NORMATIVE AND INSTITUTIONAL RESPONSES TO TORTURE IN BANGLADESH

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CERTIFICATE OF SUBMISSION

This is to certify that this Ph.D. thesis, titled 'Normative and Institutional Responses to Torture in Bangladesh' has been prepared by Raushan Ara under my supervision.

The researcher has fulfilled all the requirements of submission of thesis as prescribed by the rules and regulations of the University of Dhaka. I therefore, recommend this thesis for submission and evaluation for the award of the degree of Doctor of Philosophy.

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ABSTRACT

This thesis examines the normative and institutional responses to torture in Bangladesh to identify the norms and institutional responses in the light of international standards linked with the existing trends and try to sketch the future schemes to provide solutions for making the struggle against torture more effective. The findings of the thesis focuses existing and upcoming strategies of our country especially within the State Organs i.e., the Legislature, Judiciary and the Executive and try to interpret those with the international standards with a view to find out how far Bangladesh needs to go for having an anti-torture regime of a reasonable standard.

The study commences with an in-depth analysis of all the international standards regarding the prohibition of torture first and then provides the historical practices of torture, the horrible methods of torture used all through the history including the torture methods used by various public authorities in our country. The thesis next presents a critical analysis of the normative responses of Bangladesh regarding torture and explains how the Organs of the State are responding towards these. It reveals hidden obstacles that are hindering in the realization of international obligations of Bangladesh. The thesis with its field work also reveals that even if there are many obstacles, the State is constantly trying to overcome those. It presents that any anti-torture policy cannot be implemented if the three Organs of the State are not working together, prohibition of torture in order to be absolute requires the integration of all the activities of three Organs; one cannot fulfill the obligation without the help of the others. The study concludes by suggesting steps to be followed by the State in order to move towards an anti-torture regime perfectly.

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LIST OF ABBREVIATIONS

ACHR	:	American Convention on Human Rights
AD	:	Appellate Division
ADR	:	Alternative Dispute Resolution
AI	:	Amnesty International
APF	:	Asia Pacific Forum of National Human Rights Institutions
APT	:	Association for the Prevention of Torture
ASK	:	Ain o Salish Kendra
BGB	:	Border Guard Bangladesh
BLAST	:	Bangladesh Legal Aid and Services Trust
BLC	:	Bangladesh Law Chronicles
BLD	:	Bangladesh Legal Decisions
BLT	:	Bangladesh Law Times
BRCT	:	Bangladesh Rehabilitation Centre for Trauma Victims
CID	:	Criminal Investigation Department
Cr. P.C	:	Code of Criminal Procedure
DLAC	:	District Legal Aid Committee
DLR	:	Dhaka Law Reports
ECHR	:	European Convention on Human Rights
HCD	:	High Court Division
HRC	:	Human Rights Committee
ICC	:	International Criminal Court
ICCPR	:	International Covenant on Civil and Political Rights
Inter-Am. Ct.H.R.	:	Inter-American Court of Human Rights
IRCT	:	The International Rehabilitation Council for Torture Victims
JATI	:	Judicial Administration Training Institute

LASA	:	Legal Aid Services Act
LETI	:	Legal Education Training Institute
MLR	:	Mainstream Law Reports
MoLJPA	:	Ministry of Law, Justice and Parliamentary Affairs
NHRC	:	Human Rights Commission
NLASO	:	National Legal Aid Services Organization
OHCHR	:	Office of the United Nations High Commissioner for Human Rights
PBI	:	Police Bureau of Investigation
PLD	:	Pakistan Legal Decisions.
PRP	:	Police Reform Program
RAB	:	Rapid Action Battalion
SC	:	Supreme Court
UDHR	:	Universal Declaration of Human Rights
UK	:	United Kingdom
UNCAT	:	United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
VGD	:	Vulnerable Group Development
VSC	:	Victim Support Centre

CHAPTER 1
INTRODUCTION

1.1 General Introduction and Background to the Study

The emergence of human rights law in the international sphere is one of the most significant developments to have taken place since the end of the Second World War. The growth and expansion of human rights law has brought about a radical change in the ideological bases of international law. Such a change is first evident in the universal acknowledgement that gross violations of individual and collective rights cannot be justified on grounds of sovereignty or domestic jurisdiction.[1] Along with that, the last quarter of the twentieth century saw a mushrooming of international human rights instruments. Specific treaties dealing with the prohibition of racial discrimination and torture, and those defining and promoting children and women's rights have been adopted. Setting up of various mechanisms to publicize, promote and protect human rights has heightened human rights awareness to impact significantly on other areas of international law; and also procedural advancement of international human rights law has meant that individuals are more directly involved in challenging violations of their rights in international courts, committees and tribunals. However, one of these challenges reveals the most fundamental aspects of human rights law explicitly, the universal proscription of torture. Torture attacks the essential physical and psychological integrity of a human being.[2] It is an offence against human dignity and is rightly regarded as a crime against humanity.[3] Furthermore, the practice of torture, which denies transparency, accountability, and responsibility, often triggers enhanced levels of deprivation, such as disappearances, extrajudicial killings, and genocide. Because these forms of deprivation immeasurably enhance the stakes involved in social conflict and increase the difficulty of implementing strategies of

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1 Sands, Philippe and Klein, Pierre. 2001. *Bowett's Law of International Institutions*. London: Sweet and Maxwell, at p.24.

2 United Nations Department of Public Information. 1993. 'Vienna Declaration and Programme of Action', available at:< http://www.unhchr.ch/huridocda/huridoca.nsf/%28symbol%29/a.conf.157.23.en>, last accessed on 20 April 2013.

3 The Statute of the International Criminal Court incorporates torture as a 'crime against humanity'. See article 7(1)(f).

peaceful conflict resolution, the practice of torture attacks the idea of peace itself. Hence, there is a universal consensus in the international community including Bangladesh that torture and other forms of cruel, inhuman, or degrading punishment or treatment cannot be reconciled with a global order fundamentally committed to basic respect and human dignity.

In addition to the prohibition of torture in contemporary international law and practice, the capacity to provide a sanctioning response to torture has also been extended to the institutions of private law. Thus, in certain regional jurisdictions, torture is viewed as not only a criminal wrong, but also as a civil wrong with a tortious character. This latter area represents an important change in the capacity to control and punish torture through the institutions of civil society. This has led to multiple initiatives driven by international and regional institutions dealing with human rights law. The most notable initiative is the emergence of a private law dimension that greatly empowers private enforcement against public actors who are implicated in the practice of torture. This development embodies the extension of sanctions against torture from the public to the private sphere. Additionally, modern constitution-making has tended to draw normative inspiration from the Universal Declaration of Human Rights.

As states are principal subjects of international law and have developed a large network of human rights laws by entering into a range of agreements, these agreements bind states either in treaty or in customary law, the undertakings are broad; they represent an obligation not only not to violate human rights themselves, but also to undertake to 'ensure'[4] and to 'secure'[5] the rights of individuals. The process by which human rights are to be protected from violations conducted by private individuals, sometimes referred to as the horizontal application of law, has been approved and applied by human rights courts and tribunals. This horizontal application of law aims to provide a comprehensive protection of human rights.[6] The

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4 See Article 2(1) of the ICCPR; Article 1of the ACHR.

5 See Article 1of the ECHR; according to Article 1 of the ACHR the 'undertaking is to give effect to the rights'.

6 See the Inter-American Court of Human Rights in the *Velasquez Rodriguez Case,* Judgment of July 29 1988,Inter-Am. Ct.H.R. (Ser. C) No. 4 (1988), para 170.

progression of human rights law has generally been in the direction of protection to individuals against their States, with the 'anti-State' stance flowing 'from the assumption that individual persons must be protected from the abuse of power of parliaments, governments and public authorities.[7] It is noticeable that many of the violations of individual and group rights regularly conducted by private individuals themselves.[8] It would clearly be absurd if these non-state actors were under no obligation to protect human rights in the same way as governments and the public officials are.

However, the international community is far from reaching its goal of complete eradication of torture. The statistics showed by various media are quite shocking considering that torture and ill-treatment are most often committed by governmental officials, who knew or should have known that the law prohibited their acts of torture or ill-treatment. Even more disquieting is the knowledge that the practice of torture is often among the least transparent aspects of governmental policy and practice.

From Bangladesh's perspective, the scourge of serious human rights violations such as torture, not only characterized the violent struggle that led to Bangladesh's independence in 1971 but has since become institutionalized; a frequent occurrence; a practice that is perpetrated regardless of the government in power; there are only fluctuations in the nature of the torture practices and in the scale. The ratification of the UN Convention against Torture in 1998 has not ended the practice of torture; in fact recent reports indicate a substantial rise in torture cases.[9] The practice of torture continues unabated and that there is near complete impunity for perpetrators.[10] The

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7 Prondzynski, Fardinand Von. 1986. *Freedom of Association and Industrial Relations: A Comparative Study*. London: Mansell Publishing Limited, at p. 1.

8 See the terminology of the ECHR. ECHR jurisprudence confirms that States can be accountable for acts conducted by private individuals against each other, see *A v. UK,* Judgment of 23 September 1998, 1998-VI RJD 2692; *X and Y v. The Netherlands,* Judgment of 26 March 1985, Series A, No. 91.

9 Bangladesh Rehabilitation Centre for Trauma Victims (BRCT). 2002. *Annual Report 2002*. Dhaka: BRCT.

10 Section 197 Cr. PC: "(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction." Section 197 only applies to those persons "who act as public servants at the time of commission of the offence and remain so when cognizance of the offence is taken." See *Mohor Ranjan Pal & Ors vs. The State* (1998) 18 BLD Vol. XVIII 86.

main perpetrators of torture and other forms of ill-treatment appear to be law enforcement agencies and the police in particular.[11] The Army and paramilitaries, notably the Rifles (BDR), have also reportedly employed torture in the course of operations.[12] Armed groups associated with political parties have also been reported to be responsible for human rights violations, including torture, In the context of criminal proceedings, it is in particular suspects from poor or uneducated backgrounds that appear to be most at risk of torture.[13] Ill-treatment, which may amount to torture, is a routine feature of criminal investigations, and conditions of detention are said to be poor.[14] Torture is frequently resorted to as an investigation technique, seemingly because of the poor standards of investigation and the lack of adequate training. Poorly remunerated police investigators are highly corrupted.[15] Torture is reportedly used also as a tool to extract money from detained suspects and their families.[16]

Furthermore, the domestic response to torture in Bangladesh has been poor. Though Bangladesh has ratified the Rome Statute on March 23, 2010, making Bangladesh the 111th state to join the ICC,[17] but Bangladesh has yet to ratify the Optional Protocol to the Convention against Torture that provides for a visiting mechanism for the prevention of torture. The Statute provides the International Criminal Court with jurisdiction over "international crimes", namely genocide, crimes against humanity and war crimes, and establishes a reparation mechanism for the victims of such crimes, either through court orders against the responsible individuals under Article

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11 Bangladesh Rehabilitation Centre for Trauma Victims (BRCT). 2002. *Annual Report 2002*. Dhaka: BRCT. According to this, out of 493 persons, 82 % were tortured by the police, 13 % by BDR (paramilitary), 2% by the Army and 3% by others (not specified).

12 See Amnesty International. 2000. *Bangladesh: Human rights in the Chittagong Hill Tracts*, *Asia and the Pacific*. Bangladesh: AI and Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or, punishment, UN Doc. E/CN.4/1997/7/Add.1, 20 December 1996, para.17-18 and UN Doc. E/CN.4/1999/61, 12 January 1999.

13 Odhikar. 2001. *Abuse of section 54 of the Code of Criminal Procedure*, Dhaka: Odhikar

14 United Nations. 1996-2000. Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, available at: < http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/fda77707cc9206c4802568ba004b47b1?Opendocument>, last accessed on 20 April 2013.

15 Amnesty International. 2000. '*Bangladesh: Torture and Impunity*', Dhaka: AI.

16 Odhikar. 2001. *Breaking the Cycle of Impunity: Report on the Open Discussion on 'Impunity of Law Enforcing Agencies'*. Dhaka: Odhikar.

17 Library of Congress. 2010. 'Bangladesh: Rome Statute for the International Criminal Court Ratified', available at:<http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401927_text>, last accessed on 20 April 2013.

75 of the Statute or through the Trust Fund under Article 79. However, Bangladesh has not accepted the competence of either the Committee against Torture or the Human Rights Committee to receive individual complaints about torture.[18] In the absence of any regional mechanism,[19] individuals who have suffered torture only have recourse to national remedies, and there is only limited review by international bodies of the compatibility of Bangladesh's practice with its international obligations. The only existing institutionalized form of official external scrutiny is the examination of Bangladesh's reports to treaty bodies. In Bangladesh, international treaties are ratified by authorized State representatives but it is not fully clear whether approval by Parliament is required as the executive has in several cases ratified treaties without such an approval.[20] International treaties do not automatically become part of national law and consequently have to be incorporated by a legislative Act.[21] Bangladesh has adopted one specific implementing legislation in 2013, incorporating the provisions of the UN Convention against Torture or the International Covenant for Civil and Political Rights, despite its ratification of these treaties.

However, there are no effective mechanisms to protect and promote human rights in Bangladesh and also no comprehensive publicly available official statistics about the number of torture related complaints and the subsequent action taken in relation to such complaints, if any. While some torture survivors have filed complaints about torture with magistrates, a large number of cases of torture remain unreported.[22] In the

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18 The Committee against Torture derives such a competence from a State party's declaration under Article 22 of the Convention against Torture and the Human Rights Committee from the State becoming party to the Optional Protocol to the International Covenant on Civil and Political Rights.

19 See on such complaints mechanisms, REDRESS. 2003. *Reparation, A Sourcebook for Victims of Torture and other Violations of Human Rights and International Humanitarian Law*. London: REDRESS.

20 Article 145A of the Constitution, International treaties: "All treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament." Article 145A does not prescribe a time frame within which the President is required to lay the treaty before Parliament. It also fails to specify what parliament is required to do with the treaty presented, i.e. whether, and if so, what kind of approval is needed.

21 Per Bimalendu Bikash Roy Choudhury, J., *Hussain Mohammad Ershad vs. Bangladesh & others* (2001) 21 BLD (AD) 69, para.2: "True it is that the Universal Human Rights norms, whether given in the Universal Declaration [the case concerned, *inter* alia, the applicability of Article 13 of the Universal Declaration of Human Rights] or in the Covenants, are not directly enforceable in national courts. But if their provisions are incorporated in the domestic law, they are enforceable in national courts."

22 See Amnesty International. 2000. '*Bangladesh: Torture and Impunity*', Dhaka: AI.

majority of cases, investigations into allegations of torture have been inconclusive. Inadequate investigations and the resulting insufficiency of evidence have meant that only a few prosecutions of perpetrators of torture have been successful. As widely acknowledged, impunity for torture is one of the main factors that facilitates further violations in Bangladesh. Added to this, the right to reparation appears to exist in theory only.

The obligation of Bangladesh is not only a matter of treaty law, customary international law but also a part of international humanitarian law. And this makes it possible for Bangladeshi courts to apply the aspects of these treaties that constitute customary international law.[23] The High Court Division has the power to provide appropriate relief for violations of fundamental rights, including a violation of the prohibition of torture under Article 35 (5) of the Constitution.[24] The High Court Division has affirmed that it is competent to award compensation for fundamental rights violations.[25] In addition to aggrieved persons, the High Court Division has recently recognized that members of the public may also be granted standing in cases

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[23] As recognised in *Mohiuddin Farooque vs. Bangladesh* (FAP Case) (1997) 49 DLR (AD) 1 and *Mohiuddin Farooque vs. Bangladesh* (radioactive powdered milk case) (1996) 48 DLR 438. See on this point also Faruque, Abdullah Al. 1999. "Status of International Law under the Constitution of Bangladesh", Vol. 3, No. 1 *Bangladesh Journal of Law,* pp.23-48, at pp. 23-47.

[24] Article 102 (1) of the Constitution: "The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution." See on the discretion of the High Court Division with regard to writ petitions under Article 102 (1) Islam, Mahmudul. 1995. *Constitutional Law of Bangladesh*. Dhaka:Bangladesh Institute of Law and International Affairs, at p. 368.

[25] *Bilkis Akhter Hossain vs. Bangladesh & Others*, (1997) 17 BLD (HCD) 395: "There is no specific provision for awarding costs and compensation under Art 102 but it is a long-drawn tradition, custom or discretion of the High Court Division that in every writ case the court always passes judgment either with or without costs. In view of its special original jurisdiction and its extraordinary and inherent jurisdiction to pass any order as it deems fit and proper, the High Court Division has the power to award costs as well as monetary compensation according to the facts and circumstances of each case. Moreover, it would appear that the Appellate Division has approved the principle that the High Court Division is competent to award compensation in an appropriate case in its writ jurisdiction (*Habibullah Khan v S A Ahmed (*1983) 35 DLR (AD) 72 (Bang SC AD) considered). It follows, therefore, that the Supreme Court, in the exercise of its constitutional jurisdiction, can award monetary compensation in appropriate habeas corpus cases for illegal detention in violation of a person 's fundamental rights (*Maharaj v Attorney General of Trinidad and Tobago* [1978] 2 All ER 670 (T&T PC), *Ruhul Sah v State of Bihar & Anor* AIR 1983 SC 1086 (Ind SC), *Bhim Singh MLA v State of Jammu and Kashmir* AIR 1986 SC 494 (Ind SC), *Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR 1996 SC 2426; (1996) 2 CHRLD 109 (Ind SC), *Government of East Pakistan v Rowshan Bijaya Shaukat Ali Khan* (1966)18 DLR (SC) 214 (Bang SC), *Government of West Pakistan v Begum Agha Abdul Karim Shorish Kashmiri* (above) and *Amaratunge v Police Constables & Ors* [1993] SAARC Law Journal 88 (SL SC) applied)."

of gross human rights violations, opening the way for public interest litigation.[26] There is no express time limit for bringing such an application.[27] The petitioner is not required to exhaust all remedies for this type of application.[28] Finally, it may review its judgments and orders where considered necessary in the interests of justice.[29] However, enforcement of judgments of the High Court and Appellate Divisions is automatic. Torture survivors may also invoke common law remedies in civil courts, such as public misfeasance or trespass to the person, or assault and battery.[30] The State is vicariously liable for damages caused by its officials, so that both may be held jointly liable. Victims are entitled to damages, which are to be awarded to the extent that the victims can be put in the position they would have been if the tort had not been committed. The High Court Division has to date not awarded any reparation or constitutional remedies for torture with the exception of recent judicial pronouncements such as in the *BLAST v. Bangladesh* in which the Court expressly noted that it has jurisdiction to award compensation in torture cases brought before it and in *Saifuzzaman v. State* court issued certain guidelines to be followed by the Government, police and magistrate with respect to arbitrary arrest, detention, investigation and treatment of suspects. However, though these responses are not so great, then also, with these exceptional pronouncements and legislations, a scenario

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[26] See *Ekushey Television Ltd & ors. vs. Dr. Chowdhury Mahmood Hasan & ors.*(2002) 22 BLD (AD)163: " This Court under constitutional mandate is duty bound to preserve and protect the rule of law. The cutting edge of law is remedial and the art of justice has to respond here so that transparency wins over opaqueness. In the instant case, the petitioners, though not personally affected in espousing a genuine cause, but have drawn the court's attention to the breach of constitutional obligations. Such gross violations of fundamental rights should shock the judicial conscience and force it to leave aside the transitional procedure which shackles the locus standi and gives standing to the petitioners. Unless this Court responds to it, governmental agencies would be left free to subvert the rule of law to the detriment of the public interest" and *Chowdhury Mohmood Hossain vs. Bangladesh & ors.* (2002) 22 BLD (HCD) 459: "When an action concerns public wrong or injury or invasion of the fundamental rights of indeterminate number of people, any member of the public being a citizen suffering the common injury, has the right to invoke the jurisdiction under Article 102 of the Constitution."

[27] Islam, Mahmudul. 1995. *Constitutional Law of Bangladesh*. Dhaka: Bangladesh Institute of Law and International Affairs, at p. 380 and 472, referring to *Ghulam Azam vs. Bangladesh*, (1994) 46 DLR (AD) 192.

[28] *Ibid.,* at p.381 with further references. See also general considerations in *Jabon Naher & ors. vs. Bangladesh & ors.* (1998) 18 BLD 141.

[29] *Serajuddin Ahmed vs. AKM Saiful Alam*, (2004) 56 DLR (AD):"There is no provision in the constitution precluding the High Court Division to review its judgment and order. The Court's inherent power to do justice to the parties before it is an accepted one and for that purpose the form in which the Court shall dispense justice is a matter for the Court to resort to."

[30] See Bangia, R.K. Dr. 1991. *The Law of Torts* (including compensation under the Motor Vehicles Act). Allahabad: Allahabad Law Agency, at p. 410.

may be exposed where Bangladesh deeply needs some useful aids and endeavors to interpret the international standards and to develop a comprehensive strategy; to bring existing laws in line with that standards and to combat torture and ill-treatment with the assertion of justice and reparation for survivors which are unfortunately not yet afforded.

1.2 Objective and Scope of the Study

The proposed thesis will examine the normative and institutional progresses of Bangladesh in responding to torture and investigate how far Bangladesh is in line with the international obligation to combat torture with the assertion of justice and reparation for survivors. This thesis does not intend to examine how, torture is practiced but will focus on the positive assertion of legislative and judicial responses to torture in Bangladesh and how Bangladesh will make a step forward in providing justice and reparation to torture survivors. As well as, en route for formulating such catalog, an enquiry into the national and international legal as well as judicial response is essential. Here all the norms and institutional responses are in relation with the international obligations of Bangladesh which makes only the state actors i.e. the Legislature, Judiciary and the Executive and their activities as the core concern of the thesis. However, for the purpose of the present research, the definition of 'torture' as enumerated in Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 is taken as standard. About the 'responses' of torture, the thesis will sort out the entire obligations to provide every type of remedies for torture victims may it be in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Thus, the object of the present study is threefold. The first one is to dissect the existing legislations and legislative responses of Bangladesh to combat torture in line with international obligations. Since torture is a conduct that cannot be officially sanctioned by law; a conduct that seeks operationally, to trump law and challenges the very idea of law itself, one of the objects of present study is to analyze what are the rationales that made our country not responding enough against torture previously, and how for the last few years she is getting out of those lacunae and what are the positive assertions against torture. However, our Constitution provides for rights

relating to administration of criminal justice, right to judicial recourse to the HCD, Supreme Court's constitutional powers to review the constitutionality of laws. The Penal Code penalizes certain conducts that may amount to torture providing a wide opportunity for including those conducts in torture. All the procedural laws like C.P.C., Cr. P.C., Evidence Act etc. are paving the way for taking legal actions against the perpetrators of torture. Government is passing various special laws and forming Commission like the Human Rights Commission in order to combat torture. Though Bangladesh is providing these categories of legislative responses, this study will also focus on to what extent these responses are truly in line with international standards and up to which or what Bangladesh actually requires to pull off that standard.

The second one is to inquire into how the judiciary and the Executive in Bangladesh is developing a consistent jurisprudence for torture and providing torture survivors' access to justice. It is well known that international treaties may have some persuasive value in the courts where no domestic law exists or where the law is ambiguous but according to national jurisprudence, they are ultimately subordinate to domestic law. However, the principle of 'customary international law' makes it possible for Bangladeshi courts to apply the aspects of international conventions that proscribe torture. The HCD is now expressly noted that it has jurisdiction to award compensation in torture cases brought before it and has the power to provide appropriate relief for violations of fundamental rights, including a violation of the prohibition of torture. But, the High Court Division has not yet defined torture in its jurisprudence, nor is there any instances in which subordinate courts have defined conduct amounting to torture. The Executive is trying to fill up their gaps to have a bold step regarding this with various orders and supporting stance for both the activities of the Legislature and the Judiciary. All these judicial and executive responses; are they really enough to rule out torture or not will also be the matter of concern of this study.

The third and the last one is to scrutinize the impediments that are getting in the ways of realizing the obligations of Bangladesh and to provide solutions for making the struggle against torture more effective. Hurdles like poor, inadequate and inconclusive investigation, insufficient evidence, special laws for immunity, enactment of repressive laws, few successful prosecutions, lack of adequate training, information

gap, disrespect for the rule of law, separation of powers, abuse of the state apparatus, shortcomings in the legal, institutional framework and implementation of laws are some of the imperative impediments that are getting in the ways of realizing obligations of Bangladesh to provide every type of remedies for torture survivors. But in reality, are these all? Is there any hurdle remaining? Are there any approaches by which these hindrances can be overcome? How implementation can be activated and how the struggle against torture be made more effective; all these issues will also be examined by this thesis. So an overall attempt will be made to answer all these questions to satisfy the main objective of the thesis.

1.3 Justification of the Study

Since its birth the United Nations has condemned torture and worked towards the goal of eradicating it. Numerous legal and political means have been identified, approved and implemented. All of these prohibit torture absolutely. The United Nations Convention Against Torture obliges States to make torture a crime and to prosecute and punish those guilty of it. It notes explicitly that no circumstance can justify the use of torture. States are also obliged to provide effective and prompt redress, compensation and rehabilitation for all torture victims. Together with international mechanisms, remedies are available at the regional level now in order to provide victims of torture with additional protection and the strengthening of international justice mechanisms makes the chances of torturers being snared higher. But unfortunately situation is different in practice. Though many national Constitutions, criminal codes, laws and regulations proclaim the prohibition of torture, yet torture is still reported even in those countries. So, more than a decade after the Convention Against Torture, the international community need to place a further spotlight on this atrocious phenomenon.

And also, from Bangladesh's perspective, the situation is not a good one, though there are certain laws, procedural safeguards prohibiting torture and the Judiciary's role is not less than perfect but even with those exceptional pronouncements and legislations there is a scenario where Bangladesh really needs some useful aids and endeavors to combat torture and ill-treatment with the assertion of justice and reparation for survivors which are unfortunately not yet afforded. And in this situation, research

regarding torture is nothing but the right thing to do. However, there are various researches done on this topic conducted by many individuals and institutions either on the existing laws or on the particular judgments and they were in assessing those separately. But this research view is that Bangladesh's obligation can be fulfilled only when there will be combined efforts of the executive in pursuant to the laws and in case of violation, the reviewing authority will come and interfere. However, without having all these three state actors within one sphere, an absolute picture of torture, its perpetrators, the victims, their right to remedies cannot be a possible one, they are coupled with each other and their activities are persuading one another. So, this research will bring an inclusive picture of torture stating from the international standards, national obligation, jurisprudence, history of torture, Bangladesh's compliance in laws, what and how the executive is responding towards its obligation, the judiciary's role in formulating the strategies on the complete ban on torture and again, how the executive is following those guidelines formulated by the judiciary through the legislature and its supporting organs. So it's nothing but a circle having torture in the middle with all its actors surrounding, they can only make the torture vanish if they combined. So, this study is an effort that will be a very helpful initiative to make Bangladesh's struggle against torture absolute inclusive of a special focus on the prospects for enforcement.

1.4 Setting of the Thesis

The thesis is divided into eight chapters, the first being the introduction where general introduction and background to the study is given to fit the thesis into broader academic and country specific perspective.

Chapter 2 is about the denouncing torture that starts from the universal prohibition and ends with the national eradication of torture. Since the thesis is regarding the normative and institutional responses to torture in Bangladesh and one of the aim is to articulate the broad picture of the responses of torture worldwide with its international standards and where Bangladesh is standing in her compliance with those standards, for that, the study need to start first with an overview of the international standards, measures and mechanisms resisting torture and in order to have the compliance picture there will be an assessment of national obligations of Bangladesh also.

However, the term 'standards' here gives a broad picture of the anti-torture laws including the precautionary and preventive measures taken by the international community through the United Nations. It is important to note down here that the research is taking the United Nations instruments resisting torture as 'international standards' and will try to provide a complete picture of those so that the actual standard with which any country has to comply with can be focused, and up to which mark Bangladesh needs to go to condemn torture. And pertaining to torture, the international community agrees on considering the prohibition of torture as *jus cogens* where state parties cannot stipulate upon or derogate from the norm, and this is now elevated to a higher level than other international rules. Moreover, torture is considered an obligation *erga omnes* i.e. an obligation that each state has not only toward its citizens, but also to the international community in general. Since Bangladesh is, not out of these obligation and has ratified the UN Convention Against Torture in 1998 and the International Covenant on Civil and Political Rights in 2000, and both of which prohibit the use of torture with an obligation to hold perpetrators of torture accountable and to provide remedies and reparation to survivors, at the last of this chapter, there will be an assessment of national obligation together with a specific indication on what Bangladesh has already done, to do or should have done in a positive sense in conformity with those obligations. However, regarding this compliance, it needs to be clear that, the compliance is with state actors only, namely: the legislature, executive and the judiciary. So there will be a focus on the responses to torture in Bangladesh in a positive sense through these state actors. Therefore altogether, it will state the obligations of Bangladesh in ensuring laws and procedural framework providing safeguards against torture.

Chapter 3 reviews the torturous activities prevailing in the world including Bangladesh. Within the 'activities' focus is on the methods and practices of torture. As the earlier chapter is on the international standards i.e. the legal frameworks and standings against torture of the international community and Bangladesh's obligations according to it taking article 1 of the UN Convention Against Torture as standard, chapter 3 here, discusses the historical discourses and practices of torture in Bangladesh. In this chapter the first part features torture devices and how these devices became the legitimate means for justice and then the part stands for the age of enlightenment period with the progression of humanism and customary international

law. And at the last the thesis goes for the contemporary torture that focuses on the emergence of the new settings of torture. So the first part is all about the torture methods, their justified use by the system, then the age of enlightenment that comes with its stand against the system by banning torture and at the last of this part this research shows that within this whole circle people again go for justifying torture with its new settings and different manifestations. However, the second part of this chapter is totally on the practices of torture that prevails in Bangladesh. The necessity of this part is that as the study is already focused on the international standards and the methods of torture used by international community, the next thing it needs to materialize is the methods and practices that Bangladesh is now using in order to torture the suspects since Bangladesh is now a known country in the international community that is practicing torture with a very weak system to protest. In Bangladesh torture is practiced through the state backed organizations like the law enforcing agencies and mostly by the police and other security forces. Though there may be other organizations and personnel practicing torture in Bangladesh, the law enforcing agencies like the Police, Rapid Action Battalion and certain other Special Forces are taken for the research basing on the number of torture practiced by them.

After having the history and a very clear concept about torture practices, Chapter 4 interrogates the normative compliance of Bangladesh. This part will analyze the Bangladesh's compliance in fulfilling its international obligation in the area of enacting and implementing legislation, it's promotion and protection regime. In fulfilling this obligation, since, Bangladesh is facing various hurdles; the last part of this chapter will reveal that grim reality. Here, the core issues of concern will be availability of civil redress for victims of torture, appropriateness of penalties, enforcement and monitoring measures and the venues to combat impunity of perpetrators.

Chapter 5 is devoted to impede torture through one of the state actors involving firstly the role of the Judiciary in judicial activism that is defying torture through developing a consistent jurisprudence for torture and formulating strategies to improve the torture survivor's access to justice. Also the last part is devoted to scrutinize the institutional compliance in practice with the shortcomings in institutional frameworks and certain other procedural deficiencies.

Chapter 6 will spell out the role of the Executive in activating the implementation and promoting the effective prevention of torture. It needs to clarify here that the role of the executive won't be the overall one, but will be in special instances like its obligation to prosecute the perpetrators, what's the position of providing various guarantees against abuses of human persons in Bangladesh and how the executive is formulating strategies to provide torture survivors' access to justice. Also the last part is devoted to scrutinize the institutional compliance in practice under the heading of immunity, accountability, political reality and the non-cooperation of the country with the human rights mechanisms.

Chapter 7 is about the field research in assessing the normative and institutional areas practically; the obstacles and lessons learned there with the upcoming strategies of the Government in both the areas.

Chapter 8 is the concluding part of the thesis and consists of sorting out the entire obligations of Bangladesh in bringing the international standards home and obviously, there will be recommendations for making the struggle against torture more effective.

1.5 Methodology

In the thesis it is envisaged that it includes a practical research element to investigate questions raised in the study, primarily targeted at normative and institutional responses to torture in Bangladesh focusing on the development of existing norms and the ways in which she has or has not had a positive impact in combating torture in line with international obligations. However, the methodology of the study includes among others appraisal of national and international standards i.e. national legislations, international instruments, precedent, legal doctrine, jurisprudence on torture; review of selected literature, Government, Commission and other regulatory body publications, reports and initiations will be analyzed, critiqued and inconsistencies as well as shortcomings in those will be pointed out. There will be study of all relevant reported cases in order to understand judiciary's role and view in developing the *de jure* legal status of the rights of the victims and attract the areas that can form the basis of a reformed system of eradication of torture.

The present thesis also employs qualitative analysis as the research method in the form of purposive sampling and in-depth interviews of key persons like Policy makers, Police Officials, Judicial Officers and Home Ministry Officials who developed and currently administer the existing legislation, norms and institutions. In the normative Area or policy making the research sought to take the interview of GO officials who developed the existing legislation and are directly involved in the preparing, drafting and policy making of the government i.e. policy makers from the Ministry of Law, Justice and Parliamentary Affairs. The core issues to be investigated with are firstly their opinions on the loopholes of the existing laws regarding torture and the upcoming strategies of the Government in this field.

The researcher sought to take interviews in the institutional sector of the GO officials who are currently administered the norms and institutions particularly Police Officials, Judicial Officers, and Home Ministry Officials of the Secretariat. Taking only these types of concerned personnel is nothing but for the research purpose specifically in case of police officials the study sought to take the interview of officials who are having the legal authority for monitoring the internal discipline of the police and officials who are directly involved with the Police Reform Program (PRP) on behalf of the National Program Director (NPD), Police Reform Program, Bangladesh. The core issues here to be investigated with are firstly probabilities of complete ban on torture and then opinions on the new law criminalizing torture. There is also a focus on the upcoming strategies of the government regarding the police reform program and the torture prevention. In case of judicial officers, firstly, interview of the concerned Judges of the Supreme Court who have already dealt with the matter will be taken basing on all the relevant reported cases. The core issues to be investigated with are Judiciary's role and view in invoking the international standards regarding torture in the judgment. Interview also sought up for the measures in non-implementation of orders of the Supreme Court, separation of judiciary and the resulting independence of the judges. Secondly, the opinions of certain Metropolitan and Judicial Magistrates within the Dhaka Metropolitan area are taken through the interview. Here the issues investigated with are reasons for granting remand and impediments getting in the way of anti-remand policy. However, preferring the Dhaka Metropolitan area is, on the sensitive and unique cases here and also for convenience.

Within the Home ministry Officials of the Secretariat the interview sought to reveal issues of interrogation methodology, acceptance of the competence of the Committee against Torture or the Human Rights Committee to received individual complaints about torture, issues of not extending open invitation to the Special Procedures of the UN Human Rights Council and opposing country specific mandates for Special Procedures and issues about prison visits by independent human rights monitors and release of the findings. This part of the field work with the factual implementation also focuses the upcoming strategies of the government in this sector also.

1.6 Limitations of the Study

In view of the methodology, the study has its limitations. First of all, regarding the torture study in general, it is difficult to ensure about the true representation of the facts as torture is an emotive subject and many countries of the world including Bangladesh which practiced torture are blankly denying any knowledge of it. In addition, as there are numerous, conflicting ethical theories on torture, personal beliefs will influence each view point and for that, the researcher's opinion will likely to differ from the readers' in certain circumstances. Since, the *de facto* condition is different from the *de jure* ones, it will be identified by reviving the information collected from various news papers, reports and research out-puts of human rights organizations and for that numerous press sources will be provided to supplement the public ones where necessary. And though it is hard to ascertain the opinion on the ways employed to inflict torture, but special personnel's aid is necessary for this and it is not always possible to have it in ascertaining the actual practice of torture and this, sometimes, makes the study of torture difficult in this respect. Last of all, in case of case study, almost all the related Bangladeshi cases will be studied even though there are numerous cases of torture throughout the world and the history.

Next chapter is about the denouncing torture that starts from the universal prohibition and ends with the national eradication of torture. Since the thesis is regarding the normative and institutional responses to torture in Bangladesh and one of the aim is to articulate the broad picture of the responses of torture worldwide with its international standards and where Bangladesh is standing in her compliance with those standards, for that, the study need to start first with an overview of the international standards, measures and mechanisms resisting torture and in order to have the compliance picture there will be an assessment of national obligations of Bangladesh also.

CHAPTER 2
DENOUNCING TORTURE: FROM UNIVERSAL PROHIBITION TO NATIONAL ERADICATION

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

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

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1 Foley, Conor. 2003. *Combating Torture: A Manual for Judges and Prosecutors*. 1st edn. Great Britain: Human Rights Centre, University of Essex, at pp. 7-8.

2 Wikipedia. 2012. 'United Nations', available at: <http://en.wikipedia.org/wiki/United_Nations>, last accessed on 3rd November 2012.

3 Nagan, P Winston. and Atkins, Lucie. 2001. "The International Law of Torture: From Universal Proscription to Effective Application and Enforcement", Vol. 14 *Harvard Human Rights Journal*, pp.88-121, at 87.

4 Foley, Conor. 2003. *Combating Torture: A Manual for Judges and Prosecutors*. 1st edn. Great Britain: Human Rights Centre, University of Essex, at pp. 7-8.

5 Kelly, Tobias. 2009. The Un Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty, Vol. 31, No. 3 *Human Rights Quarterly*, pp. 777-800, at p. 782.

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

2.1 An Overview of International Standards

Since, the aim of the prohibition of torture and ill treatment is to protect both the dignity and the physical and mental integrity of the individual which is linked with

[6] Foley, Conor. 2003. *Combating Torture: A Manual for Judges and Prosecutors*. 1st edn. Great Britain: Human Rights Centre, University of Essex, at pp. 7-8.

two important human rights norms providing the principle of human dignity and the right to physical and mental integrity, and avowing the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' which is also the identical language of all the major human rights treaties including the Charter of the United Nations,[7] this chapter at first is providing the instruments and guidelines to combat torture then it will go for how torture appears in the customary international law and lastly there is a discussion about the measures and mechanisms resisting torture. The part 'instruments and guidelines specifically provide the international standards against torture through the United Nations and its subsidiary organs. 'Torture in its customary form' here is providing the other standards and principles regarding the universal nature of the prohibition. Also the part 'measures and mechanisms resisting torture', it provides the monitoring measures on torture activities; being it be through the United Nations or according to the treaty provisions or the others.

2.1.1 Instruments and Guidelines to Combat Torture

Particularly, in case of the part 'instrument and guidelines' the study's focus is not for all the international standards but is firstly for the Bill of Rights where it discusses about the UN Charter, Universal Declaration of Human Rights and the ICCPR provisions only even if it is known that the Bill of Rights includes the ICESCR also. The second part covers here the torture declaration, conventions and its optional protocols where the General Assembly played its innovative role, both in the development of legal standards and in enforcement of the prohibition of torture. After that there is a discussion about the International Humanitarian Law with the Geneva Conventions and their three additional Protocols applicable in armed conflicts and obviously focusing the torture prohibition. However, in case of treatment of prisoners and the detained persons there is a long lasting connectivity of torture issues throughout the histories and the next but not the last issue in here is about the standards that are providing a strong basis for protecting these people in these situations along with a special focus on the basic principles and the code of conduct for the law enforcement officials. The last issue of this part is all about the medical

[7] Amnesty International. 2003. *Combating torture: A Manual for Action*. London: Amnesty International.

ethics relating to the role of health professionals regarding anti-torture activity and the Rome Statute of the International Criminal Court with additional focuses on the other general standards and professional principles which materialize a lot about the universality of the torture prohibition. However these standards are taken only because those are considered suitable for the particular research purposes.

2.1.1.1 The Bill of Rights

In this Bill of Rights since the thesis is excluding the ICESCR and having just the UN Charter, the Universal Declaration of Human Rights and the ICCPR, it first starts with the UN Charter as it's the foundational treaty of the international organization called the United Nations and then will go for the ICCPR's anti-torture provisions. As a Charter, it is a constituent treaty, all members are bound by its articles and obligations to the United Nations prevail over all other treaty obligations.[8] The Charter makes repeated references to human rights though does not contain a definition of the content of human rights. Instead, it created the Economic and Social Council (ECOSOC), which established in turn the UN Commission on Human Rights, the main human rights intergovernmental body within the United Nations, in 1946. The Commission's first major task[9] and the UN human rights program's first major effort was the drafting of the Universal Declaration of Human Rights[10], to further define the concept of human rights stated in the UN Charter.[11] The UDHR reminded us that in a world still reeling from the horrors of the Second World War, the Declaration was the first global statement of what is now taken for granted 'the inherent dignity and equality of all human beings'.[12] By adopting it, the governments of the world,

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8 Wikipedia. 2012. 'United Nations', available at: <http://en.wikipedia.org/wiki/United_Nations_Charter>, last accessed on 3rd November 2012.

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

10 Wikipedia. 2012. 'United Nations Charter', available at: <http://en.wikipedia.org/wiki/United_Nations_Charter>, last accessed on 3rd November 2012.

11 The International Rehabilitation Council for Torture Victims. 2007. *International Instruments and Mechanisms for the Fight against Torture: A Compilation of Legal Instruments and Standards on Torture*. Copenhagen K, Denmark: IRCT.

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

represented at the General Assembly, agreed that everyone is entitled to fundamental human rights, they apply everywhere and not just in those countries whose governments may choose to respect them. It follows from this principle that all governments must protect the rights of people under their jurisdiction, and that a person whose human rights are violated has a claim against the government which violates them. Furthermore, the fact that governments together adopted the Universal Declaration implies that violations of human rights are of concern to all governments.[13] And as One of the most fundamental aspects of human rights law is the universal proscription of torture,[14] freedom from torture and ill-treatment must be upheld everywhere.[15] However, the UDHR constituted the beginning of an important and ongoing process toward the abolition of torture. An article prohibiting torture and ill-treatment was regarded as an essential element in a Universal Declaration of Human Rights. As it is known that, this convention was prompted by the atrocities committed by the World War II and the Nazi regimes systematic practice of torture in Germany and the occupied countries, there was widespread feeling among the founders of the United Nations that effective measures had to be taken in order to prevent this from recurring, the development of international legal instruments providing protection for individuals and prescribing basic rules of behavior for governments and authorities was one of such measures. And a prohibition against torture and ill treatment was a natural component of these efforts.[16] The unambiguous formulation of the prohibition of torture as stated in the United Nations documents, starting with the Universal Declaration of Human Rights (UDHR), was followed by many subsequent instruments in human rights, humanitarian law and administration of justice, as well as in several regional instruments. These instruments incorporate standards of governmental behaviour and, indirectly, of private behaviour. They

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13 Amnesty International. 2003. *Combating torture: A Manual for Action*. London: Amnesty International.

14 Nagan, P Winston. and Atkins, Lucie. 2001. "The International Law of Torture: From Universal Proscription to Effective Application and Enforcement", Vol. 14 *Harvard Human Rights Journal*, pp.88-121, at 87.

15 Amnesty International. 2003. *Combating torture: A Manual for Action*. London: Amnesty International.

16 Alfredsson, Gudmundur, Eide, Asbjorn and Eide Asbjrn. 1999. *The Universal Declaration of Human Rights: A Common Standard of Achievement*. Hague, Boston and Mass.: Kluwer Law International, at pp. 121-123.

oblige governments and their officials to refrain from torturing or ill-treating anyone and to protect people against such abuses when these are carried out by private individuals. Depending on their origin, the standards either are legally binding obligations, or are recommendations, some of which are so strong that they can be considered to constitute obligations. Many of the instruments which set out these standards have been adopted without a vote, a sign of strong agreement in that no member state represented at the body which adopted them wished to go on record as opposing them. And one of the instruments that followed UDHR in 1966 was the adoption of the International Covenant on Civil and Political Rights, which is the pre-eminent worldwide treaty on civil and political rights.

However, the prohibition of torture and ill-treatment of the ICCPR is formulated in absolute terms, envisaging no exception to the rule; it's a non-derogable right: a right entailing obligation from which no derogation is permitted. On becoming a party to the ICCPR, a state is legally bound to respect the prohibition and to ensure to all individuals under its jurisdiction the right not to be subjected to torture or ill-treatment.[17] It defends the right to life and stipulates that no individual can be subjected to torture, enslavement, forced labor and arbitrary detention or be restricted from such freedoms as movement, expression and association. The treaty also explains the obligations of States and provides for a Human Rights Committee to monitor how states comply with the treaty. All countries that are party to the ICCPR must report to the Human Rights Committee every five years on what they have done to promote these human rights and about the progress made. The Committee reviews these reports in public meetings, including representatives of the state whose report is being reviewed.[18] Other articles of the ICCPR which are relevant to the elimination of torture include obligation to respect and ensure human rights (Article 2), right to life (Article 6), right to liberty and security of person (Article 9), right of persons deprived

[17] Amnesty International. 2003. *Combating torture: A Manual for Action*. London: Amnesty International.

[18] United Nations. 1966. 'International Covenant on Civil and Political Rights', available at: <http://www.un.org/millennium/law/iv-4.htm>, last accessed on 3rd November 2012.

of liberty to be treated with humanity and respect for human dignity (Article 10) and right to a fair trial (Article 14).[19]

2.1.1.2 Torture Declaration, Convention and Optional Protocol

In this part there is discussion on the Declaration, Convention, Protocols etc. regarding anti-torture activity through the United Nations and its Subsidiary Bodies. The United Nations from its beginning played important role in this respect and at first the thesis will go for the period when it performed its most creative and innovative role,[20] both in the development of legal standards and instruments and in enforcement of the prohibition of torture is from 1973 to 1977 and specifically in 1975, responded to vigorous activity by non-governmental organizations (NGOs),[21] the General Assembly adopted its landmark Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment making it a pivotal event in a process which started in 1973 and continues for some fifteen years.[22] By adopting resolution 3059 (XXVIII) unanimously, the General Assembly may be seen to have come out of its first skirmish with the problem of torture and other ill-treatment ready to reaffirm its clear objection to the practices and its support for the existing human rights treaties prohibiting them.[23] It defines torture and constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment in article 1 with a specific stipulation in article 3 that no exceptional circumstances such as a state or a threat of war, internal political instability or any other public emergency may be invoked as a justification of torture or other cruel, inhuman or degrading treatment or

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19 Amnesty International. 2003. *Combating torture: A Manual for Action*. London: Amnesty International.

20 Rodley, Nigel and Pollard, Matt. 2011. *The Treatment of Prisoners under International Law*. New York: Oxford University Press Inc., at 09.

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

22 Rodley, Nigel and Pollard, Matt. 2011. *The Treatment of Prisoners under International Law*. New York: Oxford University Press Inc., at 20.

23 *Ibid.,* at p. 23.

punishment[24] which are similar with the wording of the Torture Convention that is the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The torture Convention was the result of many years' work, initiated after the adoption of the Declaration[25] and was adopted on 10 December 1984. The adoption and ratification of this Convention by numerous governments[26] represents a significant achievement in the continuing effort by the United Nations to protect the right of an individual to be free from torture and other forms of ill-treatment[27] along with the unique legal obligations to prevent torture and ill-treatment, to bring perpetrators of torture to justice and to assist victims of torture.[28] The principle aim of the Convention is to strengthen the existing prohibition of practices of torture, cruel, inhuman or degrading treatment or punishment by a number of supportive measures.[29] It contains a series of important provisions in relation to the absolute prohibition of torture.[30] The Convention defines torture in article 2 and specifies that states parties must prohibit it in all circumstances, there is no excuse of torture under any circumstances whatever, whether there is a war or emergency, or even if the torturer is merely obeying orders from a superior officers.[31] The most innovative aspect of the Convention is the obligation of States to combat impunity of

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

[25] Danelius, Hans. 2008. 'United Nations Convention Against Torture', available at: <http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.html>, last accessed on 31 March 2012.

[26] Association for the Prevention of Torture, Asia Pacific Forum of National Human Rights Institutions, Office of the United Nations High Commissioner for Human Rights. 2010. *Preventing Torture: An Operational Guide for National Human Rights Institutions*. Geneva and Sydney: APT, APF and OHCHR.

[27] Weissbrodt, David, Hoffman, Paul, Reynolds, James S., Dalton, Robert E. and Fitzpatrick, Joan. 1989. 'Prospects for U.S. Ratification of the Convention against Torture', Vol. 83 *Proceedings of the Annual Meeting (American Society of International Law),* pp. 529-531, at p. 529.

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

[29] Burgers, J. Herman and Danelius, Hans. 1988. *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Dordrecht, Martinus Nijhoff Publishers, at p. 1.

[30] Association for the Prevention of Torture, Asia Pacific Forum of National Human Rights Institutions, Office of the United Nations High Commissioner for Human Rights. 2010. *Preventing Torture An Operational Guide for National Human Rights Institutions*. Geneva and Sydney: APT, APF and OHCHR.

[31] Moira, Rayner. 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', available at: <http://www.universalrights.net/main/world.htm>, last accessed on 31 October 2012.

perpetrators of torture by criminalizing it in domestic criminal legislation with appropriate penalties and establishing universal jurisdiction for perpetrators of torture crimes worldwide. States Parties shall grant the right to an effective remedy to torture victims and their allegations shall be promptly investigated and examined by competent and impartial domestic authorities which shall grant them adequate reparation, including compensation and rehabilitation. Furthermore, States are under an obligation to take effective measures to prevent torture and ill-treatment by all means, including *ex officio* investigations wherever there is reasonable ground to believe that an act of torture has been committed. They shall provide human rights training to law enforcement officials and refrain from expelling, returning or extraditing a person to another State where he or she might face a substantial risk of being subjected to torture.[32] The Convention does not deal with cases of ill-treatment which occur in an exclusively non-governmental setting. It only relates to practices which occur under some sort of responsibility of public officials or other persons acting in an official capacity. In aiming at the effective elimination of torture and cruel, inhuman and degrading treatment or punishment, the convention pays particular attention to influencing the behavior of persons who may become involved in situations in which such practices might occur.[33]

However, this Convention against Torture, later on, is complemented by an Optional Protocol, which was adopted in 2002 and entered into force in 2006. The Optional Protocol does not establish new normative standards instead; it reinforces the specific obligations for prevention of torture in articles 2 and 16 by establishing a system of regular visits to places of detention by international and national bodies[34] to be overseen by a Subcommittee on the Prevention of Torture and Other Cruel, Inhuman

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[32] Atlas of Torture. 2009. 'Convention against Torture (CAT)', available at: <http://www.univie.ac.at/bimtor/glossary/478>, last accessed on 31 October 2012.

[33] Burgers, J. Herman and Danelius, Hans. 1988. *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Dordrecht, Martinus Nijhoff Publishers, at p. 17.

[34] *Ibid.*, at p. 20.

or Degrading Treatment or Punishment.[35] The Committee examines the reports of States parties and individual complaints. The Committee's concluding observations and its views on individual communications provide an additional aid in interpreting the Convention.[36]

2.1.1.3 The Geneva Conventions and their Additional Protocols

In this part of the Geneva Conventions and their Additional Protocols, there is a portrait of how the International Humanitarian Law is making a bold step against torture and legally how it is supporting this movement. Since, the Second World War remains a conflict distinguished by violence on an unprecedented scale and not only extreme violence by one combatant against another; much of it was directed against civilians, who had not paid such a heavy price for mankind's warmongering since the Thirty Years' War, the discovery of the Nazi concentration camps and the extent of the mass extermination carried out within their walls added yet another layer of horror to the tragedy that the world lived through from 1939 to 1945. In order to transmit the sentiment of the time, one quote by General Eisenhower while visiting a Nazi death camp in 1945 may suffice 'the world must know what happened, and never forget'. There can therefore be no doubt that the decision to draft the Geneva Conventions of 1949 was sealed by the tragedy of the Second World War and that the conventions were intended to fill the gaps in international humanitarian law exposed by the conflict.[37] The Geneva Conventions are the essential basis of international humanitarian law applicable in armed conflicts and they evolved from rules of customary international law binding on the entire international community. In the second part of the nineteenth century, when the codification of international law started, most of these rules were included in international treaties, beginning with the 1864 Geneva Convention and the 1899 and 1907 Hague Conventions. With contemporary wars continuing to produce disastrous effects, the Geneva Conventions

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35 Wikipedia. 2012. 'United Nations Convention Against Torture', available at: < http://en.wikipedia.org/wiki/United_Nations_Convention_Against_Torture>, last accessed on 3rd November 2012.

36 Burgers, J. Herman and Danelius, Hans. 1988. *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Dordrecht, Martinus Nijhoff Publishers, at p. 17.

37 Spoerri, Philip. 2009. 'The Geneva Conventions of 1949: Origins and Current Significance'. Available at:<http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-120809.htm>, last accessed on 12 August 2009.

signed on August 12, 1949, and three Additional Protocols adopted on June 8, 1977 and December 2005 respectively, are the most important treaties for the protection of victims of war.[38] And, as humane treatment is the fundamental theme running throughout the Conventions,[39] 'torture' is proscribed by all the four of the Geneva Conventions and their additional Protocols, even though 'torture', either mental or physical, is not explicitly defined in the Conventions. [40] Under the Geneva Conventions, it appears to matter little whether certain treatment is described as torture; these protect against treatment that is cruel, inhumane, and degrading even if such treatment does not amount to torture.[41] Torture or inhuman treatment of prisoners-of-war[42] or protected persons[43] are grave breaches of the Geneva Conventions, and are considered war crimes.[44] War crimes create an obligation on any state to prosecute the alleged perpetrators or turn them over to another state for prosecution. This obligation applies regardless of the nationality of the perpetrator, the nationality of the victim or the place where the act of torture or inhuman treatment was committed.[45] Detainees in an armed conflict or military occupation are also protected by common article 3 to the Geneva Conventions. Even persons who are not entitled to the protections of the 1949 Geneva Conventions such as, some detainees from third countries, are protected by the "fundamental guarantees" of article 75 of Protocol I of 1977 to the Geneva Conventions which prohibits murder, "torture of all

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38 eNotes 'Geneva Conventions on the Protection of Victims of War'. 7th May 2012. Available at: <http://www.enotes.com/geneva-conventions-protection-victims-war-reference/geneva-conventions-protection-victims-war> last accessed on 7th May 2012.

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

40 *Ibid.*, CRS:09, *Congressional Research Service, The Library of Congress,* Received through the CRS Web and International Committee of the Red Cross, 3 Commentary on the Geneva Conventions of 12 August 1949 (Jean Pictet, ed. 1960) [hereinafter "ICRC Commentary III"], at 140, available at: <http://www.fas.org/irp/crs/RL32567.pdf>, last accessed on 04th May 2012.

41 *Ibid.*, CRS:13, *Congressional Research Service, The Library of Congress,* Received through the CRS Web and International Committee of the Red Cross, 3 Commentary on the Geneva Conventions of 12 August 1949 (Jean Pictet, ed. 1960) [hereinafter "ICRC Commentary III"], at 140, available at: <http://www.fas.org/irp/crs/RL32567.pdf>, last accessed on 04th May 2012.

42 Articles 17 and 87 of the Geneva Conventions III of 1949.

43 Article 32 of the Geneva Conventions III of 1949.

44 Article 130 of the Geneva Conventions III of 1949; Article 147 of the Geneva Conventions IV of 1949.

45 Article 129 of the Geneva Conventions III of 1949; Article 146 of the Geneva Conventions IV of 1949.

kinds, whether physical or mental," "corporal punishment," and "outrages upon personal dignity, in particular humiliating and degrading treatment, and any form of indecent assault."[46]

2.1.1.4 Standards for the Treatment of Prisoners and Detained Personnel

In addition to international human rights law and the laws of armed conflict, a considerable range of other rules and standards have been developed to safeguard the right of all people to protect against torture and other forms of ill-treatment. Although not of themselves legally binding, they represent agreed principles which should be adhered to by all states and are providing important guidance for judges and prosecutors.[47] One of these treaties is the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988 provides safeguards and the rights of persons under any form of arrest and detention along with the legal assistance, medical care and access to records of their detention, arrest, interrogation and medical treatment.[48] The principles state, among others, that a person held in prison or detention of any kind shall not be exposed to any type of torture or degrading treatment; and that the reason and period of time that he is to be held in detention, the timing of the judicial or other review, identity of the relevant detaining body, and place of detention shall be documented and provided to the detainee himself or to his attorney.[49] The term "cruel, inhuman or degrading treatment or punishment" here should be interpreted "so as to extend to the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his

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

47 Foley, Conor. 2003. *Combating Torture: A Manual for Judges and Prosecutors*. 1st edn. Great Britain: Human Rights Centre, University of Essex, at pp. 7-8.

48 UN Fact Sheets, No. 4, 'Combating Torture (Rev.1), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975)', available at: <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/generalcomments/unfactsheets/combatingtorture/>, last accessed on 31 October 2012.

49 HAMOKED, Centre for the Defence of the Individual. 1988. 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', available at:<http://www.hamoked.org/Document.aspx?dID=6480>, last accessed on 01 June 2012.

awareness of place and the passing of time". It states that no detained person may be subjected to violence, threats or methods of interrogation which impair his or her decision making capacity or judgment (Principle 21). It provides that promptly after arrest and each transfer to another place of detention, members of the detainee's family or other persons of his or her choice should be notified of the place where he or she is being held (Principle 16). A proper medical examination should be offered to detained or imprisoned persons as promptly as possible after their admission to the place of detention or imprisonment. Thereafter medical care and treatment should be provided whenever necessary. In all cases, the care and treatment should be provided free of charge (Principle 24). And there is also prohibition for, even with his or her consent, to medical experimentation that may be detrimental to his or her health (Principle 22). There is also opportunity for the detained persons or their legal representatives have the right to lodge a complaint, especially regarding torture or other ill-treatment, with the authorities responsible for the place of the detention and, where necessary, to appropriate authorities vested with reviewing power. Such complaints should be promptly dealt with and replied to without undue delay. No complainant should suffer prejudice for lodging a complaint (Principle 33). And States should prohibit any act contrary to the Principles, make such acts subject to appropriate sanctions and conduct impartial investigations of complaints (Principle 7). Places of detention here should be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the place of detention. Detainees should have the right "to communicate freely and in full confidentiality" (Principle 29) with the persons concerned.[50]

However, with the increased concern for human rights and a time of growing interest in the promise of rehabilitation, the international community is providing the next Rules that are linked to an era of 'injecting the humanitarian spirit of the Universal Declaration of Human Rights into the correctional system without compromising public safety or prison security'. To accomplish this humanitarian goal, the United

[50] UN Fact Sheets, No. 4, 'Combating Torture (Rev.1), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975)', available at: <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/generalcomments/unfactsheets/combatingtorture/>, last accessed on 31 October 2012.

Nations Standard Minimum Rules for the Treatment of Prisoners was adopted with the most earnest of good intentions in 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva and approved by the Economic and Social Council Resolutions[51] of 31 July 1957 and 13 May 1977,[52] in an attempt to establish 'what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions'. Although not legally binding, the Standards provide guidelines for international and domestic law as regards persons held in prisons and other forms of custody and emphasize humane treatment and rehabilitation, stating that the only justification for imprisonment is 'to ensure, so far as possible, that upon his return to society, the offender is not only willing but able to lead a law-abiding and self supporting life'.[53] Since the SMRs embody a greater level of practical detail about how prisoners should be treated than is generally to be found in international conventions and covenants, these model standards have become an enormously important point of reference for defining what constitutes humane treatment in the prison setting.[54]

With this standard the study links with the known, accessible and comprehensive international document regulating prison conditions and prisoner treatment that is none other than the Basic Principles for the Treatment of Prisoners adopted by General Assembly in 1990. It essentially, requires that prisoners should be treated with respect for their inherent dignity as human beings[55] except for those limitations

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

52 Wikipedia. 2012. 'Standard Minimum Rules for the Treatment of Prisoners', available at:< http://en.wikipedia.org/wiki/Standard_Minimum_Rules_for_the_Treatment_of_Prisoners>, last accessed on 28 May 2012.

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

54 Correctional Service Canada. 2012. 'United Nations Standard Minimum Rules For the Treatment of Prisoners 1975', available at: <http://www.csc-scc.gc.ca/text/pblct/rht-drt/07-eng.shtml>, last accessed on 30 October, 2012.

55 OHCHR Fact sheet No. 4, (Rev.1), '*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'*, pp. 09-10, available at: <http://www.ohchr.org/Documents/Publications/FactSheet4rev.1en.pdf>, last accessed on 03 June 2012.

that are demonstrably necessitated by the fact of incarceration, and all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol thereto, and such other rights as are set out in other United Nations Covenants.[56]

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

With these above, on December 17**,** 1979 the General Assembly of the United Nations adopted, without a vote, the Code of Conduct for Law Enforcement Officials. The adopting resolution recommended, among other things, that favorable consideration should be given to its use within the framework of national legislation or practice as a body of principles for observance by law enforcement officials. The Code of Conduct is explicitly concerned with setting standards which aim to eliminate human rights abuses by law enforcement officials.[57] The most comprehensive portion of the Code of Conduct is the provision in the wording that "no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment of punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment (article 5). It also states that the functions of law enforcement in the defense of public order, and the manner in which those functions were exercised, had a direct impact on the quality of life for individuals, as well as for society as a whole. While the General Assembly of the United Nations stressed the important task that law enforcement officials were performing, it also noted the potential for abuse that the discharge of their duties entailed. There are also guidelines for the effective implementation of the

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[56] United Nations Office on Drugs and Crime. 2006. I. "Treatment of prisoners" in *The Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, New York: United Nations, pp. 3-49, at pp.42-43.

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

Code aiming at the further promotion of the use and application of the Code of Conduct for Law Enforcement Officials.[58]

Thereafter, on 7 September 1990, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana, Cuba, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials were adopted with an address on the lawful use of force and firearms, the policing of unlawful assemblies and on persons in custody or detention, and reporting and review procedures concerning the use of force and firearms in the line of duty. It states that the arbitrary or abusive use of force and firearms by law enforcement officials should be punished as a criminal offence under domestic law (Principle 7). And no exceptional circumstances such as internal political instability or any other public emergency may be invoked to justify any departure from the principles (Principle 8). Force and firearms may be used only if other means remain ineffective or without any promise of achieving the intended result (principle 4). Law enforcement officials should act in proportion to the seriousness of the offence and the legitimate object to be achieved. In case of any damage or injury, it should be minimized and medical assistance should be rendered (principle 5) to injure persons and the relatives or close friends of the victim has to be informed at the earliest possible moment.[59]

2.1.1.6 Principles of Medical Ethics

However, following the 1975 Declaration of Tokyo, at the request of the United Nations General Assembly, the World Health Organization (WHO) drafted a set of guidelines for health personnel confronted with cases of torture or ill treatment and on December 18, 1982, after three years of debate and revision, the General Assembly adopted the Principles of Medical Ethics Relevant to the Role of Health Personnel,

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[58] United Nations Office on Drugs and Crime. Vienna. 2006. *'Use and Application of the Code of Conduct for Law Enforcement Officials, Including the Basic Principles on the Use of Force and Firearms'*, available at: <http://www.uncjin.org/Standards/Conduct/conduct.html>, last accessed on 31 October 2012. This study has been administered by the Crime Prevention and Criminal Justice Division, United Nations Office at Vienna, pursuant to Economic and Social Council resolution 1993/34, adopted on the recommendation of the United Nations Commission on Crime Prevention and Criminal Justice.

[59] OHCHR Fact sheet No. 4, (Rev.1), '*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'*, pp. 6-7, available at: <http://www.ohchr.org/Documents/Publications/FactSheet4rev.1en.pdf>, last accessed on 15 May 2012.

Particularly Physicians, in the Protection of Prisoners and Detainees against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment. It should be stressed that the above principles are directed at all health personnel and not just physicians. It provides that all medical staff, including nurses, can find themselves treating a prisoner and faced with similar issues.[60] In the preamble, the General Assembly expresses alarm that not infrequently members of the medical profession or other health personnel are engaged in activities which are difficult to reconcile with medical ethics. States, professional associations and other bodies are urged to take measures against any attempt to subject health personnel or members of their families to threats or reprisals for refusing to condone the use of torture or other inhuman or degrading treatment or punishment. On the other hand, health personnel, particularly physicians, should be held accountable for contraventions of medical ethics.[61] However, the instrument consists of six principles designed to prevent complicity of health professionals in torture. According to the principles "it is a gross contravention of medical ethics, for health personnel to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment" (Principle 2); it is a violation of medical ethics for health personnel "to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health (Principle 3)," and health professionals may not use their "knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health condition of such prisoners or detainees (Principle 4)." The final Principle explicitly states that "there may be no derogation from the foregoing principles on any ground whatsoever, including public emergency (Principle 6)." These Principles unequivocally require health care personnel to maintain a professional relationship with prisoners or detainees that is unaffected by the political motivations or justifications for their incarceration. According to the instrument,

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

61 UN Fact Sheets, No. 4, 'Combating Torture (Rev.1), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975)', available at: <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/generalcomments/unfactsheets/combatingtorture/>, last accessed on 31 October 2012.

neither in extreme circumstances, nor under duress, may health professionals advise on the handling of prisoners undergoing harsh treatment. The original draft of the Principles contained a provision stating that, in certain circumstances, health personnel "may be compelled under duress" to administer medical care to victims during torture, and in such cases "their actions should be determined by the will to protect the prisoner or the detainee."[62]

And though the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, commonly known as the Istanbul Protocol, is the first set of international guidelines for documentation of torture and its consequences, it became an official United Nations document in 1999. The Istanbul Protocol is intended to serve as a set of international guidelines for the assessment of persons who allege torture and ill treatment, for investigating cases of alleged torture, and for reporting such findings to the judiciary and any other investigative body. The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains internationally recognized standards and procedures on how to recognize and document symptoms of torture so that the documentation may be served as valid evidence in the court. As such, the Istanbul Protocol provides useful guidance for doctors and lawyers who want to investigate whether or not a person has been tortured and report the findings to the judiciary and any other investigative bodies. The Istanbul Protocol even if is a non-binding document, the international law obliges governments to investigate and document incidents of torture and other forms of ill-treatment and to punish those responsible in a comprehensive, effective, prompt and impartial manner according to it and actually it's the perfect tool for doing this.[63] Since, the Istanbul Protocol describes in detail the steps to be taken by States, investigators and medical experts to ensure the prompt and impartial investigation and documentation of complaints and reports of torture. The investigation should be carried out by competent and impartial experts, who are independent of the suspected perpetrators and the agency they serve (Principle 2). They should have access to all

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

63 Wikipedia. 2012. 'Istanbul Protocol', available at: <http://en.wikipedia.org/wiki/Istanbul_Protocol>, last accessed on 3rd November 2012.

necessary information, budgetary resources and technical facilities; to issue summonses to alleged perpetrators and witnesses, and to demand the production of evidence [Principle 3(a)]. Principle 3(b) states that: "alleged victims of torture, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. The alleged victims and their legal representatives should have access to any hearing and to all information relevant to the investigation (Principle 4). And lastly it provides that those potentially implicated in torture shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation" and lastly [Principle 5(b)], the findings of the investigation should be made public.[64]

2.1.1.7 The Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court is one of the most complex international instruments ever negotiated, from which a sophisticated web of highly technical provisions drawn from comparative criminal law combined with a series of more political propositions that touch the very heart of State concerns with their own sovereignty. It establishes an international tribunal to try perpetrators of genocide, crimes against humanity and war crimes. It was adopted by a United Nations Diplomatic Conference of Plenipotentiaries on 17 July 1998.[65] And it's without any doubt that its creation is the result of the human rights agenda that has steadily taken centre stage within the United Nations since Article 1 of its Charter proclaimed the promotion of human rights to be one of its purposes. From a hesitant commitment in 1945, to an ambitious Universal Declaration of Human Rights in 1948, international community reached a point where individual criminal liability is established for those responsible for serious violations of human rights, and where an institution is created to see that this is more than just some pious wish.[66] The Rome Statute of the

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64 OHCHR Fact sheet No. 4, (Rev.1), '*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'*, pp. 6-7, available at: <http://www.ohchr.org/Documents/Publications/FactSheet4rev.1en.pdf>, last accessed on 03 June 2012.

65 *Id.*

66 Schabas, William A. 2001. *An Introduction to the International Criminal Court*. 2nd edn. Cambridge: New York, at p. 25.

International Criminal Court contains provisions prohibiting the infliction of severe physical or mental pain or suffering including for such purposes as obtaining information. These violations are considered to be war crimes in case of torture and of inhuman treatment (article 8) its crimes against humanity (article 7).[67] Under it, torture is a crime against humanity when it is committed as part of a widespread or systematic attack directed against any civilian population. In the context of a crime against humanity, the term torture is defined as 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions'. However, this definition is broader than that in the Convention against Torture, as it includes acts committed by both State and non-State actors and does not require "purpose" as an objective of the torture.

2.1.1.8 Other General Standards and Professional Principles

Moreover, in addition to these various treaties, there are a number of general standards and professional principles that are highly relevant to the prevention of torture. These soft law standards cannot be legally enforced in the same way as treaty obligations. However, they provide detailed and useful guidelines for interpreting terms such as "cruel, inhuman or degrading treatment or punishment", as well as for implementing the treaty obligations.[68] With the United Nations standards, a number of other international human rights treaties contain similar prohibitions of torture and other ill-treatment including the Convention on the Rights of the Child having a specific provision in relation to torture and ill-treatment of children (article 37), as does the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (article 10) and the Convention on the Rights of Persons with Disabilities (article 15). Although there is no specific provision on torture included in the Convention on the Elimination of All Forms of Discrimination against Women, the relevant United Nations treaty body has adopted a 'General

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[67] Greenberg, Karen J. and Dratel, Joshua L. (eds.). Introduction Lewis, Anthony. 2005. *The Torture Papers: The Road to Abu Ghraib*. Cambridge: New York, at p. 339.

[68] Association for the Prevention of Torture, Asia Pacific Forum of National Human Rights Institutions, Office of the United Nations High Commissioner for Human Rights. 2010. *Preventing Torture: An Operational Guide for National Human Rights Institutions*. Geneva and Sydney: APT, APF and OHCHR.

Recommendation on Violence against Women' that deals with torture.[69] Moreover International Refugee Law also provides an important source of international human rights law that is highly relevant to the issue of torture. The right to seek asylum in another country is one of the fundamental protections for anyone who faces the danger of persecution and there is a total prohibition on any Government returning a person to a country where they would be in danger of serious human rights violations, and torture in particular.[70]

2.1.2 Torture in Customary International Law

Since international customary law has been often equated with "general international law", it is in fact, the fundamental source of public international law and international treaties, which are supposedly a more solid and reliable source of international law, repose, as already noted, on the foundation provided for by a set of rules of general international law, which are customary in essence. In the Statute of the International Court of Justice, international custom is stated as evidence of a general practice accepted as law as well as is quoted among the sources of international law to be applied by that Court in its capacity of the main judicial organ of the United Nations (Article 38.b). However, disagreements as to other recognized or potential sources of public international law do not generally affect the understanding and the rank of 'custom' as a primary source of international law. In fact, international law cannot be conceived without its customary component since it has developed as customary law; some of its fundamental rules are customary. It is hard to imagine the validity and binding force of written international law without relying on the principles of *pacta sunt servanda* and *bona fides*, which are obviously customary.

And in a survey of the developments following the historical juncture after the end of the World War II and after which human rights had definitely become an international concern shows that when the UN Charter was adopted, including its references to human rights in its Preamble and articles 1.3 and 55.c, there was not much substance

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[69] (General Recommendation 19, 1992) of the Convention on the Elimination of All Forms of Discrimination Against Women

[70] Association for the Prevention of Torture, Asia Pacific Forum of National Human Rights Institutions, Office of the United Nations High Commissioner for Human Rights. 2010. *Preventing Torture: An Operational Guide for National Human Rights Institutions*. Geneva and Sydney: APT, APF and OHCHR.

in the commitments taken if one could not rely on some sources of non-conventional laws[71] and, as customary human rights prohibitions, proscription of torture also apply universally in all social contexts as part of the legal obligation of all members of the United Nations under the United Nations Charter to ensure "universal respect for, and observance of, human rights".[72] In December 2007, the United Nations General Assembly reaffirmed nearly unanimous and consistent patterns of legal expectation or *opinion juris*, stating that "no one shall be subjected to torture or to other cruel, inhuman or degrading treatment or punishment"[73] that freedom from such unlawful treatment "is a non-derogable right which must be protected under all circumstances, including in times of international or internal armed conflict or disturbance"[74] and also, that "a number of international, regional and domestic courts have recognized that the prohibition of torture is a peremptory norm of international law and have held that the prohibition of cruel, inhuman or degrading treatment or punishment is customary international law". Additionally, each form of ill-treatment constitutes a violation of peremptory rights and prohibitions *jus cogens* that trumps any inconsistent portion of an international agreement and more ordinary forms of customary international law. These forms of ill-treatment can never constitute lawful public acts by any state or public official. Furthermore, as customary rights and

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71 Dimitrijevic, Vojin. 2006. 'Customary Law as an Instrument for the Protection of Human Rights', available at:< http://www.ispionline.it/it/documents/wp_7_2006.pdf>, last accessed on 1st November 2012.

72 *See, e.g.*, U.N. Charter, arts. 55(c), 56; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance With the Charter of the United Nations, U.N. G.A. Res. 2625 (Oct. 24, 1970), 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971) ("Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980), observing with respect to Articles 55(c) and 56 of the Charter that the guaranties include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A) (Dec. 10, 1948) which states, in the plainest of terms, 'no one shall be subjected to torture.' The General Assembly has declared that the Charter precepts embodied in this Universal Declaration 'constitute basic principles of international law.' *Id*. (quoting G.A. Res. 2625 (XXV) (Oct. 24, 1970) [the 1970 Declaration on Principles of International Law]).

73 Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 62/148, prmbl. (18 Dec. 2007), U.N. Doc. A/RES/62/148 (4 Mar. 2008). A 2008 resolution with the same title reaffirmed this and the three points that appear here in the text at notes 9–11. *See* U.N. G.A. Res. 63/166, prmbl. (18 Dec. 2008), U.N. Doc. A/RES/63/166 (19 Feb. 2009). Similar prior resolutions with the same name reaffirmed many of the same points. *See, e.g.*, U.N. G.A. Res. 61/153, pmbl. (19 Dec. 2006), U.N. Doc. A/RES/61/153 (14 Feb. 2007); U.N. G.A. Res. 60/148 (16 Dec. 2005), U.N. Doc. A/RES/60/148 (21 Feb. 2006).

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

prohibitions *jus cogens*, each right and prohibition applies universally and without any attempted limitations in reservations with respect to a particular treaty.[75] This peremptory legal norm is deemed fundamental enough to preclude State contravention. The expansive body of prohibitive treaty law and customary international law would seem to preclude any debate on torture and render hopeless those arguments favoring the use of stronger measures of interrogation.[76] Stressing the absolute prohibition of torture and other outlawed forms of ill-treatment, the General Assembly condemned "all forms" of "treatment or punishment, including intimidation," and reiterated the fundamental expectation of the international community that such forms of ill-treatment "are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified".[77] However, one year earlier from that, the General Assembly had reaffirmed that "States are under the obligation to protect all human rights and fundamental freedoms of all persons"[78] and "must ensure that any measure taken to combat terrorism complies with their obligations under international law,[79] in particular international human rights, refugee and humanitarian law".[80] Moreover, the major distinguishing features of the rule of *jus cogens* is its indelibility indicating that prohibition of torture whether it is committed on a widespread and systematic basis, becomes a crime against humanity, or committed against a single victim, constitutes a norm of *jus cogens* along with a suggestion that the consequence of *jus cogens* status of the prohibition of torture be

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75 Paust, Jordan J. 2009. 'The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions', Vol. 43, No. 4 *Valparaiso University Law Review,* pp. 1535-1576, at pp.1535-1537.

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

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

78 Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, U.N. G.A. Res. 61/171, pmbl. (19 Dec. 2006), U.N. Doc. A/RES/61/171 (1 Mar. 2007). The same language appeared in a 2008 resolution by the same title. U.N. G.A. Res. 63/185, prmbl. (18 Dec. 2008), U.N. Doc. A/RES/63/185 (3 Mar. 2009).

79 *Id.* The 2006 resolution used the same language that appeared in a 2004 resolution with the same title. G.A. Res. 59/191, para. 1 (Dec. 20, 2004), U.N. Doc. A/RES/59/191 (Mar. 10, 2005). *See also* Human Rights and Terrorism, U.N. G.A. Res. 59/195, pmbl. (Dec. 20, 2004) (which states, in part, "*Reaffirming* that all measures to counter terrorism must be in strict conformity with international law, including international human rights standards and obligations[]") U.N. Doc. A/RES/59/195 (Mar. 22, 2005).

80 Paust, Jordan J. 2009. 'The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions', Vol. 43, No. 4 *Valparaiso University Law Review,* pp. 1535-1576, at pp.1535-1537.

that states are justified in exercising universal jurisdiction over the crime of torture irrespective of whether they are parties to the Convention Against Torture or not.

A Trail Chamber of International Criminal Tribunal for the former Yugoslavia recently stated that "at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty making power of sovereign states, and on the other hand bar states from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for states universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime."[81]

So, the principal consequence of its higher rank as a *jus cogens* norm is that the principle or rule cannot be derogated from by States through any laws or agreements not endowed with the same normative force. No treaty can be made nor law enacted that conflicts with a *jus cogens* norm, and no practice or act committed in contravention of a *jus cogens* may be "legitimated by means of consent, acquiescence or recognition"; and any norm conflicting with such a provision is therefore void.[82] It follows that no interpretation of treaty obligations that is inconsistent with the absolute prohibition of torture is valid in international law. The fact that the prohibition of torture is *jus cogens* and gives rise to obligations *erga omnes* also has important consequences under basic principles of State responsibility, which provide for the interest and in certain circumstances the obligation of all States to prevent torture and other forms of ill-treatment, to bring it to an end, and not to endorse, adopt or recognize acts that breach the prohibition.[83] Any interpretation of the ICCPR or the

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81 Wendland, Lene. 2002. *A Hand Book on State Obligations under the UN Convention against Torture*. Geneva: APT, at pp. 64-65.

82 Article 53 of the Vienna Convention on the Law of Treaties, 1969.

83 See ILC Draft Articles (40 and 41 on *jus cogens*; and Articles 42 and 48 on *erga omnes)*; see also Advisory Opinion of the ICJ on the *Legal Consequences of the Constructions of a Wall in the Occupied Palestinian Territory*, General List No. 131, ICJ (9 July 2004), § 159. In respect of the *erga omnes* character of the obligations arising under the ICCPR thereof, see General Comment 31, § 2.

CAT must be consistent with these obligations under broader international law.[84] As a principle of *jus cogens*, the prohibition of torture is among the strongest norms of international law. The ICTY also emphasized in this point that 'because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special or even general customary rules not endowed with the same normative force.'[85] And to date, no State Party to CAT has made a reservation to Article 15, reflecting the universal acceptance of the exclusionary rule and its status as a rule of customary international law.[86] Both the HRC and CAT have concluded that the exclusionary rule forms a part of the general and absolute prohibition of torture.[87] The obligations outlined above therefore create a global interest and standing against acts of torture and other forms of ill-treatment and those who perpetrate them, ensuring a united front against torture. It is against this background that the individual complaints mechanisms of the Treaty Bodies create a powerful tool for international enforcement of this universally recognized right in situations where municipal law or domestic courts have failed to give it effect.[88]

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84 Joseph, Sarah, Mitchell, Katie and Gyorki, Linda. 2006 I. "Overview of the Human Rights Committee and the Committee against Torture", in Wijkström, Boris (eds.): *Seeking Remedies for Torture Victims*: *A handbook on the Individual Complaints Procedures of the UN Treaty Bodies*. Geneva: World Organisation Against Torture (OMCT), pp. 29-49, at pp.32-34.

85 Cullen, Anthony. 2008. "Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights", Vol. 34 *California Western International Law Journal,* pp.29-46, at pp. 30-31.

86 UNHCHR. 'Treaty Body Database, Status by Country', available at: <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>, last accessed on 1st November 2012.

87 General Comment 20, § 12; *P.E. v. France*, (CAT 193/01), § 6.3; *G.K. v. Switzerland*, (CAT 219/02), § 6.10. For further detailed analysis of the history, scope and application of the exclusionary rule, see Appendix 13, Written submissions to the UK House of Lords by Third Party Interveners in the case of *A. and Others v. Secretary of State for the Home Department* and *A and Others (FC) and another v. Secretary of State for the Home Department* [2004] EWCA Civ 1123; [2005] 1 WLR 414, pp. 35-59. See also Report of the Special Rapporteur on Torture, (2006) UN doc. A/61/259, discussing the significance of Article 15 of CAT and expressing concern that the "absolute probinition of using evidence extracted by torture has recently […] come into question notably in the context of the global fight against terrorism", p. 10.

88 Joseph, Sarah, Mitchell, Katie and Gyorki, Linda. 2006 I. "Overview of the Human Rights Committee and the Committee against Torture", in Wijkström, Boris (eds.): *Seeking Remedies for Torture Victims*: *A handbook on the Individual Complaints Procedures of the UN Treaty Bodies*. Geneva: World Organisation Against Torture (OMCT), pp. 29-49, at pp.32-34.

2.1.3 Measures and Mechanisms Resisting Torture

The development of international human rights within the UN system must be seen in perspective. All celebrate the seminal date of 10 December 1948 when the Universal Declaration[89] was adopted as a symbol of the nascence of international human rights,[90] it is therefore no cause for wonder that a wide array of instruments, bodies, and mechanisms dealing with the protection of universal human rights including torture have been put in place under the auspices of the United Nations. However, there are two broad clusters of the United Nations human rights machinery[91] i.e. those established under human rights treaties[92] and those set up by the UN Commission on Human Rights, variously called "special procedures' or "extra-conventional

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

90 Dinstein, Yoram. 1995. "Human Rights: Implementation through the UN System", Vol. 89 *Proceedings of the Annual Meeting (American Society of International Law)*, pp. 242-247, at p. 242.

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

92 The treaties and treaty bodies are: International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* 21 Dec. 1965, 660 U.N.T.S. 195 {*entered into force* 4 Jan. 1969), *reprinted in* 5 I.L.M. 352 (1966) (ICERD)/Committee on the Elimination of Racial Discrimination (CERD); International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3jan. 1976) (ICESCR)/Committee on Economic, Social and Cultural Rights (CESCR); International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., No., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) (ICCPR)/Human Rights Committee (HRC); Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR 34th Sess., Supp. No. 46, U.N. Doc. A/34/36 (1980) (*entered into force* 3 Sept. 1981), *reprinted* in 19 I.L.M. 33 (1980) (CEDAW)/Committee on the Elimination of Discrimination Against Women (CEDAW Committee); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1985) (*entered into force* 26 June 1987), *reprinted in* 23 I.L.M. 1027 (1984), substantive changes noted in 24 I.L.M. 535 (1985) (CAT)/Committee Against Torture (CAT Commit tee); and Convention on the Rights of the Child, *adopted* 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989) (*entered into force* 2 Sept. 1990), *reprinted in* 28 I.L.M. 1448 (1989) (CRQ/Committee on the Rights of the Child (CRC Committee). A seventh treaty, the International Convention on Protection of the Rights of All Migrant Workers and Members of their Families, *adopted* 18 Dec. 1990, G.A. Res. 45/158, U.N. GAOR 45th Sess., U.N. Doc. A/RES/45/158 (MWC), *entered into force* on 1 July 2003. It too has a Committee, bearing the same title, which will doubtless share subject-matter jurisdiction with the Special Rapporteur on the human rights of migrants. While it will not be further studied here, what is said about existing relationships will be relevant to that one. The following works deal with the treaty system as a whole: The Future of UN Human Rights Treaty Monitoring (Philip Alston & James Crawford eds., 2000); The UN Human Rights System in the 21st Century (Anne F. Bayefsky ed., 2000); Anne F. Bayefsky, The UN Human Rights Treaty System (2001).

mechanisms," or "Charter-based bodies"[93]. The latter may be divided into country specific and thematic mechanisms.[94] Though, the current Charter-based bodies are the Human Rights Council and its subsidiaries, including the Universal Periodic Review Working Group, and the Advisory Committee,[95] the thesis will focus on the Human Rights Council and the UN Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment. And within the treaty bodies there is a discussion on the Human Rights Committee, Committee against Torture, and the Sub-Committee to the Committee against Torture. There is also a brief discussion on the other monitoring mechanisms like the International Criminal Courts and Tribunals,

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93 The following thematic mandates are in existence at the time of writing: Working Group on Enforced or Involuntary Disappearances; Working Group on Arbitrary Detention; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on the question of torture; Representative of the Secretary-General on Internally Displaced Persons; Special Rapporteur on Religious Intolerance; Special Rapporteur on the Question of the use of Mercenaries; Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression; Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance; Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography; Special Rapporteur on Violence against Women, its Causes and Consequences; Special Representative of the Secretary-General on the Situation of Human Rights Defenders; Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes; Special Rapporteur on the Human Rights of Migrants; Independent Expert on Structural Adjustment and Foreign Debt; Special Rapporteur on the Right to Education; Special Rapporteur on the Right to Adequate Housing as a component of the right to an adequate standard of living; Special Rapporteur on the Right to Food; Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People; independent expert on the question of human rights and extreme poverty; independent expert on the right to development; and Special Rapporteur on the Right to Health. The following country mandates are in existence at the time of writing: Special Rapporteur on the Situation of Human Rights in Afghanistan; Special Rapporteur on the Situation of Human Rights in Iraq; Special Rapporteur on the Situation of Human Rights in Myanmar; Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967; Special Rapporteur on the Situation of Human Rights in Bosnia and Herzegovina and the Federal Republic of Yugoslavia; Special Rapporteur on the Situation of Human Rights in the Democratic Republic of the Congo; Special Rapporteur on the Situation of Human Rights in the Sudan; Special Rapporteur on the Situation of Human Rights in Burundi; Special Representative of the Secretary General for human rights in Cambodia; independent expert on the situation of human rights in Somalia; and independent expert on the situation of human rights in Haiti. The following works deal with the special procedures system: John Carey, UN Protection of Civil and Political Rights (1985); Ton J.M. Zuijdwijk, Petitioning the United Nations (1982); M.E. Tardu, Human Rights: The International Petition System (1979); A. Dormenval, Proc?dures onusiennes de mise en oeuvre des droits de l'homme (PUF, Paris, 1991); Miko Lempinen, Challenges Facing the System of Special Procedures of the United Nations Commission on Human Rights (Institute for Human Rights, Abo Akademi University, Turku/Abo, 2001), whose chapter 8 also addresses the relationship between the special procedures and the treaty bodies.

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

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

the International Committee of the Red Cross (ICRC) and the UN Fund for Torture Victims.

2.1.3.1 Charter–based Bodies

The Human Rights Council is an inter-governmental body within the UN system made up of 47 States responsible for strengthening the promotion and protection of human rights around the globe. The Council was created by the UN General Assembly on 15 March 2006 with the main purpose of addressing situations of human rights violations and make recommendations on them. One year after holding its first meeting, on 18 June 2007, the Council adopted its "Institution-building package" providing elements to guide it in its future work. Among the elements is the new Universal Periodic Review mechanism which will assess the human rights situations in all 192 UN Member States. Other features include a new Advisory Committee which serves as the Council's "think tank" providing it with expertise and advice on thematic human rights issues and the revised Complaints Procedure mechanism which allows individuals and organizations to bring complaints about human rights violations to the attention of the Council. The Human Rights Council also continues to work closely with the UN Special Procedures established by the former Commission on Human Rights and assumed by the Council. [96] The purpose of these special procedures is to look at specific types of human rights violations wherever in the world they occur. These country-specific and thematic mechanisms include Special Rapporteurs, Representatives and Independent Experts or Working Groups. They are created by resolutions in response to situations that are considered to be of sufficient concern to require an in-depth study. These procedures report publicly to the Commission on Human Rights each year and some also report to the UN General Assembly. However, for the thesis purpose, the focus is just on the UN Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment. This mandate was established in 1985 by the UN Commission on Human Rights. It is a non-treaty, 'UN Charter-based' body, the purpose of which is to examine international practice relating to torture in any state regardless of any treaty the state may be bound by. On the basis of information received, the Special Rapporteur can communicate with governments and request their comments on cases that are raised.

[96] OHCHR. 'Background Information on the Human Rights Council', available at: <http://www2.ohchr.org/english/bodies/hrcouncil/>, last accessed on 1st November 2012.

He or she can also make use of an 'urgent action' procedure, requesting a government to ensure that a particular person or group of persons, are treated humanely. The Special Rapporteur can also conduct visits if invited, or given permission, by a state to do so. The reports of these missions are usually issued as addenda to the main report of the Special Rapporteur to the UN Commission on Human Rights.

The Special Rapporteur reports annually and publicly to the UN Commission on Human Rights and to the UN General Assembly. The reports to the Commission contain summaries of all correspondence transmitted to governments by the Special Rapporteur and of correspondence received from governments. The reports may also include general observations about the problem of torture in specific countries, but do not contain conclusions on individual torture allegations. The reports may address specific issues or developments that influence or are conducive to torture in the world, offering general conclusions and recommendations.[97]

2.1.3.2 Treaty–based Bodies

And several UN human rights conventions establish monitoring bodies to oversee the implementation of the treaty provisions. The treaty bodies are composed of independent experts and meet to consider States parties' reports as well as individual complaints or communications. They may also publish general comments on the treaties they oversee. The treaty-based bodies tend to follow similar patterns of documentation.[98] Also the Human Rights Committee established as a monitoring body by the International Covenant on Civil and Political Rights (ICCPR; article 28), the Committee comprises 18 independent experts elected by the states parties to the Covenant. It examines reports which states parties are obliged to submit periodically and issues concluding observations that draw attention to points of concern and make specific recommendations to the state. The Committee can also consider communications from individuals who claim to have been the victims of violations of the Covenant by a state party. For this procedure to apply to individuals, the state must also have become a party to the first Optional Protocol to the Covenant. The Committee has also issued a series of General Comments, to elaborate on the meaning

[97] United Nations Documentation: Research Guide. 1995-2012. 'Human Rights', available at: <http://www.hrcbm.org/NEWLOOK/research.html>, last accessed on 1st November.

[98] *Id.*

of various Articles of the Covenant and the requirements that these place on states parties.[99] And since the first treaty body, it institutes a formal follow-up mechanism which has indeed been the Human Rights Committee and at its 39th session in July 1990, it instituted the mandate of a Special Rapporteur for the Follow-Up on Views, i.e. the decisions on the merits adopted under the Optional Protocol.[100]

However, with the various other committees'[101] the Committee against Torture was established pursuant to Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee meets in two

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[99] Foley, Conor. 2003. *Combating Torture: A Manual for Judges and Prosecutors*. 1st edn. Great Britain: Human Rights Centre, University of Essex, at pp. 7-8.

[100] Schmidt, Markus G. 1992. "Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform", Vol. 41, No. 3 *The International and Comparative Law Quarterly*, pp. 645-659, at p. 651.

[101] *Committee on Economic, Social and Cultural Rights* [The Committee on Economic, Social and Cultural Rights was established by Economic and Social Council resolution 1985/17 of 28 May 1985, to supervise the implementation of the International Covenant on Economic, Social and Cultural Rights and functions like a treaty body. The Committee meets in two sessions each year in Geneva.]

Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination was established pursuant to Article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination. The Committee meets in two sessions each year in Geneva.

Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women was established pursuant to Article 17 of the Convention on the Elimination of All Forms of Discrimination against Women. The Committee meets in two sessions each year. Beginning in 2008, meetings are held in Geneva; previously all meetings were held in New York.

Committee on the Rights of the Child

The Committee on the Rights of the Child was established pursuant to Article 43 of the Convention on the Rights of the Child. The Committee meets in three sessions each year in Geneva.

Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families

The Committee on the Protection of the Rights of All Migrant Worker and Members of Their Families was established pursuant to Article 72 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Committee meets in one session each year in Geneva.

Committee on the Rights of Persons with Disabilities

The Committee on the Rights of Persons with Disabilities was established pursuant to Article 34 of the Convention on the Rights of Persons with Disabilities. The Committee meets in two sessions each year in Geneva.

With reference from United Nations Documentation: Research Guide. 1995-2012. 'Human Rights', available at: <http://www.hrcbm.org/NEWLOOK/research.html>, last accessed on 1st November.

sessions each year in Geneva[102] and is a body of ten independent experts established under the Convention. It considers reports submitted by States Parties regarding their implementation of the provisions of the Convention and issues concluding observations. It may examine communications from individuals, if the state concerned has agreed to this procedure by making a declaration under Article 22 of the Convention. There is also a procedure, under Article 20, by which the Committee may initiate an investigation if it considers there to be 'well-founded indications that torture is being systematically practised in the territory of a State Party'. However, a new Optional Protocol was adopted by the UN General Assembly in December 2002 which established a complementary dual system of regular visits to places of detention in order to prevent torture and ill-treatment (article 1). The first of these is an International Visiting Mechanism, or a 'Sub-Committee' of ten independent experts who will conduct periodic visits to places of detention. The second involves an obligation on states parties to set up, designate or maintain one or several national visiting mechanisms, which can conduct more regular visits. And the international and national mechanisms will make recommendations to the authorities concerned with a view to improving the treatment of persons deprived of their liberty and the conditions of detention.[103]

The Protocol of this foresees the creation of a Sub-Committee to the Committee against Torture. This body will be composed of ten independent members, proposed and elected by the States Parties to the Protocol (this number will be increased to 25 after the 50th ratification), with relevant professional experience and representing the different regions and legal systems of the world. In its work the Sub-Committee should be guided by the principles of "confidentiality, impartiality, non-selectivity and objectivity (article 2)". The mandate of the Sub-Committee is to visit places where persons are deprived of their liberty; it can have access not only to prisons or police stations but also, for example, to any centre for asylum seekers, to military camps, centers' for juveniles, psychiatric hospitals and transit zones of international

[102] United Nations Documentation: Research Guide. 1995-2012. 'Human Rights', available at: <http://www.hrcbm.org/NEWLOOK/research.html>, last accessed on 1st November.

[103] Foley, Conor. 2003. *Combating Torture: A Manual for Judges and Prosecutors*. 1st edn. Great Britain: Human Rights Centre, University of Essex, at pp. 7-8.

airports.[104] The Sub-Committee can only carry out "regular visits" and should establish a program and inform the State parties. In addition, it can carry out a short follow-up visits to a regular visit. In addition, there is a provision to protect people in contact with the Sub-Committee or the national preventive mechanism from any retaliation or sanction (article 15). After the visit, the Sub-Committee provides a confidential report containing recommendations, which is transmitted to the States Parties, and if relevant, also sent to the national preventive mechanism. The report is confidential but States can authorize its publication. Recommendations are not binding but the States have an obligation to examine them and enter into dialogue on implementation measures. The OPCAT also foresees the establishment of a special voluntary fund for supporting implementation of the recommendations. If States refuse to co-operate, then the Sub-Committee can propose to the UN Committee against Torture to adopt a public statement or to publish the report.[105]

2.1.3.3 Other Monitoring Mechanisms

Though there are various other monitoring mechanisms, this part only is focusing on certain *ad hoc* criminal tribunals, the International Committee of the Red Cross and the United Nations Voluntary Fund for Victims of Torture. A number of *ad hoc* international criminal tribunals have been established in recent years including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) even though national criminal courts are primarily responsible for the investigation and prosecution of crimes of torture and other criminal forms of ill-treatment. Crimes of torture as crimes against humanity and war crimes are included in the Statute of ICTY, ICTR and the Rome Statute of the International Criminal Court (ICC). The Statute of the ICC was agreed in 1998 and received the 60 ratifications necessary for it to come into effect in 2002. The ICC will, in future, be able to prosecute some crimes of torture when national courts are unable or unwilling to do so.

After the criminal courts, next comes in this part the International Committee of the Red Cross and it's an independent and impartial humanitarian body with a specific

[104] The type of place is the same as for national visiting mechanisms.

[105] Association for the Prevention of Torture. 2004. *Monitoring Places of Detention: A Practical Guide*. Geneva: APT.

mandate assigned to it under international humanitarian law, particularly the four Geneva Conventions. It is active in providing many forms of protection and assistance to victims of armed conflict, as well as situations of internal strife. In cases of international armed conflict between states party to the Geneva Conventions, the ICRC is authorized to visit all places of internment, imprisonment and labor where prisoners of war or civilian internees are held. In cases of non-international armed conflicts, or situations of internal strife and tensions, it may offer its services to the conflicting parties and, with their consent, be granted access to places of detention. Delegates visit detainees with the aim of assessing and, if necessary, improving the material and psychological conditions of detention and preventing torture and ill-treatment. The visit procedures require access to all detainees and places of detention, that no limit be placed on the duration and frequency of visits, and that the delegates be able to talk freely and without witness to any detainee. Individual follow-up of the detainees' whereabouts is also part of ICRC standard visiting procedures. Visits and the reports made on them are confidential although the ICRC may publish its own comments if a state publicly comments on a report or visit.[106]

Although the primary objective of the international community must always be the eradication of torture, the tragic situation of the victims cannot be forgotten as long as torture does in fact occur. Bringing the victims back to a normal life is a difficult task which in many places cannot be properly carried out due to lack of both financial resources and expert knowledge. In recent years, however, there has been a growing awareness of the problems of those who have undergone the traumatic experience of being tortured. With the support and encouragement of human rights groups and organizations, and sometimes with the financial help of the authorities, medical doctors and staff have developed programs to aid victims of torture. Special medical centers, entrusted with the task of helping torture victims, have been set up, or are in the process of being set up, in a number of countries.[107] In countries and regions where torture is being practiced or has been practiced in the recent past, special programs have often been organized by humanitarian groups in order to alleviate the plight of the victims. The United Nations is also responding to the challenge of

[106] United Nations Documentation: Research Guide. 1995-2012. 'Human Rights', available at: <http://www.hrcbm.org/NEWLOOK/research.html>, last accessed on 1st November.

[107] Such as, Belgium, Canada, Denmark, France, the Netherlands, Sweden, and the United States.

helping torture victims and in 1981 the General Assembly decided to set up a Voluntary Fund for Victims of Torture. The Fund is a workable and useful instrument for supplementing the existing international machinery for the protection of human rights. The task of the Fund is to solicit voluntary contributions from governments, non-governmental organizations, and individuals and then to distribute these funds as humanitarian, legal, and financial aid to torture victims and their families. These grants can be divided into different categories like grants to centers for treatment and rehabilitation of victims of torture, grants to regional programs to help victims of torture in the region and grants to programs to help victims of torture in specific countries. The fund has also received applications from centers in different countries which give aid to torture victims. They are mostly about medical facilities and are often attached to existing hospitals organized by doctors and other medical personnel. They have been set up in various western countries, usually benefit refugees who have been tortured in their countries of origin and have subsequently escaped. There are also regional projects of the fund. The programs involve individual and group therapy as well as physical rehabilitation. Community involvement in developing group activities for improving social and individual adjustment in transit centers is another important aspect of the programs. These programs provide for medical and social care during detention and after release. When necessary they provide victims with long-term medical attention after their release from detention. A special project helps the children of direct victims of repression by effectively addressing their emotional disturbances and by organizing parent workshops and group play therapy for the children. In various countries the Fund also supported human rights organizations that provide medical, psychological, psychiatric, and economic assistance. Under the program, psycho-diagnostic tests, inter-views, and case studies are offered. Treatment consists of personal and family therapy and, where necessary, private consultation and hospital treatment.[108]

2.2 Assessing National Obligations: Bringing the International Standards Home

Although international human rights law encompasses a high moral standard, its decisive power lies in holding states accountable for policy and practice through

[108] Danelius, Hans. 1986. "The United Nations Fund for Torture Victims: The First Years of Activity", Vol. 8, No. 2 *Human Rights Quarterly*, pp. 296-305, at p. 303.

voluntarily arrived at legal obligations since legally binding obligations lay down formal parameters for the promotion and protection recognized as necessary for human security and dignity.[109] "At a time when the legitimate aspirations of people in many regions of the world for greater freedom, dignity and a better life are too often met with violence and repression,[110] States are under an obligation to respect the fundamental rights of all people" and obviously including torture within the framework of their own legal systems and even if a country has not ratified a particular treaty prohibiting torture, it is general that she is in any event bound on the basis of general international law.[111] However, the Convention against Torture assumes increasing importance at present as a tool which has realistic prospects for eliminating torture through state policy.[112] Under this Convention there are substantive provisions (under articles 1-16) which State Parties must implement in their national laws. Article 2 defines the obligation of the state parties, provides for non-derogation from the provisions of the convention in time of peace and war and excludes superior orders as a justification of torture.[113] The drafters of the Convention used the word 'whatsoever' to close the door to a construction of the article which could lead to an interpretation that the exceptional circumstances referred to herein are exhaustive. What the drafters tried to say is that torture is not allowed even in time of 'public emergency', [114] and they merely gave examples of circumstances which might otherwise give rise to it.[115] However, with in the national obligations there are

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109 Maran, Rita. 2006. "Detention and Torture in Guantanamo", Vol. 33, No. 4 (106) *Social Justice*, pp. 151-181, at p. 156.

110 Ki-moon, Ban. 2011. 'Secretary-General's message on the International Day against Drug Abuse and Illicit Trafficking', available at: <http://www.un.org/apps/news/story.asp?NewsID=38851&Cr=Torture&Cr1=>, last accessed on 2nd November 2012.

111 Article 38 of the Statute of the International Court of Justice lists the means for determining the rules of international law as: international conventions establishing rules, international custom as evidence of a general practice accepted as law, the general principles of law recognised by civilised nations and judicial decisions and the teaching of eminent publicists. General international law (customary international law) consists of norms that emanate from various combinations of these sources

112 Wendland, Lene. 2002. *A Hand Book on State Obligations under the UN Convention against Torture*. Geneva: APT, at p. 54.

113 Boulesbaa, Ahcene. 1990. "The Nature of the Obligations Incurred by States under Article 2 of the UN Convention against Torture", Vol. 12, No. 1 *Human Rights Quarterly*, pp. 53-93, at p. 53.

114 Boulesbaa, Ahcene. 1999. *The UN Convention on Torture and the Prospects for Enforcement*. The Hague: Kluwer Law International, at p.79.

115 Wendland, Lene. 2002. *A Hand Book on State Obligations under the United Nations Convention against Torture*. Geneva: APT, at p.32.

various issues regarding torture to be focused on but here, it is preferred to specify just the two issues; one is the obligation to incorporate the standards in the domestic laws and the other is the procedural framework providing safeguards against torture. And these two issues for the research purpose, are more appropriate in order to find the Bangladesh's responses of torture in the area of norms and institution.

2.2.1 Ensuring Laws: Obligation to Incorporate the Standards in Domestic Law

In this part there will be a special focus on the obligation to ensure the incorporation of international standards in the domestic laws of the country dividing it in various issues like prevention, non-derogability, no justification on the basis of superior orders, duty not to expel individuals at risk of torture, criminalization and appropriate punishment, universal jurisdiction, extradition or prosecution, protection for individuals and groups made vulnerable by discrimination or marginalization. However, the obligations as set out in the Convention against Torture are stated in the following:

2.2.1.1 Non-derogability and Prevention

As for the substantive content, the core provisions concern criminal enforcement. These require state parties to ensure that torture, the attempt to commit torture and complicity in torture are offences under their criminal law and to make these offences punishable by appropriate penalties which take into account their grave nature. State must furthermore prescribe laws to punish torture committed on their territory, as well as by their nationals even outside this territory, and if appropriate, against their nationals, and in any other situations where they choose not to extradite offenders. They must also detain any alleged torturers in their territory (regardless of the location of the offence) and either submit them to the prosecuting authorities or extradite them. With these, states are obliged to prevent torture through various means and provide victims with the right to make legal complaints about torture.[116] The character of effective measures here, is left to the discretion of the concerned state, but includes making whatever changes that is necessary in order to harmonize their internal order with international standards on prevention. And thus if a state party to the convention

[116] *Ibid.,* at p.15.

fails to adopt the measures called for to execute the convention after its ratification, such state party may not cite its own laws which do not conform to the Convention to justify its policy of torture[117] or its failure to prevent it.[118] Though there are no requirements in international law as to the specific manner in which the prescribed measures must be implemented, mere adoption of preventive measures by states without any efforts directed toward their implementation is not fulfillment in good faith of the obligations under the Convention. A policy of doing nothing to implement the measures taken by the states would undoubtedly prevent the achievement of reasonable results in the prevention of torture, which is one of the objects of the Convention,[119] and could thus constitute a violation of it.[120] However, there is no standard method for implementing international treaties in national laws in the variety of legal systems prevailing in the international community. Methods include incorporation, adoption, transformation, passive transformation and reference.[121] Internal legislation or constitutional provisions may prescribe the methods of harmonizing national laws or the effect of international law on national jurisdiction. As long as these do not erode the substance of the Convention, it is the States prerogative to choose which domestic process it will undertake.[122]

2.2.1.2 Criminalization and Appropriate Punishment

The Convention also provides in article 4 that State Parties have to ensure that all forms of torture are punishable offences under their criminal law. The obligation was not extended to include a specific separate offence in national criminal law which corresponds exactly to the definition of torture laid down in article 1 of the

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117 See in the context of the ICCPR: UN Doc. CCPRE/C/I/Add. 18; Report of the Human Rights Committee 33 UN GAOR, Supp. (no.40) at 20, UN Doc. A/33/40 (1978): 'The Domestic System or Practice could not be invoked as a reason for failing to implement the Covenant.'

118 Boulesbaa, Ahcene. 1999. *The UN Convention on Torture and the Prospects for Enforcement*. The Hague: Kluwer Law International, at p.50.

119 *Ibid.,* at p.67.

120 Wendland, Lene. 2002. *A Hand Book on State Obligations under the United Nations Convention Against Torture*. Geneva: APT, at pp. 30-31.

121 For a general discussion of the various means of implementation, see Brownlie, Ian. 1998. *Princiles of Public International Law'*, 5th edn. Oxford: Clarendon Press.

122 Wendland, Lene. 2002. *A Hand Book on State Obligations under the United Nations Convention Against Torture*. Geneva: APT, at p.17.

Convention.[123] However, state parties which do not define torture or do not recognize the offence of torture in national law are confronted with the problem of the classification of a crime over which they need to establish jurisdiction and on the grounds of which they can institute prosecutions of persons who have perpetrated torture elsewhere. For this reason in its consideration of initial and periodic reports from State Parties, the CAT frequently includes in its list of recommendation that 'a definition of torture in conformity with the definition appearing in article 1 of the Convention' be inserted into domestic law as a separate type of crime.[124] In its more recent reports the CAT has deemed the inclusion of torture as an offence defined at least as precisely as article 1 of the Convention definition to be a requirement of the Convention.[125] In other words while it would not seem that the CAT'S explicit opinion is that the Convention's definition of torture should be reproduce exactly in national criminal legislation, State Parties must include a definition of torture which covers the Convention definition and make it punishable in national legislation.[126] And the punishment of torture provided for under the domestic law of a state party must not be trivial or disproportionate but must take into account the grave nature of the offence. This means that torture must be punishable by severe penalties[127] and penalties must not only be in proportion to the grave nature of the crime, [128] but also in proportion to other penalties imposed under national legislation for similar crimes.[129]

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123 Burgers, J. Herman and Danelius, Hans. 1988. *The United Nations Convention against Torture: A Hand Book on the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*. Dordrecht: Martinus Nijhoff Publishers, at p. 130.

124 *Ibid*., at pp.129- 130.

125 See, for example, initial report of Armenia (1995), Official Records of the General Assembly, Fifty-first Session, Supplement no. 44 (A/51/44).

126 CAT/C/SR.268, §2, under D, 12 (a) (Committee as a whole). See also the conclusions and recommendations to the report of Poland (CAT/C/25/Add.9): CAT/C/SR.279, §2, under D, 5 (Committee as a whole) and E, 9(Committee as a whole).

127 Ingelse, Chris. 2001. *The UN Committee against Torture: An Assessment*. The Hague: Kluwer Law International, at p. 340.

128 Burgers, J. Herman and Danelius, Hans. 1988. *The United Nations Convention Against Torture: A Hand Book on the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*. Dordrecht: Martinus Nijhoff Publishers, at p. 129.

129 Wendland, Lene. 2002. *A Hand Book on State Obligations under the United Nations Convention Against Torture*. Geneva: APT, at pp.35-36.

2.2.1.3 Universal Jurisdiction and Extradition

The Convention has an article (article 5) which makes it a cornerstone as it concerns the obligation to establish jurisdiction over the crime of torture. Based upon the recognition that torture is already prohibited under the International Law,[130] the Convention was established in order to provide a system of enforcement under which the torturer can find no safe heaven.[131] Article 5 requires and facilitates the assertion of jurisdiction by states over acts of torture including instances involving non-nationals in third State when the alleged offender is present in territories that is on the basis of so called universal jurisdiction.[132] This article also forms a foundation stone for universal reaction to torture under criminal law.[133] The provision imposes an obligation on each state party to establish jurisdiction in its domestic legislation over any alleged torturer who is found within its territory and who is not extradited pursuant to article 8 or to any of the state listed in article 5. It should be noted that the provision does not prescribe the establishment of universal jurisdiction *in absentia,* meaning that States are not obliged under the Convention to extend their jurisdiction over cases not falling under article 5, to cover cases where the alleged offender is not present in their territory. It also follows that if the offender is not present in such territory, the states are under no obligation to establish jurisdiction upon which a request for extradition could be based.[134] So the rationale of the Convention is, after all, that suspects of torture must fear prosecution[135] always and everywhere.[136] However, States are also obliged to refrain from transferring persons to another State where they would be at personal risk of torture. Article 3 of the Convention overrides any conflicting provisions of an extradition treaty which may have been concluded between the states. It is not necessary for the other State also to be a party to the

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130 Ingelse, Chris. 2001. *The UN Committee Against Torture: An Assessment*. The Hague: Kluwer Law International, at p. 342.

131 Burgers, J. Herman and Danelius, Hans. 1988. *The United Nations Convention Against Torture: A Hand Book on the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*. Dordrecht: Martinus Nijhoff Publishers, at p. 1.

132 *Ibid.,* at p. 131.

133 *Ibid.,* at p. 132. A subsequent grant of nationality to the accused is prohibited, if it is an attempt to avoid prosecution of the accused.

134 Ingelse, Chris. 2001. *The UN Committee Against Torture: An Assessment*. The Hague: Kluwer Law International, at p. 320.

135 Rodley, Nigel S. 2000. *The Treatment of Prisoners under International Law*, 2nd edn. USA: Oxford University Press, at p. 130.

136 Wendland, Lene. 2002. *A Hand Book on State Obligations under the United Nations Convention against Torture*. Geneva: APT, at pp.37-38.

Convention. And future extradition treaties concluded between these States would breach the Convention if they contained provisions conflicting with it. The nature of the activities in which a person is engaged is not a relevant consideration here, since; the protection offered by article 3 is just absolute.[137] This means that subjecting a person to a risk of torture cannot be justified on the basis of anything that person may or may not be done making it no exceptions to the rule of non-refoulement.[138]

2.2.1.4 Protection for Individuals and Groups made Vulnerable by Discrimination or Marginalization

As the principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention, non-discrimination is included within the definition of torture itself in article 1, paragraph 1, of the Convention, which explicitly prohibits specified acts when carried out for "any reason based on discrimination of any kind". The Committee emphasizes that the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture. The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States Parties must ensure that, in so far as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of race, color, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum-seekers, refugees or others under international protection, or any other status or adverse distinction. States Parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of

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137 See *G.E.T. Paez v Sweden*, Communication no.39/1996, CAT/C/18/D/39/1996.

138 Wendland, Lene. 2002. *A Hand Book on State Obligations under the United Nations Convention against Torture*. Geneva: APT, at p.33.

other positive measures of prevention and protection, including but not limited to those outlined above.[139]

2.2.1 Procedural Framework Providing Safeguards against Torture

Under the Convention against Torture, every country is having an obligation not only to incorporate the standards in domestic laws but also to provide the procedural safeguards that is to furnish a strong base to implement the laws in its full context. In order to have a full fledged picture of the procedural framework providing safeguards against torture, this part is divided into various issues like custody and other legal measures; criminal proceedings and right to a fair trial; education, information and training, ethical codes of conduct; continuous review of interrogation and detention rules and practices; prompt and impartial investigation, ex officio investigation; victims right to complain and recourse, protection of complainant and witnesses; victims right to redress and reparation, right of dependants to compensation; evidence obtained through torture inadmissible at trial; duty to prevent cruel, inhuman or degrading actions of officials, provisions applying to cruel, inhuman and degrading treatment, respect for other protection mechanisms. And these issues are discussed in the following:

2.2.2.1 Custody and Other Legal Measures

State Parties are not only obliged to established jurisdiction for the crime of torture by means of national legislation; they must actually ensure that alleged offenders are handed over to the competent authorities for the purpose of prosecution. Articles 6 and 7 oblige State Parties to take specific measures in this regard. It required States to detain any persons suspected of committing acts of torture as referred to in article 4 found in their territories when they are 'satisfied after an examination of information available to them, that the circumstances so warrant' or to take other legal measures permitted by law and in the circumstances deemed as necessary to secure the continuance custody of the accused. States have a wide degree of freedom in assessing whether the circumstances justify pre-trial detention. This assessment

[139] Committee against Torture. 2008. 'Convention against torture and other cruel, inhuman or Degrading treatment or punishment', 'General comment no. 2: Implementation of article 2 by states parties', available at: < http://www.unhcr.org/refworld/pdfid/47ac78ce2.pdf>, last accessed on 3rd November 2012.

depends in part on the domestic rules concerning evidence. Here, Parties are obliged immediately to initiate a preliminary investigation into the facts. This obligation oblige primarily when the State itself will be prosecuting the suspect. The State Party must immediately notify States which have or may have jurisdiction over any territory where offences are committed, when the alleged offender is a national of such State or when the victim is a national of such State. The obligation applies irrespective of whether the holding State intends to prosecute or extradite. The State which initiates an investigation has a duty to provide up-to-date information to other States entitled to exercise jurisdiction. She also has to provide these other States with any information pertinent to the case and clearly indicate to other States whether it intends to commence prosecution in its own law courts.[140]

2.2.2.2 Criminal Proceedings and Right to Fair Trial

State Parties are obliged to prosecute suspected torturers present in an area under their jurisdiction unless the suspected torturers are to be extradited to a State which has jurisdiction over the crime under article 5 and which intends to prosecute them itself. This is called the principle of *aut dedere aut judicare* meaning either extradite or prosecute. Failure to fulfil this obligation is a violation of International Law.[141] As the main purpose of the Convention is to ensure that there are no safe heavens for torturers, article 7 is a key component in achieving the primary aim of the Convention. However, the CAT has expressed criticism in situations involving national amnesties and impunity and stressed that in such situations the Convention must prevail over national laws resulting in impunity for torturers. Thus it must be assumed that the duty to prosecute under the Convention extends to alleged offenders who may have been granted amnesty from criminal prosecution elsewhere.[142] In case of standard of evidence, it should in all cases be the same. They should not be applied less strictly for States which have jurisdiction by virtue of the presence of the accused on their territory than for States which have jurisdiction on the basis of where the

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[140] Wendland, Lene. 2002. *A Hand Book on State Obligations under the United Nations Convention Against Torture*. Geneva: APT, at pp.42-43.

[141] Burgers, J. Herman and Danelius, Hans. 1988. *The United Nations Convention against Torture: A Hand Book on the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*. Dordrecht: Martinus Nijhoff Publishers, at p.6.

[142] Ingelse, Chris. 2001. *The UN Committee against Torture: An Assessment*. The Hague: Kluwer Law International, at p. 330.

offence took place, nationality of the accused or nationality of the victim. This article also makes it clear, however, that although the principle of universal jurisdiction has been regarded as an essential element in making the convention an effective instrument, there has been no intention to have the alleged offenders prosecuted or convicted on the basis of insufficient or inadequate evidence.[143] And under the Convention, it can be argued that in cases of 'sham trials', the sham prosecution cannot be considered to be an effective measure against torture and indeed the State would be responsible for violating its obligation under article 2 of the Convention. This means that the appropriate process guarantees implemented by the State apply to a suspect of torture. If a State is a party to the ICCPR, Articles 9, 10 14 and 15 similarly apply to a suspect of torture. This includes the right not to be arbitrarily detained, the right to a fair trial, and the right to have the case heard before an independent tribunal[144] with a presumption of innocence until proven guilty.[145]

However, Article 8 is a technical development of the possibility of extraditing a suspect of torture when a request is made to this effect. It does not suggest that State Parties must extradite their own citizens. However, if a State Party does not meet a request to extradite in the context of torture, it would be obliged under the Convention to prosecute the suspect itself. And the concerned State Party can use the Convention as a legal basis for extradition and parties which do not make extradition dependent on the existence of a treaty must mutually acknowledge torture to be an offence for which extradition is provided, subject to the conditions set down in the legislation of the requested State.[146] Furthermore, in case of assistance in criminal proceedings, supplying all evidence, mutual judicial evidence States Parties are obliged to co-operate with each other and supply all information to the relevant authorities for the purpose of institutionalizing criminal proceedings against persons accused of torture or complicity in torture. This includes taking measures which make it easier for witnesses to give testimony. Also States must assist in gathering any evidence of

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143 Burgers, J. Herman and Danelius, Hans. 1988. *The United Nations Convention against Torture: A Hand Book on the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*. Dordrecht: Martinus Nijhoff Publishers, at p. 138.

144 *Ibid.,* at p. 133.

145 Wendland, Lene. 2002. *A Hand Book on State Obligations under the United Nations Convention against Torture*. Geneva: APT, at pp. 45-46.

146 *Ibid.,* at pp.47-48.

which they have knowledge or are aware. Equally they must assist with the removal of burdensome procedures or obstacles.

2.2.2.3 Review of Interrogation and Detention Rules and Practices

Article 12 obliges the State Parties to take immediate action when there are reasonable grounds to believe that torture and other acts of cruel, inhuman and degrading treatment have been committed within their jurisdiction. The decision on whether to conduct an investigation is not discretionary.[147] The authorities have the obligation to proceed with an investigation *ex officio*, whether the origin of the suspicion, since the obligation to start an investigation is independent of the submission of a complaint in the sense of article 13.[148] It also requires that the investigation be prompt and impartial with the obligation to make the outcome of the investigation public.[149] However, Article 11 obliges States to keep under continual systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction. The CAT has emphasized that Government must exercise supervision of all places in which persons can be detained or deprived of liberty and of all regulations to which such persons are subject. This must be done systematically.[150] Prison inspection must be carried out preferably without prior notice,[151] and the supervision must be separate from police and judiciary.[152]

2.2.2.4 Victims Right to Complain and Recourse

State Parties are obliged to ensure that any individual who claims to have been subjected to torture or treated or punished in a cruel, inhuman, or degrading way has a right to lodge a complaint. However, the individual's right under article 13 is two-fold; it consists of the right to lodge a complaint to the competent authorities and of

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147 CAT/C/SR.145, § 10; CAT/C/SR.168, § 40.

148 Ingelse, Chris. 2001. *The UN Committee against Torture: An Assessment*. The Hague: Kluwer Law International, at p. 336.

149 CAT/C/SR.245, § 37.

150 Ingelse, Chris. 2001. *The UN Committee against Torture: An Assessment*. The Hague: Kluwer Law International, at p. 272; CAT/C/SR.30, § 22 and 23.

151 *Id.;* CAT/C/SR.95, § 7; CAT/C/SR.96, § 18.

152 *Id.;* CAT/C/SR.267, § 23 under E, 4 (Committee as a whole).

the right to have the complaint investigated by the authorities promptly and impartially. State Parties should protect the complainant and prevent any victimization and reprisals. Authorities should be made sensitive to the consequences of making a complaint and the vulnerable situation of the complainant. States are further required to protect any witnesses who give evidence to the investigation.[153] And in case of evidence obtained through torture, the Convention makes that inadmissible and the State Parties are obliged to ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings. This also indirectly gives the provision a preventive effect; declaring that such statements are worthless removes an important motive for the use of torture.[154] Members of the CAT have pointed out to State Parties that a range of supplementary measures must be taken in order to implement article 15 effectively. The right of a person not to make statements against him or herself must be guaranteed. Furthermore, he or she must be informed of this right.[155] The Human Rights Committee also emphasized the obligations of State Parties to the ICCPR to prohibit the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.[156]

Moreover, about the matter of victims' right to redress, reparation and right of the dependants to compensation the Convention clarifies that if the investigation referred to in articles 12 and 13 forms the start of possible penal measures, article 14 provides for civil legal recourse for victims of torture. State Parties are obliged to guarantee in their national laws that a victim of an acts of torture obtains redress and also has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.[157] However, 'redress' here involves, official recognition

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153 Wendland, Lene. 2002. *A Hand Book on State Obligations under the United Nations Convention Against Torture*. Geneva: APT, at pp. 48-52.

154 Burgers, J. Herman and Danelius, Hans. 1988. *The United Nations Convention Against Torture: A Hand Book on the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*. Dordrecht: Martinus Nijhoff Publishers, at pp. 147-148.

155 Ingelse, Chris. 2001. *The UN Committee Against Torture: An Assessment*. The Hague: Kluwer Law International, at p. 380; CAT/C/SR.245 § 44 and 47.

156 Human Rights Committee. 1992. 'General Comment No. 20: Replaces general comment 7concerning prohibition of torture and cruel treatment or punishment (Art. 7)', available at: < http://www2.ohchr.org/english/bodies/hrc/comments.htm>, last accessed on 3rd November 2012.

157 In 1989 professor Theo Van Beven was entrusted by the United Nations with a study on the right to restitution, compensation and rehabilitation for victims of gross human rights violations. This

that harm has been done to the person in question and 'compensation' generally but not always takes the form of payment of an amount of money.[158] Members of the CAT has regularly emphasized that the obligation of article 14 involves not only the provisions of material compensation and redress, but also physical, mental and social rehabilitation.[159] Also one member has spoken of the 'three M's of rehabilitation' that is 'moral, monetary and medical' rehabilitation.[160] It needs to be remembered that any amount paid in compensation must be fair and adequate and therefore must not be symbolic. Immaterial damage must also be compensated and it is on the state to decide what is fair and adequate. Moreover, the CAT has called various States to account on[161] inadequate provisions for compensation and rehabilitation of torture victims.[162]

2.2.2.5 Training and Ethical Codes of Conduct

Also State Parties are obliged to ensure that education and information regarding the prohibition against torture are fully included in the training of all persons who come into contact with detainees, be they law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individuals subjected to any form of arrest,

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ultimately resulted in draft basic principles and guidelines (1997) in which he concluded that the only appropriate response to such victims is one of reparation. Professor Van Boven's study outlined four main forms of reparation: (1) restitution (2) compensation (3) rehabilitation (4) satisfaction and guarantees of non-repetition. Professor M Cherif Bassiouni, the United Nations Commission on Human Rights Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, continued the work of Professor Van Boven and submitted to the UN Commission on Human Rights (2000) a set of draft basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law, which aims to provide guidelines for the concept of redress and reparations for victims of , *inter alia*, torture. In 2001 the commission requested that the Office of the High Commissioner for Human Rights convene a meeting with a view to finalizing the draft basic principles before the meeting of the commission in 2002. The Office of the High Commissioner for Human Rights plans to convene the meeting in 2002.

158 Rodley, Sir Nigel the former Special Rapportuer on Torture, has pointed out that 'financial compensation will not always be the appropriate remedy for human rights violations and where it is its measure will be uncertain'; Lutz, Ellen L., Hannum, Hurst and Burke, Kathryn J. (eds.). 1989. *New Directions in Human Rights*, Michigan: University of Pennsylvania Press, at p. 172.

159 See for example, CAT/C/SR. 10 § 25, Ingelse, Chris. 2001 '*The UN Committee Against Torture: An Assessment An Assessment*. The Hague: Kluwer Law International, p. 370.

160 CAT/C/SR. 36 § 21.

161 Ingelse, Chris. 2001. *The UN Committee Against Torture: An Assessment*. The Hague: Kluwer Law International, at p. 370.

162 Wendland, Lene. 2002. *A Hand Book on State Obligations under the United Nations Convention Against Torture*. Geneva: APT, at p. 54.

detention or imprisonment. The instruction should include provisions which make it absolutely clear that torture and acts of cruel, inhuman and degrading treatment or punishment are not permitted under any circumstances, whatsoever, even if a state of emergency or war exists.

2.2.2.6 Duty to Prevent CID and Respect for other Protection Mechanisms

The provision of article 16 extends the scope of application of the Convention, since they oblige State Parties to take measures to prevent not only torture but also cruel, inhuman or degrading treatment or punishment. The forms of ill-treatment other than torture do not have to be inflicted for a specific purpose, but there does have to be an intent to expose individuals to the conditions which amount to or result in ill-treatment. In order to fall within the ambit of article 16 an act must be committed by, at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity. And any wider protection mechanism relating to cruel, inhuman and degrading treatment or punishment in national and international law is not affected by the provisions of the Convention.[163]

The next chapter dealing with the 'historical discourses and practices of torture in Bangladesh' is divided into two parts; one is historical practices of torture and the other is torture in Bangladesh. Within the first part 'historical practices of torture', the study focuses on the practices of torture from the earlier to the present. There are four parts of this part that discuss the methods that were used by men to men and how the state and its system were protecting the torturers at one period of time. There is also a focus on the enlightenment period when people went for justice and stand against torture. But later on the research shows that men again went into the circle i.e. in the contemporary, they reverted to the torture of primitive humans. The second part of this chapter is totally on the practices of torture that prevails in Bangladesh where torture is mostly practiced through the state backed organizations like the law enforcing agencies and for the research purposes the police and other security forces are taken on the basis of the number of torture practiced by them. So, overall this chapter is nothing but the methods of torture used in one period or the other.

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[163] Wendland, Lene. 2002. *A Hand Book on State Obligations under the United Nations Convention Against Torture*. Geneva: APT, at pp. 56-58.

CHAPTER 3
HISTORICAL DISCOURSES AND PRACTICES OF TORTURE IN BANGLADESH

States can commit many abuses against human rights. Some of these abuses are even more serious or have worse consequences than torture. Then also it is considerable that States have to refrain from using torture as it affects the basic pillars of the legal structure of democratic States, in its very essence. Torture is prohibited, and its prohibition is absolute since it implies an outrage against human dignity. This is a non-negotiable value. In contrast to those rights defined by exclusion, physical and mental integrity, the main right representing human dignity, is a right of inclusion, shared by every human being, superior and indivisible: the torturer destroys the victim's dignity, but at the same time destroys his own dignity. This is the rationale used to explain why we legally label torture as inhumane treatment, proclaiming though not very successfully that it is improper conduct for mankind. Unrestricted respect for human dignity draws the boundary between civilization and barbarism. Torture is important because when its prohibition is not respected, all legal democratic structures become contaminated. The problem neither begins nor ends in the violation of the right to physical or mental integrity of a detainee in order to gather information: the problem begins prior to the violation and continues afterwards.[1] And in this way, whole societies become implicated in torture and its culture of violence. Rather than being an isolated event, torture, thus, only occurs "within a system." And therefore, is not reducible without remainder to the freely chosen acts of individual tormentors; it exists within a larger ecology that fosters it.[2] Cruelty, thus, is not merely a residue of some pre-modern and uncivilized past, or an accidental aberration. It can also be an inherent part of modern bureaucratic life. As Darius Rejali has shown, liberal democracies have been at the forefront of the development of torture techniques, institutions of inspection and accountability that are associated with

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1 González Castresana, Carlos .2007. "Torture as a Greater Evil", Vol. 24, No. 1, *South Central Review*, pp.119- 130, at p. 123.

2 Kolbet, Paul R. 2008. "Torture and Origen's Hermeneutics of Nonviolence", Vol. 76, No. 3 *Journal of the American Academy of Religion*, pp. 545-572, at pp. 550-551.

liberal democracy have not eradicated it. Instead, those institutions have developed methods of torture that leave no marks and are difficult to monitor.[3]

However, the history of torture may seem at first to be a steady progression of barbarous tactics, leading from one social purge to the next, but this is not completely the case. Torture, has been used in a progression from primitive methods to the present more modern styles. It has also developed extensively, both in severity and variety of methods used. But in the end, torture has gone full circle; modern forms of torture are more like those methods used by savages than anything in between. Overall, the severity of torture has fluctuated, growing and receding with the passing of each new time period, but eventually reverting to its original state.[4] Torture was fully abolished in theory and nearly abolished in practice in 19th century Europe, only to return with a vengeance in the 20th century. Torture was legal, morally accepted, and commonplace in most ancient, medieval, and early modern societies and banned in the West in the 18th and 19th centuries. During the 20th century, torture increased greatly in Europe with the rise of communist and fascist states and the coming of the two world wars, and then decreased again after the defeat of the Axis powers in 1945 and the fall of communism in 1989. In the non-Western world, torture was common throughout the 20th century, representing either an increase over or a continuation of 19th century practices. Today, torture is rarely practiced by liberal democracies against their own citizens, but occasionally practiced by liberal democracies against suspected terrorists.[5] So torture is in societies across cultures and historical time periods. Throughout human history, torture has been most frequently employed against people who are not full members or citizens of a society, such as slaves, foreigners, prisoners of war, and members of racial, ethnic, and religious outsider groups. Torture has been used only rarely against full members of a society or citizens. In these cases, torture is used only after other evidence indicates probable

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3 Kelly, Tobias. 2009. "The Un Committee Against Torture: Human Rights Monitoring And The Legal Recognition Of Cruelty", Vol. 31, No. 3 *Human Rights Quarterly*, pp. 777-800, at p. 799.

4 Frances Farmers Revenge. 2012. 'Torture Through the Ages', available at: <http://www.francesfarmersrevenge.com/stuff/archive/torture/history.htm>, last accessed on 13 November 2012.

5 Einolf, Christopher J. 2007. "The Fall and Rise of Torture: A Comparative and Historical Analysis", Vol. 25, No. 2 *Sociological Theory*, pp. 101-121, at p.104.

guilt, and in the cases of extremely serious crimes, such as heresy and treason. Torture was illegal in principle and rare in practice in 19th-century Europe, Latin America, and the United States, but increased greatly in Europe and Latin America during the 20th century.[6]

And an increase in the number and intensity of wars, and changes in the character of modern warfare, caused an increase in the torture of prisoners of war and the torture of civilian populations in occupied areas. The increase in the number of ethnically and religiously diverse states may also explain part of the prevalence of torture, particularly when these heterogeneous states are the sites of civil conflict. A change in the nature of sovereignty and an increase in state monitoring of subjects have caused a tremendous increase in the number of citizens tortured on suspicion of treason. Together, these factors offset the decrease in torture that came about due to the growth of democracy, resulting in a 20th century in which torture was as common as or more so than the 19th.[7] However, it is not clear whether the practice of torture outside of Europe followed the same pattern, and the limitations of the historical record probably render this question unanswerable. One expert on the use of quantitative data for the study of human rights states that statistics on human rights violations "simply do not exist in any systematic form" before the 20th century. Even in the 20th century, accurate statistics are impossible to obtain, given how careful governments have been to conceal their acts of torture from the international community. While the deficiencies of the historical record make it impossible to generate numerical estimates of the prevalence of torture, enough evidence exists, in the form of general historical accounts and case studies, to detect trends and draw some general conclusions.[8] Accurate and complete data on the prevalence of torture elsewhere in the 19th-century world are not available, but it seems that torture was either as common or more in the 20th century than it was in the 19th.[9] And the increase of torture in Europe, and the increase or continuation of torture elsewhere in

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6 *Ibid.,* at p.117.

7 *Ibid.,* at p. 118.

8 *Ibid.,* at p. 104.

9 *Ibid.,* at p. 117.

the world, can be explained by reference to the same rules that describe the prevalence of torture in previous eras.[10]

3.1 Historical Practices of Torture

After discussing the international standards, the thesis will focus on the torturous activities prevailing in the world including Bangladesh. Within the 'activities' there is just the methods and practices of torture. As the earlier chapter focused on the international standards i.e. the legal frameworks and standings against torture of the international community and Bangladesh's obligations according to it taking article 1 of the UN Convention Against Torture as standard, chapter 3's aim in here is to discuss the historical discourses and practices of torture in Bangladesh. Within this chapter the first part features torture devices and how these devices became the legitimate means for justice and then the part stands for the age of enlightenment period with the progression of humanism and customary international law. And at the last it will go for the contemporary torture that focuses on the emergence of the new settings of torture. So the first part is all about the torture methods, their justified use by the system, then the age of enlightenment that comes with its stand against the system by banning torture and at the last of this part the research shows that within this whole circle men again go for justifying torture with its new settings and different manifestations. The second part of this chapter is totally on the practices of torture that prevails in Bangladesh. The necessity of this part is that as there is a totally clear idea about the international standards and the methods of torture used by international community, it needs to focus on the methods and practices that Bangladesh is now using in order to torture the suspects since it is now a known country in the international community that is practicing torture with a very weak system to protest. In Bangladesh torture is practiced through the state backed organizations like the law enforcing agencies and mostly by the police and other security forces. Though there may be other organizations and personnel practicing torture in Bangladesh, the study takes just the Police, Rapid Action Battalion and certain other Special Forces for research purposes basing on the number of torture practiced by these agencies.

[10] *Ibid.,* at p. 118.

3.1.1 Featuring Torture Devices

Within the torture devices there are discussion of physical abuse, psychological torture, torture in the form of punishment, how torture is done by police and the torture methods used in detention centers and labor camps along with other methods of torture and their resulting injuries.

3.1.1.1 Physical Abuse

There are several varieties of torture in general and it is plainly evident that, since the earliest times, tremendous ingenuity has been devoted to the devisal of ever more effective and mechanically simpler instruments and techniques of torture.[11] Physical torture methods have been used throughout recorded history and can range from a beating with nothing more than fist and boot, through to the use of sophisticated custom designed devices. Remarkable ingenuity has been shown in the invention of instruments and techniques of physical torture, exploiting medical knowledge of the vulnerabilities of the human body. Other types of torture can include sensory or sleep deprivation, restraint or being held in awkward or damaging positions, uncomfortable extremes of heat and cold, loud noises or any other means that inflicts severe physical or mental pain.[12] Physical torture, however, is in most instances directed towards the musculoskeletal system, aiming at producing soft tissue lesions and pain and usually at leaving no visible or non-specific findings after the acute stage. Random beatings, systematic beating of specific body parts, strapping or binding, and suspension by the extremities, forced positions for extended periods of time, and electrical torture is frequent. Other physical torture methods include asphyxiation, near drowning, stabbing, cutting, burning, and sexual assaults including hetero and homosexual rape.[13] And it is a myth that certain torture requires complex equipment. Several methods need little or no equipment and can be improvised from innocuous household or kitchen equipment. Methods such as consummation by wild animals, impalement or confinement in iron boxes in the tropical sun are examples of other methods which

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[11] WordIQ.com. 2010. 'Torture-Definition', available at: < http://www.wordiq.com/definition/Torture>, last accessed on 15 January 2013.

[12] Wikipedia. 2011. 'Torture', available at: <http://en.wikipedia.org/wiki/Torture>, last accessed on 25 November 2012.

[13] The Parker Institute. 2013. *The need for reparation for torture survivors from a health perspective.* Denmark: The Parker Institute.

require little more than readily available items.[14] However, national and regional variations in torture practices are reported including geographical differences in the use of specific torture methods[15] and until the twentieth century, most forms of torture that were recognized as such were purely physical in nature.[16]

In the early times, the methods of torture used were very simple. People in Egypt where whipped as a means of interrogation. The Romans used the "crucifixion" method, but did not regard crucifixion as torture. The medieval Inquisition predominantly used physical torture methods, such as stretching, spiked chair, waterboarding, hanging cage, leg screw, thumb screw, flutes, masks, brands and tongs, pillory and many more.[17] For most of recorded history, capital punishments were often deliberately painful. Severe historical penalties include the breaking wheel, boiling to death, flaying, disembowelment, crucifixion, impalement, crushing, stoning, execution by burning, dismemberment, sawing, scaphism, or necklacing.[18] However, torture takes many forms because men have applied their ingenuity assiduously and creatively to that end. Simple beating with fists or boots is the most favored form of torture. Sometimes various implements such as bags or plastic tubes filled with sand and whips are used. Indeed, with the additional possibilities made available through modern technology, forms of torture are almost unlimited. Certain methods of interrogation may constitute torture and inhuman treatment.[19]

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[14] WordIQ.com. 2010. 'Torture-Definition', available at: < http://www.wordiq.com/definition/Torture>, last accessed on 15 January 2013.

[15] The Parker Institute. 2013. *The need for reparation for torture survivors from a health perspective.* Denmark: The Parker Institute.

[16] Frances Farmers Revenge. 2012. 'Torture Through the Ages', available at: <http://www.francesfarmersrevenge.com/stuff/archive/torture/history.htm>, last accessed on 13 November 2012.

[17] Atlas of Torture. 2009. 'History of the Prohibition of Torture and Torture Methods', available at: < http://www.univie.ac.at/bimtor/prohibitionoftortureandilltreatment/355>, last accessed on 20 November 2012.

[18] Wikipedia. 2011. 'Torture', available at: <http://en.wikipedia.org/wiki/Torture>, last accessed on 25 November 2012.

[19] Odeku, Kolawole Olusola. 2008. *In Search of a Regime of Responsibility and Accountability for Perpetrators of Torture with Reference to Persons with Special Responsibility for Protecting Human Rights*. South Africa: University of Fort Hare. (Unpublished PhD thesis).

However, some of the most frequently used techniques of the "new torture" include[20]: submarine,[21] electric shock,[22] body extension,[23] water pipe, [24] falange,[25] extraction,[26] sexual abuse,[27] roll-up[28] etc. There are also other methods of torture like liquids, solids and stinging powder and it has been observed that hot wax, poured onto pregnant women's bellies would amount to torture. Sand-filled sacks could be used for beating victims because it was well known that this method left no traces. Also, water, either boiling hot freezing cold or salty, was most frequently used. Burns were inflicted through the use of cigarettes, as well as candles, soldering lamps, fire launchers; open fire, ovens, etc. These are all effective torture instruments. Exposure to the sun or to freezing temperatures could also function as an indirect instrument of torture. Also animals, insects and reptiles are used as torture 'instruments'. "Torture

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20 Lippman, Matthew. 1979. "The Protection of Universal Human Rights: The Problem of Torture", Vol. 1, No. 4 *Universal Human Rights*, pp. 25-55, at pp. 33-34.

21 Here, the prisoner's head is immersed continuously in a tub of filthy water, urine, excrement, and petroleum while the victim's sexual organs are squeezed.

22 Electric torture is one of the most violent weapons used by torturers and are delivered to the sensitive portions of the victim's body. The advantage of electricity is that, unlike flesh-and-blood, the electro shock machine is indefatigable; electric shocks can be applied to the most intimate bodily parts genitals, breasts, lips, ear lobes resulting into both mental and physical injuries. The efficiency of electro-shock devices have been attested to by the torturers. These instruments are regularly used because "The main thing is not to leave any marks. It is efficient and gives us pleasure." The electric torture industry has registered a variety of devices: electrodes, introduced in teeth cavities or other orifices; the electro-shock machine; electric truncheons inserted in the mouth or the anus; electrified shields and handcuffs; electric cables, etc. where it sends electric shocks to the victims whose heads are covered with steel helmets so that their screams could be amplified.

23 The victim is fastened by the knees or ankles to a bar suspended from the ceiling and beaten or subjected to shock treatment or sexually abused. Often another prisoner or the victim's spouse is forced to witness the torture. Eventually, the victim is "cut down" and experiences severe pain on impact with the floor resulting from the fact that all the blood has drained into the victim's arms.

24 Here, the victim is bound and secured. Then the eyes are bandaged, the nose is plugged up, a tube is thrust into the mouth, and a strong stream of water is injected into the mouth until the victim is "inflated" and loses consciousness. The victim is then "pumped out" and the process is again initiated.

25 Under this process, the prisoner is secured to a bench and the soles of the prisoner's feet are beaten with sticks or pipes by five or six men. Such prolonged beating leads to a painful swelling of the feet, but, other than broken and fractured bones, no lasting overt physical impairment is likely to result. During the torture process the victim is forced to run around the bench periodically and is continuously beaten. These beatings are accompanied by pouring water down the victim's mouth and nose, rubbing detergent, soap, or pepper in the victim's eyes, banging the victim's head on the bench or floor, and beating other portions of the victim's body.

26 Extraction here is the pulling hair, nails, tongue, teeth, breasts and genitals that leads to pain, tenderness and local injuries.

27 Women are raped and objects such as bottles are jammed into females' vaginas. Males' genitals are subjected to beatings and electric shock treatment. In one torture a string is tied to the prisoner's testicles and the other end of the string is tied to a jack which is "dropped."

28 The prisoner is tightly strapped into a bed with damp sheets; the sheets dry out and squeeze and suffocate the individual. This process is repeated over a period of days

inflicted by animals had a broad scope. Most frequently used were dogs that had been trained to maim and rape. Snakes; especially cobras and boas were used mostly for psychological effect, insects like ants and bed bugs were left to crawl on the victim's body or inserted into various bodily orifices such as the anus, chameleons and other lizards were introduced in the victims' trousers so as to scratch and bite them. Also mice and rats forcefully introduced into victims' mouths. Sometimes having their tails set on fire, such rodents were pumped through hoses inside the victim's larynx. Another method is the insertion of live rats inside pipes: since at one end, the pipes were burning, the rodents would have had to dig their way to salvation through the victims' chests. And it is surprising that music and noise can sometimes be used to serve as a means of torture. Victims would be exposed to shrill and aggressive sounds which were bound to cause deafness. This technique was called the music of terror. The victim's own voice sometimes acquired the paradoxical function of brainwashing the individual at sound level.[29] Torture victims also may be forced to ingest chemicals or other products such as broken glass, heated water, or soaps that cause pain and internal damage. Irritating chemicals or products may be inserted into the rectum or vagina, or applied on the external genitalia. Cases of women being punished for adultery by having hot peppers inserted into their vagina were reported in many parts of the world.[30]

3.1.1.2 Psychological Torture

The diversity, heterogeneity or universality of certain methods of torture provides no useful indication of their severity as torture consists not only in physical violence, but also and above all in the application of a whole series of methods of intimidation, humiliation and degradation designed to subjugate the victim to the point where all capacity for judgment, resistance and sometimes even survival is lost. Torture can lead to a mental breakdown stemming from a combination of psychological and physical conditions to which the victim is subjected.[31] This form of psychological

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[29] Odeku, Kolawole Olusola. 2008. *In Search of a Regime of Responsibility and Accountability for Perpetrators of Torture with Reference to Persons with Special Responsibility for Protecting Human Rights*. South Africa: University of Fort Hare. (Unpublished PhD thesis).

[30] WordIQ.com. 2010. 'Torture-Definition', available at: < http://www.wordiq.com/definition/Torture>, last accessed on 15 January 2013.

[31] Nicole, Laurent. 1987. "Torture: The Need for a Dialogue with Its Victims and Its Perpetrators", Vol. 24, No. 3 Journal *of Peace* Research, pp. 315-322, at p. 318.

torture was known as the Second Degree.[32] In more modern times, psychological torture has all but replaced physical torture. Time in jail, for example, is often more paralyzing than many forms of physical torture.[33] Psychological torture, however, such as causing panic and mental anguish can be inflicted without doing any actual physical harm to the victim. In practice the distinction between physical and psychological torture is blurred. Whereas physical torture inflicts severe pain or suffering on the victim's body, psychological torture aims at violating the victim's psychological needs by the use of extreme stressors. As physical torture, psychological torture also inflicts severe pain or suffering and even if no physical traces are left, victims often suffer from post-traumatic symptoms for a long period of time.[34] However, examples of psychological torture techniques include[35]: sensory deprivation,[36] threats,[37] declarations,[38] nudity,[39] drug abuse[40] etc. And as terrible as the physical wounds are, the psychological and emotional scars are usually the most devastating and the most difficult to repair. Many torture survivors suffer recurring nightmares and flashbacks. They withdraw from family, school and work and feel a

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[32] Mannix, Daniel P. 1964. *The History of Torture*. New York: Dell Publishing Company, Inc., at p. 77.

[33] Scott, George Ryley. 1939. *The History of Torture Throughout the Ages*. London: Luxor Press, at p. 4.

[34] Atlas of Torture. 2009. 'History of the Prohibition of Torture and Torture Methods', available at: < http://www.univie.ac.at/bimtor/prohibitionoftortureandilltreatment/355>, last accessed on 20 November 2012.

[35] Lippman, Matthew. 1979. "The Protection of Universal Human Rights: The Problem of Torture", Vol. 1, No. 4 *Universal Human Rights*, pp. 25-55, at pp. 34-35.

[36] A hood is placed over the prisoner's head or the prisoner is incarcerated in a drab, monochromatic environment with no sensory stimulation. These sensory deprivation techniques are occasionally accompanied by a bread and water diet, sleep deprivation, and constant maintenance of a loud, monotonous whining sound throughout the prison. The prisoner is forced to maintain the "stroika position" (spread-eagle) against the wall for up to twenty-four hours. Upon collapse, the prisoner is abused and forced to resume the position.

[37] Prisoners are threatened with maiming, death, and rape of themselves or their families. Mock executions often are conducted, and prisoners are forced to witness the torture of their fellow prisoners.

[38] Individuals are forced to sign denunciations of their family, spouse, or political beliefs. This induces a sense of moral compromise.

[39] Prisoners are forced to remain in a state of nudity in cold, damp, often insect-infested cells; or the prisoner is forced to share the cell with psychiatrically deranged mental patients.

[40] Prisoners are injected with depressant drugs (for example, haloperidol, aminazine, and triftazine) which lead to moodiness and depression. Other drugs which have been used (for example, scoline) can induce paralysis and inhibit breathing, and others (for example, apomorphine) may provoke vomiting. Injection of prisoners with drugs usually used to treat schizophrenia (for example, sulphazine) may lead to toxic inflammation of the liver, elevation of intraocular pressure, fluctuations of arterial pressure, tension and cramping of the muscles, stomach cramps, headaches, depression, and fever and many more

loss of trust.[41] Psychological torture uses non-physical methods that cause psychological suffering. Its effects are not immediately apparent unless they alter the behavior of the tortured person. Since there is no international political consensus on what constitutes psychological torture, it is often overlooked, denied, and referred to by different names. Psychological torture is less well known than physical torture and tends to be subtle and much easier to conceal. Torturers often inflict both types of torture in combination to compound the associated effects.[42]

3.1.1.3 Torture as Punishment

The use of torture devices may be traced back as far as 1180 AD when knights returned from the First Crusade. Some of the devices are simple. The use of chains to place the human body in uncomfortable and excruciating positions that led often to a slow and painful death was a common punishment for political prisoners.[43] In the great inquisition, however, the accused were, rarely allowed to see witnesses against them, and were subjected to such tortures as pulleys and the rack stretching limbs, and the treatment of body parts with fire. [44] For most of recorded history, capital punishments were often cruel and inhumane. In many indeed, in nearly all of the penalties and punishments of past centuries, derision, scoffing, contemptuous publicity and personal obloquy were applied to the offender or criminal by means of demeaning, degrading and helpless exposure in grotesque, insulting and painful 'engines of punishment', such as the stocks, bilboes, pillory, brank, ducking-stool or jougs. Thus confined and exposed to the free gibes and constant mocking of the whole community, the peculiar power of the punishment was accented. Kindred in their nature and in their force were the punishments of setting on the gallows and of branding; the latter, whether in permanent form of searing of flesh, or by mutilation;

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41 United Nations. 1998. 'International Day in Support of Victims of Torture', available at:<http://www.un.org/events/torture/bkg.htm>, last accessed on 25 November 2012.

42 Wikipedia. 2011. 'Torture', available at: <http://en.wikipedia.org/wiki/Torture>, last accessed on 25 November 2012.

43 Farina, Christine. 2001. "A Review of Torture Through The Ages", Vol. 9, No. 1 *Journal Of Criminal Justice And Popular Culture*, Pp. 31-32, At P.31.

44 Scott, George Ryley. 1939. *The History of Torture Throughout the Ages*. London: Luxor Press, at p. 66.

or temporarily, by labeling with written placards or affixed initials.[45] Any method of execution which involves, or has the potential to involve, a great deal of pain or mutilation is considered to be torture and unacceptable to many who support capital punishment.[46]

However, torture was usually conducted in secret, in underground dungeons. By contrast, torturous executions were typically public, and woodcuts of prisoners being hanged, drawn and quartered show large crowds of spectators. Severe historical penalties include[47] breaking wheel, boiling to death, flaying, slow slicing, disembowelment, crucifixion, impalement, crushing, stoning, execution by burning, dismemberment, sawing, decapitation, scaphism, necklacing,[48] beheading, burning at the stake, disembowelment, drawing and quartering, electric chair, firing squad, gas chamber, hanging (if not done properly), lethal injection (supposed to be next to painless, but agonizingly painful if the anaesthetic drugs fail to keep the paralysed victim unconscious as he/she dies), the breaking wheel etc.[49] However, execution by elephant was, for thousands of years, a common method of capital punishment in South and Southeast Asia, and particularly in India. Asian Elephants were used to crush, dismember, or torture captives in public executions. The animals were trained and versatile, both able to kill victims immediately or to torture them slowly over a prolonged period. Employed by royalty, the elephants were used to signify both the ruler's absolute power and his ability to control wild animals. The practice was eventually suppressed by the European empires that colonized the region in the 18th and 19th centuries. While primarily confined to Asia, the practice was occasionally adopted by Western powers, such as Rome and Carthage, particularly to deal with mutinous soldiers. Crushing by elephant has been done in many parts of the world, by both Western and Asian empires. The earliest records of such executions date back to

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45 Frances Farmers Revenge. 2012. 'Torture Through the Ages', available at: <http://www.francesfarmersrevenge.com/stuff/archive/torture/history.htm>, last accessed on 13 November 2012.

46 WordIQ.com. 2010. 'Torture-Definition', available at: < http://www.wordiq.com/definition/Torture>, last accessed on 15 January 2013.

47 Farina, Christine . 2001. "A Review of Torture Through The Ages", Vol. 9, No. 1 *Journal Of Criminal Justice And Popular Culture*, Pp. 31-32, At P.31.

48 Wikipedia. 2011. 'Torture', available at: <http://en.wikipedia.org/wiki/Torture>, last accessed on 25 November 2012.

49 WordIQ.com. 2010. 'Torture-Definition', available at: < http://www.wordiq.com/definition/Torture>, last accessed on 15 January 2013.

the classical period. However, the practice was already well established by that time and continued well into the 19th century. During the native dynasty it was the practice to train elephants to put criminals to death by trampling upon them, the creatures being taught to prolong the agony of the wretched sufferers by crushing the limbs, avoiding the vital parts.[50] And last of all the Arthashastra acknowledges four types of tortures which include six punishments, seven kinds of whipping, two kinds of suspension from above and water tube. It further gives a description of each form of torture and the punishment incurred upon the guild. Each day a fresh torture can be employed. Regarding those who have committed crimes or those who rob in accordance with the threat previously made by them, or have been caught using the stolen items, or are caught in the very act of theft itself or have attempted to seize the king`s treasure or have committed a couple of crimes shall be subject to any of the above mentioned punishments for either once or for multiple times.[51]

3.1.1.4 Torture by Police

Some methods employed by law enforcement agencies and states are seen by some as being tantamount to torture.[52] However examples of such stress and duress tactics used by police include[53]: twisting arms and putting face in feces,[54] suffocation,[55] digging in bamboo sticks,[56] the electronic baton,[57] the foot shackle,[58] the pear,[59] the

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50 Wikipedia. 2012. 'Execution by Elephant', available at: < http://en.wikipedia.org/wiki/Execution_by_elephant>, last accessed on 28 November 2012.

51 India Netzone. 2010. 'Trial and Torture to Elicit Confession, Removal of Thorns, Arthashastra', available at: <http://www.indianetzone.com/51/trial_torture_elicit_confession.htm>, last accessed on 9th December 2012.

52 WordIQ.com. 2010. 'Torture-Definition', available at: < http://www.wordiq.com/definition/Torture>, last accessed on 15 January 2013.

53 Frances Farmers Revenge. 2012. 'Torture Methods', available at: <http://www.francesfarmersrevenge.com/stuff/archive/torture/history.htm>, last accessed on 13 November 2012.

54 In order to reveal their names and addresses, the police will twist victims arms back to the most extreme position, pull their hair and bang their heads against the wall. Sometimes the police will press the head of the down above a toilet bucket filled with feces to force the victims to smell it, or even emerse their faces in the feces.

55 When police inflict corporal punishment while trying to force the accused into "confessions," they often use a plastic bag to suffocate them. This is a cruel and easily administered torture.

56 The police hammer sharp bamboo sticks into the fingers of the suspects through the tips of the fingernails. In the process of the hammering, the fingernail will be completely torn off. As one's exposed fingernail beds are extremely sensitive, the hammering process causes an excruciating pain that one cannot even begin to describe. The police begin by hammering the bamboo stick into just one finger. If the suspect still refuses to allow his will to be bent, the police will then hammer bamboo sticks into more and more fingers until they have brutally mutilated all ten fingers.

headcrushers[60] etc[61]. In virtually all cases, detainees were forced to disrobe and were then beaten with leather straps or wooden sticks. These acts were so common that most of them did not even consider them acts of torture, but rather the expected consequences of being detained at a police station. After beatings, the most common form of torture of the respondents was leg stretching.[62] In case of suspension, detainees' hands were tied behind their backs, and the tied wrists were attached to a rope strung over a pulley or bar in the ceiling or a tree branch. They were either pulled up or made to stand on a table or chair that was pulled out from under them. With this torture, the head and upper body tilt forward and down causing excruciating pain in the shoulders. Certain victims described having weights attached to their feet or persons pulling down on their feet to increase pressure on the shoulders resulting, dislocated shoulders, broken arms etc. During this torture, it was reported that being suspended by the hair, by a rope through the upper arms, by the ankles, being beaten while suspended, also was subjected to electric shocks, to petrol being poured on the

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57 It is the most-used torture method by policemen and jail guards to persecute suspects. Electronic batons of high voltage like 30,000 volts are used to shock practitioners' sensitive and private places, like the mouth, the root of the ear, the central part of the sole of the foot, center of the palm of the hand, genitals, and nipples. Sometimes, multiple batons are used together to torture suspects.

58 It is combined with handcuffs. One hand is handcuffed to the other hand between two legs. The shackle weighs over 20 pounds. The policemen torture determined suspects this way for a long time. The victims who are tortured this way cannot go to sleep, walk, stand, use the bathroom, or eat a meal. They have to walk in a half-squatting and bowing position.

59 It was another device that expanded after being inserted orally, anally, or vaginally. It was used to rupture the sensitive membranes and tissues of these areas. With much of the damage being inside the body cavity, "confessions" thus extracted could seem to be freely given. This procedure has remained essentially unchanged from the Middle Ages until today. The victim is hoisted up in the manner shown in the accompanying illustration, and lowered onto the point of the pyramid in such a way that his weight rests on the point positioned in the anus, in the vagina, under the scrotum or under the coccyx (the last two or three vertebrae). The executioner, according to the pleasure of the interrogators, could vary the pressure from zero to that of total body weight.

60 It exerted tremendous force on the head by means of a screw. This could be used to force a confession or as a means of execution. Some headcrushers had a sharp point at the tip of the screw which would drive into the skull, anchoring it for the pressure of the skull plate.

61 Frances Farmers Revenge. 2012. 'Torture Devices, available at: <http://www.francesfarmersrevenge.com/stuff/archive/torture/history.htm>, last accessed on 13 November 2012.

62 For this torture, detainees were forced to sit on the ground with their hands tied behind their backs. One police officer stood behind the detainee, pulling his or her head back by the hair, inserting his foot between the detainee's tied hands and low back while forcing his knee into the mid-back. Two other policemen, one on each side, stretched the legs as far apart as possible. And also while their legs were stretched they were kicked in the groin and thighs by officers wearing heavy boots resulting dislocation of hips; knees; torn muscles or skin; ankle fracture.

skin, and to having motor oil being pushed up his anus. It was also reported that victims were tortured with rollers that were applied to the thighs.[63]

Several other forms of torture like electric shocks administered using wires that touched their earlobes, genitals, toes, and fingers,[64] being subjected to mock executions, forced into positions (e.g., with legs in wooden clamps), pulled by the hair with the head smashing against a wall being submerged under water to near asphyxiation, having water hosed up the nose, having chili peppers forced into the anus, placing a large, heavy log behind the neck while the hands are tied together overhead, pulling out fingernails and toenails, being poked with thick needles, having acid or gasoline poured on the body, being raped and having to watch while relatives are tortured.[65] It was reported that detainees suspected of terrorism are subject to prolonged sleep deprivation; prolonged sight deprivation or sensory deprivation; forced, prolonged maintenance of body positions that grow increasingly painful; confinement in tiny, closet-like spaces; exposure to temperature extremes, such as in deliberately overcooled rooms; prolonged toilet and hygiene deprivation; and degrading treatment, such as forcing detainees to eat and use the toilet at the same time.[66]

However, among the reasons cited for arrest and torture, mostly were, police wanted information about militants, to punish persons who had allegedly supported the militants, to find out identities or locations of militants, for allegedly providing food and shelter to militants, because of alleged possession of illegal weapons, for presumed political activities, for police extortion or as a result of interpersonal conflict, to discourage them from pursuing a wrongful death claim for a relative who

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63 For this method, the detainee was seated on the ground in the position described for leg stretching. A large, usually wooden, roller (iron rollers were used in five incidents and a smaller stick was used once) was rolled back and forth over the thighs by two police officers, one pushing down on each end. Sometimes the roller was rolled on the back from the shoulders to the feet; over the back of the thighs and calves, and sometimes each thigh was rolled separately and one or more persons standing on the roller to increase the pressure.

64 A motor-scooter battery or small generator produced the current, detainees were beaten on the soles of their feet, were burned, usually with hot metal rods, and had a bar placed behind their knees with their heels forced up toward their buttocks.

65 Laws, Ami and Iacopino, Vincent. 2002. "Police Torture in Punjab, India: An Extended Survey", Vol. 6, No. 1

Health and Human Rights, pp. 195-210, at pp. 200-204.

66 Wikipedia. 2011. 'Torture', available at: <http://en.wikipedia.org/wiki/Torture>, last accessed on 25 November 2012.

died in police custody and sometimes was tortured for silly reason like working as a human rights lawyer.[67]

3.1.1.5 Torture in Detention Centers and Labor Camps

Within the torture methods used in detention centers and labor camps the following are the commons[68]: water dungeons,[69] stripped naked and shocked,[70] force feeding,[71] backing up an airplane,[72] carrying a sword on the back,[73] tying the ropes,[74] hanging up once,[75]etc. Other means of torture used included the thumbscrew, the boot, the caschie-laws, the langirnis, the narrow-bore, the iron collar, the pynebanis, the bilboes (which compressed the ankles), the pilliwinks (which squeezed the fingers), and the

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67 Laws, Ami and Iacopino, Vincent. 2002. "Police Torture in Punjab, India: An Extended Survey", Vol. 6, No. 1

Health and Human Rights, pp. 195-210, at pp. 200-204.

68 Frances Farmers Revenge. 2012. 'Torture Methods', available at: <http://www.francesfarmersrevenge.com/stuff/archive/torture/history.htm>, last accessed on 13 November 2012.

69 The victims in here have to pass through many days of darkness while immersed in chest deep water. Often the water is dirty or even routed from sewage lines and sometimes they have died under such conditions.

70 Under this method victims have endured the humiliation of hanging, beating, electric baton shocks, and of being stripped naked. The police strips the suspects, and then use a homemade electric shocking device to torture them. The size and shape of this shocking device is like that of a masonry brick, and it carries a much higher voltage than regular electric batons. The skin will break open and bleed in every place that receives a shock from that device.

71 Some detention centers and labor camps force feed the victims who have gone on hunger strikes. Police instruct the prisoners to force the victims' mouths open, pry their teeth apart, and force-feed them with a highly concentrated salt-water solution. After having lips torn and teeth pried apart, the insides of the victim's mouth and throat are often severely injured.

72 Criminal cell leaders often use this persecution and torture method on the instigation of policemen and jail guards. This torture requires to bend over while holding the legs straight. Then, with the feet close together, the arms are lifted to the highest position possible, with the hands touching the wall. If practitioners can't bear it, the prisoners in the cells and designated torturers will gang up to beat them. While chained in this way, guards often use electronic batons, rubber tubes, and "wolf teeth" sticks to beat practitioners. The insults and beatings given to female practitioners are often even more brutal.

73 It is one of the most cruel methods to torture victims. In order to prevent suspects from doing exercises or whenever they do not obey the unreasonable requests of the guards, the policemen in the detention centers and forced labor camps apply this inhumane torture to persecute practitioners. Usually, this position causes extreme pain in just 20 minutes. However, the policemen handcuff practitioners this way for as long as 4 hours.

74 It is another inhumane torture method applied during interrogation and during the persecution of determined victims in forced labor camps, detention centers and police departments. With both arms tightly tied behind the back, both feet off the ground or only the toes barely touching the ground, one is hung from a high place with rope. Sometime there are sharp sticks on the rope. When the rope is tightly fastened, the rope will cut into one's flesh, which is extremely painful.

75 It means one time of tying the rope. As a severe punishment, this torture was only applied twice at the most to criminals who tried to escape from the detention centers. But the police tie practitioners with the rope 8 or 9 times.

brakes, a device used to break the victims' teeth. Victims were burned with fire, had gauze forced down into their stomach, and had water poured into their throat. Sometimes prisoners who refused to plead guilty were often subject to *peine forte et dure*, or pressing to death. This was used to extract confessions.[76] However, torture method has also been invoked in defence of detention facilities in the 'War on Terror' and those detained are portrayed as having information about ticking terrorists, terrorist networks and potential threats that must be mined through interrogation, or 'enhanced interrogation techniques': the latest euphemism for interrogation involving torture. They included hooding; dietary and environmental manipulation, including extremes of temperature or introducing unpleasant smells; the adjustment of sleeping times; threat of transfer to a country that the detainee is likely to fear would subject them to torture or death; forced shaving of hair or beard; prolonged standing, but not for more than four hours in a 24 hour period; sleep deprivation, allowing individuals to rest briefly but repeatedly waking them, but not for longer than four days in succession; forced nudity, with no time limit placed on this; increasing anxiety through the presence of a dog without directly threatening action etc.[77]

3.1.2 Torture in the Middle Age: A Central Component of Judicial System

This part specially provides that during the Middle Age torture is used not only as a method but also as a part of judicial system. It became a central component of judicial system. And centering in Royal Palaces and Castles of Nobility, standing in the deterrent footing torture at that time became an option for mob justice and a legitimate means for punishment.

3.1.2.1 Centering in Royal Palaces and Castles of Nobility

Throughout history torture chambers have been used in a multiplicity of ways starting from Roman times. Torture chamber use during the Middle Ages was frequent. Religious, social and political persecution led to the widespread use of torture during that time. Torture chambers were also used during the Spanish Inquisition and at the

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[76] Frances Farmers Revenge. 2012. 'The Tower of London', available at: <http://www.francesfarmersrevenge.com/stuff/archive/torture/history.htm>, last accessed on 13 November 2012.

[77] Blakeley, Ruth. 2007. "Why Torture?", Vol. 33, No. 3 *Review Of International Studies,* pp. 373-394, at p. 377.

Tower of London. However, a torture chamber is a room where torture is inflicted. The medieval torture chamber was windowless and often built underground, was lit by a few candles and was specifically designed to induce "horror, dread and despair" to anyone but those possessing a strong mind and "nerves of steel". Historically, torture chambers were located in royal palaces, in castles of the nobility and even buildings belonging to the church. They featured secret trap-doors which could be activated to throw victims into dark dungeons where they remained and eventually died. The skeletal remains of people who disappeared were strewn on the floor of the hidden dungeons. Other times the dungeons under the trap-doors included pits of water where the victim was thrown to drown after a lengthy torture session on the chamber above. The torture chambers sometimes were specifically constructed with thick walls so that the screams of the victims could not penetrate them and no sound could be heard from the outside. Other more sophisticated designs included walls that curved in such a fashion as to reflect the screams of the victims so that the sounds would not be carried to the exterior. The mere presence of the torture chamber was used as a form of intimidation and coercion. The victims were first shown the chamber and if they confessed they would not be tortured inside it. Other times the torture chamber was used as the final destination in a series of prison cells where the victims would gradually be moved from one type of cell to another, under progressively worsening conditions of incarceration, and if they did not recant in the earlier stages they would finally reach the torture chamber. However, the traditional torture users of modern times have been the dictatorship governments and the military junta. These regimes have also used torture chambers and reportedly tortured those whom he deemed as a threat. The isolation felt inside the torture chambers was so strong that it was described as another galaxy. Some rooms were hidden behind fake walls, or concealed in basements. Pictures of the dead, with their necks slashed, their eyes gouged out and their genitals blackened, were located in many torture chambers.[78]

3.1.2.2 Standing in the Deterrent Footing

The use of torture predates the Middle Ages and was systematically regulated by law with the express purpose of obtaining a confession. While torture disappeared as a

[78] Wikipedia. 2012. 'Torture Chamber', available at: <http://en.wikipedia.org/wiki/Torture_chamber>,last accessed on 20 November 2012.

formal and expressly legalized interrogation technique in most legal system throughout the 19th century, it was legalized again during the fascist and national socialist regimes, colonial administration and most recently in the Bush administration's 'war on terror'.[79] The law of primitive humans used exile for punishing major offenses.[80] Alone in the wilderness, the person would most assuredly meet an untimely death. Punishment was thus the removal of criminals from society. As time went on and civilizations grew, the need for a code of laws came. Any actual tortures inflicted would only be committed against enemy tribes and animals.[81] In many cultures, religious sacrifices were precursors to torture.[82] The early European codes were usually based on the principle of *Lex Talionis*, the idea of an eye for an eye.[83] Punishment for crimes should be similar to the offense that would form the basis of Hebrew, Greek and Roman legal systems.[84] The Greeks and others of their time still operated under *Lex Talionis*.[85] At the time, torture was mainly used as a means of extracting vengeance for real or imagined wrongs,[86] public displays such as stoning and crucifixion were used mainly to deter other criminals.[87] Karen Farrington writes of this that 'the suffering of the victim was maximized to demonstrate society's outrage of a criminal and deter others'.[88] The savagery of torture had not really entered into the European mind set yet. All this, however, would soon change[89] and in certain cases methods like executions by elephant were often held in public as a

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79 Atlas of Torture. 2009. 'History of the Prohibition of Torture and Torture Methods', available at: < http://www.univie.ac.at/bimtor/prohibitionoftortureandilltreatment/355>, last accessed on 20 November 2012.

80 Mannix, Daniel P. 1964. *The History of Torture*. New York: Dell Publishing Company, Inc., at p. 12.

81 Scott, George Ryley. 1939. *The History of Torture Throughout the Ages*. London: Luxor Press, at p. 12.

82 *Ibid*., at p. 14.

83 Mannix, Daniel P. 1964. *The History of Torture*. New York: Dell Publishing Company, Inc., at p. 14.

84 *Ibid*., at p. 15.

85 *Ibid*., at p. 24.

86 Scott, George Ryley. 1939. *The History of Torture Throughout the Ages*. London: Luxor Press, at p. 7.

87 Mannix, Daniel P. 1964. *The History of Torture*. New York: Dell Publishing Company, Inc., at p. 17.

88 *Ibid*., at p. 22.

89 Frances Farmers Revenge. 2012. 'Torture Through the Ages', available at: <http://www.francesfarmersrevenge.com/stuff/archive/torture/history.htm>, last accessed on 13 November 2012.

warning to any who might transgress. To that end, many of the elephants were especially large, often weighing in excess of nine tons. The executions were intended to be gruesome and, by all accounts, they often were. They were sometimes preceded by torture publicly inflicted by the same elephant used for the execution.[90]

3.1.2.3 Structuring Humiliation Punishment

It is now established that it has always been the custom of many States to put tortures into the class of punishment to justify their use and many so-called "punishments" enforced under British penal codes are really nothing more than veiled forms of torture and examples of such forms among many include: first of all, the ducking stool which seems to have been placed on the lowest and most contempt-bearing stage among English instruments of punishment. The pillory and stocks, the gibbet, and even the whipping-post, have seen many a noble victim, many a martyr. In all the degrading and cruel indignities offered the many political and religious offenders under the varying rules of both church and state, through the fifteenth, sixteenth and seventeenth centuries, the ducking-stool played no part and secured no victims. It was an engine of punishment specially assigned to scolding women; though sometimes kindred offenders. And one of the earliest institutions was a pair of stocks. The first public building was a meeting-house, but often before any house of God was builded, the devil got his restraining engine. And it was so essential to due order and government that every village had them. Sometimes they were movable and often were kept in the church porch, a sober Sunday monitor. Offences like petty thieves, unruly servants, wife-beaters, hedge-tearers, vagrants, sabbath-breakers, revilers, gamblers, drunkards, ballad-singers, fortune-tellers, traveling musicians and a variety of other offenders, were all punished by the stocks.

This ‘essence of punishment’, the pillory or stretch-neck can be traced back to a remote period in England and on the Continent certainly to the twelfth century. In its history, tragedy and comedy are equally blended; and martyrdom and obloquy are alike combined. Seen in a prominent position in every village and town, its familiarity of presence was its only retrieving characteristic; near church-yard and in public square was it ever found; local authorities forfeited the right to hold a market unless

[90] Wikipedia. 2012. ‘Execution by Elephant’, available at: < http://en.wikipedia.org/wiki/Execution_by_elephant>, last accessed on 28 November 2012.

they had a pillory ready for use. The pillory for which Hawthorne says in his immortal *Scarlet Letter:* 'this scaffold constituted a portion of a penal machine which now, for two or three generations past, has been merely historical or traditionally among us, but was held in the old time to be as effectual in the promotion of good citizenship as ever was the guillotine among the terrorists of France. It was, in short, the platform of the pillory; and above it rose the framework of that instrument of discipline, so fashioned as to confine the human head in its tight grasp, and thus hold it up to the public gaze. The very ideal of ignominy was embodied and made manifest in this contrivance of wood and iron. There can be no outrage, methinks against our common nature whatever be the delinquencies of the individual, no outrage more flagrant than to forbid the culprit to hide his face for shame.' It would be impossible to enumerate the offences for which people were pilloried: among them were treason, sedition, arson, blasphemy, witch-craft, perjury, wife-beating, cheating, forestalling, forging, coin-clipping, tree-polling, gaming, dice-cogging, quarrelling, lying, libelling, slandering, threatening, conjuring, fortune-telling, prigging, drunkenness, impudence etc. All sharpers, beggars, impostors, vagabonds were liable to be pilloried. So fierce sometimes was the attack of the populace with various annoying and heavy missiles on pilloried prisoners that several deaths are known to have ensued. Mr. Channing wrote an interesting account of the Newport of the early years of this century. He says of crimes and criminals in that town at that time: "the public modes of punishment established by law were four, viz.: executions by hanging, whipping of men at the cart-tail, whipping of women in the jail-yard, and the elevation of counterfeiters and the like to a movable pillory, which turned on its base so as to front north, south, east and west in succession, remaining at each point a quarter of an hour."

There are other forms of punishment like the whipping-posts, the device that however, the Church and city records throughout England show how constantly these whipping-posts were made to perform their share of legal and restrictive duties. In the reign of Henry VIII a famous Whipping Act had been passed by which all vagrants were to be whipped severely at the cart-tail till the body became bloody by reason of such whipping. Lying, swearing, taking false toll, perjury, selling rum, all were punished by whipping. Of course, for the correction of slaves the whip was in constant use till the Civil War banished slavery and the whipping-post from every state save certain. It is, however, stiffly contended that as a restraint over wife-beaters

and other cruel and vicious criminals, the whipping post is a distinct success and of marked benefit in its influence in the community. It should also be remembered that these are not the only civilized states to approve of whipping for certain crimes. About certain years ago, when garroting became so frequent and so greatly feared, the whipping-post was re-established, and whipping once more became an authorized punishment. Another form of device is the wearing of significant letters and many examples could be gathered from early court records of the wearing of significant letters by criminals where they need to wear two Capital Letters, A. D. cut in cloth and sewed on their uppermost garment on the Arm and Back; and if any time they shall be found without the letters so worn, they shall be forthwith taken and publicly whipt. The brank of scold's bridle however, was unknown in its English shape though from colonial records it is identified that scolding women were far too plentiful, and were gagged for that annoying and irritating habit. It, sometimes call the gossip's bridle, or dame's bridle, or scold's helm, was truly a shocking instrument, a sort of iron cage, often of great weight; when worn, covering the entire head; with a spiked or flat tongue of iron to be placed in the mouth over the tongue. Hence if the offender spoke she was cruelly hurt. Over fifty branks of various shapes are now in existence in various museums, churches, town halls, etc., and prove by their number and wide extent of location, the prevalence of their employment as a means of punishment. Being made of durable iron and kept within doors, and often thrust, as their use grew infrequent, into out-of-the-way hiding-places, they have not vanished from existence as have the wooden stocks and pillories, which stood exposed to wear, weather and attack. It will be noted that the brank is universally spoken of as a punishment for women; but men like paupers, blasphemers, railers also were sentenced to wear it.[91] Sometimes, it was used as a type of humiliation punishment, and sometimes, more as a torture device.[92] However, the custom of performing penance in public by humiliation in church either through significant action, position or confession has often been held as a custom of the Church. All ranks and conditions of men shared in

[91] Frances Farmers Revenge. 2012. 'Torture Through the Ages', available at: <http://www.francesfarmersrevenge.com/stuff/archive/torture/history.htm>, last accessed on 13 November 2012.

[92] Frances Farmers Revenge. 2012. 'Torture Devices, available at: <http://www.francesfarmersrevenge.com/stuff/archive/torture/history.htm>, last accessed on 13 November 2012.

this humiliation. Humbler victims for minor sins or offenses against religious usages suffered in like manner. And also for immorality, cheating, defamation of character, and other transgressions penance was performed.

Next comes the military punishments among which first the running of the gantlope which was a military punishment in universal use in the seventeenth century in England and on the continent. Another common punishment for soldiers usually for rioting or drinking, was riding the wooden horse and which was a straight, narrow, horizontal pole, standing twelve feet high. Sometimes the upper edge of the board or pole was acutely sharpened to intensify the cruelty. The soldier was set astride this board, with his hands tied behind his back. Often a heavy weight was tied to each foot, as was jocularly said, 'to keep his horse from throwing him.' And then comes the cruel punishment of 'picketing', which was ever the close companion of 'riding the wooden horse' in the English army is recorded by Dr. Rea as constantly employed in the colonial forces. In 'picketing' the culprit was strung up to a hook by one wrist while the opposite bare heel rested upon a stake or picket, rounded at the point just enough not to pierce the skin. The agony caused by this punishment was great. It could seldom be endured longer than a quarter of an hour at a time. It so frequently disabled soldiers for marching that it was finally abandoned as 'inexpedient'. However, the high honor of inventing and employing the whirlgig as a means of punishment in the army has often been assigned to our Revolutionary hero, General Henry Dearborn, but the fame or infamy is not his. For years it was used in the English army for the petty offenses of soldiers, and especially of camp-followers. It was a cage which was made to revolve at great speed, and the nausea and agony it caused to its unhappy occupant were unspeakable. In the American army it is said lunacy and imbecility often followed excessive punishment in the whirlgig. Sometimes various tiresome or grotesque punishments were employed in the military punishment. Delinquent soldiers were sentenced to carry a large number of turfs to the Fort; others were chained to a wheelbarrow. Among the Continental soldiers, culprits were chained to a log or clog of wood; this weight often was worn four days. One soldier for stealing cordage was sentenced to wear a clog for four days and wear his coat wrong side turned out. A deserter was tied to a horse's tail, lead around the camp

and whipped. Other deserters were set on a horse with face to the horse's tail, and thus led around the camp in derision.[93]

3.1.2.4 A Legitimate means for Justice

Modern scholars find the concept of torture to be compatible with society's concept of Justice during the time of Jesus Christ. Romans, Jews, Egyptians and many others cultures during that time included torture as part of their justice system. Romans had crucifixion, Jews had stoning and Egyptians had desert sun death. All these acts of torture were considered necessary (as to deter others) or good (as to punish the immoral).[94] However, an understanding of the concept of torture cannot be separated from the legal practices that have shaped its meanings and implications. Torture should be seen as a legal category, referring to specific forms of cruelty and suffering. More specifically, the category of torture is rooted in European legal reform of the seventeenth and eighteenth centuries. The growth of judicial torture was thus not simply the product of arbitrary and capricious politics, but rather a desire to create legally reliable evidence.[95] History also revealed that torture within prescribed limits was an accepted practice in several ancient civilizations and torture appears to have been fully compatible with the underlying moral codes of those communities. It is difficult to believe that people who inflicted torture in such communities did nothing wrong, but rather; those communities themselves were deeply mistaken about the morality of torture[96] and hence, torture at this time were applied to dangerous crimes alone because dangerous crimes were considered as extraordinary situations, and in order to deal with these situations, governments were obliged to put in place extraordinary measures to protect their citizens. Torture had long been used universally in criminal trials when necessary and no jurist conceived that the truth could be elicited in doubtful cases without it. As a result of persistent application of

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93 Frances Farmers Revenge. 2012. 'Torture Through the Ages', available at: <http://www.francesfarmersrevenge.com/stuff/archive/torture/history.htm>, last accessed on 13 November 2012

94 Wikipedia. 2012. 'Torture', available at: <http://en.wikipedia.org/wiki/Torture>, last accessed on 25 November 2012.

95 Tobias, Kelly. 2009. "The Un Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty", Vol. 31, No. 3 *Human Rights Quarterly,* pp. 777-800, at p. 781.

96 Odeku, Kolawole Olusola. 2008. *In Search of a Regime of Responsibility and Accountability for Perpetrators of Torture with Reference to Persons with Special Responsibility for Protecting Human Rights***.** South Africa: University of Fort Hare. (Unpublished PhD thesis).

torture, the criminal usually made a confession to the judge; and knew that the confession once made, doomed him, and that a retraction, instead of saving would only bring a renewal and prolongation of his sufferings.

However, the Medieval period of the Middle Ages was violent and blood thirsty. In barbarous times the cruel and pitiless feeling which induced legislators to increase the horrors of tortures, also contributed to the aggravation of the fate of prisoners. Torture chambers were included in many castles and law or custom did not prescribe any fixed rules for the treatment of hapless prisoners who faced torture. Different types of torture were used depending on the victim's crime and social status. Torture was seen as a totally legitimate means for justice to extract confessions, or obtain the names of accomplices or other information about the crime and for use in legal inquiries and trials.[97] The procedural methods, by which oaths and proofs could be established, were invariably linked to the judicial infliction of pain for the establishment of a "legal" truth. Possibly the most notorious procedure was the trial by ordeal. In certain situations, where the torturer exhibited a certain masochistic impulse that could influence operational behavior, the torturer rationalized the infliction of pain and suffering as a form of moral cleansing or a moral purgative. It is a tribute to human progress, moral sensibility, and juridical enlightenment that the judiciary, which often shamelessly professed its commitment to the ideals of justice and the rule of law, could reform its procedural methods to conform to ideas of practical reason and operational moral sensibility. However, before the legal profession itself is excoriated for historical hypocrisy, it must also be remembered that the torturer used religious rectitude in the defense or propagation of their religious ideals and institutions.[98] However, a skilled torturer would use methods, devices and instruments to prolong life as long as possible whilst inflicting agonising pain. However, the customs of the Medieval period dictated that many prisoners were tortured before they were executed in order to obtain additional information about their crime or their accomplices. There were many forms of torture and execution. The execution method itself was part of the torture endured by prisoners. These final methods of torture and execution

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97 The Middle Ages Webside. 2012. 'Middle Ages Torture', available at: <http://www.middle-ages.org.uk/middle-ages-torture.htm>, last accessed on 19 November 2012.

98 Nagan, Winston P. and Atkins, Lucie. 2001. "The International Law of Torture: From Universal Proscription to Effective Application and Enforcement", Vol. 14 *Harvard Human Rights Journal*, pp. 87-122, at p. 92.

included: torture and execution by fire, the sword or the axe, mechanical force, quartering, the wheel, the fork, the gibbet, spiking, dismembering and many more.[99]

However, early Roman rulers were actually quite humane. They only tortured his conquered enemies as an example for other potential foes.[100] Certain rulers tortured numerous people in an attempt to make them submit to Roman authority.[101] Slaves and other members of the lower classes were tortured heavily by their superiors for petty crimes.[102] But all this would change in the 6th Century, when an order of Pope Gregory I made statements given under torture inadmissible.[103] Torture was then not used as a legal device except as a punishment for nearly 800 years. But torture, however, was still an option for mob justice. The ordeals of fire and water were used to prove guilt if a person was not injured by exposure to extreme conditions, then they were innocent. This remained in fairly common use until its abolition in 1215.[104] Eventually, the focus of persecution would shift from religious sects, to the purging of supposed witches and sorcerers. This purge carried into the British Isles, and eventually out of Europe. In Scotland and Ireland in the 16th and 17th Centuries torture was commonly used to get the accused to confess their crimes. As time went on, the tortures increased in severity. By this time, iron gauntlets, floggings, amputation of women's breasts, and being bitten by scores of rats were common tortures.[105] One horrible torture, called the bootes, would crush a person's lower leg, usually rendering the victim permanently unable to walk.[106] And during the time period from after the fall of Rome till the 13th Century, torture was used mainly as a weapon of private citizens and eventually the State. Frequently, amputation of hands,

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99 The Middle Ages Webside. 2012. 'Middle Ages Torture, available at: <http://www.middle-ages.org.uk/middle-ages-torture.htm>, last accessed on 19 November 2012

100 Mannix, Daniel P. 1964. *The History of Torture*. New York: Dell Publishing Company, Inc., at p. 29.

101 *Ibid*., at p. 5.

102 Scott, George Ryley. 1939. *The History of Torture Throughout the Ages*. London: Luxor Press, at p. 46.

103 Mannix, Daniel P. 1964. *The History of Torture*. New York: Dell Publishing Company, Inc., at p. 43.

104 Farrington, Karen. 1996. *Dark Justice: A History of Punishment and Torture*. New York: Smithmark Publishers, at p. 22.

105 Scott, George Ryley. 1939. *The History of Torture Throughout the Ages*. London: Luxor Press, at p. 89.

106 *Ibid*., at p. 90.

feet, and genitalia was used as a punishment for sexual offenders, more often than not inflicted without State supervision.[107] Torture was then adopted by rulers that realized that their citizens respected such a display of force.[108] And as one form of torture would become commonplace, the next generation of people would adopt more harsh forms of punishment.[109] And also, during this time period there was some torture used for religious persecution. Christian leaders forced conversion of others with the application of torture.[110] As the Church used torture in its proceedings, this would prompt civil authorities to adopt the practice as well[111] and during this time period, burning at the stake, drowning, and suffocation were common tortures.[112]

3.1.3 Enlightenment Period: Ending Harsh Physical Torture

This part is about the explanation for the abolition of torture through the age of enlightenment and the progression of humanism and customary international law. Later on this research shows that after the extensive use of torture in criminal trials and for other purposes, people raised their voices against torture in many forms and the opposition became more stern resulting in one part the rejection and eventually the abolition of torture.

3.1.3.1 Age of Enlightenment

The traditional explanation for the abolition of torture dominated the legal and historical scholarship of the 19th and early 20th century. According to this view, the first step in the process leading to the abolition of torture took place when rulers began to standardize and rationalize local codes into a system of national laws. With the publication of comprehensive codes of law, jurists and scholars realized for the first

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[107] Farrington, Karen. 1996. *Dark Justice: A History of Punishment and Torture*. New York: Smithmark Publishers, at p. 27.

[108] Scott, George Ryley. 1939. *The History of Torture Throughout the Ages*. London: Luxor Press, at p. 10.

[109] *Ibid*., at p. 13.

[110] *Ibid*., at p. 26.

[111] Kieckhefer, Richard. 1989. *Magic in the Middle Ages*. Cambridge: Cambridge University Press, at p. 190.

[112] Scott, George Ryley. 1939. *The History of Torture Throughout the Ages*. London: Luxor Press, at p. 51.

time how extensively torture was being used in criminal trials and for other purposes.[113] Even from the beginnings of civilization, there have been a few notable individuals who voiced their objections to torture in its many forms. Seneca, Cicero, and St. Augustine all recognized that torture may result in the unjust conviction of innocents.[114] Unfortunately, they were a minority whose opinions did not shape events to come later. While torture was not used consistently, it has been frequently used by the Church and various States in proving cases of treason and heresy.[115] Torture was looked upon as an almost infallible method of proof and it is only after the 16th Century that stronger voices oppose torture openly. [116]

However, in the 17th and 18th Centuries the opposition became more stern. The medieval practice of state sponsored torture was rejected and eventually abolished. Johann Graefe in 1624 published *Tribunal Reformation*, a case against torture. Cesare Beccaria, and Italian lawyer, published in 1764 *An Essay on Crimes and Punishments*, opened the first real intellectual debate on the ethics of torture in which he argued that torture unjustly punished the innocent and should be unnecessary in proving guilt.[117] His book went through 6 editions in 18 months and was translated into 22 languages.[118] Beginning with a condemnation of the institution of torture on utilitarian grounds, it was argued that torture was inhuman and unreliable as a way of ascertaining the truth in a trial. The medieval institution of torture had no real practical value because its 'strange and necessary consequence' was that it punished the innocent man more than the guilty. For the guilty person, torture either provides acquittal through endurance of the procedure or condemnation. The argument against torture made the enlightenment rulers abolish it. Because, in most cases, the pain

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113 Einolf, Christopher J. 2007. "The Fall and Rise of Torture: A Comparative and Historical Analysis", Vol. 25, No. 2 *Sociological Theory*, pp.101-121, at p. 109.

114 Scott, George Ryley. 1939. *The History of Torture Throughout the Ages*. London: Luxor Press, at p. 134.

115 *Ibid*., at p. 44.

116 Klaits, Joseph. 1985. *Servants of Satan: The Age of the Witch Hunts*. Bloomington: Indiana University Press, at p. 153.

117 Scott, George Ryley. 1939. *The History of Torture Throughout the Ages*. London: Luxor Press, at p. 135.

118 Mannix, Daniel P. 1964. *The History of Torture*. New York: Dell Publishing Company, Inc., at p. 136.

inflicted in judicial torture was of no use and the confession obtained through it was inefficient in identifying the guilt or innocence of the accused.[119] Legal reformers criticized torture for being inhumane, and argued in favor of gentler methods of punishment, such as imprisonment. Torture was unjust, as it amounted to punishment being inflicted before guilt was determined. They also argued that torture was ineffective, since innocent people were likely to give out false confessions in order to escape the pain of torture, while hardened criminals might be able to resist the pain of torture and be exonerated.[120] And the barbarous custom of punishment by torture was on several occasions condemned by the Church. As early as 866, it was found that their custom of torturing the accused was considered contrary to divine as well as to human law for, a confession should be voluntary, and not forced. By means of the torture, an innocent man may suffer to the utmost without making any avowal; and, in such a case, what a crime for the judge! or the person may be subdued by pain, and may acknowledge himself guilty, although he be not so, which throws an equally great sin upon the judge. Despite this and other please, the practise of torturing victims continued. Medieval Torture was a freely accepted form of punishment in the Middle Ages and was only abolished in 1640.[121] So, torture was abolished due to a change in the standards of proof required for a conviction. During the early modern period, the requirement of two eyewitnesses or a confession was relaxed, so that circumstantial evidence or the testimony of one witness was adequate to bring a conviction. And once confessions became unnecessary, torture was abandoned for that purpose also.[122]

Thus, the Age of Enlightenment humanised the criminal law. Judicial procedures and punishments had to respect the dignity of the person. Torture was a symbol of the old

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[119] Odeku, Kolawole Olusola. 2008. *In Search of a Regime of Responsibility and Accountability for Perpetrators of Torture with Reference to Persons with Special Responsibility for Protecting Human Rights***.** South Africa: University of Fort Hare. (Unpublished PhD thesis).

[120] Einolf, Christopher J. 2007. "The Fall and Rise of Torture: A Comparative and Historical Analysis", Vol. 25, No. 2 *Sociological Theory*, pp.101-121, at p. 109.

[121] The Middle Ages Webside. 2012. 'Middle Ages Torture, available at: <http://www.middle-ages.org.uk/middle-ages-torture.htm>, last accessed on 19 November 2012.

[122] Einolf, Christopher J. 2007. " The Fall and Rise of Torture: A Comparative and Historical Analysis", Vol. 25, No. 2 *Sociological Theory*, pp.101-121, at p. 109.

regime and was abolished in many countries. During this time it has been recognised that the barbarous custom of interrogation, by putting men to the torture, is useless and contrary to law, reason and humanity.[123] The form of words 'torture' without evidence or in ordinary crimes, no doubt carefully chosen, sometimes appeared to sanction the use of torture if there was evidence to justify to resort to it. The seeds of the temptation for the authorities to resort to torture lay in the extent to which reliance was placed on a confession to establish the accused guilt. And it is now insists that evidence of the accused confession which is made extra-judicially, when he is being interviewed by the police for example, must be corroborated by independent evidence. A confession is conclusive only if it is made in the presence of the court at the trial. And by the enactment of certain Acts, it was at last decided that no person accused of any crime could be put to torture.[124] And also there was a Torture Commission which entrusted to look into the aggravated danger of torture and recommend ways how to eliminate it. As a result of the recommendations, torture by revenue officials diminished and gradually went away. The Commission was very spectacular in that it recommended to separate revenue and police functions, to make third degree (police torture) a criminal offence and to make a confessional statement to a police officer totally inadmissible as evidence.[125] Here we see that the door closed at last on its use, irrespective of whether it was to be used to extract a confession or to gather evidence and it was disposed of the last vestige of barbarity with respect to all crimes and in all cases whatsoever.[126] Thus it was the enlightenment ideas about rationality and the value of human life gained influence, and as legal reformers made increasingly persuasive arguments, the sovereigns of many states were gradually convinced to abolish torture.[127] This was the end of the era of harsh physical torture

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123 Bonaparte, Napoleon. 1961. *Letters and Documents of Napoleon: The rise to power*, *Vol. 1*, New York: Oxford University Press, at p. 274.

124 Hope, David. 2004. "Torture", Vol. 53, No. 4 *International and Comparative Law Quarterly*, pp. 807-832, at pp. 812-814.

125 Karzon, Sheikh Hafizur Rahman. 2005. 'Agency of criminal justice system: A historical review', available at :< http://www.thedailystar.net/law/2005/02/02/history.htm>, last accessed on 8th December 2012.

126 Hope, David. 2004. "Torture", Vol. 53, No. 4 *International and Comparative Law Quarterly*, pp. 807-832, at p. 823.

127 Einolf, Christopher J. 2007. "The Fall and Rise of Torture: A Comparative and Historical Analysis", Vol. 25, No. 2 *Sociological Theory*, pp.101-121, at p. 109.

and though, occasional aberrations would arise over the years, there were few government sanctioned tortures besides incarceration after this time.[128]

3.1.1.2 Progression of Humanism and the Customary International Law

The practice of torture remained legal during the early modern period, but its use in reality declined slowly. Governments started to ban torture during the 18th century, and by 1851, torture was illegal throughout the European continent. At the time, reformers urged the abolition of torture on practical and moral grounds, and in adopting their recommendations, governments emphasized their progressivism and humanity. Nineteenth-century scholars took these explanations of the abolition of torture at face value, and interpreted the abolition of torture as evidence of humankind's progress toward a more enlightened and humane future.[129] However these changes had not occurred overnight and the rapid rate of these changes of both mind and institutions puzzled contemporaries, and they have since perplexed historians who tried to account for them. The most widely accepted and influential line of interpretation stemmed from the convergence of moral outrage and judicial reforms.[130]

As it is known, the development of Humanism in 17th century philosophy, and cruel and unusual punishment came to be denounced in the English Bill of Rights of 1689, it is the mid-19th century that the modern views regarding torture have changed drastically and have been revised in accordance with more humanist principles, which are generally associated with the Enlightenment that further developed the idea of universal human rights. During this period the use of torture was condemned as a grave violation of Human Rights and torture, which uses physical or moral violence to extract confessions, punish the guilty, frighten opponents, or satisfy hatred is contrary to respect for the person and for human dignity. In times past, cruel practices were commonly used by legitimate governments to maintain law and order, who

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[128] Frances Farmers Revenge. 2012. 'Torture Through the Ages', available at: <http://www.francesfarmersrevenge.com/stuff/archive/torture/history.htm>, last accessed on 13 November 2012.

[129] Einolf, Christopher J. 2007. "The Fall and Rise of Torture: A Comparative and Historical Analysis", Vol. 25, No. 2 *Sociological Theory*, pp.101-121, at p. 109.

[130] Odeku, Kolawole Olusola. 2008. *In Search of a Regime of Responsibility and Accountability for Perpetrators of Torture with Reference to Persons with Special Responsibility for Protecting Human Rights.* South Africa: University of Fort Hare. (Unpublished PhD thesis).

themselves adopted in their own tribunals the prescriptions of Roman law concerning torture. In recent times it has become evident that these cruel practices were neither necessary for public order, nor in conformity with the legitimate rights of the human person. On the contrary, these practices led to ones even more degrading. So it is necessary to work for their abolition.[131]

It was also argued that the abolition of torture as a result of changes in perceptions of the value of pain. Because in a society that considered pain to have spiritual value, torture was seen to be not only a means of forcing a confession, but also a way to bring about penitence and spiritual renewal in the criminal. During the 18th century, the medical profession began to perceive pain as exclusively negative, and the medical view of pain as negative became influential in the wider culture. As this view of pain as negative spread throughout society, people came to view torture as a spiritually and morally valueless practice, and this change of views eventually caused torture's abolition. Also torture and corporal punishments were abolished because governments found more subtle and effective means to control their subjects. In pre-modern systems of rule, torture and corporal punishments, often carried out in public, symbolized and demonstrated the sovereign's power and control. During the modern period, governments realized that a more effective type of control could be obtained through more subtle methods. The new system relied upon surveillance and discipline, particularly self-surveillance and self-discipline, to guarantee the people's loyalty to the sovereign. New forms of control and punishment, such as the workhouse and the penitentiary, better fit the new methods of surveillance and control, and were adopted to replace torture and corporal punishment.[132]

After the end of the eighteenth century, torture acquired a universally pejorative association and came to be considered as the institutional antithesis of human rights, the supreme enemy of humanitarian jurisprudence and of liberalism, and the greatest threat to law and reason that the nineteenth century could imagine. The American historian of torture, Lea, summed up an emerging humanitarian interpretation:

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131 Wikipedia. 2012. 'Torture', available at: <http://en.wikipedia.org/wiki/Torture>, last accessed on 25 November 2012.

132 Einolf, Christopher J. 2007. "The Fall and Rise of Torture: A Comparative and Historical Analysis", Vol. 25, No. 2 *Sociological Theory*, pp.101-121, at pp. 109-111.

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

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

The emergent view of contemporary historians is that the decline of torture and its prohibition was intimately bound up with the growth of the state, the establishment of a more professional judiciary, the emergence of incarceration as punishment and subtle changes in the law of evidence. Almost beyond doubt is the fact that the legal abolition of torture was celebrated as a landmark achievement of a progressive civilizing reform; it was celebrated alongside the decline in and abolition, at least in public, of corporal and capital punishments. It was no longer deemed sensible to inflict punishment on the body or sensible to establish truth by testing the body. Whereas the body of the accused had previously been viewed also as an important aspect of the offence, and was thus the appropriate object of vengeance, evidence and punishment were now matters of the mind, calculated, refined, and, allegedly, rational.

Several other aspects of late eighteenth-century legal thought and culture may also illuminate the process of the abolition of torture like the doctrine of infamy; the movement to separate and define more sharply legislative and judicial powers,

particularly on the Continent; and the increasing articulation and importance of theories of the rule of law and natural law etc.[133] It was also prohibited that submitting suspects to any hardship was not necessary to secure his or her person since Statute law explicitly makes torture a crime and prohibited the police or justice from interrogating suspects under oath. In addition, customary international law, or the law of nations provides legal remedies for victims of torture as determined by a famous legal decision in *Filártiga v. Peña-Irala* that, 'the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind'. The adoption of the Universal Declaration of Human Rights in 1948 marks the recognition at least nominally of a general ban of torture by all UN member states which is considered part of customary international law. And States that ratified the United Nations Convention Against Torture have a treaty obligation to include the provisions into municipal law. The laws of many states therefore formally prohibit torture and many legal systems have a right against self-incrimination or explicitly prohibit undue force when dealing with suspects. Recently there was substantial controversy over the 'stress and duress' methods that were used in the War on Terrorism since similar methods were ruled in 1978 by ECHR to be inhuman and degrading treatment. In 2009, the Obama administration began the process of reversing the Bush administration policies that had permitted the use of torture by the US government. The Obama administration has consistently made it clear that it did not support the use of 'enhanced interrogation techniques', and that it viewed their use as a breach of law.[134] So, the eradication of torture was a central part of the civilizing mission of the nineteenth and twentieth century. And the prohibition of torture is absolute. It has no exceptions for security reasons or otherwise, and Article 2 states that "no exceptional circumstances whatsoever may be invoked as a justification of torture." The central principle behind the Convention is the prevention of impunity by ensuring that torture is effectively criminalized by member states.[135]

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[133] Odeku, Kolawole Olusola. 2008. *In Search of a Regime of Responsibility and Accountability for Perpetrators of Torture with Reference to Persons with Special Responsibility for Protecting Human Rights.* South Africa: University of Fort Hare. (Unpublished PhD thesis).

[134] Wikipedia. 2012. 'Torture', available at: <http://en.wikipedia.org/wiki/Torture>, last accessed on 25 November 2012.

[135] Tobias, Kelly. 2009. "The Un Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty", Vol. 31, No. 3 *Human Rights Quarterly,* pp. 777-800, at pp. 782-783.

3.1.4 Torture in the Contemporary: Reverting Tortures of Primitive Humans

This part 'torture in the contemporary' focuses on the emergence of different manifestations of torture with its new settings in the war on terror. It starts from the reverting of torture in the 19th century and finished with the justification of torture with a new explanation making it to complete the full circle of torture i.e. torture from the primitive to the middle; from the enlightenment to the contemporary and everywhere it developed extensively with methods used by savages than anything in between.

In modern times, while some harsh forms of torture persist, it seems to have reverted to the tortures of primitive humans.[136] However, before the emergence of modern policing, torture was an important aspect of policing and the use of it was openly sanctioned and acknowledged by the authority. The Economist magazine proposed that one of the reasons torture endures is that torture does indeed work in some instances to extract information or confession, if those who are being tortured are indeed guilty. Depending on the culture, torture has at times been carried on in silence (official denial), semi-silence (known but not spoken about), or openly acknowledged in public (to instill fear and obedience).[137] And from the assertion of some historians it was taken that torture was fully abolished in theory and nearly abolished in practice in 19th century with a vengeance only to return in the 20th. It is not clear whether the practice of torture worldwide followed the same pattern, and the limitations of the historical record probably render this question unanswerable.[138]

Torture however, remains a frequent method of repression in totalitarian regimes, terrorist organizations and organized crime. Even in Western democratic societies, the police sometimes resort to torture and are frequently backed-up by sympathizing politicians. In undemocratic regimes, torture is often used to extract confessions from

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[136] Frances Farmers Revenge. 2012. 'Torture Through the Ages', available at: <http://www.francesfarmersrevenge.com/stuff/archive/torture/history.htm>, last accessed on 13 November 2012.

[137] Wikipedia. 2011. 'Torture', available at: <http://en.wikipedia.org/wiki/Torture>, last accessed on 25 November 2012.

[138] Einolf, Christopher J. 2007. "The Fall and Rise of Torture: A Comparative and Historical Analysis", Vol. 25, No. 2 *Sociological Theory*, pp.101-12, at pp. 103-104.

political dissenters, so that they admit to being spies or conspirators, probably manipulated by some foreign country. However, the use of torture is by no means restricted to totalitarian and dictatorial regimes. Established democracies can also use torture, albeit illegally, for instance when it is estimated that national security is more important than the rights of suspects.[139] State torture has been extensively documented and studied, often as part of efforts at collective memory and reconciliation in societies that have experienced a change in government. Surveys of torture survivors reveal that torture 'is not aimed primarily at the extraction of information. Its real aim is to break down the victim's personality and identity.' When applied indiscriminately, torture is used as a tool of repression and deterrence against dissent and community empowerment. While many states use torture, few wish to be described as doing so, either to their own citizens or to international bodies. So a variety of strategies are used to circumvent their legal and humanitarian duties, including plausible deniability, secret police, 'need to know', denial that certain treatments constitute torture, appeal to various laws (national or international), use of jurisdictional argument, claim of 'overriding need', the use of torture by proxy, and so on. Almost all regimes and governments engaging in torture (and other crimes against humanity) consistently deny engaging in it, in spite of overwhelming hearsay and physical evidence from the citizens they tortured. Through both denial and avoidance of prosecution, most people ordering or carrying out acts of torture do not face legal consequences for their actions. UN Special Rapporteur for the Commission on Human Rights, Sir Nigel Rodley, believes that 'impunity continues to be the principal cause of the perpetuation and encouragement of human rights violations and, in particular, torture.' While states, particularly their prisons, law enforcement and intelligence apparatus, are major perpetrators of torture, many non-state actors also engage in it. These include paramilitaries and guerrilla armies, criminal actors such as organized crime syndicates and kidnappers, and those enacting individual forms of power in extreme forms of domestic violence and child abuse.[140] Reports of torture by the military, police and the secret services continued to emerge during the Cold War era, the period of totalitarianism in Southern America and Africa, and during the Balkan

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[139] WordIQ.com. 2010. 'Torture-Definition', available at: < http://www.wordiq.com/definition/Torture>, last accessed on 15 January 2013.

[140] Wikipedia. 2011. 'Torture', available at: <http://en.wikipedia.org/wiki/Torture>, last accessed on 25 November 2012.

War in the 1990s. Today, the use of torture for the purpose of extracting a confession has continued to be routine practice in many countries around the world, even though torture and ill-treatment are absolutely prohibited under international law. Recent discussions about the fight against global terrorism have revealed new techniques of coercive interrogation amounting to torture, together with new attempts to justify the use of torture under certain circumstances.[141]

3.1.4.1 Torture in the 19th and 20th Century: Emergence of Different Manifestations of Torture

Though torture was formally abolished by European governments in the 19th century, the actual practice of torture decreased as well during that period. In the 20th century, however, torture became much more common. None of the theories that explain the reduction of torture in the 19th century can explain its resurgence in the 20th. The use of torture follows the same patterns in contemporary times as it has in earlier historical periods. Torture is most commonly used against people who are not full members of a society, such as slaves, foreigners, prisoners of war, and members of racial, ethnic, and religious outsider groups. Torture is used less often against citizens, and is only used in cases of extremely serious crimes, such as treason. Two general 20th-century historical trends have caused torture to become more common.[142] And they are an increase in the number and intensity of wars, and changes in the character of modern warfare, caused an increase in the torture of prisoners of war and the torture of civilian populations in occupied areas. The increase in the number of ethnically and religiously diverse states may also explain part of the prevalence of torture, particularly when these heterogenous states are the sites of civil conflict. A change in the nature of sovereignty and an increase in state monitoring of subjects have caused a tremendous increase in the number of citizens tortured on suspicion of treason. Together, these factors offset the decrease in torture that came about due to the growth of democracy, resulting in a 20th century in which torture was as common or more so than the 19th.[143] The first reason for the persistence of torture during the 20th century, and its

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[141] Atlas of Torture. 2009. 'History of the Prohibition of Torture and Torture Methods', available at: < http://www.univie.ac.at/bimtor/prohibitionoftortureandilltreatment/355>, last accessed on 20 November 2012.

[142] Einolf, Christopher J. 2007. "The Fall and Rise of Torture: A Comparative and Historical Analysis", Vol. 25, No. 2 *Sociological Theory*, pp. 101-121, at p. 101.

[143] *Ibid.,* at pp. 117-118.

increase, at least in Europe, over the 19th century, is the increase in the number and severity of international conflicts. The first half of the 20th century saw two world wars, which involved an unprecedented number of states and peoples, a high level of mobilization of population, long-term occupation of enemy populations, and nationalist and ideological motivations to treat prisoners and occupied populations inhumanely. In the second half of the 20th century, open warfare ceased in Europe, but increased in the newly independent states of the former European colonies in the Middle East, Africa, and Asia. Even accounting for increases in population, the number of people involved in war and the number of civilians and soldiers killed in warfare increased dramatically in the 20th century, compared to 19th-century levels, possibly making the 20th century the most violent century in the history of the world. When total war tactics were combined with ideological and nationalist disrespect for conventional limitations on war, massacre, violence against civilians, and torture of enemy civilians and prisoners of war occurred at unprecedented levels.

Torture against prisoners of war was widely practiced in many wars, even democratic countries, which rarely use torture against their own populations, have tortured prisoners of war, particularly when those prisoners are from a different racial or ethnic group. Democratic countries also engage in torture when terrorist attacks on civilians cause governments to perceive a severe threat. Torture of prisoners of war, instead of other abuses such as massacre or confinement in dangerously substandard conditions, occurs most often in counterinsurgency wars. In conventional wars, common soldiers possess little information that might be of use to the opposing side, so prisoners of war are generally not extensively interrogated, and for this reason are rarely tortured. In counterinsurgency conflicts, however, common soldiers do possess valuable information, the identity and location of other insurgents and are often tortured for this information. A final reason why 20th century conflicts have caused an increase in the use of torture is that torture has been used as a way of inflicting terror and imposing control upon the civilian populations of occupied territories. However, the rise of nationalist resistance to foreign rule made it possible to profit from occupation only when violent coercion was used against conquered peoples. During World War II, the German, Soviet, and Japanese governments used torture, along with mass killings, reprisal killings, and other terror tactics, to ensure secure and profitable control of conquered territories. While the 20th century saw a large amount of torture committed

against foreign prisoners of war, there was also an increase in the category of crimes of treason, and of the number of people capable of committing treason. In pre-modern governments, where the sovereign was a single person or a small group of rulers, treason consisted of plotting against the personal safety or authority of this person or group. Only a small number of noblemen, military officials, and members of the royal family were even capable of committing treason. In modern nation-states, the sovereign is defined as the government, the people, or the revolution, a much larger category. In democratic countries, dissent is not always viewed as treason, and many peaceful means exist for the expression of dissent and the change of government policies. In states that modernized without becoming democratic, torture was much more likely to occur than in a traditional state, since the number of people capable of opposing the government in a meaningful way increased, without a corresponding increase in non-treasonous avenues of effecting political change. In addition, the rise of the nation-state as the dominant system of political organization meant that governments had much more power over citizens and were much more in contact with their citizens' lives. The prevalence of torture in the 20th century may in part represent a replacement of violence by non-state actors, such as clan leaders, village chiefs, and local warlords, with violence by governments, not an increase in violence overall.

However, the type of 20th century society where torture is most common is a totalitarian one, whether the society is fascist or communist. In a totalitarian society, there is no sphere separate from the state. Virtually any activity composing the wrong kind of music, pursuing the wrong kind of scientific research, or failing to meet a work quota might be seen as treasonous. The expansion of the definition of treason caused a related expansion in the number of people capable of committing treason. When the sovereign was a person, only those people closely connected with him could betray the sovereign, and accusations of treason were essentially limited to the nobility. When the sovereign became defined as the state or the revolution, every citizen was capable of harming the sovereign, and thus any citizen was capable of treason. Totalitarian states also operate extensive networks of spies and informers, making it much more likely that a citizen who defies or criticizes the government will be reported and punished. The expansion of the definition of treason and the expansion of networks to locate and punish traitors has occurred in many countries, including regimes that are not fully "totalitarian". Many non-democratic states under

real or perceived threat from opposition groups have used torture against suspected opponents. In these states, not only armed opposition to the government is seen as treason, but also non-violent activities such as organizing in favor of human rights, participating in labor unions and professional organizations, community organizing, and peaceful political protest. The authorities of repressive governments tend to interpret any opposition activity as treasonous, and respond accordingly. The torture of persons who engaged in non-violent political activities, or were merely suspected of doing so, occurred in many countries besides fascist and communist ones.[144]

And also the years following World War II saw the creation of a number of newly independent states, many of which had weak governments attempting to maintain control of a racially, ethnically, or religiously diverse population. Diversity does not by itself seem to cause an increase in human rights violations but may increase the level of violence inherent in civil conflicts resulting an increase in the practice of torture. In totalitarian regimes, torture was used not only on members of the opposition but even on the entire population. Moreover, people were used as guinea pigs in cruel medical experiments. Torture was legalised and extensively used as these regimes faced the real prospects of defeat during the period of the Second World War. Interrogation methods termed 'the third degree', which included flogging to get information, were officially sanctioned. The Nuremberg trials revealed that in 1942, Hitler ordered that:

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

Similarly, the Stalin regime used torture as a technique to subdue the people in order to maintain a firm grasp on power. The security agencies were officially instructed to apply torture. A memorandum was issued by Stalin which contained an averment that: "the Party Central Committee considers that physical pressure should still be used as obligatory, as an exemption applied to known and obstinate enemies of the people, as a method both justifiable and appropriate." After the Second World War, torture and other gross brutalities were perpetrated in the name of Nazism. Fascism and

144 *Ibid.,* at pp.113-116.

Bolshevik Communism during the 1920s, 1930s and 1940s have been matched by numerous totalitarian or authoritarian regimes throughout the globe. Examples are numerous. In China and elsewhere in Asia, violence was used against the citizens in the name of Communism. In South America it has been done in the name of anticommunism. In pre-1994 South Africa it was done in the name of apartheid and elsewhere in the name of secularism or moderation against alleged Islamic extremism or fundamentalist. In other parts of the world, it has been done in the name of national unity or identity.[145]

However, torture methods used in contemporary times resemble those used in earlier historical periods, with some exceptions. Rape and sexual assault seem to have been less common during historical periods and in cultures where torture was legal and formally regulated, although it is possible that sexual torture and rape were widely practiced but not recorded in historical documents. The most significant recent innovation in torture methods is electric shock torture, a widely used current technique that was not available before the 20th century. The popularity of electric shock torture, as well as some purely psychological forms of torture such as sleep deprivation and sexual humiliation, can be explained in part by the rise of human rights monitoring. Since human rights advocates have made it politically costly for regimes to use obviously detectable torture methods, some regimes have responded by adopting electric shock torture and other methods that do not leave visible scars.[146] In case of featuring the devices in the late 19th and early 20th century, police in the United States commonly used beatings and other forms of torture to obtain confessions from criminal suspects, particularly when those suspects were blacks, immigrants, or whites of a low social class.[147] In Russia in 1919 it was revealed that the Bolsheviks had nailed leather straps to victims' shoulders, gouged out their eyes and cut off noses. Similar tortures were used by British and Irish forces in Ireland in

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145 Odeku, Kolawole Olusola. 2008. *In Search of a Regime of Responsibility and Accountability for Perpetrators of Torture with Reference to Persons with Special Responsibility for Protecting Human Rights***.** South Africa: University of Fort Hare. (Unpublished PhD thesis).

146 Einolf, Christopher J. 2007. "The Fall and Rise of Torture: A Comparative and Historical Analysis", Vol. 25, No. 2 *Sociological Theory*, pp.101-12, at pp. 103-104.

147 *Ibid.,* at pp. 111-112.

the 20's.[148] The atrocities of World War II had inmates of concentration camps forced to live in lice-infested barracks, where they lived in a constant atmosphere of death and cruelty.[149] But besides these cases, most modern forms of torture involve imprisonment. While in ancient times humans could exile their criminals away from the community, now people wall them up in stone and metal jails. The circle is indeed complete.[150] However, a recent approach to interrogations has been to use techniques such as waterboarding, sexual humiliation and sexual abuse, and dogs to intimidate or pressure prisoners in a manner claimed to be legal under national or international law. Electric shock techniques such as the use of stun belts and tasers have been considered appropriate provided that they are used to "control" prisoners or suspects, even non-violent ones, rather than to extract information. This has been used on several prisoners in the courtroom itself, while conducting their own defense. These techniques have been widely criticized as torture. While methods of torture are often quite crude, a number of new technologies of control have been used by torturers in recent years. Certain governments devised a number of new electrical and mechanical means of torture and proceeded to train military officials from other countries in their techniques. And these devices now widely sold to prison authorities around the world.[151]

3.1.4.2 Contemporary Torture: Explaining New Settings of Torture in the War on Terror

Though torture has been criticized on humanitarian and moral grounds, on the grounds that evidence extracted by torture is unreliable, and because torture corrupts institutions that tolerate it and Organizations like Amnesty International argue that the universal legal prohibition is based on a universal philosophical consensus that torture and ill-treatment are repugnant, abhorrent, and immoral; shortly after the September 11, 2001 attacks there has been a debate about whether torture is justified in some

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148 Scott, George Ryley. 1939. *The History of Torture Throughout the Ages*. London: Luxor Press, at pp.265-268.

149 Mannix, Daniel P. 1964. *The History of Torture*. New York: Dell Publishing Company, Inc., at p. 193.

150 Frances Farmers Revenge. 2012. 'Torture Through the Ages', available at: <http://www.francesfarmersrevenge.com/stuff/archive/torture/history.htm>, last accessed on 13 November 2012.

151 Einolf, Christopher J. 2007. "The Fall and Rise of Torture: A Comparative and Historical Analysis", Vol. 25, No. 2 *Sociological Theory*, pp.101-121, at pp. 111-112.

circumstances or not. Some people have argued that the need for information outweighs the moral and ethical arguments against torture. However there was a clear divide between those countries with strong rejection of torture and nations where rejection was less strong. Often this lessened rejection is found in countries severely and frequently threatened by terrorist attacks. Within nations there is a clear divide between the positions of members of different ethnic groups, religions, and political affiliations, sometimes reflecting distinctions between groups considering themselves threatened or victimized by terror acts and those from the alleged perpetrator groups.[152] And inevitably, much of the discussion about torture's contemporary return has to focus on developments in the US action since 11 September 2001. Today, classical torture no longer exists; the purpose of torture is no longer 'truth' but social display for the purposes of domination. Modern torture is private, not public. It takes place in the basements of prisons and detention centers. Modern torture is clinical because it relies on the control of the mind rather than the body and not ritual torture. The torturer operates on his patient. The methods and instruments are drawn from different disciplines and professions such as medicine, engineering, psychology, and physiology. Modern torture is guided by a new punitive principle: do not seek to punish the criminal act of the body, punish instead the delinquent life of the person. These days, punishment is directed at a point slightly beyond the body; the target is a human life. Under the gaze of the torturer, human life emerged as an object for research. The victim was grasped from within, through electric shocks, injections, internal pressure, and sensory deprivation. The marks of punishment were seen not merely on the body but also in the eyes, which become frenzied out of fear, morbid dread and insomnia. This was not, as Muhammad Reza Shah put it:

> "Torture in the old sense of torturing people, twisting their arms and doing this and that this was a more intelligent punishment, one designed to persist long after the moment of its application. The objective was not to scar the flesh with marks of infamy, but to locate, isolate, and cripple the prisoner's soul."[153]

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[152] Wikipedia. 2011. 'Torture', available at: <http://en.wikipedia.org/wiki/Torture>, last accessed on 25 November 2012.

[153] Odeku, Kolawole Olusola. 2008. *In Search of a Regime of Responsibility and Accountability for Perpetrators of Torture with Reference to Persons with Special Responsibility for Protecting Human Rights.* South Africa: University of Fort Hare. (Unpublished PhD thesis).

In addition to the use of torture as a device of 'government by terror,' the 'new torture' is characterized by a number of additional attributes which in combination appear to distinguish it from the torture used in previous eras. The first of this is that torture often involves the application of sophisticated psychological and pharmacological techniques which result in intense pain but at the same time leave few overt signs of physical abuse. The second says that in many countries individuals engaged in the practice of torture have developed a 'slang' of torture and have 'ritualized' the use of torture. This appears to be a psychological attempt by torturers to deny that torture is being used and to distance themselves from their 'victims.' The third one is that the practice of torture has become internationalized and standardized. Experts, training, and equipment often are provided by one government to another. For instance, United States advisors have been involved in training security forces in various countries in techniques of torture. Fourth one says that in some countries, the intervention of the military into the area of domestic security has resulted in application of counter-insurgency techniques against political dissidents. Special military interrogation units have been organized in countries. As a result, techniques previously applied in warfare or against colonial populations now are being used against domestic populations. In the fifth one the application of torture and military techniques is to domestic populations has been accompanied in many countries by the abrogation of due process and 'natural justice' principles. This has been accomplished through 'Special Powers Acts' and application of constitutional provisions providing for martial law and for state of siege in times of 'internal rebellion'. The sixth focuses that in some countries widespread torture is carried out by quasi-governmental, vigilante-type groups. This permits the governments involved to deny any responsibility for the practice of torture. The seventh and the last is that the practice of torture often is accompanied by inflammatory political, racial, and ethnic attacks on particular groups. These attacks place such groups 'outside the pale of humanity' and help rationalize the use of torture against them.[154]

However, in the 21st century, even when states sanction their interrogation methods, torturers often work outside the law. For this reason, some prefer methods that, while unpleasant, leave victims alive and unmarked. A victim with no visible damage may

[154] Lippman, Matthew. 1979. "The Protection of Universal Human Rights: The Problem of Torture", Vol. 1, No. 4 *Universal Human Rights*, pp.25-55, at pp. 31-32.

lack credibility when telling tales of torture, whereas a person missing fingernails or eyes can easily prove claims of torture. Mental torture however can leave scars just as deep and long-lasting as physical torture. Professional torturers in some countries have used techniques such as electrical shock, asphyxiation, heat, cold, noise, and sleep deprivation, which leave little evidence; although in other contexts torture frequently results in horrific mutilation or death. The consequences of torture reach far beyond immediate pain. Many victims suffer from post-traumatic stress disorder (PTSD), which includes symptoms such as flashbacks (or intrusive thoughts), severe anxiety, insomnia, nightmares, depression and memory lapses. Torture victims often feel guilt and shame, triggered by the humiliation they have endured. Many feel that they have betrayed themselves or their friends and family. All such symptoms are normal human responses to abnormal and inhuman treatment.[155] And techniques such as sleep deprivation, the use of military dogs, sensory deprivation (such as the hooding of prisoners or the use of black masks that hinder sight, earflaps that inhibit hearing, surgical masks that restrict the sense of smell, and thick gloves that dull the sense of touch), exposure to extreme heat or cold, and forced "stress" positions (such as remaining in a squatting position for several hours) have been included in the list of 50 irregular techniques of "permitted" interrogations under the justification that they constitute "exceptional" but necessary treatment in view of the "exceptionality" of the enemy terrorist. Beyond these generalized techniques, presumably "light" because they do not produce any sharp physical pain, survivor testimony recounts the application of other methods, equally commonplace in "tough interrogations," and supposedly unauthorized. The majority of them are relatively similar as much for their brutality as for their techniques to those recorded in other situations of disappeared persons: beatings, cuts, burns, hangings, dry asphyxia or with water, electric shock, bone fractures, rapes, food deprivation, deprivation of water, and dog attacks. On the other hand, these are the techniques that authorities are attempting to exempt from the rubric of torture, those that appear relatively "new" in and of themselves, or in their modes of application. In the first place, what stands out is extreme isolation as a form of punishment. Lack of communication has been a regularly used penalty in the penitentiary system since its inception, but in more recent cases the technique is taken to the most infuriating extremes, as a systematic practice. In addition to this type of

[155] Wikipedia. 2011. 'Torture', available at: <http://en.wikipedia.org/wiki/Torture>, last accessed on 25 November 2012.

isolation, sensory deprivation, cutting off the senses (with earflaps, blinders, masks, hoods, gloves), imposes a much more radical inability to communicate. However, the means and scope of current techniques of solitary confinement are much more severe. Other practices related to the aforementioned could be considered an entirely new breed. Exposure to white noise combined with hooding, mentioned in several accounts, is a form of simultaneous disruption of sight and hearing, adding to the spatial isolation that occurs through sensory deprivation. It is known that this "produces confusion and psychological agitation, and after 40 minutes the majority of the victims begin to hallucinate". Something similar occurs with the constant exposure to loud music and intermittent lights, based on the saturation of the senses as a means of nullifying them. And certain techniques affect sleep, such as the exposure to monotonous noises in uncomfortable or "stressful" positions. Deprivation or disruption of sleep patterns is one of the most common forms of torture and probably the most damaging in this network of clandestine detention centers. This technique affects the nervous system in general and creates a kind of "hollowing" or exhaustion of the mind. Together, all the techniques described as "stressful" violently strain the senses and bodily functions by disrupting them, altering them, and traumatizing them. They take the subjects to the edge of madness through specific procedures of disorientation, and isolation through the obstruction, alteration or saturation of the senses. They provoke a kind of madness, a state of desperation that incites suicide or leads to a willingness to die of hunger.[156]

However, in 2005 a Channel 4 documentary "Torture: America's Brutal Prisons" showed video of naked prisoners being beaten, bitten by dogs, and stunned with Taser guns and electric cattle prods. Certain devices are singled out by the Amnesty International and one of them is stun belts which produce an eight-second 50,000 volt electric shock to incapacitate their wearer temporarily as a mechanism of torture. Also there are certain practices of the United States military, civilian agencies such as the CIA, and private contractors have been condemned both domestically and internationally as torture. A fierce debate regarding non-standard interrogation techniques exists within the US civilian and military intelligence community, with no

[156] Calveiro, Pilar, Nichols, William and Hilde, Thomas C. 2007. "Torture: New Methods and Meanings", Vol. 24, No. 1 *South Central Review*, pp. 101-118, at pp. 105-107.

general consensus as to what practices under what conditions are acceptable. In 2003 and 2004 there was substantial controversy over the "stress and duress" methods that were used in the U.S.'s War on Terrorism, that had been sanctioned by the U.S. Executive branch of government at Cabinet level. Similar methods in 1978 were ruled by ECHR to be inhuman and degrading treatment, but not torture. CIA agents have anonymously confirmed to the Washington Post in a December 26, 2002 report that the CIA routinely uses so-called "stress and duress" interrogation techniques, which are claimed by human rights organizations to be acts of torture, in the US-led War on Terrorism. These sources state that CIA and military personnel beat up uncooperative suspects, confine them in cramped quarters, duct tape them to stretchers, and use other restraints which maintain the subject in an awkward and painful position for long periods of time. The phrase 'torture light' has been reported in the media and has been taken to mean acts that would not be legally defined as torture. Techniques similar to "stress and duress" were used by the UK in the early 1970s and were ruled to be "inhuman and degrading treatment" but not torture by the European Court of Human Rights. Some techniques within the "stress and duress" category, such as water boarding, have long been considered as torture, by both the United States government and human rights groups. In its annual "Country Reports on Human Rights Practices," the U.S. State Department has described the following practices as torture: stripping and blindfolding of prisoners , subjecting prisoners to prolonged sun exposure in high temperatures and tying of hands and feet for extended periods, sleep deprivation and "suspension for long periods in contorted positions", sleep deprivation and solitary confinement, prolonged standing and isolation.[157]

And sometimes in the torture method there is substantial cooperation between states where the methods and coordination of torture has been documented. Through the Phoenix Program, the United States helped South Vietnam co-ordinate a system of detention, torture and assassination of suspected members of the National Liberation Movement or Viet Cong. During the 1980s wars in Central America, the U.S. government provided manuals and training on interrogation that extended to the use of torture. The manuals which have a chapter devoted to "coercive techniques" were also distributed by Special Forces Mobile Training teams to military personnel and

[157] Wikipedia. 2013. 'Torture and the United States', available at: < http://en.wikipedia.org/wiki/Torture and the United States>, last accessed on 15 January 2013.

intelligence schools. Also there are certain states that used the tactic of legal rendition in which suspected terrorists were extradited to countries where they were to be prosecuted for crimes allegedly committed. In the "war on terror" this has evolved into extraordinary rendition, the delivery of prisoners or others recently captured, including terrorism suspects, to foreign governments known to practice torture. Human rights activists have alleged that the practice amounts to kidnapping for the purpose of torture, or torture by proxy. A related practice is the operation of facilities for imprisonment, and it is widely believed torture, in foreign countries. It was reported in June 2008 that, according to human rights lawyers, the USA was "operating floating prisons to house those arrested in its war on terror". According to research, this country may have used as many as 17 ships as 'floating prisons' since 2001 and detainees are interrogated aboard the vessels and then rendered to other, often undisclosed, locations, it is claimed.[158] There is also secret detention facilities where Both United States citizens and foreign nationals are occasionally captured outside of the United States and transferred to secret US administered detention facilities, sometimes being held incommunicado for periods of months or years. Overseas detention facilities are known to be or to have been maintained at least in Thailand, the Philippines, Pakistan, Afghanistan, Uzbekistan, Azerbaijan, Jordan, Egypt, Iraq, Kuwait, UAE, Saudi Arabia, Morocco, Cyprus, Cuba, Diego Garcia, and unspecified South Pacific island nations. In addition, individuals are suspected to be or to have been held in temporary or permanent US controlled facilities in Indonesia, El Salvador, Nigeria, Equatorial Guinea, Libya, Israel, Denmark, Poland, Romania, Bulgaria, Albania, Hungary, Germany, and Scotland. There are also allegations that persons categorized as prisoners of war have been tortured, abused or humiliated; or otherwise have had their rights afforded by the Geneva Convention violated.[159]

While these methods have not disappeared in recent decades, more sophisticated techniques of torture were developed, making use of advances in psychological research, to increase the psychological impact on the individual torture victim. The British security forces used five techniques in combination against suspected

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[158] Wikipedia. 2011. 'Torture', available at: <http://en.wikipedia.org/wiki/Torture>, last accessed on 25 November 2012.

[159] Wikipedia. 2013. 'Torture and the United States', available at: < http://en.wikipedia.org/wiki/Torture and the United States>, last accessed on 15 January 2013.

terrorists.[160] In the context of the war on terror, US military intelligence and the CIA used the euphemism of "enhanced interrogation techniques" to describe a set of methods designed to break the personality of the suspect and elicit information, including prolonged isolation, prolonged sleep deprivation, sensory deprivation, extremely painful stress positions, sensory bombardment (such as prolonged loud noise and/or bright lights), forced nakedness, sexual humiliation, cultural humiliation (such as desecration of holy scriptures), being subjected to extreme cold that induces hypothermia, exploitation of individual phobias, simulation of the experience of drowning (water boarding).[161] However, in the deployment of shocking practices and techniques, US government officials have commended the interrogation techniques being used in the interrogation of detainees in Iraq and other detention centres.[162]

3.2 Torture in Bangladesh

Today infringement of human rights is a major concern throughout the world and Bangladesh is not an exception; moreover scores high in the scale. Human rights violations have become endemic and remedies for breaches are almost non-existence in here.[163] This part 'torture in Bangladesh,' states just the situation of torture prevailing in Bangladesh and the methods used by certain law enforcing agencies like the police, RAB and certain other special forces while practicing torture to suspects. However, these law enforcing agencies are taken for research purposes only because the number of torture practiced by them ranked high and reported in the media.

Since winning independence from Pakistan in 1971, Bangladesh has been wracked by violent, adversarial politics and serious challenges to the rule of law.[164] The endless practice of torture practiced with impunity has entrenched fear within Bangladeshi

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160 See the European Court of Human Rights in *Ireland v. UK*, (1978) 2 ECHR (Ser.A) 25.

161 Atlas of Torture. 2009. 'History of the Prohibition of Torture and Torture Methods', available at: < http://www.univie.ac.at/bimtor/prohibitionoftortureandilltreatment/355>, last accessed on 20 November 2012.

162 Odeku, Kolawole Olusola. 2008. *In Search of a Regime of Responsibility and Accountability for Perpetrators of Torture with Reference to Persons with Special Responsibility for Protecting Human Rights.* South Africa: University of Fort Hare. (Unpublished PhD thesis).

163 Bangladesh Legal Aid and Services Trust [BLAST]. 2005. *Arbitrary Arrests and Unreasonable Use of Power of Remand by Police*. Dhaka: BLAST.

164 Human Rights Watch. 2006. 'Judge, Jury, and Executioner: Torture and Extrajudicial Killings by Bangladesh's Elite Security Force', available at: <http://www.unhcr.org/refworld/docid/45a4db532.html>, last accessed on 16 January 2013.

society. Ninety per cent of the Bangladeshi population belongs to the less affluent class of society, and they are the victims of violence committed by state agencies.[165] Members of the law enforcement agencies are often accused of abusing their powers and defying human rights. Allegations of torture and extortion of money are also common against them.[166] People have lost faith in the criminal justice system since torture was seen as an effective tool for criminal investigation, particularly due to poor infrastructural facilities. Victims refrain from complaining about torture due to the fear of further persecution. Even if they were not afraid of making complaints, they would not be able to afford the bribes and huge litigation expenses that make up the complaint process.[167] Military and police regularly employ torture and cruel, inhuman, or degrading punishment against detainees, despite constitutional guarantees against torture and Bangladesh's ratification of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The government failed to investigate the causes of numerous deaths in custody, and there was little action to hold accountable those responsible for the deaths.[168] Since the use of torture has become second nature to the officers of law enforcement agencies, in being so, they severely undermine any ethical authority of these agencies. It is clear that in Bangladesh the law enforcement agencies exercise huge power but demonstrate virtually no ethical principles which respect the fundamental human rights of the citizens of Bangladesh.[169] Bangladesh has 629 police stations and torture is routinely practiced in all of these police stations, whether to maintain law and order, as a means of investigation, or to extort money for personal gain. Even if only a single person is assumed to be tortured per day per station, an alarming number of 229,585 persons are being tortured in Bangladesh every year and this figure excludes victims

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165 Asian Human Rights Commission. 2012. 'The practice of torture and relevant legal provisions in 10 Asian countries', available at: < http://www.humanrights.asia/resources/journals-magazines/hrschool/lesson-61/lesson-2-the-practice-of-torture-and-relevant-legal-provisions-in-10-asian-countries>, last accessed on 16 January 2013.

166 Bangladesh Legal Aid and Services Trust [BLAST]. 2005. *Arbitrary Arrests and Unreasonable Use of Power of Remand by Police*. Dhaka: BLAST.

167 Asian Human Rights Commission. 2012. 'The practice of torture and relevant legal provisions in 10 Asian countries', available at: < http://www.humanrights.asia/resources/journals-magazines/hrschool/lesson-61/lesson-2-the-practice-of-torture-and-relevant-legal-provisions-in-10-asian-countries>, last accessed on 16 January 2013.

168 Human Rights Watch. 2012. 'World Report 2011: Bangladesh', available at :< http://www.hrw.org/world-report-2011/bangladesh>, last accessed on 18 January 2013.

169 Odhikar. 2011. *Human Rights Reports 2011*. Dhaka: Odhikar.

tortured outside police stations and detention centers. However, the country's police force is not the only state agency practicing torture. Paramilitary forces like the Rapid Action Battalion, the Armed Forces, the Border Security Forces, Intelligence Agencies such as the Directorate General of Forces Intelligence (DGFI) and special cells such as the Task Force for Interrogation and the Joint Interrogation Cell also practice torture. The latter two agencies, by the very nature of their mandate, are professionally trained to extract confessions from detainees, for which torture is the most common tool.[170] And also Bangladesh's unique system of government succession at elections has led to an outbreak of widespread political violence and during the pre-election violence, reports documented excessive use of force by police and army personnel.[171] Two political parties; the Awami League (AL) and the Bangladesh Nationalist Party (BNP) dominate the scene and both the parties have used armed groups and militias in violation of the law to consolidate power and maintain control. These violations are part of a degraded human rights environment, in which arbitrary arrests, physical and psychological torture, lengthy pretrial detention, and impunity for security forces are the disturbing norm.[172]

3.2.1 Police and the Third Degree Method

Despite serious problems related to a dysfunctional political system, Bangladesh remains one of the few democracies in the Muslim world. Bangladesh is generally a force for moderation in international forums, and it is also a long-time leader in international peacekeeping operations. In May 2005, Bangladesh became a member of the United Nations Human Rights Council. Its activities in international organizations, with other governments, and its regional partners to promote human rights, democracy, and free markets are coordinated and high profile[173] but situation is not

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170 Asian Human Rights Commission. 2012. 'The practice of torture and relevant legal provisions in 10 Asian countries', available at: < http://www.humanrights.asia/resources/journals-magazines/hrschool/lesson-61/lesson-2-the-practice-of-torture-and-relevant-legal-provisions-in-10-asian-countries>, last accessed on 16 January 2013.

171 Human Rights Initiative. 2007. 'Bangladesh Country Report: Anti-terrorism Laws and Policing', available at: <http://www.humanrightsinitiative.org/publications/chogm/chogm 2007/docs/country reports/071004 chogm07 bangladesh anti terrorism policing country report2007.pdf>, last accessed on 16 January 2013.

172 Human Rights Watch. 2006. 'Judge, Jury, and Executioner: Torture and Extrajudicial Killings by Bangladesh's Elite Security Force', available at: <http://www.unhcr.org/refworld/docid/45a4db532.html>, last accessed on 16 January 2013.

173 Infoplease. 2007. 'U.S. Department of State Background Note: Bangladesh', available at: < http://www.infoplease.com/country/profiles/bangladesh.html>, last accessed on 16 January 2013.

the same as it seems. Though Bangladesh has ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (CCPR), but numerous reports suggested that with weak governance, and pervasive corruption, the practice of torture continued unabated and that there was nearly complete impunity for perpetrators. It appeared that the practice of torture had perpetuated since 1971, regardless of which government was in power. According to the Human Rights Watch (HRW) World Report torture remains widespread in Bangladesh and is frequently used by law enforcement officials to coerce confessions in criminal investigations and to extort money. It is also used for politically motivated purposes against perceived government critics and alleged national security suspects.[174] However, under its international obligations as state party to the international Covenant on Civil and Political Rights, pursuant to Article 4 (2), the government of Bangladesh is not allowed derogation from the right to life, especially in the form of extra-judicial killings, or death resulting from torture. During its term on the UN Human Rights Council and despite a longstanding request, Bangladesh did not issue an invitation to the UN Special Rapporteur on Extrajudicial Killings.[175] A Human Rights Watch report, Ignoring Executions and Torture, added that although there are no reliable statistics on the extent to which state agents engage in acts of torture, nongovernmental organizations and journalists in Bangladesh have over the years documented and reported thousands of cases. Though, in an address to the Human Rights Council on 3 February, the Foreign Minister said the Government would show "zero tolerance" towards extrajudicial killings, torture and custodial deaths, some members of security forces acted with impunity and committed acts of physical and psychological torture. The USSD report stated that even if the Constitution prohibits torture and cruel, inhuman, or degrading punishment, security forces, including the RAB, military, and police, frequently employed severe physical and psychological abuse during arrests and interrogations. It was stated by the NGO Odhikar that 29 people had been "extra-judicially killed" by the police and security forces since the

[174] UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

[175] Commonwealth Human Rights Initiative. 2008. 'Submission of the Commonwealth Human Rights Initiative (CHRI) for the Universal Periodic Review of Bangladesh September 2008', available at: <http://www.uprinfo.org/IMG/pdf/CHRI_BGD_UPR_S4_2009_CommonwealthHumanRightsInitiative_upr.pdf>,last accessed on 16 January 2013.

Awami League government came to office on 6 January 2009, of them many were killed in so-called 'crossfire'/ 'encounter'/ 'gunfight'/ 'shootout'.[176] It is also recorded that in 2010, 67 persons were reportedly tortured by different law enforcement agencies among them 22 persons were allegedly tortured to death. Law enforcement agencies however, regularly practice torture on suspects and accused persons in order to extract confessional statements.[177]

So the boundaries of freedom in Bangladesh are clearly demarcated by the use of crossfire, torture and other potent threats. This use of terror for social control optimistically referred to by the state as "law and order" is not only a human rights issue: it is also a fundamental development problem. The country's politicized and decrepit prosecution service, its total lack of witness protection, primitive forensic facilities and a whole range of other obstacles that together are all but insurmountable for the victim of human rights abuse seeking to obtain redress against a state agent. That the basic institutions for maintenance of law and administration in Bangladesh are in a serious state of collapse and it cannot be denied. It follows that agencies which are responsible for the prevalence of killings, abductions and torture, notably the police and special paramilitary groups, take advantage of conditions and become increasingly corrupt and dangerous. The popular view of police in Bangladesh however, today is that they either use investigations to make money for themselves or conduct illegal services on behalf of politicians, or both. This opinion is heard everywhere, and among people in all parts of society. It is also accepted as normal that the police demand money from complainants, from alleged perpetrators and from third parties.[178] Allegations of torture continued to dominate the concerns regarding the violations of human rights by the police.[179] As per Odhikar documentation, police topped the torture list this year.[180] Suspects were picked up by the law enforcement agencies, detained, and tortured while they were in the custody of the law enforcement agencies. Another kind of torture happened when people were taken into

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176 Odhikar. 2011. *Human Rights Reports 2010*. Dhaka: Odhikar.

177 Odhikar. 2011. *Human Rights Reports 2010*. Dhaka: Odhikar.

178 Fernando, Basil. 2006. "Short Stories about Home Truths in Bangladesh", Vol. 5 No. 4 *Article 2 of the International Covenant on Civil and Political Rights*, pp. 2-7, at p. 4.

179 Odhikar. 2007. *Human Rights Reports 2008*. Dhaka: Odhikar.

180 Odhikar. 2011. *Human Rights Reports 2010*. Dhaka: Odhikar.

remand in order to extract evidence to be used against them or others allegedly accused for corruption or crime. On many occasions they were tortured into giving confessional statements. Some were even threatened with death by "crossfire".[181] Generally police are using methods of torture in remand because they think that it is moderately helpful and indispensable for extracting information from the crime suspects. It was also explained that interrogation under remand help to rapid disposal of the case, to get confessions, elicit information from cunning criminals, getting clues to serious crimes and identify unidentified criminals, necessary to dig into the facts of a case, to recover illegal arms, stolen goods and to arrest fugitives. They described different techniques applied to extract information from the suspects. They conduct series of careful interrogation sessions, put mental pressure, psychological interrogation techniques, threats, and put questions depending on the nature of the accused. They also repeatedly asked questions on the incident and sometimes use threats and beating too.[182]

And despite a constitutional prohibition, arbitrary arrest is among the most common features of policing in Bangladesh. It is routinely accompanied by assault and extortion, and also often leads to torture, killing and further grave abuses of the arrested person and others. Once a person is under custody, the police have a range of alternative ways to proceed. If the detainee can be accused of a serious offence like murder or storing illegal weapons then the investigating officer will already be calculating how much money can be made and from whom it can be collected. On one side, he will be taking money from the complainant. On the other, he will be bargaining with the accused about how much it will cost to escape from the charges, or at least from the Third Degree Method. If threats and negotiations with an accused do not yield anything lucrative, police will turn to what is euphemistically known as the Third Degree Method: torture. The third degree starts out light, and is gradually increased in intensity as the interrogation continues. The scale of torture also depends upon the severity of the charges and amount of money involved, as well as other factors such as the amount of interest in the case from politicians or other influential persons, and the identity of the accused. However, the methods start with beating with

[181] Odhikar. 2007. *Human Rights Reports 2008*. Dhaka: Odhikar.

[182] Bangladesh Legal Aid and Services Trust. 2008. *The Advocacy Programme on the Use of Section 54 and 167 of CrPC by the Police Officers*. Dhaka: BLAST.

sticks and other objects on the joints, and soles of the feet; then, walking over the body, forcing hot or cold water into the nose (depending on the season), applying itching powders, rolling and pressing on the body with bamboo; then, hanging upside-down from the ceiling or a tree and beating, inserting sharp objects under fingernails and into other sensitive parts of the body, and hanging a heavy weight from the penis and forcing to stand on a table or chair.[183] They were alleged also to have been compressed between slabs of ice for long periods of time.[184] Abuse consisted of threats, beatings, use of electric shock, sexual harassment and rape. The bodies of the victims regularly have physical marks and injuries indicating that they have been tortured."[185] Police also inflicted mental, physical torture, inhuman behavior on them, tore their shirts, hurt their fingers seriously by squeezing them with pliers. Victims were forced to admit guilt and promised to be set free after admission. Some victims were threatened to be implicated falsely with serious charges like murder, arms-smuggling and terrorism unless they gave money. [186] However, the torture style varies in accordance with the weight of the case.[187] Ill-treatment, which may amount to torture, was frequently used by the police in the course of criminal investigations, and also as a tool to extract money from detained suspects and their families. Political opponents have reportedly been subjected to ill-treatment and torture under various governments; during times of unrest there has been a marked increase in institutional violence against journalists, demonstrators, opposition members, etc.[188]

3.2.2 Abuses by the Rapid Action Battalion and Other Special Forces

Though the government promised to institute a zero-tolerance policy and bring the perpetrators of extrajudicial killings to justice, yet little change has taken place, and in 2010 the Home Minister and other officials denied any wrongdoing by law

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183 Asian Legal Resource Centre. 2006. " Bangladesh, a corrupted and Tortured Nation", Vol. 5 No. 4 *Article 2 of the International Covenant on Civil and Political Rights*, pp. 12-19, at pp. 12-15.

184 Odhikar. 2012. *Human Rights Reports 2011*. Dhaka: Odhikar.

185 UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

186 Bangladesh Legal Aid and Services Trust [BLAST]. 2005. *Arbitrary Arrests and Unreasonable Use of Power of Remand by Police*. Dhaka: BLAST.

187 Bangladesh Legal Aid and Services Trust. 2008. *The Advocacy Programme on the Use of Section 54 and 167 of CrPC by the Police Officers*. Dhaka: BLAST.

188 UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

enforcement agencies, including the Rapid Action Battalion (RAB), the elite anti-crime, anti-terror force whose officers regularly kill with impunity.[189] Rapid Action Battalion, which refers to a joint military-police unit whose legal function, is to act as a special anti-crime unit but its actual function, it is said to arrest and kill at random in the name of "crossfire".[190] Since 2004, the RAB has flaunted its violent behavior as a way to intimidate and scare people. To date, RAB was responsible for the deaths of 1100 people around the country since its creation. They are responsible for widespread torture and killing the suspects in custody. The government justifies the killings by using the term "crossfire," which it refers to as gunfights between any alleged criminal group or "hardened" criminals and the RAB or police.[191] The Home Minister has also supported the claim that RAB officers who have killed were acting in self-defense. And in a worrying development, the police appear to have increasingly adopted the RAB's extrajudicial methods, and several hundred killings have been attributed to the police force in recent years.[192] Transparency International (TI) in 2008 published a 'National Household Survey 2007, for which fieldwork was conducted between July 2006 and June 2007. The survey identified 78 households in which individuals had been arrested by law enforcement agencies in the past year; of these, 22 per cent reported to have been tortured while in custody. A further number claimed to have been threatened with torture, or threatened with arrest without a warrant.[193] Also investigations by human rights organizations regularly find that victims were executed while in RAB custody. The bodies of the dead often bear marks of torture, and many survivors of RAB custody have repeatedly alleged ill-treatment and torture.[194] However, torture methods used by the force include beatings, boring holes in suspects with electric drills on the legs and feet, and the

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189 Human Rights Watch. 2012. 'World Report 2011: Bangladesh', available at :< http://www.hrw.org/world-report-2011/bangladesh>, last accessed on 18 January 2013.

190 Fernando, Basil. 2006. "Short Stories about Home Truths in Bangladesh", Vol. 5 No. 4 *Article 2 of the International Covenant on Civil and Political Rights*, pp. 2-7, at pp. 4-5.

191 Ullah, AKM Ahsan. 2009. "Crossfire" by the Rapid Action Battalion Exploring the extent of human rights violation in Bangladesh', available at: < http://iussp2009.princeton.edu/papers/90259>, last accessed on 18 January 2013.

192 Human Rights Watch. 2012. 'World Report 2011: Bangladesh', available at :< http://www.hrw.org/world-report-2011/bangladesh>, last accessed on 18 January 2013.

193 UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

194 Human Rights Watch. 2012. 'World Report 2011: Bangladesh', available at :< http://www.hrw.org/world-report-2011/bangladesh>, last accessed on 18 January 2013.

application of electric shock to open wounds[195] adding impunity, abduction, inhuman torture, arrogance, intimidation, and absolute terror. It has been aired that the government had given the force a mandate to kill suspected criminals instead of making arrests and the government had drafted a list of most-wanted criminals for RAB.[196]

However, in late 2002 the government of Bangladesh issued an executive order that launched a drive to arrest "wanted criminals" and recover "illegal arms". The order was aimed at curtailing a rapid rise in cases of murder, extortion, kidnapping, and crimes against women by warring gangs that were allegedly linked to members of both the major political parties. With the name of Operation Clean Heart, it comprised of army, police, village defence force, and border security personnel. It lasted for 86 days, from 16 October 2002 to 9 January 2003. During this time there were 58 deaths in custody, all were "heart attacks" according to the concerned authorities. Over an estimated 11,000 people were arrested, held and brutalized at military camps. At least 8000 were persons against whom no case had ever been lodged. A few "wanted criminals" were captured, but most managed to hide elsewhere until the whole thing blew over. Undeterred, the government cooked up some statistics upon which to claim success. Countless ordinary citizens, meanwhile, had been traumatized and panicked out of their wits. Little wonder that at least a few of the heart attacks were genuine and during Clean Heart, the sound of a military vehicle or boots approaching your front door was enough for a few persons to literally die of fear. And so Clean Heart became synonymous with Heart Attack. Some victims sought to lodge criminal complaints. The government, fearing that criminal complaints could multiply, threw a blanket of impunity over the 50,000 or so personnel involved in the operation.[197] The members of the special force certainly proved the difference between the skills of the police personnel and themselves. Despite all this, every few days it is kept on hearing of Cobra, Cheetah, Elephant, Rhino, all are various Special Forces with the mandate

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[195] Cobain Ian and Karim Fariha. 2011. 'Bangladesh Interrogation Centre where Britons were taken to be Tortured', available at: < http://www.guardian.co.uk/world/2011/jan/17/bangladesh-secret-interrogation-centre>, last accessed on 03 April 2013.

[196] Ullah, AKM Ahsan. 2009. "Crossfire" by the Rapid Action Battalion Exploring the extent of human rights violation in Bangladesh', available at: < http://iussp2009.princeton.edu/papers/90259>, last accessed on 18 January 2013.

[197] Asian Human Rights Commission. 2006. *Bangladesh: The Human Rights Situation in 2006*. Hong Kong: AHRC.

to act like other Forces.[198] Another special force that needs to focus is the DGFI and according to the Human Rights Watch report of 18 May 2009, the DGFI "is widely regarded as a driving force behind the military-backed regime that took power on January 11, 2007, and exercised a central role in its anti-corruption campaign. It intimidated, arrested, and arbitrarily detained dozens of businesspersons, senior party officials, journalists, and academics and placed them in illegal detention facilities inside the military cantonment in Dhaka. Many were physically and mentally tortured, often threatened to make forced confessions or implicate others in crimes. During much of the state of emergency, DGFI exercised control over media outlets also."[199]

However, the torture methods used by the Special Forces include blindfolding with towel, beating with sticks on hands, legs and waist, inserting an ice-like substance through the anus, pouring too hot or cold water on head or various parts of the body, hitting consistently on chest with a rifle's butt.[200] In the Taskforce for Interrogation Cell, or TFI, the methods they employ for extracting information and confessions from enemies of the state suggest that a great deal of thought has been given to suffering. Men are reported to be beaten, subjected to electric shocks and strapped to a chair that spins at high speed. A man who has suffered electric shock torture in this room recalls: "you're blind-folded, but you can hear them shuffling around you and moving equipment and tools about. Then they start to move you into position and strap you down. You don't know what's happening. And then you feel the most intense pain. It's such a shock because you don't know it's coming." Victims also said that they were put on the floor, cross-legged, and stood on knees in their boots, crushing the knees into the ground. Victims also were threatening to rape and other types of injury to the family members if he did not cooperate with them. A number of people who have survived spells inside the TFI have given accounts of what they saw when they were led further inside: there is a corridor with barred windows on its right hand side; dozens of blindfolded prisoners are shackled to the windows, with their hands above their heads. They are said to be kept in this position for up to two weeks.

198 Ain o Salish Kendra. 2009. *RAB: Eradicating Crime or Crimes of the State?* Dhaka: ASK.

199 UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

200 Biswas, Dr. Zahidul Islam. 2012. 'Police Accountability and the Rule of Politics', available at: <http://www.thedailystar.net/forum/2012/July/politics.htm>, last accessed on 03 April 2013.

Sometimes they are beaten while suspended this way. One former inmate too terrified to be identified says: "being beaten around the small of the back is standard procedure. They're obsessed with damaging kidneys." More prisoners must kneel on the floor of the corridor, blindfolded and with their hands cuffed behind their backs. Running off this corridor, on the left, is a row of nine small cells, each 3ft x 7ft, with a prisoner in each. At the end of the corridor are two offices, a computer room, and a restroom for the torturers. At the other end of the TFI, past the guard, is a corridor with a barred window on its right side and two rooms on the left. Inside the first room is a series of implements like pulleys, blocks of wood, small generators and voltmeters that are used during interrogation. There is a small window allowing people to stand outside the room and watch what is happening inside. Former inmates say the next room houses a small library of photographs of people being tortured, which are shown to people before they too are made to suffer. In the centre of the room, according to several former TFI inmates, is a motorised rotating chair into which victims can be strapped and spun at high speed. However, the taking of life during interrogation is not unknown here. Several former inmates say they were aware of prisoners dying at the TFI. A man who was held in one of the cells said he watched as a prisoner in his 50s, chained up in the corridor, was beaten to death. Several said that when a prisoner died his body was put on a stretcher and an oxygen mask placed over his face, giving the impression he was alive and receiving medical treatment.[201]

After having the history and a very clear concept about torture, the next chapter i.e. Chapter 4 is on the normative compliance of Bangladesh. This one will analyze the Bangladesh's compliance in fulfilling its international obligation in the area of enacting and implementing legislation, rights discourse, promotion and protection regime. In fulfilling this obligation, since, Bangladesh is facing various hurdles, the last part of this chapter will reveal that Grim Reality.

[201] Cobain Ian and Karim Fariha. 2011. 'Bangladesh Interrogation Centre where Britons were taken to be Tortured', available at: < http://www.guardian.co.uk/world/2011/jan/17/bangladesh-secret-interrogation-centre>, last accessed on 03 April 2013.

CHAPTER 4

NORMATIVE COMPLIANCE: TOWARDS AN ANTI-TORTURE REGIME

Bangladesh is committed to ensuring all human rights civil, political, economical, social and cultural rights including the right to development and fundamental freedoms to all its citizens and without any discrimination, she is also committed to building a society free from exploitation in which the fundamental human rights and freedom, equality and justice, political economic and social rights are secured. While favoring a holistic approach in this respect, Bangladesh believes in individuality, universality, non-selectivity, and interdependence of human rights. It is because of her commitment to the promotion and protection of human rights and fundamental freedoms of all its citizens that Bangladesh actively and constructively participated in the negotiations leading up to the creation of the Human Rights Council. She served the Commission on Human Rights, with distinction, during 1983-2000 and was elected to the Commission for the term 2006-2008.[1] However, among the other instruments Bangladesh ratified the Convention against Torture (CAT) on 5 October 1998 by an instrument of accession. But unfortunately Bangladesh has not ratified the Optional Protocol of the CAT and even after a long 15 years the country does have one specific law criminalizing torture.[2] Whereas Article 2 (1) and Article 4 of the Convention against Torture requires the state party acceding to it to enact a domestic law to recognize an act of torture, cruel, inhuman and degrading punishment and treatment, as a crime in the country.[3] And it is now well known that the international ban on the use of torture has the enhanced status of a peremptory norm of general international law (*jus cogens*). This means that it "enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. At the national level it de-legitimates any law, administrative or judicial act authorizing

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1 The Department of General Assembly and Conference Management of the United Nations. 2006. "Human rights pledges by the government of Bangladesh to the UN", Vol. 5 No. 4 *Article 2 of the International Covenant on Civil and Political Rights*, pp. 86-92, at p. 87.

2 Asian Human Rights Commission. 2013. 'Torture in Bangladesh', Available at: < http://www.humanrights.asia/countries/bangladesh/torture-in-bangladesh>, last accessed on 19 April 2013.

3 Rule of law in armed conflicts project (RULAC). 2009. 'Bangladesh: National Legislation', available at: < http://bangladesh.ahrchk.net/docs/TortureandCustodialDeathBill2009.pdf>, last accessed on 18 May 2013.

torture. Because of the absolute prohibition of torture, no state is permitted to excuse itself from the application of the peremptory norm. Because the ban is absolute, it applies regardless of the status of the victim and the circumstances, whether they are in a state of war, siege, emergency, or whatever. The revulsion with which the torturer is held is demonstrated by very strong judicial rebuke, condemning the torturer as someone who has become "like the pirate and slave trader before him '*hostis humani generis'*, an enemy of all mankind", and torture itself as an act of barbarity which "no civilized society condones," "one of the most evil practices known to man" and "an unqualified evil". Following from the status of the prohibition of torture as peremptory norm, any state has the authority to punish perpetrators of the crime of torture as "they are all enemies of mankind and all nations have an equal interest in their apprehension and prosecution". The UNCAT therefore has the important function of ensuring that under international law, the torturer will find no safe haven. Applying the principle of universal jurisdiction, UNCAT also places the obligation on states to either prosecute or extradite any person suspected of committing a single act of torture and doing nothing is not an option here.[4]

However, Bangladesh which has ratified the CAT is therefore bound by Article 4 of the CAT to ensure two different things, namely criminalization of and appropriate penalties for torture. The first obligation of Bangladesh under Article 4 of the CAT is to ensure that all acts of torture, attempt to torture and complicity or participation in torture are offences under its criminal law. The Committee Against Torture has repeatedly called on states to list torture as a specific offence in domestic criminal codes and to ensure that the offence of torture is consistent with article 1 of the Convention against Torture. However, it is not the explicit opinion of the Committee that the definition of torture as offered by the CAT should be reproduced exactly in national criminal legislation. Rather states parties must include a definition of torture which covers the CAT definition. The concluding observations of the Committee in respect of the latest report of Sweden were that 'while the specific arrangements for giving effect to the convention in the domestic legal system are left to the discretion

[4] African Policing Civilian Oversight Forum. 2010. 'Investigating Torture: The New Legislative Framework and Mandate of the Independent Complaints Directorate', available at: < http://www.ipid.gov.za/documents/report_released/research_reports/Torture%20Workshop%20Report.pdf>, last accessed on 17 May 2013.

of each state party, the means used must be appropriate, that is they should produce results which indicate that the state party has fully discharge its obligations'.[5] But unfortunately, although Bangladesh has twice gone through independence struggles, culminating in full political independence in 1971, its laws have not yet emerged from the 19th century. Meanwhile, policing has for the most part degenerated back into the feudal ages. At no stage has there been a serious attempt to modernize it or to take advantage of significant developments happening elsewhere in the world. Legal and investigative reforms are moving so slowly as to place Bangladesh completely out of touch with the rapid developments in communications, transportation and sense of time among people in other countries.[6] And for this it is necessary to make legislative provisions to give effect to Bangladesh's obligations under the aforesaid Convention[7] along with an audit on implementation of the CAT or any of its provision in the domestic arena of a country is utmost importance.[8]

4.1 Analyzing Bangladesh's Compliance in Laws

However, Bangladesh has established itself as a democratic and pluralistic polity through its unwavering commitment to the principles and practices of good governance, democracy, rule of law, and promotion and protection of all human rights and fundamental freedom of all her citizens with particular attention to the rights of women, children, minorities, disabled and other vulnerable sections of her population and has been endeavoring to meet its constitutional obligations as well as its international commitments towards promoting and protecting human rights of its citizens through among others, enacting legislations and adopting administrative measures to implement them, as well as through implementation of several socio-

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5 Rahman, Md. Mahbubur and Islam, Sk. Samidul. 2006. "Obligation of Bangladesh under Article 4 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: A Performance Audit", Vol. 10, No. 1 & 2 *Bangladesh Journal of Law*, pp.119-148, at p. 121.

6 Asian Human Rights Commission. 2006. 'Bangladesh: the Human Rights Situation in 2006', available at: < http://www.humanrights.asia/resources/hrreport/2006/Bangladesh2006.pdf>, last accessed on 02 May 2013.

7 Rule of law in armed conflicts project (RULAC). 2009. 'Bangladesh: National Legislation', available at: < http://bangladesh.ahrchk.net/docs/TortureandCustodialDeathBill2009.pdf>, last accessed on 18 May 2013.

8 Rahman, Md. Mahbubur and Islam, Sk. Samidul. 2006. "Obligation of Bangladesh under Article 4 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: A Performance Audit", Vol. 10, No. 1 & 2 *Bangladesh Journal of Law*, pp.119-148, at p. 121.

economic development program.[9] There are numerous sources of law in Bangladesh, ranging from the highest law of the land, the Constitution all the way down to case law. Aside from public law, there is also the possibility to bring civil proceedings for damages in private law. While international law is clear on the subject, it is necessary to examine the state of domestic Bangladeshi law on torture and reparation for its victims and the practical realities of the legal system to fully understand the current legal situation domestically regarding torture and reparation in Bangladesh. Thus an attempt will be made to discuss all these things in this present chapter i.e. in chapter 4 starting from the compliance in laws and finishes with revealing the grim reality. Therefore this chapter is all about the rights discourse, promotion, protection regime and the prohibition, prevention and *de jure* eradication of torture domestically.[10]

4.1.1 Rights Discourse

This part focuses on the obligation to implement the prohibition of torture as a norm of *jus cogens*, compliance in enacting and implementing legislation, review of policies, procedures and practices in Bangladesh's perspective. Starting the compliance in laws the thesis has firstly the supreme law of the Republic i.e. the Constitution and the other existing laws along with certain policies and bills of Bangladesh providing the prohibition of torture in absolute term or other.

4.1.1.1 Constitution and the Prohibition of Torture

Constitution of the People's Republic of Bangladesh has the prohibition of torture in absolute terms in various articles with an anti-torture spirit in the whole. So torture or cruel, inhuman or degrading treatment in police custody or jail custody are not permissible in any way or other under the Constitution and any such act is unconstitutional and unlawful.[11] Every day it is seen the casual way in which the matter of arrest and remand is dealt with in court. Regularly accused persons are remanded for the purpose of interrogation and extortion of information by application

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[9] The Department of General Assembly and Conference Management of the United Nations. 2006. "Human rights pledges by the Government of Bangladesh to the UN", Vol. 5 No. 4 *Article 2 of the International Covenant on Civil and Political Rights*, pp. 86-92, at p. 87.

[10] Bangladesh Rehabilitation Centre for Trauma Victims (BRCT). 2006. *Broken Promises: The State of Reparation for torture Victims in Bangladesh.* Dhaka: BRCT.

[11] *Bangladesh Legal Aid and Services Trust (BLAST) and others V Bangladesh and others* (2003) 55 DLR (HCD) 363, 373.

of force contrary to the spirit of the whole Constitution.[12] Protection of the fundamental rights of individuals is the central edifice on which the concept of democracy is based. All instruments and mechanics of a democratic system of government are meant to protect these rights. These rights cannot be curtailed, abridged or compromised except in accordance with law. However, the very foundation of a democracy is shattered and frustrated if the basic rights of its people cannot be protected or enforced through legal means. On recognition of the above, the framers of the Constitution took utmost care and gave maximum emphasis on the constitutional provisions guaranteeing protection and enforcement of fundamental human rights of its people.[13] And it should be mentioned that the Proclamation of Independence of 10th April, 1971 which furnished the basis of the Constitution of Bangladesh indicated the willingness of the nation to submit to the obligations under international law.[14] Since the Constitution of Bangladesh which embodies the principles and provisions of the Universal Declaration of Human Rights where freedom from torture is described as a basic human rights, [15] this nation's Declaration of Independence where, human rights issues have received considerable public and governmental attention, the Constitution of Bangladesh, adopted on 4 November 1972, declared that the Republic shall be a democracy in which fundamental rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed.[16] The provisions of the Constitution that pertain to international law[17] deal with two main issues. One is that international relations and the other international treaty. It is clear that constitutional provision on international law is normative in character and is the embodiment of principles of *jus cogens*. It reflects to

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12 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 279.

13 Bangladesh Legal Aid and Services Trust (BLAST). 2010. *Seeking Effective Remedies: Prevention of Arbitrary Arrests and Freedom from Torture and Custodial Violence*. Dhaka: BLAST.

14 It declared that the elected representatives of the people of Bangladesh would undertake to observe and give effect to all duties and obligations that developed upon themselves as a member of the family of nations and to abide by the Charter of the United Nations. See Karzon, Sheikh Hafizur Rahman and Faruque, Abdullah-Al. 1999. "Status of International Law under the Constitution of Bangladesh: An Appraisal", Vol. 03, No. 1 *Bangladesh Journal of Law*, pp.23-47, at p. 26.

15 The Department of General Assembly and Conference Management of the United Nations. 2006. "Human rights pledges by the Government of Bangladesh to the UN", Vol. 5 No. 4 *Article 2 of the International Covenant on Civil and Political Rights*, pp. 86-92, at p. 87.

16 Greenfield, Richard. 1981. "The Human Rights Literature of South Asia", Vol. 3, No. 3 *Human Rights Quarterly*, pp.129-139, at p.130.

17 Article 25 of the Constitution of the People's Republic of Bangladesh, 1972.

a large extent, the desire of Bangladesh to become an active member of the international community. This notion is reinforced by the fact that article 8(2) of the Constitution declares that fundamental principles of state policies shall be fundamental to the governance, shall be applied in the making laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh.[18] The Constitution sought to establish a welfare State and the preamble declared the fundamental aim of the state to be the realization through democratic process of a socialist society, free from exploitation: a society in which the rule of law, fundamental human rights and freedom, equality and justice would be ensured. The concept of a welfare state was further strengthened by the fundamental principles of state policy which set out the economic, social and political goals of the Constitution.[19] It is therefore required to take note of the scheme and objectives of the Constitution as evidenced by those principles of state policy and cannot construe any provision contrary to such principles of state policy unless the language of a provision is so clear as to convince the court that in that particular instance the framers wanted to make a departure.[20]

And also starting with that, the Constitution categorically and emphatically enshrined in its Part III the fundamental rights of the people[21] where no law could be made which was inconsistent with these rights and no action could be taken by the government in derogation of such rights. To that extent, the power of Parliament and the Executive was limited since these are basic rights which cannot be denied. In 1650, Grotius, the Dutch political thinker, propounded a theory that when a sovereign of a state infringes the basic human rights of his subjects, it becomes an international question and the sovereign forfeits his right to rule under the law of nations and other nations may be justified in intervening. Though the theory had no immediate impact, it drew the attention of the contemporary political thinkers and by the next century it

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18 Karzon, Sheikh Hafizur Rahman and Faruque, Abdullah-Al. 1999. "Status of International Law under the Constitution of Bangladesh: An Appraisal", Vol. 03, No. 1 *Bangladesh Journal of Law*, pp.23-47, at p. 27.

19 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 19.

20 *Ibid.*, at p. 42.

21 Bangladesh Legal Aid and Services Trust (BLAST). 2010. *Seeking Effective Remedies: Prevention of Arbitrary Arrests and Freedom from Torture and Custodial Violence*. Dhaka: BLAST.

was being considered that every man has certain natural and inalienable rights necessary for the development of his personality which should be inviolable.[22] The rights guaranteed by Part III of the Constitution can be classified into two groups. One the one side fall the rights which are general in nature covering the whole range of human activities and on the other fall the rights in respect of specific activities. Irrespective of the subject matter of legislation, every law must satisfy the requirements of art. 27 and 31. Article 27 is a guarantee against discrimination both in conferment of privileges and imposition of liabilities. Article 31 prohibits detrimental action affecting individuals otherwise than in accordance with law. This is an analogue of the due process concept of the American jurisdiction[23] and article 32 provides a protection in respect of deprivation of life and personal liberty.[24] However, these host of rights provide for a number of rights as fundamental which the state is prohibited from transgressing but the very purpose stated in the preamble necessitates limitations on the exercise of fundamental rights and the framers of the Constitution provided the limitations, striking a fine balance between the individuals' freedoms and the governmental needs for the welfare of the community.[25] And, considering human proneness to abuse freedom and ingenuity to misuse legal protection, the Constitution has provided for checks and balances where applicable. At the same time considering necessity of some discretionary power needed by the government to protect public interests and maintain law and order, it has provided for few circumstances when certain fundamental rights can be temporarily taken away by the government only in accordance with law.[26] And in support of that article 26 provides that all existing laws inconsistent with the fundamental rights as provided in Part III shall to the extent of the inconsistency become void on the commencement of the Constitution and the state shall not make any law inconsistent with those rights.[27]

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22 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 125.

23 *Mujibur Rahman v. Bangladesh* (1992) 44 DLR (AD) 111.

24 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 133.

25 *Ibid.*, at p. 129.

26 Bangladesh Legal Aid and Services Trust (BLAST). 2010. *Seeking Effective Remedies: Prevention of Arbitrary Arrests and Freedom from Torture and Custodial Violence*. Dhaka: BLAST.

27 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 129.

'State' as is defined in art. 152 to include Parliament and the expressions 'all existing law' and 'state shall not make law' clearly show that the prohibition of art. 26 is principally addressed to Parliament. It must be understood that the provisions of articles 27 to 29 and 31 to 44 are primarily limitations on the plenary power of legislation of Parliament and these provisions are to be interpreted accordingly otherwise the purported entrenchment of those arts. "would be little more than a mockery". And the term 'law' is defined in art. 152 to include rules, regulations and all those instruments, customs and usages which have the force of law. Any notification issued under any statutory provision has the force of law[28] and an administrative instruction which has the precision of rules and are general in nature may have the force of law if issued by authority competent to alter or amend the rules.[29] The prohibition of art. 26 is not only applicable to the Acts of Parliament, but to all those which come within the definition of law. As a law cannot be inconsistent with the provisions of Part III of the Constitution, executive and administrative actions, which must have the backing of law to encroach upon the rights of individuals, cannot also infringe the fundamental rights guaranteed by Part III. When rights are guaranteed by the Constitution in achieving the aims and objectives stated in the preamble, those rights are to be liberally interpreted and the exceptions provided in the Constitution are not to be interpreted in a manner which renders those rights inconsequential or illusory.[30] The court will employ intensive level of scrutiny in here in assessing the lawfulness of the exercise of public powers when fundamental rights are at stake.[31]

However, according to article 27 of the Constitution, all citizens are entitled to be treated in accordance with the law of the land administered by the ordinary law courts and it is a fundamental principle of law that every person is innocent before the law until proven guilty. Hence, until it is proved in court with all the safeguards provided by our criminal justice system, that a person is guilty, he or she should not be branded

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28 *Bangladesh v. Shamsul Huq* (2009) 59 DLR (AD) 54.

29 *Bangladesh v. Shafiuddin* (1998) 50 DLR (AD) 27; *West Pakistan v. Din Mohammad* (1964) 16 DLR (SC) 58; *Naseem Ahmed v. Azra Feroze Bakth* (1968) 20 DLR (SC) 78.

30 *Jibendra Kishore v. East Pakistan* (1957) 9 DLR (SC) 21, 44; *Pakistan v. Syed Akhlaque Hussain* PLD (1965) (SC) 527. 580.

31 *Bugdaycay v. Secy. of State of Home Deptt.* (1987) (AC) 514; *R v. Secy. Of State for Home Deptt.* (1993) 4 All E.R. 539.

a "criminal" and in no event should he be subject to the process of extra-judicial execution practiced by law enforcers.[32] In modern times both state constitutions and international human rights instruments, have explicitly provided that arrest can only be made in accordance with law. However, article 31of the Constitution guarantees the protection of law. It has two parts; one provides that the citizens and the residents of Bangladesh have the inalienable right to be treated in accordance with law and the other states that no action detrimental to the life, liberty, body, reputation or property of any citizen or resident of Bangladesh shall be taken except in accordance with law. The second part is illustrative of the first. Article 31is wider in its scope and operation than the due process clause of the American Jurisdiction in as much as it covers the entire range of human activities and is attracted when a person is adversely affected by any state action irrespective of the question whether it affects life, liberty or property.[33] This article must be read as guaranteeing a fundamental right and as a limitation on the power of Parliament in the enactment of laws. And finding its place in Part III it not only speaking about procedure but also cannot but be taken to be an incorporation of both substantive and procedural 'due process' as is known in the American jurisdiction[34] and the expression 'law' must mean reasonable and non-arbitrary law in both substantive and procedural aspects. Procedural due process implies procedures that the government must follow before it takes action detrimental to life, liberty, body, reputation and property[35], while substantive due process requires the government to have adequate reasons for taking away or detrimentally affect life, liberty, body, reputation and property[36]. Because of the provision of art. 31of the Constitution arbitrariness in all fields is prohibited, all laws must be tested for reasonableness. The Constitution boldly proclaims the establishment of rule of law as one of the prime objectives and incorporates article 31 as a fundamental right. As a result the concept of reasonableness pervades the entire Constitution and the provision of the Constitution cannot be interpreted in a manner which will in any way shelter

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32 Khan, Arafat Hossain. 2010. 'Stop Extra Judicial Killings: Respect and establish an effective judiciary', available at: <http://www.blast.org.bd/news/news-reports/101-stopextrajudicialkillings>, last accessed on 19 May 2013.

33 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 230.

34 *Mujibur Rahman v. Bangladesh* (1992) 44 DLR (AD) 111, 122.

35 *Honda Motor Co. v. Oberg* (1994) 512 US 415.

36 *State Farm Mutual Automobile Insurance v. Campbell* (2003) 548 US 408.

arbitrariness in any degree or form.[37] Constitutional enactment should be interpreted liberally and not in any narrow or pedantic sense.[38] In interpreting a Constitution, the widest construction possible in its context should be given according to the ordinary meaning of the words and each general word should be held to extend to all ancillary and subsidiary matters.[39] And as a general rule a constitutional provision is held to be mandatory unless it appears from the express terms thereof or by necessary implication from the language used that is intended to be directory.[40]

However, freedom from arbitrary arrests is usually grounded in constitutional provisions. Article 32 of the Constitution encapsulates this freedom. In this article 32 the conventional right to liberty was understood to have restricted the power of the state to arrest a citizen only to the situations or instances where there were reasons to believe that a citizen has committed a serious crime and continued denial of the right to personal liberty which was possible only upon conviction, through a fair and open trial on a charge of having committed a crime which was punishable by imprisonment.[41] In other words, though the law authorizes preventive detention and arrests on suspicion, yet such derogation of liberty must also meet other standards carved out by judicial pronouncements. The ambit of these requirements and the fulfillment of the conditions constitute the real parameters of the right to personal liberty. In general terms detention is authorized for 'prejudicial acts' while arrests can be made on valid suspicion of criminal wrong-doing. It follows from these propositions that it is the duty of the court to ensure that the conditions or requirements laid down by law is strictly adhered to. The deprivation of personal liberty must satisfy the requirement of 'in accordance with law' or 'under the due process of law' not only when the deprivation is authorized by law but also when the

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37 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 136.

38 *C.P. & Berar Motor Spirit Sales Tax Act,* AIR 1939 FC 1*; Anwar Hossain Chowdhury v. Bangladesh,* 1989 9 BLD (Spl) 1; *Mujibur Rahman v. Bangladesh* (1992) 44 DLR (AD) 111; *James v Commonwealth of Australia* (1936) AC 578, 614.

39 *Nur Hossain v. East Pakistan* (1959) 11 DLR (SC) 423; *Golam Ali Shah v. State* (1970) 22 DLR (SC) 247; *Mujibur Rahman v. Bangladesh* (1992) 44 DLR (AD) 111.

40 *Osman Gani v. Moinuddin* (1975) 27 DLR (AD) 61.

41 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Practice", Special Issue *Bangladesh Journal of Law*, pp.259-292, at p. 262.

requirements and conditions embedded in the authorization have been meticulously followed.[42]

And the deprivation of life or personal liberty can well be covered and protected by art. 31, but in view of the fact that deprivation of life or personal liberty is far more serious a matter than detrimental action in respect of life or personal liberty, the framers of the Constitution thought it necessary to make a separate provision in respect of deprivation of life or personal liberty. Thus detrimental action short of deprivation in respect of life or personal liberty will be covered by article 31, while deprivation of life or personal liberty must fulfill the requirement of art. 32. The expression 'liberty' has a personal content in it. So when the framers of the Constitution used the expression 'personal liberty' in art. 32 after using the term 'liberty' in art. 31, the expression 'personal liberty' must have a narrow connotation meaning freedom from bodily restraint.[43] And a casual reading of Articles 31 and 32 where the requirement of 'in accordance with law' mentions twice may indicate identity and hence, repetitions, as both the Articles require that actions in derogation of liberty may only be taken in accordance with law. A seeming repetition of a provision, requirement or norm in a Constitution cannot be taken as superfluous or redundant and must be taken to import two different meanings or requirements. Hence by providing that deprivation of life and liberty must be affected only in accordance with law, the Constitution sets a higher standard for laws which purport to deprive life and liberty. While laws affecting body, reputation and property have to be reasonable and non-arbitrary, those touching upon life and liberty must in addition to being reasonable and non-arbitrary also indicate other compelling state or social interest. Furthermore, while many constitutional rights are subject to reasonable restrictions, yet the right to personal liberty though not absolute must be judged by yard-sticks of such reasonableness which are more exacting and clearly and immediately connected to greater interest of the society and the state. The expression 'in accordance with law' does not include any law, but only laws which are not violative of fundamental rights, and incorporates both procedural and substantive safeguards. If personal liberty could be curtailed by any law, i.e. whimsical and arbitrary, the protection against

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42 *Ibid.*, at p. 265.

43 In *Maneka Gandhi v. India* (1978) AIR (SC) 597.

deprivation of liberty would become meaningless. Hence the real import of protecting personal liberty in two Articles of the Constitution lies in the fact that laws depriving personal liberty must be a reasonable legislation reasonably applied.[44] No right is so basic and fundamental as the right to life and personal liberty and the exercise of all other rights is dependent on the existence of this unalienable right. Also the core essence of Articles 31 and 32 is the right to access to justice and fair trial, which is denied outright in the face of extra-judicial recourse.[45] While there is difference of opinion as to the actual meaning of 'rule of law', the framers of the Constitution after mentioning 'rule of law' in the preamble, took care to mention the other concepts touching the qualitative aspects of law, thereby showing their adherence to the concept of rule of law as pronounced by the latter viewers. If the relevant paragraph of the preamble is read as a whole in its proper context, there remains no doubt that the framers of the Constitution intended to achieve 'rule of law'. To attain this fundamental aim of the state, the constitution has made substantive provisions for the establishment of a polity where every functionary of the state must justify his action with reference to law. Here 'law' does not mean anything that Parliament may pass. Arts. 27, 31 and 32 have taken care of the qualitative aspects of law and forbid discrimination in law or in state actions, while arts. 31 and 32 import the concept of due process, both substantive and procedural, and thus prohibit arbitrary or unreasonable law or state action.[46]

However, the arrest and detention of individuals are actions detrimental to liberty covered by art. 31. Yet separate provisions have been made in art. 33 to safeguard the individuals against arbitrary and unreasonable arrest and detention. Thus any law providing for arrests or detention to be valid must not only be reasonable and non-arbitrary to satisfy the requirement of art. 31, it must also be consistent with the provisions of article 33[47] where the rights of an arrested person confers three

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44 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Practice", Special Issue *Bangladesh Journal of Law*, pp.259-292, at pp. 266-267.

45 Islam, Md. Tajul. 2010. 'Extra-Judicial Killings in Bangladesh: 'Cross-fires' or Violations of Human Rights?', available at:<http://www.nipsa.in/extra-judicial-killings-in-bangladesh-cross-fires-or-violations-of-human-rights/>, last accessed on 07 May 2013.

46 *West Pakistan v. Begum Shorish Kashmiri* (1969) 21 DLR (AD) 1, 12.

47 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 134.

constitutional rights or safeguards upon a person arrested and they are review by an advisory board, right to communication of grounds of detention, right of fight against the detention. There is nothing in this section which provides that the accused be furnished with the grounds for his arrest. It is the basic human right that whenever a person is arrested he must know the reasons for his arrest. Clause (1) of the Article 33 provides that the person who is arrested shall be informed of the grounds for such arrest. It is true that no time limit has been mentioned in this Article but the expression 'as soon as may be' is used. This expression 'as soon as may be' does not mean that furnishing of grounds may be delayed for an indefinite period. According to one explanation, 'as soon as may be' implies that the grounds shall be furnished after the person is brought to the police station after his arrest and entries are made in the diary about his arrest. It is the duty of everyone in the country to adhere to the provisions of the Constitution since it's the Supreme law of the country and shall prevail over any other law. The Constitution not only provides that the person arrested shall be informed of the grounds for his arrest, but also that the person arrested shall not be denied the right to consult and to defend himself by a legal practitioner of his choice. From this provision it has been clear that immediately after furnishing the grounds for arrest to the person, the police shall be bound to provide the facility to the person to consult his lawyer if he desires. If these two rights are denied, this will amount to confining him in custody beyond the authority of the Constitution.[48]

Next comes article 35 of the Constitution where 'torture' is directly prohibited as a fundamental right[49] which states that no person shall be subjected to torture or cruel, inhuman or degrading punishment or treatment. Even a person accused for criminal offence has the right to an independent, impartial trial which has been articulated in article 35(3) that every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established

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48 *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR (HCD) 363, 371.

49 Asian Human Rights Commission. 2012. 'Lesson 2: The Practice of Torture and Relevant Legal Provisions in 10 Asian Countries: Bangladesh: Legal Framework Regarding Torture', available at:< http://www.humanrights.asia/resources/journals-magazines/hrschool/lesson-61/lesson-2-the-practice-of-torture-and-relevant-legal-provisions-in-10-asian-countries>, last accessed on 30 April 2013.

by law.[50] As regards the custodial death and torture Clause (4) of the Article 35 clearly provides that no person accused of an offence shall be compelled to be witness against himself. So, any information which may be obtained or extorted by taking an accused on remand and by applying physical torture or torture through any other means, the same information cannot be considered as evidence and cannot be used against him. Clause (4) of Article 35 is so clear that the information obtained from the accused carries no evidentiary value against the accused person and cannot be used against him at the time of trial. Through judicial pronouncements, it is also establishment that any statement made by any accused before a police officer in course of his interrogation cannot be used against any other accused. So, it is not understand how a police officer or a Magistrate allowing remand can act in violation of the Constitution and provisions of other laws and can legalize the practice of remand. The use of force to extort information can never be justified since the use of force is totally prohibited by the Constitution. In this connection, clause (5) of Article 35 of the Constitution may be referred which provides that no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. This clause is preceded by clause (4) where it is provided that no person accused of any offence shall be compelled to be a witness against himself. Due to the use of the word "compelled" in clause (4), it may be presumed that the framers of the Constitution were apprehensive of use of force upon an accused. So, it is found that even if the accused is taken in police custody for the purpose of interrogation for extortion of information from him, neither any law of the country nor the Constitution gives any authority to the police to torture that person or to subject him to cruel, inhuman and degrading treatment. Thus, it is clear that the very system of taking an accused on remand for the purpose of interrogation and extortion of information by application of force on such person is totally against the spirit and explicit provisions of the Constitution. So, the practice is also inconsistent with the provisions of the Constitution.[51]

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[50] Assignment Point. 2013. 'Assignment on Human Dignity and Torture in Bangladesh', available at:< http://www.assignmentpoint.com/arts/law/assignment-on-human-dignity-and-torture-in-bangladesh.html>, last accessed on 11 June 2013.

[51] *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR (HCD) 363, 370, 371.

4.1.1.2 Torture and Other laws

In this part other laws include the most controversial laws which are used for the purpose of torture generally but they are actually not enacted for that purpose. Among others the thesis has procedural laws, criminal laws, evidence act, anti-torture laws of the law enforcing agencies, torture, major crimes and the Rome Statute and lastly a draft Bill criminalizing torture, all of which focuse the anti-torture regime existing in Bangladesh.

4.1.1.2.1 Procedural Laws

Within the procedural laws it's the Code of Criminal Procedure, with the special sections like sections 167, 54, 61, 163, 132, 197 focuses that even if all these are the most controversial sections but following those in totality gives no scope of abusing it for the purpose of torture. Section 167 provides that, when investigation cannot be completed in twenty four hours of the arrest, a magistrate can authorize the detention of an accused in police custody for up to 15 days for further investigation.[52] Under the following two circumstances a person can be arrested without warrant and to be produced before the Magistrate if the investigation cannot be completed within 24 hours; and if there are grounds for believing that the accusation or information received against the person is well founded.[53] This section provides that if the FIR is complete in that case the accused arrested in this case must be forwarded to the nearest judicial magistrate within 24 hours, but if the materials which are very vital are not found in that case the police may for the ends of justice and for the investigation forwarded to the nearest Magistrate beyond 24 hours.[54] The police are required under this section to transmit to the nearest Magistrate copies of the entries in the diary relating to the case.[55] If the police do not transmit copies of the entries in the police diary, the Magistrate will have no jurisdiction to direct detention of the

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52 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Practice", Special Issue *Bangladesh Journal of Law*, pp.259-292, at pp. 273-274.

53 *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR 363, 369.

54 Wahab, M.A. Ex Justice. 2007. *The Code of Criminal Procedure*. Dhaka: Kamrul Book House, at p. 333.

55 This case diary is B.P. Form No. 38. In Police Regulation No. 264, details are given as to how this diary shall be maintained. Regulation No. 263 provides that in the diary, the police officer is to show that time at which the relevant information reached him, the time at which he began and closed his investigation the place or visited by him, and statement of the circumstances ascertained through his investigation.

accused. Though there is no procedure in the Code of Criminal Procedure authorizing a Magistrate to order arrest of a person who he thinks is guilty of the commission of an offence unless he has taken cognizance of the case. This section applies only when the police are investigating the case; that Magistrate who makes an investigation under this section keep the accused persons in custody. The mere leveling of an accusation against a person in the FIR does not make him accused person within the meaning of this section, until and unless some evidence implicating such person in the commission of offence is available. It is the duty of the Magistrate to inform the accused that he is a Magistrate and a remand has been applied for, and whether the accused has any objection to the grant of that remand. If the Magistrate in his discretion refuses to remand accused to police custody a superior Magistrate cannot direct him to do so. If the Magistrate is permitted to make orders in police station where the accused have no means to have recourse to a lawyer or their relatives, the whole significant of section 167 of the Code of Criminal Procedure would disappear and it will amount to a farcical performance.[56] And it was not at all the intention of the law giver that the police officer should at his own sweet arrest anybody he likes, although he may be a peace loving citizen of the country.[57] The Code enjoins on the police and the Magistrate strict compliance with the provisions of section 167 of the Code.[58] And the Code says that the judicial officer while granting remand should weight the evidence to decide whether the accused should be detained in custody or not, the remand to police or judicial custody being an infringement of liberty[59] should not be granted in a mechanical manner or as a matter of course. Application of mind is a must and remand should be granted in case of real necessity. And in the absence of a reasonable cause no further remand should be granted.[60] If the police officer justifies the arrest only by saying that the person is suspected to be involved in a cognizable offence, such general statement cannot justify the arrest.[61] A vague

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56 Wahab, M.A. Ex Justice. 2007. *The Code of Criminal Procedure*. Dhaka: Kamrul Book House, at p. 333.

57 *Ibid.*, at p. 48.

58 *Aftabur Rahman v. State* (1993) 45 DLR 593.

59 Huq Zahirul, 1996. *Law and Practice of Criminal Procedure*. Dhaka: Ayesha Mahal, at p. 288.

60 Wahab, M. A. Ex Justice. 2007. *The Code of Criminal Procedure*. Dhaka: Kamrul Book House, at p. 340.

61 *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 23 BLD (HCD) 115.

information that a crime was likely to be committed would not justify an arrest under this section. 'Credible information' or 'a reasonable suspicion' under this section upon which an arrest can be made by a police officer must be based upon definite facts and materials placed before him, which the officer must consider for himself before he can take any action.[62] And if detention in police custody is ordered, the Magistrate must record his reasons.[63] It is to be remembered that in many ways, the power conferred to police by section 167 to ask the magistrate for remand for further investigation is an exceptional power to be applied only in exceptional instances. In ordinary course of things, police must have enough credible and justifiable information implicating the arrested person in the commission of a crime.[64]

Another controversial section is section 54 which specifies the cases where the police officer may arrest without a warrant and it is specified in Schedule II, column 3 of the Code. The section enumerates nine categories under which the police may arrest without warrant.[65] Section 54 of the Cr. P. C. lays down certain procedures to be observed once an arrest has been made. This includes that the accused must be produced before a magistrate within 24 hours, and that a magistrate must give prior permission if police want to hold a prisoner for longer.[66] The object of section 54 is to give widest powers to the police in cognizable cases and the only limitation is the necessary requirement of reasonability and credibility to prevent the misuse of the powers. 'Reasonable suspicion' here means a *bonafide* belief on the part of the police officer that an offence has been committed or is about to be committed. And the powers under this section must be cautiously used.[67] Now-a-days in most of the cases different persons are arrested under section 54 of the Code on political grounds in order to detain him under the provisions of section 3 of the Special Powers Act, 1974. A person is detained under the preventive detention law not for his involvement in

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62 Wahab, M.A. Ex Justice. 2007. *The Code of Criminal Procedure*. Dhaka: Kamrul Book House, at pp. 46-48.

63 Huq Zahirul, 1996. *Law and Practice of Criminal Procedure*. Dhaka: Ayesha Mahal, at p. 288.

64 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Practice", Special Issue *Bangladesh Journal of Law*, pp.259-292, at p. 277.

65 See Wahab, M.A. Ex Justice. 2007. *The Code of Criminal Procedure*. Dhaka: Kamrul Book House, at p. 45.

66 UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013

67 Huq Zahirul, 1996. *Law and Practice of Criminal Procedure*. Dhaka: Ayesha Mahal, at pp. 64-65.

any offence but for the purpose of preventing him from doing any prejudicial act. So, there is no doubt that a police officer cannot arrest a person under section 54 of the Code with a view to detain him under section 3 of the Special Powers Act, 1974. Such arrest is neither lawful nor permissible under section 54 since a police officer may arrest a person under this section, under certain conditions and the main condition is that the person arrested is to be concerned in a cognizable offence and the purpose of detention is totally different. If the authority has any reason to detain a person under section 3 the Special Powers Act, the detention can be made by making an order under the provisions of that section and when such order is made and handed over to the police for detaining the person, the order shall be treated as warrant of arrest and on the basis of that order, the police may arrest a person for the purpose of detention.[68] However, when a person is arrested under section 54 without a warrant, the provisions of section 61 of the Code applies in his case. Section 61 provides that no police officer shall detain in custody a person arrested without warrant for a period exceeding 24 hours unless there is a special order of a Magistrate under section 167 of the Code. So, it is found that there is reference of section 167 in section 61 of the Code. Section 61 implies that if there is a special order of a Magistrate under section 167, the police may keep a person in its custody for more than 24 hours.[69] The object of sec. 61 is two-fold; one that the law does not favor detention in police custody except in special cases and that also for reasons to be stated by the Magistrate in writing and secondly, to enable such a person to make a representation before a Magistrate.[70] However, it needs to be remembered that grant of remand in every case should not be a mechanical exercise and it must be ascertained by a Magistrate concerned that the accusation is well founded and remand would render substantial assistance in investigation of the matter.[71]

Among the others, section 163 prohibits a police officer or a person in authority from offering or making any inducement, threat or promise[72] to any accused while

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68 *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR 363, 372.

69 *Ibid.*, at p. 368.

70 *Gauri Shankar v. State of Bihar* (1972) AIR (SC) 711, 715.

71 Wahab, M.A. Ex Justice. 2007. *The Code of Criminal Procedure*. Dhaka: Kamrul Book House, at p. 55.

72 *Ibid.*, at p. 299.

recording his statement under section 161 of the Code.[73] And section 132 provides for protection against prosecution for acts done in good faith except with the sanction of the government. However, this section should therefore be construed broadly. It is the policy of the Legislature to afford adequate protection to public servants, to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause. And no sanction is necessary when the police officer is not an officer-in-charge of a police station as his action is illegal; nor when police officers are charged under sections 302, 304, 326, 148 of the Penal Code.[74] However, section 197 provides that at any time before taking cognizance of an offence the proper authority can grant sanction and the prosecution is entitled to produce the order of sanction. The bar may be removed when sanction is given by the Government. This section gives protection from false, vexatious or *malafide* prosecution to important public servant performing onerous and responsible duties fearlessly. It does not mean that the section has laid down a wall around the public servants from prosecution for criminal offences committed by them, but the protection extended only to a public servant but not all the servants. This section does not bar to make complaint or to submit a police report but only bars a Magistrate from taking cognizance of the offence on such complaint. The court must take sanctions from the prosecution to proof that the prosecution has really takes sanction from the appropriate court.[75] And it is not every offence committed by a public servant that requires sanction for prosecution under section 197 of the Code nor even every act done by him while he is actually engaged in the performance of his official duties but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary.[76] However, criminal act such as outraging the modesty of a women and killing a man while the culprit was being chased, has no connection with acts done or purported to be done in the discharge of public duty[77] and if a public servant commits an offence of cheating or abets another to cheat, the offence is not

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73 *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR (HCD) 363, 370.

74 Wahab, M.A. Ex Justice. 2007. *The Code of Criminal Procedure*. Dhaka: Kamrul Book House, at p. 166.

75 *Ibid.*, at p. 446.

76 *Sudhir Das Gupta v. Bhupal Chandra Chowdhury* (1986) 38 DLR 343.

77 *Rakanuddin Bhuiya v. The State* (1966) 18 DLR 412.

within the span of his official duty and so no sanction is necessary. The police can investigate into the conduct of public servant for alleged offences against the law even before the sanction of the government. The question of sanction under section 197 will arise only when a charge is preferred before a court and the court's function begins.[78]

4.1.1.2.2 Criminal Laws

The Penal Code, 1860 is the principle penal legislation of Bangladesh. It defines and prescribes punishments for various offences. Besides, there are other penal laws in Bangladesh but the criminal laws prevailing in Bangladesh do not have the definition of torture in particular. However, there are a number of offences that penalize conduct that may amount to torture[79] in line with article 1 of the CAT.[80] The Penal Code, 1860 criminalizes hurt and grievous hurt.[81] And all these offences are widely categorized for the purpose of punishment where these offences may in certain circumstances cover the offence of torture[82] as defined by the CAT.[83] Among those, section 330 that

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78 Wahab, M.A. Ex Justice. 2007. *The Code of Criminal Procedure*. Dhaka: Kamrul Book House, at pp. 451-452.

79 Conduct amounting to torture may be prosecuted under the following offences: - Voluntarily causing hurt to extort confession or to compel restoration of property (punishable by up to seven years imprisonment and liable to a fine, and, if the hurt caused is grievous, the maximum punishment is ten years imprisonment and liability to pay a fine); - Wrongful confinement to extort confession or compel restoration of property (maximum punishment of three years imprisonment and fine1); - A public servant disobeying the law, with intent to cause injury to any person (up to one year imprisonment and/or a fine); - A public servant concealing the design to commit an offence that it is his or her duty to prevent (punishment depends on the imprisonment or fine that is provided for the related offence.

80 Rahman, Md. Mahbubur and Islam, Sk. Samidul. 2006. "Obligation of Bangladesh under Article 4 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: A Performance Audit", Vol. 10, No. 1 & 2 *Bangladesh Journal of Law*, pp.119-148, at p. 138.

81 Different categories of hurt and grievous hurt consists of , amongst others voluntarily causing hurt not in consequences of grave and sudden provocation, voluntarily causing hurt with dangerous weapons or means, voluntarily causing hurt in consequences of grave and sudden provocation, voluntarily causing hurt with the intention to extort property or to constrain to an illegal act, voluntarily causing hurt with the intention to extort confession or to compel restoration of property, voluntarily causing grievous hurt not in consequences of grave and sudden provocation, voluntarily causing hurt with the intention to extort property or to constrain to an illegal act, voluntarily causing hurt with the intention to extort confession or to compel restoration of property.

82 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess. Article 1(1) CAT defines torture as follows: For the purposes of this Convention, torture means 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

provides for voluntarily causing hurt to extort confession or to compel restoration of any property,[84] the principle object is to prevent torture by the police but the section covers every kind of torture for whatever purpose it may be intended. This section requires that the assault should be proved to be solely for the purpose of extorting confession or restoration of property and has to be read along with sections 30, 39 and 327[85] and for voluntarily causing grievous hurt to extort confession or to compel restoration of any property[86] seeks to punish if suspect is tortured causing him grievous hurt. Section 330 and 331 as mentioned earlier are similar, the only difference being that this is an aggravated form and the hurt caused is grievous.[87] There is another offence defined as wrongful confinement of a person to extort from him or from any other person interested in him any confession or any information which may lead to the detection of an offence or misconduct is a punishable offence under the Penal Code, 1860.[88] To some extend certain acts of torture can be punished

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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.

83 Rahman, Md. Mahbubur and Islam, Sk. Samidul. 2006. "Obligation of Bangladesh under Article 4 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: A Performance Audit", Vol. 10, No. 1 & 2 *Bangladesh Journal of Law*, pp.119-148, at p. 141.

84 Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer or any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand; or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

85 Huq, Zahirul. 2001. *The Penal Code*. Dhaka: Anupam Gyan Bhandar, at p. 663.

86 Section 331:Whoever voluntarily causes grievous hurt, for the purpose of extorting from the sufferer or any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand; or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

87 Huq, Zahirul. 2001. *The Penal Code*. Dhaka: Anupam Gyan Bhandar, at p. 664.

88 Section 348:Whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confine or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand; or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

under this penal provision.[89] Also section 348 that corresponds to section 330 substantially and may be read along with sections 30, 40 and 330 of the Penal Code, the only difference being the nature of the act made punishable. A police officer detaining a person not concerned with investigation for more than 24 hours is punishable under this section.[90] In case of personal violence or threats by a police officer, who shall offer any unwarrantable personal violence to any person in his custody, may amount to torture. In that sense, these offences are punishable[91] under the laws regulating the police forces.[92] Also the Penal Code criminalizes criminal intimidation[93] where torture, primarily arising out of severe mental pain or suffering may fall under the offence of criminal intimidation.[94] And under certain aggravating circumstances, culpable homicide[95] may amount to murder. In fact an act of torture cannot be punished as a culpable homicide. The definitions and jurisprudentially basis of these offences are altogether different from each other. Nevertheless the statutory provisions relating to culpable homicide can be relevant and accordingly employed when death is caused as a consequence of torture. However, an attempt to commit torture is punishable under the laws of Bangladesh only to the extent torture is addressed as a criminal offence under the laws of Bangladesh. However, according to the Penal Code, 1860, complicity or participation to an offence depending on the

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89 Rahman, Md. Mahbubur and Islam, Sk. Samidul. 2006. "Obligation of Bangladesh under Article 4 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: A Performance Audit", Vol. 10, No. 1 & 2 *Bangladesh Journal of Law*, pp.119-148, at p. 142.

90 Huq, Zahirul. 2001. *The Penal Code*. Dhaka: Anupam Gyan Bhandar, at p. 684.

91 Section 29 of the Police Act, 1861 and Dhaka Metropolitan Police Ordinance, 1976 (section 53), Chittagong Metropolitan Police Ordinance, 1978 (section 55), Khulna Metropolitan Police Ordinance, 1985 (section 55), Rajshahi Metropolitan Police Act, 1992 (section 55).

92 Rahman, Md. Mahbubur and Islam, Sk. Samidul. 2006. "Obligation of Bangladesh under Article 4 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: A Performance Audit", Vol. 10, No. 1 & 2 *Bangladesh Journal of Law*, pp.119-148, at p. 146.

93 It means threatening a person with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with an intention to cause harm to that person or to cause that person to do any act which he is not legally bound to do or to omit ot do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat.

94 Rahman, Md. Mahbubur and Islam, Sk. Samidul. 2006. "Obligation of Bangladesh under Article 4 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: A Performance Audit", Vol. 10, No. 1 & 2 *Bangladesh Journal of Law*, pp.119-148, at p. 145.

95 Culpable homicide means causing death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that the doer of the act is likely by such act to cause death.

circumstances of a case can be punished as a joint liability or abetment of the offence. The principle of joint liability states that when a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for that act in the same manner as if it were done by him alone. On the other hand abetment of an offence means instigating any person to do the offence or engaging with one or more other person or persons in a conspiracy to commit the offence or intentionally aiding a person to commit the offence. When an offence is committed its abetment is punishable with punishment provided for the offence. Therefore complicity or participation in torture is punishable under the laws of Bangladesh only to the extent torture is addressed as a criminal offence under the laws of Bangladesh.[96] The Penal Code, 1860 also criminalizes criminal force[97] and assault[98]. As per this penal law the term criminal force includes what in English law is called 'battery'. On an analytical look at the penal provisions of Bangladesh concerning criminal force and assault, it is evident that these provisions being very limited in application are not wide enough to deal with the offence of torture although on some occasions some particular aspects of torture can be punished under these provisions.[99]

4.1.1.2.3 The Evidence Act

It has been observed that the inadmissibility of statements made under torture, as based on international law, does not depend on any further considerations, be they related to the identity of the torturer state or to the persons concerned. This conclusion is in line with the general attitude international law takes towards the practice of torture and therefore underlines that the exclusionary rule 'is a function of the

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96 Rahman, Md. Mahbubur and Islam, Sk. Samidul. 2006. "Obligation of Bangladesh under Article 4 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: A Performance Audit", Vol. 10, No. 1 & 2 *Bangladesh Journal of Law*, pp.119-148, at pp. 146-147.

97 Criminal force is defined as an intentional use of force to any person without that persons consent, in order to the committing of an offence or without the intention or knowledge of causing injury, fear or annoyance to that person.

98 The offence of assault is defined as an act of making any gesture or any preparation with the intention or knowledge of causing any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person. It is to be noted here that mere words do not amount to an assault unless the words used by a person gives to his gestures or preparations such a meaning as may make those gesture or preparations amount to an assault.

99 Rahman, Md. Mahbubur and Islam, Sk. Samidul. 2006. "Obligation of Bangladesh under Article 4 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: A Performance Audit", Vol. 10, No. 1 & 2 *Bangladesh Journal of Law*, pp.119-148, at p. 142.

absolute nature of the prohibition of torture'. It may therefore be said that international law provides a comprehensive set of rules to combat torture and that the inadmissibility of evidence found to have been obtained by coercion is an important tool designed to eradicate torture once and for all.[100] The question of the admissibility of such evidence is broken down into several different cases. All those cases come within the exclusionary rule of Article 15 of the UN Convention against Torture. The article further argues that the inadmissibility is also comprehensive under the right to a fair trial, having regard to the right against self-incrimination and to the unreliability of statements obtained by torture. It is also argued that this exclusionary rule is part of customary international law and that the very concept of *jus cogens* obliges all states including Bangladesh to distance them from any violation of its substantive content and therefore refuse to accept any evidence obtained by torture.[101] Theoretically, the police custody is believed to be a safe area. But the real picture of our country indicates the persons in custody of police were compelled to embrace physical torture. However, the Evidence Act does not permit under various provisions the use of any inducement, influence, and force in making a person to confess.[102] First of all it's the section 24 that provides a confession[103] or admission is evidence against its maker, unless its admissibility is excluded by provisions embodied in the Evidence Act. The provisions of section 24 are general and are intended to exclude confessions which have been improperly obtained. A confession which falls within the mischief of this section is not admissible in evidence. Under section 24 a confession made by an accused is irrelevant in a criminal proceeding if the confession has been made by an accused person to a person in authority[104]; it must appear to the court that the confession has been caused or obtained by reason of any inducement, threat or

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100 Thienel, Tobias. 2006. "The Admissibility of Evidence obtained by Torture under International Law", Vol. 17 No.2 *The European Journal of International Law*, pp. 349-367, at p. 367.

101 *Ibid.*, at p. 349.

102 Akhi, farzana. 2008. 'Confession in police remand', available at:<http://farzanaakhi.blogspot.com/2008/02/remand-and-confession-are-most.html>, last accessed on 12 June 2013.

103 As the term confession is not defined in the Evidence Act, the courts in this sub-continent adopted Stephen's definition of confession given in his Digest of the Law of Evidence. Stephen defined confession as an admission made at any time by a person charged with crime stating or suggesting the inference that he committed a crime. See Sikder, M. Ansaruddin. 1991. *Law of Evidence.* Dhaka: M. Tanveer Foysal, at p. 406.

104 A person in authority in section 24 is one who is engaged in the apprehension, detention or prosecution of the accused or one who is empowered to examine him. See Chowdhury, Obaidul Huq. 1999. *Evidence* Act. Dhaka: Esrarul Huq Chowdhury, at p. 66.

promise proceeding from a person in authority; the inducement, threat or promise must have reference to the charge against the accused person, and the inducement, threat or promise, in the opinion of the court , be such that it would appear to the court that the accused in making the confession believed or supposed that he would, by making it gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him. All these conditions must cumulatively exist and in deciding whether particular confession attracts section 24, the confession has to be considered from the point of view of the confessing accused as to how the inducement, threat or promise proceeding from a person in authority would operate in his mind. If the confession is caused by inducement, threat or promise, as contemplated by section 24, the whole of the confession is excluded by this section, which excludes proof of all the admissions of incriminating facts contained in a confessional statement. The prohibition also provides in section 25 that covers a confession which was made when the maker was free and not in police custody, as also a confession made before any investigation was begun. A statement or confession made in the course of an investigation may be recorded by a Magistrate under section 164 of the Cr. P.C. subject to the safeguards imposed by that section. Even a confessional first information report to a police officer cannot be used against the accused in view of section 25 of the Evidence Act. And except as provided in section 27, a confession by an accused to a police officer is absolutely protected under section 25 and if it is made in the course of an investigation, it is also protected by section 162 of the Cr. P.C. and a confession to any other person made by him while in custody of a police officer, is protected by section 26 unless it is made in the immediate presence of a Magistrate. These provisions seem to proceed upon the view that confession made by the accused to a police officer or made by them while in custody of police officer are not to be trusted and should not be used in evidence against him. This principle is based upon grounds of public policy and fullest effect should be given to them. And the ban, which is partial under section 24 and complete under section 25, applies equally whether or not a person against whom evidence is sought to be led in a criminal trial was, at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression ‘accused person’ in section 24 and the expression ‘a person accused of any

offence', have the same connotation and describe the person against whom evidence is sought to be led in a criminal proceeding.[105] However, in case of section 26, custody does not mean custody after formal arrest, but includes any sort of surveillance or restriction or restraint by the police. When a person is called to the police station and is interrogated as an accused in connection with the investigation of a crime, he must be deemed to be in the custody of the police while he is so interrogated and no formal arrest is necessary.[106] Similarly section 25 and 26 provides bar for not only proof of admissions of an offence by an accused to a police officer or made by him while in the custody of a police officer, but also admissions contained in the confessional statement of all incriminating facts relating to the offence.[107] The objection contained in section 25 and 26 is to prevent the practice of torture etc. by the police for the purpose of extracting confessions from the accused persons.[108] And section 24 and 25 were enacted not because the law presumed the statements to be untrue, but having regard to the tainted nature of the source of the evidence, the law prohibited them from being received in evidence.[109]

There is much of controversy regarding section 27 of the Evidence Act but the real fact is that this section is one of a group of sections relating to the relevancy of certain forms of admissions made by persons accused of offence. It is founded on the principle that even though the evidence, relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted, and is therefore, declared provable in so far as it distinctly relates to the fact thereby discovered. Even though section 27 is the form of a proviso to section 26, the two sections do not necessarily deal with evidence of the same character. The ban imposed by section 26 is against the proof of confessional statements. Section 27 is concerned with the proof of information, whether it amounts to a confession or not, which leads to discovery of facts. By section 27 even if a fact is deposed to as discovered in consequence of

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105 Sikder, M. Ansaruddin. 1991. *Law of Evidence.* Dhaka: M. Tanveer Foysal, at pp. 406-407.

106 *Ibid.*, at p. 483.

107 Sikder, M. Ansaruddin. 1991. *Law of Evidence.* Dhaka: M. Tanveer Foysal, at p. 407.

108 *Ibid.*, at p. 469.

109 Sikder, M. Ansaruddin. 1991. *Law of Evidence.* Dhaka: M. Tanveer Foysal, at p. 409.

information received, only that much of the information is admissible as distinctly relates to the fact discovered.[110] However, regarding the corroboration of confession, the High Court Division has confirmed in its jurisprudence that convictions based solely on the confession of an accused to a police officer are unsafe, and other corroborative evidence is required.[111] Though the conviction of the maker can be founded on his confession alone, as a rule of prudence the courts require corroboration. There is no legal bar to a conviction being on a voluntary confession if believed to be true, but the rule of prudence does not require each and every circumstances mentioned in the confession with regard to the participation of the accused in the crime must be separately and independently corroborated, nor is it correct that confession can only be corroborated by facts and circumstances discovered after the confession was made. A judicial confession which has been corroborated by other evidence is sufficient for conviction of the accused. But where the version of events given in the judicial confession of the accused was highly improbable and the confession was yet not corroborated by any other evidence and circumstance, the accused was given the benefit of the doubt and acquitted. If there is ocular evidence in a case to which no exception can be taken, then that portion of the confessional statement which is not corroborated by ocular evidence can be discarded by the courts.[112]

4.1.1.2.4 Anti-torture Laws of the Law Enforcing Agencies

This part basically provides certain laws of the law enforcing agencies that portray the anti-torture regime in them. According to the Police Act of 1861 maintaining law and order is the principal function of the police.[113] In addition, the Police Act of 1861 lists the following offences for which a police officer can be disciplined or prosecuted and they are; a wilful breach or neglect of any rule or regulation or lawful order, withdrawal from duties of the office or being absent without permission or reasonable cause, engaging without authority in any employment other than their police duty,

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110 Sikder, M. Ansaruddin. 1991. *Law of Evidence.* Dhaka: M. Tanveer Foysal, at pp. 407-408.

111 REDRESS. 2004. *Torture in Bangladesh 1971-2004 Making International Commitments a Reality and Providing Justice and Reparations to Victims*. London: REDRESS.

112 Sikder, M. Ansaruddin. 1991. *Law of Evidence.* Dhaka: M. Tanveer Foysal, at p. 439.

113 Assignment Point. 2013. 'Assignment on Human Dignity and Torture in Bangladesh', available at:< http://www.assignmentpoint.com/arts/law/assignment-on-human-dignity-and-torture-in-bangladesh.html>, last accessed on 11 June 2013.

cowardice and causing any unwarrantable violence to any person in their custody. The penalty for these offences ranges between a fine of up to three months pay to imprisonment of up to three months or a combination of both. As mentioned earlier, any aggrieved person can file a criminal case with the police station or with a judicial magistrate against a police officer accused of any offence, such as brutality, harassment, and any abuse of power. The Human Rights Commission is another means of holding the police accountable in cases of misconduct, abuse of power, or police excess. The law authorizes the Commission to inquire into complaint of violation of human rights by a person, state or government agency or institution or organization. The Commission can do it *suo-moto* or on a petition presented to it by a person affected or any person on his behalf.[114] However, section 153 of the Police Regulations of Bengal (PRB), 1943 says about the principles governing the use of firearms in the terms that firearms should not be used other than in emergencies. Under the aforementioned section, the use of firearms is applicable only in the following three situations; to exercise the right of private defence of person or property, for dispersal of unlawful assemblies and to effect arrest in certain circumstances.[115] A police officer belonging to the forces of the Metropolitan Dhaka area faces a punishment of up to one year and/or a fine of up to two thousand taka (approximately $33) for personal violence or threats against any person in his or her custody.[116] Furthermore, the Police Act, 1861, Police Regulations of Bengal 1943 and the Dhaka Metropolitan Police Ordinance empower police authorities to impose disciplinary sanctions.[117] In case of delimiting political interference in the activities of the Police, the Draft Police Ordinance, 2007 in Chapter IV says that the NPC would be a nonpartisan body that would oversee the functioning of the Police Service so as to limit and ideally eliminate political interference.

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[114] Biswas, Dr. Zahidul Islam. 2012. 'Police accountability and the 'rule of politics', available at:< http://www.blast.org.bd/content/news/police-accountability-and-the-rule-of-politics.pdf>, last accessed on 20 May 2013.

[115] Islam, Md. Tajul. 2010. 'Extra-Judicial Killings in Bangladesh: 'Cross-fires' or Violations of Human Rights?', available at:<http://www.nipsa.in/extra-judicial-killings-in-bangladesh-cross-fires-or-violations-of-human-rights/>, last accessed on 07 May 2013.

[116] Section 53 of the Dhaka Metropolitan Police Ordinance, Ordinance No.III of 1976.

[117] REDRESS. 2004. *Torture in Bangladesh 1971-2004 Making International Commitments a Reality and Providing Justice and Reparations to Victims*. London: REDRESS.

Another controversial agency in the matter of torture is the RAB but regarding the formation of it, the formation illustrates a common trend in antiterrorism approaches to blur police or military distinctions. The Armed Police Battalions (Amendment) Act, 2003 placed the RAB under the command of the Inspector General of Police and, by extension, the Minister of Home Affairs. The Act requires the RAB to be commanded by an officer not below the rank of Deputy Inspector General of Police or a person of equivalent rank from the army, navy, air force, or other disciplined force. Human Rights Watch notes that the main tasks of the RAB, according to the law, are to provide internal security; conduct intelligence into criminal activity; recover illegal arms; arrest criminals and members of armed gangs; assist other law enforcement agencies; and investigate any offense as ordered by the government. As long as they are within these activities, they are doing it reasonably; there is no possibility of abusing power by them resulting no torture by them.[118]

4.1.1.2.5 Torture, Major Crimes and the Rome Statute

Bangladesh is the 111th state to ratify the Rome Statute and the seventh in Asia to do so, joining Afghanistan, Cambodia, Mongolia, the Republic of Korea, Timor-Leste and Japan. By ratifying the Rome Statute, Bangladesh has demonstrated an important commitment to international justice and working to end impunity for genocide, crimes against humanity and war crimes. With this ratification Bangladesh has become the first country to join the International Criminal Court in South Asia and 111th State party to the Statute. Joining of this international justice system by Bangladesh would grant the region a stronger voice and a more meaningful role in supporting this truly effective mechanism for the protection of human rights and the rule of law.[119] It seems fair to argue that torture could fit very easily into any of the three major crimes, ratifying the Rome Statute and would send a clear signal against impunity in Bangladesh.[120]

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[118] Human Rights Initiative. 2003. 'Bangladesh Country Report: Anti-terrorism Laws and Policing,' available at:< http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/docs/country_reports/071004_chogm07_bangladesh_anti_terrorism_policing_country_report2007.pdf>, last accessed on 30 April 2013.

[119] Coalition for the International Criminal Court. 2010. 'Bangladesh Ratification: CICC Ratification Campaign Backgrounder; Related Members Media Releases; EU Statement', available at:< http://www.iccnow.org/?mod=newsdetail&news=3868>, last accessed on 30 April 2013.

[120] Bangladesh Rehabilitation Centre for Trauma Victims (BRCT). 2006. *Broken Promises: The State of Reparation for torture Victims in Bangladesh.* Dhaka: BRCT.

4.1.1.2.6 Draft Bill Criminalizing Torture

A draft Bill (which is now Torture and Custodial Death Prevention Act, 2013) criminalizing torture and custodial death, prepared in accordance with CAT obligations[121] proposing enactment of a law against torture, and cruel, inhuman or degrading treatment or punishment in the hands of law enforcement agencies or government officials[122] was submitted to parliament as a Private Member's Bill by Mr. Saber Hossain Chowdhury on 5 March 2009. The Bill has primarily been reviewed by the Private Member's Bill Review Committee led by former law minister Mr. Abdul Matin Khasru, a Supreme Court lawyer.[123] It would create a simplified process and venue for redress for victims of torture, or others acting on their behalf, and would afford them protection if they want it. It would create a regime under which public officials would be held accountable for the physical and mental well-being of anyone taken into custody, from the process of arrest onward. The Bill, in an important provision, strips away the often cited excuse of public welfare to justify deaths in custody. Under the proposed Bill, war, political instability, public emergency, and superior orders could not be used to justify torture.[124] The Bill also proposes stringent punishments, including life term imprisonment and suspension from the services during investigation of charges against an offender, regardless of whether the offender is a member of regular law enforcement agencies or the armed forces, or of any other Government office. An offence under the Bill shall be cognizable, non-compoundable, and non-bailable, within the meaning and for the purposes of the Code of Criminal Procedure 1898. The Bill proposes that the trial of an offence punishable under it shall be completed within six months from the date of

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121 Asian Human Rights Commission. 2012. 'Lesson 2: The Practice of Torture and Relevant Legal Provisions in 10 Asian Countries: Bangladesh: Legal Framework Regarding Torture', available at:< http://www.humanrights.asia/resources/journals-magazines/hrschool/lesson-61/lesson-2-the-practice-of-torture-and-relevant-legal-provisions-in-10-asian-countries>, last accessed on 30 April 2013.

122 Liton Shakhawat. 2009. 'BANGLADESH: Bid to stop torture by law-enforcers', available at: < http://www.humanrights.asia/news/forwarded-news/AHRC-FAT-002-2009/?searchterm=>, last accessed on 19 April 2013.

123 Asian Human Rights Commission. 2012. 'Lesson 2: The Practice of Torture and Relevant Legal Provisions in 10 Asian Countries: Bangladesh: Legal Framework Regarding Torture', available at:< http://www.humanrights.asia/resources/journals-magazines/hrschool/lesson-61/lesson-2-the-practice-of-torture-and-relevant-legal-provisions-in-10-asian-countries>, last accessed on 30 April 2013.

124 Human Rights Watch. 2011. 'Bangladesh: Government Should Support Anti-Torture Bill', available at: < http://www.hrw.org/news/2011/03/29/bangladesh-government-should-support-anti-torture-bill>, last accessed on 19 April 2013.

filing the charge sheet against the accused, while the investigation of an offence must be completed within seven months from the date of recording the first complaint. An appeal against any verdict in a proceeding initiated under the provisions of the Bill shall be concluded within 12 months from the date of filing the appeal, the Bill adds.[125] The pending Torture and Custodial Death Bill is the Parliament's opportunity to send a strong message to state officials and their current practices and attitudes. In addition, it is likely to be a strong deterrent to such practice.[126]

4.1.2 Promotion and Protection Regime

The promotion and protection regime is for ensuring redress for the victims of torture. In general terms, redress in the form of reparation is granted to an injured party to make up for the damage caused by a wrongful act. For torture survivors, the act of procuring reparation, if handled with the proper support and care by assisting parties, may be an important part of the healing process. The pursuit of reparation can be empowering, allowing torture survivors to transform feelings of pain, isolation or stigmatization through a public process that may result in a public acknowledgement that a wrong was committed and that those responsible will be punished. Very often, the term "reparation" is wrongly thought to be synonymous with "financial compensation". Although compensation is a very common form of reparation, it is not the only form. As elucidated in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly in 2005, reparation can include restitution, such as restoration of liberty, legal rights, social status, family life and citizenship; physical and psychological rehabilitation, and legal and social services; satisfaction, which comprises verification of the facts and revelation of the truth, acknowledgment of the suffering, public apology, judicial and administrative sanctions against the perpetrator, commemoration and tributes to the victims; guarantees of non-repetition, to prevent recurrence of similar crimes such as measures to control the military,

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[125] Liton Shakhawat. 2009. 'BANGLADESH: Bid to stop torture by law-enforcers', available at: < http://www.humanrights.asia/news/forwarded-news/AHRC-FAT-002-2009/?searchterm=>, last accessed on 19 April 2013.

[126] Mahbub, Saqeb. 2011. 'A case for defining and criminalizing torture in Bangladesh', available at: < http://saqebmahbub.wordpress.com/2011/06/06/a-case-for-defining-and-criminalising-torture-in-bangladesh/>, last accessed on 13 June 2013.

strengthen the independence of the judiciary, and reform human rights laws; and compensation, which includes any monetary award calculated on the basis of the estimated damage resulting from the crime, including physical and mental pain and loss of opportunities, such as education. However, cultural differences and diversity of backgrounds and experiences can impact on perceptions of reparation.[127] And that's why national authorities commitment to implementing the right to reparation may take many and varied forms. It is unlikely that all victims will find the same form of reparation beneficial or desirable. National authorities should therefore facilitate access to a variety of reparations, including judicial, compensatory, rehabilitative, restitutive, declaratory and commemorative forms. And as all states are obliged to provide reparation to victims of torture, a precondition for successful reparation is that those responsible for making and interpreting laws and policies within the national administration are empathetic to the rights and needs of victims.[128] States are therefore not only obliged to refrain from acts of torture and to take measures to prevent its occurrence, but also have a duty to punish the perpetrators. The right to reparation also entails the obligation of States to afford effective remedies for victims to obtain reparation, including access to justice.[129] In Bangladesh victims may submit a written application to the High Court Division of the Supreme Court that has the power to provide relief for violations of fundamental rights. The court has asserted its competency in this regard that the Constitution of Bangladesh does not provide for the defence of sovereign immunity so there is no bar to awarding compensation to an aggrieved person under writ jurisdiction for a violation of his or her fundamental rights". Thus the possibility exists for constitutional relief in Bangladesh including the others also.[130]

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127 Torture Abolition and Survivor Support Coalition TASSC International. 2011. 'Reparation', available at:< http://tassc.org/blog/about-torture/reparation/>, last accessed on 09 May 2013.

128 Dalton, Paul. 2003. 'Some perspectives on torture victims, reparation and mental recovery', available at:< http://www.article2.org/mainfile.php/0106/63/>, last accessed on 09 May 2013.

129 REDRESS. 2003. *Reparation for Torture*. London: REDRESS.

130 Bangladesh Rehabilitation Centre for Trauma Victims (BRCT). 2006. *Broken Promises: The State of Reparation for torture Victims in Bangladesh.* Dhaka: BRCT.

4.1.2.1 Constitutional Remedies

As a matter of Constitutional law, torture victims may seek relief through a writ application[131] to the High Court Division of the Supreme Court.[132] The High Court Division has the power to provide appropriate relief for violations of fundamental rights, including a violation of the prohibition of torture under Article 35 (5) of the Constitution.[133] Article 102(1) of the Constitution confers power on the High Court Division to enforce fundamental rights, while article 102(2) confers power of judicial review in non-fundamental right matters.[134] Article 44(1) provides that the right to move the Supreme Court for enforcement of any of the fundamental rights is itself a fundamental right. Article 44(2) enables the Parliament to confer the jurisdiction to enforce fundamental rights on any other court, but such conferment cannot be in derogation of the power of the Supreme Court under article 102(1) which means that such other court may be given concurrent, but not exclusive, power of enforcement of fundamental rights. The Supreme Court must always have the power for enforcement of fundamental rights.[135] The Constitution does not stipulate the nature of the relief which may be granted. It has been left to the High Court Division to fashion the relief according to the circumstances of each particular case. [136] It need not be confined to the injunctive relief of preventing the infringement of a fundamental right and in an appropriate case it may be a remedial one providing relief against a breach already committed.[137] And where any person illegally detained then in favor of him any person can file a writ of *habeas corpus* under article 102(b) (1) of our Constitution.[138] The UNDP report of 2002 noted that detentions under the SPA may be challenged on

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131 Writ petition under the Constitution is maintainable in case of a violation of any fundamental right of the citizens, affecting particularly the weak and downtrodden or deprived section of the community, or if there is a public cause involving public wrong or public injury, any member of the public or an organization whether being a sufferer himself/itself or not may become a person aggrieved if it is for the realization of the objectives and purposes of the Constitution. See Rahman, Justice Muhammad Habibur. 1998. "Our Experience with Constitutionalism", Vol. 2 No. 2 *Bangladesh Journal of Law*, pp.115-132, at p. 123.

132 Articles 44 (1) and 102 (1) of the Constitution of People's Republic of Bangladesh, 1972.

133 REDRESS. 2004. *Torture in Bangladesh 1971-2004 Making International Commitments a Reality and Providing Justice and Reparations to Victims*. London: REDRESS.

134 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. Dhaka: Mullick Brothers, at p. 593.

135 *Ibid.*, at p. 385.

136 *Bangladesh v. Ahmed Nazir* (1975) 27 DLR (AD) 41.

137 *Mehta v. India* (1987) AIR (SC) 1086, 1091.

138 Sufian, Md. Ashraful Arafat. 2008. "Preventive Detention in Bangladesh: A General Discussion", Volume: 1, Issue: 2 *Bangladesh Research Publications Journal*, pp. 166 -176, at p. 173.

the basis of *habeas corpus* petitions moved before the High Court under Article 102 of the Constitution and under Section 491 of the Cr. P. C. which provides power to issue directions of the nature of a *habeas corpus*.[139] If the detention is not in conformity with the provisions of law under which he is purported to be detained he may secure release by moving the courts of law. It is to be mentioned that there is no hard and fast rule for this application.[140] And it is not discretionary with the High Court Division to grant relief under article 102(1) but a constitutional obligation to grant the necessary relief.[141] It provides that on the application of any person the court may direct the person having custody of another to bring the latter before it so that it can satisfy itself that the detenu is not being held in custody without lawful authority or in an unlawful manner. The expression 'custody' is not confined to executive custody[142] and includes custody of private person also. [143]

However, the avowed purpose of the exercise of writ jurisdiction is to further justice.[144] The High Court Division will exercise its discretion in accordance with judicial consideration and well established principles[145] and will interfere where any improper exercise of power or non-exercise of jurisdiction has caused manifest injustice.[146] It is reported in two cases of Indian jurisdiction specially the case reported in AIR 1977 SC that while fundamental rights to life and liberty is curtailed or infringed, this Court in exercise of its power given under Article 102 of the Constitution may also give compensation to the victim if it is found that the confinement or detention of the victim is not lawful and that the victim was subjected to torture, cruel, inhuman and degrading treatment. He has further submitted that the

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139 UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

140 Bhuiyan, Md. Jahid Hossain. 2004. "Preventive Detention and Violation of Human Rights: Bangladesh, India and Pakistan Perspective", Vol. 8 Nos. 1 & 2 *Bangladesh Journal of Law*, pp.103-132, at p. 126.

141 *Kochuni v. Madras* (1959) AIR (SC) 725; *Romesh Thapar v. Madras* (1950) AIR (SC) 124.

142 *Bangladesh v. Ahmed Nazir* (1975) 27 DLR (AD) 41.

143 *Ayesha v. Shabbir* (1993) BLD 186; *Abdul Jalil v. Sharon Laily* (1998) 50 DLR (AD) 55; *Farhana Azad v. Samudra Ejazul Haque* (2008) 60 DLR 12; *Bangladesh Jatiyo Mahila Ainjibi Samity v. Ministry of Home Affairs* (2009) 61 DLR 371; *Zahida Ahmed v. Syed Nooruddin Ahmed* (2009) 14 BLC 488.

144 *Brihan Mumbai Electric Supply & Transport v Loqshya Media (P) Ltd* (2010) 1 SCC 620.

145 *Janardhan Reddy v Hydrabad* (1951) AIR (SC) 217.

146 *Kallolimath v. Mysore* (1977) AIR (SC) 1980.

victim should not be asked to seek relief in any other civil court for damages and compensation.[147] For certain grounds[148] when High Court is satisfied that the detenu has been detained arbitrarily then court can declare the detention illegal and order to release him immediately. In the time of emergency when writ of *habeas corpus* is withheld then a case filed under section 491 of Cr. P. C. to get directions or rule of the nature of a *habeas corpus*. Though it is stated that under the Special Power Act there is no chance of filing a *habeas corpus* writ but it can be filed under constitutional law which is stronger than the general law i.e. the Special Power Act.[149] The High court Division has power to issue the order of release of a person in custody under section 491 of the Code of Criminal Procedure and this power can be exercised *suo motu*.[150] But this power is hedged with limitation[151] and can be taken away or curtailed by ordinary legislation. In codifying the writ of *habeas corpus*, the framers of the Constitution have freed the jurisdiction from any limitation and have conferred wide power of judicial review[152] which can in no way be curtailed by any legislative device.[153]

However, in case of exceeding powers, committing injustice and violating the legal provisions by the law enforcing agencies through the practice of torture, judicial

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147 *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR 363.

148 Most of the cases the court found the weak grounds, vague & not any specific grounds. as a result the high court can relax the detenu for following grounds like detaining by governments unlawful authority, failure to state the grounds within time, failure to give chance to be defend himself, lack of nexus with the reason of detention, not to produce the detenu before advisory board within specific time, mixing good grounds with bad grounds, retrospective issuance of orders and failure to submit essential documents before court or not in proper time.

149 Sufian, Md. Ashraful Arafat. 2008. "Preventive Detention in Bangladesh: A General Discussion", Volume: 1, Issue: 2 *Bangladesh Research Publications Journal*, pp. 166 -176, at p. 173.

150 *State v. D.C. Satkhira* (1993) 45 DLR 643 (HCD took action on the basis of news published in a newspaper)

151 Sub-section (3) of sec. 491 shall not apply to a person detained under any law providing for preventive detention. The High Court Division held that this sub-section will not bar the remedy under sec.491 when a detention order is patently illegal or passed in colourable exercise of the detention law. *Panajit Barua v. State* (1998) 50 DLR 399; *Pearu Md. Ferdous Alam v. State* (1992) 44 DLR 603; *Sultanara Begum v. Secy. Ministry of Home* (1986) 38 DLR 93.

152 *Aruna Sen v. Bangladesh* (1975) 27 DLR 122, 142; *Abdul Latif Mirza v. Bangladesh* (1979) 31 DLR (AD) 1; *West Pakistan v. Begum Shorish Kashmiri* (1969) 21 DLR (SC) 1.

153 *West Pakistan v. Begum Shorish Kashmiri* (1969) 21 DLR (SC) 1.

review is available.[154] Courts exercise the power of judicial review on the basis that powers can validly be exercised only within their true limits and a public functionary is not to be allowed to transgress the limits of his authority conferred by the Constitution or the laws.[155] In the same way the court can exercise the power of judicial review if the decision is *mala fide* or in violation of the principles of natural justice.[156] The duty of the review court is to confine itself to the question whether the authority has exceeded its powers, committed an error of law, failed to consider all relevant factors, failed to observe the statutory procedural requirement and the common law principles of natural justice or procedural fairness, reached a decision which no reasonable authority would have reached, or abused its powers.[157] The court quoted the observation of Lord Brightman that in judicial review the court is concerned not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.[158] The power of the judicial review of the superior courts has been a matter of Constitutional conferment and is a basic feature of the Constitution[159] in our country and it cannot be taken away or abridged by ordinary legislation.[160] And this Court (HCD) in exercise of its power of judicial review when finds that fundamental rights of an individual has been infringed by colorable exercise of power by the police, is competent to award compensation for the wrong done to the person concerned. Indian Supreme Court held the view that compensatory relief under the public law jurisdiction may be given for the wrong done due to breach of public duty by the state of not protecting the fundamental right to the life of citizen. So it is accepted that compensation may be given by this Court when it is found that confinement is not legal and death resulted

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154 Judicial review is available where a decision making authority exceeds its powers, commit an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers.

155 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. Dhaka: Mullick Brothers, at p. 590.

156 *Shamsul Huda v. BTMC* (1980) 32 DLR 114.

157 See *Tata Cellular v. India* AIR 1996 SC 11.

158 *Chief Constable of the North Wales Police v. Evans* (1982) 3 All E.R. 141, 154.

159 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. Dhaka: Mullick Brothers, at p. 592.

160 *Farzand Ali v. West Pakistan* (1970) 22 DLR (SC) 203; *Fazal Din v. Custodian of Evacuee Property* (1971) PLD (SC) 779.

due to failure of the state to protect the life but where it is found that the arrest was unlawful and that the person was subjected to torture while he was in police custody or in jail, in that case, there is scope of awarding compensation to the victim and in case of death of a person to his nearest relation.[161]

4.1.2.2 Common Law Remedies in Civil Courts

Torture survivors may invoke common law remedies in civil courts, such as public misfeasance or trespass to the person, or assault and battery. The State is vicariously liable for damages caused by its officials, so that both may be held jointly liable. Victims are entitled to damages, which are to be awarded to the extent that the victims can be put in the position they would have been in had the tort not been committed. Damages encompass both actual pecuniary loss, i.e. any expenses reasonably incurred by the plaintiff and future loss of income, as well as non-pecuniary damages for pain and suffering and loss of enjoyment of life. The amount of compensation depends on the facts and circumstances of each case. Exemplary damages may be awarded where the damage has been caused by the oppressive, arbitrary, unconstitutional action of Government officials. Torture survivors may file a civil claim for damages at the court of first instance in the place where the tort occurred or where the defendant resides. The Court has discretion in awarding costs and they usually follow the event. However, judgments are enforced by way of decrees issued by courts and executed by competent officers.[162]

4.1.2.3 Remedies under Criminal Law

A victim of a crime cannot claim reparation as part of criminal proceedings. However, a court hearing a criminal case has the discretion to order compensation when imposing a fine as the sentence. Section 545 (1) (b) of the Criminal Procedure Code might be utilized by courts in torture cases to order a convicted perpetrator to compensate the victim.[163] If there is a subsequent civil suit, the Court will take into

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[161] *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR 363.

[162] REDRESS. 2004. *Torture in Bangladesh 1971-2004 Making International Commitments a Reality and Providing Justice and Reparations to Victims*. London: REDRESS.

[163] Section 545 (1) Cr. PC reads: "Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of

account any sum already paid or recovered by way of compensation under section. The Special Tribunals constituted to deal with offences under the Suppression of Violence against Women and Children Act, 2000, have been expressly vested with the power to award compensation to victims[164] in cases of custodial rape by ordering the offender to pay the imposed fine as compensation.[165] Custodial violence like torture, rape or death involving not only physical suffering but also mental agony constitutes violation of human dignity and infringes the right guaranteed under art. 32 and strikes a blow at rule of law. A victim of custodial violence and in case of death while in custody, his family members are entitled to compensation under public law in addition to the remedy available under the private law for damages[166] for tortuous act of the police personnel.[167] In case of investigations into allegations of torture a victim of torture may lodge a complaint with the police[168] or a magistrate.[169] In the absence of an independent body responsible for investigating human rights violations, investigations are carried out by the police and the magistrate. Complaints to the police[170] may be made by any person in writing or they can be made orally and recorded.[171]

4.1.2.4 Legal Aid

The Constitution of Bangladesh has in clear terms recognized the basic fundamental human rights. One of the basic fundamental rights is that all citizens are equal before

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the fine recovered to be applied- (a) in defraying expenses properly incurred in the prosecution; (b) in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court."

164 Section 15 of Act No. VIII of 2000: "From section 4 to 14 [listing offences of rape and sexual abuse], the offences for which fine is imposed by the tribunal, such fines may be treated as compensation for the victims and if it is not possible to realize the fine from the existing wealth of the convicts, the fine shall be receivable from the future wealth to which the convict will be owner and in such cases realization of fine will have priority than that of other claims."

165 REDRESS. 2004. *Torture in Bangladesh 1971-2004 Making International Commitments a Reality and Providing Justice and Reparations to Victims*. London: REDRESS.

166 *DK Basu v. W.B.* (1997) AIR (SC) 610.

167 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 269.

168 Section 154 of the Code of Criminal Procedure, 1898.

169 Section 200 of the Code of Criminal Procedure, 1898.

170 Section 154 of the Code of Criminal Procedure, 1898.

171 REDRESS. 2004. *Torture in Bangladesh 1971-2004 Making International Commitments a Reality and Providing Justice and Reparations to Victims*. London: REDRESS.

law and are entitled to equal protection of law. In Bangladesh majority people are improvised. They cannot access themselves to justice to protect and vindicate their legal rights and lawful causes. To address this problem legal aid services have been activated under the Aingoto Sohayota Prodan Ain (Act No. VI of 2000) i.e. the Legal Aid Act, 2000.[172] However, Government legal aid in Bangladesh has nationally existed since the late 1990s. The current version was enacted in 2001 as the Legal Aid Services Act 2000 (LASA). It is a *judicare* program, delivered at the District level through a committee chaired by the District and Sessions judge under the central authority of a semi-autonomous body corporate named the National Legal Aid Organization (NLASO). [173] It comprehensively provides for the decentralization of activities in national and district level. At national level there is a National Legal Aid Board, at district level there are District Legal Aid Committees, in the Upazilla or Thana level there are Upazil1a Legal Aid Committees and in Union level there are provisions of Union Legal Aid Committees.[174] These Legal Aid Committees are headed by the respective District Judges, have been constituted with Government officer, Lawyer, Voluntary and Woman Organizations in each district. A statutory body called National Legal Aid Organization has been established and there is a National Board of Director consisting of 19 members. The members represent Ministers of Ministry of Law, Justice and Parliamentary Affairs as chairman, Members of the Parliament, Attorney-General of Bangladesh, Government officials as well as representatives from civil societies. [175] This Act is an honest attempt of the Government to lend its assistance to the poor people to institute or defend cases in courts. This Act along with guidelines and rules framed under it presents a comprehensive, nation-wide and state-funded legal aid scheme. It is mentioned in the preamble that the aim of enacting the Act is to provide legal aid[176] to the people who

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[172] Ministry of Law, Justice and Parliamentary Affairs, Bangladesh. 2013. 'Legal Aid Service', available at:< http://www.minlaw.gov.bd/legalaidservice.htm>, last accessed on 21 July 2013.

[173] Morrison, Ian. 2013. 'Legal Aid in Bangladesh', available at:< http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/papers/Legal_Aid_in_Bangladesh_-_Ian_Morrison.pdf>, last accessed on 21 July 2013.

[174] Islam, Shaila. 2010. 'Legal Aid in Bangladesh: A theoretical study on Govt. & Nongovt. Organization', available at:< http://shailallb.blogspot.com/2010/02/legal-aid-in-bangladesh-theoretical.html>, last accessed on 21 July 2013.

[175] Ministry of Law, Justice and Parliamentary Affairs, Bangladesh. 2013. 'Legal Aid Service', available at:< http://www.minlaw.gov.bd/legalaidservice.htm>, last accessed on 21 July 2013.

[176] According to section 2(a) of the Act, "Legal Aid" means to provide legal aid to people who are unable to get the justice due to financial position or due to different socio economic condition such

are unable to get the justice due to financial crisis or due to different socio-economic reasons.[177] Legal aid is theoretically available for all sorts of criminal,[178] family and civil matters[179] and is defined to include legal advice, legal representation and (since 2006 amendments) limited ADR services in civil matters. By 2008, the pilot Districts had well-known and accessible offices, easy to locate for poor justice seekers. Applications had more than doubled, and the number and percentage of women receiving legal aid increased greatly.[180] Processing time for cases was greatly reduced, quality standards for legal services were set and monitored, and panel lawyers received training, including gender training, more lawyers participated in legal aid including a higher percentage of women lawyers. In the pilot Districts, the

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as the payment of lawyer's fees, etc. Thus, section 2 (a) of the Act broadly defines 'Legal Aid' so as to include counseling, payment of lawyers fees and other incidental cost for expenses of litigation. See Islam, Shaila. 2010. 'Legal Aid in Bangladesh: A theoretical study on Govt. & Nongovt. Organization', available at:< http://shailallb.blogspot.com/2010/02/legal-aid-in-bangladesh-theoretical.html>, last accessed on 21 July 2013.

177 Islam, Shaila. 2010. 'Legal Aid in Bangladesh: A theoretical study on Govt. & Nongovt. Organization', available at:< http://shailallb.blogspot.com/2010/02/legal-aid-in-bangladesh-theoretical.html>, last accessed on 21 July 2013.

178 The need for legal aid is felt more in criminal matters as the life, property and personal liberty of a person are inseparably connected there. As regards criminal matters, section 340 Cr. P.C. states that an accused should be defended by a lawyer and he must pay the fees and nothing more. Commenting on section 340 (1) of the Code of Criminal Procedure, 1898, the Supreme Court of India observed that the right conferred by section 340 (1) does not extend to a right in an accused person to be provided with a lawyer by the State, or by the police or by the Magistrate. That is a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one and to engage one himself or get his relations to engage one for him. The only duty cast on the Magistrate is to afford him the necessary opportunity. In the case of Clarence *Earl Gideon v. Wainwrght*, 1963, the USA Supreme Court has recognized that it is the right of undefended accused to have a lawyer at the cost of the state. In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defence. The leading case on Sixth Amendment to USA Constitution provides that as to the right of counsel, the Courts have "no power and authority to deprive an accused of his life or liberty unless he has or waived the assistance of counsel".

179 As regards civil matters, Order XXXIII of CPC deals with the 'pauper' suit. The Conscious Law Dictionary says that a pauper, is a poor person especially one so indigent as to depend on charity for maintenance or one supported by some public provisions; one so poor that he must be supported at public expense. The words 'pauper' and 'poor' have nearly the same meaning and they both embrace several classes. But Explanation to rule 1 of Order XXXIII of CPC provides that a person is a "Pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or where no such fee is prescribed, when he is not entitled to property worth five thousand taka other than his necessary wearing-apparel and the subject-matter if the suit. See Morrison, Ian. 2013. 'Legal Aid in Bangladesh', available at:< http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/papers/Legal_Aid_in_Bangladesh_-_Ian_Morrison.pdf>, last accessed on 21 July 2013.

180 The Prime Minister Sheikh Hasina said over the last four years, some 48,444 people including women, men and children have received legal aid services. Some 19,010 cases have been disposed of under the government legal aid services. See Bangladesh Sangbad Sangstha (BSS). 2013. 'Govt plans separate legal aid cell for workers: PM', available at:< http://www1.bssnews.net/newsDetails.php?cat=0&id=327950$date=2013-04-28&dateCurrent=2013-04-30>, last accessed on 21 July 2013.

government legal aid is collaborated with NGO services with mutual referrals and supports. The possibility of delivering legal aid services to an acceptable standard through the government legal aid mechanism was clearly demonstrated.[181]

However, the government is contemplating constitution of a separate legal aid cell for the workers of mills and factories to help them getting legal assistance. The legal aid cell for worker of limited income group would help them taking step to protect their service and seek justice. The cell will work side by side existing Legal Aid Service,[182] and the National Legal Aid Committee is looking into the jail appeal matter as a result there are many poor convicts who are getting benefits of the law. Under the Legal Aid Program, private lawyers are also being engaged to press and conduct the jail appeals in courts.[183]

4.1.2.5 National Human Rights Commission

For many years the people of Bangladesh lacked an effective mechanism for addressing their grievances when basic human dignities were involved. With the reconstitution of the National Human Rights Commission people's confidence is beginning to be revived. The Government took initial steps to establish a National Human Rights Commission more than a decade ago, in 1998. Although a draft law was prepared and debated, it was not finalized. The NHRC was later formally established by the National Human Rights Commission Ordinance 2007 and commenced activities on 1 September 2008 with the appointment of a Chairman and two other Members. The 2007 Ordinance was supersede by the Jatio Manobadhikar Commission Ain, 2009 i.e. the National Human Rights Commission Act, 2009 which was approved by the Parliament on 14 July 2009 with retrospective effect from 1 September 2008. Under the 2009 Act, the NHRC was reconstituted on 22 June 2010 with the renewed aim of establishing and securing human rights in every sphere of Bangladeshi society. The present Commission is dedicated to securing and upholding

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[181] Morrison, Ian. 2013. 'Legal Aid in Bangladesh', available at:< http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/papers/Legal_Aid_in_Bangladesh_-_Ian_Morrison.pdf>, last accessed on 21 July 2013.

[182] Bangladesh Sangbad Sangstha (BSS). 2013. 'Govt plans separate legal aid cell for workers: PM', available at:< http://www1.bssnews.net/newsDetails.php?cat=0&id=327950$date=2013-04-28&dateCurrent=2013-04-30>, last accessed on 21 July 2013.

[183] Ministry of Law, Justice and Parliamentary Affairs, Bangladesh. 2013. 'Legal Aid Service', available at:< http://www.minlaw.gov.bd/legalaidservice.htm>, last accessed on 21 July 2013.

human dignity through the protection of fundamental rights and by advancing human security. The reconstituted National Human Rights Commission began its journey on 23 June 2010, envisioned as a pre-eminent organization of the State, having been created to support and embody the philosophy of Bangladesh. According to article 11 of the Bangladesh Constitution, the guarantee of 'fundamental human rights and freedoms and respect for the dignity and worth of human person' has been promulgated as the main mission of the State. Likewise, the National Human Rights Commission Act, 2009 preamble read with section 2(f) establishes the institution in order to protect, promote and foster human rights as envisaged in the Bangladesh Constitution and international instruments.[184] However, the NHRC's Draft Strategic Plan lays out the vision and mission of the Commission, with the vision being to establish "a human rights culture throughout Bangladesh" and the mission being to ensure "the rule of law, social justice, freedom and human dignity through promoting and protecting human rights". The Commission has also established four Long-term Goals[185] for itself and the country, which the NHRC will vigorously pursue during the current terms of the Commissioners and the beyond.[186] The Commission also identified sixteen thematic areas as pressing human rights issues on which it will pay particular attention, while being responsive to other human rights-related concerns or matters that may arise. One of these pressing human rights issues is 'violence by state mechanisms, particularly enforced disappearance, torture and extra-judicial killings (the highest priority[187] area in 2011), NHRC is endowed with a comprehensive mandate as outlined in the 2009 Act. A glimpse at the functions of the Commission reflects several major areas of responsibility like investigation and enquiry, recommendations, legal aid and human rights advocacy, research and training on

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[184] National Human Rights Commission. 2010. *National Human Rights Commission Annual Report 2010*. Dhaka: NHRC.

[185] Goal One: A human rights culture throughout Bangladesh where the dignity of every person is respected. Goal Two: A just society where violence by state is an episode of the past and officials know, and are held accountable for, their responsibilities. Goal Three: A nation that is respected internationally for: its human rights compliance, ratification of all human rights instruments, up-to-date reporting to treaty bodies, open cooperation with UN special mechanisms. Goal Four: An NHRC that is credible, apolitical, objective and effective and respected for leading human rights protection throughout the country. See National Human Rights Commission. 2011. *Strategic Plan of the National Human Rights Commission 2010-2015*. Dhaka: NHRC.

[186] National Human Rights Commission. 2010. *National Human Rights Commission Annual Report 2010*. Dhaka: NHRC.

[187] National Human Rights Commission. 2011. *Strategic Plan of the National Human Rights Commission 2010-2015*. Dhaka: NHRC.

human rights laws, norms and practices.[188] The functions of the commission will include investigating any allegation of human rights violation received from any individual or quarter, or the commission itself can initiate investigation into any incident of rights violation.[189] If a human rights violation has been proved, the NHRC can either settle the matter or pass it on to the court[190] or relevant authorities.[191] One of the key mandates of NHRC is to intervene in human rights violations depending on merits of the case. National Human Rights Commission of Bangladesh bearing powers of civil court, can initiate contempt case in grave violations. NHRC Bangladesh, can intervene *suo moto* or with the permission of High Court and can appoint special rapporteur on specific issue to monitor HRVs.[192] NHRC can monitor[193] whether international standards are followed or not[194] and may provide guidelines also.[195]

4.2 Prohibition, Prevention and *De Jure* Eradication of Torture: Revealing Grim Reality

According to Article 2 and 6 of the ICCPR, the Bangladeshi authorities have the obligation to ensure the right to life of the country's people and must provide prompt and effective remedies in cases where any violations take place. Bangladesh also has

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188 National Human Rights Commission. 2010. *National Human Rights Commission Annual Report 2010*. Dhaka: NHRC.

189 Section 12 of the National Human Rights Commission Act, 2009.

190 Section 14 of the National Human Rights Commission Act, 2009.

191 Human Rights Initiative. 2007. 'Bangladesh Country Report: Anti-terrorism Laws and Policing', available at:< http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/docs/country_reports/071004_chogm07_bangladesh_anti_terrorism_policing_country_report2007.pdf>, last accessed on 16 January 2013.

192 Sections 17, 18 and 19 of the National Human Rights Commission Act, 2009.

193 In 2009, Anti Torture Bill adopted by Lokshabha, the lower house of Parliament of India, was possible only for NHRCs consecutive intervention. See Ain o Salish Kendra (ASK).2010. 'Preventing Torture within the Fight against Terrorism', available at:< http://www.askbd.org/web/wp-content/uploads/2011/01/Eng_report_journ_workshop_final.pdf>,last accessed on 19 April 2013.

194 Ain o Salish Kendra (ASK). 2010. 'Preventing Torture within the Fight against Terrorism', available at:< http://www.askbd.org/web/wp-content/uploads/2011/01/Eng_report_journ_workshop_final.pdf>,last accessed on 19 April 2013.

195 Indian initiative was cited where NHRC gave direction on how to deal encounter killings & specifically mentioned that any officer goes into encounter must report to the NHRC on how much ammunition has been used. See Ain o Salish Kendra (ASK).2010. 'Preventing Torture within the Fight against Terrorism', available at:< http://www.askbd.org/web/wp-content/uploads/2011/01/Eng_report_journ_workshop_final.pdf>,last accessed on 19 April 2013.

the obligation to introduce legislation that is in conformity with the ICCPR, but continues to fail in this regard even though Bangladesh has ratified all the core human rights treaties (ICCPR, ICESCR, CERD, CEDAW, CAT, CRC) and is subject to the Universal Declaration of Human Rights (UDHR). Extra-Judicial Killings in the name of "crossfire", "gunfights" or "encounters", unwarranted arrests, torture in police remand practiced by the law enforcing agencies in Bangladesh constitute flagrant violations of basic human rights enshrined in the UDHR and in the Constitution that ensured right to life for all. Since 2004, extra judicial killings by law enforcing agencies, custodial deaths and torture, and lack of any public reports of investigation and prosecution of those responsible demonstrate the vulnerability of the right to life of Bangladeshi citizens. In the vast majority of instances, the state failed to publish any information regarding actions taken to investigate, prosecute or punish those responsible for such. In reality however, the authorities can and do get away with murder and function as if they are above the law and even the supreme law, the Constitution.[196] There are certain provisions of the Constitution[197] which are not followed by the police officers and are very much over jealous in exercising the powers given under section 54 but they are reluctant to act in accordance with the provisions of the Constitution itself.[198] Even if Bangladesh has anti-torture laws but unfortunately the grim reality is different. Sometimes it's the law itself or the implementation of it makes the whole anti-torture regime a gloomy one. This part 'prohibition, prevention and *de jure* eradication of torture' first provides certain loopholes in the existing laws and then focuses on the shortcomings in the enforcement and monitoring measures basing upon the previous part i.e. the 'compliance in laws' in order to understand the anti-torture regime perfectly.

4.2.1. *De Jure* Eradication and the Reality

Amnesty International reports that a number of laws in Bangladesh create the conditions which facilitate torture.[199] In all the cases of detention the detainees

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196 Khan, Arafat Hossain. 2010. 'Stop Extra Judicial Killings: Respect and establish an effective judiciary', available at: <http://www.blast.org.bd/news/news-reports/101-stopextrajudicialkillings>, last accessed on 19 May 2013.

197 Article 33 of the Constitution of People's Republic of Bangladesh, 1972.

198 *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR (HCD) 363, 371.

199 The most commonly used of these is Section 54 of the Code of Criminal Procedure. It is also found that under eight conditions a person may be arrested by a police-officer without warrant but from the first condition we find that this condition actually includes four conditions under which a police officer may arrest without warrant and these four conditions are couched in such wards that

claimed that they had been tortured and that torture began from the moment of their arrest'.[200] However, section 54 of the Cr. P. C. grants police qualified power of arrest of any person on reasonable suspicion without warrant on nine grounds. Practically section 54(1) is the most abused section of the Code. The Police, in fact do not comply with the provision in its totality. They bluntly ignore the qualifying terms mentioned in the section e.g., 'cognizable offence', 'reasonable complaints', 'credible information', and 'reasonable suspicion'. It is being indiscriminately used by the police and as application of this section fraught more with ulterior motives than prevention of crimes and or arrest of persons suspected of having committed or about to commit cognizable crimes. Most of the arrests under section 54 are caused on fanciful suspicion and in most cases to fill in the quota allotted to an individual police officer to make an arrest each day. This incredible practice has been going on with impunity for many years. An arrest under section 54 is often a prelude to issuance of detention order under the Special Powers Act, 1974 (SPA) that allows the authorities to detain any person on eight grounds, vague enough to detain any person according to the whim and caprice of the executives and the party in power. Such detention can extend to six months, and may extend beyond this period, if so sanctioned by the Advisory Board. The use and abuse of the SPA in the name of securing law and order have resulted in steady pattern of human rights violations.[201] The Act provides no guidance on the burden of proof necessary for the Government to conclude that an individual is likely to commit a prejudicial act. As a result, detentions under the SPA 1974 can occur on allegations with very little evidence. The Commonwealth Parliamentary Association reports that the wide ranging powers of detention without

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there is scope of abusive and colorable exercise of power. See *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR 363, 366. However, it is reported that despite the safeguards, Section 54 effectively allows the police to arrest anyone at any time for almost any reason, and is one of the most easily abused provisions in the Bangladesh legal system. See UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: <http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

200 Human Rights Initiative. 2003. 'Bangladesh Country Report: Anti-terrorism Laws and Policing,' available at:< http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/docs/country_reports/071004_chogm07_bangladesh_anti_terrorism_policing_country_report2007.pdf>, last accessed on 30 April 2013.

201 Kabir, A. H. Monjurul. 2011. 'Police remand and the need for judicial activism', available at:< http://saqebmahbub.wordpress.com/2011/06/06/a-case-for-defining-and-criminalising-torture-in-bangladesh/>, last accessed on 05 June 2013.

express reasons under the SPA 1974 have been widely used[202] against political opponents and that, in reality, detainees are held for much longer periods than those specified in the Act. Amnesty has also identified the way in which Section 54 is reinforced by Section 167 to exacerbate the likelihood of torture.[203] There are certain legal requirements to be fulfilled on the part of the Magistrate to apply his judicial mind in case of granting remand. But unfortunately though these are not fulfilled, the Magistrate as a routine matter passes his order on the forwarding letter of the police officer either for detaining the person for further period in jail or in police custody.[204] Though there are a good number of formal requirements for recording confession by a magistrate to ensure that confessions are 'voluntary', yet tortures in police custody during remand have often led to 'confession' by arrestees who had spent a few days in police custody. Voluntariness of confessions has been an issue in much criminal litigation but, again, these had hardly been scrutinized in terms of Article 35(4) and 35(5) of the Constitution.[205]

Though the Constitution contains provisions as to ensure rule of law, no right can compare with the right to life without which all other rights are meaningless and rule of law can play its most significant role in this aspect. But the tolerant and rather approving attitude of the successive governments in respect of extra-judicial killings by the law enforcing agency has seriously dented the operation of rule of law so much that it will not be a misstatement to say that rule of law for the common men in the

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202 A 2002 study by the Bangladesh Law Commission found that in 99% of cases challenging preventive detention under the SPA 1974 (between 1998–2001), the detention orders were found to be illegal and without lawful authority. Its report stated," this fact indicates how carelessly and without regard to the provisions of the law of detention as they stand today in Bangladesh, the detaining authorities applied this law'. See Human Rights Initiative. 2003. 'Bangladesh Country Report: Anti-terrorism Laws and Policing,' available at:<http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/docs/country_reports/071004_chogm07_bangladesh_anti_terrorism_policing_country_report2007.pdf>, last accessed on 30 April 2013.

203 Human Rights Initiative. 2003. 'Bangladesh Country Report: Anti-terrorism Laws and Policing,' available at:< http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/docs/country_reports/071004_chogm07_bangladesh_anti_terrorism_policing_country_report2007.pdf>, last accessed on 30 April 2013.

204 *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR 363, 369.

205 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Practice", Special Issue *Bangladesh Journal of Law*, pp.259-292, at pp. 273-274.

country exists only in the pages of the Constitution.[206] However, 1972 Constitution had included various fundamental rights which should provide safeguards including to the victims of security laws of the country. Despite temporary suspension of these safeguards during various periods, these provisions survive till now. These safeguards are not applicable during emergency and may become non-applicable during other time if they fall within the restrictions defined in the very chapter of the Constitution that describes the fundamental rights.[207]

In case of offences in the nature of torture as described in the Penal Code in 'compliance in laws part' have two significant limitations. Firstly, the acts prohibited are limited and fail to encompass a wide range of established practices of torture by state officials, which would however fall under the Convention definition. Secondly, from a principled point of view, the offences and the punishments fail miserably to reflect the particular wrongness of such acts being committed by the state as opposed to private individuals.[208] However, these provisions have no manner of application when the act of torture is committed in a legally authorized custody. Similarly an act of torture committed with a purpose other than the purpose mentioned in the penal provisions cannot be addressed under this law and also the punishments for those offences are not adequate enough to take into account the gravity of the offence of torture[209] which are so negligible that it will betray the international obligation of Bangladesh if torture is tried under these penal provisions. However, sometimes offences under these sections become difficult to detect[210] and the reasons behind paucity of evidence in cases of torture and even death of a person while in police custody are obvious. In a criminal case, the burden of proving the guilt of the accused

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206 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 85.

207 Nazrul, Dr. Asif. 2009. 'The Security and Emergency Related Laws in Bangladesh: Tools for Human Rights Violations', available at :< http://www.southasianrights.org/wp-content/uploads/2009/10/securitylaw_BD.pdf>, last accessed on 12 June 2013.

208 Mahbub, Saqeb. 2011. 'A case for defining and criminalizing torture in Bangladesh', available at:< http://saqebmahbub.wordpress.com/2011/06/06/a-case-for-defining-and-criminalising-torture-in-bangladesh/>, last accessed on 13 June 2013.

209 Rahman, Md. Mahbubur and Islam, Sk. Samidul. 2006. "Obligation of Bangladesh under Article 4 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: A Performance Audit", Vol. 10, No. 1 & 2 *Bangladesh Journal of Law*, pp.119-148, at p. 142.

210 Huq, Zahirul. 2001. *The Penal Code*. Dhaka: Anupam Gyan Bhandar, at p. 663.

is invariably on the prosecution according to the scheme and various provisions of the Evidence Act, 1872. In cases of torture on a person while in police custody one can rarely expect to get eye-witnesses to such incidents, excepting police personnel some of whom themselves happen to be the perpetrators of torture. It is an extremely peculiar situation in which a police personnel alone, and none else, can give evidence regarding the circumstances in which a person in police custody receives injuries. This results in paucity of evidence and probable escape of the culprits.[211]

4.2.2 Enforcement and Monitoring Measures in Reality

The Torture Convention was ratified by the government of Bangladesh in October, 1998 reserving the article 14 paragraph 1 of it, which states that each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation. While ratifying the CAT Bangladesh declared that it will apply article 14 Para 1 in consonance with the existing laws and legislation in the country. Again Bangladesh has not accepted the competence of either the Committee against Torture or the Human Rights Committee to received individual complaints about torture. In absence of any international mechanism, victims of torture can only recourse to the domestic remedies which are very poor in Bangladesh.[212]

4.2.2.1 Availability of Civil Redress for Victims

There were no comprehensive official statistics on the number of torture related complaints filed with magistrates or the police and subsequent action taken. A large number of cases remained unreported. Some complaints were withdrawn due to police pressure, including offers of money to victims to drop their claims. Only a few prosecutions of perpetrators had been successful; inadequate investigations and difficulty in finding witnesses and obtaining medical evidence were cited as problems.

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[211] Lawcommissionbangladesh.org. 1998. 'Law commission final report on the Evidence Act, 1872 relating to burden of proof in cases of torture on persons in police custody', available at:< http://www.lawcommissionbangladesh.org/reports/17a.pdf>, last accessed on 20 June 2013.

[212] Assignment Point. 2013. 'Assignment on Human Dignity and Torture in Bangladesh', available at:< http://www.assignmentpoint.com/arts/law/assignment-on-human-dignity-and-torture-in-bangladesh.html>, last accessed on 11 June 2013.

There had, apparently, been several instances of out-of-court settlements in torture cases. Citizens who wish to file a complaint with the police face many hurdles. First is the fear of reprisal, sometimes based on direct threats not to file a complaint. When families of victims are brave enough to come forward, the police frequently refuse to accept the case. Another reason why criminal complaints are not filed is widespread police corruption. The police were over-worked and did not have sufficient time off. Police officers spent time doing errands for higher officials or on protocol functions or VIP protection or collecting incentives or bribes, or could not perform their duties properly. According to the US State Department Country Report on Human Rights Practices 2008 (USSD 2008 report), released 25 February 2009 which stated that corruption, judicial inefficiency, lack of resources, and a large case backlog remained serious problems. It also stated that corruption and a substantial backlog of cases hindered the court system, and trials were typically marked by extended continuances, effectively preventing many from obtaining a fair trial due to witness tampering, victim intimidation, and missing evidence.[213] In the majority of cases, investigations into allegations of torture have been inconclusive. In several instances, investigations have not been opened either because the alleged perpetrator enjoys immunity under special law, or because the prosecution of the alleged perpetrators has not been authorized by the Government as required by law. Other cases were closed without any charges being brought against the alleged perpetrators. The police, often the same institution allegedly responsible for the violations, are not independent and there appears to be little interest on their part to investigate torture allegations promptly and effectively. There are several reports of police officers shielding their colleagues and discouraging victims from pursuing their cases, or otherwise obstructing investigations. It often appears that the only actions taken against the alleged perpetrators are administrative measures such as temporary suspension and transfer to other police stations. Prompt and thorough investigations into death in custody cases remain exceptional. It was only after public outcry that a 'Probe Committee' was established to investigate the circumstances of death and possible criminal responsibility. However, official inquiries are said to lack transparency and most inquiries have apparently not resulted in any subsequent criminal prosecutions of those responsible. One of the main reasons for the lack of charges being brought is the

[213] UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

difficulty that victims face in obtaining evidence, especially medical evidence, and the paucity of other evidence in the absence of any witnesses other than the victim in those cases where he or she survived the torture. Where police officers remain silent or present a differing account of events, the prosecution will find it immensely difficult, if not impossible, to secure a conviction unless other compelling evidence is available. This constellation, resulting in widespread impunity, has been identified by the Law Commission and the High Court Division,[214] both of which recommended that the burden should be on the police officer responsible for taking a person into custody to explain the reasons for injury or death and to prove the relevant facts to substantiate the explanation.[215] At present to get the most rudimentary investigation opened often requires a huge effort through the media, demonstrations and lobbying. After that, the entire legal process is so slow that it is almost unendurable for the average litigant. There is no witness protection scheme to shield victims from the inevitable pressure and harassment by the accused. Nor has the state acknowledged its responsibility to rehabilitate victims. And the slowness and inefficiency of all levels of bureaucracy makes the pursuit of complaints very difficult.[216]

In case of legal aid although the legislative framework has existed since 2001, the government legal aid scheme is still very much in its infancy; the government never established the central authority envisaged by the legislation nor did it choose to appoint any full time staff. The allocated legal aid fund was disbursed to Districts, but without any unaccountably or any particular rhyme or reason, to an outsider. For poor justice seekers who learned of the program, the application process was intimidating

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214 *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR 363. Recommendation F: "If death takes place in police custody or in jail it is difficult to prove by the relations of the victim as to who caused the death. In many cases, this court has decided that when a wife dies while in custody of the husband, the husband shall explain how the wife met her death. Similar principle may be applied when a person dies in police custody or in jail. To give a legal backing to the above principle, we like to recommend that a section in the Evidence Act (after section 106) or a clause may be added in section 114 of that Act incorporating the above principle. The new section in the Evidence Act shall provide that when a person dies in police custody or in jail, the police officer who arrested the person or the police officer who has taken him in his custody for the purpose of interrogation or the jail authority in which jail the death took place, shall explain the reasons for death and shall prove the relevant facts to substantiate the explanation."

215 REDRESS. 2004. *Torture in Bangladesh 1971-2004 Making International Commitments a Reality and Providing Justice and Reparations to Victims*. London: REDRESS.

216 Farnando Basil. 2006. "Foreword: Short stories about home truths in Bangladesh", Vol. 5 No. 4 *Article 2 of the International Covenant on Civil and Political Rights*, pp. 2-6, at p. 5.

and often completely beyond reach. Most legal aid cases came as referrals by jailers for unrepresented inmates, but this too was a haphazard process. Where legal aid was granted, services were often provided or additional fees were demanded by lawyers. Although there were honorable exceptions amongst some motivated judicial officers and lawyers who made efforts from time to time to use the legal aid fund, there were neither incentives nor mechanisms to move these beyond the level of individual initiative. As late as 2008-2009, only about 25% of the national legal aid fund was actually spent.[217]

4.2.2.2 Appropriateness of Penalties

The second obligation of Bangladesh under Article 4 of the CAT is to ensure that all acts of torture, attempt to torture and complicity or participation in torture are punishable by appropriate penalties, which take into account their grave nature. Though the CAT demands 'appropriate penalties for torture, it doesn't outlines the exact gravity of the penalties. Similarly the Committee against Torture has not prescribed a rule for the required punishment by specifying a minimum or maximum length of imprisonment. It has however, indicated the limits of appropriate sentences, finding on the one hand that short sentences of three to five years imprisonment are inadequate, and on the other that too serious penalties might deter the initiation of prosecutions. The punishment of torture provided for under the domestic law of a state party must not be trivial or disproportionate, but must take into account the grave nature of the offence. This means that torture must be punishable by severe penalties. So far the expected length of sentence for the offence of torture is concerned; one commentator argues that it must be calculated in the same way as other serious offences under international law. Lenient penalties may fail to deter torture, while rigid and draconian penalties may result in courts being unwilling to apply the law as it fails to flexibly take into account individual circumstances. The practice of the committee indicates that a significant custodial sentence is generally appropriate. Although the committee as a whole has not commented on the appropriate level of the sentence for torture, it is according to one commentator, possible on the basis of the

[217] Morrison, Ian. 2013. 'Legal Aid in Bangladesh', available at:< http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/papers/Legal_Aid_in_Bangladesh_-_Ian_Morrison.pdf>, last accessed on 21 July 2013.

individual opinions of members to establish a range within which such sentences should fall. [218]

Human Rights Watch (HRW) stated in their report 'Ignoring Executions and Torture' published on 18 May 2009 that there has been a lack of political will under successive governments to hold accountable those responsible for human rights violations. Of the thousands of killings of individuals in the custody of the security forces since independence in 1971, Human Rights Watch knows of very few cases that have resulted in a criminal conviction. The situation is not significantly different when it comes to other forms of human rights abuses, including torture, which is endemic in Bangladesh. The internal justice and disciplinary systems of the military, RAB, and police have utterly failed to deliver justice. Although these institutions have claimed that in some cases their personnel have been punished, details are not made publicly available. There is every indication, however, that the sanctions handed out to the perpetrators are wholly inadequate and stand in no relation to the gravity of the crimes committed. While the cases described in this report have not resulted in criminal convictions, it appears that in several cases those responsible have been subjected to disciplinary actions.[219] In Bangladesh today, the prospects of punishing the perpetrators of "crossfire" killings, torture and other grave abuses is remote, to say the least. Sometimes internal inquiries may lead to transfers or dismissals, and very occasionally, limited action in the courts.[220]

4.2.2.3 Monitoring Measures

Within the monitoring measures Bangladesh has the National Human Rights Commission along with the prison authorities while the accused persons are in custody. Despite certain encouraging modifications, the National Human Rights Commission Act still contains some sections in the Act which seems to be gray and needs clarification. In respect of violation by law enforcement agencies the

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[218] Rahman, Md. Mahbubur and Islam, Sk. Samidul. 2006. "Obligation of Bangladesh under Article 4 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: A Performance Audit", Vol. 10, No. 1 & 2 *Bangladesh Journal of Law*, pp.119-148, at pp. 137-138.

[219] UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at:< http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

[220] Farnando Basil. 2006. "Foreword: Short stories about home truths in Bangladesh", Vol. 5 No. 4 *Article 2 of the International Covenant on Civil and Political Rights*, pp. 2-6, at p. 5.

Commission has limited jurisdiction and can only demand report from the Government. There is no clear provision about Commission's further action in case of non compliance of the reporting of the Government.[221] The Home Ministry has asked the National Human Rights Commission not to go beyond its jurisdiction regarding the activities of the disciplined forces, especially police and RAB personnel.[222] Odhikar believes that the NHRC has become a powerless institution as it has no specific jurisdiction to take action against the accused persons or law enforcement agencies. The Commission ought to file cases against human rights violations; however, according to the Human Rights Commission Act, the Commission can only give recommendations to the government to take action against perpetrators. It appears that the NHRC does not have any effective power. Odhikar questions the actual necessity of the Commission, if the Government is going to ignore it.[223]

However, in case of prison, the prison authorities still followed statutes framed by the British colonial authorities in the nineteenth century, the main objective of which was the confinement and safe custody of prisoners through suppressive and punitive measures. There was an absence of programs for the reform and rehabilitation of offenders and vocational training programs did not cater for all classes of prisoners. The recruitment and training procedures of prison officers was inadequate to facilitate the reform of prisoners. The number of medical doctors was disproportionate to the size of the prison population, and women prisoners were attended to by male doctors. There were no paid nurses in prison hospitals; literate convicts worked as hospital attendants, without training. There were no trained social welfare officers or psychologists. However, it was stated in the USSD 2008 report that in general the government did not permit prison visits by independent human rights monitors, including the International Committee of the Red Cross. Government-appointed committees of prominent private citizens in each prison locality monitored prisons

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221 National Human Rights Commission. 2010. 'National Human Rights Annual Report 2010', available at:<http://www.nhrc.org.bd/PDF/Annual%20report%202010.pdf>, last accessed on 22 July 2013.

222 Sources said the Ministry made the comments following the NHRC's reactions regarding extrajudicial killings by law enforcement agencies and the recent incident of maiming college student Limon during a RAB shooting.

223 Odhikar. 2011. *Human Rights Monitoring Report: 2011*. Dhaka: Odhikar.

monthly but did not release their findings. District judges occasionally visited prisons, but rarely disclosed their findings.[224]

The next chapter deals with the institutional compliance of Bangladesh's. Since all the international obligations vested on State actors and the earlier chapter already focuses on the role of the Legislature in Bangladesh, this chapter as a chronology goes on with the prevention of torture through the other actor i.e. the Judiciary. This will focus the role of the Judiciary in defying torture invoking the international standards. The last part of this chapter is nothing but to focus the compliance in practice connoting the impediments that are getting in the way of activating implementation and promoting the effective prevention of torture.

[224] UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

CHAPTER 5

INSTITUTIONAL COMPLIANCE: ROLE OF THE JUDICIARY IN ACTIVATING IMPLEMENTATION AND PROMOTING THE EFFECTIVE PREVENTION OF TORTURE

The UN Human Rights Committee considers, in its General Comment No. 20, that article 7 of the International Covenant on Civil and Political Rights, 1966 dealing with prohibition of torture leads to a positive action on the part of the States Parties and 'it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7'. Therefore, recently there has been a growing emphasis placed upon the positive obligation of States to protect individuals. States have an obligation to fulfill the protected rights. The obligation to fulfill requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of those rights.[1] And generally states are doing it through their organs like the Legislature, Executive and Judiciary. Chapter 4 in this thesis deals with the role of the Legislature with the normative compliance of the state's obligation and it's the chapter 5 that focuses the role of the Judiciary regarding this that is the state's institutional compliance centering how state activates through her judicial organ the implementation of her obligation and promote the effective prevention of torture. It is to be noted that even if the NGOs are playing vital roles in making the places for effective implementation, this thesis and specially this part is nothing but the role of the Judiciary as institution here i.e. the state actors' role in implementing and promoting anti torture regime. The NGOs are leaving apart from the main role[2] here because they have no international obligation just like the state actors though they are doing it from their national and organizational obligation.

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1 Rahman, Md. Mahbubur and Islam, Sk. Samidul. 2006. " Obligation of Bangladesh under article 4 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: A Performance Audit", Vol. 10 Nos. 1&2 *Bangladesh Journal of law*, pp. 119-148, at p. 134.

2 The helping role is still present in this thesis.

5.1 Judicial Activism Defying Torture

For effective administration of justice in a democracy like Bangladesh; courts have a definite and decisive role to play. A state which declares itself a legal state has to accept the role of the judiciary to maintain checks and balances on the execution of power by the Legislative and Executive branches. To control the latter, the judiciary is responsible for deliberating on the legality of any administrative action, and to control the former, to consider the constitutionality of any legislation passed by Parliament. The judiciary in modern legal states thus plays very important roles. Apart from ensuring legality, it is obliged to protect against the infringement on the rights and liberties of people by abuse of power by the state and to uphold democracy.[3] However in countries of written constitutions like ours, Constitutional supremacy presupposes the existence of a strong neutral organ which would be able to prevent unconstitutional onslaught by the Executive and Legislature. If Executive or Legislature desires to do something which is inconsistent with the provisions of the constitution the judiciary has been empowered to undo the ill-design orchestrated by the executive or legislature.[4] And as arbitrary arrest, detention and custodial torture by law-enforcing agencies have remained a persistent feature of our criminal justice system, these practices have been widespread in Bangladesh irrespective of the forms of government and its very unfortunate that successive governments have failed to stop this endemic problem even if arbitrary arrest, detention and infliction of torture are unacceptable in any form of government that is committed to democracy and the rule of law. Against this background, the higher judiciary in Bangladesh has taken a proactive stand in prevention of arbitrary arrest, detention and torture and delivered a number of guidelines in line with the international standards in some Public Interest Litigation (PIL) cases for initiating legal reform by the government.[5]

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3 Khan, Arafat Hosen. 2010. 'Stop Extra Judicial Killings: Respect and establish an effective judiciary', available at:< http://www.blast.org.bd/news/news-reports/101-stopextrajudicialkillings>, last accessed on 14 September 2013.

4 Karzon, Sheikh Hafizur Rahman and Faruque, Abdullah-Al. 1999. "Martial Law, Judiciary and Judges: Towards an Assessment of Judicial Interpretations", Vol. 3 No. 2 *Bangladesh Journal of law*, pp. 181-210, at p. 181.

5 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

5.1.1 Invoking International Standards in Judgments

It is pertinent to stress from the outset that CAT is the only legally binding convention at the international level that deals exclusively with the eradication of torture. It obliges state parties to take specific and general measures to prevent torture and other cruel, inhuman or degrading treatment or punishment. CAT became the first binding international instrument exclusively dedicated to the struggle against one of the most serious and pervasive human rights violations of our time. Today, most general human rights conventions, at both regional and global levels, address the issue of torture and ill-treatment of persons. They declare that torture is prohibited absolutely, even during emergencies or armed conflicts. The dedication of international human rights law to outlawing such acts is also evidenced by the existence of instruments focusing on the prevention of torture. To this end, CAT imposes significant obligations on states to take measures to prevent and to facilitate redress to victims and survivors. With regard to the responsibility to protect against torture and other cruel practices, the international community has developed standards to protect people against torture that apply to all legal systems. The standards take into account the diversity of legal systems that exist and set out minimum guarantees that every system should provide. Government and people responsible for the administration of the criminal justice systems have a responsibility to ensure that these standards are adhered to, within the framework of their own national legal system.[6] That's why this part focuses on the issue that how Bangladesh State's organ especially here, the Judiciary, is invoking that international standards on torture in its judgments and activating the implementation of that standard.

However, no crime in a civilized country is to be treated with vengeance or cruelty. That is why it is extremely important for the state to ensure justice under a fair, humane and just legal system. In truth, justice in modern days is part of the universal system of justice, a state has also to satisfy the international norms and standards in its own justice system. [7] Amongst the national institutions, in fact, the Judiciary always

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[6] Odeku, Kolawole Olusola. 2008. *In Search of a Regime of Responsibility and Accountability for Perpetrators of Torture with Reference to Persons with Special Responsibility for Protecting Human Rights.* South Africa: University of Fort Hare. (Unpublished PhD thesis).

[7] Hosein, Mainul. 2013. 'Practice of police remand is unconstitutional and judges can't be party to it', available at: <http://www.thenewnationbd.com/newsdetails.aspx?newsid=62000>, last accessed on 11 June 2013.

comes in the forefront of the national systems for the protection of human rights and one of the main functions of the Judiciary is to protect human rights guaranteed in Constitutions and laws basing on international standards. In protecting human rights, the function of the Judiciary is to oversee the way in which the diverse powers of government are exercised within the framework of laws and a set of values, to protect individuals from arbitrary governmental actions.[8] In Bangladesh the Supreme Court, as usual, remains the key institution for the protection of human rights of the bewildered. Here the traditional conservative doctrine of judicial restraint[9] poses a serious threat to liberty, and is therefore not consistent with the fundamental objective of the framers of the Constitution of the People's Republic of Bangladesh but on the other hand the purpose of the desired judicial activism[10] is to obliterate procedural anfractuosities, to broaden the idea of *locus standi*, to enable the penurious many to exercise their right of access to judicial justice, to abolish expensive nuances and pachydermic chaos of interpretation and to establish free legal aid and public interest litigation. And the need of the hour now is an organizational culture that condemns abuse of power and misuse of force and encourages pro-people policing. For Bangladesh, an activist, goal oriented judiciary can limit the scope of executive arbitrariness and ensure the implementation of its dictates. And all those who are concerned with the arrest, detention, and custody of the people, must strictly implement the constitutional and legal protections and safeguards. It is necessary that

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8 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

9 The terms "judicial restraint" and "judicial activism" describe how a judge judges, that is, how he applies the law to facts in the cases before him. The difference is that restrained judges take the law as it is. Restrained judges respect the political process, whether they agree with its results or not, until it clearly crosses a clear constitutional line.

10 Activist judges make up the law as they go along. Judicial activism does not find any mention in the Constitution of Bangladesh, it is not defined anywhere but is widely talked about in all section of society, NGOs and bureaucrats. Assertion of Judiciary and its power is judicial activism, many people label it is over active judiciary. In South Asia, the Judiciary of India has created classic precedents of judicial activism for protecting human rights, human dignity and establishing good governance. *Keshvanand Bharati vs. Kesala*, *Minerva Mills vs. Union of India, India of Gaudlis vs. Raj Naraian & S.P. vs. Union of India* etc. are few landmark cases that highlight judicial activism. Activist judges feel free to re-write statutes or the Constitution, to use extra-legal factors in their decisions, to ignore limits on their power in the search for desirable results. However, in an established and well-balanced democratic system, judicial activism rarely adventures beyond certain limits. Because ultimately it is the Legislature, and the Executive created and sustained by the Legislature, that is accountable to the people whose will, after all, is sovereign. Using judicial activism as a weapon Supreme Court gives directive through government. In *Vineet Narayan vs. Union of India*, the famous *Hawala* case Supreme Court monitored the riweshgahous, it issued directives for CBI and intelligence services to be present in all hearings. He said that Judicial reforms are needed therefore judicial activism should go hand in hand with judicial restraint.

the guardians of law and the custodians of lock-ups and prison houses should be made aware of the international, constitutional and legal rights of the people including torture which the judiciary is trying to do taking the international standards into consideration.[11]

5.1.1.1 Direct Application of International Law

In Bangladesh translation from an international standard or norm to national law and then to local implementation is slow and very complex. But not only States are responsible for transforming judicial practices, direct application of international law by domestic courts can also play an important role in implementing international human rights standards, complying with relevant international standards and citing precedents of other jurisdictions. The greater the extent to which international principles about torture are known, the greater the possibility that domestic courts will comply with them. The role of courts in this complicated process, especially concerning absolute prohibitions like torture, is fundamental. Courts must constantly try to invoke international human rights standards in torture cases, either directly, where possible, or using the standards in interpreting domestic laws. The fact that national courts and lawyers play a primary role in upholding the fundamental principles of international law can also be derived from the complementarity principle contained in Article 1 of the International Criminal Court Statute (1998). This principle means that domestic jurisdictions first have to take the lead in the adjudication of international crimes, while the ICC can step in just if one state is "unable" or unwilling" to prosecute the crime.[12] In the sub-continent, courts followed the common law approach to the application of international law into municipal law.[13] International law has a long history of influencing and forming the basis for decisions of national courts. Today national courts regularly confront issues of international law as a result of the unprecedented increase in activity on the part of international organizations and states' new-found willingness to submit their disputes to

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[11] Kabir, A. H. Monjurul. 2007. 'Police remand and the need for judicial activism', available at:< http://www.banglarights.net/HTML/civilrights-07.htm>, last accessed on 14 September 2013.

[12] International Bridges to Justice. 2011. 'Representing Victims of Torture', available at:< http://defensewiki.ibj.org/index.php/Representing_Victims_of_Torture>, last accessed on 16 May 2013.

[13] Karzon, Sheikh Hafizur Rahman and Faruque, Abdullah-Al. 1999. "Status of International Law under the Constitution of Bangladesh: An Appraisal", Vol. 3 No. 1 *Bangladesh Journal of law*, pp. 23-47, at p. 26.

international tribunals. It is generally asserted that national court generally applies its own version of what the rule of international law is, and objectively try to approach a question which raises as an issue of international law where its views will inevitably be influenced by national factors."[14]

However, in Bangladesh, international treaties are ratified by authorized State representatives but it is not fully clear whether approval by Parliament is required as the Executive has in several cases ratified treaties without such an approval. International treaties do not automatically become part of national law and consequently have to be incorporated by a legislative act. Nonetheless, it is possible for Bangladeshi courts to apply the aspects of these treaties that constitute customary international law.[15] Under the present constitutional arrangement of Bangladesh, the executive exercises unlimited power of treaty making and treaty implementation. As far as the question of legitimate implementation of a treaty is concerned, the constitution does not make any distinction between self-executing and not self-executing treaties as maintained by the American Constitution or other countries. But this does not lead to conclusion that Legislature has no role in the treaty making process. As treaty very often creates rights and obligations directly for the citizens, implied conditions of Constitution require its legislative implementation.[16] Treaties may have some persuasive value in the courts where no domestic law exists or where the law is unclear but according to national jurisprudence, they are ultimately subordinate to domestic law. According to a recent judgment of the Appellate Division of the Supreme Court in the case of *Hussain Mohammad Ershad vs. Bangladesh and others*[17]:

> "… The local laws, both constitutional and statutory, are not always in consonance with the norms contained in the international human rights instruments. The national courts should not straightway ignore the international obligations, which a country undertakes. If the domestic laws are not clear

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14 *Ibid.*, at p. 29.

15 REDRESS. 2004. *Torture in Bangladesh 1971-2004 Making International Commitments a Reality and Providing Justice and Reparations to Victims*. London: REDRESS.

16 Karzon, Sheikh Hafizur Rahman and Faruque, Abdullah-Al. 1999. "Status of International Law under the Constitution of Bangladesh: An Appraisal", Vol. 3 No. 1 *Bangladesh Journal of law*, pp. 23-47, at p. 43.

17 (2001) 21 BLD (AD) 69.

> enough or there is nothing therein, the national courts should draw upon the principles incorporated in the international instruments. But in the cases where the domestic laws are clear and inconsistent with the international obligations of the state concerned, the national courts will be obliged to respect the national laws, but shall draw the attention of the law-makers to such inconsistencies."

While the High Court and Appellate Divisions of the Supreme Court have referred to international human rights standards in several judgments[18] this is not a consistent judicial practice.[19] However, the court can look into these conventions and covenants as an aid to interpretation particularly to determine the rights implicit in the rights like the right to life and the right to liberty, but not enumerated in the Constitution.[20] It is only when it is contrary to the municipal law that international conventions have to be ignored.[21]

Now the question appears whether the same perception is to be applied by our courts about which are principles of customary international law and which are not. In case of written Constitutions like ours, courts being creatures of the Constitution are required to enforce the provisions of the Constitution and of other laws enacted in consistence therewith. The court interprets the Constitution in case of ambiguity or conflicting legal norms. So it may be helpful to resort to judicial decisions in clarifying the position of customary international law under the Constitution. The higher court confronted with the issue of application of international law for the first

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18 Per Bimalendu Bikash Roy Choudhury, J., *Hussain Mohammad Ershad vs. Bangladesh & others* (2001) 21 BLD (AD) 69. See also *Bangladesh vs. Professor Golam Azam & Ors* (1994) 46 DLR (AD) 192 and *Tayazuddin and another vs. The State* (2001) 21 BLD (HCD), 503.

19 Bangladesh Rehabilitation Centre for Trauma Victims (BRCT) and Bangladesh Institute of Human Rights (BIHR). 2006. *Broken Promises: The State of Reparation for Torture Victims in Bangladesh*. Dhaka : BRCT & BIHR.

20 *H.M. Ershad v. Bangladesh* (2001) BLD (AD) 69, 70; *Bangladesh National Women Lawyers Association v. Ministry of Home Affaairs* (2009) 61 DLR 371; *State v. Metropolitan Police Commissioner* (2008) 60 DLR 660; *Apparel Export Promotion Council v. Chopra* (1999) AIR (SC) 625, 634 (in cases involving violation of human rights , the courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field.); *State v. Metropolitan Police Commissioner* (2008) 60 DLR 660 (referring to *People's Union for Civil Liberties v. India* (1997) SCC (Cri) 434 which quoted with approval the statement, "the provisions of an international convention to which Australia is a party especially one which declares universal fundamental rights , may be used by the courts as a legitimate guide in developing the common law" made in *Minister for Immigration and Ethnic Affairs v. Teah* (1995) 69 A.L.J. 423); see also *Anuj Garg v. India* (2008) AIR (SC) 663.

21 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 127.

time in the case of *Bangladesh v. Unimarine S. A. Panama*[22] in which the court declared that customary international law is binding on the state generally to give effect to rules and norms of customary international law. The next important case with relevance to international law was *Bangladesh and Others v. Somboon Asavhan*[23] in which the Appellate Division of the Supreme Court held that it is well settled that where there is municipal law on an international subject the national court's function is to enforce the municipal law within the plain meaning of the statute.[24] Thus it is clear that in case of conflict between statute and customary international law, the court will give effect to the statute. Customary international law cannot, on its own, bring about an alteration of or an addition to, the municipal law, nor can it supersede statute in Bangladesh. The trend of Bangladesh court practice is to follow the municipal law when such law on a given subject exists. This strictness in following the state law imposes a certain amount of responsibility on the law makers not to make laws as would encroach upon the accepted boundaries of the international community. So from the analysis of the above case it is clear that courts adhered strictly to the Constitutional provisions. Article 25 serves for courts as a code of interpretation of principles of international law into law of Bangladesh. Although the Constitution and other laws do not stipulate that customary international law would be part of the law of the land, the courts seem to have categorically declared it to be so. It is arguable that when deciding cases involving question of international law which may not be covered by statute, executive decision, judicial precedent or treaty, the courts have to, because of clear necessity, apply principles of state policy enshrined in the Constitution. [25]

5.1.1.2 Indirect Application of International Law

In case of indirect application of international law that is interpreting the international standards through the Constitution taking the intention of its makers as a whole it is not expressly provided for that standard and here, the function of the court in interpreting any provision of a Constitution obviously is to ascertain the intention of

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22 (1977) 29 DLR 252.

23 (1980) 32 DLR 198.

24 *Bangladesh and Others v. Somboon Asavhan* (1980) 32 DLR 198, 201.

25 Karzon, Sheikh Hafizur Rahman and Faruque, Abdullah-Al. 1999. "Status of International Law under the Constitution of Bangladesh: An Appraisal", Vol. 3 No. 1 *Bangladesh Journal of law*, pp. 23-47, at pp. 30-33.

its makers.[26] This is the polestar of the principles of construction of a Constitution and all other principles are only rules or guides to aid in the determination of that intention. As the language primarily expresses the intention, effort should be made at the first instance to gather it from the words used[27] and upon consideration of the whole of the enactment.[28] A clause cannot be interpreted in isolation and must be construed as part of a unified whole. The legal intendment is that each and every clause has been inserted for some useful purpose, and when rightfully understood has some practical operation; each word it has been said, must be presumed to have been carefully chosen and intentionally placed as though it had been hammered into place. Every word must be given effect to and no word as a general rule should be rendered meaningless or inoperative.[29] The court must lean in favor of a construction which will render every word operative rather than that which makes some words idle or nugatory. When the same expression is used in several places, it has to be construed as meaning the same thing unless the context otherwise requires. In the same way if different words are used, they must be understood as conveying different meanings, unless the context otherwise requires. In ascertaining the intention it is wrong to start with some a *priori* ides of that intention and then to try by interpretation to wage into the words of the Constitution. If the language of the Constitution is not only plain, but admits of only one meaning, the language declares the intention, even if the result is harsh. In such a case the court is not at liberty to search for a meaning beyond the instrument. But when a provision apparently within the competence of the legislature to make appears to be unduly harsh or absurd, the court is put to inquiry whether the framers of the Constitution intended to confer such power on the legislature. This is particularly so when the concept of reasonable law is woven in the fabric of the Constitution as in the case of the American and Bangladesh Constitutions. It will be seen that generally the court defers to the legislative judgment regarding the reasonableness of a law, but when a statute was found to be quite unreasonable and unnecessarily impinging on the accepted values of the society and the international community, Court can declare such law void as not being permitted by the

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26 *Anwar Hossain Chowdhury v. Bangladesh* (1989) BLD (Spl) 1.

27 *Mujibur Rahman v. Bangladesh* (1992) 44 DLR (AD) 111; *Mahboobuddin Ahmed v. Bangladesh* (1998) 50 DLR 417, 423; *Aftabuddin v. Bangladesh* (1996) 48 DLR 1.

28 *Anwar Hossain Chowdhury v. Bangladesh* (1989) BLD (Spl) 1.

29 *Anwar Hossain Chowdhury v. Bangladesh* (1989) BLD (Spl) 1; Begum Shamsunnahar v. Speaker (1965) 17 DLR (SC) 21.

Constitution[30] and existing provisions of law that may lead to torture, as are falling under this category, the courts can also follow the above mentioned principles in this situation.

And where the Constitution grants a power, that construction most beneficial to the widest amplitude of powers must be adopted[31] and all such powers which are necessary to effectuate the power specifically granted must be presumed to have been given. The court in construing a provision conferring a right including prohibition of torture ought not to adopt a construction which would unduly restrict that right; that construction which renders the right fully effective and operative should be given.[32] In respect of fundamental rights and freedoms of individuals, the court will give a generous interpretation avoiding what has been called the 'austerity of tabulated legalism' suitable to give the individuals the full measure of the fundamental liberties. However, it has to be kept in mind that by construction a provision is not extended to meet a case for which provision has clearly and undoubtedly not been made.[33] It is the duty of the court to try to get at the real intention of the legislature by carefully analyzing the whole scope of the statute or section or phrase under consideration and regard must be had to the context, subject-matter and object of the statutory provision in question in determining whether the same is mandatory or directory.[34] Thus in case of direct application or indirect application of international standards prohibiting torture, as a signatory State, our Constitution is in nowhere a bar, moreover, it has got the express provision regarding the prohibition and the existing anti-torture laws as auxiliary to help the court in interpreting that standard clearly and absolutely.

5.1.2 Developing Consistent Jurisprudence for Torture

The legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently

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30 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 43.

31 *Mujibur Rahman v. Bangladesh* (1992) 44 DLR (AD) 111; *British Coal Corp. v. R.* AIR 1935 PC 158.

32 *Rashid Ahmed v. State* (1969) 21 DLR (SC) 297.

33 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 49.

34 *Ibid.*, at p. 56.

universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. And where there was an effectively functioning investigative system and an independent judiciary, it was most unlikely that violations of human rights including torture would be systematic and widespread. An effectively functioning domestic system for providing redress normally appeared to have a preventive effect in this case and was one of the best safeguards against impunity. However, the right to challenge the legality of detention is a fundamental right of international law and an important tool in combating torture and ill treatment. Often the judge confirming the charges will be the first official unrelated to the prison establishment that the detainee sees, and consequently it may be the first opportunity for many to raise allegations of torture. The importance of the role of judicial and prosecuting authorities as regards combating torture and ill treatment cannot be overstated. Detainees have the right to be given an effective opportunity to be heard promptly by a judicial or other authority. This right has been recognized by a number of international bodies as non-derogable.[35] And the first and foremost duty of judges in this case should be to hold high and protect the justice system itself by developing anti-torture regime not only for the confidence of their own role but also for fulfilling the universal obligations to maintaining a just and fair legal system.[36] And the Bangladesh Judiciary among others, are trying to activate the effective prevention of torture through a large number of judgments and over a quarter of a century by developing consistent jurisprudence for torture which will be elaborate in this part of the thesis. This part focuses first how the judiciary is developing consistent jurisprudence in the legal reform to address arbitrary use of arrest and detention, how it is making the innovative approach in redress and how it is addressing the standards of personal liberty and its reasonable restrictions.

5.1.2.1 Legal Reform to Address Arbitrary Use of Arrest and Detention

Arbitrary use of police power of arrest and the resultant custodial violence is rampant in Bangladesh. It's becoming the usual and common incident in this country that

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35 REDRESS. 2003. *Reparation for Torture*. London: REDRESS.

36 Hosein, Mainul. 2013. 'Practice of police remand is unconstitutional and judges can't be party to it', available at:< http://www.thenewnationbd.com/newsdetails.aspx?newsid=62000>, last accessed on 11 June 2013.

police are regularly abusing and exceeding their power in case of arrest and detention violating not only the national laws but also the international standards regarding these. In this situation the judicial organ of Bangladesh i.e. the Judiciary come forefront among others to prevent that abuse and recommending legal reform of certain laws regarding these. This part is divided into three sub-parts providing first one the police power of arrest and custodial violence, second one about the unlawful detention, third one is about the system of remand and extorting confession or information and the last to develop the evidentiary principle of torture.

5.1.2.1.1 Power of Arrest and Custodial Violence

In criminal jurisprudence the wider interpretation of the term 'custodial violence' in case of arbitrary arrest and detention may include all kinds of physical and mental torture inflicted upon, or inhuman or degrading treatment given to, a person in police custody. It also includes death and torture in police lockups. While considering torture in police custody, it was observed that committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. It is also stated that custodial torture is a naked violation of human dignity and degrading which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilization takes a step backward. Eventually, the Court also held that any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of the Constitutional provisions as to right to life and liberty of a person whenever it occurs during investigation, interrogation or otherwise.[37]

However, the first major case to question the abuse of police power of arrest under section 54 of the Cr. P. C. is the *Bangladesh Legal Aid and Services Trust (BLAST) v. Bangladesh and Others.*[38] The judgment is clearly an important judicial pronouncement for restraining police power, though this was pronounced in the backdrop of a conservative trend in judicial pronouncement, frequent enactments of draconian penal laws and a general lack of sympathy for rights of accused in criminal

[37] Assignment Point. 2013. 'Assignment on Human Dignity and Torture in Bangladesh', available at:< http://www.assignmentpoint.com/arts/law/assignment-on-human-dignity-and-torture-in-bangladesh.html>, last accessed on 11 June 2013.

[38] (2003) 55 DLR (HCD) 363.

cases. The judgment offered guidelines for the police to follow and these were intended to reduce the scope and possibility of the misuse and abuse of police power.[39] It was possible precisely because it was taken up and pursued not by a victim or his family but by a nationally prominent legal aid organization.[40] The Government has been directed to amend legislation facilitating torture and follow guidelines in dealing with arrested persons. Although the guidelines and recommendations are not binding on the government, they indicate the potential areas for making necessary legal reform to address arbitrary use of arrest and detention.[41] Amnesty International released a report on this judgment, noting that the judgment restricts the arbitrary use of administrative detention law, including the Special Powers Act 1974, directs the Government to amend relevant laws, within six months and to provide safeguards against their abuse and recommends raising prison terms for wrongful confinement and malicious prosecution.[42]

However, the Judges are conscious that the question raised in this Rule is a very important question touching liberty and fundamental rights of the citizens of the country. The question of abusive exercise of power under the Code of Criminal Procedure were also debated in the past. Evidently, many tragic deaths are resulted due to sweeping and unhindered power given to a police officer under section 54 of the Code. The power given to the police officer under this section in the court's view, to a large extent is inconsistent with the provisions of part III of the Constitution. In view of this position, such inconsistency is liable to be removed and this Court in exercise of the power given under Article 102, is empowered to given proper and necessary direction upon the Government to make proper amendments in the provisions of section 54 of the Code to ensure the fundamental rights as guaranteed

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39 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Remand", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 258-292, at p. 261.

40 *Ibid.*, at p. 259.

41 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

42 Human Rights Initiative. 2007. 'Bangladesh Country Report: Anti-terrorism Laws and Policing', available at: <http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/docs/country_reports/071004_chogm07_bangladesh_anti_terrorism_policing_country_report2007.pdf>, last accessed on 16 January 2013.

under Article 27, 31, 32, 33 and 35 of the Constitution.[43] It was also held that the court has the constitutional responsibility to ensure that the fundamental rights of a citizen are protected whether he is within or outside the jail.[44] The directions given in *BLAST vs Bangladesh* broadly cover three important aspects of criminal proceedings i.e. guidelines on arrest, detention and remand. In case of arrest without warrant the court directed that no police officer shall arrest a person under Section 54 of the Cr. P.C. for the purpose of detaining him under Section 3 of the Special Powers Act, 1974. A Police officer shall disclose his identity and if demanded, shall show his identity card to the person arrested and to the persons present at the time of arrest. He shall record the reasons for the arrest and other particulars in a separate register till a special diary is prescribed. And a police officer shall furnish reasons of arrest to the detained person within three hours of bringing him to the police station. An arrested person should be allowed to consult a lawyer of his choice or meet his relatives. In case of a police officer finds any marks of injury on the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital or Government doctor for treatment and shall obtain a certificate from the attending doctor. [45]

However, if the investigating officer files any application for taking any accused to custody for interrogation, he shall state in detail the grounds for taking the accused in custody and shall produce the case diary for consideration of the Magistrate. If the Magistrate is satisfied that the accused be sent back to police custody for a period not exceeded three days, after recording reasons, he may authorized detention in police custody for that period. If the order under this provision is made by a Metropolitan Magistrate or any other Magistrate he shall forward a copy of the order to the Metropolitan Sessions Judge or the Sessions Judge as the case may be for approval. The Metropolitan Sessions Judge or the Sessions Judge shall pass order within fifteen days from the date of the receipt of the copy. And if the order of the Magistrate is approved the accused, before he is taken custody of the investigating officer, shall be

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43 *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR 363. See also *D.K. Basu v. W.B.* (1997) AIR (SC) 610; *Gautam v. Subhra Chakraborty* (1996) AIR (SC) 922; *Sube Singh v. Haryana* (2006) AIR (SC) 1117.

44 *The State v. Deputy Commissioner, Satkhira, and others* (1992) 14 BLD 266.

45 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

examined by a doctor designated or by a Medical Board constituted for the purpose and the report shall be submitted to the Magistrate concerned.[46] And in case of a person is not arrested from his residence or place of business he shall inform a relation of the person over the phone, or through a messenger, within one hour of bringing him to the police station. In *Saifuzzaman v State,* the High Court Division took notice of the severe violation of the fundamental rights of the citizens by police, and failure of the Magistrate in acting in accordance with the law. The court issued guidelines on Arrest providing that the police officer making the arrest of any person shall prepare a memorandum of arrest immediately after the arrest and such officer shall obtain the signature of the arrestee with the date and time of arrest in the said memorandum and must intimate to a nearest relative of the arrestee and in the absence of the relative, to a friend to be suggested by the arrestee, as soon as practicable but not later than 6(six) hours of such arrest notifying the time and place of arrest and the place of custody. An entry must be made in the diary as to the grounds of arrest and name of the person who informed the police to arrest the person or made the complaint along with his address and shall also disclose the names and particulars of the relative or the friend, as the case may be, to whom information is given about the arrest and the particulars of the police officer in whose custody the arrestee is staying. However, copies of all the documents including the memorandum of arrest, a copy of the information or complaint relating to the commission of cognizable offence and a copy of the entries in the diary should be sent to the Magistrate at the time of production of the arrestee for making the order of the Magistrate under section 167 of the Code. In case of accountability regarding investigation this court directed that when a detained person is produced before the nearest Magistrate under section 61, the police officer shall state in his forwarding letter under section 167 (1) of the Code as to why the investigation could not be completed within twenty four hours and why he considers that the accusation or the information against that person is well-founded. If the Magistrate releases a person on the grounds that the accusation or the information against the person produced before him is not well-founded and there are no materials in the case diary against that person, he shall proceed under section 190(1)(c) of the Code against that police officer who arrested the person without warrant for committing offence under section 220 of the Penal Code. And if the

[46] *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR 363.

investigation of the case cannot be concluded within 15 days of the detention of the accused under section 167(2), the Magistrate having jurisdiction to take cognizance of the case or with the prior permission of the Judge or Tribunal having such power can send such accused person on remand under section 344 of the Code for a term not exceeding 15 days at a time.[47]

In the Police Act of 1861, there is no provision for maintaining any diary for recording the reasons for arrest without warrant and other necessary particulars. So, the court recommended that a new section be added after section 44 of the Police Act that shall provide the officer in charge of a police station shall keep a special diary for recording the reasons and other particulars as required under recommended new sub-section (2) of section 54 of the Code.[48] However, there are numerous reports of cases of extra-judicial killings allegedly committed by law enforcement agencies. Persistent abuse of power and authority by the law enforcing agencies resulting in extra-judicial killing of the citizens, in the name of cross-fire or encounter, constitutes a gross violation of fundamental rights guaranteed by the constitution of the People's Republic of Bangladesh. In the case of *ASK, BLAST and Karmojibi Nari Vs. Bangladesh and others*, the court issued a *Rule Nisi* returnable within four weeks in 2009 calling upon the respondents to show cause as to why the extra-judicial killing, in the name of cross-fire/encounter by the law enforcing agencies, should not be declared to be illegal and without lawful authority and why the respondents should not be directed to take departmental and criminal action against persons responsible for such killing.[49] There are two rulings by the highest court of the country that have put a caveat on extra-judicial killings. These stem from the *suo moto* rule of the High Court of 17th November 2009 asking the government to explain the extrajudicial deaths of two brothers Lutfor and Khairul Khalashi, who died while in the custody of RAB-8 in Madaripur. The Government prayed for time on the date of hearing on 14 December 2009, as 11 illegal deaths had taken place since the issue of the 17th November 2009 order. The High Court put a ban on all such killings till the previous

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47 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

48 *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR 363.

49 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

case was disposed of. However, there has been no progress in the case since the reconstitution of the Bench soon after the order was passed.[50] In case of abuse and custodial torture and killing by the Special Forces like the RAB, the High Court issued Rules to protect the rights of persons taken into custody by the RAB. In one incident, the High Court Division of the Supreme Court of Bangladesh issued a *suo motu* Rule against the RAB on the basis of a report published in the Bangla Daily Janakantha dated 24 July 2006.[51] The High Court Division directed the law enforcing agencies, especially the RAB, to follow the Cr. P.C. provisions and keep within the bounds of the law in the case of the arrest of any citizen [52] and issued a show-cause ruling for the government to explain why it should not be directed to ensure the protection of people it had arrested or detained. The ruling ordered the State Minister for Home Affairs, Inspector General of the Police, Director General of RAB and the Commanders of RAB-1, RAB-2, RAB-3, RAB-4, and RAB-10 to reply within three weeks but they did not.[53] In another instance, on the basis of a public interest writ petition filed by Human Rights and Peace for Bangladesh (HRPB), the High Court Division issued a Rule against the RAB to show cause as to why they should not be directed to ensure the safety and security of persons detained in the RAB's custody.[54]

5.1.2.1.2 Unlawful Detention

However, exceptions to the conventional right to liberty are legalized by preventive detention laws. Given the *prima facie* negation of right to liberty by the preventive detention laws, the courts have, over the years, struggled to limit the exercise of power by the executive preventively detain citizens on the plea of deterring prejudicial acts, i.e. for acts which a person can be detained by the order of the Executive. However, both in cases of detention under preventive detention laws and arrests on suspicion by police under the power given to them in the criminal

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50 Islam, Md. Tajul. 2010. 'Extra-Judicial Killings in Bangladesh: 'Cross-fires' or Violations of Human Rights?', available at:<http://www.nipsa.in/extra-judicial-killings-in-bangladesh-cross-fires-or-violations-of-human-rights/>, last accessed on 07 May 2013.

51 Ain o Salish Kendra. 2007. *Human Rights in Bangladesh 2006*. Dhaka: ASK

52 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

53 Human Rights Watch. 2006. 'Judge, Jury, and Executioner: Torture and Extrajudicial Killings by Bangladesh's Elite Security Force', available at: <http://www.unhcr.org/refworld/docid/45a4db532.html>, last accessed on 16 January 2013.

54 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

procedural law, the denials of liberty are exercised in terms of prevailing laws of the country and, hence, are 'in accordance with law'.[55] But in recent years the Judiciary, especially at the highest level has delivered some judgments to open up the Judiciary, by reinterpreting the old notion of 'person aggrieved'[56] and has taken a rather liberal stance on writs of *habeus corpus*, routinely declaring preventive detention under the Special Powers Act as illegal and recently awarded compensation[57] for illegal detention.[58]

However, when the Constitution was framed there was no provision for preventive detention but within less than one year by a constitutional amendment, provisions for preventive detention were introduced. The Supreme Court held again and again that the High Court Division is obliged to examine not only the legality but also the manner in which the order for detention is passed. It was held in *Sajeda Parvin v. Government of Bangladesh*[59] that a rule issued in *habeas corpus* matter was wrongly discharged as in fructuous on the ground that the order of detention had already expired, because it was not the order but the *factum* of detention is in issue in a *habeas corpus* matter. The High Court has powers wider than the one under section 491 of the Code of Criminal Procedure and can grant ad-interim bail in a pending writ proceeding, as it did in *Bangladesh v. Ahmed Nazir.*[60] And in view of the exceptional circumstances when on two previous occasions the Court's order of release were frustrated by serving a fresh order of detention on the detenu in jail, our High Court Division in *Alam Ara Huq v. Government of Bangladesh*[61] resorted to *habeas corpus ad subjiciendum et recipiendum* (that you have the body for submitting and receiving) and the detenu was directed to be brought before the court after hearing, the court

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55 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Remand", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 258-292, at p. 264.

56 *Mohiuddin Farooque v. Bangladesh* (1997) 49 DLR (AD).

57 *Bilkis Akhter Hossain v. Bangladesh* (1997) 17 BLD (HCD) 395. The government, however, has appealed against this judgment to the Appellate Division and the matter is pending before that Division.

58 Malik, Shahdeen. 2001. "Human Rights and the Role of the Judiciary", in Bangladesh Institute of Law and Informational Affairs (BILIA): *Human Rights in Bangladesh: A Study for Standards and Practices*. Dhaka: BILIA, pp.145-172, at p. 169.

59 (1988) 40 DLR (AD) 178.

60 (1979) 27 DLR (AD) 41.

61 (1990) 42 DLR (HCD) 98.

directed the immediate release of the detenu from the court premises.[62] It has been noticed that to avoid the difficulty, the detaining authority often cancelled the initial detention order and passed another legal order claiming that the subsequent order of detention was an independent detention order and the question turned on whether the subsequent order was at all an independent order or not. In *Abdul Latif Mirza v. Bangladesh* the period of detention ordered by the Deputy Commissioner expired and two days thereafter a fresh order by the Government was served. The detention for the intervening two days was illegal. The government claimed that the subsequent detention order was an independent one. But the court rejected the plea, stating that it cannot be taken a too technical and legalistic view on one of the most cherished fundamental human right, that of liberty of an individual. Therefore it is found that an illegal order of detention cannot be continued by a subsequent order of detention even though the latter is otherwise valid. An illegal detention equally cannot be continued by an alleged independent valid order of detention, if it, in effect, continues an illegal detention. The order of the government is no doubt an independent order, but it purported to continue the earlier detention. There is no correlation between an independent order and the fact of independent detention. The order of detention purporting to continue an illegal detention cannot be sustained.[63]

Again in *Farzana Huq v. Bangladesh*[64] it was held that disregarding by the detaining authority of the Court order as to the rights of detained person are against Article 32 of the Constitution which protects the liberty of the citizens and also of Article 112 that requires the Executive to act in aid of the court's order. As to preventive detention, it was held that preventive detention cannot be extended unless an Advisory Board, before the expiry of six months, opines that there is sufficient cause for detention (*Abdul Aziz v. West Pakistan*, PLD 1958 SC 499, 513). If no such affirmative opinion is given by the Advisory Board, the detenu has to be released[65] on

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62 Rahman, Justice Muhammad Habibur. 1998. "Our Experience with Constituionalism", Vol. 2 No. 2 *Bangladesh Journal of law*, pp. 115-132, at p. 128.

63 *Abdul Latif Mirza v. Bangladesh* (1979) 31 DLR (AD) 1 Para 23 and 24; *Monwara Begum v. Secy. Ministry of Home* (1989) 41 DLR 35.

64 *Writ petition no. 271 of 1990.*

65 *Monwara Begum v. Secy., Ministry of Home, 41 DLR 35*.

the expiry of six months.[66] In a *habeas corpus* proceeding, the court is concerned with the detention and looks at the detention order only to determine the validity of detention as has been very clearly found by the court in *Sajeda Parvin v. Bangladesh*.[67] Unless the detenu is released actually and not merely on paper, a subsequent order of detention howsoever independent in fact, continues the detention which is found illegal. If the minority view is adopted a citizen can be treated otherwise than in accordance with law and the illegal detention can be continued in fact by terming the latter order to be an order independent of the illegal order and the rule of law will be undermined.[68] In *Abdul Latif Mirza v. Government of Bangladesh and other*[69] the court observed that the Special Powers Act gives a wide discretion to the detaining authority to act according to its own opinion, but on the other hand, the Constitution empowers the High Court to satisfy itself that a person is detained in custody under a lawful authority. The Bangladesh Constitution therefore provides for a judicial review of an executive action. It is well settled that a judicial review of an executive action does not imply that the court is to sit on the order as on an appeal. But then, the court is concerned to see that the executive authority has acted in accordance with law and it must satisfy the High Court that it has so acted.[70] If it is not so satisfied, the issue of the writ of *habeas corpus* also becomes obligatory while the issue of any other writ is discretionary.[71] In the case of *Habibullah Khan vs. S.A. Ahmed* the Appellate Division held that it is not only that the government is satisfied that the detention is necessary, but it is also for the court to be satisfied that the detention is necessary in the public interest. In *Krisna Gopal vs. Govt. of Bangladesh*,[72] the Appellate Division held that an order which is going to deprive a

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66 Nazrul, Dr. Asif. 2009. 'The Security and Emergency Related Laws in Bangladesh: Tools for Human Rights Violations', available at :< http://www.southasianrights.org/wp-content/uploads/2009/10/securitylaw_BD.pdf>, last accessed on 12 June 2013.

67 (1988) 40 DLR (AD) 178 (the fact of detention and not the date of the order of detention is the material point. In case of continued detention the aggrieved party has got a running grievance-per M.H. Rahman J).

68 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 761.

69 (1979) 31 DLR (AD) 1.

70 Bhuiyan, Md. Jahid Hossain. 2004. "Preventive Detention and Violation of Human Rights: Bangladesh, India and Pakistan Perspective", Vol. 8 Nos. 1&2 *Bangladesh Journal of law*, pp. 103-132, at p. 121.

71 Howlader, Md. Abdur Rob. 2006. "Writ Jurisdiction of the Supreme Court of Bangladesh", Vol. 10 Nos. 1&2 *Bangladesh Journal of law*, pp. 21-52, at p. 43.

72 (1979) 31 DLR (AD).

man of personal liberty cannot be allowed to be dealt with in a careless manner, and if it is done so, the court will be justified in interfering with such order. The court held the detention order unlawful.[73] Also in *Ferdous Alam Khan v. State*[74] the court held that if the Executive authority passes any order without any material before him or insufficient materials or without application of mind to the materials placed, it may lead to some unhappy consequences and, therefore, the superior courts of our country always favor the view that the subjective satisfaction of the authority can be looked into objectively by the High Court Division.[75] Also in *ASK (Ain o Salish Kendra) vs. Bangladesh and others,*[76] the unlawful detention of the prisoners having served out their terms of conviction, was challenged. The Court issued a rule nisi upon the respondents to show cause as to why the continued detention of the persons in violation of their fundamental rights as guaranteed under Articles 31, 32, 35 (1) and 36 of the Constitution, and in spite of serving out the terms of their respective sentences, should not be declared to be without lawful authority and why an independent commission should not be appointed to conduct an inquiry into the matter.[77] And in *State v. Deputy Commissioner, Satkhira and Others*[78] the High Court Division issued a *suo motu* rule on the basis of a news paper report. The victim who had been tried in violation of the Children Act, 1974 was freed and various directions were sent to the Ministry of Home Affairs with regard to the similarity situated victims of prison mismanagement.[79]

However, the court in exercise of the power of judicial review, will apply the test of reasonableness and inquire whether on the materials produced a reasonable man could

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73 Sufian, Md. Ashraful Arafat. 2008. "Preventive Detention in Bangladesh: A General Discussion", Volume: 1, Issue: 2 *Bangladesh Research Publications Journal*, pp. 166 -176, at pp. 170-172.

74 (1992) 44 DLR 603.

75 Bhuiyan, Md. Jahid Hossain. 2004. "Preventive Detention and Violation of Human Rights: Bangladesh, India and Pakistan Perspective", Vol. 8 Nos. 1&2 *Bangladesh Journal of law*, pp. 103-132, at p. 121.

76 (2004) 56 DLR (HCD) 620.

77 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

78 (1993) 45 DLR 643.

79 Rahman, Justice Muhammad Habibur. 1998. "Our Experience with Constituionalism", Vol. 2 No. 2 *Bangladesh Journal of law*, pp. 115-132, at p. 129.

have been satisfied or formed the opinion that it was necessary to detain a person.[80] If the answer is in the negative, the court will find the action unlawful. Now the question is what is meant by the expressions 'without lawful authority', and 'in an unlawful manner' in case of detention and its unlawfulness. According to Hamoodur Rahman J, it is agreed that within lawful authority will be comprised all questions of *vires* of the statute itself and of the person or persons acting under the statute, i.e. there must be a competent law authorizing the detention and the officer issuing such an order must have been lawfully vested with power, while in determining as to how and in what circumstances a detention would be a detention in an unlawful manner one would inevitably have first to see whether the action is in accordance with law[81]. The same view has been expressed by the Appellate Division in *Abdul Latif Mirza v. Bangladesh*[82] that what has been stated by Hamoodur Rahman J is correct with reference to the Pakistan Constitution which did not make any provision for judicial review of law and the Pakistan Supreme Court took the view that the power is inherent in the Constitution, it being a written one.[83] But art. 102, makes a specific provision for judicial review of legislation so that the question of *vires* of a statute need not always be covered in an inquiry as to 'lawful authority' which will cover the question whether the authority is competent under a statute to detain a person and the authority having such competence all other questions relating to the exercise of power will be covered in an inquiry as to 'unlawful manner'. In stating what will be an unlawful action, Hamoodur Rahman J. stated that law here is not confined to statute law alone but is used in generic sense as connoting all that is treated as law in this country including even the judicial principles laid down from time to time by the Superior Courts. It means according to the accepted forms of legal process and postulates a strict performance of all the functions and duties laid down by law. It may well be, as has been suggested in some quarters, that in this sense it is as comprehensive as the American due process clause in a new grab. It is in this sense that an action which is mala fide or colorable is not regarded as action in accordance with law. Similarly, action taken upon no ground at all or without proper application

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80 *Abdul Latif Mirza v. Bangladesh* (1979) 31 DLR (AD) 1; *Abdul Baqui Balooch v. Pakistan* (1968) 20 DLR (SC) 249.

81 *West Pakistan v. Begum Shorish Kashmiri* (1969) 21 DLR (SC) 1, Paras 20- 21.

82 (1979) 31 DLR (AD) 1, Para 6.

83 *Fazlul Quader Chowdhury v. Abdul Haq* (1966) 18 DLR (SC) 69, Para 8.

of mind of the detaining authority would also not qualify as action in accordance with law and would, therefore, have to be struck down as being taken in an unlawful manner.[84]The view of Hamoodur Rahman J has been fully endorsed by our Supreme Court.

However, when a detention is challenged the question is whether the detention is authorized by any law. According to the Indian Supreme Court, the court is to have regard to the legality of the detention at the time of return and not with reference to the date of the filing of the application and hence if a fresh and valid order is passed by the time of return of the *rule nisi* the court cannot release the detenu whatever might have been the defect if the order pursuant to which he was initially detained.[85] And the first inquiry should be whether on the face of it the detention order is valid and the detention order has been served on the detenu. If the detention order has not been served, the detention will be illegal.[86] The detention order will be invalid if it does not refer to the law under which it has been made or if the law referred to does not authorize the detention or if there is no statement in the order about compliance of certain matters which the law requires to be stated in the detention order.[87] The second inquiry is whether the authority which made the detention order is authorized under the relevant law to make the order. In rare cases it will be found that the detention order has been made by a person not competent to pass it. When the detenu alleges that his detention was not ordered by the appropriate person, the government is required to disclose the necessary facts to satisfy the court that the order was passed by the proper person in accordance with the Rules of Business.[88] The detention will also be invalid if the matter has not been referred to the Advisory Board or the Advisory Board has not approved the detention within the time stipulated in the law and at any rate within six months as prescribed by art. 33 of the Constitution.[89] The

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84 *West Pakistan v. Begum Shorish Kashmiri* (1969) 21 DLR (SC) 1, Para 21.

85 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at pp. 757-759.

86 *M.A. Hashem v. Bangladesh* (1996) 1 BLC 5; see also *Mohammad Ali v. Bangladesh* (1995) 47 DLR 350 (a writ of *habeas corpus* will not be maintainable where the detention order has been passed but the person concerned has not been detained).

87 *Anwar v. Bangladesh* (1976) 28 DLR 428 (the court found the detention order unlawful as the detention order did not indicate the nature of the prejudicial activity).

88 *Bangladesh v. Dr. Dhiman Chowdhury* (1995) 47 DLR(AD) 52.

89 *Mansur Ali v. Secy. Ministry of Home* (1990) 42 DLR 272.

next inquiry is whether the detaining authority acted within the limits and fulfilling the conditions of law. A preventive detention law authorizes public functionaries to order detention of a person on being satisfied or on having formed an opinion that the detention is necessary to prevent the person from doing certain acts specified in the law. This satisfaction or opinion must be based on materials. If it is found that the detaining authority has acted mechanically without applying his mind to the question, the detention will be found invalid.[90] When the detention order did not mention that the detention of the detenu was necessary to prevent him from doing any prejudicial act, the detention was held to be without any legal authority.[91] The facts and materials must co-exist with the order of detention and the satisfaction or the opinion of the detaining authority must be based on such facts and materials.[92] Thus absence of nexus between some of the reasons shown in the detention order and the facts and reasons disclosed in the grounds supplied may lead to the conclusion of non-application of mind by the detaining authority.[93] Where the grounds of detention merely repeat the language of the law and nothing else, it betrays non-application of mind by the detaining authority.[94] In the same way if the detention order mentions particular provisions of the detention law and the grounds relate to some other provisions of that law, the detention is held to be illegal.[95]

However, in case of communication of grounds of detention art. 33(5) requires that the grounds of detention must, as soon as may be, be communicated to the detenu and the detaining authority must afford him the earliest opportunity of making a representation against the order of detention.[96] The detaining authority has to inform the detenu that he has a right of opportunity to make representation and failure to inform may render the continued detention illegal.[97] The court will also hold a

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90 *Rama Rani v. Bangladesh* (1988) 40 DLR 364.

91 *Tahera Islam v. Secretary, Home* (1988) 40 DLR 193.

92 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 766.

93 *Kabir Ahmed v. Minisrty of Home* (19880 40 DLR 353.

94 *Amaresh handra v. Bangladesh* (1979) 31 DLR (AD) 240.

95 *Ranabir Das v. Ministry of Home* (1976) 28 DLR 48; *Tahera Islam v. Secretary, Home* (1988) 40 DLR 193.

96 *Ghulam Azam v. Bangladesh* (1994) 46 DLR 49.

97 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 282.

detention unlawful if the court on materials produced before it comes to a finding that the detention order is vitiated by malice in law or malice in fact. If the court finds that the detention order has been passed for purposes not authorized by law[98] or for mixed purposes, some authorized and others not authorized, the detention will be held unlawful.[99] Where the detention order mentioned five different kind of prejudicial acts and the grounds supplied did not cover one of such prejudicial acts, the detention was held to be unlawful.[100] If the law prescribes that the grounds are to be supplied within a certain period, supply of the grounds within the specified time is mandatory and failure to supply the grounds within the specified period renders the detention unlawful.[101] If, the detention law does not prescribed any time for serving the grounds, the requirement of art. 33 (4) will be fulfilled if the grounds are supplied within a reasonable time and what time will be reasonable will depend on the facts and circumstances of each case, but as the facts and materials must co-exist with the order of detention and as one detention law prescribes 15 days' time, the court may not be inclined to hold more than 15 days' time to be reasonable under any circumstance.[102] It may be argued that even 15 days is too long having regard to the fact that the grounds must co-exist.[103] The requirement of supply of grounds mandated by the Constitution is not a mere formality and is intended as a *post facto* compliance of the principles of natural justice so that the detenu may have an opportunity of controverting the grounds of detention and disabuse the authority about any misapprehension about any fact. In that view of the matter, the reasons stated in the initial detention order cannot be a substitute of the grounds required to be

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98 *Sajeda Parvin v. Bangladesh* (1988) 40 DLR (AD) 178 (where detention was ordered to prevent the detenu from indulging in prejudicial activities, but the Home Minister stated in Parliament that he has been detained to prevent him from escaping from the clutches of law, the court held that the detention order was passed for collateral purposes and was illegal).

99 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 771.

100 *Rama Rani v. Bangladesh* (1988) 40 DLR 364.

101 *Abdul Latif Mirza v. Bangladesh* (1979) 31 DLR (AD) 1, 14; *Farida Rahman v. Bangladesh* (1981) 33 DLR 130; *Shyam Sunder Rajgharia v. M. A. Salam* (1988) BLD 127; *Khair Ahmed v. Ministry of Home* (1988) 40 DLR 353; *Sayedur Rahman v. Secretary, Home Affairs* (1986) BLD 272.

102 See the observation of the court in *Dr. Habibullah v. Secretary, Ministry of Home Affairs* (1989) 41 DLR 160.

103 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 767.

communicated[104] and the grounds must not be vague or indefinite and must be of such specificity as would enable the detenu to make a meaningful representation to the detaining authority.[105] Thus if the grounds supplied are vague or indefinite and the court is of the opinion that it was not possible for the detenu to make a proper representation, the detention will be unlawful.[106] The grounds having been supplied, the enquiry of the court will be whether the grounds are relatable to the provisions of the detention law and whether the grounds are vague and indefinite. The court will inquire whether the satisfaction of the detaining authority was based on materials and for that matter shall examine the grounds of detention. If necessary, the court may require the detaining authority to produce the materials in support of the grounds before the court.[107] The court shall examine whether the materials are such that a reasonable man could have come to the conclusion reached by the detaining authority.[108] Though the court will not go into the question of adequacy or sufficiency of the materials, the court will interfere if it finds that the order of detention has been passed upon consideration of the grounds which are irrelevant for the purpose of the law or has left out of consideration of relevant materials.[109] If the detaining authority has acted on several grounds some of which are irrelevant, vague or non-existent, the court will hold the detention to be unlawful as it is not possible for the court to determine how far the detaining authority has been influenced by the irrelevant, vague or non-existent grounds and whether the authority would have passed the detention order had it not taken the irrelevant, vague or non-existent grounds into

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104 *Chunnu Chowdhury v. D.M.* (1989) 41 DLR 156.

105 *Abdul Latif Mirza v. Bangladesh* (1979) 31 DLR (AD) 1; *Ahmed Nazir v. Bangladesh* (1975) 27 DLR 199; *Mansur Ali v. Secy. Ministry of Home* (1990) 42 DLR 273; *Habiba Mahmud v. Bangladesh* (1993) 45 DLR (AD) 89; *Maksuda Begum v. Secy. Ministry of Home* (2000) 52 DLR 174.

106 *Ranabir Das v. Ministry of Home* (1976) 28 DLR 48; *Rama Rani v. Bangladesh* (1988) 40 DLR 364; *Shyam Sunder Rajgharia v. M. A. Salam* (1988) BLD 127; *Khair Ahmed v. Ministry of Home* (1988) 40 DLR 353; *Secondary Ali v. Bangladesh* (1990) 42 DLR 346; *Azizul Haq v. Bangladesh* (1990) 42 DLR 189; *Mansur Ali v. Secy. Ministry of Home* (1990) 42 DLR 273; *Farzana Haq v. Bangladesh* (1991) BLD 533; *Abu Spayed v. Bangladesh* (2007) 12 BLC 773; *Mohammad Spayed v. Bangladesh* (2008) 16 BLT 27.

107 *Abdul Latif Mirza v. Bangladesh* (1979) 31 DLR (AD) 1; *Ahmed Nazir v. Bangladesh* (1975) 27 DLR 199; *Faisal Mahtab v. Bangladesh* (1992) 44 DLR 168.

108 *Abdul Latif Mirza v. Bangladesh* (1979) 31 DLR (AD) 1; *Aruna Sen v. Bangladesh* (1975) 27 DLR 122; *Khair Ahmed v. Ministry of Home* (1988) 40 DLR 353; *Habiba Mahmud v. Bangladesh* (1993) 45 DLR (AD) 89; *Farzana Haq v. Bangladesh* (1991) 1 BLD 533.

109 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 769.

consideration.[110] Sometimes the executive has gone even to the extent of devising ways to avoid compliance of the order of release passed by the Supreme Court compelling the Supreme Court to initiate proceedings for contempt of court.[111] In one case the court had to resort to the now forgotten procedure of having the detenu physically present in court and releasing the detenu from the court premises.[112] The Appellate Division refused to apply the doctrine of necessity when detention of H M Ershad was sought to be justified by applying the doctrine.[113]

5.1.2.1.3 System of Remand and Extorting Confession or Information

Considering the fact that torture is a routine matter in police remand of accused, the judiciary has ruled against frequently ordering remand by police, to prevent its abuse. In a recent case of Ain-*o*-*Salish Kendra v. Bangladesh*[114] the Court held that the accused had already been remanded in custody twice, by the police, yet there is nothing before the Court to show the outcome of such remand. The Court directed respondents not to go for further remand of the accused and in the case of the ongoing remand; he should not be subjected to physical torture of any kind.[115] As for remand the Court's opinion is that the very system of taking an accused on remand for the purpose of interrogation and extortion of information by application of force on such person is totally against the spirit and explicit provisions of the constitution. And in a case when an accused was remanded twice without any material to come out, the High Court Division directed not to go for further remand and not to subject the accused to torture during the ongoing remand.[116] The position of an arrested person produced on the spot must be far worse and would make a mockery of the constitutional protection[117] since article 33(1) and (2) guarantee four rights to a person

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110 *Abdul Latif Mirza v. Bangladesh* (1979) 31 DLR (AD) 1; *Krisna Gopal v. Bangladesh* (1979) 31 DLR (AD) 145; *Aruna Sen v. Bangladesh* (1975) 27 DLR 122; *Humayun Kabir v. State* (1976) 28 DLR 259; *Hasina Karim v. Bangladesh* (1992) 44 DLR 366; *Jahanara Begum v. State* (1994) 46 DLR 107; *Mahboob Anam v. East Pakistan* (1959) PLD Dac 774.

111 *Tahera Nargis v. Shamsur Rahman* (1989) 41 DLR 508.

112 *Alam Ara Haq v. Bangladesh* (1990) 42 DLR 98.

113 *Bangladesh v. Mostafizur Rahman* (2007) 12 BLC (AD) 193.

114 (2004) 56 DLR (HCD) 620.

115 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

116 *BLAST v. Bangladesh* (2003) 55 DLR 363, 371.

117 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 279.

arrested and any law or action not in conformity with those rights will be void making the arrest unlawful.[118] However, police hardly produce the records of relevant information about the commission of crime, information about investigation to the magistrates when asking for remand. But magistrates without being satisfied of these legal requirements routinely grant remand. Such practice is illegal. The judgment very forcefully held that it is not understood how a police officer or a magistrate allowing remand can act in violation of the Constitution and provisions of other laws including this Code and can legalize the practice of remand. Such interrogation may be made while the accused is in jail custody if interrogation is necessary. The use of force to extort information can never be justified. Use of force is not totally prohibited by the Constitution. So it is found that even if the accused is not taken in police custody for the purpose of interrogation for extortion of information from him, neither any law of the country nor the Constitution gives any authority to the police to torture or to subject him to cruel, inhuman and degrading treatment. It must be recognized that police may need to further interrogate an arrested person. It seems that the Hon'ble Justices delivering this landmark judgment were aware that it may not be practically possible to monitor whether the police is continuing with their illegal practice of torture in police thana hazat or not when the arrested person is brought back there on remand. To eliminate the possibility of torture the Court directed that such interrogation can take place only in the jail. By implication it seems that the judgment has totally prohibited remand of the accused to the thana hazat. This is a most remarkable aspect of this extraordinarily forward looking judgment. Development, advancement and civilization are all about expanding and safeguarding rights of citizens and this principle of the centrality of rights has been most explicitly enunciated in this judgment. [119] And if the Magistrate is satisfied on consideration of the reasons stated in the forwarding letter as to whether the accusation or the information is well-founded and that there are materials in the case diary for detaining the person in custody, the Magistrate shall pass an order for further detention in jail. Otherwise, he shall release the person forthwith. If the Magistrate passes an order for further detention in jail, the investigating officer shall interrogate the accused, if

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[118] *Ibid.*, at p. 276.

[119] Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Remand", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 258-292, at p. 277.

necessary for the purpose of investigation, in a room in the jail[120] till the room specially made for the purpose with glass wall and grill in one side, within the view but not within hearing of a close relation or lawyer of the accused as recommended in that case is constructed.[121]

In *Saifuzzaman v State,*[122] the High Court Division took notice of the severe violation of the fundamental rights of the citizens by police, and failure of the Magistrate in acting in accordance with the law. SK Sinha J. observed that there are complaints about violation of human rights because of indiscriminate arrest of innocent persons by law enforcing agencies in exercise of power under section 54 of the Code and put them in preventive detention on their prayer by the authority and sometimes they are remanded to custody of the police under order of the Magistrate under section 167 of the Code and they are subjected to third degree methods with a view to extract confession. The Division Bench in this case issued eleven guidelines to the police and magistrates as to arrest, detention and remand of suspects providing that the Magistrate shall not make an order of detention of a person in judicial custody if the police forwarding the report disclose that the arrest has been made for the purpose of putting the arrestee in preventive detention, it shall be the duty of the Magistrate, before whom the accused person is produced, to satisfy that these requirements have been complied with before making any order relating to such accused under section 167 of the Code. The Court ordered that these guidelines should be forwarded to the Secretary, Ministry of Home Affairs, Chief Metropolitan Magistrates and District Magistrates and ordered that every police station should comply within 3 months from that date. The Registrar, Supreme Court of Bangladesh, was directed to circulate the requirements as per direction made above. The Court also directed that if the concerned police officers and the Magistrates fail to comply with the above requirements, within the prescribed time, they will be rendered liable to be punished for contempt of Court, if any application is made by the aggrieved person in the

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120 *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR 363.

121 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

122 56 DLR (HCD) (2004) 324.

Court.[123] If a person dies in custody either in Jail or in police custody the relations are reluctant to lodge any FIR or formal complaint due to apprehension of further harassment. The existing provisions of section 176 of the Code appear to the Court not sufficient enough to take appropriate and effective action about such custodial death. Under the existing provisions of this section, the Magistrate is not bound to hold inquiry. So, it is recommended that the duty of the Magistrate shall be made mandatory.[124]

And the police officer of the police station who arrests a person under Section 54 or the investigating officer, who takes a person in police custody or the jailor of the jail as the case may be, shall at once inform the nearest Magistrate of the death of any person who dies in custody. A Magistrate shall inquire into the death of a person in police custody or in jail immediately after receiving information of such death.[125] The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case. Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death the Magistrate may, cause the body to be disinterred and examined, investigate, draw up a report of the cause of the death describing marks of injuries found on the body stating in what manner or by what weapon the injuries appear to have been inflicted. The Magistrate shall then send the body for post mortem examination. The report of such examination shall be forwarded to the same Magistrate immediately after such examination. If the Magistrate finds from the report of the doctor or Medical Board that the accused sustained injury during the period under police custody, he shall proceed under section 190(1)(c) of the Code against the investigating officer for committing offence under section 330 of the Penal Code without filing of any petition of complaint by the accused. However, under the existing provisions of section 202 of the Code, there is no scope on the part of the Magistrate to proceed *suo moto;* he can act only when

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123 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

124 *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR 363.

125 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

there is a petition of complaint. If it is evident from the post mortem report that the death is culpable homicide amounting to murder, the Magistrate shall be empowered by the law itself by adding an enabling provision to section 202 to proceed with the case by holding inquiry himself or by any other competent Magistrate. So, it is recommended that any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance, or which has been transferred to him under section 192, may, if he thinks fit, for reasons to be recorded in writing postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit for the purpose of ascertaining the truth or falsehood of the complaint. Provided that save where the complaint has been made by a Court no such direction shall be made unless the provisions of section 200 have been complied with. Provided further that where it appears to the Magistrate that the offence complained of is tribal exclusively by a Court of Session, a new sub-section (3) be added with the following provisions like the Magistrate on receipt of the post mortem report under section 176(2) of the Code shall hold inquiry into the case and if necessary may take evidence of witnesses on oath. After completion of the inquiry the Magistrate shall transmit the record of the case along with the report drawn up under section 176(2), the post mortem report, his inquiry report and a list of the witnesses to the Sessions Judge or Metropolitan Sessions Judge, as the case may be and shall also send the accused to such judge. In case of death in police custody, after a person taken in such custody on the prayer of the investigating officer, the Magistrate may proceed against the investigating officer, without holding any inquiry as provided above and may send the investigating officer to the Sessions Judge of the Metropolitan area. The Magistrate may postpone the issue of process for compelling the attendance of the person complained against and may make or cause to be made an inquiry or investigation as mentioned in this sub-section for the purpose of ascertaining the truth or falsehood of the complaint. If any inquiry or investigation under this section is made by a person not being a Magistrate or a police officer, such person shall exercise all the powers conferred by this Code on an officer in charge of a police-station except that he shall not have power to arrest without warrant. Any Magistrate inquiring into a case under this section may if he thinks fit, take evidence of witness on oath. Provided that if it appears to the

Magistrate that the offence complained of is triable exclusively by the Court of Sessions, he shall call upon the complainant to produce all his witnesses and examine them on oath. Where the police submit the final report the Magistrate shall be Sessions along with his own report and post mortem report competent to accept such report and discharge the accused.[126]

The *BLAST* judgment however, re-iterated that the accused should be allowed to enjoy these rights before he is produced to the Magistrate because this will help him to defend himself, he will be aware of the grounds of his arrest and also to get the help of his lawyer by consulting him. If these two rights are denied, this will amount to confining him in custody beyond the authority of the Constitution.[127] Hence the judgment recommended that in cases of death in police or jail custody, where post mortem indicates foul play, a magistrate should be empowered to initiate legal proceedings against the suspect police without waiting for a complaint from the relatives of the murdered person.[128] The Court further directed that in order to prevent torture, or cruel or inhuman punishment or treatment, a police officer shall not arrest any person under section 54 of the Code for the purpose of detaining him under Special Powers Act, 1974, and the magistrates shall not make any such order of detention.[129] In the case of *State vs Abul Hashem*[130] the Court held that when the accused was kept in police custody for two days, it was the duty of the Magistrate, who recorded their confession, to put questions as to how they were treated in the police station, why they were making confessions and that if they made a confession or not, whether they would be remanded in police custody. Further, it is found in the record that the Magistrate did not inform the accused persons that he was not a police officer but a Magistrate. The Court held that on scrutiny, it is found, in the record that magistrate sent the accused persons to the police custody after recording their confessional statements. Therefore, the Magistrate had no idea that it was his legal

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126 *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR 363.

127 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Remand", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 258-292, at p. 275.

128 *BLAST v. Bangladesh* (2003) 55 DLR (HCD) 363, 373.

129 Nazrul, Dr. Asif. 2009. 'The Security and Emergency Related Laws in Bangladesh: Tools for Human Rights Violations', available at :< http://www.southasianrights.org/wp-content/uploads/2009/10/securitylaw_BD.pdf>, last accessed on 12 June 2013.

130 (1998) *5*0 DLR (HCD) 17.

duty to remove the inducement and influence of the police completely from the mind of the accused before recording their confession. So therefore, it was held that the confessions made by the accused cannot be considered either against the maker or against their co-accused.[131] Also where a magistrate records a confession, without following the precautions mentioned in section 164, the confession is not a proper one. No evidence can be given regarding such a confession and it cannot be taken into consideration even though it was made the accused independently of the police investigation. The act of recording a confession under section 164, is a very solemn act, and in discharging his duties under the said section, the magistrate must take care to see that the requirements of sub-section (3) of section 164 are fully satisfied.[132] In the matter of *State v. Lalu Miah and Another*[133] when the magistrate neglected to take into account that the accused had been in police custody for six days the honorable Court held that from the evidence of the magistrate, none of these requirements under section 164 are found to have been fulfilled as he simply recorded the statement of the accused ignoring the broad fact that the accused was in police custody for six days, besides the complaint by him of torture. A confession of this nature can hardly be accepted as a voluntary one.[134] In the case of *Hafizuddin vs. the State*[135] the Magistrate did not issue warnings before recording confessions and did not give time for reflection. In this case, the Magistrate was held liable for failing to inform the accused that they would not be sent to police custody after making confessional statements.[136]

However, police custody before and after the confession, is not acceptable.[137] Confessions obtained after illegal detention by the police must be regarded with grave suspicion. Confessions in the subcontinent are obtained generally by undue influence, especially by the police. A confession extracted by persistent questioning by the

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131 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

132 Sikder, M. Ansaruddin. 1991. *Law of Evidence*. 1st edn. Narail: M. Tanveer Foysal, at p. 465.

133 (1987) 39 DLR (AD) 117.

134 *State v. Lalu Miah and Another* (1987) 39 DLR (AD) 117, 134,150.

135 (1990) 42 DLR (HCD) 397.

136 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

137 Chowdhury, Obaidul Huq .1999. *Evidence Act*. 3rd edn. Dhaka: Dhaka Law Reports, at p. 67.

police, cannot be admitted as a voluntary confession, and even if it is admissible under section 27, it is of little evidential value. Also when the atmosphere of the court is not free from police influence and the accused had reason to believe that he was produced in the presence of a police officer and not a magistrate, the confession cannot be said to be voluntary.[138] In *Mizazul Islam v. State*[139] it was observed that oral evidence of P.W. 4 contradictory to the confessional statement; this discrepancy arising out of the confessional statement and the main prosecution evidence not noticed by the High Court Division after having found that the confession was voluntary it appears to have been assumed by the learned judges that the confession was true. There is another infirmity in the conclusion of the High Court Division that even if the confession is held to be voluntary[140] it must also have to be established that the confession is true and to resolve it would be necessary to examine the confession and compare it with the rest of the prosecution evidence and the probabilities of the case. This was not done by the High Court Division and since confession runs counter to the main prosecution case there is no hesitation to say that this aspect of the case raises doubt as to the truth of the prosecution case and the benefit of such doubt can never go to the prosecution.[141] And a confession cannot be used against an accused person, unless the Court is satisfied that it was voluntary and while the Court is considering this question, the question whether it is true or false does not arise. It is abhorrent to notions of justice and fair play and is also dangerous to allow a man to be convicted on the strength of a confession unless it is made voluntarily and he realizes that anything he says may be used against him.[142] Before a confessional statement made under section 164 Cr.P.C. can be acted upon it must be shown to be voluntary and free from police influence and when in a capital case the prosecution demands a conviction of the accused primarily on the basis of his confession, the Court must apply a double test that whether the confession was perfectly voluntary and if so, whether it is true and trustworthy. Satisfaction of the first test is a *sin qua non* for its admissibility in evidence. If the first test is satisfied, the Court must before acting upon the confession reach the finding that what is stated therein is true and

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138 Sikder, M. Ansaruddin. 1991. *Law of Evidence*. 1st edn. Narail: M. Tanveer Foysal, at pp. 460-461.

139 (1989) 41 DLR (AD) 157,163.

140 39 DLR (AD) 117; PLD (1964) (WP) (DB) Pesh 1.

141 Sikder, M. Ansaruddin. 1991. *Law of Evidence*. 1st edn. Narail: M. Tanveer Foysal, at p. 417.

142 9 DLR (DB) 511; PLD 1958 Dhaka 75; AIR (1956) (SC) 217.

realiable.[143] In the case of *Nazrul Islam v. The State*[144], it was held that when an accused is under threat of being sent back to police remand he is likely to make a confession out of fear. His statement in such position should not be considered as voluntary.[145] Again in case of *State v. Mizanul Islam @ Dablu and others*[146] , the condemned prisoner was kept under the charge of a police personnel when he was given time for reflection by the magistrate. It was held by the learned judge that gross illegality was committed by the magistrate while recording confessional statements, which stands vitiated by illegality.[147] And in the matter of *Md. Azad Shaikh @Azad v. the State*[148] it was held by the learned judge that in order to be admissible an admission must be voluntary. If it proceeds from remorse and a desire to make reparation for the crime it is admissible. If it follows from hope or fear excited by persons in authority it is inadmissible.[149] However, an involuntary confession is one which is not the result of the free will of the maker of it, so where a confession is made as a result of the harassment and continuous interrogation for several hours after the person is treated as an offender and an accused, such statement must be regarded as involuntary unless the delay is explained satisfactorily. Where the accused complained about the police torture at committal stage and repeated the statement before Sessions' Court, it was held that the confession could not be said to be voluntary on the circumstances. If a confession is rejected as being non-voluntary the Court has to keep the confession entirely out of consideration and see whether the other evidence is sufficient by itself for conviction and if it is not, the accused must be acquitted. The question whether it is true or whether it is corroborated by other evidence, or whether the confession of a co-accused lends it assurance, does not at all arise.[150] If the case against the accused entirely rests on the confession made by the accused and there is a conflict as to the manner in which the confession is obtained, the accused is justified in asking the court to give him the benefit of doubt.[151] The

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143 Sikder, M. Ansaruddin. 1991. *Law of Evidence*. 1st edn. Narail: M. Tanveer Foysal, at p. 414.

144 (1993) 45 DLR (HCD) 142.

145 *Nazrul Islam v. The State* (1993) 45 DLR (HCD) 142, 145.

146 (1988) 8 BLD (HCD) (DB) 317.

147 *State v. Mizanul Islam @ Dablu and others* (1988) 8 BLD(HCD)(DB) 317, 328.

148 (1989) 41 DLR (HCD) (DB) 62.

149 *Md. Azad Shaikh @Azad v. the State* (1989) 41 DLR (HCD) (DB) 62, 65.

150 Sikder, M. Ansaruddin. 1991. *Law of Evidence*. 1st edn. Narail: M. Tanveer Foysal, at p. 416.

151 AIR (1930) Lah 88.

recording magistrate did not make any genuine effort to find out the real character of the confession. Omissions in the paragraphs cast serious doubt upon the voluntary character of the confessional statement.[152] While examining the accused under section 342 Cr.P.C., the trial Court has not drawn the attention of the accused to the confessional statement made by him. In such circumstance the confessional statement cannot be used against the accused.[153] The High Court Division held that the trial Court acted wrongly in treating the confessional statement as substantive evidence against the accused appellant. Since the confessional statement is not required to be taken on oath, it cannot be considered as substantive evidence. It is found that the learned Assistant Sessions Judge erred in law in admitting the confessional statement of a co- accused as substantive evidence against the accused appellant.[154] The fact that the confession must be corroborated with material evidence, witness statements, etc. seems to be immaterial or overlooked. If the accused has confessed to the crime, what more needs to be done, he has made the task of the prosecutor and the Court much easier. However, as the learned Judge has commented in the matter of *Abu Syed v. the State,* one cannot base a conviction solely on a confession, especially in a criminal offence.[155]

However, the Penal Code, 1860 provides for punishment for extorting confession or information from any person and for confinement to extort such information. But these sections of the Penal Code do not provide for any specific crime of extortion for confession in police custody. The judgment therefore recommends that the relevant sections be modified to include a new crime of hurt in police or jail custody for extorting confession and such a crime be punished with imprisonment of up to ten years with a minimum sentence of seven years of imprisonment as well as compensation.[156] The relevant section for causing hurt for the purpose of extorting confession or information from any person is provided in section 330 and for confinement to extort such confession or information is provided in section 348. But

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152 Sikder, M. Ansaruddin. 1991. *Law of Evidence*. 1st edn. Narail: M. Tanveer Foysal, at p. 417.

153 *Ibid.*, at p. 432.

154 *Mojibor v. the State* (2000) 20 BLD (HCD) 273, 275.

155 Khan, Saira Rahman. 2007. "The Use and Abuse of the Laws of Confession in Bangladesh", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 79-106, at p. 99.

156 *BLAST v. Bangladesh* (2003) 55 DLR (HCD) 363, 373.

in neither of these sections, there is mention of causing such hurt to a person while he is in police custody or in jail. Punishment appears to be not adequate. So, the Court recommended that suitable provisions be added to those two sections by adding provision to those sections or by adding new sections by giving section Nos. 330 A and 348 A. Moreover, the Court is of the view that causing death in police custody or in jail is more heinous than death caused by a private person. So, a separate penal section may be added after section 302 of the Penal Code. Also one provision be added in section 330 providing enhanced punishment up to ten years imprisonment with minimum punishment of sentence of seven years if hurt is caused while in police custody or in jail including payment of compensation to the victim. Second proviso for causing grievous hurt while in such custody, providing minimum punishment of sentence of ten years imprisonment including payment of compensation to the victim. A new section may be added as section 302A providing punishment for causing death in police custody or in jail including payment of compensation to the nearest relation of the victim. Also a new section may be added after section 348 providing for punishment for unlawful confinement by police officer for extorting information etc. as provided in section 348 with minimum punishment imprisonment for three years and with imprisonment which may extend to seven years.[157]

5.1.2.1.4 Evidentiary Principles of Torture

Since the Evidence Act, 1872 fully recognizes the danger that if a statement made to the police officer was given the legal status of a confession, this may led the police to use all sorts of force or other methods to extract confessions which may also led the accused to falsely implicate himself.[158] Evidence of torture however, is often difficult to locate, given that torture is often perpetrated without witnesses, and torture methods are designed to avoid visible scars. International principles and treaty texts have, to a certain degree, reflected the difficulties in substantiate allegations of torture and ill treatment in custody. In respect of the burden of proof, the Special Rapporteur on torture has recommended that when allegations of torture and ill treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution

[157] *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR 363.

[158] Khan, Saira Rahman. 2007. "The Use and Abuse of the Laws of Confession in Bangladesh", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 79-106, at p. 85.

to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill treatment.[159] And in most cases, acts of torture by police are carried out as far as possible without any evidence; it is very difficult to hold the offending police officer accountable due to lack of witnesses. The High Court Division in *BLAST v. Bangladesh* case observed that if death takes place in police custody or jail, it is difficult for the relation of the victim to prove who caused the death. Therefore, the High Court Division recommended a change in the burden of proof in cases of torture in police custody, by amending the relevant provisions of the Evidence Act, 1872. In the last couple of years, the higher judiciary of Bangladesh took the position that the burden of proof can be shifted onto the accused person to prove the circumstances, if at the time of death, deceased was in the custody of the accused.[160] To give a legal backing to the above principle, the Court recommended that a section in the Evidence Act (after section 106) or a clause may be added in section 114 of that Act incorporating the above principle. The new section in the Evidence Act shall provide that when a person dies in police custody or in jail, the police officer who arrested the person or the police officer who has taken him in custody for the purpose of interrogation or the jail authority in which jail the death took place, shall explain the reasons for death and shall prove the relevant facts to substantiate the explanation.[161]

5.1.2.2 Innovative Approach of Redress

It is a principle of international law and even a general concept of law, that every violation of an international obligation that results in damage triggers a duty to make adequate reparation. Each aspect of this obligation, scope, nature and determination of beneficiaries is regulated by international law and therefore cannot be modified by a State's domestic legislation. It is also stated that compensation was the most common form of redress for human rights violations. However, in recent years, it has expanded the non-pecuniary measures awarded to victims of human rights violations. The Court determined that reparation for violations of international obligations must take the

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159 REDRESS. 2003. *Reparation for Torture*. London: REDRESS.

160 See, *State v Md. Shafiqul Islam alias Rafique and another*, (1991) 43 DLR (AD) 92; *State v Khandhker Zillul Bari* (2005) 57 DLR (AD) 29; *Shahjahan Mizi v State*, (2005) 57DLR (HCD) 224; *Shamsuddin v State*, (1993) 45DLR (HCD) 587.

161 *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others* (2003) 55 DLR 363.

form, if possible, of full restitution which consists in the restoration of the situation prior to the violation, the reparation of the consequences of the violation and monetary compensation for material and non-material damages, including emotional harm. Where full restitution is not possible it is for the Court to determine a set of measures, in addition to ensuring the rights abridged, to address the consequences of the infractions, as well as ordering payment of compensation for the damage caused. The guiding principle is that reparation must seek to remove the effects of the violation. The nature and amount of compensation depend on the damage inflicted and therefore are directly related to the specific violation found by Court. In recent decisions, Court has included in its pecuniary damages orders for the restoration of the loss of family assets resulting from the human rights violation. Generally, the amount of pecuniary damages awarded is based on the victim's particular profession or economic situation. Court assessed pecuniary damages on the basis of equity and, in some circumstances, on the basis of the minimum wage in the country. In general, with regard to material or pecuniary damages, monetary payment is awarded. In some cases, it is found that the decision recognizing the violation of the victim's rights constitutes sufficient reparation.[162] However, in this part the thesis focuses on the approach adopted by the Supreme Court in case of violation of fundamental rights and illegal detention taken into consideration of international law standards and its implementation.

5.1.2.2.1 Reparation for Fundamental Rights Violations

The High Court Division has affirmed that it is competent to award compensation for fundamental rights violations.[163] As the Constitution of Bangladesh does not provide for the defence of sovereign immunity, there is no bar to award compensation to an aggrieved person under writ jurisdiction for a violation of his or her fundamental

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[162] Odeku, Kolawole Olusola. 2008. *In search of a regime of responsibility and accountability for perpetrators of torture with reference to persons with special responsibility for protecting human rights*. London: University of Fort Hare (Unpublished PhD thesis).

[163] *Maharaj v Attorney General of Trinidad and Tobago* (1978) 2 All ER 670 (T&T PC), *Ruhul Sah v State of Bihar & Anor* (1983)AIR SC 1086 (Ind SC), *Bhim Singh MLA v State of Jammu and Kashmir* (1986) AIR SC 494 (Ind SC), *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) AIR SC 2426; (1996) 2 CHRLD 109 (Ind SC), *Government of East Pakistan v Rowshan Bijaya Shaukat Ali Khan* 18 DLR (SC) 214 (Bang SC), *Government of West Pakistan v Begum Agha Abdul Karim Shorish Kashmiri* and *Amaratunge v Police Constables & Ors* (1993) SAARC Law Journal 88 (SL SC) applied).

rights. In *Bilkis Akhter Hossain vs. Bangladesh & Others*[164] it is held that there is no specific provision for awarding costs and compensation under Art 102 but it is a long-drawn tradition, custom or discretion of the High Court Division that in every writ case the Court always passes judgment either with or without costs. In view of its special original jurisdiction and its extraordinary and inherent jurisdiction to pass any order as it deems fit and proper, the High Court Division has the power to award costs as well as monetary compensation according to the facts and circumstances of each case. Moreover, it would appear that the Appellate Division has approved the principle that the High Court Division is competent to award compensation in an appropriate case in its writ jurisdiction [*Habibullah Khan v S A Ahmed* 35 DLR (AD) 72 (Bang SC AD) considered]. It follows, therefore, that the Supreme Court, in the exercise of its constitutional jurisdiction, can award monetary compensation in appropriate *habeas corpus* cases for illegal detention in violation of a person's fundamental rights.

In the recent case of *BLAST v. Bangladesh*, the High Court Division expressly confirmed, referring to the jurisprudence of the Indian Supreme Court,[165] that it is competent to award compensation to a victim of torture or to the relations of a person whose death is caused in police or jail custody. The High Court Division of the Supreme Court has the discretion to determine the appropriate form of reparation to award where it finds a violation of fundamental rights. Its powers are not confined to awarding compensation only. It may award other kinds of reparation in the form of directions, and it may direct the State to take measures of rehabilitation, satisfaction and guarantees of non-repetition, which may include recommendations to prosecute the public official responsible for the violation of a fundamental right if such conduct constitutes a criminal offence.[166] The High Court Division has on occasion awarded

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[164] (1997) 17 BLD (HCD) 395, (1997) 2 CHRLD 312.

[165] See for an overview of the jurisprudence of the Indian Supreme Court and High Court on reparation for torture, REDRESS. 2003. *Responses to Human Rights Violations, the Implementation of the Right to Reparation for Torture in India, Nepal and Sri Lanka*. London: REDRESS.

[166] *BLAST and others v. Bangladesh and others*: "Now, a question is raised whether this court is competent to award compensation to a victim of torture or to the relation of a person whose death is caused in police custody or jail custody. Indian Supreme Court held the view in the above case that compensatory relief under the public law jurisdiction may be given for the wrong done due to breach of public duty by the state of not protecting the fundamental right to the life of a citizen. So, we accept the argument of the learned Advocate for the petitioner that compensation may be given

exemplary damages.[167] The Court decides on the quantum of compensation on the basis of the particular facts and circumstances, taking into account the severity of the violation.[168] In addition to aggrieved persons, the High Court Division has recently recognized that members of the public may also be granted standing in cases of gross human rights violations, opening the way for Public Interest Litigation.[169] In, *Dr. Mohiuddin Faruque v. Bangladesh*, and *Ekushey Television Ltd & ors. v. Dr. Chowdhury Mahmood Hasan & ors.*[170] it is held that this Court under constitutional mandate is duty bound to preserve and protect the rule of law. The cutting edge of law is remedial and the art of justice has to respond here so that transparency wins over opaqueness. In the instant case, the petitioners, though not personally affected in espousing a genuine cause, but have drawn the Court's attention to the breach of constitutional obligations. Such gross violations of fundamental rights should shock the judicial conscience and force it to leave aside the transitional procedure which shackles the *locus standi* and gives standing to the petitioners. Unless this Court responds to it, governmental agencies would be left free to subvert the rule of law to the detriment of the public interest and also in *Chowdhury Mohmood Hossain v.*

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by this Court when it is found that confinement is not legal and death resulted due to failure of the state to protect the life. But at the same time we like to emphasise that it will depend upon the facts and circumstances of each case. If the question of custodial death becomes a disputed question of fact, in that case, under the writ jurisdiction it will not be possible to give compensation. But where it is found that the arrest was unlawful and that the person was subjected to torture while he was in police custody or in jail, in that case, there is scope for awarding compensation to the victim and in case of death of a person to his nearest relation."

[167] *Bilkis Akhter Hossain v. Bangladesh & Others* (1997) 17 BLD (HCD) 395. Compare in this respect the Indian jurisprudence, in particular Justice Anand in *Nilabati Behera vs. State of Orissa* (1993) 2 SCC 746 (Ind SC), para.33 "… when the court moulds the relief by granting "compensation" in proceedings under Article 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizens. The payment of compensation in such cases is not to be understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

[168] See *Bangladesh vs. Ahmed Nazir*, 27 DLR (AD) 41 and *Bilkis Akhter Hossain vs. Bangladesh & Others* (1997) 17 BLD (HCD) 395.

[169] See *Dr. Mohiuddin Faruque vs. Bangladesh*, and *Ekushey Television Ltd & ors. v. Dr. Chowdhury Mahmood Hasan & ors.* (2002) 22 BLD (AD) 163.

[170] (2002) 22 BLD (AD) 163.

Bangladesh & ors.[171] it is decided that when an action concerns public wrong or injury or invasion of the fundamental rights of indeterminate number of people, any member of the public being a citizen suffering the common injury, has the right to invoke the jurisdiction under Article 102 of the Constitution. However, there is no express time limit for bringing such an application but a petition may be deemed inadmissible if brought with a delay that is deemed inordinate in the circumstances. The petitioner is not required to exhaust all remedies for this type of application, and has the burden to adduce evidence in support of the allegation, which must be affirmed on oath.[172] The Division has discretion in awarding costs, which must be exercised judicially according to the facts and circumstances of the case.[173] Finally, it may review its judgments and orders where considered necessary in the interests of justice.[174] So the judgment held that this Court in exercise of it's power of judicial review when finds that, fundamental rights of an individual has been infringed by colorable exercise of power by the police including victims of torture, the court is competent to award compensation for the wrong done to the person concerned[175] and to initiate criminal proceedings against the perpetrators.[176]

5.1.2.2.2 Compensation for Illegal Detention

The High Court Division also awarded compensation for illegal detention. As there is no provision for payment of compensation for illegal detention under the preventive detention laws, the detaining authority exercises arbitrary and malicious discretion. Every year a huge number of politically opponent persons become detenues without committing any offence whatsoever. It will be surprising to know that a High Court Division Bench of the Supreme Court of Bangladesh declared 198 detentions illegal

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171 (2002) 22 BLD (HCD) 459.

172 *Ghulam Azam v. Bangladesh*, 46 DLR (AD) 192. See also general considerations in *Jabon Naher & ors. v. Bangladesh & ors.* (1998) 18 BLD 141. See also the Rules of the High Court Judicature for East Pakistan, 1960, which have been adopted as the Rules of the High Court Division.

173 *Bilkis Akhter Hossain v. Bangladesh & Others* (1997) 17 BLD (HCD) 395.

174 *Serajuddin Ahmed v. AKM Saiful Alam*, (2004) 56 DLR (AD): "There is no provision in the constitution precluding the High Court Division to review its judgment and order. The Court's inherent power to do justice to the parties before it is an accepted one and for that purpose the form in which the Court shall dispense justice is a matter for the Court to resort to."

175 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Remand", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 258-292, at p. 279.

176 UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

in a day. There is no example of such a huge detention cases being declared illegal in one day in the judicial history of Bangladesh.[177] The Supreme Court of Bangladesh does not usually approve compensation but there are certain exceptions. For example in *Bilkis Akhter Hossain v. Government*[178] the Court directed the state to pay compensation to the detenues. The Court declared the detention order illegal, passed order for immediate release of the detenues and to pay taka one lakh to each detenu as compensation.[179]

5.1.2.2.3 Developing Jurisprudence through Interpretation

Among the others the Supreme Court of Bangladesh is also developing consistent jurisprudence for torture through the interpretation of certain terms that may be used for facilitating torture by the law enforcing agencies. In Bangladesh under certain laws, detention is authorized for 'prejudicial acts' while arrest can be made on valid 'suspicion' of criminal wrong-doing. It follows from these propositions that it is the duty of the Court to ensure that the conditions or requirements laid down by law is strictly adhered to. The deprivation of personal liberty must satisfy the requirement of 'in accordance with law', or under the 'due process of law' not only when the deprivation is authorized by law but also when the requirements and conditions embedded in the authorization have been meticulously followed.[180]

However, *BLAST v. Bangladesh*[181] was practically the first judgment to scrutinize the meaning or interpretation of 'credible' information and 'reasonable' suspicion leading to the formulation of a number of guidelines to be followed by Police and Magistrates in arrests and granting remand, respectively. A year later, many of the issues interpreted in the *BLAST* judgment was also taken up in another judgment i.e. *Saifuzzaman v. State*[182] which added a few more directives for Police and the State. The primary concern of this later judgment, however, was the power of preventive

177 *The Prothom Alo,* 08 December 2002.

178 (1997) MLR Vol. 2 (Dhaka).

179 Bhuiyan, Md. Jahid Hossain. 2004. "Preventive Detention and Violation of Human Rights: Bangladesh, India and Pakistan Perspective", Vol. 8 Nos. 1&2 *Bangladesh Journal of law*, pp. 103-132, at p. 128.

180 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Remand", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 258-292, at p. 265.

181 (2003) 55 DLR (HCD) 363.

182 (2004) 56 DLR (HCD) 324.

detention under the Special Powers Act, 1974.[183] However, the crux of the *BLAST* judgment is sections 54 and 167. Section 54 of the Code of Criminal Procedure empowers any police officer to arrest a person. The provision of this section that of 'there is a reasonable suspicion' about a person's involvement in crime is what enables a police to arrest anyone , claiming that the police had suspected the person of being involved in a crime. Police can arrest anyone on this suspicion which, until this judgment, was not limited by any criterion or ground of reasonableness of suspicion. To limit the abuse of police power, the judgment did laid down that if a person is arrested on suspicion the police officer shall record the reasons for the arrest including the knowledge which he has about the involvement of the person in a cognizable offence, particulars of the offence, circumstances under which arrest was made, the source of information and the reasons for believing the information.[184] Any suspicion now, after the judgment, is not good enough. The arresting officer has to record all the relevant information which led to his suspicion regarding the involvement of the arrestee in a crime. The judgment distinguished between suspicion and knowledge. A police officer can exercise the power if he has definite knowledge of the existence of some facts and such knowledge shall be the basis of arrest without warrant, further emphasizing that there can be knowledge of a thing only if the thing exists. The 'suspicion' which has been abused and misused by police as the alleged reason for arrest can no longer, after his judgment, be an indefinite and undefined guess or imagination or whim of police. The judgment elaborated that if a person is arrested on the basis of 'credible information', nature of information, source of information must be disclosed by the police officer and also the reason why he believed the information. 'Credible' means believable. Belief does not mean make-belief. An ordinary layman may believe any information without any scrutiny but a police officer who is supposed to possess knowledge about criminal activities in the society, nature and character of the criminal etc., cannot believe any vague information received from any person. If the police officer receives any information from a person who works as 'source' of the police, even in that case also the police officer, before arresting the person named by the 'source' should try to verify the information by perusal of the diary kept in the police station about the criminals to ascertain whether

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183 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Remand", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 258-292, at p. 273.

184 *BLAST v. Bangladesh* (2003) 55 DLR (HCD) 363, 374.

there is any record of any past criminal activities against the person named by the 'source'. Use of the expression 'reasonable suspicion' implies that the suspicion must be based on reasons and reasons are based on existence of some fact which is within the knowledge of that person. So when the police officer arrests a person without warrant, he must have some knowledge of some definite facts[185] on the basis of which he can have reasonable suspicion.[186] Also earlier in *Alhaj Md. Yusuf Ali v. The State*[187] the High Court Division interpreted 'reasonable suspicion' in exercising power under section 54, as a *bona fide* belief on the part of the police officer that an offence has already been committed or is about to be committed. The Court further held that a police officer arresting a person unjustifiably or otherwise than on reasonable grounds and *bona fide* belief renders himself liable for prosecution under section 220 of the Penal Code.[188] In scrutinizing the police power of arrests, the *Saifuzzaman* Court also dwelt upon the meaning and stated that any information or suspicion cannot, by itself, be sufficient to justify deprivation of the right to liberty of a citizen. The expression credible information used in the section includes any information which, in the judgment of the officer, to whom it is given, appears entitled to credit in the particular instance. The word 'reasonable' has reference to the mind of the person receiving the information. The 'reasonable suspicion' and 'credible information' must relate to definite averments, which must be considered by the police officer himself before he arrests a person under the provision. What is a 'reasonable suspicion' must depend upon the circumstances of each particular case, but it should be at least founded on some definite fact tending to throw suspicion on the person arrested and not on a mere vague surmise. The words 'credible' and 'reasonable' used in the first clause of section 54 must have reference to the mind person receiving the information which must afford sufficient materials for the existence of an independent judgment at the time of making the arrest. In other words the police officer upon receipt of such information must have definite and *bonafide* belief that an offence has been committed or is about to be committed, necessitating the arrest of the person concerned. A bare assertion without anything more cannot form the material for the

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185 *Ibid.*, 367, 368.

186 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Remand", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 258-292, at p. 275.

187 (2002) 22 BLD 231.

188 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

exercise of an independent judgment and will not therefore amount to credible information.[189]

And as for police and their power of arrest in accordance with law, the judgment by Mr. Justice M.A. Aziz pointed out that the rule of law is a basic feature of the Constitution of Bangladesh to attain the fundamental aim of the State, the Constitution has made substantive provisions for the establishment of a polity where every functionary of the State must justify his action with reference to law. 'Law' does not mean anything that Parliament may pass. Arts. 27 and 31 have taken care of the qualitative aspects of law. Art. 27 forbids discrimination in law or in State action, while art. 31 imports the concept of due process, both substantive and procedural, and thus prohibits arbitrary or unreasonable law or State action.[190] However, a plain textual reading of 'in accordance with law' or under 'due process of law', needless to say, does not make all these detentions arrests legal and proper as the conditions contained for detention and arrests are not always automatically satisfied. In other words though the law authorizes preventive detention and arrest on suspicion, yet such derogation of liberty must also meet other standards carved out by judicial pronouncements. The relevant laws do provide for the power of the state to derogate from the right to personal liberty in general terms, yet the Courts over the years, have read a number of conditions and requirements into the general terms of these enactments. The ambit of these requirements and the fulfillment of the conditions constitute the real parameters of the right to personal liberty. A law providing for deprivation of life or personal liberty must be objectively reasonable and the Court will inquire whether in the judgment of an ordinary prudent man the law is reasonable having regard to the compelling, and not merely legitimate, governmental interest. It must be shown that the security of the State or of the organized society necessitates the deprivation of life or personal liberty. [191]

The preamble of the Constitution of Bangladesh states 'rule of law' as one of the objectives to be attained. The expression 'rule of law' has various shades of meanings

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189 *Saifuzzaman v. State and Others* (2004) 56 DLR (HCD) 324, 329.

190 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Remand", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 258-292, at p. 270.

191 *Ibid.*, at pp. 265-270.

and of all constitutional concepts, the rule of law is the most subjective and value laden.[192] A.V. Dicey's concept of rule of law included three things first the supremacy of regular laws as opposed to the influence of arbitrary power and the persons in authority do not enjoy wide, arbitrary or discretionary powers, second equality before law, i.e. every man whatever his rank or position, is subject to ordinary laws and the jurisdiction of ordinary Courts and third individual liberties legally protected not through any bill of rights but through the development of Common Law. According to professor Wade rule of law connotes three ideas like it expresses a preference for law and order within a community rather than anarchy, warfare and constant strife, it expresses a legal doctrine of fundamental importance, namely, that government must be conducted according to law, and that in disputed cases what the law requires is declared by judicial decisions and it refers to a body of political opinion about what the declared rule of law should provide in matters both of substance and of procedure.[193] Rule of law requires that any absence of power by public functionaries should be subject to the control of Courts. Hilaire Barnett rightly observed that the rule of law in its many guises, represents a challenge to State authority and power demanding that powers both be granted legitimately and that there exercise is according to law. According to law means both according to the legal rules and something over and above purely formal legality and imputes the concepts of legitimacy and constitutionality. In its turn, legitimacy implies rightness or morality of law. The rule of law is an ideal of constitutional legality, involving open, stable, clear and general rules, even-handed enforcement of those laws, independence of the judiciary and judicial review of administrative action.[194] The governmental action must be based on law and the law must be reasonable and non-arbitrary with reference to some legitimate objectives to be achieved. Art. 31 like the American due process clause ensures fair procedure in any proceeding affecting rights and liberties

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[192] *Bangladesh v. Idrisur Rahman* (2010) 15 BLC (AD) 49 (the expression of rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done in accordance with law, in other words it speaks of rule of law and not of men and everybody is under the law and nobody is above the law. The other meaning of the rule of law is that government should be conducted within a framework of recognized rules and principles which restrict discretionary power and our constitution is the embodiment of the supreme will of the people setting forth the rules and principles. But the most important meaning of rule of law is that the disputes as to the legality of the acts of the government are to be decided by judges who are independent of the executive.

[193] Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 79.

[194] *Ibid.*, at p. 82.

of individuals and this fairness concept is embodied in the principles of natural justice. Our courts have held that the principles of natural justice can be excluded by statute, but because of the guarantee of art. 31 it may not now be possible for Parliament to exclude its application[195] unless it can be shown that there is a compelling governmental interest to exclude its application in a particular case. Even in case of exclusion of the requirement of notice and hearing in emergent cases, there should be provision for *post facto* hearing or other safeguards against arbitrary or unlawful application of law.[196] The Court's ruling allowing for Public Interest Litigation implies that this Court under constitutional mandate is duty bound to preserve and protect the rule of law. The cutting edge of law is remedial and the art of justice has to respond here so that transparency wins over opaqueness. In the instant case, the petitioners, though not personally affected in espousing a genuine cause, but have drawn the Court's attention to the breach of constitutional obligations. Such gross violations of fundamental rights should shock the judicial conscience and force it to leave aside the transitional procedure which shackles the *locus standi* and gives standing to the petitioners. Unless this Court responses to it, governmental agencies would be left free to subvert the rule of law to the detriment of the public interest. It deemed necessary to point out the potential negative consequences of not ruling as it did implies serious concerns on the part of the Court regarding potential subversions by governmental agencies. The questionable status of the rule of law in Bangladesh is thus a further obstacle preventing proper implementation of judicial remedies.[197]

Fundamental Principles of State Policy also provides the yardstick for testing the reasonableness of a legal provision challenged on the ground of violation of fundamental rights. Any legal provision made to further the principles of state policy will *prima facie* be constitutional. If any provision of the Constitution or any statute is susceptible of more than one meaning, the Courts should adopt that meaning which is

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[195] *See Cleveland Board of Education v. Loudermill (*1985) 470 US 532 (the right to due process is conferred, not by legislative grace, but by constitutional guarantee); see *Razia Sattar v. Azizul Huq* (2007) 12 BLC 357 (a law which excludes the necessity of hearing will be void under art. 31 and an action taken under that law will be void and not voidable.)

[196] Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 247.

[197] Bangladesh Rehabilitation Centre for Trauma Victims (BRCT) and Bangladesh Institute of Human Rights (BIHR). 2006. *Broken Promises: The State of Reparation for Torture Victims in Bangladesh*. Dhaka: BRCT & BIHR.

in conformity with the principles set out in Part II of the Constitution. When a provision of the Constitution seems to be repugnant to the principles of State Policy, an effort should be made to construe the provision in conformity with the principles of State Policy. However, it will not be permissible, on the basis of those principles, to give the language of any provision of the Constitution a meaning which it cannot bear, unless the language is ambiguous. An apparently clear language of a provision of the Constitution may not appear to be unambiguous when it is found to be inconsistent with any provision of Part II because these Principles of State Policy having been treated as fundamental to the governance of Bangladesh, it has to be assumed that the other provisions of the Constitution have been made to facilitate, and not to hinder, realization of the aims and objectives stated in Part II.[198] There may be prohibition or restriction imposed by law. If such prohibition is not violative any of the fundamental rights enumerated in Part III, there cannot be any right, much less any fundamental right which will inspire violation of such provision of law; fundamental right can never be invoked for violating any provision of law or other man's right under the law.[199] Many of the rights guaranteed by the provisions of Part III are subject to restrictions that may be imposed by law. Such restriction cannot be imposed by Executive instruction.[200] A question arises whether in imposing restriction; a law can impose prohibition also. The Indian Supreme Court has held that the expression 'restriction' includes 'prohibition'.[201] In some of the articles the rights are guaranteed subject to reasonable restrictions imposed by law on specific grounds. The question is when a restriction can be said to be reasonable, what is the standard by which the reasonableness of a restriction can be judged. The Courts opine that no fixed standard can be laid down for general application and it will vary depending on the varying circumstances of each case.[202] The learned Judge then stated that a restriction will be treated as unreasonable 'if the restriction is for an indefinite or an unlimited period or disproportionate to the mischief sought to be prevented or if the

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198 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 75.

199 *Bangladesh NCTB v. Shamsuddin* (1996) 48 DLR (AD) 184, 189. See Para 2.177A for comments on this decisions.

200 *Krisnan Kakkanath v. Kerala* (1997) AIR (SC) 128.

201 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 140.

202 *Oali Ahad v. Bangladesh* (1974) 26 DLR 376.

law imposing the restriction has not provided any safeguard at all against arbitrary exercise of power.[203] From the decided cases it appears that there are several factors which have to be taken into consideration in judging the reasonableness of a restriction. The restriction must be reasonable in both substantive and procedural aspects. When the law confers discretion upon the Executive authority to impose restrictions without providing any guideline regulating the exercise of the discretion,[204] the restriction imposed by law is treated to be substantively unreasonable. Conferment of unguided discretion on the Executive in imposing restriction may not be unreasonable where the situation is such that power must be vested in some authority to take immediate action to prevent acts fraught with imminent danger.[205] However, in such a case the law should provide a check against arbitrary exercise of the discretion. One of the modes of providing the safeguard is to require the authority to record reasons before taking action and to supply copy of the statement of reasons to the person affected. Such a requirement not only compels the authority to apply its mind, but also facilitates judicial review of the action. In absence of emergent or extraordinary circumstances, the exercise of fundamental rights cannot be made dependent upon the subjective satisfaction of the governmental authority. A law imposing a restriction may be void if it is vague and uncertain.[206]

All illegal detentions by public functionaries involve infringement of fundamental rights guaranteed by arts. 31, 32 or 33 and as such the jurisdiction to issue the writ of *habeas corpus* shall have to be understood with particular references to these articles of the Constitution. Speaking about this constitutional power, D.C. Bhattacharya J observed that the Constitution having highlighted the rule of law and the fundamental human rights and freedom in the preamble of the Constitution, and personal liberty being the subject of more than one fundamental right as guaranteed under the Constitution, a heavy onus is cast by the Constitution itself upon the authority,

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[203] *Abul A'la Moudoodi v. West Pakistan* (1965) 17 DLR (SC) 209*;* see also *Chitta Ranjan v. Secy. Judicial Department (1965)* 17 DLR 451.

[204] *Municipal Corp. v. Jan Mohammad* (1986) AIR (SC) 1205, 1210; *Maharashtra v. Kamal* (1985) AIR(SC) 119; *Kaushal v. India* (1978) AIR (SC) 1457; *Harichand v. Mizo Dist. Council* (1967) AIR(SC) 829.

[205] *Abul A'la Moudoodi v. West Pakistan* (1965) 17 DLR (SC) 209; *Joseph v. Reserve Bank* (1962) AIR (SC) 1371; *Pooran Mal v. Director of Enforcement* (1974) AIR (SC) 348.

[206] Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 142.

seeking to take away the said liberty on the avowed basis of legal sanction, to justify such action strictly according to law and the Constitution.[207] Speaking about the power of the Court under art. 32 of the Indian Constitution which corresponds to our art. 44, the Supreme Court said that in granting relief in case of a violation of fundamental rights the Court is not helpless and it should be prepared to forge new tools and devise new principles of liability for the purpose of vindicating those precious fundamental rights. In fact, the Indian Supreme Court did not rest merely giving declarations or direction; where the situation demanded, it granted exemplary costs and even damages for violation of fundamental rights relating to life and personal liberty.[208] But there is no reason why the relief should be denied in a case of clear and blatant violation of fundamental rights involving life or liberty of the citizens. In *BLAST v. Bangladesh*[209] the High Court Division held that the Court is competent to award compensation when it finds that the fundamental rights of an individual has been infringed by the colorable exercise of power by police under section 54 and 167 of the Code of Criminal Procedure. The Court awarded compensation where it found the detention of citizens to be completely without any basis on record or the result of utter negligence.[210]

5.2 Compliance in Practice

Proper and efficient administration of justice is a *sine qua non* for maintaining law and order in the country and for achieving 'the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social' as enshrined in the preamble of the Constitution of Bangladesh. To ensure rule of law and proper administration of justice in the country in addition to the law enforcing agencies there are subordinate courts and tribunals and above those the Supreme Court of Bangladesh. Since coming into force of the Constitution till date, many obstacles are found in achieving not only the 'rule of law' and proper and efficient administration of justice[211] but also to foster the active prevention of torture. Though majority of the

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[207] *Ibid.*, at p. 755.

[208] *Ibid.*, at p. 610.

[209] (2003) 55 DLR 363.

[210] *Bilkis Akhtar Hossain v. Secy. Ministry of Home* (1997) 2 BLC 257; *Shahnewaz v. Bangladesh* (1998) 50 DLR 633; *Korban v. Bangladesh* (2003) 55 DLR 194.

[211] Asiatic Society of Bangladesh. 2003. *Administration of Justice in Bangladesh*. Dhaka: Asiatic Society of Bangladesh.

people have respect for rule of law those having power and influence, if aggrieved, are not awaiting for justice through the Court[212] which is now confronted with obstacles not only those which are specifically ingrained in her constitution and the laws but also those which are very much present and are frequently resorted to by various agencies for tail-twisting of the Judiciary.[213] With this background, this part 'compliance in practice' focuses the institutional compliance by the judicial organ of the State in practice by scrutinizing the impediments. Among the impediments it focuses specifically on the flawed implementation of separation of powers both in the higher and the lower judiciary and certain deficiencies in institutional and procedural framework.

5.2.1 Separation of Powers and its Flawed Implementation

The components of the special Rapporteur's equation; rule of law, separation of powers, independence of judiciary and for that matter, genuine democracy are all missing from Bangladesh today. To understand why, it is necessary to look into more detail at the structure, work and characteristics of its judges. Although section 22 of the Constitution of Bangladesh directs the Government to ensure an independent judiciary, in fact the entire judiciary specially the lower one and in certain cases the higher judiciary in Bangladesh moves on strings extending from Government departments.[214]

5.2.1.1 In the Lower Judiciary

In Bangladesh, the Judge's Courts are the second line of defence for the State and its functionaries. Each is headed by a District and Session Judge, accompanied by an additional District and Session Judge and a number of Sub Judges, Senior Assistant Judges and Assistant Judges. Perhaps the titles are intended to be ironic, or to convince the public that through reiteration of the word "judge", one can be found somewhere. In fact, none can be properly called a Judge in the sense that the word is

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[212] Hoque, Kazi Ebadul. 2003. "Problems and Prospects of Administration of Justice", in Asiatic Society of Bangladesh : *Administration of Justice in Bangladesh*. Dhaka: Asiatic Society of Bangladesh, pp. 251-283, at p. 251.

[213] Ahmed, Justice Naimuddin. 2001. "The Problems of Independence of the Judiciary in Bangladesh", in Bangladesh Institute of Law and Informational Affairs (BILIA): *Human Rights in Bangladesh: A Study for Standards and Practices*. Dhaka: BILIA, pp.173-187, at p. 173.

[214] Ashrafuzzaman, Md. 2006. "Laws without order & courts of no relief in Bangladesh", Vol. 5 No. 4 *Article 2 of the International Covenant on Civil and Political Rights*, pp. 20-29, at p. 24.

understood in developed jurisdictions or international law. Instead, these are just a higher level of State agents. The Ministry of Law, Justice & Parliamentary Affairs oversees their recruitment, posting and promotion. Although the "judges" may not have to run around collecting taxes and looking after Government property like Magistrates, still they are subject to the dictates of the Executive, not any judicial authority. However, the Magistrates are not also independent of the Government. In fact, they are petty administrators-cum-judges. All Magistrates throughout the country, and at the four Metropolitan Cities, where they work in Chief Metropolitan Magistrate's Courts, are answerable to the Deputy Commissioner. This person is the Chief Executive Officer of the area. The Deputy Commissioner will also hold the position of District Magistrate, who is in turn the boss of the Additional District Magistrate. The latter handles the assigning of duties to the sitting magistrates throughout the jurisdiction together with the District Magistrate or Deputy Commissioner; these may include revenue collection and other administrative functions. So Magistrates work for not only the Ministry of Home Affairs but also the Ministry of Establishment and the Ministry of Finance. They can also at any time be assigned duties from other Ministries. Needless to say, the first priority of these so-called Magistrates is to implement Government orders, rather than adhere to any notion of judicial integrity. They also are actively involved in investigations of cases as well as arriving at verdicts like an Executive Magistrate and Judicial Magistrate rolled into one, but less efficient than two separate persons. It is obvious to any intelligent onlooker that when judges are under Executive control, the Government can interfere in under trial cases whenever it feels like it. And it does. Much of the time this is done through various indirect means. But sometimes also it is direct, particularly where a politician from the ruling party needs to be rescued from prosecution.[215] In addition, until recently the subordinate judiciary of Bangladesh, which includes the Magistrates' and the Sessions Judges' Courts had been under the control of the Ministry of Home Affairs and the Ministry of Law, Justice and Parliamentary Affairs. This subjugated the Judiciary to such an extent that even after the change of circumstances the Judicial Officers behave as if they are not accountable to a Superior Court, but to a Government Officer. The temporal framework of the subordinate judiciary is still that they believe that they are part of

[215] *Ibid.*, at pp. 24-25.

the Executive, but not the Judiciary. This cuts the root of the impartiality quotient of the subordinate judiciary in the country.[216]

However, the part played by political clout in the appointment of Judges and Magistrates in the subordinate judiciary now-a-days is often talked about and often not without reasonable basis. Article 116 (which ironically proceeds article 116A) guaranteeing independence of Judges and Magistrates vests in the President the control (which includes the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and of Magistrates exercising judicial functions and requires the President to exercise it in consultation with the Supreme Court .[217] Originally article 116 provided that the power would vest completely in the Supreme Court but instead of implementing it this power was transferred to the Executive organ of the Government by a subsequent constitutional amendment secured not through martial law dispensation[218] but through a popularly elected Westminster type of Parliament.[219] The requirement of the consultation with the Supreme Court by the president was, however, a subsequent innovation, martial law dispensation which was an obvious attempt to exhibit respectfulness of the military to the concept of independence of the judiciary. However, the literal, lexicographic and pedantic interpretation of the word 'consultation', according to article 116, renders the effect of article 109 and 116A as absolutely nugatory. This is because without control over the presiding Judges there cannot be any effective superintendence and control by the Supreme Court over the Courts subordinate to it. Also Executive control of the Judges of the subordinate courts by the Government cannot, as it is already said, ensure their independence. Article 116 must, therefore, be read along with the other provisions of the Constitution, practically articles 109 and 116A. So the word 'consultation' occurring in article 116 means 'fruitful and effective consultation' and does not mean merely 'formal, empty or unproductive consultation'. The lexicographic and pedantic interpretation of the word

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[216] Asian Human Rights Commission. 2013. Torture in Bangladesh. Available at:< http://www.humanrights.asia/countries/bangladesh/torture-in-bangladesh>, last accessed on 19th April 2013.

[217] See *Aftabuddin v. Bangladesh* (1996) 48 DLR (HCD) 1 for interpretation and implication of article 116.

[218] Second Proclamation Order No. IV of 1978.

[219] Constitution (Fourth Amendment) Act (Act II of 1975).

'consultation', occurring in article 116 is, therefore, an interpretative error and virtually means that the opinion of Supreme Court obtained by the Government under the said article cannot be arbitrarily and readily disregarded as in case of disagreement, the matter must be referred back to the Supreme Court with reasons for disagreement for further consideration. In that case also the question as to whose opinion shall ultimately prevail in case disagreement persists, shall remain an open question for a long time in Bangladesh, if the original article 116 is not restored. Thus article 116, as it stands now, is the insurmountable block against separation of the Judiciary from Executive control. And even if it is restored, that restoration was only partial, and as it is already seen, has been largely ineffective in securing independence of the subordinate judiciary in Bangladesh. This is because the retention by the Executive organ of the State of the power of promotion, transfer and discipline of judges of the Subordinate Judiciary and Magistrates exercising judicial functions has exposed them to an expectation of favor or a gnawing fear of victimization. In such situations, they cannot be expected to discharge their judicial functions without fear or favor. Moreover without commenting on the genuineness of the allegations of interference, it must, at least, be said that the constitutional provision empowering the Executive organ to control the Judges of the Subordinate Courts has lowered the image of the subordinate judiciary.[220]

So, the non-independence of the lower judiciary is the main obstacle to the enjoyment of human rights in Bangladesh including the prohibition of torture. On the basis of the many cases of torture, killing and illegal detention that the AHRC has documented as having occurred in Bangladesh, it can state unequivocally that victims and their family members face overwhelming obstacles when attempting to take cases to the Courts due in large part to their non-independence. As a consequence, the notion of judicial redress for abuses committed by the police or other State Officers is all but non-existent in Bangladesh. At most, victims can expect that a judicial probe will be ordered to investigate and reach a conclusion that may lead to limited disciplinary action against lower-ranked officers. The complete political control of the prosecution in Bangladesh is another cause for concern. Prosecuting attorneys are replaced *en*

[220] Ahmed, Justice Naimuddin. 2001. "The Problems of Independence of the Judiciary in Bangladesh", in Bangladesh Institute of Law and Informational Affairs (BILIA): *Human Rights in Bangladesh: A Study for Standards and Practices*. Dhaka: BILIA, pp.173-187, at pp. 185-187.

masse every time that a new government comes to power. As a result, they serve the bidding of their political masters loyally and do not accumulate experience or build an institutional legacy to pass from generation to generation. The skills needed for proper prosecuting do not develop, political bias dominates and the country's so-called Courts are sunk further into this morass. [221] Almost in all cases the Judges of the Courts permit police to take an accused on remand for interrogation as a matter of routine. Nobody will believe that the learned Judges do not know what police remand means. Police feel free to resort to violence to extract a confession of one's guilt. There are also allegations of corruption to save oneself from violence. For a person to be so helpless in the hands of police is possible only in a police state. The police cannot be so much blamed, though the Constitution is equally binding on them, because the Judges themselves are a party to granting of remand.[222] In one case, the Attorney General was successful in his appeal to block a High Court Division order, obliging the authorities to obtain a statement from the investigating police officer and to set up a new medical board to examine the prisoner who alleged torture, following concerns over the failure of the previous board to make records of the examination available to the Court. Several instances have been reported in which Magistrates ignored torture marks, failed to conduct an autopsy in death in custody cases or did not institute criminal proceedings against the perpetrators.[223]

5.2.1.2 In the Higher Judiciary

The NGO Odhikar commented in its Human Rights Report 2008 of 15 January 2009 that the separation of the Judiciary from the Executive could be regarded as one of the major successes of the Caretaker Government. The report, however, stated that the Government still exercised some control over the recruitment of judges, which was done by the Public Service Commission through the Ministry of Law, Justice and

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221 Fernando, Basil. 2006. "Bangladesh: Urgent need for UN experts to visit and assess Bangladesh judiciary", Vol. 5 No. 4 *Article 2 of the International Covenant on Civil and Political Rights*, pp. 110-112, at pp. 110-111.

221 REDRESS. 2003. *Reparation for Torture*. London: REDRESS.

222 Hosein, Mainul. 2013. 'Practice of police remand is unconstitutional and judges can't be party to it', available at:< http://www.thenewnationbd.com/newsdetails.aspx?newsid=62000>, last accessed on 11 June 2013.

223 REDRESS. 2004. *Torture in Bangladesh 1971-2004 Making International Commitments a Reality and Providing Justice and Reparations to Victims*. London: REDRESS.

Parliamentary Affairs.[224] The power of appointing the judges of the Supreme Court other than the Chief Justice practically vests absolutely in the Prime Minister, who is advised by his political colleagues and more often by the bureaucrats. Under such a constitutional setup, the possibility of entry of political factors into the question of appointments of judges of the Supreme Court cannot be ruled out. And in the Supreme Court, it has now to be seen whether in spite of any constitutional requirements to consult the Chief Justice, a constitutional convention has been established that no appointments of Judges of the Supreme Court can be made without consultation with the Chief Justice. It is however, true that a foolproof system of selection and appointment of the judges of the Superior Court has not been evolved in any country. Every method of appointment has its own advantage as well as disadvantage. But, to boast of judicial independence in a constitutional set-up where constitutionally the Chief Justice of the Supreme Court is "Mr. Nobody' in the matter of selecting people for appointment of judges of the Supreme Court, is sheer self-deception. Although instances of arbitrary discrimination against Judges of the Supreme Court are not frequent, they are not also totally absent, as judges are constitutionally, conventionally and characteristically incapable of canvassing for themselves.[225] Also the rules relating to the appointment of the stuff are subject to previous approval of the President. The rules relating to conditions of service of both the staff are subject to any law made by the Parliament in this respect. Although apparently the staffs are appointed by the Supreme Court, clearance for such appointments has to be obtained from the Government. The creation of posts of non-judicial personnel in the Supreme Court is also made by the Government on the proposals submitted by the Supreme Court. These restrictions on the power of appointment of its staff are an encroachment on the administrative freedom of the Supreme Court. However, the rule making power regulating the practice and procedure of each Division under article 107 has been made subject to two constraints. Firstly all such rules made by the Supreme Court are subject to law made by Parliament. Secondly to be effective, the rules framed by the Supreme Court must obtain the approval of the President. Consequently it is patent that the Supreme Court

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[224] UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

[225] Ahmed, Justice Naimuddin. 2001. "The Problems of Independence of the Judiciary in Bangladesh", in Bangladesh Institute of Law and Informational Affairs (BILIA): *Human Rights in Bangladesh: A Study for Standards and Practices*. Dhaka: BILIA, pp.173-187, at pp. 177-179.

in determining its own procedure and the procedure for the Subordinate Courts is subject to both legislative and executive control. It appears that reserving legislative and executive control over the procedures that the courts may deem fit to adopt for their performance has left scope for irritating interference in the functioning of the Courts. And the most serious dependence of the Supreme Court on the Executive branch of the Government is in respect of financial matters, except the remuneration of the judges of the Supreme Court which is paid out of the Consolidated Fund. The Supreme Court is for all practical purposes, still under the administrative control of the Government in financial matters. The budget allocation for meeting the expenses of the Supreme Court is financially made by the Ministry of Finance on the suggestions made by the Ministry of Law, Justice and Parliamentary Affairs. Although the proposals for budgets allocation are submitted by the Supreme Court, scissors are invariably applied by the Government and sometimes to drastically cut the proposals. Moreover, the Chief Justice is empowered to sanction expenditure up to a certain limit from the budget allocation and any expenditure exceeding the said limit must be sanctioned by the Government. This enormous financial power retained by the executive organ seriously hampers the independence of judicial administration, directly and indirectly in various ways which need not be elaborated.[226]

As already indicated, Courts by themselves, or their independence alone may not ensure the protection of human rights or avenues for sustainable development if access to such Courts is not readily available or possible for a vast majority of the population. In addition to the huge backlog of cases, the issue of easy access to Courts is of the fundamental importance for a healthy regime of human rights and sustainable development of the society. [227] The original writ jurisdiction of the High Court Division of the Supreme Court is the forum for redress of violations of fundamental rights enshrined in the Constitution. Most of these Constitutional fundamental rights echo the provisions of the UDHR. As mentioned earlier, in the absence of enabling legislation, the rights conferred by international human rights conventions to which Bangladesh is a party, are not enforceable through the judicial system. Even the

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[226] *Ibid.*, at p. 182.

[227] Malik, Shahdeen. 2001. "Human Rights and the Role of the Judiciary", in Bangladesh Institute of Law and Informational Affairs (BILIA): *Human Rights in Bangladesh: A Study for Standards and Practices*. Dhaka: BILIA, pp.145-172, at p. 164.

somewhat limited bundle of human rights available to citizens is seriously compromised by the fact that the writ Bench of the High Court Division is constrained by a huge backlog of pending and undecided cases. Some violations of fundamental rights, such as detention without lawful authority or in an unlawful manner, do get some speedier hearings. In the absence of any other Courts competent to deal with violations of constitutional rights, the huge backlog of cases in the Writ Bench is of serious detriment even to those who can afford access to the highest court of the country. So, access to justice for people is often restricted by a number of factors, some conspicuous and others somewhat less easily noticeable. Perhaps one of the less ostensible factors limiting access to justice is the time necessary for resolution of disputes by the judicial system. The backlog often implies that cases can take years to meander through the judicial system, while litigants suffer in silence. While a few cases may take as long as a quarter of a century before all stages of appeals are exhausted, the average time for civil cases for trial and first appeal is usually almost four years. It may take much longer if there are interlocutory appeals or revisions. Often unscrupulous litigants may drag a case through various procedural loopholes for years on end, often stretching to a decade or more. It seems that there are geographical variations in the backlog of cases in trial Courts. While in some District Courts, for various socio-economic and other ancillary reasons, are not overburdened with a lengthy backlog of pending cases, most Courts in the bigger districts often have cases pending from the 80's and routinely from the early 90's.[228] These figures however tentative clearly deter many litigants from accessing justice, for the simple reason that they were aware of the lengthy and uncertain wait, often for years. Secondly the lengthy period necessary for the resolution of disputes in the judicial system enhances the requirement of substantial investment of time, money and other resources, detrimentally affecting the poor and the disadvantaged more than affluent sections of the society. The huge backlog of pending cases also facilitates the unethical use of the judicial system for harassment of opponents, rather than availing justice. Fourthly it also creates opportunities for manipulation of the system for expediting one's cases through collusion with the lower strata of judicial administration and a number of related ills. Above all the current scenario undermines

[228] *Ibid.*, at pp. 160-161.

the rule of law and access to justice and at the same time creates conditions for breeding corruption.[229]

Furthermore, the problem is that as the one island of relative coherence and consistency in a sea of corruption and maladministration, the Supreme Court judges have difficulty in enforcing these directives. Even the staff members of the Supreme Court offices, such as bench clerks, are known to compel litigants to pay bribes every step of the way, and offer extra services, such as pushing cases up the queue, for more money.[230] Speakers at a views exchange meetings organized by the Bangladesh Legal Aid and Services Trust (BLAST), a human rights body, with the Law Reporters Forum (LRF) in the city, said that despite the High Court orders on various issues, including preventing extra-judicial killings, preventing sexual harassment and establishing a Court in the Hill Districts, the Government had failed to comply with these High Court orders.[231] In case of pending cases or show cause rule by the High Court Division, either the Government is filing appeal or the matter is in appellate stage and its pending there[232] or in a *suo moto* petition case, it has not been taken up for hearing as yet as several Benches were reconstituted and went out of the daily cause list. It is not clear if the Bench, which had heard this matter, would be specially reconstituted for a specified date in order to conclude the hearing.[233] A High Court verdict, which had passed directives relating to the remand and interrogation of the detained in prisons, is yet to be implemented even though more than nine years have passed. The High Court Bench of Justice Md Hamidul Haque and Justice Salma Masud Chowdhury delivered the landmark judgment on April 7, 2003, issuing a series of directives aimed at stopping abuse of power by law enforcement personnel to arrest persons on suspicion and interrogate persons remanded in custody. In the verdict, the Court had directed the authorities concerned to build rooms with glass walls in jails

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229 *Ibid.*, at p. 163.

230 Ashrafuzzaman, Md. 2006. "Laws without order & courts of no relief in Bangladesh", Vol. 5 No. 4 *Article 2 of the International Covenant on Civil and Political Rights*, pp. 20-29, at p. 25.

231 Bangladesh Legal Aid and Services Trust (BLAST). 2005. 'HC Order Ignored', available at:<http://www.blast.org.bd/issues/criminaljustice/265>, last accessed on 14 September 2013.

232 Bangladesh Legal Aid and Services Trust (BLAST). 2010. 'Implement HC orders to stop arrest on suspicion, torture in remand', available at: < http://www.blast.org.bd/news/news-reports/102-thedailystar>, last accessed on 19 May 2013.

233 Khan, Arafat Hossain. 2010. 'Stop Extra Judicial Killings: Respect and establish an effective judiciary', available at: <http://www.blast.org.bd/news/news-reports/101-stopextrajudicialkillings>, last accessed on 19 May 2013.

for interrogating those arrested. Until such rooms are constructed, those arrested will be interrogated at the prison gates in the presence of their relatives and lawyers, the Court had said. No such room with glass walls has been set up yet and no relative or lawyer has been allowed to be present during the interrogation of any arrestee.[234] However, in recent years, a small number of such cases have elicited critical comments and observations of the Judiciary on the abuses of power by police.[235] At the same time, it needs to be mentioned, that the judiciary seems to have embarked on a path of 'conservative interpretation' of many of the provisions of substantive and procedural laws for imposing long term prison sentence on the convict.[236] An important aspect of the *BLAST* judgment is that it did not find any part or provision of section 54 unconstitutional. The application of section 54 and the resultant arrests often exceed the limits imposed on police power of arrest by the relevant constitutional mandates. Moreover, the conditions that are required to be fulfilled for arrests on suspicion to be legal and proper are often not adhered to by the arresting officers. However, such a state of practical affairs does not and cannot lead to the finding by the Court that the section itself is unconstitutional. One needs to recall that, over the years, only a very few laws have actually been declared unconstitutional by the Supreme Court. In fact, not entire laws but only a few sections of some laws have actually been declared unconstitutional by judgment of the Supreme Court.[237]

And the jurisprudence of liberty, as a result, is shrouded, if not in mystery then, in fuzziness. The fuzziness stems, primarily, from the lack of a rigorous scrutiny by the judiciary of the parameters of right to liberty, which in turn, has been brought about by the absence of challenges against the power of arrest and remand by the police. In many ways it is a typical "Catch 22" situation in which the power of police is not challenged and hence, the judiciary does not scrutinize it to put checks and balance on the police power.[238] And since hardly any checks and balances are in place, the power

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234 The Independent. 2013. 'High Court directive on remand not followed', available at:< http://theindependentbd.com/index.php?option=com_content&view=article&id=162367:hc-directive-on-remand-not-followed&catid=132:backpage&Itemid=122>, last accessed on 11 June 2013.

235 See *Saifuzzaman v. State* (2004) 56 DLR (HCD) 324.

236 *State v. Billal HOssain Gazi* (2004) 56 DLR (HCD) 355.

237 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Remand", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 258-292, at p. 281.

238 *A.H.M. Abdullah v. Government of Bangladesh and others* (2005) 25BLD (HCD) 384, 391.

continues to be abused, which in turn, discourages challenges.[239] However, the dictionary meaning of 'independence' is 'not subject to the control of any person, county, etc; free to act as one pleases: autonomous, not affected by others'. To conceive that a Judge must be allowed such absolute independence, as is lexicographically defined above, is simply absurd, because judges are first of all 'constrained by and follow existing laws and procedures', secondly, 'by less tangible requirements, such as those of courtesy, fairness, cultural traditions, the etiquette of the law court and the profession', thirdly, 'a judge or magistrate is not free to act perversely, unfairly or for ulterior ends or motives', fourthly, 'the judge must rightly be influenced by others in performance of his or her judicial duties, there is no point in advocacy or pleading if it does not affect judicial decision', lastly, 'the judge must be sensitive to guidance and directions reasonably and lawfully given by those of superior rank to himself, i.e., his appellate authorities or superintending authorities.[240]

5.2.2 Procedural Deficiencies

Article 35(3) of the Constitution states that every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law. And in Article 27 provides it is stated that all citizens are equal before the law and are entitled to equal protection of law. According to the US State Department Country Report on Human Rights Practices 2008 (USSD 2008 report), released 25 February 2009, corruption, judicial inefficiency, lack of resources, and a large case backlog remained serious problems in Bangladesh.[241] The shortage of number of courts, delays in disposal of cases, along with the lack of any State facilities for legal aid,[242] have virtually made the judicial system inaccessible for the

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239 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Remand", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 258-292, at p. 260.

240 Ahmed, Justice Naimuddin. 2001. "The Problems of Independence of the Judiciary in Bangladesh", in Bangladesh Institute of Law and Informational Affairs (BILIA): *Human Rights in Bangladesh: A Study for Standards and Practices*. Dhaka: BILIA, pp.173-187, at p. 173.

241 UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

242 It needs to be mentioned that the government started a fund for legal aid from 1994. However, no official figures about the extent of legal aid actually provided by this committee could be obtained. except in one or two districts the legal aid activities have not gathered pace. In fact the judges often refer a legal aid case to relevant NGOs of the district instead of the official legal aid committee. And several factors may be responsible for the non-utilization of this legal aid fund. First and foremost, by making the district and sessions judge responsible for administering this fund, another burden has been placed on the judge who is generally overworked. A district judge is not only the highest trial and appellate judge of the district but also performs a host of administrative and other

vast majority of the poor and the disadvantaged. Also, the fact that the High Court Division in Dhaka is the only Court for enforcement of fundamental rights makes it rather impossible for litigants from outside Dhaka to file cases for violation of their rights unless they can command sufficient funds for such litigation. And in terms of budgetary allocations, the Judiciary is one of the lowest priority sectors with the result that in addition to the small number of courts, the Courts are also constrained by a lack of resources, in terms of administrative and other relevant personnel and facilities. One of the interesting causes of delay in civil matters lies in the fact that the serving of the petition may take months simply because there may not be enough process servers to actually deliver a copy of the petition on all the defendants immediately. This simple communication can be inordinately delayed if the number of defendants is large. The Courts have not been modernized in terms of information technology. In fact only the five highest Judges of the Appellate Division currently have access to computer facilities. None of the hundreds of other Judges or their offices have been equipped with any means of modern technology. Any copy of any Court documents related to any proceedings including judgments of the Lower Courts are still mostly copied by handwriting, which makes the task of obtaining any Court paper a very lengthy process.[243] Thus availability of efficient and dutiful lawyers, judges and staff of the Courts in the country may ensure delivery of proper relief to the aggrieved persons speedily through the present system of administration of justice. For proper delivery of justice speedily as efficiency of the lawyers, judges and staff of the Court is required so also their honesty and dutifulness are indispensible. It is also

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related functions. As such this responsibility of legal aid is another onerous duty for which he is not provided with any logistics or other necessary support. Secondly inclusion of the highest government officials of the district, such as the district commissioner and superintendent of police, do not we feel, make it a 'client friendly' body. The clients due to their comparatively disadvantages status may find it too intimidating to approach such a committee or body. Lastly the formalism inherent in any official action from which the district legal aid committee is not immune, makes it nearly impossible for this body to perform the task of providing services to the poor, the disadvantaged and women. The fact that the activities of this legal aid committee are not documented is indicative of the status of this committee in the concerned ministry itself. See for details Malik, Shahdeen. 2001. "Human Rights and the Role of the Judiciary", in Bangladesh Institute of Law and Informational Affairs (BILIA): *Human Rights in Bangladesh: A Study for Standards and Practices*. Dhaka: BILIA, pp.145-172, at p. 165.

[243] Malik, Shahdeen. 2001. "Human Rights and the Role of the Judiciary", in Bangladesh Institute of Law and Informational Affairs (BILIA): *Human Rights in Bangladesh: A Study for Standards and Practices*. Dhaka: BILIA, pp.145-172, at p. 171.

to be seen whether any reform in the system of administration of justice is necessary as a result of the socio-economic and political change in the country or not.[244]

However, in case of lower judiciary and their granting of remand for the purposes of extracting information Magistrates and Judges do not strictly follow the relevant legal provisions regarding confessions and sometimes base conviction on inadmissible or improper confessions. Conviction based solely on confessions seems to be a common incident in some Courts, and it is the quick conclusion of a case that is making this a common practice. A confession means that the police need not carry out further investigation for supporting evidence, that they can close a case quickly. It means that they need not ascertain whether the accused is telling the truth or whether he confesses in order to stop the inhuman torture being inflicted upon him. This overzealousness of the police is contagious and the Magistrates have picked it up. It is only when a few of the cases reach the High Court Division of the Supreme Court for appeal for retraction. However, not all such cases reach the high echelons of the Judiciary. A large number of persons who have been convicted based on confessions come from the poorer strata of society, who are unable to afford legal representation and do not know that they can appeal. When NGO's and other legal aid organizations hear of their plight, only then they are properly represented.[245] There is no specific definition of a confession or an extrajudicial confession in the Code of Criminal Procedure, 1898. There is no legal provision for a lawyer to be present when an accused makes a statement to the arresting police officers, section 29 of the Evidence Act 1872 casts doubt on how voluntary a confessional statement is if given under false promises of secrecy or by other such means. Section 533 of the Code of Criminal Procedure allows Magistrate to disregard the proper recording of confessions, causing conflicting judgments regarding the admissibility of confessional statements. There is no specific format or form used for writing down the statement of the accused person who confesses to a crime. The practice of taking the accused into remand for extraction of information leads to the physical torture of the latter, compelling him to make a confession. The major flaw that a magistrate may have

[244] Hoque, Kazi Ebadul. 2003. "Problems and Prospects of Administration of Justice", in Asiatic Society of Bangladesh: *Administration of Justice in Bangladesh*. Dhaka: Asiatic Society of Bangladesh, pp. 251-283, at p. 253.

[245] Khan, Saira Rahman. 2007. "The Use and Abuse of the Laws of Confession in Bangladesh", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 79-106, at pp. 100-103.

when getting ready to record a confessional statement is his disregard of the factors that could possible shed a negative light on the voluntary nature of the statement. Magistrate do not always follow the format laid down in section 164 and thus reassuring the accused and ensuring that the confession is being given voluntarily by him is not always done. There are cases where the Magistrate first sent the accused to police remand and then accepted his confession as 'voluntarily given'. There are cases where the Magistrate has sent the accused person back into police custody after his confession was recorded, in total contravention of the law.[246] While carrying out archival research, a case was discovered where the magistrate, before recording the confession, made the accused take an oath, in contravention with the laws of confession, where the accused cannot be compelled to make such a statement.[247] There are instances where the magistrate has failed to take into account the fact that the accused was not brought before him within 24 hours of his arrest and has recorded the latter's confessional statement never the less. Magistrates have also made convictions based on the confession of a co-accused without considering any material or corroborative evidence. With regard to the law on confessions, there seems to be a lack of professional knowledge ineptness in addressing the subject on the part of the Lower Judiciary, often leading to serious acts of injustice. In case of retraction applications, the Magistrate who recorded the confession is not always introduced as a witness in the proceedings in the Sessions Court and thus cannot opine or verify whether a confession was given voluntarily or not. The accused is sometimes not told that he does not need to make a confession by the Magistrate or that his confession may be used against him during trial. It is common for the accused to give a confession at the end of a period of remand under duress by the police. A co-accused is under the misconception that if he confesses against another co-accused, his sentence will be lighter. An accused sometimes sent back to police custody for a second time after his confessional statement has been recorded by the Magistrate. An accused is sometimes convicted solely on the basis of his confessional statement or on the confessional statement of a co-accused. Police torture during remand may lead to the death of the accused. A bitter price to pay to get a statement of admission, whereas

[246] For example in *State v. Abdul Hashem* (1998) 3 MLR (HCD) 30.

[247] *Muhammad Baksh v. State (S.C.)* (1957) 9 DLR 11.

it is also necessary for the police to carry out an investigation for material evidence as well.[248]

The next chapter i.e. chapter 6 focuses on the role of the Executive in torture prevention clarifying the obligation of the state to prosecute, how state provides guarantees against abuses of human persons and lastly the present scenario of formulating strategies to improve torture survivors access to justice. The last part of this chapter is nothing but to scrutinize the impediments that are getting in the way of activating implementation and promoting the effective prevention of torture.

[248] Khan, Saira Rahman. 2007. "The Use and Abuse of the Laws of Confession in Bangladesh", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 79-106, at p. 102.

CHAPTER 6

INSTITUTIONAL COMPLIANCE: ROLE OF THE EXECUTIVE IN ACTIVATING IMPLEMENTATION AND PROMOTING THE EFFECTIVE PREVENTION OF TORTURE

The Executive, another main organ of the State; Bangladesh, is bound by the international responsibility regarding torture. The law of responsibility is concerned with the incidence and consequences of illegal acts under international law since prohibition of torture; a right of an international character involves international responsibility. When a State commits an international wrong it is responsible under international law to cease the wrongful conduct and also to afford adequate reparation for that.[1] However, there is a strong legal argument to be made for an emerging principle in international law that States have affirmative obligations in response to massive and systematic violations of fundamental rights.[2] As established by the Permanent Court of International Justice that it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. According to the Court this is not only a principle of international law, but is "even a general conception of law".[3] So the Executive as the implementing organ of the State can in any way escape from its responsibility to protect individuals from the abuses of its activities and to provide individual victims with a forum to seek redress. And accordingly this part 'torture prevention and the executive' focuses the obligation of the Executive organ in the light of the *Aut Dedere Aut Judicare,* the existing guarantees provided by the executive against abuses of human persons in the name of torture and also strategies to provide torture survivors access to justice.

In this part and also the whole chapter with the term 'state actors' focuses the other organ's role that is the role of the Executive in torture prevention clarifying the

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1 REDRESS. 2003. *Reparation: A Source Book for Victims of Torture and other Violations of Human Rights and Humanitarian Law*. London: REDRESS.

2 Odeku, Kolawole Olusola. 2008. *In Search of a Regime of Responsibility and Accountability for Perpetrators of Torture with Reference to Persons with Special Responsibility for Protecting Human Rights.* South Africa: University of Fort Hare. (Unpublished PhD thesis).

3 REDRESS. 2003. *Reparation: A Source Book for Victims of Torture and other Violations of Human Rights and Humanitarian Law*. London: REDRESS.

obligation to prosecute, guarantees against abuses of human persons and lastly formulating strategies to improve torture survivors access to justice. It is again to be noted that even if the NGOs are playing vital roles in making the places for effective implementation, this thesis and specially this part is nothing but the role of the Judiciary and the Executive as an institution here i.e. the state actor role in implementing and promoting anti torture regime. The NGOs are leaving apart from the main role[4] here because they have no international obligation just like the state actors though they are doing it from their national and organizational obligation.

6.1 Obligation of the Executive to Prosecute

In the enforcement of the prohibition of torture, the focus on the individual without acknowledgment of the overall State involvement only serves to sustain impunity through the exceptionalisation of the actions of an individual perpetrator as distinct from the State itself. Moreover, while holding individual officials civilly and criminally responsible presents an essential component of the prohibition of torture, it cannot substitute or suffice for the accountability of the State itself. The International Law Commission rightly pointed out that every internationally wrongful act of a State entails the international responsibility of that State. Liability arises where the violation is attributable to the State, meaning that the individual official must have been acting in an official capacity or holding themselves out to be acting in an official capacity, even if their acts were (*ultra vires*), that is, beyond their authorized powers. A State party may be held responsible for attacks by private persons or entities upon the enjoyment of human rights. For example, under the ICCPR, State parties have an obligation to take positive measures to ensure that private persons or entities do no inflict torture or cruel, inhuman degrading treatment or punishment on others within their power. Human rights law also places a certain responsibility upon States to provide effective remedies in the event of violations. Those human rights that are part of customary international law are applicable to all States. The State may also be held responsible if it fails to provide an effective remedy for the violation as required by international law. The nature of States' obligations under international human rights law obliges States to do certain things and prevents them from doing others. States have a duty to respect, protect and fulfill human rights. Respect for human rights

[4] The helping role is still present in this thesis.

involves not interfering with their enjoyment. Protection entails taking steps to ensure that others do not interfere with the enjoyment of rights. The fulfillment of human rights requires that States adopt positive appropriate measures, including legislative, judicial, administrative or educative measures in order to fulfill their legal obligations[5] and Bangladesh is not outside that scope and is doing the same through its actors. The previous chapter of this thesis focused on the legislative and judicial measures and this one provides for the administrative i.e. the measures taken by the Executive to fulfill the obligation that Bangladesh has internationally regarding torture. The First part starts with the accountability of the State regarding implementation of this obligation that presently Bangladesh is trying to do through its newly enacted legislation namely the Torture and Custodial Death (Prevention) Act, 2013 and later on she goes for reforming, reviewing and addressing the abuse of powers and irregularities done by the main law enforcing agency in Bangladesh i.e. by the police. The second part provides the guarantees against the abuses of human persons through institutional reform by the Executive like separation of powers, establishing Law Commission, National Human Rights Commission, and National Legal Aid Services Organization. And the last one is about the existing and upcoming strategies of the government to improve torture survivor's access to justice through supporting legal assistance programs and promoting access to justice and human rights in Bangladesh.

6.1.1 Torture and Custodial Death (Prevention) Act, 2013

Bangladesh signed the UN Convention against Torture and Cruel, Inhumane or Degrading Treatment or Punishment on October 5, 1998, during the tenure of an Awami League-led government, promising to create effective legislation and take administrative, judicial or other measures to prevent acts of torture.[6] In pursuance of this obligation a tough new law named the Torture and Custodial Death (Prevention) Act, 2013 that provides for life imprisonment for members of police and other law enforcement agencies if they found guilty of custodial deaths, has been passed by Bangladesh's Parliament. The Bill was introduced a few months after the Parliament

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5 Odeku, Kolawole Olusola. 2008. *In Search of a Regime of Responsibility and Accountability for Perpetrators of Torture with Reference to Persons with Special Responsibility for Protecting Human Rights.* South Africa: University of Fort Hare. (Unpublished PhD thesis).

6 The Daily Star. 2013. 'Life sentence for custodial death, torture convicts', available at:< http://www.thedailystar.net/beta2/news/life-sentence-for-custodial-death-torture-convicts/>, last accessed on 28 October 2013.

first sat in 2009 and was passed nearly five years after ruling Awami League lawmaker Saber Hussian Chowdhury brought it as a Private Member's Bill.[7] It was drafted aimed at curbing tortures by the law enforcement agencies on common people under custody[8] and to conform to the UN Convention against Torture and Cruel, Inhumane or Degrading Treatment or Punishment, adopted in 1984.[9] However, police torture on Awami League MP Saber Hossain Chowdhury during the previous tenure of the BNP, prompted the leader to frame a law to prevent torture and death in custody of the police and other law enforcement agencies. The Constitution stipulated that none could do anything causing physical damage to people, curtailing their freedom, costing their property or tarnishing their image. But the constitutional rights are being violated repeatedly; the misuse of laws has been going on. Different State organs, especially the law enforcing agencies, very often forget the fundamental rights of the people. In many cases, justice cannot be delivered, said Saber Hossain Chowdhury. He said the law would be a big "no" to such human rights violations in Bangladesh.[10] However, the AHRC termed the enactment unique as the Bill was placed in the Parliament as a Private Member Bill by a lawmaker from the Treasury Bench. The enactment is the quintessence of the struggles and demands of the people, survivors of torture, families of extrajudicial executions, and human rights defenders to end the culture of custodial violence in the country. With the passing of this special statute, which criminalizes all forms of custodial violence, Bangladesh shares a covetable position amongst its counterparts in Asia. This law, which will enable everyone in Bangladesh to fight against all forms of custodial violence, is thereby one that draws from both the experience of a human rights group and the personal experiences of a torture survivor. Today, Bangladesh shares an unenviable position with its peer nations because it has one of the most dysfunctional and defunct criminal justice mainframes in Asia. Corruption is rife in the investigative, prosecutorial, and

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7 Anisur Rahman. 2013. 'New Bangladesh Law to Prevent Custodial Deaths', available at:< http://news.outlookindia.com/items.aspx?artid=814925>, last accessed on 28 October 2013.

8 Kamran Reza Chowdhury. 2013. 'JS passes bill to stop custodial deaths', available at:< http://www.dhakatribune.com/law-amp-rights/2013/oct/25/js-passes-bill-stop-custodial-deaths>, last accessed on 28 October 2013.

9 Anisur Rahman. 2013. 'New Bangladesh Law to Prevent Custodial Deaths', available at:< http://news.outlookindia.com/items.aspx?artid=814925>, last accessed on 28 October 2013.

10 Kamran Reza Chowdhury. 2013. 'JS passes bill to stop custodial deaths', available at:< http://www.dhakatribune.com/law-amp-rights/2013/oct/25/js-passes-bill-stop-custodial-deaths>, last accessed on 28 October 2013.

adjudicative limbs of the Bangladesh criminal justice machinery. Exceptional challenges exist for those that dare to make complaints of custodial violence in Bangladesh. While this has been addressed to a certain extent by the new law, now a complainant can approach the Court to file a complaint against torture and other forms of custodial violence.[11]

As per the law, torture means acts which cause physical or mental pain and are intended to intimidate, coerce or punish someone to obtain information or a confession. It also says that any person who attempts to commit, aid and abet in committing, and conspires to commit an offence shall also be guilty of an offence.[12] Under the law, personnel of Police, Rapid Action Battalion (RAB), Border Guard Bangladesh (BGB), Customs, Immigration, Criminal Investigation Department (CID), Intelligence Agencies, Ansar and Village Defence Party, Coast Guard and other public servants cannot extract confessional statement through torture. Any person attempting to commit, aiding and abetting to commit, or conspiring to commit an offence must be considered as an offender according to this law. The Court will immediately record the statement of any person who declares he was tortured in custody and then order physical examination of the victim by doctors.[13] The new legislation provides for adverse presumption against the State agent, if it is proven that a person under the State's custody has been tortured or has died whilst in custody, the statement said.[14] Besides, any suspect or criminal cannot be physically or mentally coerced or intimidated. The law enforcement agencies could not justify their offences even during war-like situation, threat of war, internal political instability and

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[11] The Financial Express. 2013. 'AHRC urges BD to implement new law against torture, custodial violence', available at:< http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMTBfMjdfMTNfMV8yXzE4ODExOQ==>, last accessed on 28 October 2013.

[12] The Daily Star. 2013. 'Life sentence for custodial death, torture convicts', available at:< http://www.thedailystar.net/beta2/news/life-sentence-for-custodial-death-torture-convicts/>, last accessed on 28 October 2013.

[13] Anisur Rahman. 2013. 'New Bangladesh Law to Prevent Custodial Deaths', available at:< http://news.outlookindia.com/items.aspx?artid=814925>, last accessed on 28 October 2013.

[14] The Financial Express. 2013. 'AHRC urges BD to implement new law against torture, custodial violence', available at:< http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMTBfMjdfMTNfMV8yXzE4ODExOQ==>, last accessed on 28 October 2013.

emergency.[15] And for the first time in Bangladesh, the law addresses delays in investigation and adjudication of the cases of custodial violence.[16] The new law mandates suspension of the accused from service during investigation into the charges, regardless of whether the suspect is a member of a regular law-enforcement agency, the armed forces, or any other government office.[17] The law mandates that investigations into cases of torture will have to be completed within 90 days of registration of a complaint, and the trial will have to be completed within 180 days.[18] The law further says, any aggrieved person can turn to the Court if they thought that the police could not carry out any investigation. In that case, the Court could instruct for a judicial inquiry into the allegation. And for any death in custody, the custodian would be awarded with rigorous life imprisonment or a fine of Tk100, 000. In addition, they must compensate the family members of the affected with Tk 200, 000 also.[19]

6.1.2 Police Reform Program

A Police Reform Programme (PRP), designed to assist the Bangladesh Police to improve performance and professionalism, to ensure equitable access to justice and to be more responsive to the needs of vulnerable people, commenced in 2005 and then progressed more rapidly under the Caretaker Government. Under the Police Reform Program, a draft Ordinance (Bangladesh Police Ordinance 2007) was prepared to replace the Police Act of 1861; it aimed to redefine the roles and responsibilities of

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15 Kamran Reza Chowdhury. 2013. 'JS passes bill to stop custodial deaths', available at:< http://www.dhakatribune.com/law-amp-rights/2013/oct/25/js-passes-bill-stop-custodial-deaths>, last accessed on 28 October 2013.

16 The Financial Express. 2013. 'AHRC urges BD to implement new law against torture, custodial violence', available at:< http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMTBfMjdfMTNfMV8yXzE4ODExOQ==>, last accessed on 28 October 2013.

17 Anisur Rahman. 2013. 'New Bangladesh Law to Prevent Custodial Deaths', available at:< http://news.outlookindia.com/items.aspx?artid=814925>, last accessed on 28 October 2013.

18 The Financial Express. 2013. 'AHRC urges BD to implement new law against torture, custodial violence', available at:< http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMTBfMjdfMTNfMV8yXzE4ODExOQ==>, last accessed on 28 October 2013.

19 Kamran Reza Chowdhury. 2013. 'JS passes bill to stop custodial deaths', available at:< http://www.dhakatribune.com/law-amp-rights/2013/oct/25/js-passes-bill-stop-custodial-deaths>, last accessed on 28 October 2013.

police.[20] The PRP is a long-term and comprehensive capacity building initiative to improve human security in Bangladesh. The main objective of the project is to support in the transition from a colonial style policing to democratic policing by strengthening the Bangladesh Police's ability to contribute to a safer and more secure environment based on respect for the rule of law, human rights and equitable access to justice. The Phase-I of the PRP was implemented by the Bangladesh Police with the financial assistance of UNDP, DFID and European Commission from January 2005 to September 2009. The Phase-I established the foundation of police reform initiative by introducing Model Thana, Victim Support Centers and a Community Policing Philosophy across the country. The Phase-II which will be implemented by Bangladesh Police under the Ministry of Home Affairs during the period from October 2009 to September 2014 provides necessary supports to implement the "Strategic Plan of Bangladesh Police-2011" and to achieve the strategic direction and organizational reform; human resource management and training; investigations, operations and policing; crime prevention and community policing; promotion gender sensitive policing; and information, communication and technology.[21]

6.1.2.1 Review of Policies, Procedures and Practices

Within the Police Reform Program, the Government is also reviewing its existing policies, procedures and practices in this sector and takes certain steps starting with the building of Service Delivery Centres and the Victim Support Centres in order to co-operate the prevention of crimes in Bangladesh.

However, the newly built Service Delivery Center at Habiganj Sadar Model Police Station was formally inaugurated with an emphasis on friendly community-police relations based on mutual understanding, trust and cooperation to prevent crime. Mr. Tripura said that partnerships between police and communities, especially vulnerable and disadvantaged groups, pave the way for voicing grievances, suggestions and recommendations by the people in order to improve policing. The aim of the Service Delivery Center is to facilitate interaction, foster partnership between people and

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[20] UNHCR. 2009. 'Country of Origin Information Report – Bangladesh',< available at: http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

[21] Police Reform Programme. 2009. 'Police Reform Programme -- Phase-II', available at:< http://www.prp.org.bd/prpNews.htm#prpcon>, last accessed on 14 May 2013.

police and to ensure community involvement in the process. This will provide an opportunity for the local residents to visit the Model Thanas to see what is happening in their local police station and discuss how to improve the interaction on the issues that affect them. Police can also facilitate community efforts to create positive changes within their neighborhood. It will provide Police an opportunity to take into account community aspirations and make sure efficient use of limited resources. The Police-Community interaction will promote openness in police practices and improve police image.[22]

And in order to encourage the victims to report crime to police in a safe and secure environment whilst accessing professional services, the Police Reform Programme (PRP) has a plan to establish 8 Victim Support Centres (VSC) around the country. The PRP has already established one VSC, an all female police run project, funded by the UNDP' Police Reform Programme was established at Tejgaon Police Station premises at the capital in 2009 in Dhaka is now fully operational. [23] It is staffed by 17 trained female police officers and is supported by a network of health care professionals, social workers, lawyers and NGO personnel. It provides legal aid, shelter, medical facility, rehabilitation, counseling etc to the woman and child victim with the help of the partner NGOs. The UN Development Program's Country Director, Stefan Priesner, commented at the Centre's inauguration that it reflected the significant shift that has taken place in the police mind set in recent years.[24] The second, third and fourth VSC are to be established at Rangamati, Rangpur and Chittagong soon. The PRP has a specific focus on the poor and disadvantaged, women and children in terms of their access to justice. In order to encourage the victims to report crime to police in a safe and secure environment, the Victim Support Centre would be a unique opportunity.[25] However, a Memorandum of Agreement (MoA) was signed at Police Headquarters between the Bangladesh Police and 10

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22 Police Reform Programme. 2009. 'Inauguration of newly built Service Delivery Center', available at :< http://www.prp.org.bd/prpNews.htm#prpcon>, last accessed on 14 May 2013.

23 Police Reform Programme. 2011. 'Workshop on Victim Support', available at:< http://www.prp.org.bd/prpNews.htm#prpcon>, last accessed on 14 May 2013.

24 UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013

25 Police Reform Programme. 2011. 'Workshop on Victim Support', available at:< http://www.prp.org.bd/prpNews.htm#prpcon>, last accessed on 14 May 2013.

NGOs on the smooth functioning of the Victim Support Centre. Under this agreement the partner NGOs will be working with the Victim Support Centre for one year and be available to provide assistance and support on a twenty four hour basis. The partner NGOs are Ain o Shalish kendra, Association for Community Development, Association for Correction and Social Reclamation, Aparajeyo Bangladesh, Acid Survivors Foundation, Bangladesh National Woman Lawyers' Association, Bangladesh Mohila Parishad, Bangladesh Legal Aid and Services Trust, Dhaka Ahsania Mission and Maries Stopes. The Victim Support Centre has provided support to 828 victims since its opening. The IGP said that a strategy based on the social cultural context should be formulated for providing supports to the victims in such centers.[26] In order to provide appropriate, professional and timely assistance to victims of crime, all staff at the VSC have been provided with specialized training to enhance their capacity to deal with victims and to facilitate and coordinate a support network, engaging health care professionals, social workers, lawyers and different NGOs personnel.[27]

6.1.2.2 Steps to Address Abuse of Power or Irregularities

Police Reform Program is also providing various specialized training, recommends increases in pay and improved allowances, proposed the establishment of a Police Complaints Commission, as well as a Summary Court for the quick adjudication of cases against police personnel accused of abuse of power or other irregularities. According to the USSD 2008 report, the Government took steps to address widespread police corruption and a severe lack of training and discipline. The Inspector General of Police continued to implement a new strategy, partially funded by international donors, for training police, addressing corruption, and creating a more responsive police force.[28] Police Reform Program is providing various training to the Police Officers for building their capacity in order to improve human security in Bangladesh. The trained officers should be at their respective workstation or thanas

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[26] Police Reform Programme. 2011. 'Victim Support Centre', available at:< http://www.prp.org.bd/prpNews.htm#prpcon>, last accessed on 14 May 2013.

[27] Police Reform Programme. 2009. 'Inauguration of Bangladesh's first Victim Support Center', available at :< http://www.prp.org.bd/prpNews.htm#prpcon>, last accessed on 14 May 2013.

[28] UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

for a reasonable period so that they can render improved service to the people.[29] It also recommended pay increases and improved allowances for police personnel, and provided for specialized training of officers. The draft ordinance proposed the establishment of a Police Complaints Commission, as well as a Summary Court for quick adjudication of cases against police personnel accused of abuse of power or other irregularities.[30]

Police Reform Program (Phase-II) has completed the last workshop on the PRP Annual Work Plan and the Dissemination of the Crime Prevention Strategy with Division and Metropolitan level for this year. Some important suggestions also came out like the RMP Commissioner proposed PRP to provide support to establish a Campus Police in Rajshahi. Besides, the officers requested PRP to provide support for effective in-service training. Mr. Tripura advised the Police Officers to build up the image of Police and bridge the gap between Police and People. He emphasized on the need to strengthen the Community Police Network[31] which is one of the five key strategic areas identified in Bangladesh Police's Strategic Plan 2008-2010. The foundations of a successful community policing strategy are the close, mutually beneficial ties between police and community members; a meaningful partnership that jointly and effectively addresses community concerns and improves the quality of life of citizens. Bangladesh Police aims to ensure successful adoption of the Community Policing philosophy through greater involvement with the public, changes in working procedures, pro-active consultation and effective monitoring of implementation. In order to achieve this, in December 2008, a total of 579 Community Policing Officers (CPOs) of the rank of Sub-Inspector were assigned to all police stations across the country to coordinate and supervise community policing activities at the 'grass-roots' level. To develop the skills and capacity of CPOs and create a dedicated group of police officers who will work for the effective functioning of community policing, the Police Reform Program (PRP) in June 2009, organized training programs on Crime

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[29] Police Reform Programme. 2010. 'Workshop on Gender Guidelines', available at:< http://www.prp.org.bd/prpNews.htm#prpcon>, last accessed on 14 May 2013.

[30] UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

[31] Police Reform Programme. 2010. 'Workshop on the PRP Annual Work Plan and the Dissemination of the Crime Prevention Strategy', available at :< http://www.prp.org.bd/prpNews.htm#prpcon>, last accessed on 14 May 2013.

Prevention and Community Policing for CPOs. PRP conducted training for a total of 60 CPOs from all six Divisions. The 60 CPOs are expected to deliver training to CPOs in their respective divisions to bring about a transition in skills, motivation, attitudes, values, and culture towards a community policing approach.[32] Crime prevention and community policing component of PRP continues its capacity development and strategy dissemination interventions. In May 2010, PRP organized four Joint Workshop for Community Policing Forum Members, Community Policing Officers (CPOs), Officers in–Charge (OCs) of in four Districts; Thakurganon, Dinajpur, Lalmonirhat and Rangpur. The workshops reviewed the concept of Community Policing, accelerated the areas of mutual cooperation and optimum utilization of PRP supports in order to put into practice effective Community Policing in model unions. A total of 182 of CPF members, CPOs and OCs participated in the workshops.[33] However, Police Reform Program sponsored a delegation of Bangladesh Police to attend a Conference on Crime Prevention being conducted in Perth, Australia in 2009 and review existing crime prevention programs. The objective of the participation at this conference was to enable the policy level officers to understand the ongoing crime prevention policies, the best practices and the implementation mechanisms. These were the unique opportunities to expose Bangladesh Police to regional police policies, procedures and practices and the participants will be able to interact with police practitioners to discuss local and regional policing issues.[34]

6.2 Guarantees against Abuses of Human Persons

The Executive made arrangements for the independence of the judiciary through the separation of powers and establishes Law Commission, Human Rights Commission and National Legal Aid Services Organization in order to afford guarantees against certain abuses of human persons providing the active implementation and promoting the effective prevention of torture.

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[32] Police Reform Programme. 2009. 'Training on Crime Prevention and Community Policing', available at :< http://www.prp.org.bd/prpNews.htm#prpcon>, last accessed on 14 May 2013.

[33] Police Reform Programme. 2010. 'Joint Workshop for Community Policing Forum Members, Officer In Charge (OC) and the Community Police Officers CPOs', available at :< http://www.prp.org.bd/prpNews.htm#prpcon>, last accessed on 14 May 2013.

[34] Police Reform Programme. 2009. 'Crime Prevention Conference and Crime Prevention Futures Forums' Workshop', available at :< http://www.prp.org.bd/prpNews.htm#prpcon>, last accessed on 14 May 2013.

6.2.1 Judicial Independence

The powers of the State are generally classified as the legislative power of making rules, the executive power of enforcing those rules and the judicial power of adjudicating disputes by applying those rules. In order to avoid autocratic exercise of powers of the State it is thought that these three powers should be entrusted to three different organs. In practice, however, no water-tight separation of powers is possible or desirable. The prevalent 'doctrine of checks and balances requires that after the main exercise has been allocated to one person or body, care should be taken to set up a minor participation of other persons or bodies. Budget and impeachment, judicial review and pardon are examples of this sort of check.' Independence of Judiciary is a basic feature of the Constitution and separation of powers as contemplated under article 22 of the Constitution is a *sine qua non* for such independence.[35] For guardianship of the Constitution and for the establishment of rule of law, independence of the judiciary is absolutely necessary. And provisions were made to ensure the independence of the Judges of the Supreme Court, subordinate Judicial Officers and the Magistrate exercising judicial functions[36] ensuing the Code of Criminal Procedure (Amendment) Ordinance which came into effect on 1 November 2007, separating the lower Judiciary from Executive control and placing it under the jurisdiction of the Supreme Court.[37] Also the enactment of historic Bill towards 'separation of judiciary' by the Ninth Parliament by enacting the Code of Civil Procedure (Amendment) Act, 2009 gave the separation of judiciary a permanent shape which is considered a milestone to the successes of the then democratic government.[38] And the Supreme Court of Bangladesh, including both of its Divisions, is the only genuinely independent Court in the country. In fact, in contrast to other parts of Bangladesh's judiciary, it has up to the present obtained public respect for its uprightness and non-partisan decisions. Among its historic verdicts in recent times was its order to the Government to cleave off the two lower tiers from the various

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35 Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 90.

36 *Ibid.*, at p. 22.

37 UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

38 Ministry of Law, Justice and Parliamentary Affairs, Bangladesh, Law & Justice Division. 2010. 'Brief Description of the Projects of Law and Justice Division', available at:< http://www.lawjusticediv.gov.bd/images/success_english.pdf >, last accessed on 1st October 2013.

Ministries to which they are answerable (in *State vs. Mr. Mazdar Hossain*, 2 December 1999). That order included 12 directives to the Government, including to establish a Judicial Service Commission for recruitment of judges of the subordinate Courts and to ensure financial upkeep of the Courts.[39] The question of enforceability of constitutional conventions came up before the Appellate Division in *Bangladesh v. Idrisur Rahman* (2009) BLD (AD) 79 and the Court upon consideration of the constitutional history and the decisions of different jurisdictions answered the question in the affirmative stating, "in the matter of appointment of judges under Article 98 and 95 of the Constitution the convention of consultation having been recognized and acted upon has matured into constitutional convention and is now a constitutional imperative. However, the actions of the Executive particularly appointment of judges without consideration of merit and suppressions in the matter of appointment of the judges and Chief Justices made the independence of the judiciary a thing to be cherished."[40]

6.2.2 Law Commission

The Law Commission is established by the Law Commission Act, 1996. As per section 5 of the Law Commission Act, 1996, the Commission consists of a chairman and two Members. Under the law, the Government is empowered to increase the number of its Members. The Chairman and Members of the Commission hold their respective offices for a term of three years from the date of their appointment. The chairman or a member may be reappointed by the Government for the prescribed term after the expiry of the said term. The Commission is supported by a Secretary and three Senior Research Officers, one Assistant Secretary and two translation officers. However, the functions of the Commission are to identify the causes of delay of civil and criminal cases in various courts and with a view to accelerate their disposal and ensure justice as quickly as possible; to recommend amendment of laws concerned or enactment of new laws in appropriate cases after examination; recommend necessary reforms in order to modernize the judicial system; training and other measures for the improvement of the efficiency of the persons involved with the judicial system such

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[39] Ashrafuzzaman, Md. 2006. "Laws without order & courts of no relief in Bangladesh", Vol. 5 No. 4 *Article 2 of the International Covenant on Civil and Political Rights*, pp. 20-29, at p. 25.

[40] Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. 3rd edn. Dhaka: Mullick Brothers, at p. 22.

as judicial officers, staff, law officers and lawyers; to recommend necessary measures for improvement of the entire judicial system and specially to prevent the abuse of the application of the laws concerned; modernization of different aspects of court management, such as, distribution of works among judges, supply of copies, transmission and preservation of records, service of notices and other relevant matters; an acceptable measure regarding the feasibility of introducing a more efficient and accountable system in place of the present system for conducting the various government cases properly and establishing a separate investigating agency for the investigation of the criminal cases; keeping in mind the attraction of domestic and foreign investigation and necessity of free market economy. It recommended amendment of relevant laws including company law or legislation of new law in appropriate cases in order to create competitive atmosphere in the field of trade and industry and to avoid monopoly; after examination, measures with regard to relevant laws especially copyright, trademarks, patents, arbitration, contract, registration and similar other matters; recommended necessary measures for the establishment of separate courts for disposal of cases arising out of commercial and bank loan matters; necessary and timely amendments and reforms of the existing electoral laws administered by the Bangladesh Election Commission; and after examination, necessary reforms of the existing laws and enactment of new laws in appropriate cases, in order to safeguard the rights of women and children and prevent repression of women. It also recommends reforms of existing laws, enactment of new laws in appropriate cases and taking of other acceptable measures for the proper implementation of legal-aid programs; to identify the various laws which conflict with each other on the same subject and in probable cases, recommends codification and unification of various laws on the same subject; repeal of existing laws which are inconsistent with the fundamental rights and in appropriate cases making amendments with regard thereto; after identification repeal of obsolete and unnecessary laws and in case of necessity, legislation of laws on any subject; acceptable measure for the upgrading of legal education, and also recommends with regard to other legal matters referred by the government from time to time.[41]

[41] Ministry of Law, Justice and Parliamentary Affairs, Bangladesh, Legislative & Parliamentary Affairs Division. 2010. 'Law Commission', available at:< http://www.legislativediv.gov.bd/legislative1/static/law_commission.php>, last accessed on 28 October 2013.

6.2.3 National Human Rights Commission

On 9th July, 2009 Parliament approved a bill ratifying the establishment of the National Human Rights Commission (NHRC) 'for the protection, development and institutionalization of human rights in the country.' As noted in the Daily Star of 13 December, various previous governments had described the setting up of a National Human Rights Commission 'watchdog' as a priority, and the approval of this ordinance represented the first definite action towards establishing such an institution. The Secretary-General of Amnesty International was quoted as welcoming the decision to create an NHRC provided that the body was made to be effective and strong, and the selection of its members and its funding were done in an accountable, transparent way. "The functions of the Commission will include investigating any allegation of human rights violation received from any individual or quarter, or the Commission itself can initiate investigation into any incident of rights violation. The Commission would be empowered to investigate particular human rights violation allegations brought forward by citizens or discovered through their own monitoring. If a human rights violation has been proved, the NHRC can either settle the matter or pass it on to the Court or relevant authorities."[42] However, contribution to the enactment of the National Human Rights Commission (NHRC) Act, 2009, and support to the establishment of the NHRC is one of the major accomplishments of one of the government project from July 2007 to January 2011. The project provided intensive support in the drafting, development and enactment of the National Human Rights Commission (NHRC) Act, 2009. In addition, the project has extended its logistic and technical support at primary stage of the NHRC office.[43]

6.2.4 National Legal Aid Services Organization

Article 27 of the Constitution of the People's Republic of Bangladesh guarantees that, "all citizens are equal before law and are entitled to equal protection of law". Article 33(1) of the Constitution entails that no person arrested shall be detained in custody

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[42] UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: < http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

[43] Ministry of Law, Justice and Parliamentary Affairs, Bangladesh, Legislative & Parliamentary Affairs Division. 2010. 'Promoting Access to Justice and Human Rights in Bangladesh Project', available at:< http://www.legislativediv.gov.bd/legislative1/static/A2J_Project.php>, last accessed on 28 October 2013.

without being informed immediately the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. Despite such provisions, many people in Bangladesh are deprived of their Constitutional rights to access justice due to poverty faced by them. Most of the people are not only poverty- stricken but are also deprived of the minimum basic needs of life. Modern life and civilization are beckoning of the horizon to them. Poverty, illiteracy, lack of knowledge keeps the indigent people illiterate and wants has still kept them subjugated and ignorant of the basic human rights and amenities. The poor litigants are unable to reach the doorsteps of the justice system as it is expensive, time consuming and impenetrable often leaving the poor litigants to silently bear the agonies of injustice. In order to ensure access to justice to the poor and indigent people, the Government of Bangladesh enacted the Legal Aid Services Act, 2000 (LASA) and thereafter the National Legal Aid Services Organization (NLASO) was established to implement the Government legal aid program across the country.

The general direction and administration of the affairs and functions of NLASO is vested in the National Board of Management which consists of 19 members and is chaired by Hon'ble Minister, Ministry of Law, Justice & Parliamentary Affairs. There are 64 District Legal Aid Committee (DLAC) through which NLASO implements the Government legal aid program at the District level. DLAC maintains a legal aid fund allocated by the Government which is spent for poor litigants upon their applications. There are Upazila and Union level committees also working to spread the legal aid program at the grassroots level.[44] The state legal aid program is currently administered within the legal frame work of the Legal Aid Services Act, 2000 (LASA). In terms of LASA, National Legal Aid Services Organization (NLASO) has been established by the Government. NLASO is a statutory body working under Ministry of Law, Justice & Parliamentary Affairs to adopt policies and principles for making legal services available under the Act. NLASO is responsible to implement government legal aid across the country. Management authority of NLASO is vested in a National Board of Management chaired by the Minister, Ministry of Law, Justice

[44] Ministry of Law, Justice and Parliamentary Affairs, Bangladesh, Law & Justice Division. 2010. 'National Legal Aid Services Organization', available at:< http://www.lawjusticediv.gov.bd/static/legal_aid.php>, last accessed on 28 October 2013.

& Parliamentary Affairs. The National Board of Management includes representatives from the Government Ministries, Parliamentarians, the Bangladesh Bar Council, the Supreme Court Bar Association, the Jatiya Mahila Sangstha, national NGOs and women organizations. NLASO has following wings to implement legal aid program. First the Supreme Court Legal Aid panel consists of 34 panel lawyers headed by a Coordinator. Presently the legal aid service of the panel is only confined to jail appeal cases. The panel lawyers receives jail appeal cases from the poor detainee through Jail Authority or any other sources and file cases before the Court. This panel works under the direct control and supervision of NLASO. Secondly the District Legal Aid Committee which is structured by section 9 of the LASA, 2000. It implements the government legal aid program at District level. There are 64 District Legal Aid Committee working in the country headed by the District & Session Judge of each District. Representatives from both government and non-government sides also work in District Legal Aid Committee. It works in the district under the direct supervision of the NLASO. There is also the Upazila Legal Aid Committee that implements the government legal aid program at upazila level. There are 480 Upazila Legal Aid Committee working across the country. Upazila Legal Aid Committee is headed by the Upazila Chairman of the concerned Upazila Parishad. Representatives from both government and non-government sides also work in Upazila Legal Aid Committee. It works in the Upazila under the direct supervision of the District Legal Aid Committee (DLAC). Lastly, the Union Legal Aid Committee implements the government legal aid program at Union level. There are 4498 Union Legal Aid Committees working in the country. Union Legal Aid Committee is headed by the Union Chairman of the concerned Union Parishad. Representatives from both government and non-government sides also work in Union Legal Aid Committee. It works in the union under the direct supervision of the District Legal Aid Committee (DLAC). However, NLASO provides legal aid to the poor litigants who are incapable of seeking justice due to financial insolvency, destitution, helplessness and also for various socio-economic conditions.[45] It also provides wide range of legal

[45] Any insolvent person whose annual average income is not above Tk. 50,000/- ; Freedom fighters disabled, partially disabled, unemployed or unable to make a yearly income above 75,000 Taka; An individual receiving old age allowance; Distressed mother holding a VGD (Vulnerable Group Development) card; Women and children victims of trafficking; Women and children victims of acid throwing by the miscreants; Allotee of a house or land in a model village; Insolvent widow, a woman abandoned by husband or a distressed woman; Disabled person, unable to earn and destitute; Person unable to protect his/her right in court or to defend him/herself due to financial

services to the poor and disadvantaged. NLASO service includes legal advice; free *vocalatnama;* provide advocate to help in a legal proceeding; fees for the lawyers, mediator or arbitrator; supply certified copies of order, judgment etc with free of cost; provide the cost of DNA test, paper advertisement in CR case; any other assistance along with expenses for a case. It also provides legal aid in all types of cases such as civil, criminal, family, jail appeal matters etc.[46]

6.3 Formulating Strategies to Improve Torture Survivors Access to Justice

In order to improve torture survivors access to justice the Executive is formulating certain strategies; existing and upcoming like supporting the legal assistance programs and promoting access to justice and human rights in Bangladesh.

6.3.1 Supporting Legal Assistance

The Government through the concerned Ministry has undertaken and attained certain projects known as the Development Projects during 2008-2010. Among those the first Technical Assistance Projects having the Legal Assistance and Reform Projects (Part B) (second phase) providing legal assistance to the poor litigant of Bangladesh and it has been undertaken from 2009 to 2011 term. Meanwhile in seven Districts the model of legal aid program has been introduced fully. Necessary assistance has been provided to establish offices of Dhaka Legal Aid Committee and National Legal Aid Committee. Besides; one Legal Aid Coordinator has been given appointment in each project District with the expenditure of this project. Under this project legal aid assistance program to the poor and needy people is continuing and different programs have been undertaken to create awareness in this regard like training, leaflet, books

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insolvency; Person detained without trial and unable to take proper steps for legal assistance; Person considered by the court as financially helpless and insolvent; Person recommended or considered by the jail authority as financially helpless and insolvent; Person who is identified from time to time by the organization as financially insolvent, destitute and suffered losses due to various socio-economic and natural calamities for the purpose of the Legal Aid Service Act, 2000, and unable to conduct a case to protect his/her rights are entitled to get free legal aid under this project. See for details Ministry of Law, Justice and Parliamentary Affairs, Bangladesh, Law & Justice Division. 2010. 'National Legal Aid Services Organization', available at:< http://www.lawjusticediv.gov.bd/static/legal_aid.php>, last accessed on 28 October 2013.

[46] Ministry of Law, Justice and Parliamentary Affairs, Bangladesh, Law & Justice Division. 2010. 'National Legal Aid Services Organization', available at :< http://www.lawjusticediv.gov.bd/static/legal_aid.php>, last accessed on 28 October 2013.

distribution etc. Also efforts are underway to strengthen the activities of the national legal aid agency with a view to ensure justice to the poor, disadvantaged and under privileged litigant people. In the meantime an officer in the rank of District judge has been appointed as Director of the Legal Aid Agency. Meanwhile, from June 2009 to June 2010 a total of 12737 persons have been provided with legal aid in the whole country including 4800 female, 7886 male and 48 children. Different programs have been taken to provide information to the people regarding free legal aid service. Moreover, Government has undertaken a project namely Legal Reform Project-Part B to bring dynamism in the activities of the Legal Aid Agency with the assistance of CIDA. The other program known as the Capacity Building Project of the Judicial Administration Training Institute of Bangladesh (2^{nd} phase project) is to develop efficiency of the lower court Judges and Officers of the JATI regarding court administration and case management and thereby to ensure for providing justice to the common people. To develop professional efficiency of the judges so far 243 judicial officers were imparted training from Joint District Judge to District Level at Judicial Administration Training Institute (JATI) after separation of judiciary.

However, in case of appointment of judges in the Higher Courts and enhancement of salaries and allowances for judges of subordinate courts, the then Government with a view to disposing the pending cases has given appointment of 45 judges in the High Court Division. Moreover, the number of Judges of the Appellate Division have been increased from 7 to 11. And it also promulgated Pay and Allowances Order, 2009 for judicial officers with separate pay structure including 30% special allowances for judicial officers who are engaged in fulltime judicial works. However, there is also another project known as the Investment Project which provides construction of the Chief Judicial Magistrate Court building in the whole of Bangladesh to be implemented from February 2009 to June 2014. Besides considering the future demand of the infrastructure and to ensure the optimal use of the land, decision is taken for vertical expansion of the under constructed building and DPP of the project has also being revised accordingly. Revised DPP is now waiting in the Planning Commission for final approval. In the second phase of the project, construction work of Chief Judicial Magistrate court building of 30 specified Districts would be started. With the implementation of the said project, necessary infrastructure for the judges would be created and thereby judicial work would get dynamism. Also the

government undertook 'Supporting the Good Governance Project' under the grant of ADB starting from 2007 to 2011 to build up the capacity of Bangladesh Supreme Court and Bangladesh Judicial Service Commission. And with a view to forming an information store for justice sector under Law and Justice Division and to provide necessary information to people for framing policy regarding technical assistance project, several committees have been formed and the committees are working in full swing.[47]

6.3.2 Promoting Access to Justice and Human Rights in Bangladesh

The project Promoting Access to Justice and Human Rights in Bangladesh (A2J) is being implemented by the Legislative and Parliamentary Affairs Division of the Ministry of Law, Justice and Parliamentary Affairs (MoLJPA) with financial support from UNDP. This project has successfully been implemented from July 2007 to June 2010 and extended for another two years until June 2012. In the first three years the project had two major outcomes namely, access to justice and human rights. In addition, during the extended period project will focus on three key outcomes like building the strategic management capacity of MoLJPA for improved service delivery, improved access to legal aid, legal reform (providing technical support to MoLJPA with a view to improving access to justice, Alternative Dispute Management (ADR), Civil Procedure Code and Criminal Procedure Code and other relevant legal reform). Another project known as the project 'Promotion of Free (*Pro Bono*) Legal Services' i.e. *Pro Bono* (free of cost) legal services create greater scope for the poor in getting access to justice since lawyers or law firms provides legal services to them free of cost. Considering this context, project has promoted *pro bono* legal services among the lawyers of six Divisional and one District level Bar Association since its inception in 2007. As a result, three *Pro Bono* Legal Services Forums had been formed in Khulna, Barishal and Barguna. Since these forums are providing free legal services to the poor and the vulnerable groups, this project is providing technical support to them with a view to strengthen the capacity of those forums. And in case of training facility specially in Human Rights, there is Training for the Law Officers and the Government has started a Project which supported establishment of ICT Cell at

[47] Ministry of Law, Justice and Parliamentary Affairs, Bangladesh ,Law & Justice Division.2010. 'Brief Description of the Projects of Law and Justice Division', available at:< http://www.lawjusticediv.gov.bd/images/success_english.pdf >, last accessed on 1st October 2013.

the MoLJPA with a view to promote public awareness and access to the legal edifice in Bangladesh, which remains an essential precondition for enhancing access to information for all, promoting good governance, rule of law and access to justice. At present, project is updating the websites for the two Divisions of the MoLJPA including Bangladesh Codes. In addition, Project has taken initiative to provide ICT training for the staff and officers of the MOLJPA. However, there is another projects named the Project ICT Training Support for the Attorney General (A-G) Office provided intensive basic and advanced ICT training to the learned Attorney General and 60 law officers of the Attorney General (A-G) office in 2010. In addition, as per the demand from the A-G office project has taken initiative to organize further ICT trainings for the other staff members and law officers of the A-G office. Also as part of the training Project, human rights component, the government organized 7 basic human rights training courses for law officers and legal practitioners of 36 Districts. This course was implemented by the Legal Education Training Institute (LETI) in Dhaka, Khulna and Sylhet where 175 participants received the training.[48]

6.4 Scrutinizing the Impediments

With all the responses as mentioned above, unfortunately the practical situation is different in Bangladesh and the stance of the Executive in this regard is not sincere enough to protect the fundamental rights of the people including torture. Here, those having power and influence be it muscle power, money power or political influence are not showing respect to the right of others and are not hesitating to take the law in their own hand. As failure of the law enforcing agencies to quickly apprehend and prosecute the real offenders for trial, long delay in disposal of cases, increasing cost of litigation and at times failure to get justice through court give rise to lack of confidence in the Courts so at times those gives rise to lack of respect in the law and includes many to take the law in their own hand.[49] With this background, this part 'scrutinizing the impediments' focuses the institutional compliance of the Executive in practice by scrutinizing certain impediments under the heading of immunity,

[48] Ministry of Law, Justice and Parliamentary Affairs, Bangladesh, Legislative & Parliamentary Affairs Division.2010. 'Promoting Access to Justice and Human Rights in Bangladesh Project', available at:< http://www.legislativediv.gov.bd/legislative1/static/A2J_Project.php>, last accessed on 28 October 2013.

[49] Asiatic Society of Bangladesh. 2003. *Administration of Justice in Bangladesh*. Dhaka: Asiatic Society of Bangladesh.

accountability and the political reality along with the present scenario of non-cooperation with human rights mechanisms.

6.4.1 Immunity, Accountability and the Political Reality

The alarming trend of torture by the law enforcers in Bangladesh exposes once again its inherent tendency of being viewed with a philosophy of paramilitarism associated with the mechanism of awe, threat and coercion. The culture of impunity endorses the existing trend and protects the culprits from being prosecuted. It encourages others to follow the suit, as the criminal justice system is open to manipulation by the agencies.[50] Acts of impunity by the arresting police officers, including physical torture and not presenting the accused person before a magistrate within 24 hours of his arrest, casts serious doubts on the voluntary nature of the confession.[51] In addition, the process for complaints, investigation and prosecution of cases involving allegations against State agents is almost impossible in the country.[52] And writ petitions in the High Court Division provided detailed accounts of deaths in police custody over a number of years and these numbers are large and horrific. Over the years many people have been killed in thana hazat or jails, but there has hardly been any prosecution of the persons responsible for these murders and tortures in custody.[53] To date, no military personnel are known to have been held criminally responsible for any of the 50 or more custodial deaths.[54] In case of abuse and custodial torture and killing by the special forces like the RAB also remains virtually unchallenged, precisely because victims or relatives of victims are intimidated, or because of the reluctance of the police to accept a case against members of such special forces. Only in a few instances, the High Court issued Rules to protect the rights of persons taken into custody by the RAB. In another instance, on the basis of a public interest writ

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50 Kabir, A. H. Monjurul. 2011. 'Police remand and the need for judicial activism', available at:< http://www.banglarights.net/HTML/civilrights-07.htm>, last accessed on 11 June 2013.

51 Khan, Saira Rahman. 2007. "The Use and Abuse of the Laws of Confession in Bangladesh", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 79-106, at p. 102.

52 Asian Human Rights Commission. 2013. Torture in Bangladesh. Available at:< http://www.humanrights.asia/countries/bangladesh/torture-in-bangladesh>, last accessed on 19th April 2013.

53 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Remand", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 258-292, at p. 279.

54 Human Rights Watch. 2006. *Judge, Jury and Executioner: Torture and Extra Judicial Killings by Bangladesh's Elite Security Force*. New York: Human Rights Watch.

petition filed by Human Rights and Peace for Bangladesh (HRPB), the High Court Division issued a Rule against the RAB to show cause as to why they should not be directed to ensure the safety and security of persons detained in the RAB's custody. Despite the High Court's ruling, the use of torture in custody of the RAB continues unabated as most of the incidents are not challenged in court due to the official impunity they enjoy.[55] Referring to extrajudicial killings by the security forces, the USSD 2008 report stated that while there was a nearly 20 percent decrease in the overall number of killings by all security personnel from 2007 to 2008, the Government and military did not take any public measures to investigate these cases. According to local human rights organizations, no case resulted in criminal punishment, and, in the few instances in which the Government levied charges, those found guilty generally received administrative punishment.[56] Since 2004, extra judicial killings by law enforcing agencies, custodial deaths and torture, and lack of any public reports of investigation and prosecution of those responsible demonstrate the vulnerability of the right to life of Bangladeshi citizens. In the vast majority of instances, the state failed to publish any information regarding actions taken to investigate, prosecute or punish those responsible for such.[57]

Law enforcing agencies in Bangladesh are institutions. Its employees are public servants. They must profess allegiance to and serve a class of people having political clout. They serve individuals and parties in power instead of their real masters merely the people. Through the illegal and partisan use, the police department has been allowed to rot and degenerate so much that it has lost its human face. It has been consistently, unethically and so unscrupulously used as a tool of oppression that it has lost its identity beyond recognition. The discipline and chain of command have totally and completely collapsed. The police no longer act as the enforcers of law. In collusion and connivance with the police, the 'maastants' under the protective umbrellas of the godfathers sitting in high position go on committing crimes against

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55 National Human Rights Commission, Bangladesh. 2013. *Analysis of Decisions of the Higher Judiciary on Arrest and Detention in Bangladesh*. Dhaka: NHRC, Bangladesh.

56 UNHCR. 2009. 'Country of Origin Information Report – Bangladesh', available at: <http://www.unhcr.org/refworld/docid/4a8d005b2.html>,last accessed on 16 January 2013.

57 Khan, Arafat Hosen. 2010. 'Stop Extra Judicial Killings: Respect and establish an effective judiciary', available at:< http://www.blast.org.bd/news/news-reports/101-stopextrajudicialkillings>, last accessed on 14 September 2013.

the properties, lives and liberties of innocent people with impunity. Many more unfortunate victims fell prey to the predators in 'khaki uniform' who are supposed to protect the victims of crimes and maintain law and order.[58] And the abuses of police power remain unreported for fear of reprisal by police and ordinary citizens neither have the resources nor the ability to stand up against police excess and bring such incidents to the Court's notice for redress.[59]

6.4.2 Non-Cooperation with Human Rights Mechanism

Also Bangladesh has not extended an open invitation to the Special Procedures of the UN Human Rights Council. At several sessions of the UN Human Rights Council Bangladesh has consistently advocated confining special procedure mechanisms with a code of conduct. Bangladesh also opposed country specific mandates for Special Procedures. In September 2007 Bangladesh also opposed the encouragement provided for broad consultation by Governments on their reports to the Universal Periodic Review by asking for the deletion of the word 'broad' from the relevant provision of the Council's draft resolution on institution building.[60]

Next chapter deals with the field work of the thesis where the researcher tries to uncover the torture and it's responses in the normative and institutional sectors. The perceptions, experiences and suggestions of the focus groups are taken in the form of interviews under the core issues like obstacles, lessons learned, implementation stratum in fact and upcoming strategies both for the normative and institutional sectors.

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58 Malik, Shahdeen. 2007. "Arrest and Remand: Judicial Interpretation and Police Remand", Special Issue: Criminal Justice System, *Bangladesh Journal of law*, pp. 258-292, at p. 271.

59 *A.H.M. Abdullah v. Government of Bangladesh and others* (2005) 25BLD (HCD) 384, 387.

60 Commonwealth Human Rights Initiative. 2008. 'Submission of the Commonwealth Human Rights Initiative (CHRI) for the Universal Periodic Review of Bangladesh September_2008', available at: < http://www.upr-info.org/IMG/pdf/CHRI_BGD_UPR_S4_2009_CommonwealthHumanRightsInitiative_upr.pdf>, last accessed on 30 April 2013.

CHAPTER 8
CONCLUSION

Arbitrary arrests, remand, custodial violence and the resulting torture is a global problem and has become a serious concern for all now in Bangladesh. The movement for justice and accountability started progressing, some matters are brought before the Courts and the culprits are facing trials and disciplinary actions even if the number is not so high. Within all through the thesis the researcher started with the international standards, national obligations, methods of torture practiced in Bangladesh, the normative compliance and it's reality, the institutional responses in fact and ended with the field work that tries to find out the hidden obstacles and the aimed future schemes to make the struggle against torture more effective. However in the following the researcher included the summary and assessment of all the chapters and provides the unique perceptions of her in the last of the thesis as the concluding observations.

First it's the Chapter 2 which is nothing but the denouncing of torture; be it in the form of universal prohibition or national eradication. This chapter reveals that there is a complete prohibition of torture and the international community is having a unique mandate to respect and protect all internationally recognized human rights standards through the United Nations. It has developed standards taken into account the diversity of legal systems that exist and set out minimum guarantees that every system should provide to protect people against torture so that no State can lead the ground of cultural relativity regarding the universal prohibition of torture. And even if a country has not ratified a particular treaty prohibiting torture, it is general that she is in any event bound on the basis of general international law. Beginning from the UDHR to the ongoing process, the international community obliges governments and their officials to refrain from torturing or ill-treating anyone and to protect people against such abuses. The standards define torture and constitute an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment with a specific stipulation that no exceptional circumstances may be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment. The principle aim of these standards is to strengthen the existing prohibition of practices of torture,

cruel, inhuman or degrading treatment or punishment by a number of supportive measures. They contain a series of important provisions in relation to the absolute prohibition of torture and oblige States to combat impunity of perpetrators of torture by criminalizing it in domestic criminal legislation with appropriate penalties, adequate reparation, including compensation and rehabilitation and establishing universal jurisdiction for perpetrators of torture crimes worldwide.

Chapter 3 provides the history of torture which is nothing but the steady progression of barbarous tactics, leading from one social purge to the next, and developed both in severity and variety of methods used. These are like the methods used by savages than anything in between. Overall, the severity of torture has fluctuated, growing and receding with the passing of each new period of time, but eventually reverting to its original state. There are several varieties of torture in general and it is plainly evident that, tremendous ingenuity has been devoted to the devisal of ever more effective instruments and techniques of torture exploiting the medical knowledge and vulnerabilities of the human body. Today, the use of torture for the purpose of extracting a confession has continued to be routine practice in many countries around the world, and the fight against global terrorism revealed new techniques of torture, together with new attempts to justify the use of it under certain circumstances. Though Bangladesh has ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (CCPR), but numerous reports suggested that the practice of torture continued unabated in here and ill-treatment, which may amount to torture, was frequently used by the law enforcing agencies in the course of criminal investigations.

And Chapter 4 is all about the normative compliance of Bangladesh measuring the anti-torture regime of her following the international standards. This chapter reveals that Bangladesh is ‘towards’ an anti-torture regime even though complete eradication of torture be a long way away. However, one of the fundamental rights guaranteed by the Constitution of the People’s Republic of Bangladesh is that “no person shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. So torture is expressly prohibited by the Constitution of Bangladesh. There are certain other encouraging developments and successful initiatives that might provide an

opportunity to quell the practice of torture, impunity and lack of justice and reparation for the victims. In particular, a number of initiatives providing legal reforms bound to result over time a change in the human rights culture in Bangladesh. Nevertheless, Bangladesh's obligation under Article 4 of CAT to which the country has committed itself in normative aspect falls even to date, far below to the international standards. Added to this, there are various shortcomings in the process of implementation with the excessive use as well as abuse of powers by the concerned authorities that inhibit accountability and effective recourse for torture survivors and relatives of torture victims to courts or other bodies.

In the chapter 5 it is stated that the Supreme Court on reviewing the Preamble, articles 7, 26(1) and 108 of the Constitution is in the opinion that full judicial power is conferred by the Constitution on the Supreme Judiciary of the country as an independent organ of the State and there is no express provision in the Constitution for exercise of the State's judicial power over it. Since existing laws are equally applicable to all however, powerful or influential that person is and will be bound by the law, in case of administrative sclerosis leading to flagrant violations of fundamental rights, the aggrieved person is entitled to get redress through the Courts, can only be corrected by the method open to the Judiciary to adopt. And the right to compensation is some palliative for those unlawful acts of the instrumentalities. In Bangladesh, the Judiciary is now acting as an agent of change, enforcing the corresponding duties of the State in order to promote, protect and implement of the rights of torture survivors both in law and in practice. The High Court Division is however, taking a leading role in providing justice and reparation to victims of torture, by developing a consistent jurisprudence for it.

Also in chapter 6 it is stated that the Executive is trying to implement its international obligations according to the standards by providing certain guarantees against abuses of human persons. It is to be noted that all these steps even if, are seen, as less than radical are being taken with varying degrees of success to introduce the safeguards against torture and its survivors.

However, the field operation in chapter 7 of this thesis is nothing but to provide the factual idea about the normative and institutional responses of torture in Bangladesh.

In the normative area even if with certain difficulties in the drafting of laws and training facilities, the authority has taken the steps to implement the Court's directives before passing the new law on torture and is handling with the training facilities in order to overcome those. In the institutional sectors within the police officials' reform is already started though technical implementation of torture exists in here and the probabilities of complete ban on torture according to them are very low. But the positive thing is that they want reform in the traditional colonial policing. In case of judicial officers and particularly the Judges of the Supreme Court are in the opinion of absolute prohibition of torture and their stand is very bold against it. They are doing whatever they can do within their sector making the struggle against torture more effective. But situation is different in case of the lower judiciary focusing the desirability of torture in certain cases along with the procedural difficulties and the lack of functional judicial independence. Then also the magistrates try sometimes but cannot reach up to the mark to join that struggle. In the third category, the Home Ministry is nothing but to make the policies, they are simply avoiding the implementation part and substituting the responsibility with it to the concerned Division and the aggrieved person even if they are the concerned authority regarding this. But again the positive side is that Government is considering the loopholes in here and trying to make it up with the reform initiatives. Hence all these field operations suggest that the responses are not so good or bad but are ok in the sense of starting the process for anti-torture regime. Whatever thought it is in the mind that there are no responses against it is, not the correct one but it can be said that those responses may not be enough for the complete ban of torture in Bangladesh. The thesis here reveals that there is still much to be done to protect the victim from professionals who expose torture, and to prevent their complicity in it. There is still a gap between laws and practice where laws need to be more clearly specific about the illegality of torture, forbidding the involvement of staffs in it and encouraging protection for the whistleblowers also.

And since the activities of the Parliamentary Committees depends upon the nature of the powers granted to them that may vary depending on the kind of political culture in each case, a strong committee system needs to be grown irrespective of the form of Government. Committees as the working hands of the Parliament can make it to perform several functions that may not be possible otherwise. In case of specific

legislation with the present law on torture a perfect legal framework on torture integrating all the protection standards established by international law has to be ensured. Also there has to be statutory instruments assuring victims access to effective and enforceable remedies and reparation in an affordable and simple manner. It is necessary to ensure that the victims' perspective is reflected in it and the measure of damages correlates to the gravity of the harm suffered. With regard to the international obligations only a thorough implementation strategy and planning with the assurance of effective realization of powers can make the laws on torture more practical.

However, the recommendations for the law enforcing agencies are that they, in the performance of their duties, have to respect and protect human dignity and uphold human rights of all as they bear faithful allegiance to the Constitution that upholds the rights of citizens guaranteed by it. They also need to keep the welfare of the people in mind, be sympathetic and considerate towards them. They shall enforce the law firmly and impartially, without fear or favor, malice or vindictiveness. The law enforcers' need to consider the limitations of their powers and functions always and use that force only to the extent required for the performance of their duty and not further. Superior orders' in any situation cannot be used as an excuse to commit torture. Subordinate officials have to be under a duty to disobey orders from a superior to commit the torture. For this it needs to establish an independent judicial and disciplinary authority for the police to give the back up for facing that dilemma. The authority will exert closer scrutiny on interrogation, remand procedure and any complain against police officials and take action against it independently. Those individuals who ordered the abuses and those who failed to prevent or punish will be in the same line and punish accordingly. The authority has also to make public the abuses and the action taken against it.

And police custody since constitutes a particularly critical moment when the detainee is especially vulnerable to ill-treatment or torture, in case of treatment of persons in custody all the persons there have to be treated in accordance with law and shall provide with adequate security and rightful safeguards. There should be clear interrogation methodology in which police interviews are to be conducted. If it is possible electronic recording of police interviews of detainees should be kept.

Independent authorities should make unannounced visits to places of detention with a view to monitoring conditions of detention and treatment of detained individuals. That team should adopt a pro-active approach to identify risks and assists the authorities to create an environment where these forms of abuse are unlikely to occur and report publicly on its findings. However, this job can be performed by the Ombudsmen or the National Human Rights Institutions in our country. There has to be thorough and impartial investigation for all cases of torture and ill-treatment. While granting remand it has to be considered that remand is not the rule but an exception and it has to be justified first whether judicial remand is required at all or not. Unjustified and mechanical remand should be stopped absolutely.

However, the law enforcement system should prioritize reforms by initiating an annual review of actions. Among different strategies, there may be a National Action Plan against Torture that will help to generate progress in combating torture at law enforcing agencies and improving conditions of detention in their cells. Also there may be creation of hotlines for the public to seek advice in pursuing claims of torture. A Peer Review system like certain other countries, which is used for the sensitization of the police, may be started. In this system after the victim has been questioned by a police detective, a second detective can inquire of the victim about how he was dealt with by the first detective. These responses may be used as a basis for further training and improving the police treatment of civilians. Also there may be a service oriented approach in the law enforcement agencies by assigning a staff at every level of law enforcement to serve a liaison to crime victims and victim services with a view to enhance and streamline the delivery of police–based services to victims of torture and also for other victims.

However, the lack of knowledge of legal safeguards on arbitrary arrest and torture remains one of the major causes of violation of human rights including the prohibition of torture, and for this there has to be a complete database to provide concrete information on acceptable interrogation methods and all available remedies on arbitrary arrest and torture and steps need to be taken to reduce the possibility of abuse of the powers by the perpetrators of torture. All the three Organs of the State should work together to promote wider dissemination of relevant educational materials targeted at all the levels of society through appropriate media, including the

on-line. Proper information and guidance through professional associations has to be provided also to those likely to come into contact with victims of torture. It needs to publicize the plight of torture survivors and encourage local awareness building programs to improve the conditions of the survivors.

And as, the aim of investigation should be to obtain accurate and reliable information in order to discover the truth about matters under investigation, allowing for adequate training to the investigating officers about modern and scientific methods of investigation should be a prime concern now. In the course of their training, particular stress has to be placed on the absolute prohibition of torture and to disobey superior orders to commit it. However, more effective training programs regarding the factual and legal matters between the specified branches of the Executive and the Judiciary has to be coordinated so that they can work together to fight against torture and make the struggle against it more effective.

Also the existing schemes of victim and witness protection need to include measures to minimize inconvenience to victims, protect privacy, when necessary, and ensure their as well as that of their families and witnesses' safety from intimidation and reprisals. In case of interrogation of the detainees there has to be specified Official Certres for it providing among the other procedural safeguards mandatory examinations by a medical practitioner of his choice, if possible, upon and leaving the detention centres. And a Death Certificate has to be publicly posted for every death in case the death occurred in custody as is currently mandated for prisoners of war by a Geneva Convention. In case of false or non-issued of death certificates concealing torture, physicians will be held professionally and criminally accountable for abetting that abuse. Physicians always need to remember and remain vigilant to prevent human rights abuses and by acting on their duty they need to refuse to participate in such bad practices totally. And interrogation at unofficial place of detention without medical report of the detainee for that should not be admitted as evidence in the Courts.

Since the main obligation to prevent torture lies at the domestic level, it has to be maintained by either setting up of new mechanisms or strengthening the existing ones through perfection and increasing their professionalism. The overall objective of the creation should be to promote effective domestic bodies to be adjusted with the

international criteria. That Credible system like Public Complaints Authority should be put in place in order to entertain complaints of torture and to carry out prompt investigations. It will be an independent, non-police agency made up solely of civilian personnel mandated to receive and investigate all allegations of torture and misconduct by the law enforcing forces and has to be formed with functional independence, required capabilities, professional knowledge and also appropriate resources. However, community policing, legal aid clinics within the country must also be improved and strengthened.

About the existing and main national human rights preventive mechanism in Bangladesh, the establishment of NHRC even if with its weak foundation becomes the locus of human rights awareness at national level and demonstrates that human rights protection does not have to rely entirely on Courts. This institution is an indication that Government is willing to abide by international human rights norms and has taken tough and independent stands on several occasions. However, it also needs to consider that the jurisdiction of the National Human Rights Commission with all its activities also needs to be expanded to play a stronger role in respect of the investigation of acts of torture. It has to be upgraded to an authority that can encompass powers to issue binding orders to public officials. And within the NHRC, there may be a Reparation and Reconciliation Committee to be composed for victims of unjust imprisonment or detention and in here torture victims can claim reparation through schemes aimed at assisting victims of crimes and other forms of assistance.

And within the State Organs true independence of the judiciary needs to be guaranteed by the State. This independence entitles and requires that the rights of the parties are to be respected and assures fair conduct of judicial proceedings. It has to decide matters on the basis of facts and in accordance with law only without any interference direct or indirect, from any quarter or for any reason. Since, Magistrates and lower judges of our country lacks genuine independence and often fail to take pro-active stance on torture allegations, their stance need to upright and principled decisions that support human rights, particularly the prohibition of torture. And for this absolute and complete separation of powers are required now because the law enforcing agencies are presently under two Ministries at a time and work with the direct and indirect control of both the Ministries in various situations making

altogether the activities of them nothing but the order of the concerned Ministries and ultimately the Government's. However, it is the duty of our State to ensure and support the independence and impartiality of the State Organs according to the international standards and to provide adequate resources to enable it properly to perform its functions. Lastly there has to be an approach that enhances justice that punishes, and also a justice that restores.

Lastly and the main recommendation is that Government must overcome from providing legitimate excuse for avoiding its obligations and implement the appropriate legislative and judicial measures properly. Immense abuse demands measures beyond the standard rules of Government and it's now a high time for it to have a comprehensive approach to torture prevention by developing new ways to meaningfully address the past and to provide moral and financial support for prevention activities. Also in order to tackle the huge corruption within the State there has to be a combined effort of police, judiciary and the administration; if one is within the corrupt practices the other cannot be expected to become fair and transparent. One's abetment here becomes the incentives of others. These incentives need to be totally stopped now.

In conclusion it can be said that as torture endures because of shortcomings both in the law and in the structure of the criminal justice system, there is an acute need for reform of laws along with the ongoing criminal justice system where credible and human rights friendly alternative methods like forensic and other scientific techniques to be used in law enforcement and crime prevention other than torture and cruel, inhuman and degrading treatments. All initiatives and efforts to alleviate the plight of torture if carried out in isolation from each other, in spite of the coordinated attempt and systematic approach would not help to reduce victimization in torture. The important utopia with the anti-torture regime is nothing but the abolition of torture absolutely with the participation of all the three Organs of the State no matter how dire the circumstances and strengthening rehabilitation programs for the existing.

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APPENDIX A

Interviewed personnel and the core issues to be investigated with

1. In the Normative Area or Policy Making

GO officials who developed the existing legislation who are directly involved in the preparing, drafting and policy making of the government i.e. Policy makers from the Ministry of Law, Justice and Parliamentary Affairs

Concerned Personnel

From the Legislative and Parliamentary Affairs Division *the Joint Secretary, Deputy Secretary, Senior Assistant Secretary and Assistant Secretary*

The core issues to be investigated with

- *Their opinions on the loopholes of the existing law making processes*
- *Upcoming strategies of the Government*

2. In the Institutional Sector or Implementing Stratum

GO officials who currently administer norms and institutions

Concerned Personnel

I. Police Officials,
II. Judicial Officers, and
III. Home Ministry Officials of the Secretariat

I. Police Officials

Certain specified Police Officials firstly, official who is having the legal authority for *monitoring the internal discipline of the police* on behalf of the IGP and secondly officials who are directly involved with the *Police Reform Program (PRP)* on behalf of the National Program Director (NPD), Police Reform Program, Bangladesh.

Specified personnel

Assistant Inspector General of Police (AIGP), other police officers on behalf of the IGP from the Discipline and Professional Standards (Previously, Security Cell) of the

Police Headquarter and *officials from the newly formed investigating unit known as the Police Bureau of Investigation(PBI)*

The core issues to be investigated with

- *Police Reform Program and torture prevention*
- *Upcoming strategies of the Government*
- *Opinion on the new law criminalizing torture*
- *Probabilities of complete ban on torture*

II. Judicial Officers

Firstly, concerned Judges of the Supreme Court who have already dealt with the matter will be taken *basing on all the relevant reported cases on torture,* secondly, the opinions of certain Magistrates within the Dhaka Metropolitan area who are boldly against granting easy remand and give it rarely in certain exceptional and reasonable cases

Specified personnel in the 1st category

Concerned Judges of the Supreme Court

The core issues to be investigated with

- *Judiciary's role and view in developing the de jure anti-torture regime*
- *Measures in non-implementation of orders of the Supreme Court*
- *Comment on separation of judiciary and the resulting independence of the judges*

Specified personnel in the 2nd category

Certain Metropolitan and Judicial Magistrates within the Dhaka Metropolitan area

The core issues to be investigated with

- *Reasons for granting remand (what are the exceptional and reasonable cases)*
- *Impediments getting in the way of anti-remand policy*
- *Attitudes towards impunity of the perpetrator of torture*

- *Torture victim's right of complaint, protection of the complainant and accessing the procedural safeguards*
- *Comment on the Judicial Independence*

III. Home ministry Officials of the Secretariat

The core issues to be investigated with

- *Comment on the Interrogation Methodology, torture and the treatment of criminals*
- *Comment on prison visits by independent human rights monitors and release of the findings*
- *Opinion on the acceptance of the competence of the Committee against Torture or the Human Rights Committee to received individual complaints about torture and suggestions on not extending open invitation to the Special Procedures of the UN Human Rights Council and opposing country specific mandates for Special Procedures*
- *Upcoming strategies of the Government*