Denouncing Torture: From Universal Prohibition to National Eradication

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1. Introduction

The global movement of 'universalism' and the campaign for 'promoting and protecting all human rights' represents the world's commitment to universal ideals of 'human dignity' and a unique mandate from the international community to 'respect and protect' all internationally recognized human rights enshrined in the Universal Declaration of Human Rights and the other international human rights standards through the United Nations (UN).[1] Despite the problems encountered by the League of Nations, UN was founded in 1945, aiming at 'to facilitate cooperation in international law, security, human rights, social progress, economic development and the achievement of world peace and, making it a key step in the advancement of human rights in order to stop wars between countries, and to provide a platform for dialogue'.[2] This creation represented an effort to specifically prescribe certain obligations on States. These revolutionary obligations implicitly recognized that the idea of state and sovereignty are not unlimited. The international human rights instruments developed in the aftermath of the War were designed to forestall abuses by states affirming absolute prohibitions and obligations, instituting safeguards and providing for effective remedies.[3] And the United Nations, from its beginning, has taken a leading role in this movement as well as continued to work on the adaption of universally applicable standards to prevent abuses of individuals including torture.[4]

However, from the penal reformers of the eighteenth century, to the debates over the "war on terror," the fight against torture has been associated with the values of a 'seemingly enlightened modernity'.[5] The international community has developed

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1 Conor Foley, *Combating Torture: A Manual for Judges and Prosecutors* (Human Rights Centre, University of Essex, 1st ed, 2003) 7-8.

2 Wikipedia, *United Nations* (2012) <http://en.wikipedia.org/wiki/United_Nations> accessed 3rd November 2012.

3 P Winston Nagan and Lucie Atkins, 'The International Law of Torture: From Universal Proscription to Effective Application and Enforcement' (2001) 14 *Harvard Human Rights Journal* 88, 87.

4 Foley, above n 1.

5 Tobias Kelly, 'The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty' (2009) 31(3) *Human Rights Quarterly*, 777, 782.

standards to protect people against torture that apply to all legal systems in the world. The standards take into account 'the diversity of legal systems' that exist and set out minimum guarantees that every system should provide. These standards are having different legal status. Some are contained in treaties that are legally binding on those states that have signed and ratified or acceded to them. And many of the more detailed safeguards against torture are contained in 'soft law' instruments; such as, 'declarations, resolutions, bodies of principles or in the reports of international monitoring bodies and institutions'. While not directly binding, these standards have the persuasive power of having been negotiated by governments or adopted by political bodies such as the UN General Assembly. Sometimes they affirm principles that are already considered to be legally binding as principles of 'general or customary international law'. And sometimes they also spell out in more detail the 'necessary steps to be taken' in order to safeguard the fundamental rights of all people to be protected against torture. A number of 'UN bodies' have been created by particular conventions to 'monitor compliance with these standards and provide guidance' on how they should be interpreted. These bodies generally issue general comments and recommendations, review reports by States parties and issue concluding observations on the compliance of a State with the relevant convention. Some also consider complaints from individuals who claim to have suffered violations. In this way they are providing authoritative interpretations of the treaty provisions and the obligations that these are placing on State parties. The UN has also set up a number of extra-conventional mechanisms to examine particular issues of special concern to the international community or the situation in specific countries. These monitor all States, irrespective of whether they have ratified a particular convention, and can draw attention to particular violations.[6] And, this article is all about focusing the international standards in denouncing torture along with a specific discussion on State obligations derived from it.

2. An Overview of International Standards

The aim of the prohibition of torture and ill treatment is to protect both the dignity and the physical and mental integrity of individual. Since avowing the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world',[7] this article at first provides all the instruments and guidelines combating torture, how torture appears in the customary international law and then there is a discussion about the measures and mechanisms resisting torture. The part 'instruments and guidelines' specifically provides the international standards against torture through the United Nations and its subsidiary organs. 'Torture in its customary form' here is providing the other standards and principles regarding the universal nature of the prohibition. Also the part 'measures and mechanisms resisting torture', provides the

6 Foley, above n 1.

7 Amnesty International, *Combating torture: A Manual for Action* (2003).

monitoring measures on torture activities; being it be through the United Nations or according to the treaty provisions or the others.

2.1 Instruments and Guidelines to Combat Torture

Particularly, in case of the part 'instruments and guidelines' the article's focus is not for all the international standards but firstly for the Bill of Rights discussing the UN Charter, Universal Declaration of Human Rights and the ICCPR provisions only even if it is known that the Bill of Rights includes the ICESCR also. The second part covers the torture declaration, conventions and its optional protocols. It is generally known that the General Assembly played in this sector its innovative role, both in the development of legal standards and in enforcement of the prohibition of torture. Later on there is a discussion about the International Humanitarian Law with the Geneva Conventions and their three additional Protocols applicable in armed conflicts and obviously focusing specially the torture prohibition. However, in case of 'treatment of prisoners and detained persons' there is a long lasting connectivity of torture issues throughout histories and the next but not the last issue of this part is about standards that are providing a strong basis for protecting 'those people' in various situations along with a special focus on the basic principles and the code of conduct for the law enforcement officials. The last issue of this part is all about the medical ethics relating to the role of health professionals regarding anti-torture activity and the Rome Statute of the International Criminal Court with additional focuses on the other general standards and professional principles which materialize a lot about the universality of the torture prohibition.

2.1.1 The Bill of Rights

Among the Bill of Rights the UN Charter since, is a constituent treaty, all members of it are bound by its articles and obligations to the United Nations. It prevails over all other treaty obligations.[8] The Charter makes repeated references to human rights and created the 'Economic and Social Council' (ECOSOC) that established in turn the 'UN Commission on Human Rights'. It is the main human rights intergovernmental body within the United Nations, in 1946. The Commission's 'first major task'[9] and the UN human rights program's 'first major effort' was the drafting of the 'Universal Declaration of Human Rights'.[10] This Declaration defined the concept of human rights stated in the 'UN Charter'[11] and was the first global

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8 Wikipedia, above n 2.

9 The International Rehabilitation Council for Torture Victims (IRCT), *International Instruments and Mechanisms for the Fight against Torture: A Compilation of Legal Instruments and Standards on Torture* (2007).

10 Wikipedia, *United Nations Charter* (2012) <http://en.wikipedia.org/wiki/United_Nations_Charter> accessed 3rd November 2012.

11 IRCT, above n 9.

statement of 'the inherent dignity and equality of all human beings'.[12] By adopting it, the governments of the world, represented at the General Assembly, agreed that 'everyone is entitled to fundamental human rights, they apply everywhere and not just in those countries whose governments may choose to respect them'. It follows from this principle that all governments must protect the rights of people under their jurisdiction, and victims have claims against those governments which violates them. Furthermore, the fact that governments together adopted the Universal Declaration implies that violations of human rights are of concern to all governments.[13] And as one of the most fundamental aspects of human rights law is the universal proscription of torture,[14] freedom from torture and ill-treatment must be upheld everywhere.[15] However, the UDHR constituted the beginning of an important and ongoing process toward the abolition of torture. An article prohibiting torture and ill-treatment was regarded as an essential element in the Universal Declaration of Human Rights. This convention was prompted by the atrocities committed by the World War II and the Nazi regimes systematic practice of torture in Germany and the occupied countries, there was widespread feeling among the founders of the United Nations that effective measures had to be taken in order to prevent this from recurring. And the development of international legal instruments providing protection for individuals and prescribing basic rules of behavior for governments and authorities was one of such measures. The prohibition against torture and ill treatment was also a natural component of these efforts.[16] The explicit formulation of the prohibition of torture as stated in the United Nations documents, starting with the Universal Declaration of Human Rights (UDHR), was followed by many subsequent instruments in human rights, humanitarian law and administration of justice. These instruments oblige governments and their officials to refrain from torturing or ill-treating anyone and to protect people against such abuses when these are carried out by private individuals. Many of the instruments which set out these standards have been adopted 'without a vote': a 'sign of strong agreement in that no member state represented at the body which adopted them wished to go on record as opposing them'. And one of the instruments that followed UDHR in 1966 was the adoption of the 'International Covenant on Civil and Political Rights', which is the

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12 UNA Putney, *Celebration of the 60th Anniversary of the adoption of the Universal Declaration of Human Rights: A Magna Carta for All Humanity* (2008) < http://unitingforpeace.com/resources/speeches/Celebration%20of%20the%2060th%20Anniversary.pdf> accessed 07 April 2012.

13 AI, above n 7.

14 P Winston Nagan and Lucie Atkins, 'The International Law of Torture: From Universal Proscription to Effective Application and Enforcement (2001) 14 *Harvard Human Rights Journal* 88, 87.

15 AI, above n 7.

16 Gudmundur Alfredsson and Asbjorn Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Kluwer Law International,1999) 121-123.

paramount worldwide treaty on civil and political rights. However, the prohibition of torture and ill-treatment of the ICCPR is devised in absolute terms, envisaging no exception to the rule. It is a non-derogable right involving obligation from which no derogation is permitted. On becoming a party to the ICCPR, a state is legally bound to respect the prohibition and to ensure to all individuals under its jurisdiction the right not to be subjected to torture or ill-treatment.[17] It defends the 'right to life' and stipulates that no individual can be subjected to 'torture, enslavement, forced labor and arbitrary detention or be restricted from such freedoms as movement, expression and association'. The treaty also provides for a Human Rights Committee to monitor how states comply with the treaty. All countries that are party to the ICCPR must report to the Human Rights Committee every five years on what they have done to promote these human rights and about the progress made. The Committee reviews these reports in public meetings, including representatives of the state whose report is being reviewed.[18] Other articles of the ICCPR which are relevant to the elimination of torture include 'obligation to respect and ensure human rights', 'right to life', 'right to liberty and security of person', 'right of persons deprived of liberty to be treated with humanity and respect for human dignity and 'right to a fair trial'.[19]

2.1.2 Torture Declaration, Convention and Optional Protocol

The United Nations from its beginning played an important role in case of torture prevention and the period when it performed its most 'creative and innovative role',[20] is from 1973 to 1977 and specifically in 1975, responded to vigorous activities by non-governmental organizations (NGOs).[21] This response resulted in the adoption of landmark 'Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' making it a fundamental event in a process which started in 1973 and continues for some fifteen years.[22] By adopting resolution 3059 (XXVIII) unanimously, the General Assembly may be seen to have come out of its 'first skirmish' with the problem of torture and other ill-treatment ready to reaffirm its clear objection to the practices and its support for the existing human rights treaties

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17 AI, above n 7.

18 United Nations, *International Covenant on Civil and Political Rights* (1966) <http://www.un.org/millennium/law/iv-4.htm> accessed 3rd November 2012.

19 AI, above n 7.

20 Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford University Press, 2011) 9.

21 UN Fact Sheets, No. 4, *Combating Torture (Rev.1), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975)* <http://www.humanrights.is/the-human-rights project/humanright scasesand materials/generalcomments/unfactsheets/combatingtorture/> accessed 09 May 2012.

22 Nigel Rodley and Matt Pollard, above n 20, 20.

prohibiting them.[23] It defines torture and constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment in article 1 with a specific stipulation of 'no justification of torture' in article 3,[24] which are similar with the wording of the 'Torture Convention' that is the 'United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment'. The torture Convention was the result of many years' work initiated after the adoption of the Declaration[25] and was adopted on 10 December 1984. The adoption and ratification of this Convention by numerous governments[26] represents a significant achievement in the continuing effort by the United Nations to protect the right of an individual to be free from torture and other forms of ill-treatment[27] along with the unique legal obligations to prevent torture and ill-treatment, to bring perpetrators of torture to justice and to assist victims of torture.[28] The principle aim of the Convention is to strengthen the existing prohibition of practices of torture, cruel, inhuman or degrading treatment or punishment by a number of supportive measures.[29] It contains a series of important provisions in relation to the absolute prohibition of torture.[30] The most innovative aspect of the Convention is the obligation of States to combat impunity of perpetrators of torture by criminalizing it in domestic criminal legislation with appropriate penalties. State parties need to establish universal jurisdiction for perpetrators of torture crimes worldwide. There has to be prompt, *ex officio* investigation and examination of the accusation by competent and impartial domestic authorities providing adequate reparation, including compensation and rehabilitation. There is also obligation on the state parties to provide human rights training to law enforcement officials and refrain from expelling, returning or extraditing a person to another State where there is a

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23 Ibid, 23.

24 Office of the High Commissioner for Human Rights, *Fact Sheet No. 4 (Rev. 1) Combating Torture* <http://www.ohchr.org/Documents/Publications/FactSheet4rev.1en.pdf> accessed 15 May 2012.

25 Hans Danelius, *United Nations Convention Against Torture* (2008) <http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.html> accessed 31 March 2012.

26 Association for the Prevention of Torture, Asia Pacific Forum of National Human Rights Institutions, Office of the United Nations High Commissioner for Human Rights, *Preventing Torture: An Operational Guide for National Human Rights Institutions* (2010).

27 David Weissbrodt, Paul Hoffman, James S. Reynolds, Robert E. Dalton and Joan Fitzpatrick, 'Prospects for U.S. Ratification of the Convention against Torture' (1989) 83 *Proceedings of the Annual Meeting (American Society of International Law)* 529, 529.

28 Atlas of Torture, *Convention against Torture (CAT)* (2009) <http://www.univie.ac.at/bimtor/glossary/478> accessed 31 October 2012.

29 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* (Martinus Nijhoff Publishers, 1988) 1.

30 APT, APF and OHCHR, above n 26.

substantial risk of being subjected to torture.[31] The Convention does not deal with cases of ill-treatment which occur in an 'exclusively non-governmental' setting. It only relates to practices which occur under some sort of responsibilities of 'public officials or other persons acting in an official capacity'. For effective elimination of torture the convention focuses on influencing the behavior of persons who may become involved in situations in which such practices might occur.[32]

This Convention against Torture, however, later on, complemented by an 'Optional Protocol', which was adopted in 2002 and entered into force in 2006. This Protocol reinforces specific obligations for prevention of torture starting from articles 2 and 16. It establishes 'system of regular visits' to places of detention by international and national bodies[33] to be overseen by a 'Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'.[34] The Committee examines reports of States parties and individual complaints through concluding observations and views that assist in interpreting the Convention.[35]

2.1.3 The Geneva Conventions and their Additional Protocols

In order to transmit the sentiment of the time from 1939 to 1945 and the tragedy of the Second World War the decision to draft the Geneva Conventions of 1949 was sealed. These Conventions were intended to fill gaps in international humanitarian law that were exposed by those conflicts.[36] The Geneva Conventions are the essential basis of international humanitarian law applicable in armed conflicts and evolved from rules of customary international law binding on the entire international community.[37] As humane treatment is the fundamental theme running throughout the Conventions,[38] 'torture' is proscribed by all the four of the Geneva Conventions and their additional Protocols.[39] Under the Geneva Conventions, protection entails

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31 Atlas of Torture, above n 28.

32 Burgers and Danelius, above n 29, 17.

33 Ibid, 20.

34 Wikipedia, *United Nations Convention Against Torture* (2012) < http://en.wikipedia.org/wiki/United_Nations_Convention_Against_Torture> accessed 3rd November 2012.

35 Burgers and Danelius, above n 29, 17.

36 Philip Spoerri, *The Geneva Conventions of 1949: Origins and Current Significance* (2009) <http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-120809.htm> accessed 12 August 2009.

37 eNotes, *Geneva Conventions on the Protection of Victims of War* (7th May 2012) <http://www.enotes.com/geneva-conventions-protection-victims-war-reference/geneva-conventions-protection-victims-war> accessed 7th May 2012.

38 Jennifer K. Elsea, 'Lawfulness of Interrogation Techniques under the Geneva Conventions', [CRS: 18 *Congressional Research Service, The Library of Congress,* Received through the CRS Web and International Committee of the Red Cross, 3 Commentary on the Geneva Conventions of 12 August 1949 (Jean Pictet, ed. 1960) 2004] 140. See also <http://www.fas.org/irp/crs/RL32567.pdf> accessed 04th May 2012.

39 Ibid, CRS: 09.

not only torture but also against treatments that are cruel, inhumane, and degrading even if such treatment does not amount to torture.[40] Torture or inhuman treatment of prisoners-of-war[41] or protected persons[42] are 'grave breaches' of the Geneva Conventions, and are considered 'war crimes'.[43] War crimes create an obligation on any state to prosecute the alleged perpetrators or turn them over to another state for prosecution. And this obligation applies regardless of the nationality of the perpetrator, the victim or the place where the act of torture or inhuman treatment was committed.[44] Detainees in an armed conflict or military occupation are also protected by common article 3 to the Geneva Conventions. Even persons, who are not entitled to the protections of the 1949 Geneva Conventions such as, detainees from third countries, are protected by the 'fundamental guarantees' of article 75 of Protocol I of 1977 to the Geneva Conventions. This article prohibits 'murder, torture of all kinds, corporal punishment, and outrages upon personal dignity, in particular humiliating and degrading treatment, and any form of indecent assault'.[45]

2.1.4 Standards for the Treatment of Prisoners and Detained Personnel

In addition to international human rights law there are other rules and standards concerning the protection against torture and other forms of ill-treatment.[46] One of these standards is the 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988'. This standard provides safeguards and the rights of persons under any form of arrest and detention along with the 'legal assistance, medical care and access to records of their detention, arrest, interrogation and medical treatment'.[47] The principles state, among others, that a person held in prison or detention of any kind shall not be exposed to any type of torture or

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40 Ibid, CRS: 13.

41 Geneva Conventions III of 1949, arts. 17 and 87.

42 Ibid, art. 32.

43 Ibid, art. 130 and Geneva Conventions IV of 1949 art. 147.

44 Ibid, art. 129 and Geneva Conventions IV of 1949 art. 146.

45 Human Rights Watch, *Summary of International and U.S. Law Prohibiting Torture and other Ill-treatment of Persons in Custody* (2004) <http://www.unponteper.it/liberatelapace/dossier/contributi/0504HRW.pdf> accessed 04 May 2012.

46 Foley, above n 1.

47 UN Fact Sheets, No. 4, *Combating Torture (Rev.1), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975)* <http://www.humanrights.is/the-human-rights project/humanrights casesandmaterials/generalcomments/unfactsheets/combatingtorture/> accessed 31 October 2012. See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988, Principles 16, 21, 22, and 24.

degrading treatment.[48] The term 'cruel, inhuman or degrading treatment or punishment' under this principle should be interpreted 'so as to extend to the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time'. Complaints of torture should be dealt with, investigated and replied to without undue delay. No complainant should suffer prejudice for lodging a complaint.[49] And States should prohibit act contrary to the Principles and provide appropriate sanctions for that. Regular visits of places of detention should be conducted by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the place of detention. Detainees should have the right 'to communicate freely and in full confidentiality' with the persons concerned.[50]

However, with the increased concern for human rights and a time of growing interest in the promise of rehabilitation, the international community is providing special Rules that are linked to an era of 'injecting the humanitarian spirit of the Universal Declaration of Human Rights into the correctional system without compromising public safety or prison security'. To accomplish this humanitarian goal, the 'United Nations Standard Minimum Rules for the Treatment of Prisoners' was adopted in 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva and approved by the Economic and Social Council Resolutions[51] of 31 July 1957 and 13 May 1977.[52] It was adopted to establish 'what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions'. These standards emphasize humane treatment and rehabilitation. They affirm that the only justification for imprisonment is 'to ensure, so far as possible, that the offender upon his return to society is not only willing but also able to lead a law-abiding and self-

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48 HAMOKED, Centre for the Defence of the Individual, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988) < http://www.hamoked.org/Document.aspx?dID=6480> accessed 01 June 2012.

49 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988, Principles 7 and 33.

50 UN Fact Sheets, above n 47. See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988, Principle 29.

51 OHCHR Fact sheet No. 4, (Rev.1), *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment* <http://www.ohchr.org/Documents/Publications/FactSheet4rev.1en.pdf> accessed 15 May 2012.

52 Wikipedia, *Standard Minimum Rules for the Treatment of Prisoners* (2012) < http://en.wikipedia.org/wiki/Standard_Minimum_Rules_for_the_Treatment_of_Prisoners> accessed 28 May 2012.

supporting life'.[53] Since the SMRs[54] embody a greater level of practical details about how prisoners should be treated and have become an important point of reference for defining what constitutes 'humane treatment in the prison settings'.[55]

And with this the 'Basic Principles for the Treatment of Prisoners' regulating prison conditions and treatment of prisoners was adopted by General Assembly in 1990 has to be linked with. This international document effectively requires that prisoners should be treated with respect for their inherent dignity as human beings[56] except for those limitations that are obviously required by the fact of incarceration. It also spells out that and all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights and other United Nations Covenants.[57]

2.1.5 Basic Principles and the Code of Conduct for Law Enforcement Officials

The General Assembly of the United Nations having explicitly concerned with setting standards to eliminate human rights abuses by law enforcement officials[58] adopted, without a vote, the **'**Code of Conduct for Law Enforcement Officials' in 1979. The most comprehensive portion of the Code of Conduct is the provision of article 5 stating '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 any ground whatsoever as a justification of torture. It also stressed the important task that law enforcement officials perform in the defense of public order, and noted the risk of abuses that the discharge of their duties entails. There are also guidelines for the effective implementation of the Code focusing further promotion of the use and application of the Code of Conduct for Law Enforcement Officials.[59]

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53 Sara A. Rodriguez, 'Impotence of Being Earnest: Status of the United Nations Standard Minimum Rules for the Treatment of Prisoners in Europe and the United States'(Working Paper 1627, The Berkeley Electronic Press (bepress) Legal Series, 2006). See also <http://law.bepress.com/expresso/eps/1627> accessed 30 October 2012.

54 United Nations Standard Minimum Rules for the Treatment of Prisoners, in short SMRs.

55 Correctional Service Canada, *United Nations Standard Minimum Rules For the Treatment of Prisoners 1975* (2012) <http://www.csc-scc.gc.ca/text/pblct/rht-drt/07-eng.shtml> accessed 30 October, 2012.

56 OHCHR, above n 51.

57 United Nations Office on Drugs and Crime, *The Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (United Nations, 2006) ch I, 3, 42-43.

58 G.A. Res. 169, U.N. GAOR, 44th Sess., Supp. No. 46, at 185, U.N. Doc. A/34/46 (1980), particularly preambular paragraphs 5 and 6.

59 United Nations Office on Drugs and Crime, *Use and Application of the Code of Conduct for Law Enforcement Officials, Including the Basic Principles on the Use of Force and Firearms*

Thereafter, on 7 September 1990, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana, Cuba, the 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' were adopted. It states in Principles 7 and 8 that the 'arbitrary or abusive use of force and firearms' by law enforcement officials should be punished as a 'criminal offence' under domestic law with no justification for any departure from the principles. Force and firearms under Principle 4 and 5 may be used as a last resort and law enforcement officials should act in proportion to the seriousness of the offence with the legitimate object to be achieved. And when damage or injury occurs medical assistance should be rendered to injure persons and at the earliest possible moment the relatives or close friends of the victim has to be informed.[60]

2.1.6 Principles of Medical Ethics

Following the 1975 Declaration of Tokyo, at the request of the United Nations General Assembly, the World Health Organization (WHO) drafted a set of guidelines for health personnel who are confronted with cases of torture or ill treatment. And on December 18, 1982, after three years of debate and revision, the General Assembly adopted the 'Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment'. It provides that all medical staff, including nurses, can find themselves treating a prisoner and faced with similar issues.[61] The instrument consists of six principles designed to prevent complicity of health professionals in torture with non-derogability.[62] In the preamble, the General Assembly expresses alarm that 'not infrequently members of the medical profession or other health personnel are engaged in activities which are difficult to reconcile with medical ethics'. States, professional associations and other bodies are recommended to take actions against any attempt to subject health personnel or members of their families to threats or reprisals for snubbing to condone the use of torture or other inhuman or degrading treatment or punishment. On the other hand, it also states that health personnel,

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(2006) <http://www.uncjin.org/Standards/Conduct/conduct.html> accessed 31 October 2012. This study has been administered by the Crime Prevention and Criminal Justice Division, United Nations Office at Vienna, pursuant to Economic and Social Council resolution 1993/34, adopted on the recommendation of the United Nations Commission on Crime Prevention and Criminal Justice.

60 OHCHR, above n 51.

61 Noam Lubell, *Health Professionals within the Prison System: Their Role in Protecting the Right to Health and Other Human Rights* (2004) <www.nuigalway.ie/sites/eu-china.../noam%20lubell-eng.doc> accessed 30 May 2012.

62 Summer Volkmer, *International Ethics Applicable to Health Care Professionals* (2010) <http://www.law.berkeley.edu/files/IntlMedlEthicspaper%28final%2911June10.pdf> accessed 31 October 2012.

particularly physicians, should be held accountable for contraventions of medical ethics.[63]

And though the 'Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', commonly known as the 'Istanbul Protocol', is the first set of international guidelines for documentation of torture and its consequences, it became an official United Nations document in 1999. The Istanbul Protocol is designed to serve as international guidelines for the assessment of persons who allege torture and ill treatment in investigation of cases of torture and for reporting the findings to the judiciary or any other investigative body. This Manual contains principles and procedures on how to 'recognize and document symptoms of torture' so that such documentation may be served as valid evidence in various relevant proceedings.[64] Victims of torture, witnesses, persons conducting investigation and their families have to be sheltered from any type of control or power, violence, threats or any form of intimidation arises pursuant to the investigation under Principle 3(b) of the Manual. And lastly the findings of the investigation should be made public [Principle 5(b)].[65]

2.1.7 The Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court is one of the most versatile international instruments ever negotiated and establishes an international tribunal to try perpetrators of 'genocide, crimes against humanity and war crimes'. It was adopted by a United Nations Diplomatic Conference of Plenipotentiaries on 17 July 1998.[66] From a diffident commitment in 1945, to a striving Universal Declaration of Human Rights in 1948, international community arrived at a point where individual criminal liability is established for those responsible for serious human rights violations.[67] The Rome Statute of the International Criminal Court prohibits 'the infliction of severe physical or mental pain or suffering including for such purposes as obtaining information'. These violations are considered to be 'war crimes' and in case of torture and of inhuman treatment (article 8) its 'crimes against humanity' when it is committed as part of a 'widespread or systematic attack' directed against civilian population (article 7).[68]

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63 UN Fact Sheets, above n 47.

64 Wikipedia, *Istanbul Protocol* (2012) <http://en.wikipedia.org/wiki/Istanbul_Protocol> accessed 3rd November 2012.

65 OHCHR, above n 51.

66 Id.

67 William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: New York, 2nd ed, 2001) 25.

68 Anthony Lewis, 'Introduction' in Karen J. Greenberg and Joshua L. Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: New York, 2005) 339.

2.1.8 Other General Standards and Professional Principles

Moreover, in addition to these United Nations standards, there are other general standards and professional principles that are highly relevant to the prevention of torture.[69] Among them the 'Convention on the Rights of the Child' having a specific provision in relation to torture and ill-treatment of children in article 37 as does the 'Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families' provides that in article 10. The 'Convention on the Rights of Persons with Disabilities' provides anti-torture provision in article 15. Although there is no specific provision on torture included in the Convention on the Elimination of All Forms of Discrimination against Women, the United Nations specified treaty body has adopted a 'General Recommendation on Violence against Women' that deals with torture.[70] Moreover 'International Refugee Law' also provides an important source of international human rights law that is highly relevant to the issue of torture. The 'right to seek asylum' in another country is one of the elemental protections for anyone who faces the danger of persecution and Governments are prohibited totally to return a person to a state where they may face danger of serious human rights violations and torture in particular.[71]

2.2 Torture in Customary International Law

Since international customary law has been often equated with "general international law", it is in fact, the fundamental source of public international law and international treaties. In the Statute of the International Court of Justice, international custom is stated as evidence of a general practice accepted as law and is cited among the sources of international law to be applied by the Court (Article 38.b). It is really hard to envisage the validity and binding force of written international law without relying on the principles of '*pacta sunt servanda* and *bona fides*', which are obviously customary. When the UN Charter was adopted, with its references to human rights in its Preamble and articles 1.3 and 55.c, there was 'not much substance in the commitments taken' if one could not rely on some sources of non-conventional laws.[72] And, as customary human rights prohibitions, proscription of torture also apply universally in all social contexts as part of the legal obligation of all members of the United Nations under the United Nations Charter since it is

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69 APT, APF and OHCHR, above n 26.

70 Convention on the Elimination of All Forms of Discrimination Against Women 1992, General Recommendation 19.

71 APT, APF and OHCHR, above n 26.

72 Vojin Dimitrijevic, *Customary Law as an Instrument for the Protection of Human Rights* (2006) < http://www.ispionline.it/it/documents/wp_7_2006.pdf> accessed 1st November 2012.

committed to ensure 'universal respect for, and observance of, human rights'.[73] In December 2007, the United Nations General Assembly reaffirmed nearly unanimous and consistent patterns of legal expectation or *opinion juris*, stating that 'no one shall be subjected to torture or to other cruel, inhuman or degrading treatment or punishment' and that freedom from such unlawful treatment 'is a non-derogable right which must be protected under all circumstances, including in times of international or internal armed conflict or disturbance'.[74] Additionally, each form of ill-treatment constitutes a violation of peremptory right and can never constitute lawful public acts by any state or public official.[75] Therefore it is deemed fundamental enough to preclude any State contravention.[76] A Trail Chamber of International Criminal Tribunal for the former Yugoslavia recently stated about the universal jurisdiction of torture. This legitimate basis bears out and strengthens the legal foundation for such jurisdiction that is found by other courts in the inherently universal character of the crime.[77] So, the principal consequence of its higher rank as a *jus cogens* norm is its non-derogability. No practice or act committed in contravention of a *jus cogens* may be 'legitimated by means of consent, acquiescence or recognition' and any norm conflicting with such a provision is therefore void.[78] And it is evident from the fact that to date, no State Party to CAT has made a reservation to Article 15, which reflects the 'universal acceptance of the exclusionary rule and its status as a rule of customary international law'.[79] Both the HRC and CAT have concluded that the exclusionary rule forms a part of the general and absolute prohibition of torture.[80] The obligations outlined above therefore create

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73 *See, e.g.*, U.N. Charter, arts. 55(c), 56.

74 Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 62/148, prmbl. (18 Dec. 2007).

75 Jordan J. Paust, 'The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions' (2009) 43 (4) *Valparaiso University Law Review* 1535, 1535-1537.

76 Louis-Philippe F. Rouillard, *Misinterpreting the prohibition of torture under international law: the office of legal counsel memorandum* (2002) <http://www.auilr.org/pdf/21/21-1-3.pdf> accessed 1st November 2012.

77 Lene Wendland, *A Hand Book on State Obligations under the UN Convention against Torture* (APT, 2002) 64-65.

78 Vienna Convention on the Law of Treaties 1969, art 53.

79 UNHCHR, *Treaty Body Database, Status by Country* <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet> accessed 1st November 2012.

80 General Comment 20; *P.E. v France*, (CAT 193/01); *G.K. v Switzerland*, (CAT 219/02). For further detailed analysis of the history, scope and application of the exclusionary rule, see Appendix 13, Written submissions to the UK House of Lords by Third Party Interveners in the case of *A. and Others v Secretary of State for the Home Department* and *A and Others (FC) and another v Secretary of State for the Home Department* [2004] EWCA Civ 1123; [2005] 1 WLR 414, pp. 35-59. See also Report of the Special Rapporteur on Torture (2006) UN doc. A/61/259, on the significance of Article 15 of CAT and having concern that the absolute prohibition to use evidence extracted by torture has recently […] come into question in the global fight against terrorism, 10.

international interest and standing against acts of torture and other forms of ill-treatment and make certain complaints mechanisms of various Treaty Bodies a 'powerful tool' for enforcement of this universal right in situations where domestic courts have failed to give it an effect.[81]

2.3 Measures and Mechanisms Resisting Torture

The development of international human rights within the UN system must be seen in perspective. All celebrate the seminal date of 10 December 1948 when the Universal Declaration[82] was adopted as a 'symbol of the nascence of international human rights'.[83] It is therefore no wonder that a wide array of instruments, bodies, and mechanisms dealing with the protection of universal human rights including torture have been put in place under the auspices of the United Nations. However, there are two broad cluster of the United Nations human rights machinery[84] i.e. those established under human rights treaties[85] and those set up by the UN Commission on

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81 Sarah Joseph, Katie Mitchell and Linda Gyorki, 'Overview of the Human Rights Committee and the Committee against Torture' in Boris Wijkström (ed), *Seeking Remedies for Torture Victims*: *A handbook on the Individual Complaints Procedures of the UN Treaty Bodies* Geneva: [World Organisation Against Torture (OMCT), 2006] 29, 32-34.

82 Universal Declaration of Human Rights, General Assembly Res. 21 7(111) 1948, 2 in D.J. Djonovich (ed) *United Nations Resolutions (Series 1)* 135.

83 Yoram Dinstein, 'Human Rights: Implementation through the UN System' (1995) 89 *Proceedings of the Annual Meeting (American Society of International Law)* 242, 242.

84 Viljoen, Frans. 2005. "The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities", Vol. 27, No. 1 *Human Rights Quarterly*, pp.125-171, at pp. 125-127.

85 The treaties and treaty bodies are: International Convention on the Elimination of All Forms of Racial Discrimination (*adopted* 1965 *and entered into force* 1969), /Committee on the Elimination of Racial Discrimination (CERD); International Covenant on Civil and Political Rights, (*adopted* 1966, *entered into force* 1976) (ICESCR)/Committee on Economic, Social and Cultural Rights (CESCR); International Covenant on Civil and Political Rights, (*adopted* 1966, *entered into force* 1976) (ICCPR)/Human Rights Committee (HRC); Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 1979, *entered into force* 1981), (CEDAW)/Committee on the Elimination of Discrimination Against Women (CEDAW Committee); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 1984, *entered into force* 1987), /Committee Against Torture (CAT Committee); and Convention on the Rights of the Child, *adopted* 1989, *entered into force* 1990), (CRQ/Committee on the Rights of the Child (CRC Committee). International Convention on Protection of the Rights of All Migrant Workers and Members of their Families, *adopted* 1990 *entered into force* on 1 July 2003. It too has a Committee, bearing the same title. See also Philip Alston & James Crawford (eds), 'The Future of UN Human Rights Treaty Monitoring' (Cambridge University Press, 2000); Anne F. Bayefsky (ed), 'The UN Human Rights System in the 21st Century' (Kluwer Law International, 2000); Anne F. Bayefsky, 'The UN Human Rights Treaty System: Universality at the Crossroads' [Report conducted in collaboration with the Office of the High Commissioner for Human Rights (OHCHR), 2001].

Human Rights, variously called 'special procedures' or 'extra-conventional mechanisms', or 'Charter-based bodies'[86]. The latter may be divided into country specific and thematic mechanisms.[87] Though, the current Charter-based bodies are the 'Human Rights Council' and 'its subsidiaries', including the 'Universal Periodic Review, Working Group and the Advisory Committee',[88] there is a focus in this article on the 'Human Rights Council and the UN Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment'. And within the treaty bodies the article focuses on the 'Human Rights Committee, Committee against Torture, and the Sub-Committee to the Committee against Torture'. There is also a brief discussion on the other monitoring mechanisms like the 'International Criminal Courts and Tribunals, the International Committee of the Red Cross (ICRC) and the UN Fund for Torture Victims'.

2.3.1 Charter–based Bodies

Among the Charter-based bodies 'the Human Rights Council' is an inter-governmental body within the UN system responsible for 'strengthening the promotion and protection of human rights around the globe'. The Council was created by the UN General Assembly in 2006 with the main purpose of addressing situations of human rights violations and make recommendations on them. One year after holding its first meeting in 2007, the Council adopted its 'Institution-building package' providing elements to guide it in its future work. Among the elements is the new 'Universal Periodic Review' mechanism which assesses the human rights situations in all 192 UN Member States. Other features include a new 'Advisory Committee' serves as the Council's 'think tank' providing it with expertise and advice on thematic human rights issues and the revised 'Complaints Procedure' mechanism allows individuals and organizations to bring complaints about human rights violations to the attention of the Council. The Human Rights Council also continues to work closely with the UN 'Special Procedures' established by the former Commission on Human Rights and assumed by the Council. [89] The purpose of these special procedures is to look at specific types of human rights violations wherever in the world they occur. These country-specific and thematic mechanisms include 'Special Rapporteurs, Representatives and Independent Experts or Working

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86 Various thematic mandates are presently in existence like Working Groups, Special Rapporteurs, Special Representatives, Independent Experts etc.

87 Frans Viljoen, 'The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities' (2005) 27 (1) *Human Rights Quarterly* 125, 125-127.

88 Previously, the Charter-based bodies were the Commission on Human Rights and its subsidiaries, including the Sub-commission on the Promotion and Protection of Human Rights.

89 OHCHR, *Background Information on the Human Rights Council* <http://www2.ohchr.org/english/bodies/hrcouncil/> accessed 1st November 2012.

Groups'. They are created by resolutions in response to situations that are considered to be of sufficient concern to require an in-depth study. These procedures report publicly to the Commission on Human Rights each year and some also report to the UN General Assembly. However, for the article purpose, the focus is just on the 'UN Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment'. This mandate was established in 1985 by the UN Commission on Human Rights. It is a non-treaty, 'UN Charter-based' body, the purpose of which is to examine international practice relating to torture in any state regardless of any treaty the state may be bound by. On the basis of information received, the Special Rapporteur can communicate with governments and request them to act on cases observed by them. He or she can also make use of an 'urgent action' procedure, requesting a government to ensure that a particular person or group of persons, are treated humanely. The Special Rapporteur can also conduct visits if invited, or given permission, by a state to do so. The reports may also include general observations about the problem of torture in specific countries.[90]

2.3.2 Treaty–based Bodies

There are also several UN human rights conventions that establish monitoring bodies to oversee the implementation of the treaty provisions. The treaty bodies are composed of independent experts and meet to consider States parties' reports as well as individual complaints or communications. They may also publish general comments on the treaties they oversee. The treaty-based bodies tend to follow similar patterns of documentation.[91] Among them the **'**Human Rights Committee' established by the International Covenant on Civil and Political Rights (ICCPR; article 28) examines reports which states parties are obliged to submit periodically and issues concluding observations that draw attention to 'points of concern and make specific recommendations' to the state. The Committee can also consider communications from individuals who claim to have been the victims of violations of the Covenant by a state party. For this procedure to apply, the state must also have become a party to the first Optional Protocol to the Covenant. The Committee has also issued a series of 'General Comments' to elaborate on the meaning of various articles of the Covenant and the requirements that these place on states parties.[92] There is a formal follow-up mechanism which has indeed been the Human Rights Committee and at its 39th session in 1990 instituted the mandate of a 'special Rapporteur for the Follow-Up on Views', i.e. the decisions on the merits adopted

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90 United Nations Documentation: Research Guide, *Human Rights* (1995-2012) <http://www.hrcbm.org/NEWLOOK/research.html> accessed 1st November 2012.

91 Id.

92 Foley, above n 1.

under the Optional Protocol.[93] Also the Committee against Torture was established pursuant to Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It considers reports of States Parties regarding their implementation of the provisions of the Convention and issues concluding observations. It may examine communications from individuals, if the state concerned has agreed to this procedure by making a declaration under Article 22 of the Convention. There is also a procedure, under Article 20, by which the Committee may initiate an investigation if it considers there to be 'well-founded indications that torture is being systematically practised in the territory of a State Party'. However, a new Optional Protocol was adopted by the UN General Assembly in December 2002 which established a complementary dual system of regular visits to places of detention in order to prevent torture and ill-treatment under article 1. The first of these is an 'International Visiting Mechanism', or a 'Sub-Committee' which will conduct periodic visits to places of detention. The second involves an obligation on states parties to set up, designate or maintain one or several national visiting mechanisms, which can conduct more regular visits. And the international and national mechanisms will make recommendations to the authorities concerned with a view to improving the treatment of persons deprived of their liberty and the conditions of detention.[94] The OPCAT also foresees the establishment of a special voluntary fund for supporting implementation of the recommendations. If States refuse to co-operate, then the Sub-Committee can propose to the UN Committee against Torture to adopt a public statement or to publish the report.[95]

2.3.3 Other Monitoring Mechanisms

A number of '*ad hoc* international criminal tribunals' have been established in recent years including the 'International Criminal Tribunal for the former Yugoslavia (ICTY)' and the 'International Criminal Tribunal for Rwanda (ICTR)' even though national criminal courts are primarily responsible for the investigation and prosecution of crimes of torture and other criminal forms of ill-treatment. Crimes of torture as 'crimes against humanity and war crimes' are included in the Statute of ICTY, ICTR and the Rome Statute of the International Criminal Court (ICC). The Statute of the ICC was agreed in 1998 and received the 60 ratifications necessary for it to come into effect in 2002. The ICC will, in future, be able to prosecute some crimes of torture when national courts are unable or unwilling to do

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93 Markus G. Schmidt, 'Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform' (1992) 41(3) *The International and Comparative Law Quarterly* 645, 651.

94 Foley, above n 1.

95 Association for the Prevention of Torture (APT), *Monitoring Places of Detention: A Practical Guide* (2004).

so.[96] 'International Committee of the Red Cross' is an independent and impartial humanitarian body with a specific mandate assigned to it under international humanitarian law, particularly the four Geneva Conventions is authorized to visit all places of internment, imprisonment and labor where prisoners of war or civilian internees are held. In cases of non-international armed conflicts, or situations of internal strife and tensions, it may offer its services to the conflicting parties and, with their consent, be granted access to places of detention. Delegates visit detainees with the aim of assessing and, if necessary, improving the material and psychological conditions of detention and preventing torture and ill-treatment. The visit procedures require access to all detainees and places of detention. There should not be any limit placed on the duration and frequency of visits, and that the delegates are able to talk freely and without witness to any detainee. Individual follow-up of the detainees' whereabouts is also part of ICRC standard visiting procedures. Visits and the reports made on them are confidential although the ICRC may publish its own comments if a state publicly comments on a report or visit.[97]

However, in recent years, there has been a growing awareness of the problem of bringing torture victims back to normal life which is a very difficult task owing to lack of financial resources and expert knowledge. With this aim in hand human rights groups, organizations, specified authorities, medical doctors and staffs have developed programs to aid victims of torture.[98] Along with them the United Nations in 1981 also set up a 'Voluntary Fund for Victims of Torture'. The Fund supplements the existing international machinery for the protection of human rights. It solicits voluntary contributions from governments, non-governmental organizations, and individuals to distribute these in humanitarian, legal, and financial aid to torture victims and their families. In various countries the Fund also supported human rights organizations that provide medical, psychological, psychiatric, and economic assistance. [99]

2.3.4 Implementation and Monitoring Mechanisms: Revealing the Grim Reality

Although international human rights law takes in a 'high moral standard', its fundamental power lies in holding states accountable for policy and practice. States are under an obligation to arrive at 'voluntarily' legal obligations since legal obligations lay down formal parameters for the promotion and protection of human

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96 United Nations Documentation, above n 90.
United Nations Documentation: Research Guide, *Human Rights* (1995-2012) <http://www.hrcbm.org/NEWLOOK/research.html> accessed 1st November 2012.

97 Id.

98 Such as, Belgium, Canada, Denmark, France, the Netherlands, Sweden, and the United States.

99 Hans Danelius, 'The United Nations Fund for Torture Victims: The First Years of Activity' (1986) 8 (2) *Human Rights Quarterly* 296, 303.

security and dignity.[100] In addition to international human rights law and the laws of armed conflict, a considerable range of other rules and standards have been developed to safeguard the right of all people, to protect against torture and other forms of ill-treatment. Although not legally binding, those represent 'agreed principles' which should be adhered to by all states and provides important guidance for international and domestic laws[101] and for judges and prosecutors.[102] Certain treaties established various 'systems' to be overseen by a variety of Committees and Sub-committees who examine reports of States parties and individual complaints ensuing 'aid in interpreting Conventions through concluding observations and views'.[103] Moreover, in addition to these various treaties, there are a number of 'general standards and professional principles' that are highly relevant to the prevention of torture. These 'soft law' standards 'cannot be legally enforced' in the same way as treaty obligations. Sometimes they provide exhaustive and useful guidelines for interpreting terms such as 'cruel, inhuman or degrading treatment or punishment'. Those also provide for effective implementation the treaty obligations[104] aiming at further promotion of the 'use and application' of those.[105] There are also standards that recommended 'favorable considerations' of their use within the framework of national legislation or practice.[106] However, certain Conventions that became essential basis of international law evolved from rules of 'customary international law' which is binding on the entire international community.[107] And, as customary human rights prohibitions, proscriptions of torture also apply universally without any 'attempted limitations in reservations' with respect to a particular treaty.[108] It becomes part of the legal obligations to ensure 'universal respect for, and observance of, human rights' of all members of the United Nations.[109] This peremptory legal norm is deemed fundamental enough to prevent State contravention.[110] The corollary of *jus cogens* status of the prohibition of torture is that state parties are warranted in exercising 'universal jurisdiction' over the crime of torture irrespective of whether they are parties to the particular

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100 Rita Maran, 'Detention and Torture in Guantanamo' (2006) 33 (4) (106) *Social Justice* 151, 156.

101 Sara A. Rodriguez, above n 53.

102 Foley, above n 1.

103 J. Herman Burgers and Hans Danelius, above n 29.

104 APT, APF and OHCHR, above n 26.

105 United Nations Office on Drugs and Crime, above n 59.

106 G.A. Res. Above n 58.

107 eNotes, above n 37.

108 Jordan J. Paust, 'The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions' (2009) 43 (4) *Valparaiso University Law Review* 1535, -1576, 1535-1537.

109 See, U.N. Charter, arts. 55(c), 56.

110 Louis-Philippe F. Rouillard, Misinterpreting the prohibition of torture under international law: the office of legal counsel memorandum (2002) <http://www.auilr.org/pdf/21/21-1-3.pdf> accessed 1st November 2012.

Convention or not.[111] Those provide non-derogable principles and treaties cannot be made or law cannot be enacted that conflict with a *jus cogens* norm. Not only practice but also act committed in contravention of a *jus cogens* may not be 'legitimated by means of consent, acquiescence or recognition' and any norm conflicting with such a provision is therefore void.[112] Even no interpretation of treaty obligations inconsistent with the absolute prohibition of torture is valid in international law.[113] Certain Treaty Bodies also establish 'powerful tools' and create inclusive interest and standing via 'individual complaints mechanisms' for universal enforcement of this where municipal law or courts have failed to give it effect.[114] There are certain inter-governmental bodies within the UN system that adopted 'Institution-building package' having elements to guide it their future work and assess the human rights situations in all 192 UN Member States. Sometimes it makes recommendations, supports with expertise and advice on thematic human rights issues.[115] It can also communicate with governments and 'request to implement' its comments on cases that are raised. There are also urgent action procedure and visiting mechanisms that conduct visits if 'invited, or given permission' by a state to do so. [116] These recommendations are 'not binding'. States only have an obligation to 'examine them and enter into dialogue' on implementation measures. Where States refuse to co-operate, UN Committee against Torture can adopt a public statement or to publish the report.[117] Certain mechanism solicits 'voluntary' contributions from governments, non-governmental organizations, individuals and distributes those as various aids to torture victims and their families.[118]

Although the 'human rights treaties' are at the heart of the international system to promote and protect international human rights, the problem of implementation of those treaties is that when these standards were drafted, effective international

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111 Lene Wendland, above n 77.

112 Vienna Convention on the Law of Treaties 1969, art. 53.

113 See ILC Draft Articles (40 and 41 on *jus cogens*; and Articles 42 and 48 on *erga omnes)*; see also Advisory Opinion of the ICJ on the *Legal Consequences of the Constructions of a Wall in the Occupied Palestinian Territory*, General List No. 131, ICJ (9 July 2004). In respect of the *erga omnes* character of the obligations arising under the ICCPR thereof, see General Comment 31.

114 Sarah Joseph, Katie Mitchell and Linda Gyorki, above n 81.

115 OHCHR, *Background Information on the Human Rights Council* (2012) <http://www2.ohchr.org/english/bodies/hrcouncil/> accessed 1st November 2012.

116 United Nations Documentation, above n 90.

117 APT, above n 95.

118 Hans Danelius, above n 99.

monitoring of those was neither 'intended nor achievable'.[119] And presently there are various major problem areas in the 'effective implementation which started with the restricted political support focusing the tapered will of the state parties to improve the system. There are also 'questionable reservations, overdue or inadequate reports or even to failure of compliance' with the reports raise questions about their underlying rationales of implementation. Huge backlog in state reports, resource, secretariat or personnel constraints, other financial constraints, limited technology, problems in communications procedures,[120] failure to create national vehicles for implementation etc. all are needed to be considered and are 'sensitive enough to demonstrate the standing of these treaties in the world of monitoring and implementation'. [121]

3. Assessing National Obligations: Bringing the International Standards Home

Under international law states are having an obligation to respect the fundamental rights of all people including torture within the framework of their own legal systems. And where a country has not ratified particular treaties prohibiting torture, in all purpose she is in any event bound by the general international law.[122] At present the Convention against Torture (CAT) assumes increasing importance as a tool which has pragmatic prospects for eliminating torture through state policy.[123] Under this Convention there are substantive provisions starting from articles 1to16 which State Parties must implement in their national laws with non-derogable obligation of the state parties without any justification in time of peace and war.[124]

3.1 Obligations in Ensuring Laws

Among all other national obligations, the obligation to ensure the incorporation of international standards in the domestic laws of the country dividing it in various issues like prevention, non-derogability, no justification on the basis of superior orders, duty not to expel individuals at risk of torture, criminalization and appropriate punishment, universal jurisdiction, extradition or prosecution, protection for individuals and groups made vulnerable by discrimination or marginalization are

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[119] Professor Anne F. Bayefsky, 'The UN Human Rights Treaty System: Universality at the Crossroads' (Report conducted in collaboration with the Office of the High Commissioner for Human Rights, 2001) 1.

[120] Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) 1.

[121] Bayefsky, above n 119, 6-7.

[122] Article 38 of the Statute of the International Court of Justice provides that customary international law consists of norms derived from international conventions, customs, principles, judicial decisions and teaching of eminent publicists.

[123] Lene Wendland, above n 77, 54.

[124] Ahcene Boulesbaa, 'The Nature of the Obligations Incurred by States under Article 2 of the UN Convention against Torture' (1990) 12 (1) *Human Rights Quarterly* 53, 53.

included in this part. In order to find out the Bangladesh's responses of torture, a very brief statement of the implementation of those obligations are included in this part. However, the obligations and the brief implementation regarding this are stated in the following:

3.1.1 Criminal Enforcement and Appropriate Penalties

As for the substantive content, the core provisions concern criminal enforcement. These require state parties to punish torture committed on their territory as well as outside territory by their nationals with appropriate penalties taken into account the grave nature of the offence. States are obliged to prevent torture through various effective means and provide victims with the right to complain against torture.[125] The nature of effective measures is on the discretion of the concerned state, but includes 'making whatever changes that is necessary' in order to complement their internal order with international standards on prevention. In case of failure, state party may not cite her own laws which are incompatible with the Convention to justify its policy of torture or its failure to prevent it.[126] Also in case of penalties of torture under the domestic law it must not be disproportionate considering the grave nature of the offence. This means that torture must be punishable by severe penalties[127] which should be in proportion to other penalties imposed under national legislation for similar crimes.[128]

In pursuance of these obligations, the first obligation of Bangladesh under Article 4 of the CAT is to ensure that 'all acts of torture, attempt to it and complicity or participation in torture' are offences under its criminal law with proper penalties. There are numerous sources of law in Bangladesh, ranging from the highest law of the land, the Constitution all the way down to case laws. Constitution of the People's Republic of Bangladesh has the prohibition of torture in absolute terms in various articles with an anti-torture spirit in the whole. Aside from public law, there is also the possibility to bring civil proceedings for damages in private law. Within the procedural laws even if there are certain controversial sections existing but following those in totality give no scope of abusing it for the purpose of torture. Penal legislations of Bangladesh with the current 'Torture and Custodial Death (Prevention) Act, 2013 defines and prescribes punishments including life imprisonment for torture and other conducts that may amount to torture in line with article 1 of the Convention against Torture. In Bangladesh, the Judiciary is enforcing the corresponding duties of the State in order to promote, protect and implement of

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125 Ibid, 15.
126 Ibid, 50.
127 Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International, 2001) 340.
128 Lene Wendland, above n 77, 35-36.

the rights of torture survivors both in law and in practice. It also takes a leading role in providing justice and reparation to victims of torture by developing a consistent jurisprudence for it.

3.1.2 Universal Jurisdiction and Extradition

Article 5 of the Convention against Torture requires and facilitates jurisdiction by states over acts of torture including instances of non-nationals in third State when the alleged offender is present in territories on the basis of universal jurisdiction.[129] The provision entails an obligation on each state party to have jurisdiction in its domestic national legislation over any alleged torturer within its territory and not extradited but does not prescribe the establishment of universal jurisdiction *in absentia*.[130] Therefore the purpose of the Convention is that suspects of torture must fear 'prosecution[131] always and everywhere'.[132] However, States are also obliged to refrain from transferring persons to another State where they are at personal risk of torture. Article 3 of the Convention overrides conflicting provisions of any extradition treaty which may have been concluded between the states. It is not necessary for the other State also to be a party to the Convention. And upcoming extradition treaties concluded between States would contravene the Convention if those contained provisions conflicting with it.[133] This simplifies that subjecting to a risk of torture cannot be justified on the ground of anything that person may or may not be done which is an exception to the rule of non-refoulement.[134]

From Bangladesh's perspective the country signed the UN Convention against Torture and Cruel, Inhumane or Degrading Treatment or Punishment on October 5, 1998 and in pursuance of obligations provided by it a tough new law with almost similar wordings of CAT named the 'Torture and Custodial Death (Prevention) Act, 2013' has been passed by Bangladesh's Parliament. Under this act all offences of torture are extraditable offences and will be regulated by the Extradition Treaty of 1974 of Bangladesh.[135] This Act also provides that the aggrieved person and any third party can lodge a complaint of torture domestically in the specified court i.e. the Court of Sessions in Bangladesh.[136]

3.1.3 Protection for Marginalized Groups and Individuals

Protection of certain minority or marginalized individuals especially from the risk of torture is part of the obligation to prevent torture or ill-treatment under the

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129 Ibid, 131.
130 See Ingelse, above n 127, 320.
131 Nigel S. Rodley, *The Treatment of Prisoners under International Law* (Oxford University Press, 2nd ed, 2000) 130.
132 Lene Wendland, above n 77, 37-38.
133 See *G.E.T. Paez v Sweden*, Communication no.39/1996, CAT/C/18/D/39/1996.
134 Lene Wendland, above n 77, 33.
135 See *Torture and Custodial Death (Prevention) Act 2013,* s 18.
136 Ibid, ss 6, 7.

Convention against Torture included within the definition of torture itself in article 1, paragraph 1, of the Convention. State Parties therefore, should, guarantee the protection of members of marginalized groups especially at risk of being tortured through fully prosecuting and punishing all acts of violence and abuse against these individuals.[137]

However, in Bangladesh the principle of non-discrimination a basic and general principle in the protection of human rights and it is fundamental also to the interpretation and application of the recent torture law.[138]

3.2 Obligations in Providing Procedural Safeguards

Under the Convention against Torture, every country is having an obligation not only to incorporate the standards in domestic laws but also to provide the procedural safeguards furnishing a strong base to implement the laws in its full context which are discussed in the following:

3.2.1 Custody, Prosecution and other Measures

State Parties are obliged to ensure that alleged offenders are handed over to the competent authorities for the purpose of prosecution. Articles 6 and 7 oblige State Parties to take specific measures in this regard. States have a wide range of freedom in assessing the circumstances that justify pre-trial detention. Here, Parties are obliged immediately to initiate a preliminary investigation into the facts and notify States where offences are committed when the alleged offender is a national of such State or when the victim is a national of such State. [139] State Parties are also under an obligation either to prosecute or extradite suspected torturers failure of which is a violation of International Law.[140] In case of impunity and amnesties the provisions of the Convention must prevail over national laws resulting impunity from criminal prosecution elsewhere.[141] In the issue of standard of evidence, it is in all cases be the same. [142] Appropriate process guarantees implemented by the State also apply to a suspect of torture. And it includes the right 'not to be arbitrarily detained', 'to a fair trial', and 'to have the case heard before an independent tribunal'[143] with a 'presumption of innocence until proven guilty'.[144]

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137 Committee against Torture, *Convention against torture and other cruel, inhuman or Degrading treatment or punishment, General comment no. 2: Implementation of article 2 by states parties* (2008) < http://www.unhcr.org/refworld/pdfid/47ac78ce2.pdf> accessed 3rd November 2012.

138 *Torture and Custodial Death (Prevention) Act 2013,* s 2(6).

139 Lene Wendland, above n 77, 42-43.

140 J. Herman Burgers and Hans Danelius, above n 29, 6.

141 Ingelse, above n 127, 330.

142 J. Herman Burgers and Hans Danelius, above n 29, 138.

143 Ibid, 133.

144 Lene Wendland, above n 77, 45-46.

However, in Bangladesh under the newly enacted legislation the Court of Sessions[145] is the trial court and provisions of the Code of Criminal Procedure, 1898 is applicable unless anything contrary appears in this Act.[146] After the complaint is lodged, there are provisions for immediate recording of the statement of the aggrieved person, ordering medical treatment of the victim if required.[147] There are also provisions for sending to the Superintendent of Police the recorded statement of torture by the court, order for filing of the case and with this statement in hand the Superintendent of Police will start the investigation of the case according to the law with the statement in hand send to the Superintendent of Police by the court.[148] It also addresses delays in investigation and adjudication of the cases of custodial violence.[149] The Act also provides access to Court when the police could not carry out any investigation of torture and court could instruct judicial inquiry in this situation.[150] Within the Evidence Act the use of any 'inducement, influence, and force' in making a person to confess is not permitted.[151]

3.2.2 Right to Complain and Recourse

State Parties are obliged to ensure that any individual who claims to have been subjected to torture has a right to lodge a complaint and of the right to have the complaint investigated by the authorities promptly and impartially under article 13 of the CAT. There is also protection of the complainant from victimization and reprisals. [152] Furthermore, victim must be informed of his right to recourse.[153] State Parties are also obliged to guarantee in their national laws that a victim of an acts of torture obtains redress and has an enforceable right to fair and adequate compensation.[154]

As a matter of Constitutional law, in Bangladesh torture victims may seek relief through a writ application[155] to the High Court Division of the Supreme Court.[156]

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145 *Torture and Custodial Death (Prevention) Act 2013*, ss 6, 7.

146 Ibid, s 9.

147 Ibid, s 4.

148 Ibid, s 5.

149 Ibid, s 8.

150 Ibid, s 5(2).

151 Farzana Akhi, *Confession in police remand* (2008) <http://farzanaakhi.blogspot.com/2008/02/remand-and-confession-are-most.html> accessed 12 June 2013.

152 Lene Wendland, above n 77, 48-52.

153 Ingelse, above n 127, 380.

154 Convention against Torture 1984, arts. 12-14.

155 'Writ petition under the Constitution is maintainable in case of a violation of any fundamental right of the citizens, affecting particularly the weak and downtrodden or deprived section of the community, or if there is a public cause involving public wrong or public injury, any member of the public or an organization whether being a sufferer himself/itself or not may become a person aggrieved if it is for the realization of the

The High Court Division has the power to provide appropriate relief for violations of fundamental rights, including a violation of the prohibition of torture.[157] Torture survivors may invoke common law remedies in civil courts. The State is vicariously liable for damages caused by its officials, so that both may be held jointly liable.[158] Under the new torture law, about reparation in torture cases, the legislation provides a fine up to 50, 000 taka and additional compensation of 25,000 taka to the victim. And in case of death in custody[159] the custodian would be awarded a fine of Tk100,000 and additional compensation of Tk 200,000 to the aggrieved person.[160]

3.2.3 Systematic Review and Supervision

It is an obligation under Article 11 of the Convention against Torture that States are to keep their interrogation 'rules, instructions, methods, practices and arrangements' under persistent review for the custody and treatment of arrestee, detainee and imprisoned persons in any territory under its jurisdiction. The CAT has also emphasized supervision of all places of detention and deprivation of liberty as well as of all regulations to which they are subject by the concerned Government. All these review and supervision must be done systematically. Prison inspection must be carried out if possible, without prior notice and the supervision must be separate from 'police and judiciary'.[161]

The Government Bangladesh regarding this obligation is reviewing its policies and practices within the 'Police Reform Program'. It provides 'Service Delivery Centers and Victim Support Centers' in order to co-operate the overall prevention of crimes including torture in Bangladesh. It also established various 'commissions and organizations' that made arrangements for checking abusive exercise of power and ensures justice. There are also arrangements for review and monitor legislations, upgrading the entire judicial system which will ultimately help in preventing torture.

3.2.4 Respect for other Protection Mechanisms

All persons who are involved in and come into contact with any persons being subjected to any form of 'arrest, detention or imprisonment' should have the

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objectives and purposes of the Constitution', see Justice Muhammad Habibur Rahman, 'Our Experience with Constitutionalism' (1998) 2 (2) *Bangladesh Journal of Law* 115, 123.

156 *Constitution of People's Republic of Bangladesh 1972,* arts 44 (1) and 102 (1).

157 REDRESS, *Torture in Bangladesh 1971-2004 Making International Commitments a Reality and Providing Justice and Reparations to Victims* (2004).

158 Mahmudul Islam, *Constitutional Law of Bangladesh*, (Mullick Brothers, 3rd ed, 2012) 279.

159 Custodial death means 'death in custody of a public servant, death at the time of arrest or illegal arrest by law enforcing agencies, death in investigation, quarries or remand'. See *Torture and Custodial Death (Prevention) Act 2013,* s 2(7).

160 Ibid, s 15.

161 Ingelse, above n 127, 272.

'education and information' regarding the prohibition of torture. And State Parties are obliged to ensure that these are fully included in the training of them. All through the training instructions should include the non-derogable provisions of torture without any justification of it.[162]

From Bangladesh's perspective the non-derogable provision is included in the newly enacted legislation termed 'Torture and Custodial Death (Prevention) Act, 2013 under section 12 of the Act. For improving torture survivors access to justice the Government is trying to support legal assistance projects providing 'legal reform, capacity building, good governance and justice sector facility' etc.

4. Conclusion

International community has developed standards to respect and protect all internationally recognized human rights through the United Nations. In case of denouncing torture be it in the form of universal prohibition or national eradication; there is a complete *de jure* eradication of torture. Though these standards considered the diversity of various legal systems of the world, complete eradication of them vary according to *de facto* situations of various countries. Other than the customary human rights prohibition that is universal in nature, many limitations in the form of 'voluntary obligation', 'request to governments', 'permission from concerned states', 'useful guidelines', 'providing non-binding recommendations' 'favorable use in national legislation or practice' etc. appear in the lane of implementation that may eventually impede the complete proscription of torture worldwide. In national eradication and specially Bangladesh's perspective the proscription of torture is absolute from the supreme law to the others. The state is trying hard through norms and the institutions to fulfill their international obligations. Government of Bangladesh is considering all assorted loopholes and trying to make it up with reform initiatives. But there is still much to be done to achieve a complete *de facto* ban on torture. But then also Bangladesh is extremely optimistic about that accomplishment in future.

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[162] Lene Wendland, above n 77, 56-58.