

THE LEGAL IMPLICATIONS OF CUSTODIAL TORTURE UNDER INTERNATIONAL HUMAN RIGHTS FRAMEWORK

AYUSHI SRIVASTAVA

"More than 90% of all countries worldwide whether they are big or small dictatorships or democracies use torture." — Manfred Novak

Abstract

'Custodial torture is widely recognised as one of most significant forms of human rights violations. severity of this issue is heightened when those tasked with upholding law become perpetrators resulting in profound assault on human dignity. Torture inflicts enduring physical and psychological harm on victims. This article outlines essential characteristics of jus cogens norms while examining status of absolute prohibition against torture within international law. It delves into contributions of International Law Commission notable judicial decisions, and writings of esteemed legal scholars.

Furthermore piece assesses critical function of international legal framework addressing torture by elucidating pertinent provisions from various international agreements including Universal Declaration of Human Rights (1948) International Covenant on Civil and Political Rights (1966) Rome Statute of International Criminal Court (1998), and four Geneva Conventions of 1949. comprehensive analysis of Convention against Torture adopted in 1984 along with its Optional Protocol will also be presented in this article.

INTRODUCTION

Custodial torture is widely recognised as one of most significant forms of human rights violations. severity of this issue is heightened when those tasked with upholding law become perpetrators resulting in profound assault on human dignity. Torture inflicts enduring physical and psychological harm on victims. This issue of custodial torture has been a serious concern under the international legal framework as well and lets understand the legal mechanism developed over time to combat the same.

JUS COGENS: PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW

DEFINITION

The peremptory norm of general international law also known as jus cogens is norm that international community of states accepts and recognizes as one from which no deviation is allowed and which can only be changed by subsequent norm of general international law of same

character. Article 531 of Vienna Convention on Law of Treaties which has significant influence on both state and customary law is source of jus cogens (peremptory standards).

GENERAL NATURE

The essential principles of international community are reflected and safeguarded by universally applicable and hierarchically superior preemptory norms of general international law or jus cogens. International courts and tribunals have frequently mentioned hierarchical superiority of jus cogens. International Criminal Tribunal for Former Yugoslavia for instance determined that "a feature of prohibition of torture relates to hierarchy of rules in international normative order." Inter-American Court of Human Rights also retaliates its hierarchical superiority.¹ Court of First Instance of European Communities articulated "body of higher rules of public international law" in *Kadi v. Council and Commission*.

A treaty is null and void if at time of its conclusion it contradicts with peremptory norm of general international law according to Article 53²: Treaties Conflicting with Peremptory Norm of General International Law ("JusCogens").³ peremptory norm of general international law as defined by current Convention is one that is acknowledged and accepted by international community of states as whole from which no deviation is allowed, and that can only be altered by later norm of general international law of same nature.⁴

PROHIBITION AGAINST TORTURE UNDER THE AMBIT OF JUS COGEN

The requirements for norm to acquire jus cogens legitimacy are outlined in Article 53 of 1969 Vienna Convention. However International Law Commission has chance to provide traits that could be used to demonstrate that norm has achieved both general international law norm status and jus cogens status. An analysis of incidents in which courts or tribunals determined jus cogens would aid Commission in determining process of formation as well as criteria-for finding jus cogens norms As a-result the following are crucial in determining whether prohibition against torture has reached level of jus cogens.

INTERNATIONAL LAW COMMISSION

Article 13 (1)(a) of United Nations Charter required UNGA to "initiate studies and make recommendations for purpose of... encouraging progressive development of international law and its codification" in 1947. International Law Commission was created to carry out Assembly's mandate.

At its 3472nd meeting on May 31 2019 International Law Commission reviewed Drafting Committee's report (A/CN.4/L.936) and after first reading draft conclusions on peremptory rules of general international law (jus cogens) with annexure adopted following:

¹ United States Michael Dominigues para. 49

² Jus cogens has also been characterized as "a standard that enjoys higher status in international hierarchy than treaty law and even 'ordinary' customary rules" by European Court of Human Rights in *Al-Adsani v. United Kingdom*.

³ Council of European Union and Commission of European Communities v. Yassin Abdullah Kadi [2005] ECR II-3649 para. 226.

⁴ Application No. Al-Adsani v. United Kingdom. 35763/97 Grand Chamber European Court of Human Rights Reports of Judgments and Decisions 2001-XI paragraph 21 November 2001. 60.

- (a) proscription of violence;
- (a) Genocide prohibition;
- (c) proscription of inhumane crimes;
- (d) International humanitarian law's fundamentals;
- (e) prohibition of apartheid and racial discrimination;
- (f) Slavery is prohibited;
- (g) ban on torture;
- (h) Self-determination rights.⁵

Regarding preemptive standards of general international law (*jus cogens*) this is partial list. The seventh annex norm is prohibition of torture. "prohibition of torture" is mentioned by Commission in discussion to draft Article 40 of articles on state responsibility for crimes committed abroad.

Commission mentioned prohibition of "crimes against humanity and torture" in commentary on draft article 26.⁶ However Study Group's findings on fragmentation of international law mentioned prohibition of "apartheid and torture."⁷

Commission has chosen to provide in an appendix non-exhaustive list of criteria that were previously referred to as having peremptory character. These standards include:

I. phrase "without prejudice to existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*)" indicates that inclusion of list in annex does not preclude existence of other norms that may currently have peremptory character or emergence of other norms with that character in future. This appendix has no bearing on existence or subsequent development of other peremptory rules of general international law.

II. In reality it says that requirements in annexure are ones that Commission has already determined to be peremptory.

III. Lastly it notes that appendix's list is not all-inclusive underscoring fact that alternative standards with comparable features are not excluded.⁸

It isn't comprehensive in two ways. It is not all-inclusive because there may be other preemptive general international law norms (*jus cogens*) in addition to those listed. Secondly annex should not be seen as denying peremptory nature of other rules because Commission has previously mentioned other standards as having peremptory character in addition to those listed in appendix. appendix's inclusion of standards that Commission has already addressed has significant impact on list.

I. Every standard is derived from formulation that has been employed by Commission in past. Consequently Commission has not taken any action to update standards on list. comments to draft

⁵ Chapter V: Peremptory standards of general international law (*jus cogens*) International Law Commission Report A/74/10 2019

⁶ paragraph 5 of article 40 commentary.

⁷ conclusion (33).

⁸ Paragraph 6 of Article 40 Commentary

conclusions' following paragraphs demonstrate how Commission has occasionally used different language in past releases.

II. second conclusion is that no effort has been taken to specify applicability content or extent of recognized rules. Using same language and without explaining what regulations entail appendix merely enumerates standards that have previously been set by Commission.

standards to which Commission has referred in previous publications have been described using variety of terms. In its commentary on article 50 of draft articles on law of treaties it used phrases "conspicuous example" and "example" to refer to two of standards.⁹

JUDICIAL ROLE

As previously mentioned rulings from international courts and tribunals particularly International Court of Justice are used as subsidiary method to ascertain preemptive nature of principles of general international law. In same vein international courts and tribunals have frequently cited prohibition of torture as preemptive principles of international law in general (Juscogens).

The addition of extradition limits in Torture Convention which enjoins more states ensures worldwide responsibility for crimes of torture. Convention established an international structure that prevented torturers and other international criminals from finding safe haven rather than creating brand-new international crime.

Prosecutor v. Furundzija

According to International Criminal Tribunal for Former Yugoslavia ban on torture "has evolved into peremptory norm or jus cogens that is norm that enjoys higher rank in international hierarchy than treaty law and even 'ordinary' customary rules," and it "relates to hierarchy of rules in international normative order." International Criminal Tribunal for Former Yugoslavia noted following in its ruling:

Paragraph 144: It is important to remember that ban on torture found in human rights treaties is an inalienable right that cannot be waived not even in an emergency. This has to do with jus cogens or preemptive norm that forbids torture. scope of this restriction is so extensive that under international law nations are not allowed to expel deport or export someone to another nation if there are good grounds to suspect that they would be subjected to torture.

Paragraph 145: These treaty provisions urge states to forbid and punish torture and to prevent their citizens from being tortured by their government.

Para146: existence of these fundamental and treaty laws prohibiting torture shows that world community aware of need to prevent this heinous act has decided to outlaw torture in all its manifestations both at public and private levels. There aren't any legal gaps.

Paragraph 147. Nowadays there is widespread opposition to torture. number of treaty and customary norms on torture have gained particularly high standing in international normative system as result of this hesitancy and importance that states take on ending torture.

⁹ paragraphs 1 and 3.

Paragraph 151: States are subject to an erga omnes requirement.

Paragraph 154: fact that ban on torture is jus cogens principle clearly shows that it has established itself as one of most important principles globally.

The prosecution of Mucić¹⁰ and Delalić¹¹

Prosecutors in Mucić and Delalić among others at para. 454 depending on 1950 conventions that safeguard fundamental freedoms and human rights i.e. According to International Criminal Tribunal for Former Yugoslavia prohibition of torture is "norm of customary international law" that "further constitutes norm of jus cogens." This was reiterated by ECHR 1966 ICCPR 1966 CAT 1984, and American Convention on Human Rights 1969 ("Pact of San José Costa Rica").

In United Kingdom Al-Adsani¹²

In legal dispute concerning liability purportedly owing to an individual (Al-Adsani) who had been tortured by Kuwaiti agents European Court of Human Rights (ECtHR) was asked to rule on whether Britain had violated ECHR by maintaining State of Kuwait's immunity.

Court found no violation of ECHR articles 1 and 3 in way UK courts had been applying State Immunity Act of 1978 but it did uphold prohibition of torture as part of jus cogens. By stating that "[clearly jus cogens nature of prohibition against torture articulates notion that prohibition has now become one of most fundamental standards of international community]," Court made clear connection between significance of principles it upholds and prohibition of torture's status as peremptory norm of general international law (jus cogens).

They offer variety of sources that demonstrate how ban on torture has developed over time into jus cogens law including Statutes of AdHocTribunals for Former Yugoslavia and Rwanda as well as International Criminal Court. majority of Court expressly acknowledges that rule prohibiting torture had reached status of peremptory rule of international law at relevant period specifically when applicant filed civil suits in English courts (jus cogens).

DISSENTING OPINION

Lord Justice Stuart Smith's views according to judges who dissented represent core stance of Court of Appeal last court to deal with matter in its entirety which simply denied that prohibition of torture was jus cogens norm. judges noted that rule of sovereign immunity in that domain is nullified by prohibition of torture which has legal implications in international arena regardless of whether domestic procedures are civil or criminal.

By acknowledging that prohibition of torture is jus cogens rule majority recognizes that it is hierarchically higher than any other rule of international law. After all jus cogens rule has power to override any other rule that does not have same status, and when jus cogens norm clashes with another rule of international law former takes precedence. This effectively captures effects of

¹⁰ 16 November 1998 (IT-96-21-T)

¹¹ 1998, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, at para. 454

¹² Supra 61, para 30

peremptory rules of general international law (jus cogens) on existence of competing rule of customary international law.

Ex parte Pinochet Ugarte (No. 3) Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others¹³

majority of House of Lords concluded that both before and after UN Convention international ban on official torture had status of jus cogens or preemptive norm.

Senec. Federal Department of Justice and Police and Federal Prosecutor's Office

As early as 1983 Swiss Federal Tribunal concurred that prohibition of torture in European Convention on Human Rights is jus cogens norm: "According to Federal Court they are...binding rules[rightly:imperatives] of international law ruleswhichshould be taken into take into consideration while reviewing an extradition request whether Switzerland is connected to state making request through bilateral treaty European Convention on Human Rights or European Extradition Convention¹⁴.

❖ Questions on Duty to Prosecute or Execute¹⁵

The International Court of Justice's jurisprudence provides strong evidence of prohibition of torture as peremptory norms of general international law (jus cogens). In case of Questions relating to Obligation to Prosecute or Extradite Court recognized prohibition of torture as "part of customary international law" that "has become peremptory norm (jus cogens)."

In this instance International Court of Justice cited both 1949 Geneva Conventions for protection of resolutions ("the Universal Declaration of Human Rights of 1948; General Assembly resolution 3452/30 of 9 December 1975 on Protection of All Persons from Being Subjected to Torture and Other Cruel Inhuman and Degrading Treatment or Punishment") and war victims; International Covenant on Civil and Political Rights of 1966") in stating that ban on torture is preemptive standard of general international law (jus cogens).

For instance arguments presented by International Court of Justice (ICJ) in this case for conclusion that prohibition of torture qualifies as jus cogens may be pertinent in search for specific conditions for identification of jus cogens. ICJ concluded that ban on torture was peremptory because it had "been incorporated into domestic legislation of almost all States."

A related issue is process by which preceding jus cogens norms are superseded by succeeding jus cogens norms as specified in Vienna Convention Article 53. States' statements may also help Commission in this endeavor to extent that they go beyond simply suggesting that this or that norm is jus cogens norm.

The prohibition also occurred in "numerous international instruments of universal application" and was "grounded in widespread international practice and on State opinio juris."

has been included into practically every state's domestic legislation, and Court claims that "torture acts are regularly denounced within national and international fora."¹⁶

¹³ [1999] UKHL 17

¹⁴ ATFvol.109Ib p. 72 (19).

¹⁵ Belgium v. Senegal Judgment I.C.J. Reports 2012 p.422 at p.457 para.99

¹⁶ Ibid

Kane v. Winn

In Kane v. Winn US District Court for District of Massachusetts ruled that ban on torture is jus cogens norm¹⁷ meaning that it is non-derogable and peremptory requirement erga omnes.

United States Court of Appeals for Second Circuit determined on appeal that under Freedom from torture is guaranteed by customary international law which states that "the torturer has become - like pirate and slave trader before him - hostis humani generis an enemy of all mankind."

As mentioned earlier "teachings of most highly trained publicists" of different states can also be used as backup method to determine whether general international law standards are preemptive. following factors can be taken into account when evaluating ban on torture as jus cogens- Supporting idea that ban on torture is preemptive rule of universal is good source for information on international law (jus cogens).

In study group's report on fragmentation prohibition of torture was mentioned of international law as an illustration of general international law preemptive norm (jus cogens).

Lan Brownlie "Principles of Public International Law," p. 516 mentions ban on Perhaps only commonly acknowledged examples are use of force (as mentioned in United Nations Charter) and prohibitions on slavery torture, and genocide. In her 1994 book "Problems and Process International Law and How We Use it," Rosalyn Higgins lists laws against torture genocide, and execution of prisoners of war on pages 21–22.

STATE IMMUNITY AND BAN ON TORTURE

The absences legal provision on torture ban,governing state immunity when the victims of torture perpetrator State before courts of other States has made issue disputed area in law-of State immunity. In recent years however national courts mostly ruled in favour of foreignState immunity and denied to hear claims of extraterritorial tortures. States are worried that by rejecting immunity in cases of torture they would be treated similarly by perpetrator State. Moreover forum State may have perception that by allowing individuals to seek reparation before its courts it would confront with floods of litigation from torture victims around world. Although safe haven for all torture victims where they can be heard is ideal for human rights advocates States won't like their courts to become tribunals for human rights claims against foreign States. recent practice of States shows that courts being influenced by mentioned political concerns have largely, and at times blindly followed previous rulings of national and international courts who upheld immunity in cases of extra- territorial torture.

Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others Ex parte Pinochet Ugarte (No. 3)¹⁸

The British House of Lords had to decide whether Britain was required to extradite General Augusto Pinochet to Spain on charges of State torture committed while in office. During 1970s

¹⁷ Kanev.Winn 31F.Supp.2d162,199(D.Mass.2004).

¹⁸ [1999] UKHL 17

and 1980s Pinochet was accused of using torture against political opponents in Chile. In 1997 he traveled to UK to undergo surgery in London. One of issues in this case was whether Pinochet could claim immunity as former head of state.

The court used *jus cogens* nature of prohibition of torture to override former head of state's rationale material immunity. majority of Lords came to conclusion that although torture is an international crime and violation of *jus cogens* norm international law cannot be said to have established *jus cogens* crime while also providing an immunity that is coextensive with responsibility that it tries to impose.

For first time local domestic court denied immunity to former head of state on grounds that there cannot be immunity against prosecution for breach of *jus cogens* according to ILC's report on fragmentation: "the British House of Lords used *jus cogens* as conflict norm in Pinochet case."²⁵

In United Kingdom Jones and others

As result English courts' dismissal of suit on grounds of sovereign immunity did not violate Article 6 (1) of European Convention on Human Rights which guarantees access to courts. case involved UK House of Lords' decision to grant Saudi Arabia and Saudi Arabi officials state immunity in civil actions filed in UK by British nationals who claimed they had been tortured in Saudi Arabia. European Court of Human Rights upheld House of Lords' decision. chamber of Court concluded that granting of immunity to Saudi Arabia and its state officers in civil actions was consistent with generally accepted public international law principles.

Although there was some growing international support for specific rule or exemption in public international law in cases involving submitted civil claims for torture Chamber explicitly stated that there was no access to courts. Chamber also asserted that state's right to immunity could not be circumvented by suing specific officials instead.¹⁹

The European Court of Human Rights however has stated that in view of recent developments in this area of public international law Contracting States should continue to review this matter. judgment continues where International Court of Justice left off in Jurisdictional Immunities (Germany v Italy)²⁰ case holding that claims of *jus cogens* breaches do not render state immunity inapplicable.

INTERNATIONAL PROHIBITION OF TORTURE MEASURES

Numerous human rights instruments forbid torture and other cruel inhuman or degrading treatment protecting everyone from being purposefully subjected to extreme physical or psychological suffering by or with consent or cooperation of government agents acting for specific purpose like gathering information.

1948's UDHR (Universal Declaration of Human Rights)

¹⁹ ILC describes in its study of fragmentation of international law "how rule of international law may be superior to other rules on account of importance of its content as well as universal acceptance of its superiority." This is case of *juscogens* norms. study group's conclusion on "Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law" was adopted in 2006 and submitted to UNGA as part of ILC's Report Covering Work of 58th session. UN Doc. A/61/10 at paras 251 370, and 371 [Fox Law of State Immunity]

²⁰ ICGJ434; February 3 2012

A SHORT OVERVIEW

India is founding member of UDHR²¹ landmark document in history of human rights that was drafted by representatives from all over world with varying legal and cultural backgrounds. On December 10 1948²² United Nations General Assembly in Paris declared declaration as common standard of accomplishments for all peoples and all nations. UDHR established universal protection of fundamental human rights for first time.

Despite not being legally binding in and of themselves Declaration's thirty articles that uphold an individual's rights have been expanded upon in later international treaties economic transfers regional human rights instruments national constitutions, and other laws.

Its inclusion demonstrated intention "to eradicate medieval practice of torture and cruelty." punishment that was recently used by Nazis and Fascists."²³ As result it prohibits any kind of torture in detention whether it be physical or psychological. As mentioned above Declaration is merely set of recommendations but it still has great deal of moral weight.

According to Article 3 everyone has right to life liberty, and security which entails human life rather than only an animal one.

The act of torture in any form is prohibited by Article 5.

Furthermore everyone has right to be treated as person in eyes of law since Article 6 grants person right of recognition.

❖ No less no more. Article 7 guarantees equality before law and forbids discrimination of any kind.

Torture and cruel barbaric, and humiliating punishment are expressly prohibited by UDHR's aforementioned articles, and other Declaration provisions uphold this by ensuring equal and fair legal protection and room for human development in future.

Conventions of Geneva August 12 1949

A SHORT OVERVIEW

Important agreements pertaining to international humanitarian law that apply in armed war situations include four Geneva Conventions of August 12 1949²⁴ on protection of Victims of conflict which are supplemented by two 1977²⁵ Additional Protocols.

²¹ Henceforth referred to as "the Declaration."

²² United Nations 172A(III).

²³ Treatment of Prisoners under International Law Nigel S. Rodley and Matt Pollard 3rd Ed. Oxford University Press Oxford 2009 p. 18.

²⁴ August 12 1949 Geneva Convention for Treaty of Prisoners of War; August 12 1949 Geneva Convention for Improvement of Status of Wounded and Sick in Armed Forces in Field; August 12 1949 Geneva Convention for Improvement of Status of Wounded Sick, and Shipwrecked Members of Armed Forces at Sea; and August 12 1949 Geneva Convention for Protection of Civilians in Time of War.

²⁵ Geneva Conventions of August 12 1949, and Their Supplementary Protocol Concerning Protection of International Armed Conflict Victims

In addition to establishing system of protection for those who are entitled to benefits of regulations Geneva Conventions²⁶ were designed to provide comprehensive framework of regulations for conduct of international armed conflict specifically for treatment of individuals from one party to war who end up in hands of another.

According to Article 3 of Geneva Conventions which aim to lessen effects of armed conflict torture is "severe breach" of fundamental international humanitarian law.

According to Geneva Conventions states must pass laws required to effectively punish those who have committed or are ordered to commit such crimes. They must also look for those who are suspected of committing such serious crimes and bring them before their own courts regardless of their nationality if they are not extradited to another State Party. Conventions also protect both military and civilian personnel from torture.

❖ International Committee of Red Cross (ICRC) is impartial and autonomous. humanitarian organization with special mission set forth by international humanitarian law particularly four Geneva Conventions. It engages in range of operations with goal of protecting and assisting victims of both domestic disturbance and military war.

❖ An information package on national enforcement of international

Humanitarian law Geneva Conventions are set of agreements that regulate how civilians prisoners of war (POWs), and troops who have been enlisted are treated in combat or incapable of fighting as well as defense of sick and wounded men in combat.

Common Article 3 of four 1949 Geneva Conventions provides minimum level of protection and includes duties for "each party to conflict." Common Article 3 functions as mini Convention within larger Geneva Convention establishing fundamental norms from which no exceptions are authorized condensing Geneva Convention's core provisions and making them relevant to non-international conflict. Armed opposition organizations are subject to specific duties under humanitarian law that apply during internal armed conflict.

ICCPR 1966 International Covenant on Civil and Political Rights

A SHORT OVERVIEW

It promotes conditions to allow enjoyment of civil and political rights within states and also recognizes inherent dignity of each individual. ICCPR was adopted by UN General Assembly on December 19 1966, and went into effect on March 23 1976. India acceded to ICCPR on April 10 1979. Countries that have ratified Covenant are required to protect and preserve fundamental human rights as well as to adopt administrative judicial, and legislative measures to protect rights of treaty and provide an adequate solution.

²⁶ Hereafter referred to as "the Conventions."

According to Human Rights Committee not all "disturbances or tragedies" meet definition of "public emergency endangering existence of nation" under Article 4(2) of ICCPR which states that protection against torture is non-derogable right that cannot be used in any situation. As result situations involving armed conflict whether domestic or international may fall under definition. Furthermore Committee emphasized that State does not have limitless jurisdiction to make derogations under Article 4 just because there is an armed conflict. This is because actions that deviate from Covenant are only permitted if and to extent that context warrants it. presents risk to survival of country.

Even in cases of national emergency there can be no exceptions to fundamental right to life guaranteed by Article 6's first paragraph.

Article 7 of ICCPR prohibits torture in all its forms. article's goal is to protect person's physiological and mental health as well as their dignity. ICCPR does not require participation of public official in order for an act to qualify as torture in contrast to Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

Everyone must be protected from acts prohibited by Article 7 whether they are committed by people operating in their official role outside of their official capacity or in their private capacity. This is duty of State party.

Article 7 forbids not only behaviors that inflict physical harm on victim but also behaviors that cause person mental distress. Although torture is expressly prohibited by Article 7 of ICCPR term is not defined in that document:

list of forbidden activities or clear distinctions between torture and other forms of ill-treatment are not necessary although these differences "rely on origin purpose, and severity of administered treatment. Paragraph 3 of Article 2 should be read in conjunction with Article 7 of Covenant. According to Article 10(1) of ICCPR everyone who is deprived of their freedom shall be handled humanely which suggests that all forms of torture including those that cause death are strictly forbidden. Treating everyone who is denied their freedom with kindness and regard for their dignity is an essential and widely applicable standard. Regardless of race color sex language religion political views national or social origin property birth or other conditions this rule must be applied. Everyone who has been deprived of their freedom by laws and authorities of state and is being held in hospitals prisons or detention camps among other locations is subject to this rule.

Under Covenant Human Rights Committee is established to supervise application of rights outlined in treaty. It does this by reviewing State Party reports and individual communications and complaints received under Optional Protocol to Treaty Force. Law enforcement authorities may only use these documents when absolutely necessary and only in extreme circumstances.

❖ In state of war an external conflict or threat to national security there is no law

Any individual should not be subjected to torture or any other cruel inhuman or degrading treatment by an enforcement officer nor should they be encouraged to do so.

Osbourne v. Jamaica²⁷ states that corporal punishment is severe inhumane, and degrading act that violates ban of torture. In Polay Campos v. Peru²⁸ it was ruled that victim's public exposure and 23 hours of isolation in tiny cell with only 10 minutes of sunlight per day were violations of Articles 7 and 10 of ICCPR.

The 1984 Convention on Prevention of Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT)

A SHORT OVERVIEW

In order to prevent torture and other cruel inhuman or humiliating treatment or punishment worldwide United Nations Convention Against Torture and Other Cruel Inhuman or Humiliating Treatment or Punishment was established. Resolution 39/46 of UN General Assembly adopted CAT on December 10 1984, and it became operative on June 26 1985.

By authorizing arrest of suspected torturers based only on their presence in State Party's territory and by designating torture as crime against humanity Convention places victims at center of its normative mechanism and helps to combat impunity enjoyed by those who commit such crimes.

On other hand Convention only covers painful acts committed in public; it does not cover those committed in private. Convention also outlines government's obligations to prevent torture punish those who engage in it provide education and training, and provide significant compensation and rehabilitation to victims of torture.

By creating number of international monitoring mechanisms to make sure that countries abide by Convention's provisions Convention strengthens current ban on torture and other cruel inhuman or degrading treatment or punishment. Countries that have ratified Convention are obligated to forbid and punish acts of torture as defined by Convention. Effective legislative administrative judicial, and other procedures must be implemented by nations that have ratified Convention in order to outlaw torture on their territory.

❖ Article 2: Torture is forbidden, and State Party must take necessary measures to stop it in any territory under its jurisdiction. This prohibition is clear and non-derogatory. Special circumstances that could be used to justify torture include war threat of war internal political instability public emergency terrorist acts violent crime or any type of armed conflict. Torture cannot be justified as means of disaster prevention or public safety. In few instances it has been observed that police officers torture individuals with approval of higher-ups or by using open. Police Commissions and law courts have often

²⁷ U.N.Doc.CCPR/C/68/D/759/1997 (2000) Communication No. 759/1997.

²⁸ (1997) Communication No. 577/1994.

cautioned police administration to stop this disgusting behavior and to stop using excuses of superior authorities to torture people.²⁹

❖ Article 3: Parties are not allowed to repatriate or extradite anyone to nation where there are good grounds to suspect that they would be subjected to torture. Only violations committed at request of or with consent or acquiescence of public official or other person acting in an official capacity are covered by criterion mentioned in Article 3 paragraph 2 "a consistent pattern of gross flag and of mass violations of human rights."³⁰ Convention Committee has decided that this risk must be taken into account not only for original receiving state but also for states to which person may be expelled repatriated or extradited in future.

Concept of universal jurisdiction which has been recognized in treaties against airline hijacking and other terrorist acts must be applied to determine jurisdiction over acts of torture committed outside borders of States including by individuals who are not their nationals, and not only on basis of territory or nationality of offender according to Article 5 of Convention.

Article 13 states that anyone who believes they have been tortured has right to file complaint with appropriate authorities and have their case swiftly and impartially investigated. Additionally efforts will be made to protect complainant and witnesses from any unfavorable treatment as result of their complaint or any evidence they provide. Each State Party is responsible for making sure that people who suspect someone has been tortured can file complaint and have it investigated.

Committee believes that Article 14 applies without discrimination to all victims of torture and acts of cruel inhuman or degrading treatment or punishment.³¹ term "redress" in Article 14 encompasses concepts of "effective remedy" and "reparation," including restitution³² compensation rehabilitation³³ satisfaction, and guarantees of non-repetition³⁴, and refers to full scope of measures required to redress violations under Convention.

❖ Article 14: State Party is required to ensure that victims receive compensation including full medical care and payments to survivors if victim dies as result of abuse.

In order to put Article 14 into effect States Parties must enact laws that specifically guarantee victims of torture and other cruel treatment an effective remedy as well as right to adequate and

²⁹ Committee against Torture "General comment no. 1: Communications concerning return of person to State where there may be grounds in context of Article 22 parties that he would be subjected to torture" (1998) para. 3.

³⁰ S R Sankaran "A Framework for Reforms in Criminal Justice System," Economic and Political Weekly Vol. 34 1999 pp. 1316–1320.

³¹ General Comment No.3: Implementation of Article 14 by States Parties Committee Against Torture 2012 para 1.

³² Ibid. para. 8.

³³ Ibid. para. 11.

³⁴ Ibid. para. 18.

appropriate reparation including compensation and full rehabilitation. Additionally victims must be able to exercise this right and have access to judicial remedy under such laws.³⁵

❖ provision 15: This provision increases protection of those under police custody by mandating

detainee's statement however will be admissible as evidence against someone accused of torture.

Article 15 forbids not only use of self-incriminating remarks in criminal proceedings but also use of utterances of any kind. Each State Party must ensure that any statement obtained through mistreatment is not used as evidence in case as proof in "any proceedings" where it is demonstrated that such remarks were made under duress.

Article 4 states that torture is "grave nature" offense, and Article 8 states that states must exclude torture from list of crimes that are extraditable which allows suspected offenders to be sent to another country to face charges.

According to Article 7 State Party whose territory accused person is accused of torture must refer case to its competent authorities for prosecution if accused person is not extradited. These authorities will make their decision in same manner as they would in event of any other serious offense under that State's laws.

In order to prevent torture states must also regularly review their interrogation protocols guidelines procedures, and methods as well as prepare for treatment and custody of individuals who are arrested detained or imprisoned (Article 11).

❖ Every State Party should ensure that its authorities carry out an investigation when there is reasonable suspicion that an act of torture has been committed (Article 12).

Convention's Article 17 creates Committee Against Torture which will be made up of ten experts in field of human rights who are recognized for their expertise and high moral standing. Each member will serve in their own capacity.

objective of Committee is to oppose interpretations of lawful sanctions clause that severely restrict rights of victims and to make every effort to guarantee that actions that are wholly incompatible with right to physical integrity are deemed "torture" under contemporary international law and are therefore forbidden.³⁶

primary duty of Committee against Torture is to oversee application of Convention. procedures outlined in Articles 19 20, and 21 of Convention are followed by Committee as it performs its duties.

³⁵ Ibid. para. 20.

³⁶ "Ratification status: OPCAT"

According to Article 22 of Convention people have right to directly register complaint with Committee Against Torture. State Party that is being accused must admit that Committee has authority to consider each allegation separately.³⁷

Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 2002 (OPCAT)³⁸ contains an optional protocol.
SHORT OVERVIEW

Optional Protocol to Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment³⁹ was adopted by UN General Assembly on December 18 2002. On June 22 2006 Protocol came into force. It has been ratified by 91 governments and signed by 14 states. Protocol established supplemental twofold system of routine visits to detention facilities in order to prevent torture and cruel treatment.

To stop torture and other cruel inhuman or humiliating treatment or punishment Protocol's Article 2 creates Subcommittee on Torture and Other Cruel Inhuman or humiliating Treatment or Punishment. Subcommittee regularly travels to various nations including "any place under [the State's] jurisdiction and control where persons are or may be deprived of their liberty either by virtue of an order issued by public authority at its instigation or with its consent or acquiescence."

Article 14 gives State authority to oppose to Subcommittee's visit to specific detention facility on extraordinary grounds such as urgent and compelling national security concerns.

The Protocol expressly stipulates that State Party may not use existence of declared state of emergency as justification for allowing visit, and that defense public safety natural disasters or significant disorder at destination temporarily prohibit such visit.

If State Party declines to work with Prevention Subcommittee take action to

Committee against Torture may at request of Subcommittee determine by majority of its members to either publish Subcommittee's findings or make public comment on subject in order to ameliorate situation in light of its recommendations.

According to Protocol when developing national preventative procedures countries must consider Paris Principles regarding standing of national institutions for advancement and defense of human rights.⁴⁰

Rome Statute of International Criminal Court

A SHORT OVERVIEW

The Rome Statute which established International Criminal Court (ICC) to prosecute those responsible for war crimes crimes against humanity, and genocide was accepted by UN on July 17 1998. Once ratified by required number of countries it became operative on July 1 2002. Rome

³⁷ Committee may receive communications from private people their relatives or representatives who allege they were victims of violation of Convention by state that has recognized Committee's authority under Article 22.

³⁸ "OPCAT," OCR

³⁹ Henceforth referred to as "the Protocol."

⁴⁰ Over 118 International Criminal Court "Rome Statute of International Criminal Court," ISBN 92-9227-227-6 ICC-

Statute expands ICC's jurisdiction to include following offenses some of which may involve torture.

The torture "inhuman treatment," which is serious violation of Geneva Conventions "cruel treatment," which is violation of common Article 3 of Geneva Conventions knowingly causing great suffering or severe physical or medical harm mutilation violations of one's own dignity especially insulting and humiliating treatment rape forced prostitution forced sterilization forced pregnancy, and any other kind of sexual abuse.

definition of crimes against humanity is "any of sequence of activities performed aspart According to Article 7(1) of Rome Statute "of widespreard systematic attack intended against any civilian population with knowledge of attack."

Genocide is defined in Article 6 as any of series of events "committed with purpose to As in Genocide Convention "causing significant physical or mental harm to members of group" is one of stated crimes. "Eradicate in whole or in part national ethnic racial or religious group as such."

An act of torture or cruel treatment that is included in list of prohibited acts in Article 8 may be tried by ICC as war crime whether it is carried out during an international or non-international armed conflict.

An act of torture or cruel treatment described in Article 7 may be tried as crime against humanity if it is part of large-scale or planned attack against any civilian population with knowledge of attack. Serious bodily or psychological injury caused by acts of torture or cruel treatment to members of national ethnic racial or religious group may be charged as genocide if act is carried out with intent to completely or partially eradicate group.⁴¹

Therefore within bounds of its jurisdiction International Criminal Court can look into and punish torture. Many nations have rendered torture illegal under their own domestic laws, and prohibition of torture also requires governments to take action to stop and punish torture. Governments could use universal jurisdiction to punish those who torture others, and members of International Criminal Court are required to assist court in investigation and prosecution of crimes including torture that fall within their purview. States are also required by Geneva Conventions and CAT to extradite or punish those responsible for torture authority. During times of armed conflict International Committee of Red Cross oversees adherence to international humanitarian law.⁴²

1998 EUROPEAN CONVENTION TO PREVENT TORTURE and INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT SHORT OVERVIEW

European Convention for Prevention of Torture and Inhuman or Degrading Treatment or Punishment¹²⁸ was adopted by Council of Europe's member states in 1987 after to ratification of CAT.

European Committee for Prevention of Torture and Inhuman or Degrading Treatment or Punishment is established by Convention. Its purpose is to investigate treatment of individuals who have been deprived of their freedom and if required to improve their protection against torture and other cruel inhuman or degrading forms of punishment. According to Article 7(1) Committee travels to countries both regularly and as needed. Any institution of detention—defined as place where individuals are detained by or under supervision of state authority—may be visited.

⁴¹ Amnesty International "Combating Torture: Manual for Action," 2003.

⁴² "Torture": IJR Center <<https://ijrcenter.org/thematic-research-guides/torture/>>

❖ Although government in question must be informed of Committee's intention to conduct visit no minimum amount of notice is necessary. Additionally it is exempt from providing notice for each detention facility it may want to visit (Article 8). Convention permits governments to object to visit at time or to specific location suggested by Committee in "exceptional circumstances," as there is no restriction on kinds of places of confinement Committee may visit.

grounds for making such claims are limited to public safety national defense major disruptions in detention facilities an individual's physical state or fact that an urgent interrogation related to serious crime is in progress.

Even though grounds are few it is evident that they are open to wide interpretation. However representatives are not definitive; rather they act as catalyst for dialogue between government and Committee to clarify matter and come to consensus on protocols that would enable Committee to fulfill its responsibilities in timely manner. Convention is applicable during times of war or other public emergencies in addition to times of peace.

CONCLUSION

The author claims that positive law interpretation of jus cogens which is predicated on states' acceptance may diverge from previous interpretation that was grounded in natural law theory. In order to ascertain whether jus cogens norms share characteristics Commission may be able to examine kinds of norms that have so far been granted status of jus cogens through analysis of their nature. idea of prohibiting torture is more than just formal clause in international treaties according to study of sources on international law. idea that prohibition of torture is higher norm of jus cogens that States must endeavor to uphold is supported by provisions of treaties that make prohibition absolute and non-derogable as well as by its further manifestation in international customary law and recognition in international law. The researcher discovers that number of experts firmly believe that torture prohibition has been gradually crystallized as result of Jus cogens's authority. As stated in preceding paragraphs international judicial bodies facilitate identification and elucidation of jus cogens standards. "teachings of most highly qualified publicists" and International Law Commission have also made equal contributions to this. As result prohibition of torture which is one of most widely accepted human rights and gives rise to duty erga omnes (owed to and by all States) to take action against those who torture has achieved status of jus cogens or peremptory norm of general international law. As result even if State has not ratified any of pertinent treaties prohibition may still be enforced against it, and since norms are so fundamental there is no deviation. Regarding international legal environment author also discovers that global campaign against torture was about to take shape when UN Charter stated that promoting and developing human rights was one of organization's fundamental objectives. proclamation's ban on torture gained legal weight both internationally and regionally, and it began to mobilize worldwide community against many types of torture. In contrast U.S. N. itself started taking some action to end torture worldwide.

The author comes to conclusion that people who commit grave violations can be held accountable before international tribunals, and that more and more states are adopting treaties that forbid torture and agree to supervision of such treaties' oversight institutions. However non-legal measures are needed to support and consolidate progress because enforcement mechanisms at international and regional levels are still either very weak or nonexistent. International and regional organizations are more eager to use each other's jurisprudence as result of growing number of legal sources for prohibition of torture. rich intricate and—above all—more coherent body of international law pertaining to ban on torture has been developed as result of this cross-fertilization.