have been accused of over 1500 instances of rape. This is clearly not on the same scale as the Soviets but it does not make it any less terrible.<sup>25</sup> Although Hitler was never known to directly torture or kill any Jews, it was under his command that Nazi army committed genocide and ended the lives of approximately six million Jewish people.<sup>26</sup>

There is a shocking catalogue of German torture methods: putting people's hands in boiling water until the skin and finger nails came off like gloves; stamping on a man's foot for ten minutes with a special steel boot and repeating the process for two weeks; pressing a hot poker into the hands; hanging persons by their hands behind their backs until their shoulders were disjointed, then gashing the soles of their feet and making the victims walk on salt; pulling teeth and cutting and twisting of the ears; running electric current through the victim bodies and other fiendish devices too horrible to describe. These tortures and other brutalities were used by the German occupation forces.<sup>27</sup> Among the instances, which we feel must be mentioned here, is the case of the former Chilean leader, General Augusto Pinochet, allegations against whom include that his victims were tortured with electric shocks, beatings, sexual abuse and threats of rape. In five of the cases the torture was followed by death. Britain's Crown Prosecution Service barrister Alun Jones said the charges "constitute some of the most serious allegations of crime ever to come before English Criminal Courts". The specific torture charges allege that as Commander-

---

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> <http://www.historiography-project.com/clippings/1946/01/nazi-torture-and-medical-exper.html>. (last accessed on 10-11-2013).

in-Chief of the Chilean Army, Augusto Pinochet, jointly with other public officials, intentionally inflicted severe pain or suffering on people in purported performance of official duties.<sup>28</sup>

The United States Department of justice has continued to produce secret memos that reportedly defend harsh (“enhanced”) interrogation techniques. Journalists are reporting more about the atrocities committed at ‘Abu Gharib jail’<sup>29</sup> and elsewhere.<sup>30</sup> George W. Bush calls them “alternative set of procedures”: forcing victims to stand for forty hours; depriving them of sleep for weeks on end; and strapping prisoners to include boards, then flooding their mouths with water. These techniques are torturous but still legal in the United States.<sup>31</sup>

In 2002, the C.I.A and Pentagon became concerned about the fact that the standard questioning was inadequate for suspected terrorists and turned to a military training program called Survival, Evasion, Resistance and Escape, (SERE). For decades, SERE trainers had exposed aviators and others at high risk for capture to Soviet-style tactics, including disrupted sleep, exposure to extreme heat and cold, and hours in uncomfortable stress positions. Sometimes the ordeal included water boarding, in which a prisoner’s face is covered with cloth and water, is poured from above to create a feeling of suffocation. Some of these techniques have been used on prisoners at Guantanamo Bay, Afghanistan and Iraq and at the C.I.A’s secret overseas jails for high-level operatives of Al-Qaeda.<sup>32</sup>

---

<sup>28</sup> Ibid.

<sup>29</sup> The Baghdad Central Prison, formerly known as Abu Gharib prison. Abu Gharib is an Iraqi city 32km west of Baghdad. It was built in 1950s by British contractors.

<sup>30</sup> New Yorker, March 24, 2008, “Exposure” by Philip Gourevitch and Errol Morris, 44-57.

<sup>31</sup> Ibid.

<sup>32</sup> [http://www.nytimes.com/2007/06/03/weekinreview/03shane.html?\\_r=0](http://www.nytimes.com/2007/06/03/weekinreview/03shane.html?_r=0). (Last accessed on 11-11-2013)

It is reported that detainees in US custody in Abu Gharib, Kandahar and Bagram (where many were taken before Guantanamo Bay) have been sodomised with broomsticks, 'a chemical light' or rifles. Other forms of sexual humiliation have also been reported; parading men naked in front of female soldiers, forcing them to wear women underwear and dance with other men, forcing them to undress in front of female interrogators and guards, touching their genitals or provoking them in a 'humiliating' way and force them to watch pornography. Most detainees in U.S. custody have alleged that they were raped, threatened with rape, or anally probed. Sexual humiliation is used to induce feelings of humiliation and fear and hence is considered a war crime.<sup>33</sup>

Although these techniques were used before 2002, the military responded to General Miller's request by seeking legal approval for 'harsher' interrogation methods. They split the methods into three categories, the third category being the most brutal. The methods authorized included: stress positions, mock executions, solitary confinement, hooding and other forms of sensory deprivation, removal of 'comfort items', forced nudity, forced grooming, taking advantage of the detainees fears (dogs), exposure to cold weather or water and allowing an interrogator to use 'a wet towel and dripping water to induce the misperception of suffocation'.<sup>34</sup>

Despite being illegal, Binyam Mohamed, Ethiopian with British residency, was arrested in Pakistan in April 2002. Over two years later, on 19 September 2004, he was taken to Guantánamo. In between, he was allegedly subjected to rendition to Morocco where he was held for 18 months, then transferred to the CIA-run "Dark Prison" in Kabul in Afghanistan, before being held in Bagram air base. In late 2009, a US District Court judge outlined the evidence of

---

<sup>33</sup> [http://thejusticecampaign.org/?page\\_id=273](http://thejusticecampaign.org/?page_id=273). (Last accessed on 11-11-2013).

<sup>34</sup> *Ibid.*

human rights violations committed against Binyam Mohamed, who in February of that year had been released from Guantánamo to the United Kingdom:

Binyam Mohamed's lengthy and brutal experience in detention weighs heavily with the Court... Binyam Mohamed's trauma lasted for two long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculcate himself and others in various plots to imperil Americans. The Government does not dispute this evidence.<sup>35</sup>

According to recent reports by Amnesty International and the US State Department, more than 100 of these nations have failed to fully eradicate torture as technique for extracting evidence. In April 2009, for example, Amnesty International revealed that allegations of beatings, racial abuse, excessive force and even unlawful killings by French police are rarely investigated effectively and those responsible are seldom brought to justice.<sup>36</sup>

## **1.2. Defining Torture: Meaning and Scope**

Defining torture is not an easy task because it is a very wide term and can be used or defined in a number of dimensions. In general the word torture denotes infliction of severe physical or mental pain. This infliction may be for any revenge or as punishment as a mean of extracting a confession, any information or for collecting any evidence.

---

<sup>35</sup> <http://www.amnesty.org/en/news/guantanamo-case-profiles>. (Last accessed on 10-11-2013)

<sup>36</sup> <http://www.amnesty.org/en/region/pakistan/report-2009>. (Last accessed on 10-11-2013)

Literal meaning of torture is that “it is an act of causing some body great pain as a punishment or in order to make him confess something.”<sup>37</sup>

Torture is also defined as the infliction of physical pain or psychological anguish. But it is very difficult to draw a distinction that what acts are torturous and what not.

According to Nowak, “torture is a direct attack on the core of human dignity”.<sup>38</sup> Nowak summarizes this conditional definition of torture as requiring:

- a) Acts of public officials that;
- b) Intentionally inflict;
- c) Severe physical or mental pain or suffering;
- d) In order to fulfill a certain purpose, such as extracting information, punishing intimidating or discriminating against a person.<sup>39</sup> Any act that falls outside the purview of this definition is, thus, regarded as ‘inhuman or degrading treatment or punishment’.

Several attempts were made to define the term torture. The United Nations General Assembly defined the term as: “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 purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed, or intimidating him or other person. It does not include pain or suffering arising only

---

<sup>37</sup> The Encyclopaedia Americana, International Edition. Volume 26. Grolier Incorporated.

<sup>38</sup> See Manfred Nowak, UN Covenant on Civil and Political Rights- CCPR Commentary, 2<sup>nd</sup> Revised edition, N.P. Engel (2005), at 158.

<sup>39</sup> Ibid., 161.

from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.”<sup>40</sup>

The above mentioned definition specifically talks about the infliction of torture on any person only by or at the instigation of public officials and it is for a specific purpose i.e. extracting a confession or information. Though it is only one ‘Type’ of torture, the term ‘torture’ is very vague and it may be observed or can be defined in a number of ways. Torture has so many kinds and torture in custody or torture by public official is one of them. To hurt someone without any justified or lawful reason shall amount to torture. Here the terms justified and lawful must be determined by some recognized international body or convention. A person brutally beaten by another person without any justified reason or during any protest would amount to torture as well. Here the other person is not a public official but he hurts someone or causes pain to somebody. The purpose of torture inflicted by public officials is not only to extract evidence or information but sometimes it is just to threaten or to deter someone of your position. So to concise the definition of torture with such purpose is not enough to cure torture.

Torture may also be constituted by the infliction of mental suffering through the creation of a state of anguish and stress by means other than bodily assault. As Judge Evrigenis observed in *Ireland v. United Kingdom*, “torture can be practiced and indeed is practiced by using subtle techniques developed in multidisciplinary laboratories which claim to be scientific. By mean of new forms of suffering that have little in common with the physical pain caused by conventional torture it aims to bring about, even if only temporarily, the disintegration of an individual’s

---

<sup>40</sup> Sieghart, Paul. *The International Law of Human Rights*. Clarendon Press, Oxford. P. 162.

personality, the shattering of his mental and psychological equilibrium and the crushing of his will.”<sup>41</sup>

Here the Judge Evrigenis very carefully observed the infliction of mental suffering and the other emerging techniques of torture. In the above mentioned case the honorable judge unveiled a very important phenomenon of the torture that is being used under legal umbrella. He very precisely unveiled the new forms of sufferings and their effect.

In *Denmark et al. v. Greece* EUCM said that “solitary confinement, isolation in a police cell without food, water or access to toilets, mock executions, threats to throw a person out of a window, the use of insulting language, rubbing the head with vomit, being forced to strip naked, and being compelled to be present at the torture or inhuman or degrading treatment of relatives or friends, all constitute torture because they are forms of intimidation and humiliation designed to destroy an individual’s will and conscience.”<sup>42</sup>

In this case EUCM mention out different techniques of torture. The torture defined above is revolving around the techniques usually used in police custody or in custody of any law enforcement agency.

Torture is the purposeful infliction of severe pain or suffering on a detainee by public officials or with their acquiescence to gain information, to obtain a confession, to punish, to intimidate or to terrorize.

As a whole the definition is very clear and simple but the terms used in the definition are very vague and unclear. The term ‘purposeful infliction’ gives an ambiguous meaning that is difficult

---

<sup>41</sup> Sieghart, Paul. *The International Law of Human Rights*. Clarendon Press, Oxford. Pp. 16 3-164.

<sup>42</sup> *Ibid.* P. 164.

to define or describe the actual legal purpose for such act. Same is the term 'severe' which gives a thought one can harm other until it couldn't reach the point of severity.

The absence of a single, precise definition not only affects torture prevention, but sustains the ability of nations to avoid consequences through dishonesty and hypocrisy. As the 1973 Amnesty International Report on Torture points out, "given that the word 'torture' conveys an idea repugnant to humanity, there is a strong tendency by torturers to call it by another name, such as 'interrogation in depth' or 'civic therapy,' and a tendency of victims to use the word too broadly." In the absence of a universal definition, many governments narrowly define torture, enabling their agents to act however they see fit without crossing the definitional line. Governments are able to continue to condemn torture publicly while employing horrific methods of interrogation and punishment. For example, in 2002, the U.S. Department of Justice defined torture to exclude even extreme methods of interrogation so long as they did not result in impairment of bodily function or pain similar in intensity to organ failure.<sup>43</sup>

To define the word torture is very important for many reasons. First, governments must be bound by a clear and constant standard that cannot be manipulated in times of crisis. Second, public officials need guidance as to the lawfulness of their tactics. Lastly, the international community must be able to hold governments accountable for torturous acts. Without a definition that is both clear and generally agreed upon, all three tasks are hampered.<sup>44</sup>

Finally, a single definition would assist the international community in placing pressure on offending governments. U.N. Secretary-General Kofi Annan has explained that

---

<sup>43</sup> Miller, Gail H. *Defining Torture*, *Floersheimer Center for Constitutional Democrac*. Benjamin N. Cardozo School of Law. New York. P. 4.

<sup>44</sup> *Ibid.* p.1.



*“torture is an atrocious violation of human dignity. It dehumanizes both the victim and the perpetrator. The pain and terror deliberately inflicted by one human being upon another leave permanent scars. . . Freedom from torture is a fundamental human right that must be protected under all circumstances. Growing awareness of international legal instruments and protection mechanisms gives hope that the wall of silence around this terrible practice is gradually being eroded.”<sup>45</sup>*

### **1.2.1. Meaning and Scope of Inhuman and Degrading Treatment and Punishment**

As a matter of fact, torture, inhuman and degrading treatment recurrently happen which deprive people of their liberty, irrespective of the fact that they belong to different ethnic, social and cultural groups, to young and old, to women and men. Nobody is safe of torture; everyone can become a victim of it.<sup>46</sup> The most elaborated recognition of the prohibition of inhuman and degrading treatment and punishment is seen in Article 16 of the Convention against Torture which states that:

- Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official

---

<sup>45</sup> Freedom from Torture ‘Fundamental Right,’ Says Secretary-General,” SG/SM/7855, OBV/223 (June 26, 2001), available at [www.unis.unvienna.org/unis/pressrels/2001/sgsm7855.html](http://www.unis.unvienna.org/unis/pressrels/2001/sgsm7855.html) (last visited July 25, 2012).

<sup>46</sup> Wolfgang Benedek, Understanding Human Rights Law: Manual on Human Rights Education, ed. (Austria: Neuer Wissenschaftlicher Verlag, 2006), 61.

capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment of punishment.

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

It is important to mention that ill treatment in its secondary sense does not have sufficient intensity or purpose, will be categorized as inhuman or degrading treatment.<sup>47</sup> Inhuman treatments are acts which are premeditated, applied for hours at a stretch, and caused either actual bodily injury or intense physical and mental suffering. Many instances of inhuman treatment arise in the context of detention, where victims have been subjected to ill-treatment which has been severe, but not of the intensity required to qualify the treatment as torture.<sup>48</sup> It can also apply to variety of behavior outside of detention where victims are subjected to deliberate cruel acts which leave them in extreme distress.<sup>49</sup>

Degrading treatment arouses feelings of fear, anguish and inferiority, capable of humiliating and debasing them. This also includes treatments which will lead to breaking down the physical or moral resistance of the victim, or as driving the victim to act against his will or conscience.<sup>50</sup>

---

<sup>47</sup> Aisling Reidy, *The Prohibition of Torture; a guide to the implementation of Article 3*. Human Rights Handbooks, Nos. 6 and 10 of the European Convention on Human Rights, 16.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Aisling Reidy, *The Prohibition of Torture; a guide to the implementation of Article 3*. Human Rights Handbooks, Nos. 6 and 10 of the European Convention on Human Rights, 17.

The absolute prohibition of torture and other forms of cruel, inhuman and degrading treatment or punishment is mainly vital for human safety measures.<sup>51</sup>

In particular, CID treatment or punishment refers to:

- Any unkind or careless treatment that could injure a physical or mental health of the detainee, i.e. prison conditions, and
- Any harsh punishment which, has to cause physical or mental pain, or distress, or to disgrace the detainee.

The human rights worker extensively investigated CID treatment or punishment committed against individuals while they are detained (or when they are in police station or secret detention centers). A person detained in his house or any other building, even in a street, is within the meaning of CID punishment.<sup>52</sup>

In the case of ‘Ireland v. United Kingdom’, the European Court of Human Rights (ECHR) held that, “there is a difference between torture and inhuman and degrading treatment”.<sup>53</sup> Torture is an act of the cruelest and serious nature and it has to be purposely inflicted.<sup>54</sup> Although the purpose of the act may be taken into consideration, inhuman and degrading treatment does not contrary to torture have to be deliberately inflicted.<sup>55</sup>

---

<sup>51</sup> Wolfgang Benedek, *Understanding Human Rights Law: Manual on Human Rights Education*, ed. (Austria: Neuer Wissenschaftlicher Verlag, 2006), 62.

<sup>52</sup> Amnesty International and Codesria. *Monitoring and Investigating Torture, Cruel, Inhuman or Degrading Treatment, and Prison Conditions* (2000), 11.

<sup>53</sup> Eur. Ct. H.R., *Ireland v. United Kingdom* (Appl. No. 5310/71), Judgment of 18 January 1978, Rep. 1978-25.

<sup>54</sup> Eur. Ct. H.R. (GC), *Selmouni v. France* (Appl. No. 25803/94), Judgment of 28 July 1999, Rep. 1999-V.

<sup>55</sup> *Ibid.*

## **1.3. Universal Legal Regimes for Prohibition of Torture**

### **1.3.1 International Human Right Law Instruments for Elimination of Torture**

In International Human Right law all forms of torture, inhuman or degrading treatment or punishments is prohibited even in case of any emergency, such as war or threat of war. So there is no room vacant for torture or any other kind of ill-treatment even the plea of emergency or doctrine of necessity is also no excuse for this.

During the past several decades numerous international and regional declarations, conventions and agreements have been drawn up to condemn and to prohibit the practice of torture by public officials. Most important of them are discussed in detail in the preceding paragraphs:

#### **1.3.1.1. Universal Declaration of Human Rights, 1948 (UDHR)**

Universal Declaration of Human Rights<sup>56</sup>, 1948, is built upon the principle of ‘inherent dignity’ of every person. This dignity and the rights attached with are unquestionable. Article 5 of the declaration provides that “no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment”.

UDHR is mere a declaration that is not binding but it works as the milestone for fundamentals of human rights and as a guiding mechanism for the next generation of human rights.

---

<sup>56</sup> The UDHR was adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

### 1.3.1.2. International Covenant on Civil and Political Rights, 1966

Article 7 of the 'International Covenant on Civil and Political Rights, 1966'<sup>57</sup>, titled as prohibition of torture avows that No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.<sup>58</sup> Article 4 paragraph 2 of the same covenant provides that no derogation from Article 7 can be made.

Article 10 of the same covenant reads as follows:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as un-convicted persons;  
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.<sup>59</sup>

---

<sup>57</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, ICCPR entered into force on 23 March 1976.

<sup>58</sup> United Nations Action in the Field of Human Rights. Centre for Human Rights Geneva. United Nations, New York, 1988. P.200.

<sup>59</sup> International Covenant on Civil and Political Rights. (<http://www2.ochr.org/english/law/iccpr.htm>), Article 10. Retrieved on 15<sup>th</sup> June, 2011.

**1.3.1.3. Declaration on the Protection of all Persons from Being Subjected to  
Torture and other Cruel, Inhuman or Degrading Treatment or  
Punishment, 1975;**

All forms of torture, inhuman, cruel or degrading treatment or punishment are strictly prohibited by all International and Regional Human Rights Instruments. United Nations Organization took very important steps for the promotion and protection of Human rights as well as to overthrow the problem to torture from the world. Hence, by resolution 3452 (XXX) of 9<sup>th</sup> December 1975, at its thirtieth session the assembly adopted the above titled Declaration.

The declaration contains twelve articles. In article 1, 'torture' is defined, for the purpose of the declaration, as meaning "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 purposes 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."<sup>60</sup>

Various provisions of the declaration require:

- Torture to be outlawed by states;
- Suspected act of torture to be investigated;
- Training of law enforcement officials to take full account of the prohibition against torture;
- The prohibition to be included in general rules or instructions issued to officials responsible for the custody of detainees;

---

<sup>60</sup> United Nations Action in the Field of Human Rights. Centre for Human Rights Geneva. United Nations, New York, 1988. P. 201.

- States to keep under systematic review interrogation methods and practices;
- Arrangements for the custody and treatment of persons deprived of their liberty to be kept under review.<sup>61</sup>

Article 2 emphasizes over the observance of prohibition of torture in the words: any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal declaration of Human Rights.

No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment, all this is provided in the Article 3 of the Declaration. This article specifically put a bar on member states to abstain and refrain from commission of torture in official capacity.

### **1.3.2. Prohibition of Torture and International Humanitarian Laws**

Torture is firmly prohibited in International Human Right laws as well as in International Humanitarian Laws. As a notion of IHL, the customary norms regarding torture evolved in the later part of nineteenth and the early twentieth century and have been widely accepted, both in

---

<sup>61</sup> Human Rights and Law Enforcement Professional Training, Series no. 5.

‘opinion juris’<sup>62</sup> and in practice by States before being codified in the four ‘Geneva Conventions’<sup>63</sup> of 1949 and again in later Protocols Additional to the Geneva Conventions.<sup>64</sup>

Common Article 3 (CA-3) to the four Geneva Conventions of 1949 provides that: in case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum the following provisions;

1. Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:
  - a. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,
  - b. Taking of hostage,
  - c. Outrages upon personal dignity, in particular humiliating and degrading treatment,

---

<sup>62</sup> Latin: the sense of legal obligation. In international law, acceptance of a practice as sufficient to create legal obligations. <http://www.duhaime.org/LegalDictionary/O/OpinioJuris.aspx>>> (Last accessed on 05-12-2013)

<sup>63</sup> The Geneva Conventions and their Additional Protocols form the core of International Humanitarian law, which regulates the conduct of armed forces and seeks to limit its effects. They specially protect people not taking part in hostilities and those who are no longer doing so, such as wounded, sick and shipwrecked soldiers and prisoners of war. <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>(Last accessed on 05-12-2013)

<sup>64</sup> Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture under International Law; the Office of Legal Counsel Memorandum*, American University International Law Review (2005), 12, 13.



- d. The passing of sentences and the carrying out of executions without previous judgment pronounced by regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
2. The wounded and sick shall be collected and cared for an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further Endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

The notion prohibition against torture is so deeply ingrained in the '*corpus juris*' of international law that its status is known and acknowledged as erga omnes obligations for States, clearly defined as one owed by a state to all members of the international community, and deemed as having acquired the status of Jus cogens. During international armed conflicts (IAC), all prisoners of war, enemy aliens, spies, saboteur, insurgents, and enemy combatants are included in this notion.<sup>65</sup>

The obligation of any party to a conflict to treat their adversary humanely, or with humanity, stands at the epicenter of international humanitarian law (IHL).<sup>66</sup> No, war, no imperative reason of National security, no military necessity can justify torture, inhuman and degrading treatment.<sup>67</sup>

---

<sup>65</sup> Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture under International Law; the Office of Legal Counsel Memorandum*, American University International Law Review (2005), 13-14.

<sup>66</sup> Cordula Droege. The Prohibition of Torture and Other Forms of Ill-treatment in International Humanitarian Law, International Review of the Red Cross. Volume 89 Number 867 September 2007. 516.

<sup>67</sup> *Ibid.*

### **1.3.3. Regional Conventions on Prohibition of Torture**

#### **1.3.3.1. American Declaration of the rights and duties of Man (ADRD):**

Torture is also strictly prohibited by regional instruments as prohibited in international instruments. Regions across the globe revealed assurance for prohibition of torture and looking forward to implement it in its true spirit. Leading declaration in this esteem was the American Declaration of the rights and duties of Man (ADRD) adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948. According to its Article 26 every person accused of an offence has security from cruel, infamous or unusual punishments or any type of inhuman treatment.<sup>68</sup>

#### **1.3.3.2. American Convention on Human Rights, 1969:**

This convention also protects the rights of persons under article 5 headed as Right to human treatment. Article 5 (1) speaks about the right of every person to have his physical, mental and moral integrity protected and respected. Article 5 para. 2 of the same convention fundamentally prohibit torture in the same terms as stated in UDHR. It also includes that the persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.<sup>69</sup> According to article 27, suspension of this provision is not possible, even in time of war, public danger, or other emergency that threatens the independence or security of the state.<sup>70</sup>

---

<sup>68</sup> <http://www.lidh.oas.org/Basics/English/Basic2.american%20declaration.htm>. Retrieved on 20<sup>th</sup> July, 2011.

<sup>69</sup> Evans. Malcolm D., Blackstone's International Law Documents. 6<sup>th</sup> Edition. Oxford University Press, New York, 2003. P. 142.

<sup>70</sup> J. Herman Burgers and Hans Danelius, The United Nations Convention Against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, International Studies in Human Rights, Martinus Nijhoff Publishers.

**1.3.3.3. Inter-American Convention to Prevent and Punish Torture,  
1985 (IACPPT):**

It is another very important regional instrument which strictly prohibits torture in its all forms, article 2 declares that:

- For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.
- The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

**1.3.3.4. European Convention for the Protection of Human Rights and  
Fundamental Freedoms (ECHR):**

In 1950 European Convention for the Protection of Human Rights and Fundamental freedoms (ECHR) was promulgated which also provides protection against torture, inhuman or degrading treatment or punishment under its 'article 3'<sup>71</sup>. It prohibits all types of torture and also speaks about the obligation of international community to respect the Human Rights within their jurisdiction.

---

<sup>71</sup> "No one shall be subject to torture or to inhuman or degrading treatment or punishment."

#### **1.3.3.5. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987:**

In addition to this 1950 European Convention in 1987 a specific convention was introduced with a new approach of promotion and protection of human rights i.e. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987. Article 1 of the convention asserts that there shall be a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which has to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such person from torture and from inhuman or degrading treatment or punishment, by means of visits to such persons.

The objective of the Convention is the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits.<sup>72</sup>

#### **1.3.3.6. African Charter on Human and Peoples' Right, 1981:**

Moving further around the globe Article 5 of the African Charter on Human and Peoples' Right, 1981, also provides the prohibition of torture and all other kinds of ill-treatment. Article 5 provides that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation

---

<sup>72</sup> Preamble paragraph 5 of the Convention.

of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.<sup>73</sup>

**1.3.3.7. Declaration on the Protection of Women and Children in  
Emergency and Armed Conflict, 1974:**

Paragraph 5 of the above titled declaration reads as: all forms of repression and cruel and inhuman treatment of women and children, including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed belligerents in the course of military operations or in occupied territories shall be considered criminal.<sup>74</sup>

**1.3.3.8. Declaration on the Elimination of Violence Against Women, 1993:**

This declaration deals with violence against women strictly prohibits any kind of torture against women in its Article 3. It asserts that: women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, and civil or any other field. Prohibition of torture is one of the rights in the article which states that, *(h). the right not to be subject to torture, or other cruel, inhuman or degrading treatment or punishment.*

---

<sup>73</sup> Jayawickrama, Nihal. The Judicial Application of Human Rights Law. Cambridge: Cambridge University Press, 2002. P. 297.

<sup>74</sup> United Nations Action in the Field of Human Rights. Centre for Human Rights Geneva. United Nations, New York, 1988. P. 200.

#### **1.3.3.9. Islamic Declaration of Human Rights, 1981:**

The prohibition of torture has also been included in a universal Islamic Declaration of Human Rights issued in 1981. According to article 7 of this Islamic declaration, 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 to him.<sup>75</sup>

#### **1.3.3.10. Cairo Declaration:**

In 1990 Organization of the Islamic Conference (OIC) introduced a very important document that is referred to as the 'Cairo Declaration'<sup>76</sup>. The Declaration deals with the basic Human Rights, supports and protects the human honor and human life, property and family, upholds the right of education of Human beings, medical and right to clean environment and strongly outlaws discrimination on any ground and any kind of torture. In this regard Article 20 of Declaration is very important that states: it is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of maltreatment, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experiments without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.

---

<sup>75</sup> J. Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, International Studies in Human Rights, MartinusNijhoff Publishers.

<sup>76</sup> Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Human Rights, 4<sup>th</sup> Session Agenda Item 5, U.N. Doc.A/CONF. 157/PC/62/Add.18 (1993).

#### 1.3.4. Other Important Documents and International Organizations on Prohibition of Torture

A very important UN document, **The Standard Minimum Rules for the Treatment of prisoners, 1955**, is to set out what is generally accepted as being good principle and practice in the treatment of prisoners and management of institutions. One of the Standard Rules, Rule 31, is to the effect that corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishment shall be completely prohibited as punishment for disciplinary offences.<sup>77</sup>

77-16581  
The proscribing of torture as a peremptory norm of international law is illustrated by the judgment of the **International Criminal Tribunal for the former Yugoslavia (ICTY)** in the *Furundzija* case: it should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency . . . . This is linked to the fact . . . that the prohibition on torture is a peremptory norm or *jus cogens*. . . . This prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.

**The European Court of Human Rights** adopted a similar position: Within the Convention system it has long been recognized that the right under Article 3 not to be subjected to torture or

---

<sup>77</sup> United Nations Action in the Field of Human Rights. Centre for Human Rights Geneva. United Nations, New York, 1988. P. 200.

to inhuman or degrading treatment or punishment enshrines one of the fundamental values of democratic society. It is an absolute right, permitting of no exception in any circumstances.<sup>78</sup>

According to the European Court of Human Rights; in determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. In addition to the severity of the treatment, there is a purposive element, as recognized in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating.<sup>79</sup>

On 17 December 1979 the United Nations General Assembly adopted a **Code of Conduct for Law Enforcement Officials** in resolution 34/169. According to article 2 of the code human dignity of all persons should be protected and respected and their human rights should be maintained and uphold. Under its Article 5 torture is strictly prohibited. Article 5 of the Code reads as: no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a

---

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*



justification of torture or other cruel, inhuman or degrading treatment or punishment.<sup>80</sup> The Assembly adds that the term 'cruel, inhuman or degrading treatment or punishment' has not been defined by the general assembly, but should be interpreted so as to extend the widest possible protection against abuses whether physical or mental.<sup>81</sup>

**The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment** contains 39 principles. Principle 1 set out the basic requirement to treat detained or imprisoned persons in a humane manner. Principle 6 enshrines the prohibition against torture. It stipulates that:

- It shall be prohibited to take undue advantage of the situation of a detained person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person (principle 21, para.1);
- No detained person while being interrogated is to be subjected to violence, threats or methods of interrogation which impairs his capacity of decision or judgment (principle 21, para.2).<sup>82</sup>

---

<sup>80</sup> United Nations Action in the Field of Human Rights. Centre for Human Rights Geneva. United Nations, New York, 1988. P.202.

<sup>81</sup> Ibid.

<sup>82</sup> Human Right and Law Enforcement, Professional Training Series No. 5.

## CHAPTER 2

# UNITED NATIONS CONVENTION AGAINST TORTURE

### Introduction

Being a crime against humanity and an immoral act torture is strictly prohibited on international level. In this regard there are many conventions and treaties under international law. Almost all countries of the world signed, ratified or access these treaties and convention one way or the other. Many of them specifically made domestic legislation to prohibit torture.

“n perhaps no other area has the United Nations been so prolific or, some would argue, so successful as it has been in the adoption of new international norms for the protection of human rights. A recent UN compilation of human rights instruments lists sixty-seven conventions, declaration, and other documents adopted under UN auspices, and even this number is surely incomplete.<sup>83</sup> These instruments range from narrowly focused recommendations, such as the UN Standard Minimum Rules for the administration of Juvenile Justice to such basic human rights texts as the two International Covenants on human rights.<sup>84</sup>

---

<sup>83</sup> UN Centre for Human Rights, A Compilation of International Instruments (1988). The compilation includes two conventions adopted prior to 1945 and only a very short selection of instruments adopted by specialized agencies such as the International Labour Organization and UNESCO.

<sup>84</sup> The United Nations and International Law. Ed. Christopher C. Joyner. The American Society of International Law, Cambridge University Press, 1998.P. 131.

In 1975, the General Assembly adopted the declaration on the Protection of all Persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment.<sup>85</sup> The provisions of the declaration were given the force of international law in the convention against torture and other cruel, inhuman or degrading treatment or punishment in 1984, and now the prohibition of torture and inhuman treatment is a norm of customary international law.<sup>86</sup> The convention entered into force on 26 June 1987.

Excerpts from Methods of Combating Torture, Fact Sheet #4, UN Centre for Human Rights:

*Torture is a particularly serious violation of human rights and, as such, is strictly condemned by international law and, in particular, by the Universal Declaration of Human Rights, article 5, which states that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.*

*To ensure adequate protection for all persons against such abuses, the United Nations has sought for many years to develop universally applicable standards. The Convention against Torture ..., which was adopted by the General Assembly of the United Nations on 10 December 1984, and many other relevant conventions, declarations and resolutions adopted by the international community, clearly state that there may be no exception to the prohibition against torture....*

*The Convention against Torture... not only specifies that the States Parties will outlaw torture in their national legislation, but also notes explicitly that no order*

---

<sup>85</sup> General Assembly Resolution 3452 (XXX) of 9 December 1975.

<sup>86</sup> Human Rights and Pre-trial Detention, A Handbook of International Standards relating to pre-trial detention. United Nations, New York and Geneva, 1994. P.2.

*from a superior or exceptional circumstances may be invoked as a justification of Torture....*<sup>87</sup>

The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment intend to:

- Prevent torture around the world.
- The Convention requires states to take effective measures to prevent torture within their borders.
- Forbids states to return people to their home country if there is reason to believe they will be tortured.

It is very common assumption that the convention's principle objective is to out-law torture and other cruel, inhuman or degrading treatment or punishment. But this assumption is totally wrong because such practices are already prohibited under international law. The main purpose of the convention is to strengthen the existing prohibition of such practices by a number of supportive measures.<sup>88</sup> The convention only deals with the practices of torture by public officials or such persons acting in an official capacity and it obligates the parties to prohibit such type of maltreatments.

Basically the convention is divided into three parts. Its first part comprise of the substantive provisions that is from article 1 to 16. Implementation provisions are discussed in part to that starts from article 17 and ends at article 24. These articles provide for several forms of

---

<sup>87</sup> <http://www.pdhre.org/conventionsum/torsum.html> accessed on 10th June, 2011.

<sup>88</sup> J. Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, International Studies in Human Rights, Martinus Nijhoff Publishers, p. 1.

international supervision with regard to the observance by States Parties of their obligations under the substantive provisions.<sup>89</sup> The final clauses are written in the articles 25 to 32. These articles are regarding the signature and ratification of the convention, its entry into force, amendments, denunciation, and settlement of disputes concerning the Convention's interpretation or application, and optional exclusion of one of the implementation provisions.<sup>90</sup>

## 2.1. Substantive Provisions of CAT

**Part I:** CAT appears to be the first international agreement to actually attempt to define the term.<sup>91</sup> The term 'torture' is defined in the **Article 1** of the convention as meaning "*any act by which sever pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or from a third person information or a confession, punishing him for an act he or a third person has committed or is suspected to have committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*"<sup>92</sup>

This conventional definition does not embrace every act of mistreatment instigating mental or physical suffering or pain but only the one of severe nature. Most important is that this torture must be purposefully inflicted and it must be committed by someone acting under the color of law. So far this definition the acts of torture, done in private capacity or by any private individual

---

<sup>89</sup> Ibid, pp. 1-2.

<sup>90</sup> Ibid, p. 2.

<sup>91</sup> CRS Reports for Congress. U.N. Convention against Torture: Overview and Application to Interrogation Techniques. Congressional Research Service.

<sup>92</sup> Ibid.

to another individual and there is absence of instigation or consent of a public official, does not constitute 'Torture' for the purpose of CAT.

**Article 2** of the convention talks about the state responsibility. It requires parties to take effective measures legislative, administration, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. There should be 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. Neither can it be justified by orders from superior officers or public officials. According to this article torture is absolutely prohibited and a non-derogable right. Since the conventions entry into force, this absolute prohibition has become accepted as a principle of customary international law.

According to this article there are some specific measures that should be taken by the countries that are parties to the UNCAT, those measures are:

- The prohibition and punishment of all acts of torture through appropriate laws and penalties in domestic criminal law;
- The full integration of educational information about the prohibition against torture into the training of law enforcement personnel, civil or military, medical personal, public officials and others who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment;
- The systematic review of interrogation rules, instructions, methods and practices, as well as of arrangements for the custody and treatment of suspects, detainees and prisoners;
- Guarantees for the prompt and impartial investigation of allegations of torture by competent authorities;

- The protection of witnesses;
- The possibility for victims to obtain redress and fair and adequate compensation and rehabilitation.<sup>93</sup>

**Article 3** of the convention speaks about the principle of non-refoulment. Parties to the convention are barred from deporting, extraditing or re-fouling people where there are substantial grounds for believing they will be tortured.<sup>94</sup> This article strictly banned the countries to return or expel any person to any other territory or state where he or she might be tortured. The committee against torture has held that this danger must be assessed not just for the initial receiving state, but also to states to which the person may be subsequently expelled, returned or extradited.<sup>95</sup>

**Article 4** asks the parties to criminalize all the acts of torture and this should be applicable not just to the acts but to an attempt to commit torture as well. Central objective of the convention includes ensuring that torture is a criminal offense. Each state must ensure that all acts of torture, attempts to commit torture, and complicity or participation in torture are offences punishable by law.<sup>96</sup> There should be appropriate punishment or penalties for all such offences. CAT article 4 requires states to ensure that all acts of torture are criminal offences, subject to appropriate penalties given their 'grave nature'.<sup>97</sup>

---

<sup>93</sup> <http://www.irct.org/what-is-torture/convention-against-torture.aspx>. Retrieved on 10<sup>th</sup> June 2011.

<sup>94</sup> Convention against Torture (<http://www2.ochr.org/english/law/cat.htm>), Article 3.1. Retrieved on 15<sup>th</sup> June, 2011.

<sup>95</sup> [http://en.wikipedia.org/wiki/United\\_Nations\\_Convention\\_Against\\_Torture](http://en.wikipedia.org/wiki/United_Nations_Convention_Against_Torture). Retrieved on 15<sup>th</sup> June, 2011.

<sup>96</sup> Convention against Torture (<http://www2.ochr.org/english/law/cat.htm>), Article 4. Retrieved on 15<sup>th</sup> June, 2011.

<sup>97</sup> CRS Reports for Congress. U.N. Convention against Torture: Overview and Application to Interrogation Techniques. Congressional Research Service.

Under **Article 5** each state party to convention requires to establish its jurisdiction over acts of torture committed by or against a Party's citizens. It also speaks about establishing universal jurisdiction to try cases of torture where an alleged torturer cannot be extradited. Pursuant to CAT article 5, a state party must establish jurisdiction over CAT article 4 offences when:

- The offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- The alleged offender is a national of that State;
- The victim was a national of that State if that State considers it appropriate;

And

- The alleged offender is present in any territory under its jurisdiction and the State does not extradite him in accordance with CAT article 8, which makes torture an extraditable offence.<sup>98</sup>

**Article 6** of the convention talks about the custody of the alleged offender that each State party shall, on certain conditions, take a person suspected of the offence of torture into custody and make a preliminary inquiry into the facts.<sup>99</sup> Under this article Right of communication must also be provided to the alleged offender with the nearest appropriate representative of the State of which he is a national. Notification of facts of the custody of the alleged offender and of the circumstances which warrant his detention to the States referred to in article 5, paragraph 1. Subsequently report of the preliminary inquiry must also be shared with the said State and shall also indicate whether it intends to exercise jurisdiction.

---

<sup>98</sup> Ibid.

<sup>99</sup> <http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.htm>. Retrieved on 10<sup>th</sup> June, 2011.



**Article 7** states that the State party, if it does not extradite the alleged offender, will submit the case to the competent authorities for prosecution.<sup>100</sup> These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state.<sup>101</sup> The person shall be guaranteed fair treatment at all stages of the proceedings.

Under **Article 8** the offence of torture may be considered as legal basis for extradition if no extradition treaty exists. But it depends on other conditions provided by the law of the requested State. The offences referred to in article 4 shall be deemed to be included as extraditable offence in any territory.<sup>102</sup>

**Article 9** of the convention speaks about the state responsibility to provide the possible judicial assistance in connection with cases of alleged torture and to provide with the all evidence at their disposal.

**Article 10** speaks about the education of the convention. It 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 the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.<sup>103</sup>

Under **Article 11** of the convention a systematic review of interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons

---

<sup>100</sup> <http://www.pdhre.org/conventionsum/torsum.html> accessed on 10th June, 2011.

<sup>101</sup> CAT at Art. 7

<sup>102</sup> Convention against Torture (<http://www2.ochr.org/english/law/cat.htm>), Article 8. Retrieved on 15th June, 2011.

<sup>103</sup> Convention against Torture (<http://www2.ochr.org/english/law/cat.htm>), Article 10. Retrieved on 15<sup>th</sup> June, 2011.

subjected to any form of arrest, detention or imprisonment with a view to preventing any cases of torture.<sup>104</sup>

**Article 12** of the convention speaks about the State responsibility to a prompt and impartial investigation against the alleged torture under its jurisdiction. Under this article it's the State responsibility to investigate the act of torture if there is believe that such act is done in its territory.

Under **Article 13** it is State's responsibility to protect the right of the individual, who alleges he has been subjected to torture, has the right to complain to and to have his case promptly and impartially examined by competent authorities.<sup>105</sup> Complainant and the witnesses must be protected against all form of ill-treatment as a consequence of his complaint or any evidence given.

**Article 14** requires the State parties to the convention that their legal system must provide proper re-dressal of an act of torture. An enforceable right to fair and adequate compensation must also be provided including all means for as full rehabilitation as possible. If the victim died as a result of torture, his dependents shall be entitled to appropriate compensation.

**Article 15** speaks about the statement made as a result of torture. Such statements shall not be invoked as evidence except against a person accused of torture as evidence that the statement was made. Now under this article a question arises about the practices in Pakistan especially in thana culture, attitude of investigation officer during the investigation or the status of confessional statements during such investigation.

---

<sup>104</sup> <http://www.pdhre.org/conventionsum/torsum.html> accessed on 10th June, 2011.

<sup>105</sup> <http://www.pdhre.org/conventionsum/torsum.html> accessed on 10th June, 2011.

Article 16 is another very important article of the convention. It generalizes the definition of torture as stated in article 1 of the same convention. Under this article each State party must undertake appropriate steps to prevent all other acts of cruel, inhuman or degrading treatment or punishments which do not amount to torture as defined in article 1, when such torture is committed by or at the instigation of a public official or other person acting in an official capacity.<sup>106</sup> This article provides with the prohibition of all forms of inhuman, cruel or degrading treatment and it also strengthens the provisions of Article 1. In Particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.<sup>107</sup>

## **2.2. Provisions Regarding Implementation of CAT**

Part II- Article 17 to Article 24 provides details for establishment of a committee against torture. It is the most important part from implementation point of view of the convention. This part defines the duties of the members of the committee, their eligibility criterion and all other rules and regulation of the committee. It provides that committee shall consist of 10 experts elected by the States parties.

According to article 17 there should be a committee against torture. That must be comprised of 10 experts of high moral standing and recognized competence in the field of human rights and committee members shall be elected for a term of four years.

---

<sup>106</sup> Ibid

<sup>107</sup> J. Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, International Studies in Human Rights, Martinus Nijhoff Publishers, 1988. pp. 181-182.

**Article 18** of the convention speaks about the rules that committee shall establish its own rules of procedure.

**Article 19** provides with the reporting mechanism for the submission of reports on the measures taken by the state parties to give effect to their undertakings under this convention. According to this article after ratification of the convention the state party must submit the report within one year and shall submit the supplementary reports every four years regarding any new measures taken or such other reports on the request of the committee. Such reports shall be communicated with all state parties by the Secretary-General of the United Nations.

**Article 20** of the convention is about any information received regarding practices of torture in the territory of State parties. It states that if the committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practiced in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observation with regard to the information concerned.<sup>108</sup> After considering any information provided by the concerned state and all other relevant information the committee may designate any of its members to make confidential inquiry and to report to the committee. In agreement with the State Party concerned, such an inquiry may include a visit to its territory.<sup>109</sup>

**Article 21** is about the recognition of competence of the committee by the State party to receive and consider communications. A State party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider

---

<sup>108</sup> J. Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, International Studies in Human Rights, Martinus Nijhoff Publishers, 1988. P.184

<sup>109</sup> *Ibid.*

communications to the effect that a State party claims that another State party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State party which has not made such a declaration. The provisions of this article shall come into force when five States parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State party concerned has made a new declaration.

**Article 22** allows a State party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State party which has not made such a declaration as provided under article 21.

**Article 23** provides that the members of the Committee and of the ad hoc conciliation commissions which may be appointed under article 21, 'paragraph I (e)'<sup>110</sup>, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

According to the **Article 24** of the convention an annual report must be submitted by the committee regarding its activities to the General Assembly and to the States Parties.

## **2.3. Procedure to become a Party to the Convention**

**Part III: Article 25 to Article 33** provides with the details of ratification, coming into force and amendments to the convention. Process of ratification or coming into force includes Signature, ratification, accession and reservation.

**Article 25 (1)** provides the opportunity to become a signatory of the Convention by opening it for the Signature for all States. Signature is preliminary step on the way of ratification of the treaty by the state. The act of signing does not impose positive a legal obligation on the states. However signature does indicate the states intention to take steps to be bound by the treaty at the later date.<sup>111</sup>

---

<sup>110</sup> (e), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission.

<sup>111</sup> Consent to be bound by a treaty expressed by signature; (Art: 12 of Vienna convention on law of treaties 1969).

Provision of ratification is given under **Article 25 (2)** of the convention. In this regard the instrument for ratification must be placed with the Secretary-General of United Nations. The state establishes its consent to be bound by a treaty which it has already signed.<sup>112</sup>

**Article 26** provides with the option of accession to all States. When a State not signed the treaty or convention it can express its consent to become a party by depositing an 'Instrument of Accession' with the Secretary-General of United Nations. Accession has the same legal effect as ratification.<sup>113</sup>

**Article 27** is about the enforcement after ratification or accession of the convention. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

According to **Article 28** any State party can made reservation on the competence of the committee against torture at the time of signature, ratification or accession. And also provide with option to withdraw such reservation any time by notification to the Secretary-General of United Nations.

**Article 29** is related to the amendments to the convention. A State party can purpose the amendments to the convention and must file with the Secretary General of the United Nations in this regard. Then the Secretary General must communicate it with the States parties and ask them to inform if they will favor the conference for considering and voting the proposal of amendment. Such conference should be conducted within four months and at least one third

---

<sup>112</sup> Consent to be bound by a treaty expressed by ratification, acceptance or approval (art: 14 of Vienna convention on law of treaties 1969).

<sup>113</sup> Consent to be bound by a treaty expressed by accession (Art: 15 of Vienna convention on law of treaties 1969).

States favor it. When any such amendment is adopted by majority State present at the conference and vote for it, the Secretary-General has to submit it to all States parties for acceptance.

The adopted amendment shall come into force after the notification of two thirds of the States parties that they adopted the amendment in accordance with their constitutional procedures and then the States parties who accepted the amendment are bound by the provisions of the amendments.

Under **Article 30** an optional mechanism for arbitration is provided when there is any dispute between two or more States parties to this convention. But if the parties are not able to agree upon the organization for arbitration within six months from the date of request for arbitration, the dispute can be referred to the International Court of Justice by any of the parties in dispute.

Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the above said obligations of this article. The other States parties shall not be bound by paragraph I of this article with respect to any State party having made such a reservation.

According to **Article 31** any State party can denounce from the convention and has to submit a written notification to the Secretary-General in this regard. The denunciation becomes effective after one year from the date of receipt of the notification. But it does not affect the state's obligations under the convention for any act or omission prior to the effectiveness of such denunciation and will not affect the consideration prior to the date of denunciation become effective. This denunciation does not bar the commencement of the State for any new matter by the Committee.



**Article 32** articulates that the Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

- (a) Signatures, ratifications and accessions under articles 25 and 26;
- (b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;
- (c) Denunciations under article 31.<sup>114</sup>

## **2.4. The Committee Against Torture**

The Committee against Torture (hereafter, the Committee) is one of the United Nations treaty bodies created to supervise the implementation by state parties of their obligations under the respective parent convention.

The committee shall be established under the provisions of Article 17 and 18 of the 'Convention'<sup>115</sup>. It provides details about working and membership of the CAT. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience. The committee is responsible for monitoring the extent to which states parties respect their obligations to implement the convention, i.e to prevent, to prohibit and to punish torture. The main procedure

---

<sup>114</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>. (Last accessed on 4-12-2013)

<sup>115</sup> Convention means United Nations Convention Against Torture and other cruel, inhuman or degrading treatment or punishment, 1984.

for monitoring the implementation of the convention is through the State party reporting procedure under 'article 19'<sup>116</sup> of the convention.<sup>117</sup>

The purpose of this procedure is to help the committee gain a clear picture of the extent to which States Parties are respecting their treaty obligations, by asking them to describe how they are implementing those obligations in practice. States have an obligation to submit reports on the regular basis.<sup>118</sup>

Once the Committee has received a State party report, it must examine it carefully in order to identify any areas of concern. The Committee will draw conclusions and make recommendations to the state on ways to better implement its obligations, if necessary. In addition to the examination of the State party reports, the committee can carry out a confidential inquiry into allegations of a systematic practice of torture.<sup>119</sup>

The Convention contains no provision obliging States to implement the committee decisions, and there is no enforcement mechanism. However, State parties must offer redress and compensation

---

<sup>116</sup> 1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.

<sup>117</sup> Lene. Wendland, *A Hand Book on the State Obligations under the UN Convention against Torture*, Geneva, May, 2002. 17.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid, 18.

to a complainant when the committee finds that there had been a violation of the convention and the State party is obliged to indicate how it will offer redress.<sup>120</sup>

According to the Article 22 of the convention a State party to this Convention may at any time declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State party which has not made such a declaration. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State party concerned. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

According to the Article 24 of the convention the Committee shall submit an annual report on its activities to the States parties and to the General Assembly of the United Nations.

---

<sup>120</sup> Ibid, 18,19.

## **2.5. The Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2002 (OPCAT, 2002)**

This optional protocol was adopted by United Nations General Assembly on 18<sup>th</sup> day of December, 2002 which entered into force on 22<sup>nd</sup> June, 2006. It is a treaty of United Nations that supplements to the United Nations Convention Against Torture, 1984. The idea for this scheme of torture prevention goes back to the Swiss Committee for the Prevention of Torture (today Association for the Prevention of Torture, APT), founded in 1977 by Jean-Jacques Gautier in Geneva. It envisaged the establishment of a worldwide system of inspection of places of detention, which later took the form of an Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984).<sup>121</sup> For a long time, however, the necessary support for such an optional protocol was not forthcoming. As a consequence, the UN Committee against Torture (CAT) had at its disposal only relatively weak instruments: it could analyze and discuss the self-reports of the respective governments and create the institution of a Special Rapporteur on Torture. But neither CAT nor its Special Rapporteur had the power to visit countries, let alone inspect prisons, without the respective government's permission.<sup>122</sup> OPCAT establishes an international inspection system for places of detention. The protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention. It reaffirms that torture and other

---

<sup>121</sup> [http://en.wikipedia.org/wiki/Optional\\_Protocol\\_to\\_the\\_Convention\\_against\\_Torture](http://en.wikipedia.org/wiki/Optional_Protocol_to_the_Convention_against_Torture). (Last accessed on 4-12-2013)

<sup>122</sup> *Ibid.*

cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights.

## **2.6. Sub-Committee on Prevention of Torture, 2002**

This Sub-committee was established under the provisions of Optional Protocol of the Convention against Torture. The UN Sub-committee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) is one of the United Nations mechanisms directed to the prevention of torture and other forms of ill-treatment. It started its work in February 2007. The Protocol gives the SPT the right to visit all places of detention in those States and examine the treatment of people held there.<sup>123</sup> It has a purely preventive mandate focused on an innovative, sustained and proactive approach to the prevention of torture and ill treatment.

The SPT has a dual mandate:

- to monitor conditions in detention and treatment of persons deprived of their liberty through country visits
- to advise on OPCAT implementation, in particular support the establishment and functioning of National Preventive Mechanisms.

The SPT presents a public annual report on its activities to the Committee against Torture and convenes three times a year for sessions of one week duration at the United Nations Office at

---

<sup>123</sup><http://nhritortureprevention.org/un-resources/opcat-overview/un-sub-committee-for-the-prevention-of-torture/> (Last accessed on 5-12-2013).

Geneva. The SPT, with its 25 independent experts, is the largest human rights treaty body of the UN. SPT mandate, independent experts, human rights treaty body.<sup>124</sup>

---

<sup>124</sup> <http://www.ap.t.ch/en/subcommittee-on-prevention-of-torture/> (Last accessed on 5-12-2013).

## CHAPTER 3

# NATIONAL LEGAL FRAMEWORK OF PAKISTAN AND PROHIBITION OF TORTURE

### Introduction

Pakistan is a State party to various human rights instruments like UNCAT, ICCPR, Geneva Conventions, CRC, CEDAW and UDHR, which deliberately ban torture and emphasis for its absolute prohibition in its all forms and in all state of affairs. By signing these international covenants and treaties and protocols, the States reaffirm their commitment to their own people. It is actually an extension of the social contract that each State makes with its own citizens.

In this chapter we will discuss the existing laws in Pakistan regarding elimination of torture in the light of international instruments pertaining to prohibition of torture specifically torture in custody of law enforcement agencies or by public officials. Pakistan does not have any specific legislation related to prohibition of torture or any other form of cruel, inhuman or degrading treatment or punishment by any public official or other person acting in official capacity except some provision in constitution just under the heading of fundamental rights and the Pakistan Penal Code, which are not directly related to the prevention or protection against torture by public officials but we can take them as a source to enact laws regarding torture.

### 3.1. The Constitution of Pakistan, 1973

Pakistan ratified the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment on June 26, 2010, however, the use of torture in its all forms was prohibited by the Constitution of Pakistan, 1973 long before the ratification. Constitution is considered as the book of principles for the country and as per Article 14(2) prohibition or torture is principle of law. Torture in one form or the other is inflicted by individuals in their private capacity as well as by public functionaries in respect of or in connection with their public offices. Here in this chapter we will discuss the torture inflicted upon common man under the garb of law. There are some provisions of Constitution that could be considered as preventive clauses for protection of human life but these are not directly applicable for prohibition of custodial torture or torture by public officials except article 14(2). Articles 4, 8, 9, 10, 10-A, 12, 14(1), 14(2) and 25 of the constitution can also be considered as preventive clauses.

The Constitution of Pakistan, 1973 provides the protection of Fundamental Rights under part I and part II of chapter 1. Article 4 in Part I of the Constitution is very precisely elaborates the right of individuals to be dealt with in accordance with the law. According to this article enjoyment of equal protection of law and to be treated in accordance with law is the 'inalienable right'<sup>125</sup> of every citizen which cannot be snatched in derogation of law applicable. This is highly important provision of the constitution of Pakistan 1973. It is even available as shield

---

<sup>125</sup> Inalienable rights are those rights which are non-transferable, cannot be relinquished, abridged or usurped. Such rights are conferred by the constitution and cannot be taken away or modified except be the constitution itself. When such rights are given constitutional guarantees they are called 'Fundamental Rights' because they have been placed beyond the power of any organ of the State, whether Executive or legislative to act in violation of them.



against tyranny (totalitarianism) and excesses (extravagance) in emergency. It casts obligation upon functionaries of Federation and federating units/legislatures to ensure the doctrine of rule of law and embody the principle of equality. This article embodies the concept of dignity, equality of law and save citizens from arbitrary/discriminatory laws and actions by the Governmental Authorities.<sup>126</sup> Here individual includes every citizen of Pakistan and every other person for the time being within Pakistan. To enjoy protection of law and to be treated in accordance with law is inalienable right of every citizen as enshrined in this Article.<sup>127</sup> Duty of each and every public functionary is to act in accordance with law and not in derogation of law as ordained under Article 4 of the Constitution.<sup>128</sup>

Article 4(2) provides that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. The term 'in accordance with law' seems to be the modification of the American concept 'Due process of Law'. The law contemplated by this Article is one which is passed by a competent legislature and which is not repugnant to any other Article relating to Fundamental Rights or other provisions of the Constitution. It, therefore, follows that to deprive others of their liberty one must strictly and scrupulously observe the forms and rules of the law.<sup>129</sup>

What the Article declares is that any public functionary or person taking any action affecting the life, liberty, body, property or reputation of a person, or affecting his profession, trade, or business, must rely on some law to justify his action. Thus, a hangman must be equipped with a legal authority to hang, a jailer with a legal warrant to imprison and so on. Thus, a direction or

---

<sup>126</sup> *Shaukat Ali Mian vs. Federation of Pakistan* (1999 CLC 607).

<sup>127</sup> *Mst Rashida Bibi vs. Border Area Committee through its Board of Revenue etc* (PLJ 2004 Lah 459).

<sup>128</sup> *Muhammad vs. Pakistan Railways* (2004 YLR 521).

<sup>129</sup> *Fundamental Laws by Sharif-ud-Din Pirzada*, page 171.

order by the Executive which infringes a present right would be invalid, if it does not have the backing of a valid contemporaneous law.<sup>130</sup> Every executive action must be backed by some law. Provisions of Article 4 of the Constitution ordain that every person has a right to insist that he be dealt with in accordance with law and law alone.<sup>131</sup>

According to Honorable Lahore High Court observation out of the legal rights, the right to liberty is placed on a higher pedestal, which is to be respected by all and sundry. Courts are the guardians of the liberties of the citizens. Even a worst criminal in the society is entitled to legal safeguards and his legal rights cannot be taken away in a slipshod manner.<sup>132</sup> Every act of the Government is required to be exercised lawfully and every individual has to be dealt with in accordance with law. To enjoy protection of law and to be treated in accordance with law is inalienable right of every citizen.<sup>133</sup> Police is no exception to this general rule.<sup>134</sup>

To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. Police officers have not been given unbridled authority to humiliate and ridicule the citizens without any iota of evidence against them. To call a person to police station without factual or legal justification make him to sit there against his will, *prima facie*, amounts to wrongful confinement and action needs to be taken against the police.<sup>135</sup> Police is not possessed of right to murder or kill or take life of any citizen accused of any offence only for the reason that such person was involved in criminal cases and kept a previous bad record. Person keeping bad record could be innocent in the case registered against him, because under the law

---

<sup>130</sup> Haji Ghulam Zamin vs. A.B. Khondkar (PLD 1965 Dacca 156).

<sup>131</sup> M. D. Tahir Advocate vs. Federal Government (PLD 2000 Lah. 251).

<sup>132</sup> Muhammad Afzal vs. Sessions Judge Multan (PLD 2008 Lah 479).

<sup>133</sup> Mazhar Husain vs. Province of Punjab (PLD 1985 Lah. 394).

<sup>134</sup> Muhabbat Khan vs. Atta Muhammad (1985 P.Cr.L.J 360).

<sup>135</sup> Noor Muhammad vs SHO, Police Station Klur Kot, District Bhakkar (2000 YLR 85).

presumption of innocence would continue until he was proved guilty. Where the police machinery takes law in its hands it is to be dealt with in the same manner as the ordinary citizens are dealt with. Nobody could be allowed to take law into his hands and it was the duty of the Courts to curb the highhandedness sternly.<sup>136</sup>

Prohibition of any kind of torture and any violation of human rights is also provided in Article 8 of the Constitution in general terms by stating that “any law or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by Chapter 1, shall to the extent of such inconsistency, be void”. State has no right to take away these rights by any means and is not allowed to make any law in contravention to these guaranteed rights. For the purpose of this section the word ‘State’ shall include all federal and provincial governments as provided in Article 7 of The Constitution. It include all the agencies and functionaries. “Principle of social justice and Fundamental Rights guaranteed to every citizen must be fully safeguarded by the courts” held by the Apex Court in 1996.<sup>137</sup>

All the rules and laws are enacted for securing proper administration of justice. The rules are meant to advance justice and to preserve the rights of litigants. The Rules are not enacted for entrapping the persons into blind corner so as to frustrate the purpose of law and the justice.

Doctrine of personal security is enshrined very clearly in Article 9 of the Constitution read as, “no person shall be deprived of life or liberty, save in accordance with law”. In this Article the Constitution provides guarantee against any attack on the life or liberty of a person subject to law in general terms and can be consider as guiding principle. Term life used in article 9 of the Constitution is of very wide import and includes all those rights which are necessary for living a

---

<sup>136</sup> Malka Jan vs. Inspector General of Police N.W.F.P (2000 P.Cr.L.J. 320).

<sup>137</sup> Ch. Muhammad Anwar vs. Province of Punjab through secretary Housing and others (1996 MLD 961).

particular person and according to the law we are governed, a person alleged to have committed any crime shall be treated as innocent till the court announces its verdict holding him guilty. This principle has been provided to safeguard the interest of the accused and also to protect the citizens from the highhandedness of the investigating/police authorities. When the agencies charged with the duty to protect the life and property of the citizens indulge in extra judicial killings, then starts State terrorism in which the Police Authorities, the Rangers or any other agency is permitted by an executive order to execute, eliminate or kill a particular person. The crime become more heinous where persons are arrested under any charge, false or true and then they are killed while in custody of the Police/Rangers. This law of jungle cannot be allowed to be perpetuated nor can any civilized Government be allowed to continue with it without any check. Such acts violate Article 9 of the Constitution which confers, protects and preserve life, liberty and property of the citizens. .... Even the prisoners of war are not allowed to be killed. Such acts by the State violate Fundamental Rights under which a person is entitled to be treated according to law and equal before law. The Human Dignity is inviolable and that the right to life cannot be taken away except as provided by law.<sup>141</sup>

The apex Courts of Pakistan in its interpretation of article 9 of the Constitution, 1973; states; it is the duty of the Court under articles 9 and 14 of the Constitution to safeguard and preserve life and dignity of the citizens and protect them from serious and hazardous risks, so that they can live a happy and meaningful life.<sup>142</sup> Extra judicial killing or custodial deaths, arrests and

---

<sup>141</sup> Allah Jewaya vs. Muhammad Baksh (PLD 1998 S.C 388 + PLD 1994 S.C. 693).

<sup>142</sup> 2004 PTD 534.

torture such acts of States machinery violate Fundamental Rights under which a person is entitled to be treated according to law and equal before law.<sup>143</sup>

Article 10 of the Constitution declares the safeguard as to arrest and detention without any lawful authority. The rights provided under this are that no person shall be detained in custody without being informed of the reason or grounds for arrest. The right to information, of any detainee is very much important because it come under the ambit of torture, if not provided. If a person is detained in custody without knowing of the reason he shall suffer mental or in some cases physical torture.

Under this Article the right to consult and be defended by the legal practitioner of the choice of the person is also provided to the detainee. He shall not be deprived by his legal right of fair trial and be represented by legal practitioner in the courts of law. He must be provided with a right to defend the assertions alleged against him. He shall be allowed to consult and be defended by a legal practitioner of his choice.<sup>144</sup>

The detainee must be provided before the Magistrate within the twenty four hours of his detention. It is an established practice that the person arrested should be produced before the nearest magistrate within the prescribed time. Failure to comply with this requirement would make further detention illegal.<sup>145</sup> In another case the apex Court held that non production of accused before magistrate within a period of 24 hours of his arrest would be violative of article 10 of the Constitution of Pakistan, 1973.<sup>146</sup> In the light of the discussion under article 10 of the Constitution it can be reviewed that operation conducted by security forces so as to unlawfully

---

<sup>143</sup> Allah Jewaya vs. Muhammad Baksh (PLD 1993 S.C. 338).

<sup>144</sup> Hakim Khan vs. State (PLD 1975 SCMR 1).

<sup>145</sup> Sakhi Daler Khan vs. Superintendent in charge, recovery of abducted Women (PLD 1957 Lah. 813).

<sup>146</sup> Maqbol Ahmad Shah vs. the State (NLR 1992 criminal Kra 384).

detain (arrest) the people amounts to torture, which is totally prohibited by the Constitution of Pakistan.

In April 2010, National Assembly of Pakistan passed the 18<sup>th</sup> Constitutional Amendment, and insert a worldwide well recognized right of fair trial in the Constitution as Article 10-A. It is an internationally recognized right and acknowledged right that is enshrined in various declarations of international law that becomes customary international law, such as UDHR, ICCPR, CAT, etc.

Article 14 (inviolability of dignity of man, etc) of the Constitution of Pakistan provides with the right of Human Dignity and absolute prohibition of torture. A man should be treated with dignity whatsoever. Article 14 of the Constitution guarantees the dignity of the citizen and declares in clear terms that no citizen of Pakistan shall be subjected to torture. Dignity of man is not only provided by Constitution of Pakistan, but according to history and belief under Islam great value has been attached to the dignity of man and the privacy of home.<sup>147</sup> It, in clear terms, prohibits that no person shall be subject to torture for the purpose of extracting evidence. The Supreme Court here faced with a situation where members of the law enforcing agency, who are charged with the duty to protect the citizen, had themselves perpetrated upon their ward acts of inhuman torture. Words are not adequate to express our sense of horror at this outrage. It seems to us a positive afferent that these officers should now seek our assistance to evade what we consider an inadequate punishment for their behavior.<sup>148</sup>

---

<sup>147</sup> Allah Jewaya vs. Muhammad Baksh (PLD 1998 S.C. 388).

<sup>148</sup> Sher Ali vs. Zahoor Ahmed (PLD 1977 S.C. 545).

Article 14(2) of the Constitution expressly prohibits the use of torture for extracting evidence. It states that no person shall be subjected to torture for the purpose of extracting evidence.<sup>149</sup> The above mentioned Article of Constitution provides a principle for prohibition of 'Torture' and speaks about the 'Human Dignity' in any case.

These fundamental rights of citizens whenever violated and complained of, the Court must step into and investigate under constitutional jurisdiction and passed such order as may be found just, legal and equitable.<sup>150</sup> This guarantee is not subject to law but is an unqualified guarantee.<sup>151</sup> Torture for the purpose of obtaining confession is strictly prohibited not only by this article but also by the general law of the land as the apex Court observed in the case of *The Province of Punjab v. Begum Shamim Afridi* that all punishments which are inhuman and cruel violative of dignity of man, as for instance, whipping, solitary confinement and barbarous invasion on human personality.<sup>152</sup>

But the appreciation to exercise the right, as envisaged under Article 14(2), has thus far been minimal. To make matters further worse, in a claim against torture, the victims have the burden of proof, and there are no independent investigating agencies that are empowered to inquire on a complaint against torture.<sup>153</sup> The most common and simplest procedure of complaint against any wrong done is to lodge a report in the concerned Police Station and how is it possible to complain against a person in his own working place or police station. Practically the value of such complaints is very less or equal to nothing and it may cause more danger to the life of aggrieved party or person related to him instead of any relief.

---

<sup>149</sup> Constitution of Islamic Republic of Pakistan, 1973,

<sup>150</sup> *Muhammad Fazal vs. Kaura* 1994 SCMR 1783.

<sup>151</sup> *In Re: Suo Motu Constitutional Petition* (1994 SCMR 1028).

<sup>152</sup> *Muhammad Aslam Khan vs. Government of Punjab* (PLD 1973 Lah. 120).

<sup>153</sup> See. <http://notorture.ahrchk.net/profile/pakistan>; accessed: July 21,2011

Article 25 of the Constitution provides with the right of equality of citizens before law and there equal protection of law. Any kind of discrimination on the basis of sex is strictly prohibited. Concept of equality is negation of arbitrariness. Every power has its extent and legal limits. Exercise of such power would be based on fairness and reasonableness. Persons in similar circumstances should have similar treatment, unless differentiation is based upon valid classification, which should not have taint of arbitrariness and that is the hallmark of ideal dispensation of justice.<sup>154</sup> Concept of equal protection of law envisages that a person or class of persons should not be denied the rights, which are enjoyed by other persons in the same situation.<sup>155</sup> The principle of equality before the law and of prohibition of discrimination is of the essence of the rule of law and of human freedom,<sup>156</sup> and it has been said that every republican Government is duty bound to protect all its citizens in the enjoyment of equality of rights.<sup>157</sup>

### **3.2. Pakistan Penal Code, 1860**

As there is not any specific definition of torture but there are some legal provisions for prevention of torture provided in Pakistan Penal Code, 1860. Section 44 of PPC provides definition of 'Injury' that is not enough to fulfill the purpose. According to this section injury can be defined as any harm whatever illegally caused to any body and it includes all kind of mental and physical harm to reputation or property. It includes any torturous act but it is a very general provision and speaks about a wrong by a subject of State to another subject of State.

---

<sup>154</sup> Suleman Daud vs. development authority (2008 CLC 1251).

<sup>155</sup> Miss Shazia Batool vs. Government of Balochistan (2007 SCMR 410).

<sup>156</sup> International Law and Human Rights, p 338.

<sup>157</sup> 92 US 542



Another very important section in chapter IX of Pakistan Penal Code is that 'of offences by of relating to public servants'. Section 166 headed as 'Public servant disobeying law, with intent to cause injury to any person' speaks about the disobedience of law in general by any public servant. This section pertains to a public servant knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

According to some jurists and academics Pakistan Penal Code also has some provisions that may provide some sort of relief in the cases of torture in Chapter XVI-A (of wrongful restraint and wrongful confinement) particularly under sections 339, 340, 348 and 349, cover some aspects but all those are instances of torture. Sections 332 and 337(K) of Pakistan Penal Code can also be considered as the provisions for preventing torture.

Section 332 of Pakistan Penal Code gives the definition of hurt which is related to offences affecting the Human Body. It states that whoever causes pain, harm, disease, infirmity or injury to any person or impairs, disables or dismembers any organ of the body or part thereof of any person without causing his death, is said to cause hurt.<sup>158</sup> Hurt can be defined as causing bodily pain, disease or infirmity, may either be permanent or temporary, to any other person. The essential element of hurt is causing bodily pain. This definition contemplates the causing of bodily pain etc. by one person to another but it is silent about such acts done by any public servant because it becomes more heinous crime when some public official or member of any law enforcement agency done such illegal act in his official capacity. The causing of bodily pain

---

<sup>158</sup> Criminal Procedure Code, 1898.

is sufficient to constitute the offence of hurt under this section. It is not necessary that any visible injury should be caused on the person of victim. Where a person is dragged by the hair and also fisted, it was held that hurt was caused irrespective of the fact whether any visible injury was caused to the victim thereby.<sup>159</sup> The degree of severity of the pain caused is not material factor in deciding whether the offence of hurt has been committed or not. This section is very exhaustive in its nature and cover major aspect of torture in general. According to this section mental or physical pain is enough to constitute an offence, degree of severity does not matter as according to CAT (Convention Against Torture, article 1) torture is constituted only when an act by which sever pain or suffering, whether physical or mental, is intentionally inflicted. Here the term sever pain is used as a relative term which depends on strength or physique of the individuals. There is not a single definition or instrument from which we can measure the severity of any torturous act.

Sections 333 to 337-Z provides definition of different kinds of hurt to human body and the punishment accordingly. It includes all kinds of hurt that are divided as itlaf-e-udw, Itlaf-e-salahiyyat-i-udw, shajjah, jurhand all kinds of other hurts to human body.

Section 333 gives the definition of hurt that causes itlaf-i-udw. It provides that whoever dismembers, amputates, sever any limb or organ of the body of another person is said to cause itlaf-i-udw. It falls within the ambit of grievous hurt. Punishment for all such acts is provided under section 334 of PPC that is if such act is done intentionally shall be punished with qisas and where qisas is not executable, the offender shall be liable to arsh. In addition to this he may also be punished with imprisonment of either description for a term which may extend to ten years as ta'zir punishment.

---

<sup>159</sup> AIR 1967 AndhPra. 206, 208.

By the virtue of section 335 whoever destroys or permanently impairs the functioning, power of capacity of an organ of the body of another person, or causes permanent disfigurement is said to cause itlaf-i-salahiyyat-i-udw.<sup>160</sup>

Whoever causes itlaf-i-salahiyyat-i-udw to any other person shall be punished under section 336 of the same code. Such person shall also be punished with qisas and if the same is not executable the offender shall be liable to arsh and may also be punished with imprisonment of either description for a term which may extend to ten years as ta'zir.

Causing hurt to extort confession or to compel restoration of property<sup>161</sup>, Section 337-K, to somehow comes under the ambit of the definition of torture as provided in CAT. It states that whoever causes hurt for the purpose of extorting from the sufferer or any person interested in the sufferer any confession or any information which may lead to the detection of any offence or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore, or to cause the restoration of, any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property, or valuable security shall, in addition to the punishment of qisas, arsh or daman, as the case may be, provided for the kind of hurt caused, be punished, having regard to the nature of the hurt caused, with imprisonment of either description for a term which may extend to ten years as ta'zir.<sup>162</sup> Under this section the torturous act done by any person to any other person in order to extort confession or any information is illegal and is punishable as a criminal act. This section somehow covers the aspect torture that is discussed in the Convention against Torture.

---

<sup>160</sup> Pakistan Penal Code (Act XLV of 1860).

<sup>161</sup> IBID

<sup>162</sup> IBID

There are some other provisions of PPC which one way or the other deal with the situations that lead to torturous activities. Chapter XVI-A, of wrongful restrains and wrongful confinement, particularly in sections 339 (wrongful restrain), 340 (wrongful confinement), 348 (wrongful confinement to extort confession or compel restoration of property) and 349 (under subject of Criminal Force and Assault) to some extent covers the aspect of torture.

A wrongful restrain, according to section 339 PPC, is keeping of a man out of a place where he wishes to be and has a right to be. It implies voluntary obstruction of a persons' liberty. It could be considered as torture. To confine someone without any legal justification is illegal and a form of physical and mental torture. Such person shall be punished with simple imprisonment for a term, which may extend to one month, or with fine, which may extend to five hundred rupees or with both.

According to section 340 PPC a wrongful confinement is considered as wrongful restrain of any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits". "Whoever wrongfully confines any person, shall be punished with imprisonment of either description for, a term, which may extend to one year, or with fine which may extend to one thousand rupees or with both.<sup>163</sup> Whoever wrongfully confines any person, for three days or more, shall be punished with imprisonment of either description for a term, which may extend to two years, or with fine, or with both.<sup>164</sup> Whoever wrongfully confines any person for ten days or more, shall be punished with imprisonment of either description for a term, which may extend to three years, and shall also be liable to fine.<sup>165</sup>

---

<sup>163</sup> Section 342 of PPC.

<sup>164</sup> Section 343 of PPC.

<sup>165</sup> Section 344 of PPC.

In this chapter the most important section is 348 that are related to the Wrongful confinement to extort confession, or compel restoration of property. It is states that, whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

These are the some provisions of Pakistan Penal Code, 1860 that are related to any wrong done or offence affecting the human body by any person. All these are instances of torture, it cannot be considered as an exhaustive definition that can serve the purpose in its true sense. These are offences per se to qualify for torture but to cope with the conditions of torture in Pakistani jails, an appropriate definition of torture, a very clear policy to eliminate torture and a well-defined implementation mechanism is required. The response from various groups of criminal justice clientele unanimously damned the police behavior, ranging from procrastination, negligence, incompetence and bribery to torture. Once the police department is modelled after a punitive organ of the state, the investigation of crime is unsurprisingly structured around torture as a quick-fix in all situations. Torture is employed to identify the accused, to extract the confession, to dovetail the loose ends during investigation and to manipulate the facts to suit the seedy designs. This is a blatant violation of the law by the very authority that is meant to enforce it.

Torture techniques used by the investigation agencies or the Public officials for investigation are subtle, usually those which never physically affect the offender or culprit as caused by conventional torture but mental torture, disintegration of an individual's personality or in such a way that leave no marks on the body for evidence. For instance in Pakistan, Police usually use a leather shoe termed as 'chithar' for beating the culprits to extract confession or for any other illegal or even legal purpose.

Similarly where a public official arrested a person and refused to release him without payment of bribe and released him only when the money was paid; the action of such public official, amounted to putting the person arrested in fear of injury and the accused was guilty of 'extortion'<sup>166</sup> under section 383.<sup>167</sup> To somehow it covers the aspect of torture as discussed in the first chapter but it is not an appropriate definition. It provides the criminal act which can be committed by any one not specifically by the public officials. This section is very exhaustive in its implementation. But the only problem is that implementation procedure provided is not appropriate.

The emphasis on torture predictably results in low conviction rate and proportionate decline of public trust in criminal justice system. The failure to carry out reforms has led people to regard the police with mistrust; the police have become a symbol of terror and incompetence. The police lock-ups and other detention points such as Bakhshi-khana are in poor condition when it comes to the provision of basic human needs such as food, drinking water and toilets.

---

<sup>166</sup> Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits "extortion".

<sup>167</sup> AIR 1942 Oudh 163—41 Cri.L. Jour 139.

But comprehensive study of PPC, 1980 divulges there is a provision of this code that is derogation of the rights provided by the Constitution, 1973 and the principles of prohibition of torture as ordained by International Human Right Laws. The provision is regarding the punishment of solitary confinement that is allowed to under section 73 of PPC. It is usually used as a punishment for those prisoners who misbehave in the prison.

Solitary confinement means to place a prisoner in isolation in a prison cell away from other prisoners, usually as a form of internal penal discipline or it is a special form of incarceration in which a prisoner is isolated from any human contact, though often with the exception of members of prison staff. Solitary confinement is colloquially referred to in American English as "the hotbox", "the hole", "lockdown", "punk city", "SCU" (Solitary Confinement Unit), "AdSeg" (Administrative Segregation), the "SHU" (pronounced "shoe")—an acronym for "security housing unit", or "the pound"; and in the British English as "the block" or "the cooler". In Canada they are known as a Special Handling Unit, in France "gallows" and in Pakistan "KaalKotri".

The concept of imprisonment is based on the principle of 'reformation'. In case of solitary confinement the primary purpose of punishment is defeated. The idea of solitary confinement is global. Used almost everywhere, this experiment, of which the favorable results had been expected, proved otherwise for the majority of prisoners kept in segregation. It devours the victims increasingly and unmercifully; it does not reform, it kills.<sup>168</sup>

---

<sup>168</sup> Craig Haney & Mona Lynch, *Regulating Prisoners of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 *New York University Review of Law & Society*, Change 477, 483 (1977) (quoting Torsten Eriksson, *The Reformers, An Historical Survey of Pioneer Experiments in the Treatment of Criminals* (1976)), 49.

In the early nineteenth century, the U.S. led the world in a new practice of imprisoning people in solitary cells, without access to any human contact or stimulation, as a method of rehabilitation. The results were disastrous, as prisoners quickly became severely mentally disturbed. The practice was all but abandoned. Over a century later, it has made an unfortunate comeback. Instead of torturing prisoners with solitary confinement in dark and dirty underground holes, prisoners are now subjected to solitary confinement in well-lit, sterile boxes. The psychological repercussions are similar.<sup>169</sup>

Today, tens of thousands of individuals across the country are detained inside cramped, concrete, windowless cells in a state of near-total solitude for between 22 and 24 hours a day. The cells have a toilet and a shower, and a slot in the door large enough for a guard to slip a food tray through. Prisoners in solitary confinement are frequently deprived of telephone calls and contact visits. “Recreation” involves being taken, often in handcuffs and shackles, to another solitary cell where prisoners can pace alone for an hour before being returned to their cell.<sup>170</sup>

The devastating psychological and physical effects of prolonged solitary confinement are well documented by social scientists: prolonged solitary confinement causes prisoners significant mental harm and places them at grave risk of even more devastating future psychological harm.

Researchers have demonstrated that prolonged solitary confinement causes a persistent and heightened state of anxiety and nervousness, headaches, insomnia, lethargy or chronic tiredness, nightmares, heart palpitations, and fear of impending nervous breakdowns. Other documented effects include obsessive ruminations, confused thought processes, an over sensitivity to stimuli,

---

<sup>169</sup> <http://ccrjustice.org/solitary-factsheet>. (last accessed 5<sup>th</sup> May 2014).

<sup>170</sup> Ibid.



irrational anger, social withdrawal, hallucinations, violent fantasies, emotional flatness, mood swings, chronic depression, feelings of overall deterioration, as well as suicidal ideation.<sup>171</sup>

### **3.3. The Code of Criminal Procedure, 1898**

The Code of Criminal Procedure, 1898 is the book of procedure which provides procedure for investigation of offences. This code provides the procedure for lodging FIR, process of investigation, recording of evidence and statement of the witness and accused, confession, custody, and bail, in short, this is the procedure by following which offenders are prosecuted to let the justice prevail.

The Code provides the laws related to remand and custody of the corpus/accused that practically bypass the guarantees provided by the Constitution, 1973. In cases of physical remand the accused is in the custody of police and kept in police station for investigation. In the Cr.P.C physical remand of the accused is 14 days provided under section 167. This period is provided for fair, complete and thorough investigation. But the methods used for investigation are very inhuman and degrading. Bribe is also very common in such circumstances. Police use very severe torture for investigation and sometimes to extract confessional statements. To investigate means to prob not to torture but police took the meaning of physical custody as akin to the use of any kind of force. It becomes the worst violation of the right of fair trial and prevention against torture. The main purpose of physical custody is to collect the facts of the case rather to force the accused to accept the allegations. Sometimes to create pressure on the accused the police also kept other members of the accused family and torture them in-front of him so that he must confess of to produce evidence. The apprehension of abuse of power is further substantiated by

---

<sup>171</sup> Ibid.

the report released by the Independent Human Rights Commission of Pakistan (HRCP) recorded 147 cases of police torture and 65 deaths in custody in the year 2007 alone.<sup>172</sup>

Judicial remand is provided under section 344 Cr.P.C. it means that the accused is in the custody of jail authorities and kept in jail for the prescribed period of time. The purpose of judicial remand and keeping under trial prisoner in custody is to prevent the repetition of the offence or perpetration of some other offence or to assure the attendance of the accused at trial. In some cases the accused kept in jail for more than the period of his imprisonment when the trial ended and he is proved guilty. But it can be compensated under the provisions of 382-b Cr.P.C. It provides that “the length of any sentence of imprisonment imposed upon an accused person in respect of any offence shall be treated as reduced by any period during which was detained in custody for such offence.”

This procedure is very effective when the accused actually commits an offence and it is proved but in case if the accused is acquitted from all the allegations against it him it became an irreparable lose to him. There is no remedy available to the accused in such cases; he cannot be compensated by any means. His period in custody without any offence or charge come under the tortious acts and the same is not curable under Pakistani laws; no compensation is available to the person except the hardships in the rest of his life.

### **3.4. The Police Order, 2002**

The Police Order, 2002 was promulgated by the Chief Executive of the Islamic Republic of Pakistan in pursuance of the Proclamation of Emergency of October 14, 1999 and the

---

<sup>172</sup> Reforming Pakistan’s Police, Asia Report no. 157, 14<sup>th</sup> July 2008.

Provisional Constitutional Order No. 01 of 1999. It came into force on August 14, 2002. The Order replaced the Police Act, 1861. It provided a legal framework for governing the police in Pakistan with significant changes in its superintendence, organizational structure, and relationship with the public. This statute was promulgated keeping in view the need for making the police professionally competent, operationally neutral, functionally cohesive, and organizationally responsible for its performance.

Its primary objective was to reform the police in such a way that it could function according to the Constitution, law, and democratic aspirations of the people of Pakistan. It aimed at creating a police service, which is professional, service oriented and accountable to the people. Furthermore, it envisaged a police service, which is also efficient in prevention and detection of crime as well as the maintenance of public order. The new structure of the police service was based on separation of watch and ward from investigation. A number of new institutions have been envisaged in the Order, which provide greater space for public oversight and accountability of the police.

Section 35, 114(2) and 156(d) of Police Order 2002 also comes under the head of preventive measures for torture taken by the Government of Pakistan.

With reference to any complaints of neglect and excesses by police, section 35 of Police Order, 2002 provides that if any complaint or information has reason to believe that any 'police official'<sup>173</sup> has committed an act of neglect, failure or excess is received, or the Union Public Safety Committee on its own motion or on receipt of a complaint from an aggrieved person reports to ZilaNazim about such acts, the ZilaNazim may direct Head of District Police to take

---

<sup>173</sup> "Police Officer" means a member of the police who is subject to the police order, [Section 2(xviii)].

remedial measures, which may include registration of First Information Report in a cognizable offence in appropriate cases within a specified period. The ZilaNazim shall inform the concerned 'Commission'<sup>174</sup> at the District level accordingly.

On the directions of ZilaNazim the Head of District Police or the concerned competent authority shall immediately take appropriate remedial measures, he can suspend the concerned police official if necessary, initiate an enquiry and take appropriate action in accordance with law. He shall inform about his actions to the ZilaNazim and the concerned Commission at the District level and also provide a final report of inquiry within forty-five days.

Section 114(2) of the same provides that if there is any misconduct by the police officials or subject to rules, a Police Officer contravening the code of conduct may be awarded one or more punishments provided under section 113 as suspension, dismissed compulsory retired, reduced in rank or pay, within in a time scale, fined, censured or awarded any other punishment in the prescribed manner.

Another important section of Police Order, 2002, is 156 (d), which provides imprisonment of five years and fine for the offence of torture by a police officer. If any police officer inflicts torture or violence to any person in his custody shall be punished under this section. But implementation of this provision is very difficult because of lack of definition of torture. What acts of a police officer constitute torture is never defined under any law. To refrain someone from any act or compel to do some act is only possible when that act is properly defined.

---

<sup>174</sup> "Commission" means National Public Safety Commission, Provincial Public Safety and Police Complaints Commission, Islamabad District Public Safety Commission and District Public Safety and Police Complaints Commission established under this Order.[Section 2(v)]

Under Police Order, 2002 institutions for Public Safety and Grievance Redress mechanism were introduced. From the citizens' point of view, the most important feature of the new legal framework was its ability to institutionalize citizen participation and oversight in the police functions. A number of new institutions had been envisaged, which bring the public closer to the police to take maximum benefits from its services, on one hand and hold it accountable for its performance on the other hand. These institutions are as follows:

- i. National Public Safety Commission
- ii. Federal Police Complaints Authority
- iii. Public Safety and Police Complaints Commission
- iv. Public Safety Fund
- v. Citizens-Police Liaison Committee
- vi. Other professional bodies

A brief overview of each institution is given below:

#### **3.4.1. National Public Safety Commission (NPSC)**

The Order provides for establishment of NPSC consisting of 12 members, half independent and half elected. It is high powered institution to recommend to the Government technical and professional inputs for improvement of the law enforcement agencies. It also submits a report to the Government regarding the overall law and order situation. It can ask for recall of PPO on the grounds of unsatisfactory performance.

### **3.4.2. Federal Police Complaint Authority (FPCA)**

The Order requires the Federal Government to establish the FPCA comprising of a chairperson and six members appointed by Federal Government on the recommendation of FPSC. It will receive complaints against the Federal Law Enforcement Agencies and take appropriate necessary action. It will also call for reports relating to death, injury or rape in the police custody and order for enquiry. If necessary it can ask for judicial enquiry. It can establish regional offices and when necessary refer a complaint to the concerned PPSPCC.

### **3.4.3. Public Safety and Police Complaints Commission (PSPCC)**

The order provides for the establishment of DPSPCC. This is a public oversight and public complaint re-dressal authority at District level. As is clear from the name, the commission is assigned the function of receiving public complaints against police excesses, and non-registration of FIRs. The commission will also evaluate the police performance in the District on the basis of annual policing plan. The disposal of the unclaimed property and submission of reports to the Government regarding its own functioning and the general law and order situation in the district is another primary responsibility of the Commission.

At the provincial level, the Order provides for establishment of PPSPCC. The Commission meets at least once a month and can call emergency meetings. It performs the function of receiving complaints from public and getting reports of the DPSPCC. It can conduct inquiry in case of mishandling of issues by the DPSPCC at the district level, if so recommended by the Nazim of the district. The Commission is further empowered to oversee the implementation of the policing plan and submit a report regarding the law and order in the province to the

provincial assembly and also regarding its own performance. It will also help to establish the CPLCs.

#### **3.4.4. Public Safety Fund (PSF)**

The Government may establish Public Safety Fund (PSF) at the Provincial and District levels for the purpose of improving facilities for public and service delivery at police stations and improving the performance of the traffic police. This Fund can also be utilized for rewarding police officers for good performance.

#### **3.4.5. Citizen Police Liaison Committees (CPLCs)**

Under the Police Order, 2002, the appropriate Government can establish CPLCs at the Federal, Provincial or district levels in consultation with the concerned Public Safety Commission. This is a voluntary and autonomous body, which would operate on self-finance basis. The framers of the Police Order, 2002 have taken lead from the CPLC established in Karachi. The functions assigned, however, are not like that of the Karachi CPLC. It has been assigned more ambitious task of capacity building of the members of PPSPCCs. Though, it will serve as bridge between citizens and police, it will also assist, whenever necessary, the PPSPCCs and Federal Public Safety Commission and Federal Police Complaints Authority.

#### **3.4.6. Other Professional Bodies**

In addition to the above-mentioned forums of public-police cooperation, a number of other professional bodies have been envisaged for seeking inputs of professionally sound and directly relevant persons for strengthening the criminal justice system. These bodies are as follows:

➤ **District Criminal Justice Coordination Committee**

It is a district level professional body, which is responsible for reviewing the criminal justice system and making recommendations for its improvement. District and Sessions Judge shall be the Chairperson of the Committee, whereas the DPO, District Public Prosecutor, District Superintendent Jail, District Probation Officer, District Parole Officer and head of Investigation shall be its members.

➤ **National Police Management Board**

The National Police Management Board (NPMB) shall have representation of the heads of law enforcement agencies. The mandate of the Board is to provide internationally accepted technical and professional inputs for the improvement of the law and order system in the country, and to see how effectively the present system works. The Board shall act as an advisory body to the Federal and Provincial Government on matters relating to law and order. The Board can assign any task to the National Police Bureau, which is already undertaking research and development work for the police.

### **3.4.7. Suit against Police Officers involved in Wrongdoing**

The law under Police Order 2002 gives protection to the police officers in performance of their duties. Any act done in good faith as an obligation or duty under the law, cannot be treated as a reason for imposing penalty or payment of damages for such act. However, if an allegation is made against a police officer that he has committed an offence or is involved in a wrong act in the exercise of his duty, he is liable to be tried in a court of law, but in such a case the suit should be filed against him within six months from the date of the action on which complaint has been



made. After the lapse of six months, the suit or prosecution shall not be entertained, or shall be dismissed. The Police Order, 2002 requires the person who intends to sue the police officer on account of the wrong done in exercise of his duties to give a two months' notice to the officer. In the notice, the person should give 'sufficient description' of the wrong on which the suit is being instituted.

The Police Order 2002 is no doubt written splendidly but lacks implementation. The other point is that it is just a departmental law and comes under administrative provision that is not by any means equal to Penal provisions. But despite of all these draw backs it was a law that can help a little bit to change the police culture, in presence of a law we can think over the implementation of it. Unfortunately this Order was stand void ab initio by the Honorable Supreme Court of Pakistan in the case of "Dr. Mobashir Hassan etc. v. Federation of Pakistan"<sup>175</sup> vide order dated 16<sup>th</sup> December, 2009. By virtue of this order of Apex Court NRO became void ab initio and all the orders passed under NRO was also repealed so is the Police Order 2002.

### **3.5. Anti-Terrorism Act, 1997**

Though this act is promulgated to curtail the law and order conditions in the country but it also includes the element of torture. It provides a mechanism to cope with the insurgencies but at the same time allows using the force against the persons under custody. In other words we can say it ostensibly denies the standards of prohibition of torture.

---

<sup>175</sup> Dr. Mobashir Hassan etc. v. Federation of Pakistan (PLD 2010 SC 265).

Under section 5 of ATA, 1997, any police officer or member of the armed forces, or civil armed forces are authorized to fire or order the firing upon any person or persons against whom suspicious exist that he has committed a terrorist act or a scheduled offence or is about to commit any of such offence.

This section also authorize such officers to arrest any person without warrant against whom a reasonable suspicion exists and they can also enter and search any premises for making an arrest or taking any property, weapons or articles to be used without any warrant. We can remind the case of Sindh Rangers killed a man named Sarfaraz Shah in 2011 under the same garb of law. They abused the powers provided under this law and killed an innocent man merely on suspicion basis. The Rangers have since said that the young man had been caught trying to rob someone but this is totally against the fundamental principles of Justice and is very shameful act. It is clear violation of right of fair trial, protection of human dignity and the prohibition of torture.

The facet of the above mentioned provisions of ATA has been professed as illegal by the Supreme Court of Pakistan as held, that section 5 of ATA, 1997 is invalid to the extent it authorizes the officer of police, Armed Forces and Civil Armed Forces charged with the duty of preventing terrorism, to open fire or order for opening the fire against person who, in his opinion, in all probability is likely to commit a terrorist act or any scheduled offence.<sup>176</sup>

The apex Court also held that the same provision regarding entry and search is in conflict with article 14 of the constitution and is not valid the same requires to be suitably amended as to provide that before entering upon a premises which is suspected to have materials.<sup>177</sup>

---

<sup>176</sup> *Mehram Ali v. Federation of Pakistan* (PLD 1998 SC. 1445).

<sup>177</sup> *ibid*

Section 21-E of the ATA as amended through Presidential Ordinance in 2009 and 2010 and amendment act of 2013 which further restrains the legal rights accessible by the suspect. Under this section a suspect can be detained for a period of ninety days under the head of “preventive detention”<sup>178</sup> and he is not allowed to access his right of judicial review or fundamental right of bail. This custody of corpus is to restrain him doing any illegal act or to investigate any terrorist activity done by him or any other person in his knowledge but unfortunately there is no check over the detaining agency and use of third degree torture is very common by the agency. To detain someone without allowing him to access the Courts of Justice or punish him without any conviction is blatant violation of Fundamental Human Rights.

### **3.6. Confession to Police: Admissible Evidence or Not?**

In Pakistani law to extract confession from an accused is not the task of police. As a general rule, confession before a police officer is not admissible in evidence. According to section 38 of the Qanun-e-Shahadat Order, 1984, no confession made to a police-officer shall be proved as against a person accused of any offence. Such confession is not admissible by the Court of law. It is also termed as ‘extra-judicial confession’. Where extra-judicial confession is made by the accused while he is in custody of police, same is not admissible in evidence.<sup>179</sup> The only reason of this is that there might be some coercion or undue influence on the part of police.

Code of Criminal Procedure, 1898, under section 164 and 364 provides that confession must be made before the magistrate and the same is attested by the magistrate. Confessional statement for being relied upon is not only be true, voluntary and believable but should be without fear, favour

---

<sup>178</sup> Preventive detention is an imprisonment that is putatively justifies for non-punitive purposes.

<sup>179</sup> Liaqat Ali vs. State (1999 P.Cr.L.J. 1469).

or any inducement.<sup>180</sup> Provisions of sections 164 and 364 are mandatory in nature and put a legal obligation on the Magistrate to comply with the same while recording the confessional statement. Violation would delete to an illegality not curable.<sup>181</sup>

Whereas the ATA section 21-H holds that a confession made by the accused during the course of investigation before the police can be held admissible before the trial court merely on presumption of probability that the accused has committed the offence.

This provision of ATA is also against the principle enshrined in “Article 13(b)”<sup>182</sup> of the Constitution, 1973. No person shall, when accused of an offence, be compelled to be a witness against himself, and equality of citizens, article 25 of the Constitution of Pakistan, keeping in view the state of affairs obtaining in the police force, court cannot equate a police officer with a magistrate.<sup>183</sup> In the same case the Supreme Court held that the section of ATA which allowed confession to police admissible, cannot be sustained, the same requires to be amended by substituting the words “police officer not below the rank of a Deputy Superintendent of police” by the words “Judicial Magistrate”.<sup>184</sup>

### 3.7. Protection of Pakistan Ordinance, 2013

Protection of Pakistan Ordinance, 2013 was promulgated by the Presidential Orders to protect the State against the Terrorist activities and is adopted as preventive measure to ensure the country free from terrorism but in order to cope with the terrorist activities torture to some extent is

---

<sup>180</sup> Asif Mahmood vs. the State (2005 SCMR 515).

<sup>181</sup> Sajjad Ali etc. vs. the State (PLD 2005 Kar.213) + Muhammad Kalam vs. state (1999 MLD 55) + Mst. Khial Meena vs. the State (1997 P.Cr.L.J. 539).

<sup>182</sup> “No person shall, when accused of an offence, be compelled to be a witness against himself.

<sup>183</sup> *Mehram Ali v. Federation of Pakistan*, (PLD 1998 SC 1449).

<sup>184</sup> *Ibid.*

allowed by the Government. Section 3 of the Ordinance provides the same rights to the officers or police as provided under the section 5 of ATA. Any police officer or member of the armed forces, or civil armed forces are authorized to fire or order the firing upon any person or persons against whom suspicious exist that he has committed a terrorist act or a scheduled offence or is about to commit any of such offence.

This section also authorize such officers to arrest any person without warrant against whom a reasonable suspicion exists and they can also enter and search any premises for making an arrest or taking any property, weapons or articles to be used without any warrant.

Under section 6 of the Ordinance the preventive detention of 90 days is permitted and under section 9 establishes that the person so detained can be detained anywhere in Pakistan which means it legalize the so called private jails that can now be use under the garb of law for any illegal purposes.

The general principle of burden of proof is that who alleges he has to prove but under this Ordinances the burden of proof will be upon the accused and if cannot provide any proof against such allegation he may be considered as the culprit. The presumption of innocence is not attached to such accused. All these are the violation of basic Human rights and in such cases many innocent people were put in difficult situation.

## Chapter 4

# Analysis of CAT and Pakistani's Domestic Laws

### 4.1. Gap Analysis

“Man has no right to kill his brother. It is no excuse that he does so in uniform: he only adds the infamy of servitude to the crime of murder” – Percy Shelley.

Torture is not specifically defined as such in Pakistani laws. Penal clauses mainly cover the physical and mental harm as a general crime but do not cover the various elements and aspects of definition of torture provided in UNCAT. The definition of torture provides that: for qualifying the definition of torture, the act of causing pain or suffering must be inflicted by a public official directly, or at the instigation of or with the consent or acquiescence of a public official. But there are no such provisions in the definitions of hurt and injury etc. mentioned in PPC.

Lack of definition of torture is not the only flaw but there are many other gaps like no proper preventive mechanism in place. There is no proper procedure for making a report at the time of arresting an accused except a record keeping mechanism practiced in Pakistani Police Stations known as “Roznamcha” which is used to keep everyday record. Contrary to the prescribed duration for custody (24 Hours) the pretexts to hang this duration are sought by the police due to lack of effective procedural mechanism for arrest and due to the lacunas in laws. The other reason is lack of awareness of the public regarding their fundamental rights.

Torture has not been legislated as a crime in Pakistan. So, there is not any adequate mechanism for impartial investigation of reported cases of torture. In Pakistani Criminal Law there is not a single provision which considers the torture as an offence. There is not any proper and sufficient mechanism for reporting torture inflicted on a person in police custody. Departmental enquiry is held if a complaint of torture is received in which the partiality and biasness can take place. We saw in our daily life many reports that are usually highlighted by media regarding deliberate torture in police custody even deaths of accused due to torture but don't have proper mechanism for reporting and investigation of such cases. There is also not any military law that defines torture. Similar is the case of other law enforcement agencies. Torture is not defined yet in our national law that's why there is no such specific provision regarding jurisdiction over the offences of torture. The appropriate provisions regarding eradication of torture are inattentive. There is no proper mechanism for the protection of victims and witnesses against any kind of intimidation or ill-treatment during the course of judicial proceedings. It is totally based on judicial discretion not mandatory. Police continue to collect evidence by inflicting torture due to lack of modern forensic facilities.

Pakistani Police officials who are at the dealing end in the field are not highly educated, and most of the trainings are highly technical or irrelevant as compared to their educational and social or cultural backgrounds. Neither torture prevention adequately included in training programs of officials nor there is any training mechanism for medical personnel dealing with detainees or asylum seekers or any other potential victims of torture and ill treatment.

Pakistan Prison Rules and all other relevant laws are very out dated. There is no mechanism for periodic systematic review of various interrogation and detention rules and practices in Pakistan.

Although the Pakistan Extradition Act 1972 provides mechanism to hold a preliminary inquiry before making formal decision of extradition of an offender to a treaty state, the legislation of Pakistan does not have a norm requiring that competent bodies should clarify the situation with the use of torture in the state where expulsion or extradition is carried out. There is no legally established principle of non-refoulment to a country where a person could be in danger of being subjected to torture. Torture is still not included in the list of extraditable offences. Bilateral extradition and Mutual Legal Assistance treaties made by Pakistan are insufficient. There is no proper and adequate mechanism for judicial assistance.

## **4.2. Major State Obligations after Ratification of UN CAT to Combat Torture**

It is the state responsibility to provide a substantive law that must have a very clear definition of torture. State should define torture as a crime in criminal law and its punishment as well as the investigation procedure. There must be laws conveying the cases of torture and other ill treatments and these laws must be of wider application. It is also our State responsibility to take effective measure for prevention of torture and there shall be no exceptional circumstances to justify the act of torture. Torture must be absolutely prohibited in all its forms and it must be declared as a non-derogable right. It is responsibility of a State to protect its citizens against any kind of torture so it must provide education about torture is a crime to all its officials. Education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel. All interrogation rules and techniques should be reviewed for police stations, prisons and any other custody or detention centers. State should provide protection to the victims and witnesses and should develop a proper individual complain mechanism for such



violation. It is the responsibility of the state to make laws for protection of victims of torture. Under such law State must ensure that any kind of statement, confession or admission made through torture should be invalid and inadmissible. Same principle must be adopted in case of evidence.

In short it is the state responsibility to protect its citizens even if they are criminals against all forms of torture. State must ensure prohibition of all other forms of ill treatments which do not fall under the category of torture but considered as inhuman.

#### **4.2.1. Pakistan as Dualist State**

Mere ratification of these instruments will not be sufficient to put an end to the use of torture as this practice is deeply entrenched in the policing system and in whole law-enforcing system. Dualists emphasize the difference between national and international law, and require the translation of the latter into the former. As Pakistan is dualistic State and it has to incorporate the provisions of CAT to be the part of its national law, so that these provisions have legal effect as well fulfill the international obligations.

#### **4.3. Mechanism to Implement ‘CAT’:**

Pakistan is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. These principles are common to International law. Respect for human rights features among the key objectives of the ‘Islamic Republic of Pakistan’. There is a proposed mechanism to implement ‘CAT’:

### **1. Operational Guidelines:**

The operational part of these guidelines is meant to identify ways and means to effectively work towards the prevention of torture and ill-treatment within the state. ie

- To adopt the rules and regulations regarding implementation CAT which can minimis the gap between national law and International law.
- Appraisal of existing policies relevant to implementation of CAT.
- Impartial Committee should be formed which carried out oversight business that no personnel can indulge himself in any form of torture.

### **2. Monitoring and reporting:**

In their reports, party will comprise an analysis of the occurrence of torture and ill-treatment and the measures taken to combat it. The state party will also provide initial and periodic evaluation of the effect and impact of the actions. The state party will have the possibility of sending representatives as observers to trials where there is a reason to believe that defendants have been subjected to torture or ill-treatment.

### **3. Dialogue:**

Dialogue between the government, civil society, stake holder and nongovernmental organizations will be conduct, where relevant issues of torture and ill-treatment must be discussed.

**4. In its actions against torture the state Party will urge to take, inter alia, the following measures:**

- a. prohibit torture and ill-treatment in law, including criminal law;
- b. condemn, at the highest level, all forms of torture and ill-treatment;
- c. take effective legislative, administrative, judicial and other measures to prevent the occurrence of acts of torture and ill-treatment in any territory under its jurisdiction
- d. Prevent the use, production and trade of equipment which is designed to inflict torture or other cruel, inhuman or degrading treatment or punishment and prevent the abuse of any other equipment to these ends.

**5. Groups requiring special protection:**

Establish and implement standards and measures relating to women, children, refugees, asylum-seekers, internally displaced persons, migrants and other groups requiring special protection against torture and ill-treatment.

**6. Provide effective training:**

- a. Train law enforcement officials and military personnel as well as medical personnel (civil and military) to comply with the relevant international standards.
- b. Ensure the training of the judiciary, prosecutors and lawyers on the relevant international standards;
- c. Ensure that transfers of equipment and training for military, security or police use do not facilitate torture and ill-treatment;

- d. Ensure that training programmes for law enforcement personnel include training on the prevention of violence against women, on the rights of the child and on discrimination on such grounds as race and sexual orientation.

#### **7. Bilateral and multilateral co-operation:**

Combating and preventing torture and ill-treatment will be considered a priority in bilateral and multilateral co-operation for the promotion of human rights, inter alia in collaboration with civil society, including in the legal field and the field of training. Particular attention should be given to such co-operation within the framework of the “PCHR” Initiative for Democracy and Human Rights.

#### **8. Support the work of medical professionals:**

- a. Enable medical professionals to work independently and confidentially when preparing observations on alleged cases of torture and ill-treatment;
- b. Protect doctors, forensic experts and other medical professionals who report cases of torture and ill-treatment.

#### **9. Provide reparation and rehabilitation for victims:**

Provide reparation for the victims of torture and ill-treatment and their dependents, including fair and adequate financial compensation as well as appropriate medical care and social and medical rehabilitation.

## **4.4. Best Practices of the World**

### **4.4.1. European Union**

In 2001 the EU adopted guidelines on EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment. The guidelines do not create new legal obligations, but are the expression of a political commitment to carry out systematic and sustained action in the fight against torture. They provide the EU with an operational tool to be used in contacts with third countries at all levels as well as in multilateral human rights for in order to support and strengthen efforts to prevent and eradicate torture and ill-treatment in all parts of the world and to support rehabilitation of torture victims.

- Through timely submission of periodic reports to the UN Committee against torture, constructive participation in the Committee's country monitoring process, following up on UN recommendations and preparing the ratification and implementation of OPCAT, EU member states contribute to demonstrate their commitment to uphold the UN framework and to pre-empt possible accusations of double standards.
- The EU Guidelines commit the EU to preventing the use, production and trade of equipment which is designed to inflict torture or other cruel, inhuman or degrading treatment or punishment. The EU adopted on the 27 June 2005 a Regulation (EC Regulation 1236/2005) which prohibits the export and import of goods whose only practical use is to carry out capital punishment or to inflict torture and other cruel, inhuman or degrading treatment or punishment.

#### 4.4.2. Thailand

Thailand has ratified CAT. It has taken many effective measures in order to eradicate and combat torture from all departments and agencies. In this process they have trained Lawyers from civil society to carry out the business of implementing of CAT. In this regard they educate the concerned personnel about the torture as a flagrant abuse to human rights. They kept on eye on all trade departments to ensure that no trade of that instruments which inflict torture and use in torture techniques can be exported.

### 4.5. CASE STUDY

Next to the very extensive legislation, the most important step was to interpret and implement these laws in true sense. At the time of interpretation one must keep in mind the will of legislature related to determination of rights and liabilities of the subject. In order to determine such rights and liabilities in the light of various international and regional instruments we must have a look on some important cases.

In case of, '*Ireland v. the United Kingdom*,' the commission has unanimously found that the combined use of so-called 'five techniques'<sup>185</sup> in the case before it, so-called 'disorientation' or 'sensory deprivation' techniques constituted a practice of inhuman treatment and of torture in breach of Article 3.<sup>186</sup>

---

<sup>185</sup> The so-called five techniques were wall-standing; hooding; putting a black or navy coloured bag over the detainees heads and, at least initially, keeping it there all the time except during interrogation; subjection to noise; deprivation of sleep; deprivation of food and drink.

<sup>186</sup> European Court of Human Rights, *Ireland v. United Kingdom* (Appl. No. 5310/71), judgment of 18 January, 1978, Rep. 1978- 25.

The other important case is '*Prosecutor v. Anto Furundzija*'<sup>187</sup> the international tribunal for the former Yugoslavia (ICTY) gives his opinion in words that the violation of the jus cogens norms, such as prohibition of Torture, had direct legal consequences for the legal character of all official domestic actions relating to the violation.<sup>188</sup>

In '*Selmouni vs. France*' the applicant was a Dutch and Moroccan National who was imprisoned in France. The applicant was subjected to a large number of intense blows covering almost all his body. He was dragged along by his hair; made to run along a corridor with police officer positioned on either side to trip him up; made to kneel down in front of a young women to whom someone said "look, you are going to hear somebody sing"; he was urinated over and was threatened with a blow lamp and then a syringe; the court observed that "these act were not only violent, but that they would be heinous and humiliating for anyone, irrespective of their condition. The court expressed that the physical and mental violence, considered as a whole, committed against the applicant's person caused 'severe' pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of ECHR."<sup>189</sup>

In case of '*Labita v. Italy*,' the European Court held that torture or inhuman or degrading treatment or punishment was absolutely prohibited, irrespective of the circumstances and the victim's behavior.<sup>190</sup>

---

<sup>187</sup> Prosecutor v. Anto Furundzija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 Decmber 1998. <http://www.refworld.org/docid/40276a8a4.html> (last acceseed on 9 Nov, 2014)

<sup>188</sup> Erica de wet, *The prohibition of Torture as an international norm of Jus Cogens and its implication for national and customary law*, EJIL (2004), vol. 15 No, 1-97.98.

<sup>189</sup> Ibid.

<sup>190</sup> Eur. Ct. H.R. (GC), *Labita v. Italy* (Appl. No. 26772/95), judgment of 6 April 2000, Rep. 2000-IV, 119.

In '*Dikme v. Turkey*'<sup>191</sup> the Court found that the treatment inflicted on the victim consisted of at the very least a large number of blows and other similar forms of torture. The blows inflicted on Mr. Dikme were such as to cause both physical and mental pain or suffering, which could only have been exacerbated by the fact that he was totally isolated and that he was blindfolded.<sup>192</sup> The Court observed that, Mr. Dikme was therefore treated in a way that was likely to arouse in him feelings of fear, anxiety and vulnerability likely to humiliate and debase him and break his resistance and will.<sup>193</sup> The court considered that such treatment was intentionally meted out to Mr. Dikme by agents of the State in the performance of their duties.<sup>194</sup> In this case court determined that the infliction of ill-treatment was carried out with the aim of extracting a confession or information about the offences of which Mr. Dikme was suspected.<sup>195</sup>

In the case of '*Sulaiman Al-Adsani*'<sup>196</sup>, a British and Kuwaiti national, was tortured in Kuwait by order of a Kuwaiti Sheikh in 1991. In civil proceedings first instituted in the United Kingdom, Al-Adsani sought compensation against the Sheikh and the State of Kuwait and, later, against two further individuals. On 21 January 1994 the British Court of Appeal granted leave serve the writ on the Kuwaiti government, mainly on the basis that there were three elements indicating the existence of the responsibility of the foreign State: the claimant was taken to a State prison, government transport was used for his transportation to the prison, and then, in prison, he was mistreated by public officials.<sup>197</sup>

---

<sup>191</sup> Case of *Dikme v. Turkey* (Application no. 20869/92) Judgment Strasbourg 11 July 2000.

<sup>192</sup> Ibid.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> *Al-Adsani V. United Kingdom*. 21 November 2001.

<sup>197</sup> <https://www.google.com.pk/#q=al-adsani+v.+united+kingdom>. (Last accessed on 9<sup>th</sup> Nov, 2014).



In '*Aksoy v. Turkey*' case, in its first judicial determination that an individual had been tortured; the court noted that 'this treatment could only have been deliberately inflicted'.<sup>198</sup> The court went on to say that in fact a certain amount of preparation and exertion would have been required to carry it out. The treatment spoken of was so-called 'Palestinian hanging' where the victim is suspended by his arms, tied behind his back.<sup>199</sup> The Victim was subject to 'Palestinian hanging', in other words, he was stripped naked, with his arms tied together behind his back, and suspended by his arms. This led to a paralysis of both arms which lasted for some time. The seriousness and cruelty of this treatment led it to be described as torture by the court.<sup>200</sup>

One of the very famous cases is '*Hamdan v. Rumsfeld*,' in which the US Supreme Court decided this case involving an alleged member of Al-Qaida who was held at Guantanamo Bay and designated for trial by Military Commission. The Court invalidated the president Military Commission on the ground that they were not properly authorized by Congress. A majority of ruled that Common Article 3 of the Geneva Conventions applies to the conflict between the United States (US) and Al-Qaida and the Military Commission violated the fair trial provisions of the article.<sup>201</sup>

In the 'Public Committee against Torture in *Israel v. Government of Israel*,'<sup>202</sup> the application for relief brought before the court concerned interrogation methods used by the general security services (GSS) to investigate individuals suspected of committing crimes against Israel's security. Petitioner was arrested on September 21, 1995 and interrogated by GSS investigators.

---

<sup>198</sup> ECHR, *Aksoy v. Turkey*, (100/1995/606/694) 18 December 1996.

<sup>199</sup> Ibid.

<sup>200</sup> Aisling Reidy, *The Prohibition of Torture; A guide to the implementation of Article 3*. Human Rights Handbook No. 6. 10 of the European Convention on Human Rights. 15.

<sup>201</sup> *Hamdan v. Rumsfeld*. 126 S.Ct.2749 (2006).

<sup>202</sup> *Public committee against Torture in Israel v. Government of Israel*. Supreme Court of Israel, 1999. H.C.5100/94.

He complained of the interrogation methods allegedly used against him, including sleep deprivation, shaking, beatings, and use of the 'Shabach' position. They claim that the GSS is not entitled to employ those methods by the Report of the Commission of Inquiry, such as 'the application of non-violent psychological pressure' and of 'a moderate degree of physical pressure'.<sup>203</sup> The GSS does not have the authority to 'shake' a man, hold him in the 'Shabach' position (which includes the combination of various methods, force him into a 'frog Crouch' position and deprive him of sleep in a manner other than that which is inherently required by the interrogation. Likewise, the court also declares that the 'necessity defense', found in the Penal law, cannot serve as a basis of authority for interrogation practices of this kind. It was held that this decision does not negate the possibility that the 'necessity defense' will be available to GSS investigators either in the choice made by the Attorney-General in deciding whether to prosecute, or according to the discretion of the court if criminal charges are brought.<sup>204</sup>

In case of '*Aydin v. Turkey*' the applicant alleged, inter alia, that she was raped in police custody. The court, in finding on the evidence that 'she had been raped', states that 'rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim'.<sup>205</sup> Furthermore, rape leaves deep psychological scars on the victim who does not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which

---

<sup>203</sup> The Supreme Court Sitting as the High Court of Justice, May 5, 1998, January 13, 1999, May 26, 1999, *Public Committee Against Torture in Israel v. The State of Israel etc.*

<sup>204</sup> Ibid.

<sup>205</sup> (Applications Nos. 28293/95, 29494/95 and 30219/96) Judgment (friendly settlement) Strasbourg 10 July 2011.

must have left her feeling debased and violated both physically and emotionally.<sup>206</sup> The court went on to hold that ‘the rape amounted to torture in breach of Article 3 of the ECHR’.<sup>207</sup>

Centering torture in Pakistan will clearly gave this idea that there is no law related to torture, except article 14(2) of the constitution that prohibits use of torture for extracting evidence. In Pakistan not a single case is being dealt under this article but there are so many reports of torture in custody or by law enforcement agencies in daily newspapers. Some of them are discussed in the succeeding paragraphs.

On 12<sup>th</sup> February, 2013 daily newspaper ‘the Nation’ highlighted a case of custodial death by Kot Nakka Police. A Suspect named Naveed Ahmed was arrested by police on the charge of theft and robbery but he died during night. His family claimed that police is guilty for his death as police severely tortured him in custody due to which he died.

Another report was published in the same year on 22 January by daily ‘Dawn’ that a young man Khalid Hussain was arrested by mangopir police station for his alleged involvement in a robbery case. On 19<sup>th</sup> January, 2013 police arrested the victim along with some other suspects but didn’t lodged any FIR or made any entry in the daily diary for record. Family of the victim alleged that Khalid was no able to pay the demanded bribe that was reason of torture which resulted as his death, whereas the other suspects were released after receiving the bribe. The Judicial Magistrate under whose supervision the post-mortem examination was conducted confirmed that the victim’s jaw was broken and the whole body bore torture marks. He stated that multiple marks of abrasion and bruises were found on the face, chest and other parts of body. There were marks of ropes on his legs and some object had also been inserted into his throat that fractured his jaw.

---

<sup>206</sup> Ibid.

<sup>207</sup> Ibid.

On the other hand phenomenon of custodial and extra judicial killing is unfortunately very common in Pakistan. Major reason behind this is that legal system has failed to deliver. The system of investigation and prosecution needs to be overhauled while the culture of tolerating extra judicial killings must be done away with. It is for the courts to decide who is guilty and who should be punished. The list of these killings is very exhaustive. On November 3<sup>rd</sup>, 2012, the daily newspaper 'DAWN' highlighted a case of death of Azizullah Janwari in an alleged encounter. Police and Mr. Janwari clansman have difference of opinion over this so called police encounter. Some very important questions regarding this encounter need to be addressed, i.e. how come the injured attackers managed to flee as police said that the suspect's community members tried to release him from detention and despite being injured during encounter ran away. Not a single police officer was injured in the shoot even then they cannot arrest the attackers.

In 2011 cases of a young man was highlighted by the media that shows maltreatment done by rangers and try to protect themselves under the garb of law. A 22 years old boy Sarfraz Shah was brutally killed by some personals of rangers. Park and ranger employees said he had been caught trying to rob someone but this is a justified reason to kill any accused.

Another very heinous offence was committed in Tandlianwala against a woman suspected to be a part of a robbery gang. She was arrested along with other people of the said gang by Tandlianwala city police. Police use the third degree torture as proved by a medico legal report. The victims claimed that police interrogators inserted chilies in his private parts. At a later stage the Investigation Officer admitted that nothing has been recovered from the victim. This is the worst kind of violation of human rights.

Ironically justice is most delayed when violated within its precincts. Such kind of violation is very common by the police officials. Usually they cover the extra judicial killings under the apparel of suicide. Police officials usually use strategy of threats to stop any kind of complaints against them. The above mentioned cases are only few examples of the most heinous offence and worst form of violation. It becomes a routine matter for law enforcement agencies especially the police officials.

## CONCLUSION AND RECOMMENDATIONS

### CONCLUSION:

A thorough analysis of the Constitution of 1973 and the Pakistani law reveals that discretion is vested in the hands of different public officials all over Pakistan under legal titles and they are enjoying a status in which torture can be legally exercised and they actually do exercise it. This fact is strengthened by different reports referred to in this dissertation. Pakistan has ratified the UN CAT, 1984, however, it seems that it has not been successful in incorporating the necessary amendments in the municipal laws of the country hence leading to the violation of the UN CAT guarantees. It has also been observed that the prohibition of torture, inhuman and degrading treatment and punishments is not only an issue of UN CAT, but the Constitution, 1973 guarantees the same standards against such type of attitudes.

At international level prohibition of torture is treated as customary international law and attains the status of *jus cogens* that means it is internationally accepted norm. As per Article 38(1)(b) of the Statute of the International Court of Justice (ICJ) reckons that “international custom, as evidence of general practice accepted as law”. It means prohibition of torture is now considered as *jus cogens* and is amongst the sources of International Law to be consulted while dealing with the a case on international level.

The crime became more heinous when it is committed by the guardian of law. If a common man kills a person the police or other law enforcement agencies will take action against him and bring him to the court of law. But if the same crime was committed by a police man or by any other person of law enforcement agencies the same procedure has to be followed but there are few

cases that could come to the courts of law for justice so there must be a proper tribunal for such complaints of torture and its subsidiaries. There must be a strong legislation to stop torture and other brutal acts done by law enforcement agencies against the culprits to extract evidence or to collect confession or any information.

In some cases now a days like terrorism it is somehow essential to pressurize the accused for collection of information or evidence but there also must be some limits. In many circumstances it becomes inevitable to stop terrorists from inhuman activities except to take strict actions and use torture but in all cases it is against the Article 2 of UNCAT which provides that there should be no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be provoked as a justification of torture. Though terrorists could not be considered as humans but even then the State functionaries, the law enforcement agencies and the police, must follow the human ethics and bring them to court of law for justice. To pronounce any order or punishment is the task of Judiciary, when the courts are satisfied that the accused is the actual culprit can utter the judgment but before that police has no authority to punish them in any case. Even in cases of supreme punishment of death the order must be given by competent court of law otherwise it would be considered as the extra-judicial killing. Otherwise the State has to face chaos and lawlessness if torture is permitted in any case.

Torture is not a way to achieve the goal of a just society. The basic pillar of a just society is a well-defined and well implemented legal system. Torture must be precisely defined in Pakistani national law to curtail the phenomenon of torture in the State. To protect the citizens from all

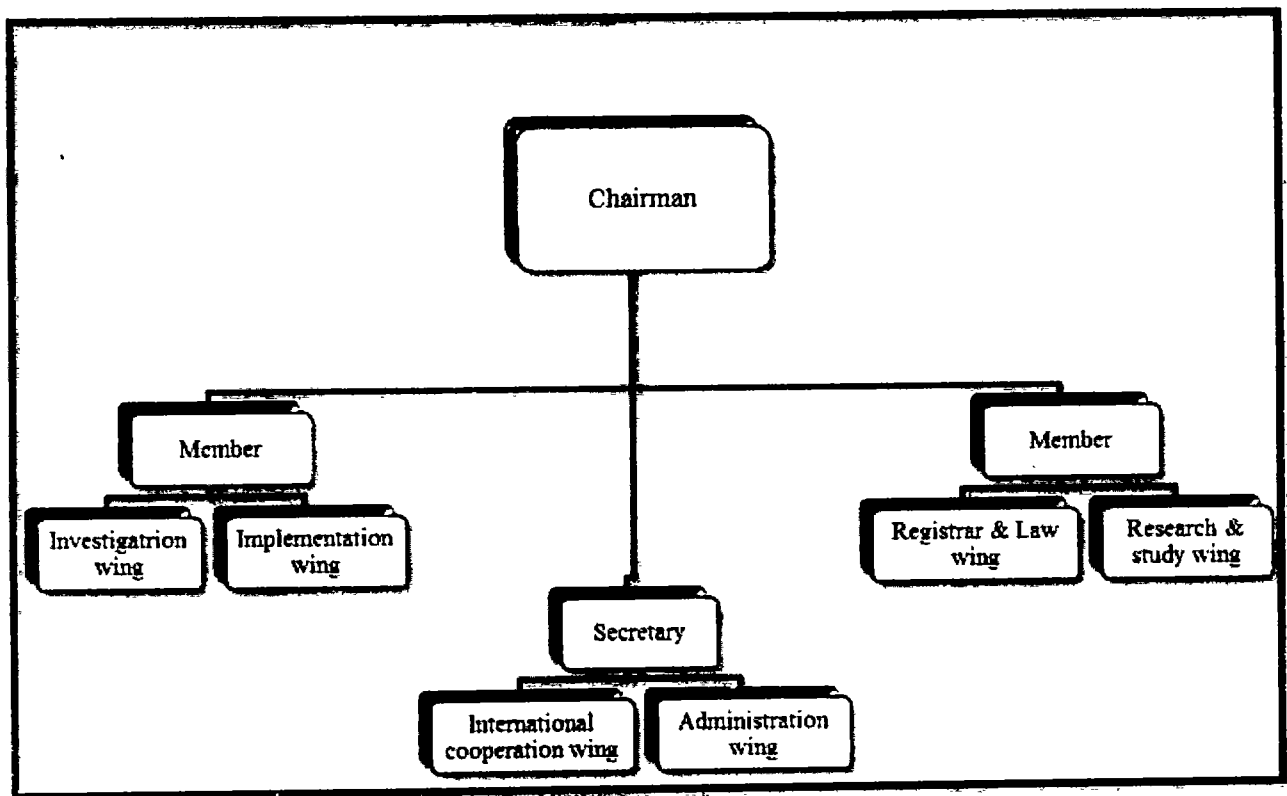
kind torture is the responsibility of the State hence is Pakistan not under International Law only but also under its own constitution, 1973.



## RECOMMENDATIONS:

To improve the structure of national legal system regarding torture, to meet the international obligations and protection against any kind of violation certain recommendations are as follows:

1. Torture must be properly defined in national laws of Pakistan or the definition provided under CAT must be adopted as it is.
2. To fulfill obligation under CAT there must be a proper legislation to curtail the situation of torture in country.
3. A committee must be established to consider the violations against the right of prohibition of torture and to develop workable mechanism to improve the conditions. Committee for prevention of torture should be headed by the Federal minister for Law and Justice working with a team of two competent members from Human Rights and Development sector. The committee investigates the cases of torture promptly and confidentially. It must organize visits to places of detention, in order to assess how persons deprived of their liberty are being treated. These include places police stations, prisons, detention centers, brostal houses or other such places. This committee must have unlimited access to such places and right to move inside without any restriction. After each visit, this committee sends a detailed report to the head of State. This report includes committee's findings and its comments and recommendations. Proposed structure of the committee is given as under:



4. A separate tribunal must be established to deal with the cases of all kind of torture and its subsidiaries. An independent and impartial mechanism for investigation of the offences of torture and other cruel inhuman or degrading treatment or punishment must be formulated. Those accused of such crimes must not be allowed to interfere in the investigation.
5. Torture by public officials or at their instigation must be declared as an offence under PPC.
6. Constitutional amendments are needed as to include prohibition against all kinds of torture in chapter of fundamental rights.
7. Laws related to remand under CrPC must be reviewed and modified in order to meet international standards of human rights.

8. Section 73 and 74 of PPC regarding the punishment of solitary confinement must be altered so as to bring it in conformity with the international legal obligations.
9. Laws related to remand including physical remand, judicial remand and remand under section 21-E of ATA, 1997 must be altered according to human rights.
10. Police order must be declared as a valid law and the Supreme Court must declare its abrogation null and void.
11. Community Police Liaison committees must be established throughout Pakistan at district and provincial levels.
12. Installation of CCTV cameras must be ensured by the government at all police stations especially at the places where investigation of accused is being conducted.
13. There must be a Human Rights Cell and Human Rights Help lines in each police department at district level to ensure the rights of the citizens.
14. Prisoners must be educated about their rights and information about such human right cells and help lines must be given to them.
15. Law enforcement agencies must train its officials to ensure the protection of human rights especially protection against torture during investigation.
16. All interrogation rules and techniques should be reviewed for police stations, prisons and any other custody or detention centers of any law enforcement agencies.
17. Interrogation rules and custody arrangements are to be kept under review with a view of preventing any acts of torture and ill-treatment.
18. State should provide protection to the victims and witnesses and should develop a proper individual complain mechanism for such violation.
19. Separate police stations for women must be established in all districts.

20. In any case physical remand of women should not be allowed.
21. Women must be interrogated by female investigating officers and no male is allowed to interfere during investigation or interrogation.
22. Human Rights education must be inculcated in the curriculum of educational institutions and also in the training modules of Law enforcement agencies.
23. Proper medical facilities must be provided to all prisoners. Regular checkup by an authorized medical practitioner must be done on weekly basis. A daily report register regarding the health of prisoners must be maintained.
24. Develop policy framework based on gap analysis and review.
25. Also ensure the implementation of policy framework and establish a system for periodic reviews regarding implementation.

# BIBLIOGRAPHY

## BOOKS

Aisling, Reidy. *'The Prohibition of Torture; a guide to the implementation of Article '3. Human Rights Handbooks, Nos. 6 and 10 of the European Convention on Human Rights.*

Benedek, Wolfgang. *'Understanding Human Rights Law: Manual on Human Rights Education'.*  
Austria: Neuer Wissenschaftlicher Verlag, 2006.

Burgers, J. Herman and Hans Danelius. *'The United Nations Convention Against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'.* International Studies in Human Rights, Martinus Nijhoff Publishers.

Dixon, Martin. *'Textbook on International Law'.* London: Blackstone Press Limited, 2000.

Evans, Malcolm D. *'Blackstone's International Law Documents'.* 6<sup>th</sup> Edn. Oxford University Press, New York, 2003.

Garner, Bryan A. *'Black's Law Dictionary'.* 8<sup>th</sup> edn. USA: West, A Thomson Business.

James, Ross. *'A History of Torture', Torture: A Human Rights Perspective.* Pennington: Prince and the Law, 2005.

Jayawickrama, Nihal. *'The Judicial Application of Human Rights Law'.* Cambridge University Press, Cambridge, 2002.

Lene. Wendland, *'A Hand Book on the State Obligations under the UN Convention against Torture'.* Geneva, 2002.

- Maddex, Robert L. '*International Encyclopedia of Human Rights: Freedoms, Abuses and Remedies*'. Congressional Quarterly Press, Washington, D.C, 2000.
- Michael, John Garcia. '*U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*'.
- Munir, Muhammad. '*The Constitution of Islamic Republic of Pakistan, 1973: A Commentary*'. Lahore, PLD Publishers, 1998.
- Nowak, Manfred. '*UN Covenant on Civil and Political Rights- CCPR Commentary*'. 2<sup>nd</sup> Revised edn. N.P. Engel, 2005.
- Richard, Mowery Andrews. '*Law, Magistracy, and Crime in the Old Regime Paris*'. 1735-1789. Cambridge: Np, 1994.
- Sieghart, Paul. '*The International Law and Human Rights*'. Clarendon Press, Oxford.
- '*The United Nations and International Law*'. Ed. Christopher C. Joyner. Cambridge University Press, Cambridge, 1998.

## ARTICLES

- Cordula, Droege. '*The Prohibition of Torture and Other Forms of Ill-treatment in International Humanitarian Law*'. International Review of the Red Cross. Volume 89, Number 867. September, 2007.
- Elizabeth Vasiliades. '*Solitary Confinement and International Human Rights: Why U.S. Prison System Fails Global Standard?*' American University International Law Review.
- Gourevitch, Philip and Errol Morris. '*Exposure*'. New York, March 24, 2008.
- Jordan J. Paust. '*The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*'. 43 Val. U. L. Rev. 1535, 2009.

Louis-Philippe, F. Rcuillard. *'Misinterpreting the Prohibition of Torture under International Law'*. The Office of Legal Counsel Memorandum, American University International Law Review, 2005.

Miller, Gail H. *'Defining Torture'*. Floersheimer Center for Constitutional Democrac. Benjamin N. Cardozo School of Law. New York.

*'Pakistan: Government purposely avoids making law against the torture in country'* Available at <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-088-2011>.

## REPORTS

Amnesty International and Codesria. Monitoring and Investigating Torture, Cruel, Inhuman or Degarding Treatment, and Prison Conditions, 2000.

Amnesty International Report, 2001.

Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Human Rights, 4<sup>th</sup> Session Agenda Item 5, U.N. Doc. A/CONF. 157/PC/62/Add.18. 1993.

CRS Reports for Congress. U.N. Convention against Torture: Overview and Application to Interrogation Techniques. Congressional Research Service.

Human Rights and Law Enforcement. A Manual on Human Rights Training for the Police. Professional Training, Series no. 5. United Nations, New York and Geneva, 1997.

Human Rights and Pre-trial Detention, A Handbook of International Standards relating to pre-trial detention. Professional Training, Series no. 3. United Nations, New York and Geneva, 1994. P.2.

Human Rights Watch Reports.

Kofi Annan, UN Secretary-General, 2001.

United Nations Action in the Field of Human Rights. Centre for Human Rights Geneva. United Nations, New York, 1988.

## WEBSITES

<http://faculty.cua.edu/pennigton/PinningtonTortureEssay.htm>

<http://newpol.org/content/torture-and-historical-memory>

<http://nhrtortureprevention.org/un-resources/opcat-overview/un-sub-committee-for-the-prevention-of-torture/>

<http://notorture.ahrchk.net/profile/pakistan>

<http://phrtoolkits.org/toolkits/istanbul-protocol-model-medical-curriculum/module-1-international-legal-standards-overview/torture/history-of-torture/>

[http://thejusticecampaign.org/?page\\_id=175#i](http://thejusticecampaign.org/?page_id=175#i)

<http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.htm>

<http://www.amnesty.org/en/news/guantanamo-case-profiles>

<http://www.duhaime.org/LegalDictionary/O/OpinioJuris.aspx>>>

<http://www.historyworld.net/wrldhis/plaintexthistories.asp?historyid=aa57>

[http://www.nytimes.com/2007/06/03/weekinreview/03shane.html?\\_r=0](http://www.nytimes.com/2007/06/03/weekinreview/03shane.html?_r=0)

<http://www2.ochr.org/english/law/iccpr.htm>



<http://www.historiography-project.com/clippings/1946/01/nazi-torture-and-medical-exper.html>

<https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>

<http://www.lidh.oas.org/Basics/English/Basic2.american%20declaration.htm>

<http://www.irct.org/what-is-torture/convention-against-torture.aspx>

<http://www.pdhre.org/conventionsum/torsum.html>

<http://www.apt.ch/en/subcommittee-on-prevention-of-torture/>