

**THE CONVENTION AGAINST TORTURE AND OTHER CRUEL,
INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT
: A DETAILED ANALYSIS OF THE PROVISIONS ENSHRINED AND
A CRITICAL APPRAISAL OF THE JUDICIAL TRENDS INVOLVED**

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**I. INTRODUCTION TO AND THE COURSE OF DEVELOPMENT OF
THE ‘TORTURE CONVENTION’**

The **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (commonly known as the **United Nations Convention against Torture (UNCAT)**)¹ is an international human rights treaty, which was formulated under the review of the United Nations. The objective of the Convention stands to prevent torture and other acts of cruel, inhuman, or degrading treatment or punishment around the world.¹

The Convention also imposes obligations upon the State Parties to take effective measures to prevent and prohibit torture in any territory, within their jurisdiction, and further forbids States from transporting people to any country where there is reason to believe that they shall be subjected to torture.

The text of the Convention was adopted by the United Nations General Assembly on 10 December 1984 and, following ratification by the 20th state party², it came into force on 26 June 1987.

Since the entry into force of the convention, the absolute prohibition against torture and other acts of cruel, inhuman, or degrading treatment or punishment has become accepted as a principle of customary international law.³

¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

² *Ibid.*, Article 27

³ "CAT General Comment No. 2: Implementation of Article 2 by States Parties" (PDF), Committee against Torture. 23 November 2007

Development of the Convention : It's Evolution

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") was adopted by the General Assembly of the United Nations on 10 December 1984 (resolution 39/46). The Convention entered into force on 26 June 1987, after that had been ratified by 20 States.

The Torture Convention was a product of prolonged efforts, initiated after the adoption of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Declaration") by the General Assembly on 9 December 1975 (resolution 3452 (XXX)).

In a second resolution, adopted on 9 December 1975, the General Assembly requested the Commission on Human Rights to pay regard the question of torture and any necessary steps for ensuring the effective observance of the Torture Declaration (resolution 3453 (XXX)). On 8 December 1977, the General Assembly requested the Commission on Human Rights to produce a draft convention against torture and other cruel, inhuman or degrading treatment or punishment, with respect to the principles embodied in the Torture Declaration (resolution 32/62).

The Commission on Human Rights began its work on this subject at its session in February-March 1978. A working group was set up to deal with this item, and the main basis for the discussions in the working group was a draft convention presented by Sweden. During each of the subsequent years until 1984 a similar working group was set up to continue the work on the draft convention.

II. THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT : AIMS AND OBJECTIVES

There tends to be a wrong notion as to the principal aim of the Convention.

As per the popular opinion, such as been inferred that the aim of the Convention is with regard to that of outlawing torture and other forms of cruel, inhuman and degrading treatment or punishment. The erroneousness as to this inference is that, such an inference will cause the assumption that the prohibition of all such practices as stipulated by the Convention

is established under International law, by the virtue of the Convention only. However, such is a rather wrong notion, as such would imply that the prohibition would stand as binding as a rule of international law only with respect to the States which are parties to the Convention and not otherwise.

However, on the other hand, the very foundation the Convention is derived from the assumption that the Convention is based upon the recognition that the aforementioned acts of torture, cruel, inhuman and degrading treatment and punishment are outlawed under International law.

Thereby, the aim of the Convention stands in strengthening the existing prohibition of such practices by virtue of these execution of a number of supportive measures.

Secondly, however, the Convention does not deal with those cases which occur exclusively in a non- government setting. It only aims to regulate and control those practices which are with respect to some sort of responsibility of the public officials or the other person's who are acting in an official capacity.

The Convention, is on the basis of the Declaration in the same matter of the General Assembly of the United Nations, in 1975.⁴

Hence, the objective of the Convention is to ensure an efficient implementation of the elimination of all form so torture, cruel, inhuman and degrading treatment or punishment by the State Parties, and ensuring an effective punishment of the person who are regarded as having undertaken such unlawful practices.

⁴ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

III. DEFINITION OF ‘TORTURE’ ELUCIDATED UNDER THE ‘TORTURE CONVENTION’

As per the **Article 1** of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ‘*torture*’ means⁵ –

- Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person
- for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind,
- when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Further, as per the **clause 2⁶**, the Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.\

Thereby, the requirements as per the definition of ‘torture’ are :

- The infliction of severe mental or physical pain or suffering
- By or with consent or acquiescence of State Authorities
- For a specific purpose such as receiving information, or for intimidation or punishment

Hence, the two guidelines for assessing whether a set of facts amount to torture, are specified as :

- i. The requirements comprised in the definition of torture should be supported by the virtue of facts.
- ii. Torture can be differentiated from the other kinds of ill – treatment through the degree of suffering involved and the purposive element.

⁵ supra note. 2, Article 1

⁶ *Ibid.*, Article 1(2)

IV. STRUCTURE OF THE UNCAT: AN ANALYSIS OF THE SEGMENTED DIVISIONS UNDER THE CONVENTION

The Articles of the Convention stand divided in three different parts, elaborated as :

i. **Part I (Articles 1 – 16) :**

The Part I comprises of the *substantive provisions*.

Thereby, most of the provisions enlisted in the specified part are about torture and not about the other forms of cruel, inhuman or degrading treatment or punishment.

However, a very limited number of provisions stipulated apply to all the categories.

ii. **Part II (Articles 17 - 24) :**

The Part II further comprises of the *implementation provisions*.

These articles deal with the several forms of international supervision, with respect to the due regard and observance paid by State Parties, as to their obligations under the substantive provisions stipulated.

iii. **Part III (Articles 25 - 32) :**

The Part III comprises of the *final clauses*.

These Articles pertain to the provisions as the signature and ratification of the Convention, it's entry into force, amendments, denunciation, settlement of disputes concerning the Convention's interpretation and application, and optional exclusion of one of the implementation provisions.

V. THE STATE PARTY UNDERTAKINGS UNDER THE UNCAT
: AN EXAMINATION OF THE RELEVANT PROVISIONS

The provisions under the Convention that deal with the obligations of the State Parties under the Convention and their requisite undertaking, are specified as :

- i. **Article 2⁷** : As per the Article 2, each State party shall undertake the effective legislative, administrative, judicial or other measures to prevent the acts of torture from being committed. The prohibition against torture shall stand as being absolute, and shall be upheld without regard to a state of war, as well as, in other exceptional circumstances.
- ii. **Article 3⁸** : As per Article 3, no State party may expel or extradite a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
- iii. **Article 4⁹** : The Article 4 stipulates that, each State party shall ensure that acts of torture are regarded and punished as serious criminal offences, within its legal system.
- iv. **Article 6¹⁰** : As per Article 6, every State to the Convention shall take a person suspected of the offence of torture into custody and make a preliminary inquiry into the facts. However, such can only be undertaken on the ground of certain conditions.
- v. **Article 7¹¹** : According to Article 7, each State party shall either extradite a person suspected of the offence of torture or submit the case to its own authorities for prosecution.
- vi. **Article 12¹²** : The Article 12 stipulates that every State party shall ensure that its authorities make investigations, whenever

⁷ *Ibid.*, Article 2

⁸ *Ibid.*, Article 3

⁹ *Ibid.*, Article 4

¹⁰ *Ibid.*, Article 6

¹¹ *Ibid.*, Article 7

¹² *Ibid.*, Article 12

there tend to be a reasonable ground to believe that an act of torture has been committed.

- ii. **Article 13**¹³ : The Article 13 provides that every State party shall ensure that an individual who alleges that he has been subjected to torture, shall have his case examined by competent authorities.
- iii. **Article 14**¹⁴ : According to Article 14 of the Convention, every State party shall ensure to the victims of torture that an enforceable right to fair and adequate compensation shall be afforded to them.

VI. CRITICAL ANALYSIS OF THE PROVISIONS OF THE TORTURE CONVENTION : A DETAILED APPRAISAL

A. Substantive Part Of The Convention On Cruel, Inhuman And Degrading Treatment Or Punishment :

The substantive part of the Convention deals with a limited number of provisions enshrined, which further apply to both torture and the other forms of cruel, inhuman and degrading treatment and punishment, when such acts are committed by or at the instigation or with the consent or acquiescence of a public official or any other person acting in official capacity.

As per the **paragraph 1 of Article 2*** and **Article 16**¹⁵ of the Convention, respectively, each State Party to the Convention shall undertake a due prevention and prohibition of any acts of torture, cruel or inhuman treatment or punishment, within the territory which is under its jurisdiction.

¹³ *Ibid.*, Article 13

¹⁴ *Ibid.*, Article 14

* *Ibid.*, Article 2 (p.1)

¹⁵ *Ibid.*, Article 16 (p.1)

¹⁶ *Ibid.*, Article 10 (p.1)

As per **paragraph 1 of Article 10**¹⁶ of the Convention, every State Party shall further ensure that the information regarding this prohibition is fully comprised in the training of such persons.

Further, as per **paragraph 2 of Article 10**¹⁷ of the Convention, each State Party to the Convention shall undertake the prohibition of all such acts in the rules or the instructions, issued with regard to the duties and functions of both the civil and military law personnel as well as the medical personnel, public official, as well as the other persons who maybe involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

Also, as per **Article 11**¹⁸, each State Party is required to maintain interrogation rules, methods, and arrangements under it's systematically review, for the purpose of the treatment and custody of the persons under arrest, detention or imprisonment, so as to ensure the prevention and prohibition of any acts of cruel, inhuman and degrading treatment or punishment.

In accordance with **Article 12**¹⁹ of the Convention, each State Party has been vested with the obligation to comply with the provisions which stipulate that such a State Party shall ensure that its competent authorities undertake an impartial and prompt investigation, whenever there tends to be a reasonably viable ground to believe that any such act has been committed in it's territory.

Any individual who alleged that he had been subjected to any cruel, inhuman or degrading treatment or punishment shall be entitled to ensure the examination of his case by the competent ⁶authority, in a prompt and impartial manner. Such a provision has been specified under **Article 13** of the Convention.

Further, the provisions as stipulated under the **Article 10, 11, 12 and 13** only pertain to acts of torture. However, as per the **paragraph 1 of Article 16**²⁰ of the Convention, the obligations as have been constituted in the aforementioned articles also apply to the other forms of cruel, inhuman and degrading **treatment and punishment**.

¹⁷ *Ibid.*, Article 10 (p.2)

¹⁸ *Ibid.*, Article 11

¹⁹ *Ibid.*, Article 12

²⁰ *Ibid.*, Article 16 (p.1)

B. Substantive Provisions Of The Convention As To The Act Of Torture :

The substantive part of the Convention provides an elaborate definition as to the term ‘torture’ for the purposes of the Convention. The definition is provided under that **paragraph 1 of Article 1** is as specified –

Further, as per **paragraph 1 of Article 2**,²¹ each State Party is under the obligation to implement the effective and efficient measures to ensure the prohibition of the acts of torture in it’s territory.

Also, as per the stipulation specified under **paragraph 2 of Article 2**,²² of the Convention, no exceptions on the ground of a state of war, a threat of war, internal political instability or any other instance of public emergency or any other circumstances whatsoever, shall be inflicted as the justification for infliction of torture.

As per **paragraph 3 of Article 2**,²³ there shall not stand to be an implementation of any order which maybe made by a superior officer or public authority as the justification for torture.

According to **Article 15**²⁴ of the Convention, any statement which has been made as a result of torture shall not be regarded or held as evidence in any proceedings whatsoever. The victims of torture shall be rendered with and enforceable rights to adequate and fair compensation, including the means for as full rehabilitation as maybe possible. Such has been provided under **Article 14**²⁵.

As per the provision under **Article 3**²⁶ of the Convention, no State Party shall return, extradite or expel a person to another State if there exist substantial grounds for believing that he would be in the danger of being subjected to incidences of torture.

Also, the stipulations as specified under **Article 4-9**, include provisions with respect to the application of penal laws as to persons who are guilty of torture.

According to **Article 4**²⁷ of the Convention, each State Party shall have the obligation to endure that all acts of torture, attempt to commit torture,

²¹ *Ibid.*, Article 2 (p.1)

²² *Ibid.*, Article 2 (p.2)

²³ *Ibid.*, Article 2 (p.3)

²⁴ *Ibid.*, Article 15

²⁵ *Ibid.*, Article 15

²⁶ *Ibid.*, Article 3

²⁷ *Ibid.*, Article 4

as well as the acts constituting participation or complicity in torture, are specified as offences under its criminal law, which shall be punishable by appropriate penalties imposed as per the graveness of the offence.

With respect to such offences as specified, the Convention comprises of the stipulations which provide for a system of **universal jurisdiction**, as enshrined under the **Articles 5,6 and 7**. However, as per the provisions of the Articles, if the offence had been committed in a territory abroad, then the State Party shall be obliged to submit the case to its competent authorities for the purpose of prosecution, unless it extradites the alleged offender to another State.

Under the **Article 8**²⁸ of the Convention, with respect to the offences punishable under Article 4, the Convention comprises of the provisions concerning extradition to other State Parties.

Also, **Article 9**²⁹ provides for the assistance to be extended by the State Party with regard to the criminal proceedings instituted in that State.

C. Implementation Provisions :

The part of the Convention that deals with the implementation - based provisions provides for the creation of the international supervisory body, under the provisions of **Article 17 and 18** of the Convention. Such is regarded as the '**Committee Against Torture**' which comprises of 10 experts who are elected by the State Parties. Such experts perform the functions vested in them not in the capacity of the representatives of the government, but rather in their personal capacity.

Under **Article 24**³⁰ of the Convention, the Committee is required to submit a report once in a year to the State Parties and to the General Assembly of the United Nations, with respect to its activities. The State Parties are further required to submit their own reports with respect to the measures, as have been instituted by them, to execute their own undertaking under the Convention, and whereas, such reports shall also be transmitted to the other States parties to the Convention, as per the **paragraph 1 and 2 respectively of Article 19**³¹ of the Convention.

Subsequently, the report as has been submitted by the State Parties are thereupon considered by the Committee, on which general comments⁸ maybe forwarded by the Committee in a particular report. However, the

²⁸ *Ibid.*, Article 8

²⁹ *Ibid.*, Article 9

³⁰ *Ibid.*, Article 30

Committee may also decide to incorporate the report in it's own annual report, along with the observations, as per the **paragraph 2 and 3 of Article 19**³² of the Convention.

Further, the provisions of Article 19 apply to all the State Parties, although the stipulations under Articles 20 to 22 do not so apply uniformly to all State Parties. The procedures have been described in detail in the subsequent sections.

Also, the Articles 21 and 22 comprise of *two optional procedures*, which enable the Committee to consider the opinions against State Parties. The procedures tend to be optional for the reason that each of those procedures apply to only those State Parties which have made an explicit declaration of the fact, that, they recognize the competence of the Committee under the procedure.

Under the procedure under **Article 21**³³, the Committee may consider the communications made by the State Parties which claim that another State Party has not complied with it's obligations under the Convention.

Under the second procedure under **Article 22**³⁴, the Committee may consider the communications made from or on behalf of the individuals who claim to be the victims of violation of the Convention by the State Party.

VII. THE IMPLEMENTATION PROCEDURE UNDER THE TORTURE

CONVENTION : THE FRAMEWORK COMPRISED

The Implementation Procedure, as stipulated under the Convention, constitutes the specified segments :

A. Committee Against Torture :

A Committee against Torture which comprised of ten experts, having high moral standards and competence in the field and with respect to the discipline of human rights, was further constituted in the year 1986 when the Convention finally came into force.

³¹ *Ibid.*, Article 2

³² *Ibid.*, Article 19 (p.2&3)

³³ *Ibid.*, Article 21

³⁴ *Ibid.*, Article 22

The Committee, thereby, comprises of ten experts, who are, in practice, elected by the State parties.

Significant regard has also been rendered to the concept of equitable geographical distribution, and required usefulness of the participation of such member belonging to the field of law for further having the requisite legal experience.

Furthermore, the members of the Committee stand elected for the period of 10 years. Such members are further eligible for a subsequent re - election, on the ground that they are re – nominated.

The Committee has further been rendered with several functions under it's authority and competence, briefly elaborated as specified :

- i. The Committee has the principal function of affording regard to such reports as have been submitted by the State Parties, pertaining to the efforts instituted by such parties in effecting a due implementation of the provisions of the Convention. Hence, with respect to the aforementioned, the guidelines have also been laid forth to the State Parties to adhere to, and discussions have also been undertaken with the State representatives with the object of establishing constructive dialogue with them.
- ii. The Committee has been afforded the power to also make any general comments, as maybe considered fit and requisite, with regard to the reports which have been submitted by the State Parties. The comments so specified and extended and the content of the comments shall further be communicated and forwarded to the State Parties, the reports of which have been so submitted.
- iii. The Committee may, thereby, also come to a decision to extend the invitation to the State Party in whose territory the incidences of torture have occurred or have been otherwise systematically practiced, to cooperate in the due examination of the information in hand. They may also be further required to extend submissions as to the concerned data made available.
- iv. The Committee is also under the requirement to undertake such functions, as maybe required for the purpose of fostering inter - state communication system, as have been made requisite under the provisions of Section 21 of the Convention.

B. Inter – State Communication System.

The provisions under the Convention have been provided for, for the purpose of fostering inter – State communication, which also stand on a similar ground as those stipulated under the Article 42 of the International Covenant on Civil and Political Rights³⁵.

The Article further stipulates that the State Parties may, at any stage, recognize the competence of the Committee in the task of receiving and paying due consideration, to the effect that a State party extends the claim that another State Party has not fulfilled the obligations put forth in the Convention.

However, if a State Party decides that another State party has not undertaken a due execution of the provisions of the Convention, then the criticizing State Party shall undertake efforts to bring such in the notice¹¹ of that other State Party.

However, the Inter - State communication shall stand liable to be recognized only when such has been submitted by that State Party which has extended the recognition, through Declaration, to the competence with respect to the Committee. However, no communication made whatsoever, with respect to the Committee, shall be liable to be dealt with by such a Committee ,if the said information is as regards to a party which has not made the declaration.

Furthermore, if a party consider that another State party has not undertaken the requisite implementation of the various provisions enshrined in the Convention, then such may bring the same within the notice of the State Party which failed to undertake the implementation, as per it's opinion. In lieu of the same, the receiving State shall, within a period of three months from the receipt of the communication as aforementioned at it's helm, shall afford to that State Party which extended the communication, an explanation or any other statement in writing, extending a clarification as to the matter in question, along a reference to the domestic proceedings. bad the remedies employed to curb the issues, which maybe pending or available.

Further, if the matter does not settle and is not adjusted to the satisfaction of both the parties concerned, then, within a period of six months of the receipt by the receiving State of the initial communication, either of the States shall have to right to refer the matter to the

³⁵ International Covenant on Civil and Political Rights, Article 42

Committee, upon giving a notice to the Committee and the other State party concerned.

However, the Committee shall have the competence to deal with the question of non - implementation, only when such is satisfied that all remedies have been invoked and exhausted, unless such remedies available have been unreasonably prolonged or is regarded as unlikely to bring relief to the person who is the victim of the contravention of the provisions of the Convention. The Committee may also make available it's good offices to aid the State Parties, so as to arrive at an amicable solution.

Also, the Committee, when it regards as appropriate, may further set up an *ad hoc* Conciliation Commission.

Such is important to be understood that the inter - State communication system is ***optional***. Such is because of the fact that the inter - State communication system shall come into force only when five States have supplied declarations in that direction. The declarations are subsequently required to be deposited with the Secretary General of the United Nations. The copies of the declarations shall then be transmitted by the Secretary General to the other State Parties.

C. Individuals' Communication System.

The provisions for the Individuals Communication System have been stipulated under the Section 22 of the Convention. As per the Section, a State Party may, at any point, declare that such recognizes the competence of the Committee to receive and consider the communication made by or on behalf of individuals. Such individuals shall be under it's jurisdiction and who claim to be the victims of violation of the Convention by the State party.

Thus ,the inter - State communication system stands applicable to only that State which has made the communication, and thereby, the process becomes optional.

However, the communication made shall be regarded inadmissible if such is :

- anonymous, or,
- that which is considered by the committee as amounting to an abuse of the right of submission of such communications, or,
- that which is incompatible with the provisions of the Convention.

Further, the Committee shall not consider any communication from an individual unless it has ascertained that :

- *firstly*, the same matter is not being or has not been examined under any other procedure of international investigation or settlement, and,
- *secondly*, that the individual has exhausted all available domestic remedies.

The Committee should also undertake closed meetings for the purpose of examining the communications, and thereby, shall send it's own opinions on such communications to the State parties and the individual.

The number of individual communications which have been extended to the Committee has increased manifold. Although, in the year 1994, the number of communications were between 7 and 18, in 1995, the figure expanded to 39 in 1997.

The Office of the Special Rapporteur : Further, the Commission on Human Rights, in the year 1985, appointed a *Special Rapporteur* on Torture to examine the questions with respect to torture, and to thereby, receive the credible and reliable information on such questions, and to be able to respond to the questions put forth without delay. The function of the Rapporteur further also includes the sending of urgent appeals. The Rapporteur is also further required to undertake country visits and is required to cooperate with the Committee on Torture.

VIII. THE OPTIONAL PROTOCOL TO THE CONVENTION ON PREVENTION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

An Optional Protocol to the Torture Convention was adopted by the of the United Nations General Assembly on 18 December 2002 (resolution 57/199)³⁶. The Optional Protocol³⁷, entered into force on 22 June 2006, and further established a system of regularly undertaken by international and national bodies to places of detention with the purpose of preventing the acts of torture and other cruel, inhuman or degrading treatment or punishment.

Under the Optional Protocol to the Convention, a sub - committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment

or Punishment has been established to undertake such visits and to extend the support States parties and national institutions in duly implementing the functions of a similar type at the national level.

The significant provisions of the Optional Protocol to the Convention on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment include :

- The Optional Protocol reaffirmed that the cruel, inhuman and degrading treatment and punishment amount to the grave violation of human rights and are absolutely prohibited.
- The Optional Protocol stipulates that the further measures become imperative to ensure the implementation of the purposes enshrined in the Convention. The OPCAT further provides for the significant requirement to strengthen the protection of the persons who tend to be deprived of their liberty against torture, cruel, inhuman and degrading treatment or punishment.
- The OPCAT provides that the States have the responsibility to ensure the efficient and the requisite protection of those people who tend to be deprived of their liberty. The OPCAT also provides for the fostering of common responsibility, and that the international institutions shall also undertake to strengthen and aim in the implementation of the national measures, as have been formulated.
- The OPCAT emphasized upon the fact that the World Conference on Human Rights declared that the efforts towards the removal of torture shall be directed towards the prevention of the acts of torture, and that the OPCAT shall cause the establishment of a preventive system.
- The Optional Protocol also provides for the non – judicial means of preventive measures, which include the visits to places of detention.

³⁶United Nations General Assembly (Resolution 57/199)

³⁷Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 2006

A. The Evolution Of The Optional Protocol To The Torture Convention

The mechanism concerning the prevention in of torture emerged from development of Swiss Committee for the Prevention of Torture (today Association for the Prevention of Torture, APT), which was founded by Jean-Jacques Gautier, in Geneva in 1977. Such provided for the establishment of a well - organized system for the inspection of the places of detention. Such was subsequently constituted as the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

However, the Committee in Torture (CAT), had only weak instruments as that could only analyze the self reports if the respective governments and establish the institution of a Special Rapporteur on Torture. However, the problem was as to the fact that neither the CAT and not the Special Rapporteur were rendered with the requisite power to visit countries and thereby inspect prisons and such could not be a possibility for such Institutions without having at their helm the permission if the respective government.

Hence, in the year, 1987, the Council of Europe brought about a formulation and subsequently, an implementation of the original ideology, however at a regional scale, with the European Convention for the Prevention of Torture. On the basis of the same, the European Committee for the Prevention of Torture demonstrated the possibility of a success and the viability of the model constituted through the reports, regular visits, and the recommendations to the government as well as undertaking the publication of such reports.

Such brought about a major development in the United Nations, and thereby, the Optional Protocol to the Torture Convention was created, and was opened for signatures on 18 December 2002 by the UN General Assembly.

Subsequent to the ratification by 20 states, the Optional Protocol came into force on 22 June 2006.

B. Status of Ratification of the OPCAT

As on September 2017, 84 states have ratified the Option Protocol including - Albania, Argentina, Armenia, Austria, Azerbaijan, Belize, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso,

Burundi, Cambodia, Cape Verde, the Central African Republic, Chile, Costa Rica - among others.

Also, about 15 states have signed, but not ratified the Optional Protocol, which include - Australia, Belgium, Cameroon, Chad, Republic of the Congo, East Timor, Guinea, Guinea-Bissau, Iceland, Ireland, Sierra Leone, South Africa, Venezuela, and Zambia.

IX. JUDGEMENTS UNDER THE CONVENTION : INTERNATIONAL JUDICIAL DECISIONS RENDERED

i. Defining Cruel Treatment and Torture :

a) *Wainwright v. United Kingdom*³⁸

In this case, the European Court had emphasized upon the fact that an applicant must meet a certain standard to establish a claim under Article 3, under the Convention.

The Court held that –

*“Ill-treatment must attain a **minimum level of severity** if it is to fall within the scope of Art.3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim. In considering whether a treatment is ‘degrading’ within the meaning of Art. 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Art.3. Though it may be noted that the absence of such a purpose does not conclusively rule out a finding of a violation. Furthermore, the suffering and humiliation must in any event go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment, as in, for example, measures depriving a person of their liberty.”*

³⁸ Application no. 12350/04 (2007) 44 E.H.R.R.

b) Ireland v. The United Kingdom³⁹,

In this case, the European Court of Human Rights elaborated upon the **factors to be taken into account in determining the severity** of treatment, including the age, sex, and state of health of the victim. The Court also examined some of the methods of interrogation, none of which were found to cause acute *physical* injury, finding that forcing detainees to remain in stress positions for periods of time, subjecting them to noise and depriving them of food, drink and sleep amounted to ill-treatment, but refusing to find that the treatment amounted to torture. The case stresses the applicability of the prohibition, even *in cases involving terrorism and public danger*.

ii. Psychological Suffering :

a) Soering v. The United Kingdom⁴⁰

In this case, the European Court of Human Rights regarded that a suspected criminal could not be extradited to the United States because of the psychological harm he would suffer if he were sentenced to death and held on death row. ¹⁴

iii. Corporal Punishment :

a) Osbourne v. Jamaica⁴¹

In the case of **Osbourne v. Jamaica**, the Human Rights Committee regarded that corporal ¹⁵punishment violates the prohibition of torture, cruel, inhumane and degrading treatment or punishment, and that such is prohibited by Article 7 of the Covenant..

b) Curtis Francis Doebller v. Sudan⁴²

In the case, the African Commission ruled that the corporal punishment violates the human right to dignity.

³⁹ Application No. 5320/71 (1978)

⁴⁰ Application No. 25803/94, Judgment of 28 July 1999

⁴¹ Communication No. 759/1997, U.N. Doc. CCPR/C/68/D/759/1997 (2000)

⁴² African Commission on Human and Peoples' Rights, Comm. No. 236/2000 (2003).

iv. Treatment of Prisoners and Detainees :

a) Antti Vuolanne v. Finland⁴³

In this case, the Human Rights Committee examined a case involving the solitary confinement of a Finnish infantryman who was sanctioned for abandoning his military service. The Committee regarded that for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty. In determining the severity of the alleged maltreatment, the court should consider all the circumstances of the case at hand, including the duration and manner of treatment, its physical and mental effects and the sex, age and state of health of the victim.

v. Death Penalty :

a) Cox v. Canada⁴⁴

In the case, the Human Rights Committee considered that imposing death by lethal injection is not cruel and inhuman, despite evidence showing that the injections can cause terrible suffering.

⁴³ Communication No. 265/1987, U.N. Doc. Supp. No. 40 (A/44/40) at 311 (1989).

⁴⁴ Communication No. 539/1993, U.N. Doc. CCPR/C/52/D/539/19930. (1994).

X. JUDICIAL DECISIONS IN INDIA : DETERMINING THE
IMPLICATIONS OF ACTS OF TORTURE AND THE MEASURES
UNDER PROTECTIVE MECHANISMS TO BE DEPLOYED

The right to life as has been provided under article 21 of the Constitution has been regarded as ‘supreme’, and including includes both so-called negative and positive obligations for the State.

Thereby, as per the positive obligation, the State has an overriding obligation to undertake the protection of the right to life of every person, within its territorial jurisdiction. Hence, the obligation provides that the State shall implement the administrative and such other measures as are requisite for the protection of the life and the investigation of any cases of suspicious deaths.

Some of the judgements include -

In the case of **D.K. Basu v. State of West Benga**⁴⁵, the Supreme Court that the term, ‘Torture’ has not been defined in the Constitution or in other penal laws.

The Court held –

“Torture of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word torture today has become synonymous with the darker side of the human civilisation”.

In the case of **Francis Coralie Mullin v. Administrator, U.T. of Delhi**⁴⁶, the Supreme Court held that torture or cruel, inhuman or degrading treatment of any kind would be offensive to the human dignity and shall be prohibited under the Right to Life under the Article 21 of the Constitution of India, unless that is in accordance to the procedure established by law. Further, the Court held that no law which authorizes the infliction of any torture or cruel, inhuman or degrading treatment can be viable in accordance to the test of reasonableness and non – arbitrariness. Such a law would also be violative of Article 14 and Article 21 of the Constitution of India.

In the case of **Charan Lal Sahu v. Union of India**⁴⁷, the Supreme Court held that under the Articles 21, 48A and 51A(g) of the Constitution of India, the right to life, liberty, pollution free air and water is guaranteed

⁴⁵ AIR 1997 SC 610

⁴⁶ AIR 1981 SC 746

⁴⁷ AIR 1990 SC 1480

and that the duty of the State shall be to undertake the steps requisite for the protection of the constitutional rights as have been specified.⁹³

In the case of **Prithipal Singh etc. v. State of Punjab and Anr. etc.**⁴⁸, the Court considered the police atrocities towards prisoners and held that as under Article 21 of the Constitution of India, any form of torture or cruel, inhuman or degrading treatment is prohibited. As per the Court, torture is not permissible whether it occurs during investigation, interrogation or otherwise.

The Court held that the Latin maxim *salus populi est suprema lex* - the safety of the people and that, *salus reipublicae suprema lex* - safety of the State are the supreme laws which co-exist.

In **Munshi Singh Gautam v. State of M.P.**⁴⁹, the Supreme Court held that the peculiar type of cases shall be considered in a way that is different than that utilized for the ordinary criminal cases. Such is because of the fact that when a person dies while in police custody, the evidence does not tend to be available.

The Court provided –

“The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case, often results in miscarriage of justice and makes the justice-delivery system suspect and vulnerable. That used for the reason that in a case where the person is alleged to have died in police custody, it is difficult to get any kind of evidence... Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity... The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of the judiciary itself, which if it happens, will be a sad day, for anyone to reckon with.”

The Supreme Court, in the case of **Mehmood Nayyar Azam v. State of Chhattisgarh**⁵⁰, dealt with a case of a social activist, who agitated the exploitation of people who were belonging to poor and marginalized sections of the society. Those persons were falsely roped in criminal cases and were after that arrested. The Court held that the torture or cruel, inhuman or degrading treatment of any kind shall be violative of the Articles 20 & 21 of the Constitution.

⁴⁸ (2012) 1 SCC 10.

⁴⁹ AIR 2005 SC 402

⁵⁰ AIR 2012 SC 2573

The Court held that the term ‘harassment’ has a wider meaning and also includes any kind of torment and vexation.

The Court held:

“If the functionaries of the Government become lawbreakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy.... The right to life of a citizen cannot be put in abeyance on his arrest.”

In the case of **Rama Murthy v. State of Karnataka**⁵¹ the Supreme Court considered that there tend to be problems in the prison which is to be rectified and that includes torture and ill-treatment.

The Apex Court in the case of **Sube Singh v. State of Haryana**⁵², considered the incidences of custodial violence and third degree methods used by police during interrogation and also considered the reasons due to which such acts are carried out and also provided for the measures which can be utilized to prevent those instances.

The Court observed:

“The expectation of quick results in high-profile or heinous crimes builds enormous pressure on the police to somehow ‘catch’ the ‘offender’. The need to have quick results tempts them to resort to third degree methods. They also tend to arrest “someone” in a hurry on the basis of incomplete investigation, just to ease the pressure. The three wings of the Government should encourage, insist and ensure thorough scientific investigation under proper legal procedures, followed by prompt and efficient prosecution.”

In the case of **D.K Basu v. State of W.B**⁵³, the Supreme Court after pesuring the seveal reports that were provided on custodian violence, held that –

“Custodial violence including torture and death in lock ups strikes a blow at the rule of law which demands that the powers of executive should not only be derived from law but also that the same should be limited by law.”

The Court also provided for the guidelines on the cases of arrest and detention, which include –

⁵¹ AIR 1997 SC 1739

⁵² AIR 2006 SC 1117

⁵³ supra note 45

- a) The police personnel who carry out the investigation and arrest shall carry identity card providing his designation, etc., and his designation should also be recorded in the register.
- b) The arresting officer shall prepare the memo of arrest at the time of arrest. The memo of arrest should be attested by a witness, who may be the family member of the arrestee, and which shall also be counter-signed by the arrestee, providing the time and date for arrest.
- c) The arrestee shall, during the period of interrogation, be entitled to have one friend or his relative with him unless the attesting witness of his arrest is his relative/friend.
- d) The time, place of arrest and venue of custody of an arrestee must be notified by the police and legal aid organisations should be informed.
- e) The arrestee must be informed of his right to inform someone about his arrest, immediately after the arrest.
- f) The entry should be made in the diary providing for the place of detention and the particulars of the police officials having his custody.
- g) The arrestee, where he so requests, shall be examined medically at the time of his arrest, if he has any major or minor injuries, and the arrestee should be subjected to medical examination within 48 hours of his detention.
- h) The copies of the Memo of arrest and all the other documents shall be sent to the illaqa magistrates.
- i) The arrestee may be permitted to meet his lawyer during interrogation, and the information regarding arrest and custody shall be communicated to the police control room, and shall also be displayed on a conspicuous notice board.

In the case of **Raghubir Singh v. State of Haryana**⁵⁴, the violence which was carried out by the police to extract a confession resulted in the death of a person suspected of theft, the Court held that –

“We are deeply disturbed by the diabolical recurrence of police torture resulting in terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of law gore human rights to death.”

In **Haricharan v. State of M.P**⁵⁵, Supreme Court held that –

“life or personal liberty in Article 21 includes right to live with human dignity. Therefore, it also includes within itself guarantee against the torture and assault by the States or its functionaries.”

⁵⁴ AIR 1980 SC 1087

⁵⁵ (2011) 4 SCC 159

In the case of **Bhagwan Singh & Anr. v. State Of Punjab**⁵⁶, there was a death of a person in the police custody, and the Supreme Court held that the interrogation does not amount to inflicting injuries.

The Court held –

“Torturing a person and using third degree methods are of medieval nature and they are barbaric and contrary to law. The police would be accomplishing behind their closed doors precisely what the demands of our legal order forbid.”

- **Victim Compensation :**

The judgements of the Courts in India with respect to the need for compensation to the victims of torture and the mitigating circumstances include :²¹

In the case of **Kasturi Lal v. State of U.P.**⁵⁷, the Supreme Court upheld the plea of sovereign immunity. In that case, a partner of the Kasturilal Raliaram Jain, which was a firm of jewellers of Amritsar was taken into custody by police in Meerut on the suspicion that he was of possessing stolen property. He stood released, but however, the gold jewellery taken from him was not returned. The head constable in charge of the *malkhana* had not only misappropriated the same, but he fled away to Pakistan, and so, the firm claimed the recovery of ornaments or compensation, as the alternative.

The Apex Court rejected the claim, and did not provide any compensation, on the ground that, the act was carried out by the employees during the course of their employment, which was in the characteristic of a sovereign power.

In the case of **Rudal Shah v. State of Bihar**⁵⁸, the Supreme Court took a completely opposite stand, and rejected the plea of sovereign immunity and provided the compensation, as the petitioner had been illegally detained in jail for over fourteen years, after his acquittal in full-dress trial.

In the case of **State of Andhra Pradesh v. Challa Ramakrishna Reddy**⁵⁹, the Supreme Court provided that where the fundamental right of the citizen is violated, the plea of sovereign immunity would not be available. The Court held :

⁵⁶ AIR 1992 SC 1689

⁵⁷ AIR 1965 SC 1039

⁵⁸ AIR 1983 SC 1086

⁵⁹ AIR 2000 SC 2083

“The maxim that King can do no wrong or that the Crown is not answerable in tort has no place in Indian jurisprudence where the power vests, not in the Crown, but in the people who elect their representatives to run the Government, which has to act in accordance with the provisions of the Constitution and would be answerable to the people for any violation thereof.”

In the case of **Nilabati Behera v. State of Orissa & Ors.**⁶⁰, the Supreme Court held :

“... ..in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience.”

In the case of **Ram Lakhan Singh v. State of U.P.**⁶¹, the Supreme Court considered a case under the Article 32 of the Cnstitution for the compensation for loss of professional career, reputation, great mental agony, heavy financial loss and defamation.

The Court held that there was the illegal detention by the respondent authorities of the petitioner, who was an Indian Forest Service officer, by implicating false vigilance cases at the instance of the then Chief Minister of respondent State.²²

The Supreme Court in the case of **Smt. Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble**⁶², directed the State Government to pay the compensation of Rs.1,00,000/- to the mother and children of the deceased. The Court held :

“This amount of compensation shall be as a palliative measure and does not preclude the affected person(s) from bringing a suit to recover appropriate damages from the State Government and its erring officials if such a remedy is available in law.”

⁶⁰ AIR 1993 SC 1960

⁶¹ (2015) 16 SCC 715

⁶² AIR 2003 SC 4567.

XI. PROVISIONS BY COMMISSIONS IN INDIA IN PUSUANCE

PREVENTION OF TORTURE : LEGAL MEASURES AND

RECOMMENDATIONS EXTENDED

The various Commissions in India have contributed towards the incorporation of provisions under the Indian laws for the prohibition of acts of torture and the relief to the victims of violence.

Some of the Commissions in India which have provided signification recommendations include :

A. National Commission to Review the Working of the Constitution – under which report was the recommendation made?

The National Commission to Review the Working of the Constitution (2002) is established by the Law Ministry. The Commission recommended that the ‘prohibition of torture and cruel, inhuman or degrading treatment or punishment’ shall be provided under the fundamental rights chapter under the Article 21(2) of the Constitution⁶³, taking into account the provisions which have been upheld under the various Supreme Court judgments.

Under the clause 3.9 of the Report of the Commission, it is provided :

“3.9 Rights against torture and inhuman, degrading and cruel treatment and punishment.

3.9 Rights against torture and inhuman, degrading and cruel treatment and punishment grossly violate human dignity. The Supreme Court has implied a right against torture, etc. by way of interpretation of Article 21 which deals with Right to life and Liberty. The Universal Declaration of Human Right 1948 and the ICCPR prohibit such acts in Art. 5 and 7 respectively. It is therefore, recommended that the existing Art.21 may be numbered as Clause (1) thereof and a new clause should be inserted thereafter on the following lines-²³

“(2) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

⁶³ Article 21(2), Constitution of India

B. Reports of the Law Commission of India :

a) 113th Report (1985): Injuries In Police Custody⁶⁴ – was the section 114B added?

In the 113th Report the Law Commission recommended provision for the amendment of the Indian Evidence Act, 1872, by including the section 114B which provides that in the case of custodial injuries, if there is evidence, the Court may presume that the injury was caused by the police who had the custody of that person during the period.

b) 152nd Report (1994): Custodial Crimes⁶⁵

The Commission considered the issues of arrest and abuse of authority by the officials, taking into account the Constitutional and statutory provisions including Articles 20, 21 and 22.

The Commission recommended that there should be the amendment of the IPC, and also, provision shall be included to provide for the punishment for the violation of Section 160 of Cr.PC.

The Commission also provided for the inclusion of Section 41(1A) under the Cr.PC, for recording the reasons for arrest and the section 50A to inform the relatives etc.

In the Indian Evidence Act, the Commission recommended adding a new provision, i.e. section 114B as recommended in the 113th Report.

c) 177th Report of the Law Commission (2001) titled “Law Relating to Arrest”⁶⁶ and 185th Report of the Law Commission (2003) : Review of the Indian Evidence Act, 1872⁶⁷

The Law Commission of India, in the 177th Report provided the section 55A for inclusion in the Cr.PC, which provided -

“Health and Safety of the Arrested Persons: It shall be the duty of the person having the custody of an accused to take reasonable care of the health and safety of the accused.”

In the 185th Report, the Commission specified the judgement of the Supreme Court, in the case of *State of MP v. Shyam Sunder Trivedi*⁶⁸, where the Court considered the 113th Report of the Law Commission.

⁶⁴ 113th Report (1985), Law Commission of India

⁶⁵ 152nd Report (1994), Law Commission of India

⁶⁶ 177th Report (2001), Law Commission (2001)

⁶⁷ 185th Report (2003), Law Commission of India

⁶⁸ 1995(4) SCC 262

d) Fourth Report of National Police Commission (1980)⁶⁹

The National Police Commission, in the Fourth Report (1980) considered that custodial torture had been prevalent and that any instance of that torture on a person in police custody was dehumanising.

⁶⁹Fourth Report (1980), National Police Commission

XII. RECOMMENDATIONS FOR EFFICIENT IMPLEMENTATION OF THE CONVENTION IN INDIA

A. Ratification of the Convention by India

The ratification of the Convention against Torture become very significant considering the issues that maybe with respect to ensuring the requirements of extradition of criminals from the nation in the absence of a law governing torture provisions and providing for the prohibition of the infliction of instances of torture at any cost or on any grounds.

ther, the requirement for the ratification of the Torture Convention becomes highly integral taking into account the need for the protection of the human rights, and the prevention of the violation of the same, with respect to safeguarding the Right to Life under the Article 21 of the Constitution of India.

B. Stringency of the Punishment for the Acts of Torture

There is a requirement that any acts of torture as are inflicted with respect to prisoners or accused persons shall be prohibited, and the mechanisms shall be utilized which ensure the efficient prevention of the same, so as to safeguard the members of the society from the violation of their fundamental rights.

Thereby, the instances of torture and the persons by whom such acts are carried out must be protected against by ensuring stringent punishment for the perpetrators.

The measures maybe incorporated to deter the acts of torture so that they may not be carried out.

C. Compensation of Victims of Torture

The Courts shall determine a just compensation for the victims of torture which may enable their rehabilitation. In order for the restoration of the rights of such persons, the measure must be taken by the Courts to provide the compensation that can help in medical aid and other requirements as per their condition, as per the facts and circumstances of the case.

The Courts should also take into account the economic conditions of the victim, the injuries caused, the cost of reparation etc. for determining the compensation.

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