



# “OUTLAWRY OF TORTURE IN CONSTITUTION OF INDIA AND INTERNATIONAL LAW”

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## **ABSTRACT**

Torture was quickly recognised as a human rights issue that belonged in the core human rights standards created following World War II, along with slavery, fundamental freedoms, and many due process issues. One of the most egregious abuses of a person's basic human rights is torture. It has profound consequences on family and community and ruins one's sense of dignity, body, and mind. According to international law and the UN Convention against Torture, everyone has the fundamental and universal right to be free from torture. The term “police brutality” is sometimes used to refer to various human rights violations by police. This might include beatings, racial abuse, unlawful killings, torture, or indiscriminate use of riot control agents at protests. Hence, it must be considered as falling inside the range of offences for which the defendant may be extradited in accordance with Article 8. The UN approved the Torture Convention in 1984, criminalising torture as well as collaboration and participation in it. It also established a complex structure of universal criminal jurisdiction intended to eliminate any potential havens for torture. Torture has been used in criminal proceedings since the dawn of civilization. Torture and corporal punishment scenes can be found on ancient Mesopotamian and Egyptian monuments. The length of custody, mistrust of police, and recovery are the three characteristics that characterise the practical logic of implementing the third degree in investigations. The Indian Supreme Court, as well as other State High Courts, has harshly denounced police misconduct in atrocities committed against those being held in prison. The Law Commission's continuous review of amendments to existing criminal legislation, not an exclusive anti-torture Bill, was addressed when India delivered its third Universal Periodic Review (UPR) to the UN Human Rights Council in 2017. The NHRC cannot look at a complaint that is made more than a year after the incident.

**Key word: Torture, Human rights, United Nations, Police Brutality.**

## CHAPTER I

### 1. INTRODUCTION

#### 1. INTRODUCTION:-

The 1966 International Covenant on Civil and Political Rights and the 1948 Universal Declaration of Human Rights forbid torture. One of the offences that constitutes a "grave breach" of the 1949 Geneva Conventions on the care of war victims is listed as torture. Torture was quickly recognised as a human rights issue that belonged in the core human rights standards created following World War II, along with slavery, fundamental freedoms, and many due process issues. As a result, neither theoretically nor legally, human rights organisations did not include torture in human rights policy. Yet, their worry and anger over its continued use did contribute to the creation and expansion of the legal and policy framework around torture.

Amnesty International was initially made aware of the prevalence of torture, which is regularly used against political detainees, through its work to secure the release of "prisoners of conscience (opens in a new tab)". Amnesty started a Campaign Against Torture in 1972 and pushed UN members to pass a resolution condemning torture as a result of this worry. Nigel Rodley relates how the Swedish government was eager to forward that effort by backing a treaty that would have full force as international law. That project was made possible thanks in large part to Amnesty International and the International Council of Jurists. Under UN supervision, a Convention Against Torture was negotiated in 1984 and, among other things, provided a definition of torture in international law:

“For the purposes of this Convention, the term "torture" refers to any act inflicting severe pain or suffering, whether physical or mental, on a person with the intent to coerce information or a confession from them or a third party, punish them for an act they committed or are suspected of having committed, intimidate them or a third party, or for any other reason based on discrimination. It excludes any pain or suffering that results solely from, is a natural consequence of, or results from legitimate sanctions”.

The twenty signatures needed for the Convention Against Torture to go into effect were collected by 1987. More than 150 nations have ratified the Convention as of today, which has led some authorities to believe it has been incorporated into common law and has become a jus cogens concept of law. That doesn't mean that torture is still used today. Contrarily, state-authorized torture is still being documented by human rights watchdogs around the globe, and various clinics have been established to provide care for its victims. The US reliance on "enhanced interrogation" in the course of its so-called War On Terror was probably the worst blow to the emerging normative consensus surrounding the prohibition of torture. Nonetheless, Bush Administration lawyers accepted the absolute nature of the international legal ban on torture even in the infamous "torture memos" (opens in a new tab). Government spokespersons attempted to define their way around the ban rather than challenge it. Governments that have ratified the Convention Against Torture are required to provide the Committee Against Torture with recurring reports on how they are carrying out the agreement (CAT). In 2000, 2006, and 2011, the US stood before the CAT committee.

One of the most egregious abuses of a person's basic human rights is torture. It has profound consequences on family and community and ruins one's sense of dignity, body, and mind. According to international law and the UN Convention Against Torture, everyone has the fundamental and universal right to be free from torture. Yet, it's still an alarmingly common practise, especially in places where people can't see it. The World Medical Association (WMA) has a long history of supporting efforts to stop all types of abuse and torture. Any involvement of doctors in torture, whether active or passive, is categorically condemned by the WMA as a grave violation of the International Code of Ethics and the legislation governing human rights. The first set of internationally accepted standards for medical and legal specialists on how to evaluate if a person has been tortured are provided by the Istanbul Protocol (1999), which has been approved by the UN. It outlines independent, reliable proof that can be utilised in legal proceedings against alleged torturers. An essential tool in the global campaign to abolish the immunity of offenders is the Istanbul Protocol. The WMA actively promotes the publication and application of the Istanbul Protocol, which was co-written by a number of its members.

### **1.1 BACKGROUND OF THE STUDY:-**

On October 12, 1993, India's National Human Rights Commission (NHRC) was founded. According to the Protection of Human Rights Act (PHRA), 1993, which underwent revisions in 2006 and 2019. The constitution was approved by the General Assembly of the United Nations in its Resolution 48/134 of December 20, 1993, and it is in accordance with the Paris Principles, which were adopted at the first international workshop on national institutions for the promotion and protection of human rights, held in Paris in October 1991. The Commission is a physical representation of India's commitment to the advancement and defence of human rights. The Commission provided specific directions to the law enforcement agencies on reporting deaths in police lock-ups and correctional facilities shortly after its constitution in recognition of the fact that custodial torture is one of the worst violations of human rights. It required the DMs and SPs of the districts to report deaths that occurred while in custody within 24 hours of the death. Also, it became necessary to videotape post-mortem examinations. It is necessary to look into the cause of this instruction's problem. The Commission was alarmed by the increasing number of deaths in custody and believed that the police were deliberately trying to cover up their abuses and excesses. There was a conscious effort to hide the truth. Police influence caused the doctors performing the post-mortems to conduct the examinations improperly. They gave up to the police's demands. One of the most crucial ways to determine the real cause of death is through a post-mortem, yet what was being reported at the time was merely the police's account of the circumstances. In this way, the post-mortem served to cover up the victim's death through torture while in custody rather than shedding light on the cause of death. The outcome of the case depended solely on the observations made and the doctor's assessment provided in the post-mortem report because there was no other independent evidence. The panel also modified the autopsy model and the procedure for the magisterial inquest as an additional precaution. The commission also established a thorough methodology for reporting physical changes brought on by torture. There is no doubt that the NHRC's proactive involvement has put some strain on the police, who always worry that they could

be stopped at any moment. The Commission takes into account complaints from the victim's family members in addition to relying heavily on police records. According to the information above, it is accurate to say that a number of rulings, directives, and recommendations have been made in an effort to increase openness and hold police personnel more responsible. Moreover, the NHRC has provided standard guidance in this area. These have undoubtedly established valuable legal guidelines and practises that, in theory, should lower the number of cases of murder and torture and result in the arrest of responsible personnel. When making an arrest and holding a person in custody, law enforcement officials should be more circumspect and refrain from being overbearing and excessive. The reality, however, is considerably different. Custodial Death is still being encouraged in India. According to official data from the National Crime Records Bureau, 1,303 people died or vanished while being held by the police between 2005 and 2017. The top 2 states for police custody fatalities in 2018 were Gujarat and Tamil Nadu, with 14 and 12 respectively. Up to 117 persons passed away while in police custody in 2019. In India, there are an average of 5 persons who pass away while being held captive each day, many of whom were victims of police torture while being held in judicial or police custody. India has a very high level of police impunity. They are also skilled at figuring out ways to get around following directions. The instructions are still mostly on paper because there is no consistent follow-up method. Police can also get away with causing a nuisance by intimidating witnesses and harassing regular people. They are usually successful in presenting their side of the story to the court. Most crucially, none of these rules take effect until after the arrest. As a result, abuse still occurs, usually just before an accused person is taken into custody. Such crimes go unreported and unacknowledged. Hence, the age-old conundrum of "who will protect the guardians?" still looms over humankind. The recent occurrence involving the deaths of Jayaraj and Bennicks while they were being held in custody at the Sathankulam police station in Thoothukudi, Tamil Nadu, is also shocking to us. The police made an effort to cover their tracks by claiming that because the death occurred when the person was in judicial custody rather than police custody, the instructions and rules on custodial death applied in this situation. This demonstrates how little we value a person's dignity, right to life, and other basic human rights.

## **1.2 STATEMENT OF THE PROBLEM:-**

Places of imprisonment must be open to the public and regularly audited by outside parties in order to prevent torture and other forms of maltreatment. Allowing inmates to interact with the outside world, such as through family visits and legal consultations, is more than just a basic human right. It is essential in assisting in the fight against torture and other forms of cruel treatment that go unreported and unpunished. In order to prevent abuse, monitoring systems have been put in place that make routine, unauthorised trips to detention facilities. The likelihood that abuse will be discovered is increased by the prospect that an unannounced visit could be made at any time. Thus, it deters jail guards and police officials from using torture or other cruel practises. The effectiveness and scope of criminal investigations are also very important. Under pressure to solve crimes, law enforcement agencies are more prone to rely on confessions gained through torture or other cruel treatment when forensic capacity to investigate crimes is weak. In a

detention setting, systematic or humiliating searches, the use of restraint devices, disciplinary measures, the lack of access to adequate medical care, and substandard living circumstances can all be considered torture or other forms of ill-treatment. Regardless of adoption of the Optional Protocol to the Convention against Torture, governments are required by international law to avoid torture and other cruel treatment of people (OPCAT). In a number of ways, we assist monitoring organisations, such as National Preventative Mechanisms (NPMs), in their work. In accordance with the conditions for their efficiency, we support the establishment of preventative monitoring bodies (eg. independence, comprehensive mandate, unannounced visits, private interviews). We create tools to aid monitoring organisations, such as National Preventative Mechanisms (NPMs). We train oversight organisations to improve their ability to stop abuse and torture. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), an independent, non-judicial and proactive control organisation with a preventive purpose, works to stop torture and other types of cruel treatment.

The CPT arranges visits to detention facilities to observe how those who are denied their freedom are handled. These locations include jails, juvenile detention facilities, police stations, immigration detention facilities, psychiatric hospitals, and residential care facilities. Detention facilities are open to CPT delegations at all times, and they are free to wander around them as they like. They speak openly and in private with anyone who can help them gather information while interviewing prisoners. The European Court of Human Rights handles individual complaints; as a non-judicial entity, the CPT is not authorised to do so. The CPT typically meets with numerous civil society organisations and human rights advocates before conducting a periodic or ad hoc visit to a nation. Meetings with representatives of national and/or international non-governmental organisations and human rights advocates take place during visits and are an essential aspect of the programme. Following each visit, the CPT sends the state in question a private report that includes its findings and detailed suggestions. The report's issues are addressed, and the national authorities are asked to respond. Only when requested by the national authorities are visit reports and government answers made public. Staff members and Commissioners from national human rights institutions (NHRIs) often observe incarceration facilities throughout the Asia Pacific, from jails and police stations to immigration detention facilities and closed psychiatric clinics. Additionally, NHRIs look into claims of torture, educate law enforcement personnel, raise public awareness, and suggest amendments to national legislation and detention practises. In several nations in the area, their work has played a crucial role in influencing favourable changes to laws, policies, practises, and community attitudes. NHRIs also urge their State to sign the Optional Protocol to the Convention against Torture, an international agreement that creates a "national preventative framework" for independent monitoring teams to visit sites of detention.

### **1.3 REVIEW OF LITERATURE:-**

All research fields and all research endeavours must take into account prior, pertinent literature. Regardless of the subject, when reading an article, the author usually starts by outlining prior studies in order to map and evaluate the research area, justify the study's purpose, and support the research question and hypotheses. The "literature review," "theoretical foundation," or "research backdrop" are common

names for this. As with any other research, specific procedures must be followed and actions must be done to guarantee that the review is exact, precise, and reliable if a literature review is to be considered a legitimate research approach. The usefulness of an academic review depends on what was done, what was discovered, and how well it was reported, just like it does with all research. A literature review might be the greatest methodological instrument to offer solutions to a number of research concerns. Reviews can be helpful, for instance, when a researcher needs to assess the validity or accuracy of a certain theory or rival hypotheses, or analyze theory or evidence in a specific field. This strategy might be specialized, like looking at the impact of the relationship between two particular variables, or it can be more general, like looking at the body of evidence in a certain field of study. Additionally, literature reviews are helpful when trying to give a general overview of a subject or research challenge. This kind of literature evaluation is typically done to gauge how much is known about a certain subject. For example a study by **Suribabu, Majji** (2022)<sup>1</sup> concluded that solution for custodial torture is to establish grievance cell, complaint board and security commission. Another study by **Sharma, Prakriti Bhanwarlal** (2016)<sup>2</sup> highlighted that there should be no de jure or de facto immunity from the prosecution for officials suspected of torture, and the scope of immunities from foreign nationals should be as restrictive as possible.

A study by **Vijay.V.Muradande** (2018)<sup>3</sup> concluded that special courts shall be established to deal with police torture cases under Prevention of Torture Bill. There is a need for research that focuses specifically on the Interrogation and punishment against the perpetrators and legitimate sanctions in National and International laws.

### 1.3.1 NEED OF REVIEW OF LITERATURE:-

It is vital to analyze earlier research in international law, States are obligated to prevent torture and other cruel treatment for everyone who is subject to their authority. They must establish a criminal offence against torture. According to the Torture Convention, States must make sure that statements produced as a result of torture are never used as evidence in legal proceedings (except in relation to the prosecution of the alleged torturers). They are required to look into allegations of torture, bring charges against individuals who are found guilty, and make torture an extraditable offence. The international community has been able to adopt effective protections that assist avoid these abuses thanks to systematic analysis of the circumstances in which torture and other forms of cruel treatment frequently take place. Respect for the guiding principles governing justice administration, law enforcement, and the prison system is one of them. Torture and other forms of abuse cannot be stopped by the mere existence of these protections. But there is reason to be concerned about their disappearance. Making sure they are established is a good starting point for prevention. Although the nation attained independence in 1947, it took close to 70 years for a legislation to

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<sup>1</sup> Suribabu & Majji, *Bail sine qua non prevention of custodial torture a socio legal study*, 302-342, (2022) <https://hdl.handle.net/10603/381232>

<sup>2</sup> Sharma & Prakriti Bhanwarlal, *Torture And Custodial Deaths Role of The Indian Judiciary And National Rights Commission In Building Human Rights Jurisprudence*, 766-781, (2016) <https://hdl.handle.net/10603/89148>

<sup>3</sup> Vijay.V.Muradande, *Police torture a critical analysis from human rights perspective*, 302-313, (2018) <https://hdl.handle.net/10603/441234>

be established that aimed to defend a person in custody's fundamental right to life. The only piece of law passed specifically to control torture committed while a person is being held captive in the nation was the Prevention of Torture Bill, which was introduced in 2010. In the case of D.K. Basu v. State of West Bengal, the Supreme Court provided clear instructions on how detainees were to be protected. According to the ruling, the protections required that the detention be documented, that immediate access to counsel be provided, and that the person be brought before a magistrate within 24 hours of the arrest.

These are the below topics to be covered on the matter of my research and literature that needed to be reviewed.

- 1) Torture, Ill or Cruel or Degrading Treatment
- 2) Illegal Detention
- 3) Police Brutality
- 4) The Prohibition of Torture: Absolute Means Absolute by Nigel S. Rodley.
- 5) The International Law of Torture: From Universal Proscription to Effective Application and Enforcement  
Winston P. Nagan & Lucie Atkins.
- 6) Torture Team by Philippe Sands.
- 7) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

### **1.3.2 TORTURE, ILL OR CRUEL OR DEGRADING TREATMENT:-**

Numerous documents on the ICRC website and elsewhere outline the ICRC's views on torture and ill-treatment, as well as the steps we are taking to stop these practises. However, any debate of the subject necessitates a shared understanding of the terminology, so we've opted to publish the definitions of four crucial terms as given by the ICRC.

#### 1) Torture:-

Torture is defined as the infliction of severe pain or suffering, whether physical or mental, for the goal of gaining information or a confession, applying pressure, intimidation, or humiliation. Torture is expressly prohibited in a number of international human rights treaties, however defining what treatment constitutes torture is difficult. Certain sorts of treatment are clearly considered torture by the majority of people, whereas other examples may be less evident due to cultural or other considerations.

Article 1(1) of the UN Convention Against Torture defines torture broadly but identifies specific characteristics that, when combined, constitute torture under the Convention:

- 1) Extreme pain or suffering must have been inflicted,

2) For a specified objective, such as obtaining information, as punishment or intimidation, or for any other discriminatory motive,

3) By or at the request of, or with the approval or acquiescence of, state authorities.<sup>4</sup>

2) Cruel Treatment:-

Cruel or inhuman (synonymous terms) treatment is defined as acts that inflict substantial pain or suffering, whether physical or mental, or that constitute a serious violation of individual dignity. These acts, unlike torture, do not have to be undertaken for a specific reason.

3) Degrading Treatment:-

Humiliating or degrading treatment (synonymous terms) comprises of acts that produce real and significant humiliation or a major outrage on human dignity, and whose intensity is such that any reasonable person would be outraged.

4) Ill-treatment:-

Ill-treatment is not a legal phrase, yet it encompasses all of the behaviours listed above. Furthermore, the magnitude of the anguish undergone distinguishes torture from other forms of mistreatment. If the suffering is less severe than that which defines torture, cruel, inhuman, or degrading treatment or punishment may have occurred. In contrast to torture, ill-treatment does not need to have a specific goal; nonetheless, as with torture, intent must be established. This is the European Court's problematic approach, as many authors argue that it is the deciding factor of torture, rather than and not only the amount of pain.

### 1.3.3 ILLEGAL DETENTION:-

There are seven main problems.

1. Prisoners of conscience – someone who has not used or advocated violence or hatred in the circumstances leading to their imprisonment but is imprisoned solely because of who they are (sexual orientation, ethnic, national or social origin, language, birth, colour, sex or economic status) or what they believe (religious, political or other conscientiously held beliefs).
2. Arbitrary detention – being detained for no legitimate reason or without legal process.
3. Incommunicado – being detained without access to family, lawyers.
4. Secret detention – being detained in a secret location.
5. Inadequate prison conditions – such as overcrowding and prolonged solitary confinement.
6. Unfair trials – trials conducted without ensuring minimum legal process.

<sup>4</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 <https://www.ohchr.org> (Last seen 21<sup>st</sup> Jan 2023)

## 7. Torture and other forms of ill-treatment.

### Remedy for Illegal Detention:-

- 1) No secret detentions.
- 2) No torture or other forms of ill-treatment.
- 3) Rapid and regular access to lawyers, doctors and relatives.
- 4) Effective legal process so that people can challenge their detention and treatment.
- 5) Independent judges.
- 6) Adequate detention conditions, including an end to prolonged solitary confinement.
- 7) Prompt and independent investigations when someone dies in detention.
- 8) Independent Monitoring bodies make regular visits to detention places.
- 9) Fair trials within a reasonable time or release.
- 10) All prisoners of conscience released without conditions.<sup>5</sup>

### 1.3.4 POLICE BRUTALITY:-

The term “police brutality” is sometimes used to refer to various human rights violations by police. This might include beatings, racial abuse, unlawful killings, torture, or indiscriminate use of riot control agents at protests. At its worst, unlawful use of force by police can result in people being deprived of their right to life. If police force is unnecessary or excessive, it may also amount to torture or other ill-treatment. Unlawful force by police can also violate the right to be free from discrimination, the right to liberty and security, and the right to equal protection under the law. There are strict international laws and standards governing how and when police can use force – particularly lethal force.

The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (**BPUFF**) is the key international instrument that deals with police use of force. The most important thing to remember is this: it is the utmost obligation of state authorities, including police, to respect and protect the right to life. Under international law, police officers should only ever use lethal force as a last resort. This means when such force is strictly necessary to protect themselves or others from the imminent threat of death or serious injury, and only when other options for de-escalation are insufficient.

Many killings by the police that we have seen around the world clearly do not meet this criteria. In the USA, George Floyd, Michael Brown, Breonna Taylor, Eric Garner and too many other Black people who have been killed by police were unarmed. During protests in Iran in November 2019, police shot and killed hundreds of protesters who posed no risk, including at least 23 children. And in the Philippines, witnesses

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<sup>5</sup> What We Do Detention? <https://www.amnesty.org> (Last Seen at 21<sup>st</sup> Jan, 2023)

have described seeing police shoot poor people who were suspected of using or selling drugs as they were on the ground begging for mercy.<sup>6</sup>

Cases of custodian deaths, cruelty against the innocent ones, torture, outlawed killings and violence against protesters are prevalent these days in India. There are innumerable instances where the protectors have been the perpetrators. The police metes out brutality not just by being the perpetrator but also being mute audience to the illegal violence being carried out by offenders. Former Chief Justice of India, Justice N.V Ramana recently remarked that the highest threat to human rights and bodily integrity is in the police stations in India. He stated, "The second, and often less talked about, form of police brutality is when the police is not an active participant, but instead stands as a mute spectator, thereby acting as a facilitator of the violence."<sup>1</sup> It is utter shameful that though such acts of the police are unconstitutional yet there is a complete disregard for the provisions of the Constitution of India. What is worse is that some people feel proud of such acts of the police and justify them. Even ministers of some states have bragged and flaunted the illegal actions of the police which reflects the absolute dishonour of the Constitution.<sup>7</sup>

### **1.3.5 THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW BY NIGEL S. RODLEY:-**

It always seemed rather simple to start with international humanitarian law given that is where the Presidential Directive begins. Many clauses in each of the four main international treaties, including the Humane treatment is required under the Geneva Conventions. For instance, article 17 of the Third Geneva Convention on the Protection of Prisoners of War states that prisoners of war may not be subjected to any form of force or physical or mental abuse in order to extract information of any type. No threat, insult, or other unfavourable treatment of any type should be used against prisoners of war who fail to respond. While in non-international armed conflict, Article 3 of the Geneva Conventions states that "persons taking no active part in hostilities, including... those placed hors de combat by... incarceration... shall in all circumstances be treated humanely." Violence against life and person, namely any forms of murder, mutilation, harsh treatment, and torture, as well as "outrages on personal dignity, in particular humiliating and degrading treatment," are some actions that are "prohibited at any time and in any location whatsoever." ' The International Criminal Tribunal for the Former Yugoslavia has deemed violations of these rules to be war crimes. Article 8 of the Statute of the International Criminal Court takes this into consideration (ICC). The Additional Protocol I (1977) to the Geneva Conventions, which is one of the sources mentioned for the proposition, contains Article 75. If there was ever a "gap," that piece fills it. It includes "individuals who hold positions of authority within a Party to the conflict and who are not entitled to preferential treatment under the Geneva Conventions. Such individuals must be "treated with humanity at all times. The article goes on to say that "any forms of torture, physical or mental," "outrages against personal dignity, in particular humiliating and degrading treatment... and any type of indecent assault," as well as "threats to perform any of the preceding actions" are prohibited. No extraordinary circumstances, including a state of

<sup>6</sup> What We Do Police Brutality? <https://www.amnesty.org> (Last Seen at 21<sup>st</sup> Jan, 2023)

<sup>7</sup> Protectors Or Perpetrators Police Brutality In India <https://articles.manupatra.com> (Last Seen at 21<sup>st</sup> Jan, 2023)

war or the danger of war, internal political instability, or any other public emergency, may be used as a justification for torture, according to CAT, which defines torture (see below). That disqualifies the justification of following higher-ups' directives. By demanding the criminalization of not just the act of inflicting torture but also its incitement, agreement, or acquiescence, as well as involvement or participation in torture, it establishes criminal responsibility. Any person who is present on the territory and who is suspected of having committed torture must be brought to justice or extradited to another country with jurisdiction (i.e., (quasi)-universal jurisdiction). It must be admitted that the tone of the December 2004 memorandum is far more in line with the general legal consensus on the subject than that of the 2002 version. Particularly applaudable is its categorical rejection of the obscene the pain would have to be "excruciating and terrible" or "equal in intensity to the anguish preceding major physical injury, such as organ failure, impairment of bodily function, or even death," as stated in the earlier paper as the threshold of severity for torture. The idea of specific purpose being reexamined is also commendable, particularly the statement that "[t]here is no provision under the legislation authorising torture to be employed for a "legitimate reason,"" such as safeguarding national security.

The fact that torture and other cruel or inhumane treatment are considered war crimes under international humanitarian law is first and foremost telling, as is the fact that all human rights treaties declare the prohibition non-derogable. Second, "a more effective implementation of the existing prohibition under international and national law of the practise of torture and other cruel, inhuman, or degrading treatment or punishment" was mentioned in the UN General Assembly resolution that led to the CAT's adoption. (I added emphasis). Finally, states reject the facts or assert that the acts do not violate the restriction rather than asserting a right to engage in the activity that is prohibited. Fourth, the pertinent practises are frequently prohibited by domestic law.<sup>8</sup>

### **1.3.6 THE INTERNATIONAL LAW OF TORTURE: FROM UNIVERSAL PROSCRIPTION TO EFFECTIVE APPLICATION AND ENFORCEMENT WINSTON P. NAGAN & LUCIE ATKINS:-**

The crime of torture is one of a "grave nature," according to Article 4 of the Convention Against Torture. Hence, it must be considered as falling inside the range of offences for which the defendant may be extradited in accordance with Article 8. The Convention Against Torture's Articles 5 through 7 include the well-known concept of state-conditioned universal jurisdiction, which mandates that the state either bring charges against the torturer or extradite the victim to another country so they can face prosecution there. These tenets are not limited by the concepts of jurisdiction based on nationality or territoriality. Another crucial aspect of the Agreement is its emphasis on preventing torture. After torture has been carried out, it cannot be undone, making it very difficult to implement a sanctions programme where the penalty is somewhat equal to the offence in cases of torture, mass murder, and genocide. Thus, emphasising the prevention of torture is a crucial component of global law enforcement's approach against the practise. Article 10 of the Convention Against Torture mandates that nations indoctrinate their "law enforcement

<sup>8</sup> NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 12-37 (3<sup>rd</sup> edition, 2009)

personnel, civil or military, medical personnel, public officials, and other persons who may be involved in the custody, interrogation, or treatment of any individual subjected to any form of arrest, detention, or imprisonment" with information about the illegality of torture. An important procedural value is recognised in order to ensure a strong rule of law that serves as the foundation for the prohibition of torture. If the person is unable to complain, there is nothing to stop and no one to punish. Furthermore, the mere challenge of shielding witnesses and complainants from officials who are accountable for victimising them because of torture strikes at the very core of the entire process of law enforcement under the rule of law. As torture undermines the legitimacy of the state, an individual may understand why states are reluctant to implement improved protections for torture victims and witnesses. Articles 12 and 13 may appear to request a fox to check out the chicken coop at first glance. These provisions, however, presuppose that states are complex organisational units and that governance frequently involves the exercise of many, concurrent, and sequential authorities. One branch of a state can oversee and punish another branch for disobeying the law. This realisation forces the Convention Against Torture's assessors to look at a state as a collection of coextensive and conflicting interests rather than as an undivided, homogenous entity. Political parties and advocacy organisations may be able to structure enough pressure to persuade authorities to act even when the officials would otherwise be hesitant because of this dispersed and divided structure. The Convention Against Torture also provides institutions and procedures to carry out its objectives in addition to those parts that deal with issues of cruel, inhuman, or degrading treatment or punishment. A Commission Against Torture is established (Article 17) and describes how the Committee works (Article 18). It is within the purview of the Committee Against Torture to review state party reports and to look into claims of systematic torture (Articles 19 and 20). Moreover, the Committee Against Torture has the authority to consider complaints from states alleging that a certain state has violated the Convention (Article 21).<sup>9</sup>

### 1.3.7 TORTURE TEAM BY PHILIPPE SANDS:-

Many of you will be familiar with the last scene from the 1961 Oscar-winning film Judgment at Nuremberg, which starred Spencer Tracey as Judge Dan Haywood delivering the verdict of an American military tribunal in a trial against Nazi lawyers. The judgment's guiding concept was straightforward but important: anyone who provides a fatal weapon for a crime may be culpable of the crime, and this includes a lawyer who provides legal counsel. The "Justice Trials" were a real-life series of proceedings that took place in 1947 under the supervision of the American military tribunal in Nuremberg. Telford Taylor, who served as the lead prosecutor in the Justice Trials and later served as professor of constitutional law at Columbia Law School, served as the writer Abby Mann's primary adviser for the US v. Altstoetter movie. Of course, and this needs to be emphasised, it would be completely incorrect to draw a direct comparison between what occurred in Germany in the 1930s and 1940s and what has lately taken place in the pursuit of the "war on terror." Yet it's important to think about the guiding principle: under what conditions may a lawyer cross the threshold separating poor legal counsel from improper (or unethical) legal advice. He released a book

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<sup>9</sup> Winston P. Nagan & Lucie Atkins: The International Law of Torture: From Universal Proscription to Effective Application and Enforcement, UF Law Scholarship Repository (Last seen 21<sup>st</sup> Jan 2023) <https://scholarship.law.ufl.edu>

named *Lawless Planet* in 2005. It explained how the Bush Administration had deliberately undercut many of the standards of international law that the US had worked so hard to establish, frequently with the help of the Blair government in Britain. In one of its chapters, the book discussed Guantánamo Bay and how, in the name of military necessity, the Administration had persuaded the US military to embrace cruelty. By doing this, the Administration disregarded President Lincoln's illustrious declaration from 1863 that "military necessity does not tolerate of brutality." This is stated in a memo sent to Mr. Rumsfeld on November 27, 2002, and written by William "Jim" Haynes II, General Counsel to the US Secretary of Defense. In his report, "Counter-Resistance Tactics," Mr. Haynes suggested that the Secretary of Defense approve 15 brand-new interrogation methods. On December 2, 2002, a few days later, Mr. Rumsfeld gave his approval to that suggestion. He wrote: "I stand for 8 to 10 hours a day; why is standing limited to 4 hours?" next to his signature. The document has gained some prominence due to its handwritten objection to one of the suggested interrogation techniques—the use of "stress positions," which include standing for up to four hours. In his most recent book, *Torture Team*, I discuss some of the main points made in that memo as well as the real tale that lies behind it. The United States took the lead in developing a new set of international laws after the Second World War. New rules of international law were established along with the creation of the United Nations to safeguard everyone's basic rights. The Nuremberg Charter helped shape international criminal law, which was swiftly followed by the Geneva Conventions' gradual advancement of international humanitarian law. Common Art 3 of those Conventions forbids the use of interrogation methods that violate human dignity, are harsh, or amount to torture. The UN approved the Torture Convention in 1984, criminalising torture as well as collaboration and participation in it. It also established a complex structure of universal criminal jurisdiction intended to eliminate any potential havens for torture. The House of Lords decided as a result of that Convention that Senator Pinochet was not qualified to request protection from the jurisdiction of the English courts with respect to acts of torture perpetrated while he served as the head of state of Chile. It made way for wider application of international criminal laws. There is a strong body of international law that, by the middle of the 1980s, had solidified into an outright ban on torture under all circumstances. Nonetheless, the widespread acceptance of that general restriction has been called into question by the events of September 11, 2001. As seen in the Rumsfeld Memo, they have created a pathway for a new direction.

#### **1.4 OBJECTIVES OF THE STUDY:-**

1. To describe the sanctions available against torture and ill or degrading treatment of human beings.
2. To Examine the History and nature of Torture.
3. To Evaluate the Legal framework of India and Judicial system in Protecting People against Torture.
4. To verify the role of human rights commission of India in preventing custodial Torture.
5. To determine the role of United Nations and the International legal framework in prohibiting Torture.

## 1.5 RESEARCH QUESTIONS:-

- 1) Whether Constitution and other penal laws of India protect people from Third Degree treatment?
- 2) Whether Protection of Human Rights Act, 1993 and Human Rights Commission of India adequately protect people against Custodial Torture?
- 3) How does UN protect people against torture?
- 4) How does UNCAT framework prohibit torture?

## 1.6 HYPOTHESIS:-

In order to have an effective study the following Hypothesis has been framed.

” As Torture inflicted by public officials results in serious human rights violation, there is a need to prohibit the same, the present national and international legal regime in this regard is inadequate, since it is not implemented effectively”.

## 1.7 RESEARCH METHODOLOGY:-

Any study's dependability and reliability are influenced by the methodology used. The black letter or Doctrinal method is employed with the study's goals in mind. The study has looked at the problem of civil and political rights of common people that lead to the methodology of doctrinaire research. The information is gathered from both primary and secondary sources. Primary data including legislations, regulations, bills, constitution and conventions reports of National Human Rights Commission, civil rights groups like Amnesty International and the APCLC, reports from inquiry commissions. Secondary sources including court rulings, newspaper clippings, journal articles from legal and other publications, etc. In doctrinal research, sources of information include the rule itself, cases brought under the rule, relevant legislative history, and commentaries and literature on the rule. This strategy is advantageous because it offers a strong framework, arranging the paper and permitting a comprehensive clarification and explanation of the rule. This method may be very formalistic and could result in the legal doctrine being oversimplified. The findings are documented, and the information and data are presented in a descriptive manner. The conclusions are reached based on the results, and the hypothesis is examined. At the study's conclusion, the findings are given. The report also offers policymakers some realistic recommendations for reducing the threat of custodial mortality.

### 1.7.1 DATA COLLECTION METHOD:-

The present study is based on the collection of secondary data.

### 1.7.2 SECONDARY DATA:-

Secondary data includes information that has already been published and information gathered from previous sources. Secondary data is defined as information gathered from a source other than the user. Census data, information gathered by government agencies, company records, and data that was initially gathered for other research goals are all common sources of secondary data for social science. The following sources were used by the researcher: Searching online, reading books, journals, and reports.

### 1.7.3 RESEARCH PERIOD:-

This study was conducted during at the library of Central Law College, Salem.

### 1.7.4 OPERATION DEFINITION:-

Definition of Outlawry:-

“The state of being outlawed, disregard of defiance of the law”.

Definition of Torture:-

"TORTURE is defined as any act in which a person is purposefully subjected to great pain or suffering, either physically or mentally, in order to obtain information or a confession from him or a third party, or to punish him for an act he or the third party has committed. When such pain or suffering is inflicted by, at the instigation of, with the consent or acquiescence of a public official or other person acting in an official capacity, whether that person is suspected of having committed, intimidating or coercing him or a third party, or for any reason based on discrimination of any kind. It excludes discomfort or suffering brought on only by, resulting from, or resulting from legal sanctions.”

Definition of Constitution:-

“The basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it”.

“A written instrument embodying the rules of a political or social organization”.

Definition of International Law:-

“International laws are a set of rules, agreements and treaties that are binding between countries. Countries come together to make binding rules that they believe will benefit the citizens. It is an independent system of law existing outside the legal framework of a particular state”.

## **1.8 ORGANIZATION OF CHAPTERS:-**

This Dissertation is divided into seven chapters

### **Chapter 1:-**

The first chapter is about Introduction of the research and Definition of Torture with review of literature, research methodology, research questions and others.

### **Chapter 2:-**

The Second Chapter is about the historical background of the study and research.

### **Chapter 3:-**

The Third Chapter is about the penal laws and constitution provision to abolish torture and third degree treatment.

### **Chapter 4:-**

The Fourth Chapter is about the human rights Act in India and the prevention of custodial torture.

### **Chapter 5:-**

The Fifth Chapter is about the United Nations work to prevent torture and punishment against torture.

### **Chapter 6:-**

The Sixth Chapter is about convention against torture and International authors about torture.

### **Chapter 7:-**

The Seventh Chapter filled with the answer to the research questions and the suggestions of the researcher.

## **CHAPTER II**

### **HISTORICAL BACKGROUND OF THE STUDY**

## **2. HISTORICAL BACKGROUND OF THE STUDY:-**

### **2.1 HISTORY AND NATURE OF TORTURE:-**

The history of torture gives us two truths. First, it informs us that our imaginative potential for inflicting agony and terror on our fellow humans is astounding. Second, we learn from history that we don't learn from history: same patterns of violence and humiliation reappear with sinister regularity. Even the torturer's speech can be heard down the generations. During the English Civil War in the 1640s, the Earl of Clarendon had a unique plan: rather than allowing people suspected of being parliamentary opponents to benefit from the rule of law, he would create a jail on an island off the British coast. He reasoned that this way, they could be safely forgotten, buried alongside their legal rights. Torture has been used in criminal proceedings

since the dawn of civilization. Torture and corporal punishment scenes can be found on ancient Mesopotamian and Egyptian monuments. The Sumerian Code of Ur-Nammu (about 21st century bc) and the Babylonian Code of Hammurabi (around 18th century bc) were the first records of the legal application of torture to show guilt or innocence, which used the so-called 'divine judgement' of the water-ordeal in the evidential procedure. Both Codes were predicated on the theocratic concept of law, which invokes divine authority and interprets rules as divine will, which all people must obey. During the time of Plato and Aristotle, the Ancient Greek judiciary established 'nature' as the new foundation of law. The Greeks saw laws as man-made and created the concept of 'equity' as the cornerstone of 'good' law. Torture was used in evidential proceedings in addition to laws, customs, testimonies, and oath-taking. Torture was reserved for slaves whose utterances had no moral value: because torture served to determine the truth, a confession gained in this manner was considered true. Although the use of torture was limited by legal control and justified as a technique of determining the truth rather than as a form of punishment, its usage in practise quickly exceeded legal limits. Torture was used even when there was no sufficient evidence, and its use ranged from serious crimes to minor property offences. Torture became the primary form of extortion throughout the Inquisition's crusade against heresy, witchcraft, and political offences, spiralling out of hand. The records of trials held throughout Europe in the 16th and 17th centuries attest to the numerous catastrophic judgements made on the basis of confessions extorted through horrific torture methods. Many of those trials resulted in Capital punishment. The Age of Enlightenment in the 18th century altered all aspects of society, including legal science. Changes in trial procedures were influenced not just by the Enlightenment concepts of Voltaire, Rousseau, and Montesquieu, but also by the work of Cesare Beccaria, an Italian criminologist, jurist, philosopher, and politician. His essay *On Crimes and Punishments* (1764) is considered the birth of contemporary criminal law. Beccaria, in his treatises, advocates the notion of respect for the accused's human rights and condemns torture and the death penalty.

He believes that the criminal justice system should focus on crime prevention rather than punishment, and that better living conditions will lead to a decrease in crime. *On Crimes and Punishments* by Beccaria aided in the eradication of torture. In 1740, Prussia became the first country to prohibit torture, followed by Austria in 1776 and France in 1789. Torture was no longer employed as a legal tool in trial procedures in Europe at the turn of the nineteenth century. Unfortunately, this was just temporary. Human and civil rights were pushed out by the rights of nations and the revolution at the beginning of the twentieth century, with national socialist and revolutionary ideologies. As a result, torture began to be used against "enemies of the revolution" in the Soviet Union and China, as well as "enemy of the political order" in fascist Germany and other Axis powers. Torture was widely used by secret civil and military police forces, which tortured political dissidents, spies, and prisoners of war. Individual rights of citizens were subordinated to 'greater causes,' and political freedom was restricted or even lost. Under such conditions, all measures were permissible for the sake of a "higher and more vital cause," and therefore the use of torture found fertile ground due to fear and insecurity. In addition to the traditional torture implements, sites for mass torture and killing were established in Nazi concentration camps and Stalin's gulags. There is almost no country in Europe, the Americas, or Asia that did not have camps where "those who were different" were imprisoned

and tortured during and after World War II. International human rights and humanitarian organisations began to take action in response to this systematic and unfettered use of repression. They condemned countries all over the world for the atrocities perpetrated on civilians and the devastation wrought by war, and they urged them to return to the Enlightenment-era ethical values and the famous Declaration of the Rights of Man and of the Citizen of 1789. These efforts led in the passage of the United Nations' Universal Declaration of Human Rights in 1948, which was crucial in condemning torture. At the initiative of the Council of Europe, a number of acts for the protection of human rights were adopted, the most prominent of which is the Convention for the Protection of Human Rights and Fundamental Freedoms, which was adopted in Rome in 1950. The United Nations General Assembly enacted the International Covenant on Civil and Political Rights in 1966. Amnesty International and other international non-governmental organisations for the protection of human rights contributed to the creation of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (commonly known as the United Nations Convention against Torture), which was adopted by the United Nations General Assembly in 1984. The Convention, which prohibits the use of torture under any circumstances, became an intrinsic component of the national legislation of all States Parties, independent of their judicial system. States Parties are expected to take effective steps to prevent and prohibit any act of torture committed on their territory.

This also contributed to international public condemnation of France's post-war use of torture in Algeria between 1954 and 1962, as well as the Greek military regime of 1967-74. The Parties are also required to extradite or prosecute anyone accused of torture in territory under their jurisdiction, regardless of where the alleged torture occurred. In 1998, the United Kingdom used this statute to arrest and detain Chilean dictator Augusto Pinochet. In 2002, the United Nations established the Committee Against Torture, a body of independent human rights experts that monitors States Parties' implementation of the Convention Against Torture. The monitoring is intended to encourage adjustments, with public condemnation coming only if the changes are not adopted. In 1252, Pope Innocent issued the bull *Ad extirpanda*, a crucial document for the practise of judicial torture, which permitted the use of torture to extort confessions from heretics under certain conditions. Torture could be employed only in the case of a serious crime, provided valid evidence was produced, the accused's confession was deemed to be truthful and consistent with other evidence, and the confession was repeated in neutral circumstances. Torture and its intensity were regulated: following the tribunal's unanimous ruling, torture was always done in the presence of legal authority. Torture of minors and pregnant women was outlawed. If the accused endured the torture, he would still be convicted on the basis of insufficient evidence and sentenced to the so-called extreme punishment, which was usually less severe than the sentence he would have received if he had confessed to the crime<sup>10</sup>.

The Human Rights Committee is a monitoring organisation established by the International Covenant on Civil and Political Rights. The 18 impartial specialists on the Committee were chosen by the States Parties to the Covenant. It looks at reports that States must submit and makes specific suggestions to the State in the form of concluding observations that highlight topics of concern. The Committee may also take into account

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<sup>10</sup> History of Torture <https://tortureum.com/> (Last Visited 22 Feb, 2023)

submissions from those who assert they are the victims of a State's violation of the Covenant. The State shall have become a Party to the First Optional Protocol to the Covenant in order for this procedure to apply to people. The Committee has also released a number of General Remarks that outline what they believe the meaning to be. The International Committee of the Red Cross is a private, neutral organisation that was established in Geneva in 1863 to provide aid to victims of armed conflict and other internal afflictions. It functions under the rigorous premise of impartiality towards the conflicting parties. The ICRC is permitted to visit all locations housing prisoners of war or civilian internees in situations of international armed conflict between States Parties to the Geneva Conventions. It offers its services to the opposing parties in non-international armed situations and, with their permission, has access to detention facilities. It provides humanitarian activities that may be helpful in times of internal conflict and stress. Delegates make visits to prisoners with the goal of evaluating and, if required, improving the physical and psychological aspects of confinement as well as averting torture and other cruel treatment. The visit protocols demand that all detainees and sites of custody be accessible, that there be no restrictions on the length or frequency of visits, and that the delegates be permitted to speak openly and in private with any detainee. Also, as part of the ICRC's standard visiting practises, each detainee's whereabouts is followed up on individually. The ICRC and authorities must work together and have faith in one another. Visits are private, as are the reports that result from them.

The US Army Field Manual FM 34-52 had, up until that point, forbade using these techniques because they were obviously against the Geneva Conventions. The Rumsfeld Note, however, noted:

I have spoken about this with the Deputy [Mr. Wolfowitz], the Undersecretary of Defense for Policy (Doug Feith), and the Chairman of the Joint Chiefs of Staff (General Meyers). I believe everyone concurs with my recommendation that, as a matter of policy, you permit the Commander of USSOUTHCOM to use only categories I and II and the fourth technique listed in category III (the "Use of mild, non-injurious physical contact such as grabbing, poking in the chest with a finger, and light pushing") at his discretion.<sup>11</sup>

### **2.1.1 NELSON MANDELA RULES:-**

The Nelson Mandela Guidelines were updated and given that name in 2015. The Standard Minimum Standards for the Treatment of Prisoners were first adopted in 1957. States frequently view them as the main source of norms pertaining to care in detention. The updated laws now recognise that independent healthcare practitioners have a responsibility to abstain from participating in torture or other cruel treatment, as well as stronger requirements for solitary confinement and body searches.

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<sup>11</sup>PHILIPPE SANDS, TORTURE TEAM: THE RESPONSIBILITIES OF LAWYERS FOR ABUSIVE INTERROGATION 45-94 (1<sup>st</sup> edition, 2008)

### 2.1.2 THE OPCAT:-

In order to prevent torture and other forms of cruel, inhuman, or degrading treatment or punishment, the Optional Protocol to the United Nations Convention against Torture (OPCAT) establishes "a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty" (Article 1 of the Protocol). State Parties are invited to establish a visiting body for the prevention of torture as part of this system (commonly referred to as the National Preventive Mechanism, NPM). The WMA thinks that doctors' involvement in these visiting processes is crucial for addressing health issues associated to torture and other cruel treatment, for assessing the health system, and for determining how general detention conditions affect the health of the detained population.

The UN system's human rights treaty bodies, such as the Human Rights Committee, the Committee Against Torture, and the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, carry out the prohibition of torture and other forms of cruel, inhuman, or degrading treatment and punishment. Moreover, complaints of torture may be investigated and reported on by the UN Human Rights Council's special processes. The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for instance, is permitted to investigate issues pertaining to torture in all UN Member States through urgent appeals, country visits, and reports.

The individual complaints processes of regional human rights tribunals, such as the European Court of Human Rights, are another avenue for enforcement, the African Commission on Human and Peoples' Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, and the African Court of Human and Peoples' Rights. As was previously stated, the prohibition of torture also calls for governments to take action to stop and punish torture, and many States have made torture a crime under their domestic legislation. Governments are required to extradite or prosecute persons who commit acts of torture by the Geneva Conventions and the Convention against Torture. Governments may also use universal jurisdiction to bring charges against torturers, and states that are parties to the International Criminal Court are obligated to work with the court in its investigation and prosecution of all crimes, including those that fall under its purview. The International Committee of the Red Cross keeps track of victims of armed conflict.

All people are protected from being intentionally subjected to severe physical or psychological distress by, or with the approval or acquiescence of, government agents acting for a specific purpose, including to inflict punishment or to obtain information. This right is enshrined in many human rights instruments. In order for the abuse to qualify as torture under international humanitarian law, which is applicable in situations of armed conflict, it is not essential for a State agent's approval, participation, or complicity. The prohibition of torture, one of the most widely accepted human rights, has acquired status as a jus cogens or preeminent principle of general international law, giving rise to the obligation erga omnes (due to and by all States) to take action against those who torture. So, even if a State has not signed any of the pertinent treaties, the prohibition may still be applied to that State, and it is not subject to exceptions during times of

emergency or war. International agreements that outlaw torture typically also forbid cruel, inhumane, or humiliating treatment or punishment. Compared to torture, cruel, inhuman, or degrading (CID) treatment causes less pain and is not always carried out for a specific reason.

1. According to this Declaration, torture is defined as any act in which a person is purposefully subjected to great pain or suffering, whether it be physical or mental a person by a public authority in order to obtain information or a confession from him or from a third party, punish him for an act he has committed or is suspected of having committed, or intimidate him or other people. In accordance with the Standard Minimum Guidelines for the Treatment of Prisoners, it excludes pain or suffering that is only caused by, inherent in, or incidental to legal sanctions.

2. Torture is a particularly severe and intentional type of cruel, inhuman, or otherwise offensive treatment or punishment.

### **2.1.3 AMNESTY INTERNATIONAL:-**

The Rome Statute makes no mention of any concept of the relative intensity of pain or suffering by reference to other forms of ill-treatment, despite the fact that the pain or suffering must, in both senses, be severe. Similarly, there is no mention of any aspect of. It is considered that no special purpose needs to be proven for this crime, as stated in a footnote in the finished draught language of the Elements of Crimes adopted by the Preparatory Commission for the ICC, with regard to the crime against humanity of torture. Also, there is no indication of the offender's position as a public official. With regard to the amended form of the authorised sanctions exception, this is actually compatible with the exclusion found in the definition of torture stated in article 1 of the Convention against Torture and doesn't raise any new difficulties that haven't already been covered elsewhere. Thus, we won't pursue this issue any further.) A unique concept of custody or control is proposed in contrast. Hence, the question of whether there is any cohesive definition of torture under general international law is put up. Of course, it would be conceivable for there to be distinctions between the definitions that apply to the prohibition of torture under international human rights law, which establishes state responsibility, and the offence of torture under international criminal law, which establishes individual criminal responsibility. The appropriate burdens of proof for an alleged victim of an international human rights violation, as opposed to a prosecutor attempting to establish an individual's guilt for an offence under international criminal law, or the legality of drawing inferences from mental elements are a few examples of where these differences may arise.

The Greek case that was brought before the European Commission of Human Rights in 1969 was where the topic of the degree of pain or suffering and its relative character in regard to torture first came up. Article 3 of the European Convention on Human Rights, which states that "No one shall be subjected to torture or to cruel or degrading treatment or punishment," was called upon by the Commission to be applied in that case. The Commission notably made the unnecessary decision to break down the overall prohibition into its constituent pieces, with an indication of its comprehension of each, even though no specific legal repercussions followed from it. The phrase "inhuman treatment" was used to start it off, and it was defined

as "at least such treatment as intentionally causes extreme suffering, either mental or physical, which For the interest of completeness, it should be added that the Commission also considered "degrading treatment" of a person to be a part of torture. According to the Commission, this type of treatment "grossly humiliates him before others or compels him to behave against his will or conscience." Leaving aside the question of the implications of potential justification of inhuman treatment, which the European Court of Human Rights abandoned and rejected into force in 1976 and whose Human Rights Committee was established a year later, it was also potentially in a position to help clarify these issues. In actuality, the way it operates makes things murky. Notwithstanding the modest goal, which was restricted to the treaty itself, it was anticipated that this definition would end up serving as the standard. In large part, this has come to pass. The Declaration against Torture, on which it was based, featured a definition of torture that differed significantly from this one. The most notable change is the removal of the claim that torture is an aggravation of other forms of maltreatment. In fact, the effect of the new paragraph 2 appears to imply acknowledgment of the possibility of additional, wider rather than narrower understandings of torture. Yet, as the Convention's full name implies, several of its provisions go beyond outlawing torture to include other forms of cruel treatment. Additional language in Article 16 alludes to "cruel, inhuman, and degrading treatment" allowing for a number of the Convention's articles to apply to both torture and other forms of abuse. The words that were underlined were a compromise. Amnesty International<sup>30</sup> and the International Commission of Jurists, two non-governmental groups, were primarily on one side, favouring the wording "which do not constitute torture." They desired the complete eradication of the notion that the degree of pain or suffering is comparable to, or greater than, the degree of other forms of cruel treatment. Some who disagreed with that view, most notably the United Kingdom, wished to specifically affirm the degree of pain or suffering, presumably in an effort to maintain the benefits of the ruling in *Ireland v. UK*. The phrase adopted left the matter unresolved.

The Committee against Torture, a body created by the Convention to oversee its implementation, hasn't had a chance to comment on the situation. Overall, the European Court of Human Rights has tended to stick with its established stance. In several recent cases, it has unequivocally adopted the UNCAT definition of torture, emphasising in particular the element of purpose (see following section). The conventional statement that "it was the aim of the Convention to attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering" has nevertheless been maintained. In *Ireland v. UK*, it has in fact typically confirmed its stance. The main and ongoing endeavour that frequently determines the overall mission's success in contemporary peace operations is capacity building. One of the main goals of capacity building activities is to help societies in post-conflict settings, which are frequently characterised by weak law enforcement institutions, deal with the legacy of past wrongdoings and advance justice and reconciliation through effective Security Sector Reform (SSR). The public's trust in the State has been undermined by the security institutions' frequent participation in wars and links to egregious human rights abuses. The only way to restore public law and order and to help the populace regain faith in the ability of the State to rule is through effective and human rights compatible law enforcement. These latter conditions

are a prerequisite for laying the groundwork for the receiving State to experience the appropriate level of social and economic development.

The only way to achieve a lasting and self-sustaining peace has been shown to be to reform, restructure, and rebuild State institutions in accordance with international human rights standards; as a result, protection and promotion of human rights must be integrated into the full range of mission activities as essential components. The pinnacle of every SSR programme is a State that can successfully use its coercive powers to protect individuals' human rights without abusing them. In this sector, adherence to laws against torture and other comparable practises is frequently a touchy subject. One of the most heinous abuses of a person's human rights is torture. It is an assault on a person's dignity at its core, and regrettably, national institutions' attitudes about it are frequently inconsistent with the prohibition's intent and show themselves to be founded on misconceptions and prejudice. Although recipient States formally pledge to the prevention of torture and acknowledge their unquestionable obligation to do so, this commitment is frequently not put into action. Implementing effective measures against torture is more challenging in environments that are frequently marked by a lack of respect for the rule of law, high levels of corruption, and a culture of violence.

Hence, combating torture necessitates a comprehensive approach including numerous parties. It is somewhat accurate to point out that, on a global scale, the practical enforcement of the ban against torture is a touchy subject in the area of human rights. Despite the implementation of numerous legal and practical preventive instruments, even the most significant police and troop-contributing nations still struggle to make them effective. What becomes apparent is that, despite the obvious international legal framework, there is a general dearth of knowledge regarding torture and its prevention among those who are not expert practitioners. First, it is important to clarify that the legal definition of torture differs from the way the term is typically used in the media or in everyday discussion, which frequently stresses the severity of the pain and suffering inflicted. The term "torture" is defined in Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) as follows: "Torture" is defined as any act in which a person is purposefully subjected to great pain or suffering, either physically or mentally, in order to obtain information or a confession from him or a third party, or to punish him for an act he or the third party has committed. When such pain or suffering is inflicted by, at the instigation of, with the consent or acquiescence of a public official or other person acting in an official capacity, whether that person is suspected of having committed, intimidating or coercing him or a third party, or for any reason based on discrimination of any kind. It excludes discomfort or suffering brought on only by, resulting from, or resulting from legal sanctions.

According to the definition, torture must comprise all three of the following factors:

- (a) Purposeful infliction of extreme mental or physical anguish;
- (b) Involvement of a public official, either directly or indirectly;
- (c) Specific intent.

### 2.1.4 TORTURE CONVENTION:-

Article 16 of the Convention against Torture prohibits "...other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an offended manner." Even if an act does not meet all of the criteria for being considered torture, it may still be prohibited. It is important to stress that torture is expressly not defined as any pain or suffering that is "simply from, inherent in or incidental to" legal sanctions. Therefore, this provision cannot be used to support the application of harsh sanctions. Notwithstanding the fact that some States have brought up the topic of "legalised" corporal punishments under the so-called "lawful sanctions" provision, it has been unequivocally established that they are illegal under international law. International norms, such as the United Nations Standard Minimum Rules for the Treatment of Prisoners, which were specifically mentioned in the 1975 United Nations Declaration on the Protection of All Persons from Being Subjected to Torture, should be used to determine whether the sanction is legal. Second, it's critical to make it clear that the international protection of human rights accords the prohibition of torture and other types of ill-treatment an unique standing. It is a part of customary international law, which is binding on all States, and is mentioned in a number of international and regional treaties. Since the adoption of the International Covenant on Civil and Political Rights (1966) and the Universal Declaration of Human Rights (1948), "no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment," has become the accepted definition of the prohibition of torture. The use of cruel, inhumane, or humiliating treatment or punishment, including torture, is strictly prohibited and is never acceptable. This prohibition is also non-derogable, which implies that under no circumstances, including a state of war, internal political unrest, or any other public emergency, is a State allowed to temporarily relax the ban on torturing. Additionally, it is acknowledged that the prohibition of torture is a mandatory principle of international law, or *jus cogens*. In other words, it takes precedence over any inconsistency between it and another treaty or rule of law. Notwithstanding the strong legislative restrictions listed above, many frequently challenge the outright ban on torture on the basis of security or counterterrorism, frequently citing a fictitious "ticking bomb" scenario. In this scenario, the police apprehend a terrorist they believe is responsible for a bomb that is going to detonate in the heart of a major metropolis. Many claim that the only way to get the suspect to reveal the information needed to stop the lives of thousands of people would be through torture.

Actually, if the "ticking bomb" defence is accepted, it might be dangerously extended to attempt and justify torture in a wider range of circumstances. Professional interrogators have also underlined time and time again that questioning can be done far more successfully without resorting to torture and that doing so makes detectives less active in taking advantage of other investigative opportunities. Thirdly, the traditional obligations of States to respect, preserve, and fulfil human rights are complemented by a new commitment to avoid torture and other forms of ill-treatment. This is because the prohibition of torture is given such a high priority. The United Nations Convention against Torture broadens the definition of torture and requires States parties to take clear measures to stop torture and other types of ill-treatment. While article 16

mandates that "each State Party shall undertake to prevent other acts of cruel, inhuman or degrading treatment or punishment," Article 2.1 states that "each State Party shall take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under its jurisdiction." Torture must be clearly defined as a crime under national criminal law, according to Article 4 of the Convention. Some States contend that this is not necessary because current offences in their penal laws already cover acts of torture. This clause is crucial, though, because torture is more than simply a violent assault; it's also when a state official abuses his authority over a victim in a way that doesn't fit any other crime. By outlining the specifics and importance of the offence, the definition of torture as a crime sends a strong message to authorities that the crime is prosecuted in line with its gravity. The Convention creates a universal jurisdiction over the crime of torture, and because it is viewed as a crime against humanity and a war crime when it is committed on a large scale, consistently, or during an armed conflict, the International Criminal Court may try those who commit it. States parties are obligated by Article 10 of the Convention to take action to ensure that all law enforcement officers, medical professionals, public officials, and other parties involved in the deprivation of liberty receive training and information on the outlawry and avertance of torture. In addition, article 15 of the Convention stipulates that "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made" in an effort to deter the use of torture. Once the fundamental components of torture and cruel, inhuman, or humiliating treatments or punishments have been explained, it is vital to develop a national policy in order to execute at the State level their complete ban. A comprehensive strategy that combines three interconnected components is necessary, including a legal foundation that forbids torture, its successful execution, and monitoring measures.

Indeed, a key element of any effort to prevent torture is a robust legal framework that forbids it. The legislative structure should incorporate explicit rules that forbid and prevent torture as well as reflect pertinent international human rights standards. To ensure that national laws against torture and other forms of cruel treatment are upheld in reality, practical steps must be made on a variety of levels. The various parties involved in putting the law into practise, and particularly those who work in the criminal justice system (such as law enforcement officers, judges, and detaining authorities), will need the appropriate initial and ongoing training regarding the normative framework and the creation of operational practises that respect these norms. Procedure protections should be implemented and work as intended, especially for people who have been robbed of their freedom. This can entail making sure that all registrations in detention facilities are kept up to date and that police behaviour codes are regularly reviewed. Even in the absence of a formal complaint, allegations of torture must be immediately, objectively, and efficiently examined. Any legal transgression must be punished accordingly. Last but not least, victims of torture and other forms of maltreatment deserve to get complete and effective reparation, including restitution, compensation, rehabilitation, satisfaction, and an assurance that it won't happen again. If this doesn't happen, a culture of impunity might emerge, undermining the law's authority and effectiveness, ultimately leading to the peace mission's failure to achieve its long-term goals of stabilisation and capacity building.

You must take the restriction into account if you are creating legislation, a policy, or a programme that:

- 1) Gives public authorities, including police officers, members of intelligence or security agencies, soldiers, or immigration or customs officials, new authority or alters existing authority
- 2) Has an impact on how detention facilities operate and how people are held, whether they are in jails, police stations, military detention facilities, or immigration detention centres.
- 3) Has an impact on how institutional care facilities that are utilised for medical, disability, or elderly care operate as well as how people are accommodated for institutional care.
- 4) Has an impact on the circumstances under which someone can be investigated for criminal offences, including the right to search and seize property.
- 5) Increases current punishments for offences, including mandatory fines, or adds new forms of sanctions.
- 6) Affects the ability to file complaints against treatment by public officials or current limitations on the use of evidence collected through torture or other cruel, inhuman, or degrading treatment as evidence in criminal proceedings.

An act must involve severe pain and suffering, be committed intentionally, be carried out for one of the purposes listed in the definition in the CAT, and be authorised by, carried out at the behest of, or carried out with the consent or acquiescence of a public official or person acting in an official capacity. CAT has the criterion that the offender must be a public official or someone acting in an official capacity, whereas the ICCPR does not. A public official or another person acting in an official position would always be barred from inflicting extreme pain or suffering, as the term "purpose" is defined widely. Even behaviour that does not satisfy the criteria for torture may be considered cruel, inhuman, or humiliating treatment or punishment (often known as "ill treatment"), and if so, would be illegal under both article 7 of the ICCPR and article 16 of the CAT. Both physical and mental abuse are possible. Although the ICCPR and CAT do not define ill treatment, the UN treaty authorities in charge of ensuring its implementation have provided recommendations on the kinds of treatment that are forbidden. Acts committed by police officers using excessive force, such as the use of restraints when they are not necessary, the use of a weapon to punish an offender for refusing to cooperate, or excessively prolonged detention that results in mental harm, are examples of cruel, inhuman, or degrading treatment. The use of privately maintained detention facilities by the government does not relieve it of its obligation to ensure that no one is subjected to torture or other cruel treatment there. The UN Subcommittee on Prevention of Torture is established by the Optional Protocol to the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment. The Subcommittee may visit detention facilities to check on the observance of pertinent human rights laws. Moreover, visits from domestic authorities are contemplated for this reason. Australia committed to the Optional Protocol on May 19, 2009, and is now trying to ratify it.

The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which went into effect in 1987, has 173 parties, including the United States. Even Nevertheless, torture and other human rights abuses continue to occur all throughout the world, frequently against political opponents, people from marginalised groups, prisoners of war and other detainees, human rights advocates, and others who express beliefs that certain governments find objectionable. Our quest of accountability and support for torture survivors will go on as long as anyone, anywhere, is subjected to torture. The United States continues to support the Convention against Torture, as stated in our most recent periodic report to the UN Committee Against Torture in September. We understand that in order to sustain American principles, we must face our own inadequacies and failures. As a State Party, we take seriously our responsibilities to prohibit and punish torture as well as to not deport, return, or extradite anyone to a nation where they would be subjected to such treatment. Todd Buchwald was elected as an independent expert to the Committee last October, and we supported this decision as well as the Committee's action to encourage treaty responsibilities by parties to the Convention. According to US law, we cannot offer support to any foreign government security forces that have been credibly linked to using torture. Also, we continue to support rehabilitation and justice programmes to aid victims all around the world in moving from horror to healing as the largest contributor to the UN Voluntary Fund for Victims of Torture. Via initiatives like the Survivors of Torture Initiative, we also actively support the needs of survivors and their demands for the truth. The Convention against Torture's vision of a world free from torture is one that the United States will continue to work towards. Torturers should be aware that we will vigorously seek justice for torture, other human rights abuses, and transgressions of international humanitarian law.

President George W. Bush's administration construed the term "torture" very narrowly after the September 11 attacks on the United States in 2001 in an effort to give authorities more latitude to abuse detainees. Memos that were later made public revealed that Article 5 prohibits torture and other cruel, inhumane, or humiliating treatment or punishment. The government thought that the President could "override" international law and that the laws against torture were "quaint" and "obsolete," did not apply in what it called the "war on terrorism." To disguise the conduct of the administration, new euphemisms were created. Suspects were sent to "black sites" by the U.S. under "extraordinary rendition," including the detention facilities at Abu Ghraib in Iraq, Bagram Prison in Afghanistan, and Guantanamo Bay in Cuba - to be subjected to "enhanced interrogation techniques". Many groups and individuals, including a number of retired generals, admirals, military attorneys, and intelligence personnel, denounced these terrible actions. Yet, any discussion of human rights tended to be overshadowed by more "practical" debates which are illegal under international law about whether using torture was a reliable and effective way to obtain important information. Finally, the widespread use of digital cameras, not moral justifications, helped shift public opinion away from "defining away" torture. American soldiers joyfully grinned into the camera as they degraded naked Iraqi inmates in photos that became a symbol of government human rights violations. Afterwards, the United States denounced these actions.

## 2.1.5 CUSTODIAL TORTURE IN INDIA:-

Today, activists risk their lives all around the world to report violations and immediately share information on social media. But political will determines what will be done with the information. Former Amnesty International leader Pierre Sané of Senegal claims that the issue is not a lack of early warning but rather a delay in taking action. Despite yet, the UN believes that one of the most efficient ways to stop torture is through routine oversight of detention facilities by internal and external independent oversight procedures. The internationalisation of human rights has removed national laws as the sole determinants of behaviour. Arguments that some people possess international immunity have been disproved by international and regional treaties against torture as well as against genocide and enforced disappearances. Under the 'universal jurisdiction' principle, those suspected of the most serious international crimes, including torture, may be tried in any country arrested, tried, and found guilty outside of their own country. No one gets allowed off the hook, according to former UN Human Rights Head Navi Pillay, not the real torturers themselves nor the policy-makers and public officials who set the policy or issue the instructions. For instance, "Chuckie" Taylor, the son of the former president of Liberia, is currently serving a 97-year term in a U.S. jail in Florida for acts of torture and other human rights abuses he perpetrated when living in his country. One of the most significant fundamental rights in the Indian Constitution is the Right to Life and Personal Liberty, which expresses a person's right to live fully in liberty and dignity. Nonetheless, there are instances where the general public is not at all granted these rights. Custodial Death and Torture in Detention are two hotly contested topics right now. Custodial Torture and Custodial Death are just two terms used to describe the practise of police torturing those who are detained or imprisoned. Sometimes, this torturing results in their deaths as well. They are subjected to harsh punishments such as beatings, harassment, and physical and emotional abuse in a brutal and terrible manner. Many instructions addressing the correct treatment of those who are detained or in police custody in prison were provided by the Supreme Court of India in the historic D.K. Basu case verdict.

The Convention Against Torture, which also lays out a number of rules pertaining to the same, is one convention that addresses the issue on an international level. The given standards are nevertheless occasionally not entirely embraced and used in the current situation. The implementation of all relevant regulations must be done so strictly in order to protect those who are being held in custody, grant them the fullest right to life, and ensure that they are free to live their lives as they choose. The rights of the accused are safeguarded by the Indian Constitution, the Code of Criminal Process of 1872, and the Indian Evidence Act<sup>4</sup>. The IPC<sup>5</sup> provides several legal measures for the avoidance of torture, including those pertaining to criminal intimidation, causing hurt or grave harm in order to get confessions, and wrongful incarceration. Also, there are a number of protections against torture and confinement while in custody, including those included in Articles 20(1), 20(2), and 20(3) of the Indian Constitution. In addition to this, there are a number of provisions under the Indian Evidence Act (Sections 24, 25, and 26), the Indian Penal Code (Section 348), and the Code of Criminal Procedure, 1973 (Section 164(4)).

**2.1.6 ARTICLE 20, 21, 22 OF CONSTITUTION OF INDIA, 1950:-**

Article 20:-

20. Protection in respect of conviction for offences.—

(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself

Article 20(3) of the Constitution says that no one who has been accused of a crime may be coerced into testifying against himself. This right forbids the police from using coercion and torture to get evidence. Contrarily, everyone is required by law to disclose the truth to a public authority regarding any matter, according to Section 179 of the IPC. Police may also question the accused during an investigation under Section 161 of the Criminal Procedure Code. On the other hand, if the authorities exert any kind of pressure—subtle or overt, mental or physical, direct or indirect—to obtain information from the accused, it is referred to in law as "compelled testimony."<sup>12</sup>

Article 21

21. Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 21 states that no one shall be deprived of life or personal liberty except following the procedure established by law. The right provides a constitutional guarantee against torture, assault, or harm, and thus serves as a deterrent to custodial torture and violence.<sup>13</sup>

The Supreme Court broadened the ambit of Article 21 of the Constitution in

*Maneka Gandhi vs. Union of India (1978)*<sup>14</sup>

Emphasising that this right is not limited to physical existence but also includes the fundamental right to live with dignity.

*Inderjeet v. State of Uttar Pradesh (2014)*<sup>15</sup>

The Supreme Court ruled that torture-like punishment is unconstitutional.

*Prem Shankar Shukla v. Delhi Administration (1980)*<sup>16</sup>

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<sup>12</sup> INDIA CONST. art. 20

<sup>13</sup> INDIA CONST. art. 21

<sup>14</sup> Maneka Gandhi v. Union of India AIR 1978 SC 597

<sup>15</sup> Inderjeet v. State of Uttar Pradesh WP NO. 837 OF 2020

<sup>16</sup> Prem Shankar Shukla v. Delhi Administration AIR 1980 SC 1535

The Supreme Court ruled against mandatory handcuffing of inmates in ruling the practice to be inhuman.

Article 22.

Protection against arrest and detention in certain cases.—

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply— (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention.

Right to know the reason for one's arrest: Article 22(1) of the Indian Constitution grants the person who has been arrested the right to know the circumstances surrounding their arrest as well as the right to consult with a lawyer of their choosing to represent them. The accused is given a similar privilege and the ability to ask for bail under Section 50 of the Criminal Procedure Code.

According to Article 22(2) of the Indian Constitution, the person who was arrested has a right to a prompt trial. Any person who has been arrested must show up before the local magistrate within twenty-four hours of their arrest. A magistrate must approve of any further detention. Thus, he has the right to seek bail, to reveal his grievances arising from any maltreatment meted out to him in custody, and to have an impartial investigation on the validity of his arrest.<sup>17</sup>

### **2.1.7 INDIAN PENAL LAWS:-**

The Code of Criminal Procedure, 1973

The Criminal Procedure Code (CrPC) was amended in 2009 to include safeguards under Sections 41A, 41B, 41C, and 41D, ensuring that arrests and detentions for questioning have legitimate justifications and follow established procedures, that arrests are made public, that family, friends, and the general public are informed of the arrest, and that legal counsel is available. An antidiscrimination safeguard is provided by Section 49 of the Criminal Procedure Code. It states that a person who has been arrested cannot be subjected to more restrictions than are required to prevent him from escaping. The caretaker of the accused person has a responsibility to protect the accused's health and safety under Section 55A of the Criminal Procedure Code. Section 163 of the Code of Criminal Procedure, 1973: This section forbids any investigating officer from using a threat or any other type of enticement to get the accused to confess so that it can be used against him in court. Code of Criminal Procedure, 1973, Section 164(4): This Section mandates that

<sup>17</sup> INDIA CONST. art. 22

confessions be signed and recorded correctly, and that this be further supported by the Magistrate's declaration that the confession was given voluntarily. According to Section 46 of the 1973 Code of Criminal Procedure, an accused person cannot be tortured to death if they are not charged with a crime that carries a death sentence or a life sentence.<sup>18</sup>

Indian Evidence Act, 1872:-

Investigating authorities are forbidden by Section 163 of the Criminal Procedure Code from bribing, intimidating, or promising to violate Section 24 of the Indian Evidence Act (1872), and they are also forbidden from coercing witnesses into making statements against their will. Section 24 of the Indian Evidence Act of 1872 prohibits the admission of any confessions obtained under duress, threat, or coercion. Because it is commonly accepted that if such evidence is accepted, it will encourage the authorities to use torture and other forms of coercion to obtain evidence against him, the article grants the accused the right to refuse to make any confessions against his will.

According to Section 25 of the Indian Evidence Act, a police officer cannot be found guilty of a crime based on a confession that was delivered to them.

The Indian Evidence Act's Section 27 exempts Section 25 from application. It says that if a statement is made while a person is being held, it can be admissible if it produces new information.<sup>19</sup> The accused may, however, utilise his right against self-incrimination under Article 20(3) of the Constitution if he is forced to deliver a confession under this Section, according to the Supreme Court, if that happens.

Indian Penal Code, 1860:-

The IPC's Section 348 addresses wrongful imprisonment and forbids such confinement with the intent to get a confession or other information in order to identify any crime or improper behaviour. The criminal offence of wrongful confinement now carries a maximum three-year prison sentence and a fine.<sup>20</sup>

### 2.1.8 UDHR, ICCPR:-

UDHR

Article 5 of Universal Declaration of Human Rights, 1948

The term "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 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

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<sup>18</sup> The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974(India)

<sup>19</sup> Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872 (India)

<sup>20</sup> Indian Penal Code, 1860, No. 12, Acts of Parliament, 1891 (India)

acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>21</sup>

Article 7 of International Covenant on Civil and Political Rights, 1976

The term “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 or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>22</sup>

Article 1 of Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975

1. Torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

Article 3 of the Declaration stipulates that no exceptional circumstances such as a state 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 punishment.<sup>23</sup>

### **2.1.9 THE PREVENTION OF TORTURE BILL, 2010:-**

The Bill aimed to be the main piece of law that would regulate situations and issues involving torture and other cruel, inhumane acts. The aforementioned law was passed in order to comply with the UN convention against torture and other cruel activities and to lessen the number of deaths occurring in detention facilities around the nation. The Prevention of Torture Bill, 2010, outlined stringent guidelines for how cases of torture were to be handled after the bill's passage and explained how those guidelines differed from those outlined under the Indian Criminal Code on forcing or coercing a confession.

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<sup>21</sup> Universal Declaration of Human Rights, 1948

<sup>22</sup> International Covenant on Civil and Political Rights, 1976 <https://www.ohchr.org> (Last seen 22<sup>nd</sup> Jan 2023)

<sup>23</sup> Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975 <https://www.ohchr.org> (Last seen 22<sup>nd</sup> Jan 2023)

The 2010 Prevention of Torture Law seeks to sanction any public servant who abuses a person who is in custody. The Act specifies certain situations in which a public official may be held accountable, including:

- 1) When the crime is conducted to elicit a confession from the victim or any other information that links the accused to the crime.
- 2) When an act is perpetrated on the basis of a person's caste, language, race, or other characteristic.

The Law also specifies the proper procedure to be followed in cases involving torture in custody.<sup>24</sup>

#### **2.1.10 PREVENTION OF TORTURE BILL, 2017:-**

While the Prevention of Torture Bill, 2010, outlined the fundamental framework that would be used to reduce crimes related to torture in detention, there were a number of legal gaps that needed to be closed for the detainees' protection. The main piece of legislation passed by parliament to address torture committed when a person is being held captive was the Prevention of Torture Bill, 2017. It addressed concerns pertaining to the original bill and the several reforms that the law commission had recommended to the government. The previous Act failed to address several important concepts that were spelled out in the agreement with regard to broadening the scope of offences that were to be brought under prison torture, thus it was changed to be more consistent with the UN convention of Torture and other Cruel Activities. The 2017 Act's main goal is to broaden the scope of situations that should be considered to be torture. It aims to bring lawsuits that affect the victim's mental state rather than just those involving physically or grievously offensive acts. The initial measure that the government presented in 2010 did not include a number of new features that were included in the Amendment Act. By offering damages for the emotional stress the detainee or victim is put through, the Act places priority on expanding the range of instances that are to be presented under the same. Even while the Act specifies damages, it gives the court discretion over how much should be given to each victim based on the circumstances of the case. In conclusion, it is critical to realise that even while the 2017 Amendment Act includes a number of measures listed in the UN convention against torture and other inhumane practises, it still does not cover several crucial areas of the detainee's existence.<sup>25</sup>

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<sup>24</sup> Prevention of Torture Bill, 2010

<sup>25</sup> Prevention of Torture Bill, 2017

## CHAPTER III

CONSTITUTION, OTHER PENAL LAWS OF INDIA AND JUDICIARY IN PROTECTING  
PEOPLE AGAINST TORTURE**3. PROTECTION FROM THIRD DEGREE TREATMENT IN INDIA:-**

Although the use of truth machines (lie detectors, brain scans, and Narco analysis may not be able to obtain the truth in a legal sense, discussion of these methods might shed light on the dynamics of interrogation in a detention facility. The police were open in their explanations of how they operated throughout my interviews because they believed these techniques to be professional, respectable, and based on science. The length of custody, mistrust of police, and recovery are the three characteristics that characterise the practical logic of implementing the third degree in investigations. The fact that these are factors intrinsic to how the police operate and connected to the third degree's original meaning of inquiry may be my most significant divergence from earlier studies (which focuses on ideological causes and/or colonial continuity). Police reports indicate that one of the primary justifications for resorting to third-degree interrogation is the length of detention. According to the CrPC, the Indian police are required to present a suspect to a magistrate within 24 hours. The suspect is subsequently taken into judicial custody unless bail is granted or a special circumstance necessitates continued police remand. This little window makes the length of custody essential for conducting an interrogation, as a police officer based in Ahmedabad noted: Now, in the Indian system what happens is, once you arrest someone and he must appear in court within 24 hours, at the most, of his arrest. Consequently, after his arrest, the police are required to wrap up their investigation and question him for 24 hours. And that 24-hour timeframe is quite strange because if you make an arrest this evening or tonight, the court wouldn't typically start meeting until around midday, and courts also don't appreciate it when people are brought in late or at weird hours. In actuality, they would have the accused for 12, 13, or 15 hours. You only have the accused for around 3, 4, hours during the investigation before he is produced. These are the factors, then, that make it challenging for the police to follow the law. In order to extract information from him during those three hours, they would choose to utilise third-degree or abusive methods on the assumption that they would not be able to win custody of him the following day after he was presented and that he would remain silent once in judicial custody. Similar to how the NPC [National Police Commission] report ascribed expedited interrogation techniques to the limited time that was permitted in police custody, the police sought prompt confessions or asked for further detention to retrieve stolen goods.

According to a top official headquartered in Delhi:

"You see, there are basically two reasons why police use torture. People have been parting with money because they are scared they would be subjected to that kind of routine, so one is to extract information and another is to extract money. If torture vanishes, at least the information component will be removed right away. Because once the seeming need for torture disappears, need no longer exists. Honestly, I think torturing is pointless."

Requests for narco analysis or brain scans can become another delay strategy to extend the term of custody in the absence of a revision to the rule regulating the duration of custody. That could be the main cause of the rise in demand for these procedures, even if in reality there aren't many labs with the necessary tools and they now need the accused's permission to use them. So, it is noted that one frequent justification for resorting to the third degree is the urge to produce results fast, within the confines of custody. During my conversations with police, the second main justification for employing third-degree interrogation was mistrust of their line of work. According to a police officer in Hyderabad, the system is based on "distrust" because a statement made in front of a police officer "has no evidentiary value, as it reflects a system designed for perpetuation of colonial power," and the CrPC "allows the constable... to investigate and arrest even the president of this country." In fact, one of the police officers I spoke with frequently brought up how different America is from other Western nations and quipped, "Whereas in a Western country, the accused makes a statement, he signs it. It is confirmed. You go back to him and tell him, "Hey, dude, you are speaking a falsehood," if it turns out to be untrue. And if it's accurate, then it's put to use. These police officer accounts could be seen as reasons for third-degree interrogation or torture. However there is a warning in Upendra Baxi's well-known article on torture, where he points out the need to deal with people's mistrust in the police when it comes to recording confessions

Paradoxically, the very act of attempting to uphold the accused's dignity has a tendency to undermine the police profession's dignity, whether that loss is actual or perceived. Some police authorities do link mistrust and accountability directly. For instance, the 2010 revision of the draught anti-torture measure seemed to hold those in command as well as those who perpetrate torture accountable. According to one official I spoke with, the bill was overly severe because Indian courts do not accept the police's account of events; therefore, any admissions made to the police are not admissible in court. If that is the case, it will be exceedingly challenging for the police to carry out their duties if the anti-torture measure is introduced as well. And in that case, our lone, modest plea is that the courts accept police versions.

One official said, "Well, the anti-torture measure brings in that accountability. When asked how making police testimony admissible would assure accountability. I'm responsible if I do... I'm responsible if you employ third-degree tactics, engage in investigational hanky-panky, or otherwise cause trouble.

Among my respondents, distrust was a common topic. Trust and accountability are founded on independence, according to a police officer in Delhi:

You see, if you trust the cops, you must do so while also exercising the due diligence that goes along with that trust. You cannot put your trust in someone who is reliant on others. There will be chaos in society if you continue to trust the police as they currently operate, solely at the behest of politicians. So, you must give them independence if you truly want to be able to trust them. Nevertheless, in addition to the trust, they also need to be given the freedom to act independently and be responsible for their own actions. This story underlines the danger of reprisals and political pressure, especially for high-ranking officials, and links trust, accountability, and independence from political control. While being aware that everything a suspect says

during their conversation is not admissible in court, these police officers express their experiences with a lack of trust and motivations to utilise third-degree questioning in a clear and concise manner. Hence, their testimonies are contradictory: why use torture if they feel (or know) that they can't be trusted and can't use the statements they obtain while being held? This issue is covered by the third theme to emerge from my interviews: recovery. India uses torture in a variety of situations, including terrorism, murder, and theft, despite the fact that evidence and confessions obtained through torture are not acceptable in court and that protocol prohibits police from lawfully recording confessions (a remnant of colonial practise that has often been a sore point for the Indian police). Yet, Section 27 of the Indian Evidence Act<sup>26</sup> permits the admission of the material that was discovered as a result of a confession as well as the portion of the confession that resulted in its discovery.

A senior police officer stationed in Mumbai made the following statement, which was shared by several other police officers:

“Right now, a theft case has come to your attention. Now I am unable to say, "My Lord, look at the thief. He confessed in front of me. Sure enough, the court won't accept that. The court will accept the man's statement that he will "show you here where I have disposed of or hidden that property". See here, I'm not going to trust you unless you produce this, the law itself is saying, and "produce this" is not going to come voluntarily. The law is also aware. I am also aware. The judge also knows that no recovery, no discovery of fact as is known in the legal parlance, can take place voluntarily.” So, it appears that recovering evidence is one of the main motivations for torturing people in extremely regular circumstances. "Courts don't insist on recovery, but recovery does ensure guilt," a different police official stated.

In my interviews, the most common types of crimes for which third-degree interrogation is used in routine instances are theft and property violations. We cannot proceed with it unless the accused gives us permission, as one officer stated. Although this officer acknowledged that other techniques, such as call detail analysis, aid in the production of evidence, recovered property is eventually most frequently utilised to face the accused. Hence, ensuring recovery becomes a top responsibility. In fact, the National Crime Research Bureau breaks down state-specific property recovery rates, and some media reports specifically emphasise how some states take pride in retrieving the most property. At least two police officers theorised that this trend would only reverse itself if the Indian populace, particularly the influential and powerful, could insure their property and quit depending on police recovery. But, my interviews also exposed a paucity of police interrogation training, which was so severe that the National Police Academy didn't have an interrogation curriculum until the 1990s. Police accounts thus reveal the pragmatic logic of third-degree interrogation, which has otherwise been linked to a normalization of torture and receives close scrutiny only in cases of custodial death or “severe” torture.<sup>27</sup>

<sup>26</sup> Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872 (India)

<sup>27</sup> Police Torture Interrogation By Jinee Lokaneeta <https://thewire.in/> (Last visited on 02 Mar. 23)

### 3.1 WHAT IS 'THIRD DEGREE' TORTURE? :-

In its fourth edition, Encyclopaedia Britannica (1929), the method was described as follows: "Third degree refers to the use of harsh tactics by police or prosecutors to coerce information or confessions from people in custody. The term was originally American slang or cant, but it is now widely used in the United States and is gaining popularity in Great Britain. The third masonic degree, master mason, which is awarded with significant ceremony, is thought to have provided the phrase." Added was: "The phrase is frequently used to refer to acts of physical abuse as well as other types of torture, such as depriving a prisoner of food, water, sleep, and bathroom access, as well as extended, nonstop questioning of him while he is suffering from these effects. Nonetheless, term is most frequently used in reference to physical assaults that cause anguish but leave no visible signs, as beatings with rubber hoses." While several Bollywood films in India turned "third degree" torture well-known and even became a sort of punchline, it is obvious that it is no laughing affair.

### 3.2 INDIAN POLICE AND THIRD DEGREE CONNECTION:-

The administration informed the Lok Sabha on Tuesday that 1,189 additional persons were found to have been tortured while in custody, while 348 people may have passed away while being held by the police in various regions of the nation in the previous three years. According to data from the National Human Rights Commission (NHRC), 136 persons died while in police custody in 2018, 112 in 2019, and 100 in 2020, according to Union Minister of State for Home Nityanand Rai. In response to a written query, he added that 411 persons were tortured in police custody in 2019, 236 in 2020, and 542 in 2018. Here, it's crucial to remember that India is one of just five nations that has not ratified the UN Convention against Torture. But why do police ever use the third degree, one could wonder. One argument is that such tactics are used by a police force that is perpetually short-staffed, overworked, and under continual pressure from superiors. The obvious flaw in this situation is that any evidence obtained using such techniques is highly dubious and may lead to innocent people being wrongfully convicted. Making matters worse, the impoverished and the disenfranchised are frequently the ones who suffer the most in society. Even worse, statistics show that negligent police officials in India rarely face punishment for their misdeeds. CNN reports that despite over 600 incidents being reported, only 21 police were found guilty for deaths while in custody between 2005 and 2010. Official statistics on these fatalities may be a "huge understatement," according to Suhas Chakma of the National Campaign Against Torture (NCAT), who spoke to CNN. According to the NGO, which conducts research and keeps track of custodial deaths using local media reports, 76 percent of deaths in police custody last year were allegedly caused by torture or other criminal activity, and 19 percent occurred in suspicious circumstances, with police citing other causes like sudden illness and suicide. The victims were four women and five children. In a 2019 Times Now article titled "The curse of third degree," former Uttar Pradesh DGP Vikram Singh made an effort to explain why the police use such heinous tactics: "The feudal legacy left by the British, who gave us the antiquated Police Act of 186, is said to have almost become ingrained in

the DNA of the police in India. The Brits wanted to control the Indian masses, so they established a repressive police force. Yet the country deserves much better now that it has been independent for so long."

"Police violence has a very old history. According to reports, many police stations in northern India allegedly used third-degree and cunning forms of torture during interrogations to coerce illegal confessions. This is frequently done more for the sake of taking a self-righteous stance than to resolve the dispute. Generally speaking, the police leadership is powerless to stop this egregious infraction of the law and human rights. In the interest of convenience, the unpleasant existence of torture devices in police stations was casually disregarded "Added he. The approach is to educate police officers, as CJI Ramana advised. We now come to police training, or the absence of it. More than half of police officers with more than five years of experience either received their training on human rights at the time of entering the force or never did, according to the 2019 State of Policing in India study, which polled over 12,000 police officers across 21 states. The greatest percentage of police officers in Bihar who never got human rights training was discovered (about two in every five). Overall, at least one out of every five police officers in the seven states studied—Bihar, Assam, Gujarat, Nagaland, Chhattisgarh, Uttar Pradesh, and Telangana—had never received training in human rights.

The research also clarified certain alarming beliefs held by the police:

- 1) Four out of five employees think it's okay for the police to beat up criminals to get confessions.
- 2) Three out of four employees believe that using force against criminals by the police is acceptable.
- 3) 37 percent of the workforce believe that in lieu of a court appearance, the police should issue a light punishment for minor offences.
- 4) One in five police officers believe that executing dangerous offenders is preferable to going to court.

Now that it has been said, a better transformation could be approaching.

### **3.3 WORDS OF INDIAN HOME MINISTER:-**

In a speech at the National Forensic Science University (NFSU) in Gandhinagar in July, home minister Amit Shah seemed to indicate as much when he declared "the days of third-degree torture over" and suggested that forensic investigation be made mandatory for any crime that carries a punishment of six years or more. Shah continued, "If forensic work is done effectively, even a hard-hearted individual can be torn down and found guilty. Custodial violence has been dubbed "abhorrent" and unacceptable in civilised society by the Supreme Court, which refused to compound the offence of two cops accused of abusing a man who later died from his injuries in 1988 in Odisha. The highest court ruled that the accused's act was not just against the deceased but also against humanity and a blatant violation of the rights protected by Article 21 of the Constitution. The compensation to be awarded to the deceased person's family members was increased by a bench of justices Ashok Bhushan and Ajay Rastogi while

refusing to compound the offence under section 324 of the IPC (voluntary inflicting harm). The bench declared that everyone is concerned about and terrified by the beating of a person in a police station. We can only hope that things will get better.

*D.K. Basu v. the State of Bengal*<sup>28</sup>

In this instance, Mr. D.K. Basu, the executive chairman of Legal Aid Services, a nonpartisan organisation licenced under the Societies Registration Act, sent a letter to the Chief Justice of India expressing his concern regarding recent deaths and acts of violence that were being reported in police detention centres and jails. It was indicated in the letter that despite numerous efforts, the recorded crime remains unpunished. In order to provide the victim's family members with some compensation for their pain, the courts must examine the relevant issues. When the letter was submitted to the Supreme Court of India, it was treated as a writ petition. In his letter to the Chief Justice of India, Shri Ashok Kumar Johri brought up the passing of Mahesh Bihari, a resident of Aligarh, while he was being held by the police. Concerns about the police authority were also voiced by the petitioners in this case. People should be compensated if their constitutional rights under Articles 21 and 22 are violated in any way. The State of Bengal, the defendant, refuted the accusations against them by claiming that the writ petition was poorly drafted, unsuitable, and legally deceptive. In this case, the court established 11 rules that must be strictly obeyed and adhere to Articles 21 and 22 (1). There must be a record of all workers managing the interrogations of the arrested person. At the moment of the arrest, a memorandum of arrest should be written. Also, it must be dated and bear the detainee's signature and the time of the detention. Officers are required to provide detainees notice of their time, location, and custody arrangements. All district and state headquarters should have a police control room where details about the arrest and where the arrestee is being held must be transmitted by the arresting officer within 12 hours of the arrest and must be posted on the notice board of the police control room.

The arrested person must be allowed to speak with his or her attorney while being questioned, but not constantly.

*State of U.P v. Ram Sagar Yadav*<sup>29</sup>

In the case below, a farmer was falsely accused of cattle trespass by his neighbour over a dispute, and the concerned police officer allegedly threatened the farmer for bribes. The officer initially relented, but after reporting the incident to the police station, another officer was appointed to look into the farmer's allegations against the officer. The farmer was taken into custody by the police officer in charge of the investigation, who subjected him to extreme torture before killing him six hours after filing the initial complaint. The Apex court then took up this issue and stated that "police officers alone and no one else can give evidence regarding the circumstances in which a person in their custody comes to receive injuries." It also acknowledged the rise of torture and death in custody as well as the indemnity enjoyed

<sup>28</sup> DK Basu v. the State of Bengal (1991) 1 SCC 416

<sup>29</sup> State of U.P v. Ram Sagar Yadav, AIR 1985 S.C. 416

by police officials. They frequently chose silence in these circumstances because they are bound by brotherly connections, and when they do talk, they distort the truth and add their own spin to the facts.

*Yashwant And Others v. the State of Maharashtra*<sup>30</sup>

On September 4, the Supreme Court affirmed the conviction of nine Maharashtra police officers in connection with a 1993 case of custodial death and increased each of their sentences from three to seven years. According to reports, a bench consisting of Justices NV Ramana and MM Shanatanagoudar affirmed the decision and noted that situations involving the police often cause people's trust in the legal system to decline. The Supreme Court stated, "With tremendous power comes more responsibility," while lengthening the police officers' prison sentences. The Indian Criminal Code's Section 330, which deals with intentionally causing harm in order to coerce a confession or the restoration of property, was used to convict the police officers.

*Raghubir Singh v. State of Haryana*<sup>31</sup>

The court stated, "We are deeply disturbed by the diabolical recurrence of police torture resulting in terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of law gore human rights to death." In that case, police violence used to extract a confession led to the death of a person suspected of stealing. The Court also noted that because violent crimes are committed by the police, an instrument of the government whose job duty is to protect citizens rather than harm them, the fragility of human rights takes on a painful, excruciating poignancy.

*Prakash Kadam v. Ramprasad Vishwanath Gupta*<sup>32</sup>

The Court stated that, in the rarest of rare situations, where a false encounter is proven against police officers during a trial, they must be awarded the death penalty. The policemen were told that killing someone in the name of a "encounter" will not be justified on the grounds that they were following orders from higher-ranking officers or politicians. Nazi war criminals in the Nuremburg trials argued that "orders are orders," but they were nonetheless hanged. A police officer must refuse to carry out an illegal order from a superior to conduct a fictitious "encounter" in order to avoid being charged with murder and sentenced to death if proven guilty sentenced to death.

*Sheela Barse v. State of Maharashtra*<sup>33</sup>

The Supreme Court established rules for arrest in general and for women in particular in this case, the Court ordered that four or five police lockups be set aside for female suspects, who should be kept separate from male suspects and guarded by female constables; female suspects should only be interrogated in front of female police officers or constables; and the District Judge would make surprise visits to police lockups on occasion in order to give the detained individuals a chance to voice their complaints and find out what are

<sup>30</sup> Yashwant And Others v. the State of Maharashtra (2018) 4 MLJ (CrI) 10(SC)

<sup>31</sup> Raghubir Singh v. State of Haryana 1974 AIR 1516

<sup>32</sup> Prakash Kadam v. Ramprasad Vishwanath Gupta (Criminal) Appeal Nos. 1174-1178 of 2011

<sup>33</sup> Sheela Barse v. State of Maharashtra 1983 SC 378

the magistrate before whom an arrested person is produced must ask the arrested person if he has any complaints of torture or mistreatment in police custody and inform him that he has a right under Section 54 of the CrPC 1973 to be medically examined. The magistrate must also make sure that the directions we gave are being followed. Hence, it is clear from the aforementioned legal declarations that torture committed by a public servant or the State's tacit approval of it has always been condemned by the Courts. The controversial topic of torture has a direct impact on a person's right to life and liberty. The Commission believes that such horrific acts must be prevented by tough laws that provide strict penalties which will act as a deterrent.

*Gauri Shanker Sharma etc. v. State of U.P*<sup>34</sup>

As they are in command of police station records, which they do not find difficult to falsify like in this case, it is typically challenging to obtain evidence against the cops responsible for using third degree methods. The fact that the offence was perpetrated by someone who was expected to protect the public and not abuse his position of power and uniform to viciously assault them while in his care makes it all the more heinous. If we don't take death in police custody seriously, we'll be contributing to the development of police raj. It needs to be heavily restrained.

*Munshi Singh Gautam v. State of M.P*<sup>35</sup>

The Supreme Court ruled that unusual instances must be viewed through a lens that is different from that used in conventional criminal cases since it is challenging to gather any kind of evidence in situations when a person is alleged to have died while in police custody. The Court stated: "Rarely is direct ocular proof of the complicity of the police personnel available in cases of police torture or custodial death, and the police personnel alone can only account for the circumstances surrounding a person's death while in their custody. It is fairly uncommon for police officers to prefer silence and frequently even to distort the truth to protect their comrades because of their bonds of brotherhood.

*Mehmood Nayyar Azam v. State of Chhattisgarh*<sup>36</sup>

A social activist who raised awareness about the exploitation of those in the underprivileged and marginalised parts of society was wrongfully implicated in criminal proceedings, imprisoned, and treated with contempt. He suffered verbal abuse and physical violence while being held by police. The Court declared that regardless of whether it takes place during an investigation, interrogation, or another situation, any type of torture or cruel, inhuman, or humiliating treatment would be prohibited by Articles 20 & 21 of the Constitution. Torment and vexation are included in the connotative range of the word "harassment". The Court declared: "If government employees start breaking the law, it will inevitably create a disdain for the rule of law, encourage lawlessness, and give rise to anarchy as everyone would start acting as their own lawmaker. A citizen's right to life cannot be suspended upon arrest."

<sup>34</sup> Gauri Shanker Sharma etc. v. State of U.P 1990 AIR 709, 1990 SCR (1) 29

<sup>35</sup> Munshi Singh Gautam v. State of M.P Appeal (crl.) 919 of 1999

<sup>36</sup> Mehmood Nayyar Azam v. State of Chhattisgarh Civil Appeal No. 5703/2012

### 3.4 SECRECY IN CUSTODY:-

Even the entire jail system lacks transparency due to its intrinsic opaqueness. Prisons are the strong commanders' realms, where they will exercise their authority. India, a member of the UN, also failed to implement the much-needed prison reforms, and conditions in prisons continue to be poor due to overcrowding, severe labour shortages, and a lack of adequate protection from harm. There are also no restrictions on the seemingly unrestricted authority of uniformed personnel. Legally sound judges and human rights doctrine help the rights to endure from time to time. Since 1997, India has signed the UN Convention Against Torture but has not yet ratified it. The act of ratification, as opposed to the simple act of signing a treaty, involves putting in place the necessary laws and procedures to ensure that the country complies with its responsibilities. Only our lofty intentions are renowned, and we have a poor track record of committing. We refer to India as a welfare state, yet each Prime Minister and each Chief Minister wants to impose an authoritarian police state to stifle dissent, opposition, and criticism. Although the Protection of Human Rights Act exists, the administration still has power over the institutions, which are filled by retired Chief Justices or senior judges as a thank-you for their coordination and cooperation with the government prior to their retirement. The fact that state human rights commissions are led by retired individuals reduces them to becoming less important institutions. Human rights courts at the district level and lesser levels were still only existing on paper. Corruption in the judiciary and the ineffective operation of human rights forums will persist while people are tortured in police stations and by those in authority unless these Commissions at National and States and district or taluk Human Rights Courts are converted into regular courts with youngsters institutionalising into a cadre and removed the scope of flourishing as rehabilitation centre of retired judges. There is no additional anti-torture legislation to punish guilty uniform offenders and make custodial brutality illegal, notwithstanding the fact that this Human Rights Protection law is frail and a paper tiger.

We should review what the CJI said: "The marginalised must be assured that the judiciary is there for them if it is to earn the trust of the poor and vulnerable. The most vulnerable groups have traditionally been excluded from the court system. The judiciary must convince everyone that we are here for them if it hopes to win the trust of the populace. The most vulnerable group has long been excluded from the court system. The impoverished and the disadvantaged are discouraged by courts' lengthy, expensive formal procedures. Breaking down these hurdles is currently the judiciary's biggest challenge".

However, it is important to remember CJI's additional statement: "It is critical that we close the accessibility gap between the most wealthy and the most vulnerable in our society in order to maintain the rule of law. We must always keep in mind that the socioeconomic diversity that exists in our country cannot ever be an excuse for the denial of rights. Do not let the past dictate our future."<sup>37</sup>

<sup>37</sup> Murders Passed Off As Deaths <https://www.thehansindia.com/> (Last Visited 03 Mar. 23)

### 3.5 CONSTITUTIONAL SAFEGUARDS AGAINST TORTURE:-

A number of decisions have ruled that a person's basic constitutional rights are not violated just because they are in police custody, being held, or under arrest. If their rights are violated, they have the right to petition the Supreme Court under Article 32 of the Indian Constitution. One's fundamental rights are not violated when they are in custody. They stay put as he enters the prison, despite the fact that incarceration may cause them to shrink. But, shrinking should never go so far as to subject people to such severe forms of interrogation torture that they are reduced to living like animals.<sup>38</sup>

Article 14 of the Constitution of India:

It imposes a duty on the state to provides equality before law and equal protection of law to every person including arrested or detained person<sup>39</sup>

Article 20 of the Constitution of India:

The rights against being found guilty of crimes are the main thing that Article 20 provides. They include the ex-post facto laws' principle of non-retroactivity (Nullum crimen sine legal), which deems it a breach of the person's fundamental rights if efforts are made to condemn and torture him in accordance with any statute. Moreover, Article 20 guards against double jeopardy (Nemo debet pro eadem causa bis vexari ). The most essential protection provided by this Article is against self-incrimination. Even when a person has not committed the crime in question, the police will torture them until they confess.<sup>40</sup>

Article 21 of the Constitution of India:

The right to be free from torture is protected by this article, according to Indian law. Because the right to life encompasses more than just the ability to lead an animalistic existence, this viewpoint is held. Article 21's reference to "life or personal liberty" includes a guarantee against torture and assault, even by the State and its agents, to a person who is taken into custody. No claim of sovereign immunity can shield the State from liability for such unlawful use of force against the captive person.<sup>41</sup> It stipulates that a person may only be deprived of their life and freedom in accordance with a legal process. Everything necessary to exist with human dignity is covered by this article, including protection from involuntary servitude also.

Article 22 of the Constitution of India:

Four fundamental rights are set forth in Article 22 with regard to conviction. They include being notified of the reasons for the arrest, having the right to legal representation from a lawyer of one's choosing, regulations governing preventive detention, and appearing before the closest magistrate within 24 hours of the arrest. These rules therefore serve to protect people from suffering mistreatment that lacks legal support

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<sup>38</sup> Custodial Torture And Its Remedies <https://aishwaryasandeep.com/> (Last Visited 03 Mar. 23)

<sup>39</sup> INDIA CONST. art. 14

<sup>40</sup> INDIA CONST. art. 20

<sup>41</sup> INDIA CONST. art. 21

or goes above and beyond permitted limits. In accordance with Article 22(1), the person who has been arrested must be informed of the reason(s) for their arrest as soon as possible. They also have the right to speak with any attorney of their choosing. According to Article 22(2), anyone who has been arrested or taken into custody must appear before the local magistrate within 24 hours of their arrest, and no one may be held in jail for a period of time longer than 24 hours without the magistrate's approval.<sup>42</sup>

### 3.6 OTHER SAFEGUARDS:-

Indian Evidence Act, 1872:

According to Section 25 of the Evidence Act, a confession given to a police officer cannot be used against a person accused of any crime, and any confession induced by a person in a position of authority in order to prevent any temporary wrong would be irrelevant in criminal proceedings as, among other things, provided in Section 24. So, even if it is not expressly forbidden by Indian law, evidence obtained through illegal means, including torture, is not admitted in court.

Code of Criminal Procedure, 1973:

Anyone in custody who are not being held for a crime carrying a death sentence or a life sentence, as well as those who are being held during an escape, are protected against torture under Sections 46 and 49 of the Code. Sections 50 through 56 are consistent with Article 22. The Code's Section 54 prohibits any use of violence and torture while a person is being held in custody. It states that when a person in custody complains of being mistreated, the magistrate is immediately compelled to check the individual's body and record the results of such examination together with any justifications. It grants them the right to report any torture or assault they may have experienced to the Court and to request a medical examination for themselves. In some cases, courts have utilised a compensating procedure. When the Magistrate disregards protocol when considering a charge of torture committed while in custody, the High Court is asked to intervene pursuant to Section 482 of the Code. Sec. 176 of the Code, which requires a mandatory magisterial inquiry when an accused person dies as a result of torture while in police custody, is another major provision with regard to custodial abuse resulting in deaths. The purpose of sections 167 and 309 of the Code is to present the accused before the court and protect their rights and interests because the detention is done with their consent.

Indian Police Act:

Police officers who are careless in the performance of their responsibilities or unfit to do so may be fired, fined, or suspended under Sections 7 and 29 of the Act. This can be understood in light of the police officers' violations of many legal and constitutional protections as well as the recommendations made in *D.K. Basu v. State of West Bengal*.

Indian Penal Code (IPC), 1860:

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<sup>42</sup> INDIA CONST. art. 22

After the contentious Mathura Rape case, Section 376 of the IPC underwent a change. Custodial rape by police officials is punishable under Section 376(1)(b). This modification to the part in question was a welcome one because it finally denounces the actions of police personnel who abuse their authority. The IPC's Sections 330, 331, 342 and 348 are apparently intended to prevent police officers from using third-degree techniques that constitute "torture" when they are investigating an offence and have the authority to arrest and question a person.

### 3.7 JUDICIARY ON CUSTODIAL VIOLENCE:-

The Indian Supreme Court, as well as other State High Courts, have harshly denounced police misconduct in atrocities committed against those being held in prison. They have advocated for severe penalties for violence committed while in custody. The Supreme Court noted that "The police, with their extensive authority, are prone to go beyond what is necessary in their pursuit of criminal activity and are tempted to retaliate harshly against people who happen to fall into their exclusive purview. In the wider interest of justice, the propensity and temptation must be suppressed. Hence, it should be obvious that law enforcement officials who conduct acts of custodial violence such as torture, rape, and custodial death or killing are breaking the law and that they are not allowed to engage in such behaviour because their job is to uphold the law. It compromises people's sense of dignity, brutalises the police force, betrays public and judicial confidence, and harms law enforcement's reputation as a whole. For many years in India, captives in police custody have frequently been subjected to physical abuse. Political prisoners and those who are awaiting trial for crimes are among those who are being held in police custody in India. The truth is that neither of these two categories of detainees is exempt from physical abuse by the police while in their care. A quick examination of violence in police custody in India reveals that the police engage in rape as well as other types of physical abuse. Hundreds of detainees die in police custody as a result of physical abuse most frequently. Custodial fatalities are a widespread problem that continue to occur with alarming regularity."<sup>43</sup>

The Supreme Court recognised the urgency of the situation and the need for tools that may be used to make an arrest. In *D.K. Basu v. State of West Bengal* (1997)<sup>44</sup>, the Supreme Court ruled that the system needed more transparency and accountability. The court also established the following rules for law enforcement to follow while making an arrest:

- 1) The police officer in charge of the investigation should have a complete and correct identity of the subject on them at all times.
- 2) A police officer must prepare a memo of the arrest at the time of the arrest, which must be signed by the arrested person, one witness (who may be a family member of the arrestee or a member of the community), and include the date and time.

<sup>43</sup>Dr. Anju Sinha, Assistant Professor, Custodial Violence And Human Rights: Constitutional Perspective (Last Visited 23rd Jan, 2023) <https://www.ilkogretim-online.org>

<sup>44</sup>DK Basu v. the State of Bengal (1991) 1 SCC 416

- 3) Everyone who has been detained by the police in custody or has been arrested has the right to contact their family, friends, and relatives as quickly as feasible.
- 4) Within 8 to 12 hours of the arrest, the arrested person's friends and family members who reside outside of the town or district must be notified by the district's legal aid organisation or police station.
- 5) The person being arrested must be aware of his rights and the circumstances behind the arrest.
- 6) The name of the next buddy of an arrested person should be recorded in a diary.
- 7) Somebody must be identified, along with information about how the police took the person into custody.
- 8) The arrestee must have a medical examination every 48 hours while they are being held by a licensed physician chosen by the Director of Health Services of the State or Union.
- 9) The arrested person is entitled to see his lawyer, but not while being questioned.
- 10) All District level and State headquarters should have a police central room. The location of the arrest and the site of detention should be disclosed.

By mandating that the accused appear in front of the magistrate within 24 hours of the arrest, the Constitution has given the magistrate's position significance.

*State of Gujarat v. Manubhai Ratilal Patel* (2013)<sup>45</sup>

The Supreme Court ruled that "directing the remand of an accused is basically a judicial role. The magistrate has a responsibility to use his or her judgement and not only pass an order of remand mechanically or automatically. The truth is that without independent organisations to uphold these rights and offer channels for redress, prisoners' rights while in the custody of the police have no real value. To remove the threat of custodial violence, the judiciary and law enforcement must collaborate. Senior officers can set a good example by ensuring that no one is held improperly and that they are not brutalised while in police custody. The investigating police must be instructed in proper and legitimate interrogation techniques. Remind the police officers that they will be held accountable for any fatalities or injuries sustained while in custody, rape, or torture. The Supreme Court's guidelines on questioning and detainee care in police holding facilities, given to guard against abuses of human rights, must be strictly adhered to. The managerial levels should be where accountability begins. Every supervisor shall be held liable for any physical abuse meted out to inmates. It is necessary to conduct judicial inquiries concerning police excesses and then take legal action when a case is made prima facie. Unbiased organisations like the state Criminal Investigation Departments and the Central Bureau of Investigation must look into cases of death, rape, and torture committed while a person is being held captive. The police cannot establish their own laws.

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<sup>45</sup> State of Gujarat v. Manubhai Ratilal Patel (2013) 1 SCC 314

### 3.8 COMPENSATION FOR CUSTODIAL TORTURE AND DEATH:-

The idea of sovereign immunity, a common law tenet that has been repeatedly upheld in British jurisprudence over the past several centuries, holds that a monarch is immune from liability for his own personal carelessness or wrongdoing as well as for that of his employees. The doctrine developed based on the sovereignty idea that states are immune from being sued in their own courts. The Law Commission of India noted in its first report, "Liability of the State in Tort," published in 1956, that future legislation will need to address the issue of whether or to what degree the Union and the States should be held accountable for the torts committed by their employees or agents. Hence, the nation should likewise create appropriate legislation in light of the altered circumstances/conditions. The outdated distinction between sovereign and non-sovereign functions should no longer be taken into consideration when determining the state's liability, and as a result, the state should be subject to general law liability for harms caused to citizens as well as in the event that State employees violate the law while performing their duties.

#### *Rudul Sah v. State of Bihar*<sup>46</sup>

The petition was granted by the court, which ruled that the petitioner's imprisonment following his acquittal was totally illegal. The Supreme Court is empowered by Article 32 to impose directives or instructions and to issue the proper writs in order to uphold any of the rights guaranteed by Part III of the constitution. Article 21, which guarantees the right to life and liberty, will lose its value if this Court's authority is limited to making orders for release from unlawful confinement. The right to compensation is a palliative for the wrongdoing of agents operating in the public interest and defending themselves with the authority of the State. In addition, even if he had a mental illness at the time of his acquittal, he could not be held behind bars for a protracted amount of time. The explanation is simple. Even a lunatic enjoys legal protections while a case is being tried. The state's action was deemed by the court to be severe and without any supporting evidence. The court concluded that the petitioner's detention was unreasonable as a result.

The Court then assessed whether it would be appropriate to accept the petitioner's request for ancillary relief in light of its claim to relief. If the court was limited to ordering the release of illegal convicts without taking any action to improve their situation, Article 21, which protects personal freedom and the right to life, would be meaningless.

#### *Kasturi Lal v. State of U.P.*<sup>47</sup>

In contrast, the Supreme Court upheld the claim of sovereign immunity. In that case, authorities in Meerut detained a partner of the Amritsar-based jewellers Kasturilal Raliaram Jain on the grounds that he may have been in possession of stolen goods. He was freed, but the gold jewellery that had been seized from him was never given back. In addition to misappropriating the funds, the top constable in charge of the malkhana fled to Pakistan. The company demanded the return of the ornaments or, failing that,

<sup>46</sup> Rudul Sah v. State of Bihar 1983 AIR 1086

<sup>47</sup> Kasturi Lal v. State of U.P AIR 1965

compensation. The act was committed by the employees while they were working, which was consistent with the characteristics of a sovereign power, hence the Apex Court rejected the claim.

*Khatri vs. State of Bihar (The Bhagalpur Blinding case)*<sup>48</sup>

A habeas corpus's sole purpose is to free a person from unjustified confinement. Nonetheless, even in a habeas corpus proceeding, the court has the authority to modify the relief to suit the needs of a specific case or to give pertinent instructions. The Court declared that the Article 32 procedures constitute neither an investigation nor a criminal trial. Criminal procedural laws are not relevant to the Supreme Court's writ jurisdiction under Article 32 of the Constitution because neither the court nor the petitioners are criminal defendants. Judge Bhagwati emphasised that the state governments cannot get out of their constitutional duty to offer free legal representation to the impoverished accused by claiming administrative or financial incapacity. A trial will be void and the conviction will be overturned if a destitute accused person wasn't provided with legal representation at no cost to the state. Any reasonable, fair, and equitable system must include free legal assistance for the impoverished and the vulnerable. The Court further applauded rigorous and diligent adherence to section 209 of the Crpc 1973, which stipulates that an apprehended individual must appear before a judicial judge within 24 hours of their arrest. Legal assistance is essential to guaranteeing access to courts. This indigent's right becomes applicable the moment he is first brought before a magistrate. The accused requires professional legal advice and representation at this stage because this is his first opportunity to get bail, get out of jail, and fight being remanded to police custody. After a judge has passed judgement and the accused has been given the opportunity to appeal the decision, he or she may also request free legal representation. The Supreme Court further emphasised that under Section 304 of the Code of Criminal Procedure, 1973, it is the duty of the magistrate or judge before whom the accused is produced to inform him that under Article 39A of the Constitution, he is entitled to receive free legal services at the expense of the state if he is unable to hire a lawyer because of poverty or indigence. The Court held that the indigent accused's access to free legal representation would be illusory unless the trial judge made him aware of it.

*Smt. Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble*<sup>49</sup>

The Supreme Court, acting within its authority under Article 142 of the Constitution, ordered the State Government to compensate the deceased's mother and children to the tune of Rs. 1,000,000. It was noticed: "This sum of compensation shall be as a palliative measure and does not restrict the aggrieved person(s) from pursuing a suit to recover appropriate damages from the State Government and its erring officials if such a remedy is available in law," the compensation clause states.

*State of Maharashtra v. Christian Community Welfare Council of India*<sup>50</sup>

<sup>48</sup> *Khatri vs. State of Bihar (The Bhagalpur Blinding case)* 1981 SCR (2) 408, 1981 SCC (1) 627

<sup>49</sup> *Smt. Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble Appeal* (crl.) 857 of 1996

<sup>50</sup> *State of Maharashtra v. Christian Community Welfare Council of India* AIR 2004 SC 7

The Supreme Court held that "the question whether such compensation paid by the State can be recovered from the officers concerned will depend on the fact whether the alleged misdeeds by the officer concerned is committed in the course of the discharge of his lawful duties, beyond or in excess of the same which will have to be determined in a proper enquiry". The amount of compensation must be decided by the court while taking into account a number of factors, including the type of harm that was sustained, how it was sustained, why it was inflicted, and how much the victim has suffered as a result. The type of torture, which may be physical, mental, or psychological, may also be taken into account by the court. The victim's need for money for additional medical care for their injuries as well as any potential costs for victim rehabilitation to help them recover from their ordeal under torture must be considered by the court. The victim's socioeconomic status will be a deciding element for evaluating the amount of appropriate and adequate compensation, so the Court will need to keep it in mind as they go about calculating the compensation.

### 3.9 CUSTODIAL TORTURE IN TAMIL NADU:-

A father-son team in Tamil Nadu who kept a shop open after COVID-19 curfew hours perished in jail the same week that the globe observed International Day in Support of Victims of Torture (June 26). It is believed that they were tortured by the Thoothukudi district police. Reports state that one man had a baton pushed into his anus. A generation will remember the Chinese army's usage of iron rods and clubs with nails in them in 2020. But Thoothukudi's events will quickly be forgotten, as if they were an isolated incident rather than an example of India's widespread police aggression. The police allegedly pulled up Jayaraj on June 19 from his store in Sathankulam in the Thoothukudi district after he allegedly broke the COVID-19 curfew. When his son Bennix saw this, he went to the station. Bennix was also detained by the police, and it is said that they tortured the two merchants for defying lockdown regulations by keeping the shop open past 8 o'clock. However, a nearby store's CCTV footage revealed that Jayaraj was picked up by the Sathankulam police just before 8 o'clock in the evening. The father and son pair was then driven to Kovilpatti and imprisoned. Bennix and Jayaraj were transported to Kovilpatti Government Hospital after complaining of chest trouble. Bennix passed away on June 22, and Jayaraj passed away on June 23. On the High Court's instructions, the CB-CID was initially in charge of the Jayaraj and Bennix custodial killings case. Ten or so police officers were booked and taken into custody on murder charges under Section 302 of the Indian Penal Code. The CBI then took up the investigation, which they are still doing<sup>51</sup>.

On May 22, 2018, the police in the same district shot and killed 13 individuals who were part of a mob that had peacefully protested for 100 days to close Vedanta's extremely polluting Sterlite Copper Unit. No one has been charged in two years, and it appears that cops are still acting with impunity. It is clear from the persistence of cruel treatment that India is committed to upholding police violence. The 1987 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has only been ratified by five nations, including India (UNCAT). Haiti, Brunei, and Sudan are the other nations. The

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<sup>51</sup> Sathankulam custodial deaths <https://www.thenewsminute.com/> (Last Visited 23rd Jan, 2022)

Prevention of Torture Bill, 2010, which was passed by the Lok Sabha just before US President Barack Obama's 2010 visit to India, was a reluctant and utterly insufficient first step towards India ratifying the UNCAT. The lip service has remained notwithstanding the change in administration. The Law Commission's continuous review of amendments to existing criminal legislation, not an exclusive anti-torture Bill, was addressed when India delivered its third Universal Periodic Review (UPR) to the UN Human Rights Council in 2017. Even after the Lok Sabha's Bill was significantly modified by a multi-party Rajya Sabha select committee in 2010, the court continued to disregard senior lawyer Ashwani Kumar's and the Indian people's requests in 2017 for the Supreme Court to urge the government to pass the Bill. One-sixth of the world's population is exposed to arbitrary police violence under the worse-than-colonial Indian State. Not all of them, though; most likely, the 39% of them who identify as Dalit, Muslim, or Adivasi. This demographic makes up a disproportionate 53% of Indian convicts. According to the Pew Research Centre, US Blacks made up 33% of convicted convicts despite making up only 12% of the adult population. The cause of police torture in both democracies is not addressed by "Dalit Lives Matter" or other memes that mimic "Black Lives Matter" in the US. The difference is crucial. The focus in America has suddenly shifted to racism (whose corrections are, quite rightly, inclusive measures such as seeking greater Black presence in more diverse areas of employment and education). Sadly, merely mentioning social problems like "racism" or "casteism" does not address the criminal in the room—the police officer whose use of force the state condones. In India, the US, and everywhere else, social and criminal issues must be addressed in distinctly different ways.

Each district has a Social Justice and Human Rights Unit of the Tamil Nadu police. To respond to crimes against SC and ST populations, they have mobile police squads, but the units also employ economists and sociologists. It is ineffective for either goal to combine social justice (for equal access to resources) with human rights (for the suppression of violence). There is confusion outside of Tennessee. Reservations for at-risk groups haven't stopped the violent 'reservation' for them in institutionalised prison and torture systems across India.<sup>52</sup>

### **3.10 STATE LIABILITY ON CUSTODIAL TORTURE:-**

In addition, even if he had a mental illness at the time of his acquittal, he could not be held behind bars for a protracted amount of time. The explanation is simple. Even a lunatic enjoys legal protections while a case is being tried. The state's action was deemed by the court to be severe and without any supporting evidence. The court concluded that the petitioner's detention was unreasonable as a result. The Court then assessed whether it would be appropriate to accept the petitioner's request for ancillary relief in light of its claim to relief. If the court was limited to ordering the release of illegal convicts without taking any action to improve their situation, Article 21, which protects personal freedom and the right to life, would be meaningless. The results of the study presented above, which included a wide range of cases, suggest that the state no longer enjoys sovereign immunity when its employees harm civilians. Now that Kasturilal has been overturned by the Supreme Court, the Rudul Shah case has shed new light on the idea of state liability.

<sup>52</sup> Custodial deaths India convention against torture <https://thewire.in/> (Last Visited 23<sup>rd</sup> Jan, 2023)

The state is held vicariously liable when a governmental employee violates a basic right to life or liberty. Damages may be demanded through a writ or civil litigation. You can also get it by getting in touch with the Human Rights Commission at the federal or state level.

In 2005, the UN General Assembly adopted a resolution called "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" that addresses the rights of people who have been the victims of war crimes and human rights violations. The pertinent section addressing compensation is as follows: Any economically quantifiable harm brought on by transgressions of international humanitarian law or human rights shall be compensated, including:

- (a) Damage to one's body or mind, including discomfort, suffering, or anguish
- (b) Missed chances, such as in education;
- (b) Actual damages and lost wages, including lost future earnings;
- (d) Negative effects on honour or dignity;
- (e) Expenses for expert or legal counsel, medication.

It is therefore obvious that the Courts have rejected the claim of sovereign immunity, which runs counter to the fundamental principles of tort law. According to tort law, individuals and States are liable for the carelessness of their agents' and employees' actions taken while performing their official duties. The claim for a violation of fundamental rights by the statutory authorities or their agents is not acceptable because negligence and torture are illegal and in violation of Article 21 of the Constitution, and because the statutory concept of sovereign immunity cannot supersede the constitutional requirement. Thus, such officials cannot assert sovereign immunity.<sup>53</sup>

### **3.11 PUNISHMENT FOR TORTURE:-**

Section 331(2) of IPC:

Punishment for torture and other cruel, Inhuman or Degrading Treatment or Punishment<sup>54</sup>

Anyone who intentionally commits an act of torture while working for the government, while being assisted by a government employee, including a superior officer, or with their knowledge or consent, faces up to ten years in prison and a fine. Additionally, anyone who subjects another person to cruel, inhumane, or degrading treatment or punishment faces up to twenty years in prison. With the exception that, in cases where torture results in a person's death, the offender faces the possibility of both death and life in prison as well as a fine. As long as the court remembers that a public employee who engages in torture or other cruel, inhumane, or degrading treatment or punishment deserves increased punishment while deciding on a

<sup>53</sup> Implementation United Nations Convention against Torture and other Cruel, Inhuman Degrading Treatment or Punishment Othrough Legislation <https://www.advocatekhoj.com/> (Last Visited 03 Mar. 23)

<sup>54</sup> Indian Penal Code, 1860, No. 12, Acts of Parliament, 1891 (India)

sentence. Furthermore, the fine imposed in accordance with this section must be fair and reasonable in order to aid in the rehabilitation of the victim and his or her family members, and it must be recoverable from the offending public employee.

(1) Any public employee listed in Section 3 who tortures or attempts to torture any person for the purpose of extracting from him or from anyone else interested in him any confession or any information that may lead to the detection of an offence is punishable by imprisonment of either description for a term that may not exceed ten years, if not assisted by the public employee or with his consent or acquiescence.

(2) If someone dies as a result of torture, the offender faces the possibility of being put to death or sentenced to life in prison as well as a fine.

(3) The fine imposed in accordance with this section must be fair and reasonable in order to cover the victim's medical costs and rehabilitation costs.

(4) The victim must receive payment for any fine imposed pursuant to this section.

(5) The Central Government or the State Government, as the case may be, shall pay such adequate compensation, including interim compensation for the victim's rehabilitation, as may be determined by the court. In the event of an errant public servant, the compensation so paid shall be recoverable from such public servant after holding an enquiry.

Although the term "torture" is used in Section 330 of the IPC's illustration, it is not legally defined. Other crucial aspects of torture recognised under India's national laws with regard to offences committed by common people and constitutional jurisprudence are not included in Sections 319 (definition of hurt), 320 (definition of grievous hurt), 330 (punishment for hurt in custody), and 331 (punishment for grievous hurt in custody). The current provisions of the IPC do not cover the following:

(i) essential components of physical torture; (ii) mental torture; (iii) cruel, inhuman, or degrading treatment or punishment; and (iv) discrimination as one of the motivations for engaging in torture and other cruel, inhuman, or degrading treatment or punishment, as will be explained below.<sup>55</sup>

*State of Rajasthan v. Kishore Singh*<sup>56</sup>

The Supreme Court of India stated in 1981 that "nothing inflicts deeper wounds on our constitutional culture than a state official running crazy regardless of human rights" and that "nothing is more cowardly and despicable than a person in police custody being beaten up."

<sup>55</sup> The Indispensability Of Adding Offences Of Torture In Indian Penal Code <http://www.uncat.org/> (Last Visited 03 Mar. 23)

<sup>56</sup> State of Rajasthan v. Kishore Singh (AIR 1981 SC 625).

**CHAPTER IV****ROLE OF HUMAN RIGHTS COMMISSION OF INDIA IN PREVENTING CUSTODIAL  
TORUTURE****4. HUMAN RIGHTS COMMISSION & HUMAN RIGHTS ACT:-**

Humans are sensible creatures. Human beings have certain fundamental, unalienable rights often referred to as "human rights" by virtue of being creatures. They are innate in every person, regardless of caste, creed, religion, sex, or nationality. These rights are necessary for everyone because they uphold each person's freedom and dignity and promote their physical, moral, social, and spiritual well-being. Most people are aware of their rights, but how they will be protected is still an issue. Absolutely, we have a number of safeguards in place to protect our rights. The largest democracy in the world is found in India. The preservation of peoples' fundamental rights is one of the key goals of a democratic nation. The acknowledgment and defence of human rights have received proper respect from the Indian government. These rights of the people are acknowledged by the Indian Constitution, which also expresses great concern for them. Civil, political, economic, social, and cultural rights are outlined in the Universal Declaration of Human Rights. The majority of the rights outlined in the International Declaration of Human Rights are protected under the constitution. Civil and political rights are covered in Part III of the constitution, while economic, social, and cultural rights are included in Part IV. The Constitution's provisions must be reflected in every statute. The safeguarding of an individual's dignity is one of the principles and goals of the Indian Constitution, which are written in the preamble. The right to equality, the right to freedom, the right against exploitation, the right to freedom of religion, the right to cultural and educational rights, and the right to constitutional remedies are among the fundamental rights that are guaranteed to individuals under Part III of the constitution in order to achieve this goal. The central and state governments have a responsibility to ensure that each person has the necessary circumstances to exercise their human rights. The Directive Principles of State Policy, which are incorporated in Article IV of the Constitution, establish the obligations on the government to strive for the welfare of the people and the defence of their human rights. These serve as the state's guiding principles when developing policies pertaining to distributive justice, the right to work, the right to an education, social security, just and humane working conditions, the promotion of interests of the weaker sections of society, raising the standard of nutrition and living, enhancing public health, protecting and improving the environment, enhancing ecology, etc., so that each person can fully exercise their rights.

This dissertation aims to discuss one of these systems, namely the National Human Rights Commission's (NHRC) function in safeguarding human rights. After introducing the subject and defining human rights, the assignment's next section discusses the significance of national institutions for protecting human rights in a nation and the numerous steps taken at the international level to create such institutions. Following then, India's position has been discussed and the Protection of Human Rights Act has been passed. Also, a brief discussion of the NHRC's organisation and operations as well as its effectiveness in defending human rights in India has been included.

#### 4.1 STAGES OF HUMAN RIGHT COMMISSION IN INTERNATIONAL ATTEMPTS:-

##### First Stage

As early as 1946, the UNESCO proposed the concept of establishing a neutral institution of human rights in the United States. The Secretariat had advocated for the establishment of such an organisation in the States in the Memorandum "Supervision and Enforcement of Human Rights" in 1947.

##### Second Phase:

The General Assembly passed a resolution in 1966 asking for the proposal to establish a national commission on human rights to execute specific duties related to the compliance of the ICCPR and ICESCR to be taken into consideration. The resolution gave the Economic and Social Council permission to request that the Commission on Human Rights look into the matter from all angles.

##### Third Stage:

The Commission addressed the issue in 1970 and came to the conclusion that each government should determine whether to establish a national commission on human rights in consideration of its particular traditions and institutions.

##### Fourth Stage:

The necessity of establishing a national institution was once more stressed by the Commission in 1978. Yet none of these efforts were successful. States gave them little attention. They may not have been supportive of the national institution's establishment out of concern that it may criticise the state's executive and judicial branches of government if the situation called for it.

##### Fifth Stage:

In October 1993, Paris hosted the first ever international workshop on national institutions for the defence and advancement of basic freedoms and human rights. The Commission on Human Rights adopted its recommendations as the guiding principles for the classification of national institutions in resolution 54 of 1993. (the Paris Principles). In 1993, the General Assembly also approved it. The principles underlined that national institutions must be given a clear mandate, spelled out in a constitutional or legislative document, giving them the authority to safeguard and advance human rights. Additionally, it contains criteria for the membership selection and make-up of National Institutions.

##### Sixth Stage:

The World Conference on Human Rights, which recognised the significance of such a commission or institution in 1993, urged governments to build national social structures, institutions, and organisations that support and defend human rights. The Conference also proposed that the UN activities and programmes be strengthened in order to better respond to requests for help from States that desire to create or develop their own national institutions for the advancement and defence of human rights. Together with cooperation with

regional organisations and the UN, it also suggested enhancing cooperation between national institutions, notably through the sharing of knowledge and experience. It was also suggested that representatives of these institutions hold regular meetings under the supervision of the Centre for Human Rights to discuss ways to enhance their operations and exchange experiences. As a result, the World Conference gave national institutions for the defence and advancement of human rights a high priority. The importance of national institutions in addressing difficult human rights issues was underlined by the Fourth International Workshop of National Institutions held in Merida (Mexico), as well as regional conferences in Asia and the Pacific (1997) and Africa (1998). In its Final Report on the Implementation of the Vienna Declaration and Plan of Action of September 12, 1998, the United Nations High Commissioner for Human Rights recommended that States think about developing and/or bolstering National Human Rights Structure and Institutions. In order to help this process, they should also utilise the technical assistance programmes already in place. The international community should allocate enough funds for that goal and ensure that they are used effectively at the local and federal levels.

#### 4.1.1 ROLE OF JUDICIARY:-

The goal of "protecting the dignity of an individual" cannot be achieved just by providing for fundamental rights; instead, the rights must be freely enjoyed. The right to constitutional remedies, or the right to petition the Supreme Court to uphold fundamental rights, is so guaranteed by Article 32. The protection of citizens' human rights is the judiciary's constitutionally mandated duty. The Supreme Court and High Courts have the authority to act to uphold these rights. The Constitution's Articles 32 and 226 also provide mechanisms for remedy. For the preservation of his or her fundamental rights, the redress of grievances, and the enjoyment of their fundamental rights, an aggrieved person may directly approach the Supreme Court or High Court of the concerned state. In certain situations, the court has the authority to issue the proper orders, directives, and writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari. The judiciary is ultimately responsible for defending citizens' human rights. In addition to defending the constitutionally guaranteed rights, it has also expanded the definition of the fundamental rights to include some unrecognised rights. People consequently have access to both enumerated and unenumerated rights.

Supreme Court in *Maneka Gandhi v. Union of India*<sup>57</sup> interpreted the right to life and to broaden its scope and deduced un-enumerated right such as "right to live with human dignity". The Supreme Court developed the "emanation" hypothesis to give the existence of the basic right a purpose and an active component.

*Citizens for Democracy v. State of Assam and others*<sup>58</sup>

The Supreme Court ruled that using handcuffs and ropes to tie someone up is inhumane and a clear violation of their human rights, which are protected by both domestic and international law. The court ordered that prisoners who had been convicted or were awaiting trial not be forced to wear handcuffs or

<sup>57</sup> *Maneka Gandhi v. Union of India* AIR 1978 SC 597.

<sup>58</sup> *Citizens for Democracy v. State of Assam and others* (1995) 3 SCC 743

other fetters while being held in custody or even while being transported. Police and jail staff are not allowed to order the handcuffing of any inmates or to do so while they are being transported without the magistrate's permission. Without a magistrate's approval, the individual who has been detained cannot be handcuffed during the execution of the arrest warrant.

Because of this, the judiciary continuously contributes to the protection of people's human rights by extending the purview of existing rights and recognising new ones as circumstances dictate. The judiciary has broadened the definition of the right to life to include obligations that are necessary for the exercise of the right to life in dignity. Whether it is a right against violence in custody, a right to live in a pollution-free environment, a right to health, a right to adequate wages for workers, a right to the safety of women at work, a right to compensation for rape victims, a right to protect the rights of child labourers, etc., courts have protected people's rights in numerous cases.<sup>59</sup>

#### 4.1.2 ROLE OF NGO'S:-

In addition to the government, non-governmental organisations are crucial to the defence of human rights. NGOs have a significant impact on society. These groups fill the service gaps left by the government and support the defence of citizens' rights. NGOs are non-profit organisations with branches all over the world and can range in size from tiny groups to large worldwide organisations. An NGO is a state-independent, privately run organisation that supports issues on a voluntary basis. This support gives NGOs their strength. Through educating and empowering people, NGO's increase awareness of people's rights. NGOs are essential to the planning, oversight, and evaluation of the human rights protection process. As noted by B.R.P. Bhasker<sup>53</sup>, "the role of NGO is particularly important in the field of human rights as Government or their agencies often become violators of the very rights they are committed to protect and promote vast sections of the people who are illiterate and ill-informed, and that makes it easy for rights violators to act with impunity. In light of this, the need of human rights education becomes apparent, and NGOs are principally responsible for carrying out this responsibility. Even the government has acknowledged the significant role that NGOs play in a variety of disciplines. They are making a significant contribution in a number of areas, including those related to health, education, the environment, and the defence of the rights of different social groups. Saheli for women's rights, Youth of Voluntary Action for the abolition of child labour, Bandhua Mukti Morcha for the abolition of bonded labour, People's Union for Civil Liberties, and Citizens for Democratic Rights are some of the NGOs working in this field. They have also played a crucial role by bringing numerous cases of human rights violations before the Supreme Court of India. NGOs have on numerous occasions been the first to alert the appropriate authorities to a human rights infringement. The National Human Rights Commission has responded to a number of complaints, primarily submissions from regional Organizations. Organizations are also playing a significant role in effectively enforcing the government's policies. The Protection of Human Rights Act of 1993 recognises the extraordinary contribution that NGOs make to advancing human rights. In addition to this Act, the 1993 Vienna Declaration and Plan of Action also emphasised the importance of NGOs in advancing human rights.

<sup>59</sup> A Review by Amartish Kaur: Protection Of Human Rights In India ( Last visited on 06 Feb, 2023) <https://niu.edu.in>

In order to create favourable conditions for the exercise of human rights, this declaration emphasised the necessity of national cooperation with NGOs.

The Commission was specifically instructed to "support the activities of non-governmental organisations and institutions working in the field of human rights" under Section 12(i) of the Protection of Human Rights Act. This is a duty that the Commission gladly accepts because the cause stands to benefit greatly from both the practical assistance and the constructive criticism that NGOs and the Commission can offer in the course of their ongoing dialogue. The Commission has occasionally welcomed prominent human rights advocates and NGO representatives for talks and recommendations, and has enlisted their practical assistance.<sup>60</sup> Additionally, the Commission has made it a point on each visit to a State to take advantage of the expertise and contacts of NGOs, whose connections at the "grass-roots" level give the human rights movement strength and meaning where it matters the most.<sup>61</sup>

#### **4.2 HUMAN RIGHTS COMMISSION- ATTEMPTS AT NATIONAL LEVEL (INDIA):-**

Before the Third Committee of the General Assembly, India has previously expressed a strong interest in creating or bolstering a national institution for the promotion and protection of human rights. It unveiled a draught resolution in which it stressed the value of these national institutions' independence and integrity. In the proposed resolution, it was also urged that the UN Secretary-General report to the General Assembly in two years on how various state institutions operate and what role they play in putting human rights laws into practise. It was admirable that India expressed interest in creating a national organisation for the defence and advancement of human rights. The Human Rights Commission: National L The worldwide forum seems to be interested in creating such an institution based on its interest. Unfortunately, no such institution was in existence at the time. In response to criticism from foreign countries regarding political upheaval and violence in Punjab, Jammu & Kashmir, the North-East, and Andhra Pradesh in the early 1990s, India felt the need to create a Commission. Due to public awareness of the need to preserve human rights, domestic pressure was also added for the establishment of such a commission. All of this convinced the government to pass legislation creating the Human Rights Commission. Government's proposal to establish the Commission was of course sudden and without due deliberations.

#### *National Human Rights Commission v. State of Arunachal Pradesh*<sup>62</sup>

In accordance with Article 32 of the Indian Constitution, the Commission has petitioned the Supreme Court of India with a writ in the public interest. The Commission brought its petition primarily to uphold the constitutionally guaranteed rights of around 65,000 Chakma Hajong tribal members. In this instance, the KaptainHydel Project resulted in the displacement of a sizable number of refugees from the former East Pakistan in 1964. These displaced Chakmas had sought refuge in Assam and Tripura, two North-Eastern Indian states. There were primarily two problems in this instance;

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<sup>60</sup> SANJOJ RAJAN, INTERNATIONAL HUMANITARIAN LAW IN INDIA A HANDBOOK (1<sup>st</sup> Edition, 2020)

<sup>61</sup> A Review by Amartish Kaur: Protection Of Human Rights In India ( Last visited on 06 Feb, 2023) <https://niu.edu.in>

<sup>62</sup> National Human Rights Commission v. State of Arunachal Pradesh, AIR 1996 SC 1234

1) Citizenship conferral;

2) Concern for persecution by some groups of Arunachal Pradesh residents.

NHRC was contacted by two different NGOs mostly about these two issues.

In this instance, the Commission argued before the Court that it had determined that the authorities of Arunachal Pradesh appeared to encourage the serving of quit notices by the All Arunachal Pradesh Students Union (AAPSU) to Chakmas and their attempted enforcement. The State government purposefully delayed the resolution of the case by failing to provide the NHRC with the necessary response, and it actually helped impose the eviction of the Chakmas from the State through its agents. After hearing all sides of the argument, the court ordered the state of Arunachal Pradesh to protect the lives and personal liberties of every Chakma living there. The importance of this decision also resides in dispelling any lingering questions about whether refugees are entitled to basic rights. According to this ruling, foreigners have a constitutionally guaranteed right to the protection of their lives and liberties under Article 21. Several innocent Chakma refugees from AAPSU have been spared their lives because to the Commission's prompt intervention.

#### **4.3 PUNJAB MASS CREMATION ORDER:-**

Two writ petitions containing significant claims of widespread cremations carried out by the Punjab Police of people purportedly slain in what were referred to as "encounters" were submitted to the Supreme Court of India. The major argument of the Writ Petitions was that there had been rushed and covert cremations as well as extrajudicial killings, making the State liable for action. The Shiromani Akali Dal's Human Rights Wing press release from January 16, 1995, with the subject line "Disappeared" "cremation ground," served as the main source for these petitions. According to the memo, the Punjab Police incinerated numerous human bodies after designating them as unidentified. The Central Bureau of Investigation (CBI) reported to the Supreme Court regarding the burning of dead remains, and the court noted after reviewing the report that 1238 unidentified bodies and 274 partially identified bodies totaled 585 fully identified dead bodies. The report reveals egregious, widespread human rights violations. On December 12th, 1996, the Court asked the Commission to investigate the situation legally and identify all pertinent matters. Whilst the complaint is still pending before the Commission for consideration, it has in some cases given the 89 deceased victims' next of kin compensation totaling Rupees 2,50,000 (Rs. 2,50,000/-).

The Commission based its decision to award compensation on the legislation created by Indian courts that address developing legal requirements for remedial, reparatory, punitive, and exemplary damages for violations of human rights. The Commission noted that the notion that monetary or pecuniary compensation is an appropriate, effective, and sometimes the only suitable remedy for redress of the established infringement of the fundamental right to life of a citizen by public servants and the State is now widely accepted in most jurisdictions. The citizen's claim is founded on the strict liability principle, which precludes the use of sovereign immunity as a defence, and the citizen must be given the full sum of compensation.

#### 4.4 GUJARAT COMMUNAL RIOT:-

The decision to act was based on media reports, both print and electronic, on the sectarian riot that occurred in Gujarat at the beginning of 2002. A request for the Commission to become involved was also sent to it via email. Between March 19 and March 22, 2002, a commission team visited Gujarat and wrote a report that was ultimately made public. Given the seriousness of the claims in the confidential study, it was first delayed in order to allow the Gujarat government a chance to respond on its contents. Sadly, the State administration paid little attention to this study. The Commission found that the State had not upheld its fundamental and unavoidable duty to safeguard the rights to life, liberty, equality, and dignity of all its citizens. For determining the level of State accountability for failing to defend the constitutional rights of the Gujarati people, the *res ipsa loquitur* (the matter speaking for itself) principle is applicable. The State was accountable for not just the actions of its own agents but also those of non-State actors who were subject to its laws and for any behaviour that would contribute to or enable the violation of human rights.<sup>63</sup>

#### 4.5 PROTECTION OF HUMAN RIGHTS ACT, 1993:-

The first known use of the term "human rights" can be found in the United Nations Charter, which was formed after World War II in San Francisco on June 25, 1945. This charter had no enforceable legal status. It defined the ideal, which would afterwards be developed by other organisations and entities. With the adoption of the Universal Declaration of Human Rights in December 1948, the United Nations General Assembly made a fundamental contribution to the preservation of human rights. The issue was that this proclamation was not a legally binding agreement, so the UN had no way to enforce it. In order to solve the problem, the United Nations General Assembly adopted two agreements for the defence of human rights in December 1965:

The Economic, Social, and Cultural Rights Covenant as well as the Covenant on Civil and Political Rights. While the second called on states to enact laws to implement individual rights, the first established those rights as being legally enforceable. After receiving the required number of member state ratifications, the two Covenants came into effect in December 1976. Following that, many states accepted the Covenants before the end of 1981, including India. As a result, these agreements were enforceable against the ratifying states. India received harsh criticism for the human rights abuses committed by the military in the state of Jammu & Kashmir. The Indian government was under pressure from the US and other western nations to recognise the instances of human rights breaches in the nation. A significant national desire for such a law that would address the different problems related to human rights breaches existed in addition to the international pressure. The Human Rights Commission Bill was originally introduced in the Lok Sabha on May 14, 1992, in response to a nationwide demand and as a response to criticism from other nations. The Bill was ultimately referred to the Standing Committee on Home Affairs of the Parliament after careful consideration. Yet on September 27, 1993, the President of India issued an Ordinance that created a

<sup>63</sup>Role Of National Human Rights Commission In Protection Of Human Rights In India <https://thelawbrigade.com/> (Last Visited 03 Mar. 23)

National Commission on Human Rights in response to regional and global pressures. After that, on December 18, 1993, the Lok Sabha approved a Bill on Human Rights to replace the ordinance; on January 8, 1994, the Bill was made into an Act. In accordance with Section 1(3) of the Act, this Act became effective on September 28th, 1993. As a result, the commission was constituted on September 27, 1993, by presidential edict. The commission's first chairperson, Justice Ranganath Mishra, a former chief justice of India, was chosen on October 12, 1993.

#### **4.6 SIGNIFICANCE OF THE PROTECTION OF HUMAN RIGHTS ACT 1993:-**

- 1) To defend people against being violated in their rights. In accordance with the constitution's guarantees, "Human Rights" encompass the rights to life, liberty, equality, and dignity.
- 2) To defend these rights against state institutions abusing their authority.
- 3) To create a company dedicated to the improvement of current life forms and the personality development of those entities.
- 4) To offer the appropriate and efficient steps for obtaining redress in the case of a breach of rights.

The Act's creation of the National Human Rights Commission, State Human Rights Commissions, and Human Rights Courts is its most important component because it enables them to investigate and prosecute major human rights breaches.

#### **Section 2(d) of the Protection of Human Rights Act 1993**

Human rights are described as individual rights to life, liberty, equality, and dignity that are protected by the Constitution or acknowledged in international accords and are upholdable in Indian courts in the Act. Nonetheless, the National Human Rights Commission's authority is constrained by the aforementioned definition. Only the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights were ratified by India as a result. The agreements are not, however, directly enforceable as legal obligations in Indian courts. Hence, the definition of human rights under the Protection of Human Rights Act of 1993 is strictly constrained to the essential freedoms guaranteed by Part III of the Constitution and upheld by Indian courts.

Beenu Rawat v. Union of India (2013)<sup>64</sup>

#### **Facts**

In this instance, the police used a lathi to attack Aam Aadmi Party members who were protesting the failure to file a FIR in a rape case. This led to the demonstrators being hurt.

<sup>64</sup> Beenu Rawat v. Union of India WP(Civil) No. 446 of 2013

Issue

Whether or not the police's use of excessive or unreasonable force violates the person's fundamental right to a dignified existence.

Decision

In accordance with Section 12(a) of the Protection of Human Rights Act of 1993, the National Human Rights Commission was requested to look into any alleged violations of the protesters' fundamental rights to life and dignity after the Supreme Court transferred this case to it. The court further clarified that the definition of "human rights" is broad enough to include rights relating to life, liberty, equality, and dignity of the individual guaranteed by the Constitution.

#### **4.7 THE NATIONAL HUMAN RIGHTS COMMISSION:-**

##### **Section 3**

Constitution of a National Human Rights Commission.-

(1) The Central Government shall constitute a body to be known as the National Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to, it under this Act.

(2) The Commission shall consist of- (a) a Chairperson who has been a Chief Justice of the Supreme Court; (b) one Member who is, or has been, a Judge of the Supreme Court; (c) one Member who is, or has been, the Chief Justice of a High Court; (d) two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.

(3) The Chairpersons of the National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes and the National Commission for Women shall be deemed to be Members of the Commission for the discharge of functions specified in clauses (b) to (j) of section 12.

(4). There shall be a Secretary-General who shall be the Chief Executive Officer of the Commission and shall exercise such powers and discharge such functions of the Commission as it may delegate to him.

(5) The headquarters of the Commission shall be at Delhi and the Commission may, with the previous approval of the Central Government, establish offices at other places in India.<sup>65</sup>

Section 4 Appointment of Chairperson and other Members.

Appointment of Chairperson and other Members.-

(1) The Chairperson and other Members shall be appointed by the President by warrant under his hand and seal. Provided that every appointment under this sub-section shall be made after obtaining the recommendations of a Committee consisting of-

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<sup>65</sup>Protection of Human Rights Act, 1993, No. 10, Acts of Parliament, 1994 (India)

(a) the Prime Minister --chairperson;

(b) Speaker of the House of the People --member;

(c) Minister-in-charge of the Ministry of --member; Home Affairs in the Government of India

(d) Leader of the Opposition in the --member; House of the People

(e) Leader of the Opposition in the --member; Council of States

(f) Deputy Chairman of the Council --member; of States Provided further that no sitting Judge of the Supreme Court or sitting Chief Justice of a High Court shall be appointed except after consultation with the Chief Justice of India.

(2) No appointment of a Chairperson or a Member shall be invalid merely by reason of any vacancy in the Committee.<sup>66</sup>

*People's Union for Civil Liberties v. Union of India*<sup>67</sup>

#### Facts

As a member of the NHRC, the central government chose an ex-senior police official who had previously held the positions of vice president of (Asia) Interpol and director of the CBI.

This appointment was contested by the petitioner in a writ petition. Respondent 1 in this case was the central government, while Respondent 2 was the assigned police officer. The petitioner contends that the appointment of a former police officer to the NHRC is a violation of the Act's provisions as well as the fundamental purposes for which the Commission was created. As a result, such an appointment would have an effect on the Commission's standing and its ability to receive international recognition as a human rights organisation.

#### Issues

1) The Supreme Court had to decide whether Section 3(2)(d) of the Act needed to be interpreted or construed in a way that prevented police officers from joining the NHRC.

2) The second concern was that one of the six members of the selection committee was absent from the meeting, which resulted in a statutory error in the appointment of the second respondent.

3) The third concern was that because the "Paris Principles" forbade the appointment of a civil servant like a police officer to such a Commission (these principles were later endorsed by the UN Human Rights Council and the UN General Assembly), the appointment of the second respondent, who is a former police officer, also violates international agreements.

<sup>66</sup> Protection of Human Rights Act, 1993, No. 10, Acts of Parliament, 1994 (India)

<sup>67</sup> People's Union for Civil Liberties v. Union of India WP(civil) 105 of 2004

## Decision

The Supreme Court denied the petition, ruling that Section 3(2) (unambiguous)'s language excludes any room for interpretation. Simply put, it means that any two individuals with familiarity or experience in the field of human rights concerns are qualified to serve on the Commission. Any determination based on popular opinion or bias cannot be tainted by the plain language of this provision. As long as they possess the knowledge or practical experience with human rights concerns required by the Selection Committee, no group is excluded by this clause. The Court cannot interpret an exclusionary clause to bar police officers from serving on the Commission notwithstanding the fact that Section 3(2)(d) of the Act does not specifically allow for such an exclusion because there is no exclusion there and the language is clear.

## Section 12

### Functions of the Commission.-

The Commission shall perform all or any of the following functions, namely:-

- (a) Inquire, suo motu or on a petition presented to it by a victim or any person on his behalf, into complaint of- (i) violation of human rights or abetment thereof; or (ii) negligence in the prevention of such violation, by a public servant;
- (b) Intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;
- (c) Visit, under intimation to the State Government, any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection to study the living conditions of the inmates and make recommendations thereon;
- (d) Review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;
- (e) Review the factors, including acts of terrorism, that inhibit the enjoyment of human rights and recommend appropriate remedial measures;
- (f) Study treaties and other international instruments on human rights and make recommendations for their effective implementation;
- (g) Undertake and promote research in the field of human rights;
- (h) Spread human rights literacy among various sections, of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;
- (i) Encourage the efforts of non-governmental organisations and institutions working in the field of human rights;

(j) Such other functions as it may consider necessary for the promotion of human rights.<sup>68</sup>

### *Paramjit Kaur v. State of Punjab*<sup>69</sup>

Regarding the duties and authority of the Commission, the Supreme Court of India established some guidelines and rules. The case's specifics are as follows.

#### Facts

The National Human Rights Commission was asked to look into the flagrant human rights violations occurring on a large scale in the state of Punjab, as revealed in the CBI Report submitted to this Court (Supreme Court) in the aforementioned writ petitions. The Union of India has filed a petition with the Supreme Court asking for clarification of the order issued by the same Court in the aforementioned writ petition.

#### Issue

Preliminary objections were made regarding the Commission's jurisdiction when the matter was brought before it, citing the body's statutory obligations and restrictions, such as the prohibition on conducting an investigation into any matter more than a year after the alleged date of the act constituting the violation of human rights, as stated in Section 36(2) of the Protection of Human Rights Act, 1993.

#### Held

The National Human Rights Commission was given the authority to handle a number of issues by the Supreme Court as part of its exercise of jurisdiction under Article 32 of the Indian Constitution. The Supreme Court has the authority to issue orders, and all national authorities are required to follow those orders and support the Supreme Court. No exception applies to the National Human Rights Commission. The Supreme Court's directives would govern the Commission's operations, not the Act by which it was established. The National Human Rights Commission is allowed complete discretion when making decisions on the issues that the Supreme Court has delegated to it. As a result, the National Human Rights Commission is acting *sui generis* because the jurisdiction it has over these issues is of a unique kind and isn't protected by legislation or the law.

#### Section 18.

#### Steps after inquiry.-

The Commission may take any of the following steps upon the completion of an inquiry held under this Act, namely-

(1) Where the inquiry discloses, the commission of violation of human rights or negligence in the prevention of violation of human rights by a public servant, it may recommend to the concerned Gov-

<sup>68</sup> Protection of Human Rights Act, 1993, No. 10, Acts of Parliament, 1994 (India)

<sup>69</sup> *Paramjit Kaur v. State of Punjab* WP(criminal) No. 497 of 1995

ernment or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons;

(2) Approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;

(3) Recommend to the concerned Government or authority for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary;

(4) Subject to the provisions of clause (5) provide a copy of the inquiry report to the petitioner or his representative;

(5) The Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission;

(6) The Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission.<sup>70</sup>

#### **4.8 THE STATE HUMAN RIGHTS COMMISSION:-**

Section 21.

Constitution of State Human Rights Commission:-

(1) A State Government may constitute a body to be known as the..... (Name of the State) Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to, a State Commission under this Chapter.<sup>71</sup>

Section 21.

Constitution of State Human Rights Commission:-

(1) A State Government may constitute a body to be known as the..... (Name of the State) Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to, a State Commission under this Chapter.

(2) The State Commission shall consist of-

(a) A Chairperson who has been a Chief Justice of a High Court;

(b) One Member who is, or has been, a Judge of a High Court;

(c) One Member who is, or has been, a district judge in that State,

<sup>70</sup> Protection of Human Rights Act, 1993, No. 10, Acts of Parliament, 1994 (India)

<sup>71</sup> Protection of Human Rights Act, 1993, No. 10, Acts of Parliament, 1994 (India)

(d) Two members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.<sup>72</sup>

#### 4.9 HUMAN RIGHTS COURTS:-

Section 30.

Human Rights Courts.-

For the purpose of providing speedy trial of offences arising out of violation of human rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Session to be a Human Rights Court to try the said offences:

Provided that nothing in this section shall apply if:

- (a) A Court of Session is already specified as a special court; or
- (b) A special court is already constituted, for such offences under any other law for the time being in force.<sup>73</sup>

In the year 2019 the NHRC once more presented the except few states no state compiled the order to specify or set up the HRC during the hearing of *Punjab state Human Rights Commission vs. Jatt Ram*<sup>74</sup>. The bench stated that although the establishing of these courts does not necessitate the appointment of extra judges or other infrastructure, the court's judgement is still not carried out. Chief Secretaries have been ordered by the Supreme Court to give justification as to why such directives are not necessary.

#### 4.10 SHORTCOMINGS OF PROTECTION OF HUMAN RIGHTS ACT, 1993:-

Authorities that disregard the NHRC's directives are not subject to sanctions.

- 1) The NHRC cannot look at a complaint that is made more than a year after the incident.
- 2) This Act makes no mention of the requirement that judges (NHRC members) have expertise or qualifications in the field of human rights activism or a track record of human rights activism.
- 3) The commission might merely request a report from the government regarding human rights breaches committed by the armed forces before making recommendations.
- 4) Academics, NGOs, and other members of civil society who have aided in the advancement of human rights are not required by law to be included.
- 5) To help the victims, it can only request that the authorities go to the higher courts.
- 6) The relevant authority shall either carry out its suggestions or justify its failure to do so within one month.
- 7) The NHRC has no authority over violations of human rights committed by private parties.

<sup>72</sup> Protection of Human Rights Act, 1993, No. 10, Acts of Parliament, 1994 (India)

<sup>73</sup> Protection of Human Rights Act, 1993, No. 10, Acts of Parliament, 1994 (India)

<sup>74</sup> Punjab state Human Rights Commission vs. Jatt Ram Civil Appeal No. 5912/2012

8) It is unable to enact cures; it can only recommend them.

Because of the Protection of Human Rights Act of 1993 and the National Human Rights Commission's formation, Indians are now well informed of their constitutional rights (NHRC). The National Human Rights Commission and the State Human Rights Commissions also operate in a similar manner. The Special Courts/Human Rights Courts, as specified in Section 30 of the PHR Act, must nevertheless be maintained in order to ensure a prompt trial for offences originating from violations of human rights. Because of the Protection of Human Rights Act of 1993 and the National Human Rights Commission's formation, Indians are now well informed of their constitutional rights (NHRC). The National Human Rights Commission and the State Human Rights Commissions also operate in a similar manner. The Special Courts/Human Rights Courts, as specified in Section 30 of the PHR Act, must nevertheless be maintained in order to ensure a prompt trial for offences originating from violations of human rights.

#### **4.11 HUMAN RIGHTS VIOLATIONS IN INDIA (2020-2022):-**

##### **4.11.1 UNLAWFUL OR POLITICALLY MOTIVATED KILLINGS:-**

There have been allegations of extrajudicial murders of suspected terrorists and criminals by the government or its agents as well as other arbitrary or illegal killings. Killings committed by security and paramilitary forces are primarily investigated by military courts. Accounts of inmates or detainees who died while in the care of the police or the courts persisted. The National Coalition Against Torture announced in March that 111 people would die in police custody in 2020. The investigation said that 82 of the deaths were allegedly caused by torture or malicious intent. The two states with the most custodial fatalities Uttar Pradesh and Gujarat reported 11 each, followed by Madhya Pradesh with 10 deaths. The National Crime Records Bureau (NCRB) released a separate Prison Statistics of India (PSI) report in which 1,887 inmates died while held under judicial supervision in 2020. According to the survey, West Bengal and Uttar Pradesh had the highest number of deaths while in custody and that the majority of jail deaths were due to natural causes. In response to a complaint stating that police killed more than 20 petty criminals without justification, the National Human Rights Commission ordered the director general of police in Assam to write a report. On June 18, a Dalit lady who was being held by the police on suspicion of theft fell and passed away. A probe into claims that the victim was beaten to death was mandated by the Telangana High Court. For their part in the death that occurred while in custody, the Telangana government fired three police officials and gave the family members compensation.

Two tribal members accused of taking part in a bicycle theft case, Ravi Jadav and Sunil Pawar, were discovered hanged inside a police station in Gujarat's Navsari District on July 22. In relation to the deaths in custody, three police officers were detained, and on September 18, Navsari police gave compensation to the victims' families. In connection with the custodial murders of Ponraj and Beniks Jeyaraj in Tamil Nadu, the Central Bureau of Investigation charged nine police officers in September 2020. Ten police officers who were allegedly engaged in the murders were detained by the Tamil Nadu government and jailed without bail; however, one of those officers later passed away from COVID-19. The nine defendants who remained were

on trial. The country's Maoist-affected regions, northeastern states, and Jammu and Kashmir all recorded killings by both government and nongovernment forces (see section 1.g.). As of November 27, the South Asia Terrorism Portal stated that 23 civilians had perished nationwide as a result of terrorism. In connection with the 2018 murders of Rising Kashmir editor-in-chief Shujaat Bukhari and his two police bodyguards, police made five arrests in July. According to a police inquiry, Lashkar-e-Tayyiba militants targeted Bukhari in punishment for his backing of a government-backed peace effort. Many murders were committed by terrorists. Maoist insurgents have persisted in attacking security personnel and infrastructure, like as highways, railroads, and communication towers, in Jharkhand and Bihar. In Jammu and Kashmir, terrorists murdered 10 political party leaders. Terrorists shot and killed BJP leader Gulam Rasool Dar and his wife in Anantnag District on August 9. Terrorists murdered Ghulam Hassan Lone, the leader of the Apni Party, on August 19 in Kulgam District.

#### **4.11.2 TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT:-**

Although it is against the law, there have been reports of police departments using torture. Custodial deaths occurred as a result of police beatings of detainee. Despite the fact that the law forbids authorities from doing so, nongovernmental groups (NGOs) have claimed that officials have used torture to obtain confessions. Officials allegedly utilised torture as a form of summary punishment or to extort money. In addition to allegations that police sexually assaulted both male and female convicts, there were complaints of guards and inmates abusing prisoners. Punith K.L., a Dalit man, made a complaint against Subinspector Arjun Honkera on May 23 alleging that Honkera had forced him to lick the urine of another prisoner while he was in police custody. Karnataka police then suspended Honkera. In addition, the plaintiff claimed that cops beat him for hours. On September 2, Honkera was taken into custody by the Karnataka police's Criminal Investigation Department. The National Human Rights Commission (NHRC) has been given government approval to look into rape incidents involving police officers. The NHRC is authorised by law to inquire about matters involving the army and paramilitary groups, but it is not required to look into them. NGOs asserted that the number of rapes perpetrated while police were holding people was undercounted in NHRC figures. Due to societal stigma and the possibility of retaliation if the perpetrator was a police officer or other official, some rape victims were reluctant to disclose offences. According to accounts, police officers declined to disclose rape cases. Crime victims occasionally experienced intimidation, threats, and assaults. Although there were allegations of security forces acting illegally without consequence, some of them were also disciplined. A court trial was ongoing when the army indicted three people in December 2020 for extrajudicial executions that occurred in Jammu and Kashmir. The accused were also the subject of local charges by the Jammu and Kashmir police.<sup>75</sup>

<sup>75</sup> 2021 Country Reports On Human Rights Practices In India <https://www.state.gov/> (Last Visited 03 Mar. 23)

#### 4.11.3 TORTURE & CUSTODIAL DEATH IN TAMIL NADU:-

A father-son team in Tamil Nadu who kept a shop open after COVID-19 curfew hours perished in jail the same week that the globe observed International Day in Support of Victims of Torture (June 26). It is believed that they were tortured by the Thoothukudi district police. Reports state that one man had a baton pushed into his anus. A generation will remember the Chinese army's usage of iron rods and clubs with nails in them in 2020. But Thoothukudi's events will quickly be forgotten, as if they were an isolated incident rather than an example of India's widespread police aggression. The police allegedly pulled up Jayaraj on June 19 from his store in Sathankulam in the Thoothukudi district after he allegedly broke the COVID-19 curfew. When his son Bennix saw this, he went to the station. Bennix was also detained by the police, and it is said that they tortured the two merchants for defying lockdown regulations by keeping the shop open past 8 o'clock. However, a nearby store's CCTV footage revealed that Jayaraj was picked up by the Sathankulam police just before 8 o'clock in the evening. The father and son pair was then driven to Kovilpatti and imprisoned. Bennix and Jayaraj were transported to Kovilpatti Government Hospital after complaining of chest trouble. Bennix passed away on June 22, and Jayaraj passed away on June 23. On the High Court's instructions, the CB-CID was initially in charge of the Jeyaraj and Bennix custodial killings case. Ten or so police officers were booked and taken into custody on murder charges under Section 302 of the Indian Penal Code. The CBI then took up the investigation, which they are still doing<sup>76</sup>.

On May 22, 2018, the police in the same district shot and killed 13 individuals who were part of a mob that had peacefully protested for 100 days to close Vedanta's extremely polluting Sterlite Copper Unit. No one has been charged in two years, and it appears that cops are still acting with impunity. It is clear from the persistence of cruel treatment that India is committed to upholding police violence. The 1987 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has only been ratified by five nations, including India (UNCAT). Haiti, Brunei, and Sudan are the other nations. The Prevention of Torture Bill, 2010, which was passed by the Lok Sabha just before US President Barack Obama's 2010 visit to India, was a reluctant and utterly insufficient first step towards India ratifying the UNCAT. The lip service has remained notwithstanding the change in administration. The Law Commission's continuous review of amendments to existing criminal legislation, not an exclusive anti-torture Bill, was addressed when India delivered its third Universal Periodic Review (UPR) to the UN Human Rights Council in 2017. Even after the Lok Sabha's Bill was significantly modified by a multi-party Rajya Sabha select committee in 2010, the court continued to disregard senior lawyer Ashwani Kumar's and the Indian people's requests in 2017 for the Supreme Court to urge the government to pass the Bill. One-sixth of the world's population is exposed to arbitrary police violence under the worse-than-colonial Indian State. Not all of them, though; most likely, the 39% of them who identify as Dalit, Muslim, or Adivasi. This demographic makes up a disproportionate 53% of Indian convicts. According to the Pew Research Centre, US Blacks made up 33% of convicted convicts despite making up only 12% of the adult population. The

<sup>76</sup> Sathankulam custodial deaths <https://www.thenewsminute.com/> (Last Visited 23<sup>rd</sup> Jan, 2023)

cause of police torture in both democracies is not addressed by "Dalit Lives Matter" or other memes that mimic "Black Lives Matter" in the US. The difference is crucial. The focus in America has suddenly shifted to racism (whose corrections are, quite rightly, inclusive measures such as seeking greater Black presence in more diverse areas of employment and education). Sadly, merely mentioning social problems like "racism" or "casteism" does not address the criminal in the room—the police officer whose use of force the state condones. In India, the US, and everywhere else, social and criminal issues must be addressed in distinctly different ways.

Each district has a Social Justice and Human Rights Unit of the Tamil Nadu police. To respond to crimes against SC and ST populations, they have mobile police squads, but the units also employ economists and sociologists. It is ineffective for either goal to combine social justice (for equal access to resources) with human rights (for the suppression of violence). There is confusion outside of Tennessee. Reservations for at-risk groups haven't stopped the violent 'reservation' for them in institutionalised prison and torture systems across India<sup>77</sup>.

#### **4.12 STRUCTURAL LIMITATIONS:-**

The Protection of Human Rights Act of 1993 is largely to blame for the structural restrictions, which also include:

Only recommendations:-

Commissions make recommendations to the government that may include paying compensation to the victim or to their families, initiating disciplinary actions against incompetent employees, filing charges against those responsible, and giving specific instructions on how to protect human rights or how to avoid taking actions that violate them. They lack the authority to impose decisions, thus they can only offer recommendations. Unfavorable results result from this lack of authority to guarantee compliance:

Completely rejecting a suggestion:-

Governments frequently provide a lengthy bureaucratic discourse explaining why following the proposal is not in the public interest (read: governmental interest) or completely ignore it.

Partial compliance:-

Failure to release the entire amount of compensation is an example of partial compliance. Another illustration is acting simply on one advice when there were actually two, such as to pay compensation and implement disciplinary measures.

Delayed compliance:-

Governments are often required to act on recommendations within 4-6 weeks, however this is rarely the case, and occasionally the delay makes the recommendation worthless.

<sup>77</sup> Custodial deaths India convention against torture <https://thewire.in/> (Last Visited 23<sup>rd</sup> Jan, 2023)

#### 4.13 PRACTICAL LIMITATIONS:-

Notwithstanding structural restrictions, cultures that exist within governmental sectors also hinder the operation of human rights commissions. The following are a few of the practical challenges that human rights commissioners face:

Non-filling of vacancies:

The majority of human rights commissions operate with fewer members than the required five. This reduces commissions' ability to respond to complaints quickly, especially given that they are all dealing with steadily rising complaint volumes.

Non-availability of funds:

Another major issue is a lack of resources, or rather a lack of resources being employed for human rights-related purposes.

Too many grievances:

The overwhelming volume of complaints is a common issue for most human rights commissions. From 2000 and 2001, More than 70,000 complaints were submitted to the National Human Rights Commission. The growing number of complaints is making it tough for state human rights bodies as well.

Bureaucratic methods of operation:

The internal environment of human rights commissions is typically the same as any other government institution because the majority of their workers are drawn from government ministries, either on deputation or reemployment after retirement. It is frequently challenging for complainants to access papers or information regarding the progress of their case since strict hierarchies are upheld. The presence of security personnel, hordes of peons, and office staff makes it difficult for regular people to interact with government representatives in person to their complaint.

#### 4.14 DATA OF CUSTODIAL DEATH FROM 2018 TO 2021:-

State wise registration of cases during last three years under the incident Head custodial death (Police)<sup>78</sup>

The data provided with the reply revealed that overall across India while the number of such custodial deaths had declined over three successive years from 146 in 2017-18 to 136 in 2018-19, then to 112 in 2019-20 and further to 100 in 2020-21 they had recorded a sharp rise to 175 in 2021-22. And over the last three full financial years, there was a nearly 60% jump in such cases. Among the states, over the last three years, the highest number of cases were reported from Gujarat (53), Maharashtra (46), Madhya Pradesh (30), Bihar (26), Rajasthan (21), West Bengal (20) and Uttar Pradesh (19).

GUJARAT- 42, MADHYA PRADESH- 38, MAHARASHTRA- 27, TAMIL NADU - 25.

<sup>78</sup> Data of Custodial Death from 2018 to 2021 In India <https://www.mha.gov.in/> (Last Visited 23<sup>rd</sup> Jan, 2023)

As for the rise in custodial death cases over the last three years, the number of such cases rose from 3 in 2019-20 to 30 in 2021-22 in Maharashtra; they increased from 12 to 24 during the same period in Gujarat; from 5 to 13 in Rajasthan; from 4 to 8 in Karnataka, from 3 to 8 in UP and from 2 to 6 in Kerala.<sup>79</sup>

#### **4.15 DATA OF POLICE ENCOUNTER FROM 2018 TO 2021 IN INDIA:-**

India has registered 813 cases of encounter killings in the last six years, which means one such case has been registered almost every three days since April 2016 in the country. While there was a significant drop in these cases during the peak of the COVID-19 pandemic (from 112 in 2019-20 to 82 in 2020-21), there was a 69.5% spike the next year with 139 cases. In the six years since April 2016, Chhattisgarh recorded the most extrajudicial killing cases (259), followed by Uttar Pradesh (110) and Assam (79).<sup>80</sup>

Although Chhattisgarh saw the highest number of these cases in the six years, the number of cases in the state have dropped by 62.6% in the period. Assam too has seen a drop in extrajudicial killings by 45% in the span of six years with a 325% spike in the last one year 4 in 2020-21 to 17 in 2021-22. But, it's not the same for Uttar Pradesh. The most populous state has seen more than a two-fold increase in extrajudicial killings in the last six years. In the six years since April 2016, UP saw the highest number of encounter killing cases in 2017-18, coincidentally the year the Bharatiya Janata Party's government came into power in the state. The UP Police, in their unofficial mission called 'OperationLangda', shot and injured more than 3,300 criminals in 8,472 encounterleaving them with bullet wounds in legs.

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<sup>79</sup> Custodial Deaths Data <https://thewire.in/> (Last Visited 23<sup>rd</sup> Jan, 2023)

<sup>80</sup> Data of Police Encounter from 2018 to 2021 In India <https://www.mha.gov.in/>(Last Visited 23<sup>rd</sup> Jan, 2023)

**CHAPTER V****ROLE OF UNITED NATION IN PROTECTING PEOPLE AGAINST TORTURE****5. UNITED NATIONS & PROTECTION OF HUMAN RIGHTS:-****5.1 HISTORY OF UNITED NATIONS:-**

The League of Nations served as the UN's forerunner. The Treaty of Versailles during World War I created the League of Nations in 1919. (One of the peace treaties adopted at the end of WWI). The League of Nations' objectives were to promote international cooperation and maintain world peace and security. Regrettably, the League of Nations was viewed as a failure since it was unable to stop World War Two. The term "United Nations" was originally used by President Franklin D. Roosevelt to refer to the collection of nations that signed the United Nations Declaration in 1942. Twenty-six countries made a commitment in the United Nations Declaration to fight alongside one another as the Allies against the Axis Powers during World War Two. Throughout World War Two, a group of nations known as the Axis Powers was led by Germany, Italy, and Japan. The representatives of the Allied Powers and twenty-four other nations gathered in San Francisco for the United Nations Conference on International Organization two months after World War II came to a conclusion. The UN Charter was the conference's only agenda item. The United Nations Charter was ratified on June 26, 1945, by 51 nations, including Poland, which had not attended the convention but had signed subsequently. Several nations started signing up soon after the UN was established. The League of Nations' remaining members convened after the UN Charter was ratified, and they unanimously decided to transfer all of its assets to the UN and formally dissolve the League of Nations.

Nations were in ruins as World War II was set to come to a close in 1945, and peace was desired by all. From 25 April to 26 June 1945, representatives from 50 nations assembled in San Francisco, California, for the United Nations Conference on International Organization. The United Nations Charter, which established a new international organisation and was intended to avert another world war like the one they had just experienced, was written over the course of the following two months. The United Nations formally began on 24 October 1945, four months after the San Francisco Conference, when its Charter was accepted by China, France, the Soviet Union, the United Kingdom, the United States and by a majority of other signatories. More than 75 years later, the United Nations is still working to enforce international law, provide humanitarian aid to those in need, promote international peace and security, and protect human rights. The United Nations is simultaneously carrying out new tasks that its founders did not intend for it to perform in 1945. In order to create a better and more sustainable future for all of us, the United Nations has established sustainable development goals for the year 2030. Moreover, UN members have endorsed climate action to slow global warming. The United Nations is looking to the future and new accomplishments now that it has achieved a great deal in the past. The United Nations' history is continually being written.

There are 51 nations came together to form the United Nations, an international body dedicated to preserving world peace and security, fostering goodwill among states, and advancing social progress, higher living standards, and human rights. The Organization's 193 Member States have a forum to express their views through the General Assembly, Security Council, Economic and Social Council, and other bodies and

committees because of its distinctive international nature and the authority granted to it in its founding Charter. Every part of the world is touched by the United Nations' operations. Although the United Nations and its System (specialised agencies, finances, and programmes) are best recognised for peacekeeping, peace building, conflict prevention, and humanitarian assistance, there are several additional ways they impact our lives and improve the world. To accomplish its objectives and coordinate efforts for a secure future, the Organization works on a wide range of fundamental issues, including sustainable development, the environment, and the protection of refugees, disaster relief, counterterrorism, disarmament, and non-proliferation, as well as promoting democracy, human rights, gender equality, and the advancement of women, governance, economic and social development, clearing landmines, increasing food production, and more.

The UN has 4 main purposes:

- 1) To keep peace throughout the world;
- 2) To develop friendly relations among nations;
- 3) To help nations work together to improve the lives of poor people, to conquer hunger, disease and illiteracy, and to encourage respect for each other's rights and freedoms;
- 4) To be a centre for harmonizing the actions of nations to achieve these goals

The UN can act on a wide range of issues and offer a forum for its 193 nation-states to express their views through the General Assembly, the Security Council, the Economic and Social Council, and other bodies and committees due to its distinctive international character and the powers granted to it in its founding Charter. Every area of the world is touched by the UN's activity. There are numerous other ways the "UN System," which includes organisations like UNICEF and the World Food Programme as well as intergovernmental bodies like the Security Council, influences our lives and improves the world. It is best known for peacekeeping, peace building, conflict prevention, and humanitarian assistance. In order to accomplish its objectives and coordinate efforts for a safer world for all, the UN works on a wide range of fundamental issues, including sustainable development, environment and refugee protection, disaster relief, counterterrorism, disarmament and non-proliferation, promotion of democracy, human rights, gender equality and the advancement of women, governance, economic and social development, international health, removing landmines, increasing food production, and more.

The finances, programmes, specialised agencies, and other UN System institutions help the UN organise its work. One element of the UN System is the UN organisation itself. To fulfil the objectives of the Organization outlined in the UN Charter, cooperation between the UN and the other UN system organisations is crucial. Since the writing of its Charter, the United Nations has been required to carry out new tasks that were not anticipated. The Organization has committed to taking collective action to halt climate change and has established goals for creating a more sustainable world. After the Second World War's devastation, the United Nations was established in 1945 with the maintenance of international peace

and security as its primary objective. The UN does this by attempting to avert war, assisting parties to conflict in reaching a settlement, sending peacekeepers, and fostering circumstances that will allow peace to endure and develop. In order to be effective, these activities should complement one another and frequently overlap. International peace and security are primarily the responsibility of the UN Security Council. Together with other UN offices and bodies, the Secretary-General and the General Assembly serve significant, crucial, and complementary duties.<sup>81</sup>

## 5.2 UNITED NATIONS CHARTER:-

The United Nations was founded on the principles set forth in its Charter. After the conclusion of the United Nations Conference on International Organization, it was signed on June 26, 1945, in San Francisco, and it went into effect on October 24, 1945. Due to its special international status and the authority granted by its Charter, which is regarded as an international treaty, the United Nations is able to act on a wide range of topics. As a result, the UN Charter is a part of international law and is binding on all UN Member States. The major tenets of international relations, such as the sovereign equality of States and the proscription of the use of force in those relations, are codified in the UN Charter. The goals and values outlined in the UN's founding Charter, which has been modified three times in 1963, 1965, and 1973, have served as the organization's compass since its establishment in 1945. The International Court of Justice, the primary court of the United Nations, operates in line with its statute, which is appended to the UN Charter and is a fundamental component of it. (See Article 92 in Chapter XIV)

Article 1 of the UN Charter lists the following four goals for the UN:

- 1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and elimination of peace threats, for the suppression of acts of aggression or other breaches of peace, and to bring about by peaceful means, in accordance with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace;
- 2) To achieve international cooperation in solving global issues of an economic, social, cultural, or humanitarian nature, as well as in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or other factors;
- 3) To foster friendly relations between nations based on the principle of equal rights and the right of peoples to self-determination;
- 4) To take other appropriate steps to strengthen universal peace;

The UN as an organisation and each member state are subject to the following principles, which are outlined in Article 2 of the UN Charter:

- 1) The fundamental tenet of the Organization is the sovereign equality of each and every one of its Members.

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<sup>81</sup> United Nation's History <https://www.un.org/> (Last Visited 3rd Mar, 2023)

- 2) To ensure that all Members receive the rights and advantages that come with membership.
- 3) All Members must really fulfil the duties they have taken on in accordance with the current Charter.
- 4) All Members are required to use peaceful measures to resolve their international conflicts so as not to compromise global justice, security, or peace.
- 5) All Members must provide the UN with full help in any action it takes in conformity with the current Charter and must forgo providing aid to any state that the UN is taking enforcement or preventive action against.
- 6) Insofar as it may be required for the maintenance of global peace and security, the Organization shall ensure that states that are not members of the United Nations operate in accordance with these Principles.
- 7) Nothing in the current Charter authorises the United Nations to intervene in matters that are essentially within the domestic jurisdiction of any state or requires the Members to submit such matters for settlement under the current Charter; however, the application of enforcement measures is not affected by this principle.<sup>82</sup>

### 5.3 SECURITY COUNCIL OF UN:-

The UN Security Council occasionally addresses egregious human rights crimes, frequently in places rife with violence. According to the UN Charter, the Security Council has the power to launch an investigation, act as a mediator, designate special envoys, or ask the Secretary-General to use his influence. A cease-fire order, military observers, or a peacekeeping force may be sent by the Security Council. If these steps are not sufficient, the Security Council may choose enforcement actions like travel bans, blockades, financial penalties and limitations, arms embargos, economic sanctions, and financial penalties and restrictions, as well as collective military action. The upkeep of global peace and security is primarily the duty of the Security Council. Each of its fifteen members has one vote. According to the United Nations Charter, all Members are required to abide with Council decisions. When evaluating whether there is an aggression or threat to the peace, the Security Council is in charge. It suggests ways of adjusting the terms of settlement and encourages parties to a conflict to settle it peacefully. The Security Council occasionally has the option of using sanctions or even approving the use of force in order to preserve or restore global peace and security.

The duties and authority of the Security Council are:

- 1) To uphold peace and security on a global scale in conformity with the goals and ideals of the United Nations;
- 2) To look into any disagreement or circumstance that can cause international conflict;
- 3) To make suggestions regarding how to modify such issues or the terms of settlement;

<sup>82</sup>Overview United Nations <https://una.org.uk/> (Last Visited 6<sup>th</sup> Mar, 2023)

- 4) To create strategies for the implementation of a system to control weaponry;
- 5) To identify any threats to the peace or acts of aggression and to provide recommendations for the appropriate course of action;
- 6) To exhort Members to employ economic sanctions and other non-violent ways to discourage or avert hostility;
- 7) To take military action against an aggressor;
- 8) To recommend new Members' admission;
- 9) To carry out the United Nations' trusteeship duties in "strategic areas";
- 10) To recommend the Secretary-general's appointment to the General Assembly;
- 11) To vote for the judges of the International Court of Justice alongside the Assembly.

China, France, the Russian Federation, the United Kingdom, and the United States are the Security Council's five permanent members. To guarantee that each region is represented, the General Assembly elects 10 non-permanent members to two-year terms in regional groups. There is much criticism that the permanent five members represent the most powerful countries from 1945, rather than today, and that they do not represent the world geographically.

#### **5.4 REPERTOIRE OF THE PRACTICE OF THE SECURITY COUNCIL:-**

The Repertoire includes in-depth coverage of the Security Council's interpretation and application of the United Nations Charter and its own Provisional Rules of Procedure since 1946. It was required by the General Assembly in resolution 686 (VII) in 1952. Its main objective is to serve as a resource for knowledge about the Security Council's changing procedures for Member States, the United Nations system, individuals who have been elected to serve on the Security Council, academics, and others. The Repertoire gives a brief overview of the Security Council's role in maintaining international peace and security, which is its main duty. Studies for each agenda item include summaries of Council public deliberations, the Secretary-general's reports, and other documents that highlight significant events that occurred during the time under study. The upkeep of global peace and security is primarily the duty of the Security Council. It is structured to work continually, and representatives from each of its members are required to be present at United Nations Headquarters at all times. In accordance with the English alphabetical listing of the member states, the Council's Presidency alternates every month.

#### **5.5 MAINTAINING SECURITY AND PEACE:-**

The Council often advises the parties to try to come to an agreement through peaceful methods when a complaint regarding a threat to peace is presented before it. The Council could:

- 1) Describe the guiding principles for such an accord;

- 2) Carry out an investigation and, in some situations, mediate;
- 3) Send out a mission; name special envoys; or ask the Secretary-General to use his good offices to settle the conflict amicably.
- 4) The Council's top priority is to put an end to hostilities as quickly as possible when a disagreement turns into conflict. In that situation, the Council could:
- 5) Give orders for a cease-fire that can help stop the situation from getting worse;
- 6) To ease tensions, divide opposing troops, and create a quiet environment where diplomatic agreements might be pursued, send military observers or a peacekeeping force.
- 7) Beyond this, the Council may decide to use enforcement actions, such as:

Economic sanctions, arms embargoes, financial penalties and limitations, travel bans, a break in diplomatic ties, a blockade, or even mass military action are all possible responses.

- 8) The primary goal is to target those responsible for the international community's condemned policies or practises while limiting the effects of the actions taken on other segments of the population and the economy.<sup>83</sup>

## 5.6 UNITED NATIONS ON WAR CRIMES:-

The concept of war crimes emerged specifically at the end of the 19th and the beginning of the 20th centuries, when international humanitarian law, also known as the law of armed conflict, was codified, even though the prohibition of specific conduct in the conduct of armed conflict can be traced back many centuries. The Hague Conventions adopted in 1899 and 1907 focus on the ban to warring parties to utilise particular means and tactics of warfare. Since then, a number of further related treaties have been ratified. The protection of those who are not or are no longer participating in hostilities is the main subject of the Geneva Convention of 1864 and subsequent Geneva Conventions, including the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. Some of the violations of its rules are classified as war crimes under both Geneva and Hague Law, albeit not all of them are. International law does not, however, contain a single text that codifies all war crimes. Both international criminal law and international humanitarian law treaties, as well as international customary law, contain lists of war crime. The Additional Protocols and other international humanitarian law accords have not yet attained the same level of recognition as the 1949 Geneva Conventions, which have been ratified by all United Nations Members. Many of the laws outlined in these treaties, however, have been regarded as a component of customary law and as such, regardless of whether States have ratified the treaties themselves, are binding on all States (and other parties to the conflict). The protection provided in non-international armed conflicts, which are only governed by Common Article 3 of the Four Geneva Conventions and Additional Protocol II, is also

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<sup>83</sup> Security Council <https://www.un.org/> (Last Visited 6<sup>th</sup> Mar, 2023)

expanded by the fact that many rules of customary international law apply in both international and non-international armed conflict.

## **5.7 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT:-**

### Article 8

#### War Crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, 'war crimes' means:
  - a. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
    - i. Wilful killing
    - ii. Torture or inhuman treatment, including biological experiments;
    - iii. Wilfully causing great suffering, or serious injury to body or health;
    - iv. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
    - v. Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
    - vi. Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
    - vii. Unlawful deportation or transfer or unlawful confinement;
    - viii. Taking of hostages.

In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- 1) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- 2) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- 3) Taking of hostages;
- 4) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

- a. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
  - i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
  - ii. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
  - iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
  - iv. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
  - v. Pillaging a town or place, even when taken by assault;
  - vi. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
  - vii. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
  - viii. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
  - ix. Killing or wounding treacherously a combatant adversary;
  - x. Declaring that no quarter will be given;
  - xi. Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
  - xii. Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;<sup>84</sup>

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<sup>84</sup> Genocide Prevention Atrocity Crimes <https://www.un.org/en/> (Last Visited 6th Mar, 2023)

## 5.8 ELEMENTS OF WAR CRIME:-

War crimes are those transgressions of treaty or customary international humanitarian law that give rise to personal criminal liability under international law. As a result, unlike crimes against humanity and genocide, war crimes are always committed during an armed conflict, whether it be one that is international or not. Depending on whether an armed conflict is international or not, different things can be considered war crimes.

For instance, Article 8 of the Rome Statute divides war crimes into the following categories:

- 1) Severe breaches of the 1949 Geneva Conventions, connected to international armed conflict;
- 2) Other grave transgressions of the laws and traditions that apply to international armed conflict;

More specifically, war crimes can be broken down into the following categories:

- a) Crimes against people who need special protection;
- b) Crimes against those who perform humanitarian aid and peacekeeping operations;
- c) Crimes against property and other rights;
- d) Crimes involving prohibited means of warfare;
- e) Crimes involving prohibited methods of warfare.

The following are some examples of prohibited behaviours: homicide; cruel treatment or torture; taking hostages; planning attacks against civilians; attacking places of worship, schools, museums, hospitals, or other charitable institutions; pillaging; rape; sexual slavery; forced pregnancies; or any other form of sexual violence; conscripting or enlisting minors under the age of 15;

There are two key components to war crimes:

- 1) "The action took place in the context of and was related with an international or non-international armed conflict," is a contextual element;
- 2) A mental component: knowledge and intent regarding the particular act as well as the context.

In contrast to genocide and crimes against humanity, a variety of victims, including combatants and non-combatants, can be the target of a war crime, depending on the crime's kind. Victims of international armed conflicts include prisoners of war, civilians, and injured and ill members of the armed forces on land and at sea. Protection is given to people not actively engaged in hostilities in non-international armed conflicts. This includes military personnel who have laid down their weapons and others who are otherwise "hors de

combat" due to illness, injuries, captivity, or other circumstances. Protection is also given to medical and religious personnel, humanitarian aid workers, and civil defence personnel in both sorts of conflicts.<sup>85</sup>

## 5.9 THE THIRD GENEVA CONVENTION OF 1949:-

A warrior who is captured by an adversary during an international armed conflict is referred to as a prisoner of war. People who fall into the hands of the enemy during an armed conflict are protected under humanitarian law. As a prisoner of war, the person is given protection if they are a combatant. If the person is a civilian, they are safeguarded as such. No one in enemy hands can be beyond the law, as stated in the ICRC Commentary on the Geneva Conventions. The Third Geneva Convention of 1949, whose definition of a prisoner of war is derived from that of a combatant, controls the treatment of prisoners of war specifically (GCI–III). In both international and domestic armed conflicts, treatment guarantees are given to civilians who take part in the fighting (GCIV). Members of non-state armed groups are not recognised as combatants in non-international armed conflicts. Humanitarian law pertaining to non-international armed conflicts offers, nevertheless, a specific regime of protection for those deprived of their liberty for causes related to the conflict. Combatants who take part in non-international armed conflicts as members of non-state armed groups are at the very least covered by this status of confinement. This status recognises that combatants have the legal right to employ force up until the point of capture. It aims to establish that capture and imprisonment are not exploited as an occasion for retribution, harsh treatment, or torture of prisoners of war to get information. Prisoners of war may be questioned, but no coercion of any type, including physical or mental torture, is permitted in order to get information of any kind. Also, having the status of a prisoner of war shields a person from prosecution and punishment just for having taken part in a war. Combatants who have broken humanitarian law, notably by carrying out terrorist attacks, may not lose their status as prisoners of war but may instead face legal action for the crimes they have committed.

The following groups of people fall within the Third Geneva Convention's definition of "prisoners of war":

Prisoners of war are those who fall under the control of the enemy and are from one of the following categories:

- 1) Members of the armed forces of a Party to the Conflict, as well as volunteers or militias that are a part of such armed forces.
- 2) Members of other militias and volunteer corps, including those in organised resistance movements, who are affiliated with a Party to the Conflict and are engaged in operations within or without their own territory, even if that territory is occupied, provided that they meet the following requirements:

Those of having a fixed distinctive symbol that can be seen from a distance, carrying armaments openly, and conducting their actions in line with the laws and customs of war; being led by a person who is accountable for his subordinates. Regular military personnel who pledge loyalty to a power or entity that the

<sup>85</sup> Genocide prevention war crimes. <https://www.un.org/> (Last Visited 6<sup>th</sup> Mar, 2023)

Detaining Power does not recognise. Anyone who travels with the armed forces but isn't actually a member of them, such as civilian crew members of military aircraft, war reporters, supply contractors, labour units, or personnel from services in charge of the armed forces' welfare, as long as they have permission from the armed forces they are travelling with, who will give them an identity card for that purpose. People who are or have been members of the occupying country's armed forces may be interned by the occupying power if it deems it necessary due to their allegiance, even if it initially freed them while hostilities were ongoing outside the territory it occupies. This is especially true if they have made an unsuccessful attempt to reenlist in the armed forces they belong to, which are engaged in combat, or if they fail to pay a fine. The individuals who fall under one of the categories listed in the present Article and who have been accepted on the territory of neutral or non-belligerent States and who these Powers are bound by international law to intern. Any individual who comes under the control of a hostile party is automatically assumed to be a prisoner of war. Additional Protocol I broadens the application of this principle to avoid disputes as to whether a combatant is a member of the armed forces. Both groupings of military forces and everyone taking part in the fighting are given prisoner-of-war status. According to the Third Geneva Convention and Additional Protocol I, a competent tribunal, not the detaining power, shall decide whether a person is entitled to the status of prisoner of war where there is a question about that person's eligibility.<sup>86</sup>

#### **5.10 THE RIGHTS AND OBLIGATIONS SET OUT BY THE THIRD GENEVA CONVENTION:-**

1) The treatment of prisoners of war must always be humane. Any unlawful detaining power action or inaction that results in the death or gravely jeopardises the health of a prisoner of war under its control is forbidden and will be viewed as a grave violation of humanitarian law (GCIII Art. 13).

2) Prisoners of war have a right to respect for their person under all circumstances. Women must be treated with respect for their unique needs and receive treatment that is equal to that given to males (GCIII Art. 14).

3) The detaining power is bound to give prisoners of war, free of charge, with the necessary maintenance and medical attention necessitated by their state of health (GCIII Art. 15).

4) The power holding the prisoners of war shall treat all prisoners of war equally (GCIII Art. 16).

5) The only information that prisoners are need to provide is their last and first names, rank, birthdate, and serial number. Each party to a conflict is required to issue each prisoner of war under its custody with an identity card. While interrogation is not prohibited, the Third Convention prohibits using any form of coercion, including physical or mental torture, to extract information from prisoners of war. Prisoners of war who fail to respond when questioned may not be threatened, insulted, or subjected to any unfavourable treatment. The interrogation of prisoners of war must be conducted in a language they can understand (GCIII Art. 17).

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<sup>86</sup> Prisoners Of War <https://guide-humanitarian-law.org/> (Last Visited 6<sup>th</sup> Mar, 2023)

6) After being captured, prisoners of war must be moved as soon as possible to camps that are located distant from the front lines of battle. A humanitarian evacuation must take place in settings akin to those used by the detaining power's military during station swaps. The right amount of food, clean water, clothing, and medical care must be provided for prisoners of war (GCIII Arts. 19, 20).

7) Facilities for incarceration must offer every assurance of cleanliness and healthfulness and take local climate conditions into consideration (GCIII Art. 22).

8) Prisoner of war camps must be conspicuously identified by the letters PW or PG (for prisoners of war or prisonniers de guerre), where military circumstances so permit (GCIII Art. 23).

9) Prisoners of war must be housed in quarters that are just as comfortable as those used by the detaining power's military, who are also housed nearby. The aforementioned conditions must never be harmful to their health. The location must have enough heating, lighting, and dampness protection (GCIII Art. 25).

10) To maintain the health of prisoners of war and to stop weight loss or the emergence of nutritional deficiencies, the basic daily meal rations must be adequate in terms of amount, quality, and diversity. Also, the convicts' typical diet must be considered (GCIII Art. 26).

11) The detaining authorities is required to implement all essential hygienic measures to guarantee the camps' cleanliness and well-being and to stop epidemics. There must be distinct facilities for female prisoners of war in any camps where they are housed (GCIII Art. 29).

12) Every camp needs to have a decent infirmary. Medical care must be provided to prisoners of war, preferably by personnel from the government on which they rely and, if feasible, from that nation. Every military or civilian medical facility that can provide such treatment must admit prisoners of war who have serious illnesses or whose conditions call for specialised care. At least once every month, medical examinations of prisoners of war must be conducted. Each prisoner's weight as well as their general health, nutrition, and cleanliness must be checked and recorded (GCIII Arts. 30 and 31).

13) Chaplains and members of the medical staff who are being held by the detaining power with the intention of helping prisoners of war are not regarded as prisoners of war. They should, however, enjoy as a minimum the advantages and protection of the Third Convention and shall be given the facilities essential to carry out their task (GCIII Art. 33).<sup>87</sup>

## **5.11 PRISONERS OF WAR TORTURED BY BOTH RUSSIA AND UKRAINE:-**

Both sides in the battle are abusing prisoners of war, according to a UN human rights office report. According to a Tuesday statement from the UN high commissioner's office, both Russia and Ukraine have violated the Geneva Conventions by torturing and mistreating prisoners taken during the conflict in Ukraine. According to the UN Human Rights Monitoring Mission in Ukraine, over the past few months, it has interviewed 159 Russian and 175 Ukrainian prisoners of war. The "overwhelming majority" of Ukrainian

<sup>87</sup>Prisoners Of War <https://guide-humanitarian-law.org/> (Last Visited 23rd Mar, 2023)

prisoners of war, detained by Russia recalled being tortured and ill-treated throughout their captivity. They said that these actions were often used to frighten and degrade them in addition to forcing them to provide military intelligence. Head of the monitoring mission Matilda Bogner stated that in some statements, inmates claimed being beaten, including with batons, and given electric shocks with tasers and military phones known as TAPiKs. She was speaking to reporters at a press briefing in Geneva from Ukraine. In one instance, a guy who was arrested and brought to a penal colony close to Olenivka claimed that members of an armed gang with ties to Russia "attached wires to his genitalia and nose" and shocked him. "They simply had fun and were not interested in my replies to their queries," the former prisoner, reported by Bogner, state. Others spoke of being hanged by their hands or legs, burned with cigarettes, fired with a stun gun, threatened with mock executions, and stabbed. Twenty female prisoners of war on the Soviet side were also interrogated by the UN mission. According to Bogner, those detained in a prison colony close to Olenivka did not experience physical abuse, but they did report being psychologically tormented by the sounds of male prisoners of war being tortured in adjoining cell. Others have reported that during interrogations in other places, they had been beaten, electrocuted, or threatened with sexual abuse. Due to Russia's refusal to give access to detention facilities, interviews with Ukrainian captives were conducted after their release. Bogner claimed that the mission had received "credible claims" of summary deaths of non combatants as well as other instances of torture and ill-treatment allegedly carried out by Ukrainian military personnel. She informed reporters that "in some instances, Ukrainian law enforcement agents or military guarding them used the TAPiK military phone to stab or shock prisoners of war. According to the reports provided, the "riskiest time" was during capture, first questioning, or when they were transferred to transit camps and internment sites. Other convicts claimed they were kicked and pummeling in the face and body after turning themselves in and during interrogation. Soviet prisoners of war and members of allied armed organisations have spoken of the deplorable and frequently humiliating circumstances surrounding their transfer to transit camps. They were frequently transported naked in minivans or vehicles with their hands bound behind their backs. Moreover, instances of "welcome beatings" upon arrival at a penal colony were documented by the UN monitoring team, which was permitted access to inmates at Ukrainian detention facilities.

Bogner urged all parties to keep in mind their commitments to treating all prisoners of war humanely under the Third Geneva Convention. "The ban of torture and ill-treatment is absolute, even - indeed especially - in times of armed conflict," she added, asking on Russia to give "full, confidential and unrestricted access to prisoners of war, in particular in their areas of internment". Bogner noted that the organisation was also anticipating developments from Ukraine about criminal inquiries into claims of torture of prisoners of war by members of its military forces. In addition to visiting nearby accessible villages, she claimed that the UN delegation had already planned to travel to Kherson when Russian forces left the area. where it had documented summary executions as well as almost 80 cases of enforced disappearances and arbitrary detention.

“We will be following up further on those cases and will try to understand whether the scale is in fact larger than what we have documented”, Bogner said.<sup>88</sup>

## 5.12 UN CONDEMNS SYSTEMIC RACISM, POLICE VIOLENCE:-

The United Nations Human Rights Council is fighting systemic racism and police brutality, especially in the US. On June 19, the 47-member council passed a resolution ordering Michelle Bachelet, the UN high commissioner for human rights, and UN experts to compile a global report on institutionalised racism and excessive use of force by law enforcement against individuals of African heritage. The study shall especially address George Floyd's death in the US and other occurrences that led to the deaths of people of African heritage, according to the resolution, "to contribute to responsibility and redress for the victims." The resolution came following a discussion after George Floyd was killed on May 25 by a police officer in the US state of Minnesota, which sparked protests both domestically and internationally. Floyd's murder was the most recent in a long line of African Americans killed by US police, for which no one has ever been held accountable. Almost 120 speakers, including Human Rights Watch, joined the stage during the debate, which the African group of countries had asked. Floyd's brother had made a powerful appeal to the UN rights body before the debate began, and many of them expressed compassion for Floyd's family. Ambassadors, UN experts, and Bachelet had also denounced the murder and demanded that racial policing end immediately. The resolution falls short of the thorough international investigation that many civil society organisations have called for. Yet, the chosen wording is a positive move because it, for the first time, calls attention to the problems of systematic racism and police brutality in the US and around the world. No nation, regardless of its size or influence, should be free from the Human Rights Council's scrutiny. Human Rights Watch has been calling for accountability and an end to policing practises that unfairly target Black and brown communities for decades as they have documented excessive police use of force and racially biased policing, most notably in the US, France, and Brazil. We have also worked with partner organisations to modify government initiatives, from education to health care, that exacerbate rather than address racial and ethnic inequalities and trap far too many people in poverty and misery. The council resolution that was adopted makes mention of the US while denouncing institutional racism worldwide. In addition to ordering a report on police killings of individuals of African origin, it urges the high commissioner to look into government responses to anti-racism peaceful marches, "particularly the alleged use of excessive force against demonstrators, bystanders and media." The US opted to leave the Human Rights Council in 2018, becoming the first member to do so after being elected to a seat. The US has long evaded receiving substantial attention from the council. Civil society organisations must make sure that the emphasis remains on the US in the council-mandated report and high commissioner updates in order to address the difficulties that families like Floyd's confront in pursuing justice and responsibility for police abuse.

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<sup>88</sup> Prisoners Of War Tortured By Both Russia And Ukraine UN Probe Shows <https://genevasolutions.news/> (Last Visited 26<sup>th</sup> Jan, 2023)

### 5.13 POLICE VIOLENCE AND SYSTEMIC RACISM IN THE UNITED STATES:-

The signatories to the letters are urging the Council to create an independent commission of inquiry into police killings of Black men and women as well as violent police responses to protests in the United States. They are also urging the Council to create a thematic commission of inquiry with the authority to look into systemic racism in law enforcement around the world, particularly where it is connected to the legacies of colonialism and transatlantic slavery, as required by the UN Special Procedures. The organisations ask the UN to support the requests made by the families of victims and others to mandate an independent investigation into police violence and provide recommendations for a national plan of action to end systemic racism and racial discrimination in the United States in a letter sent to Michelle Bachelet, the UN High Commissioner for Human Rights, today. This includes allocating funds to implement programmes like reparations and other measures to address historical racial injustices in order to attain racial equality. The demands made by victims' families, civil society organisations, and Special Procedures in the context of the urgent debate on the "current racially inspired human rights violations, systemic racism, police brutality, and violence against peaceful pr" were supported by the signatories of a letter sent to the ministers of foreign affairs of African states. The signatories also expressed their appreciation for the African Group's leadership at the Council. In June 2020, in response to the police killing of George Floyd and the ensuing racial justice demonstrations, the African Group requested that the Council form an inquiry commission. But, the Council, under diplomatic pressure from the Trump administration and American allies, adopted a weaker resolution. Instead, the agreed resolution instructed the UN High Commissioner for Human Rights to draught a report on systemic racism and police brutality around the world, to be delivered to the Council on July 12, 2021. According to the letters, a strong international accountability system would strengthen rather than weaken efforts to eradicate systematic racism in the United States, particularly in light of police abuse of Black people.<sup>89</sup>

In the wake of the murder of George Floyd, a UN report on racial justice urged member states, including the UK, to stop the "impunity" enjoyed by police personnel who violate the human rights of black people.

The UN human rights office's research of 190 killings worldwide led to the sobering conclusion that, in part because of inadequate investigations and a refusal to accept the effects of structural racism, law enforcement officials are seldom held accountable for killing Black people. Seven instances of deaths involving police are highlighted in the 95-page conference room paper that goes along with the 23-page worldwide report, including the death of Kevin Clarke in London in 2018 after being restrained by police. A jury at Clarke's inquest determined that the police's improper use of restraints contributed to his death. Clarke had been given a paranoid schizophrenia diagnosis in 2002. Additional case studies include that of Adama Traoré in France, George Floyd and Breonna Taylor in the US, Janner Garca Palomino in Colombia, and Luana Barbosa dos Reis Santos and Joo Pedro Matos Pinto in Brazil. In June 2020, the UN human

<sup>89</sup>Call For Un Inquiry Into Police Violence And Systemic Racism In The United States <https://ishr.ch/latest-updates/> (Last Visited 28<sup>th</sup> Jan, 2023)

rights office was charged with writing a thorough report on institutionalised racism against black people. The research looked into government reactions to peaceful anti-racism protests, violations of international human rights law by law enforcement, and victim compensation and accountability. Michelle Bachelet, a former president of Chile and the UN High Commissioner for Human Rights, headed the report. Bachelet called the current situation "untenable". "Systemic racism requires a systemic response," she declared. Dismantling systems rooted in centuries of violence and discrimination requires a comprehensive strategy rather than a piecemeal one. "I am calling on all states to stop denying racism and start dismantling it; to end impunity and build trust; to listen to the voices of people of African descent; and to confront past legacies and deliver redress," he said. The analysis was based on more than 340 people who participated in online discussions, the majority of whom were of African origin, more than 110 written comments, a review of materials that were made accessible to the public, and additional consultations with pertinent specialists. The report, which looks at deaths in police custody in various nations, states that the patchwork of data paints "an alarming picture of system-wide, disproportionate and discriminatory impacts on people of African descent in their encounters with law enforcement and the criminal justice system in some states". "Many families related to me the agony they suffered in seeking truth, justice, and redress—and the distressing idea that their loved ones somehow "deserved it," added Bachelet. That the system is not doing more to help them is depressing. This has to alter. "We want to see responsibility and true change," Wendy Clarke, Kevin Clarke's mother, told the UN inquiry. "We don't simply want to see training changed; we want to see a change in how the police and other services view and treat people of colour. So that the police are not the only first point of response, we want mental health services to be better funded. Another family member who addressed the UN inquiry was Marcia Rigg, whose brother Sean Rigg passed away at a Brixton police station in 2008. It was an honour to meet the other families, including those of Breonna Taylor's mother and George Floyd's brother, she said. But, it was also noteworthy how similar the patterns and our experiences were.

While the UK government is unequivocal in its rejection of systemic racism, this UN study confronts them with the evidence, according to Deborah Coles, the director of the advocacy group Inquest. The disproportionate number of black men who pass away as a result of official negligence and the deployment of lethal force is at the extreme end of a continuum of racism and violence. Our criminal justice and policing systems exhibit a trend of systemic racism. Rigg believed the study would renew calls for systemic reform in the UK and that the British government would take action. "This has been going on for years. There are other examples of George Floyd here, both before and after him, including my own experience and what happened to my brother."<sup>90</sup>

The COVID-19 epidemic forced a three-month break, which was followed by the inaugural meeting of the UN Human Rights Council on June 15, 2020. The Council concentrated on racism and police violence, two serious threats to public health that are frequently ignored. Governments are required by human rights law and policy to acknowledge and stop any practise of racial discrimination or other human rights abuses.

<sup>90</sup>UN Alls End Impunity Police Violence Against Black People George Floyd <https://www.theguardian.com/> (Last Visited 28<sup>th</sup> Jan, 2023)

In order to safeguard and uphold human rights everywhere, the United Nations Human Rights Watch raises the alarm when such violations take place. For instance, in 2018, the United Nations urged China to stop its racially motivated discriminatory actions against the Muslim ethnic minority known as the Uighurs, including the widespread incarceration and arbitrary arrest of approximately 1 million Uighurs. Although there is broad consensus and a wealth of evidence that racially motivated police violence poses a serious threat to many Americans, the subject was first raised at the U.N. summit in June 2020. After George Floyd was killed by police in Minneapolis, Minnesota, on May 25, the meeting was called. Sadness and resentment spread across the nation after horrifying video of Floyd's horrific death due to a fake \$20 note, which led to historically significant demonstrations and marches across the nation. George Floyd's passing is not an unusual occurrence.

In the United States, racialized police violence has long been a contentious topic of public health. Almost a thousand people were shot and murdered by police in 2019—almost three people each day on average. These figures clearly show a racial disparity. Compared to white Americans, who only have a mortality risk of between 0.6 and 0.7, black Americans have a mortality risk of between 1.9 and 2.4 fatalities per 100,000 per year. Police violence also disproportionately targets Black women and Black transgender individuals. The Human Rights Council acknowledged the 21 deaths of transgender and gender non-conforming people in the first half of 2020 as the most violent deaths in a vulnerable community since the advocacy group started keeping track of them in 2013. Insisting that numerous other people of African descent had "met the same destiny because of their origin and police aggression," the Human Rights Council concluded that it would be "inconceivable" to ignore racially motivated police abuse. In addition to urging the U.S. to ensure that law enforcement officials have a thorough understanding of the International Convention on the Elimination of All Forms of Racial Discrimination through improved training and education, the U.N. Committee on the Elimination of Racial Discrimination urged the U.S. to make immediate structural reforms to end racial discrimination. These demands for action show that the human rights community agrees that police violence against people of colour will no longer be allowed. Yet this is merely the first step in the process of putting an end to the repeated killings of Black people by the police. The Committee's recommendations for education and retraining are crucial in changing police behaviour and attitudes, but they will not be enough to eradicate the structural prejudice and systemic racism that have afflicted the United States since its establishment. In terms of racial fairness, the United States continues to lag well behind most other nations. The struggle against racism and racial discrimination must be given top priority since it is clear that racism and police violence against Black people pose a serious threat to the public's health and violate their human rights.<sup>91</sup>

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<sup>91</sup>Racially Driven Police Violence Is A Human Rights Violation <https://oneill.law.georgetown.edu/> (Last Visited 28<sup>th</sup> Jan, 2023)

**5.14 POLICE BRUTALITY AND BLACKS: AN AMERICAN IMMUNE SYSTEM DISORDER:-**

According to the Hennepin County Medical Examiner, a preliminary examination found no proof that George Floyd, who had been kneeling on his neck for 8 to 9 minutes by former Minneapolis police officer Derek Chauvin, died from strangulation and severe asphyxia. According to the medical examiner, Floyd had coronary artery disease and hypertensive heart disease as well as other underlying medical issues. The medical examiner concluded that Mr. Floyd's death was likely caused by a combination of the police's restraint of him, his underlying medical issues, and any possible intoxicants in his system. We won't discuss the fact that the medical examiner cited underlying conditions as a contributing factor in the cause of death; while this is frequently true in non-traumatic deaths, it is probably much less likely to be the case here. The implication might be that if he had been in perfect health, he might not have passed away; or maybe it would have only taken another one or two minutes of neck compression to kill him. I'll leave it up to you to interpret that. Saying that a GSW victim died because the host was not strong enough to endure the hypovolemic shock is analogous to attributing his death to underlying problems. This is terrible in and of itself, but let's keep our attention on determinate implicit prejudice, one of the main reasons for police violence, lest we go off into unrelated implicit bias. After Mr. Floyd's death, there was civil unrest in Minneapolis for many days. This was followed by protests, vandalism of property, and assaults on protesters and law enforcement officers in numerous other American cities, including New York City, Atlanta, Baltimore, Oakland, and Los Angeles. On May 26, the cop who strangled Mr. Floyd was fired, and on May 29, he was taken into custody and charged with second- and third-degree manslaughter. The civil disturbance in the US is still going on as of the time this article was written. In addition to numerous other places, the National Guard has been stationed in Los Angeles.

Legal definitions of police brutality or police violence include officers using excessive or unjustified force on a citizen. This includes, but is not limited to, property damage, death, physical or verbal abuse, and physical or mental harm. Police brutality against Black people in America has a long history. Several political and social movements in the United States, such as the 1960s civil rights movement, anti-war protests, the War on Drugs, and the Global War on Terrorism, all involved the use of excessive force by police. In 2014, the UN Committee against Torture criticised police brutality and excessive use of force by law enforcement in the US, and emphasised the "regular and recurrent police shootings or fatal pursuits of unarmed black individuals". The Justice Department acknowledged the racial bias of the Ferguson police force in a report that was published in response to the shooting of Michael Brown in Ferguson, Missouri. The police department claimed that in order to increase local budget revenue by way of fines and court costs, it is routinely attempted to ticket as many low-income Black citizens as possible. According to the Justice Department, when a person is being questioned by police officers and acts disrespectfully or undermines their authority, the situation may escalate into overt abuse. The Department of Justice also made a statement that addressed how vulnerable police officers are to unconscious bias: One of the things they looked for was "threat perception failure," which occurs when an officer mistakenly believes that someone is armed when they are not case.

We found that these mistakes happened more frequently when the suspect was Black. An immune system disorder is the analogy that is made clear in the article's title. The immune system in this situation is the larger society, which in this case includes law enforcement and the overall Black community for discussion's purposes. The antigen is the offending agent. Two police officers arrived in response to the antigen, Mr. Floyd, a 6 foot 6 inch, 240 lb man who, by all accounts, posed a minimal threat to society's immune system. He was restrained in the same way as an antigen-presenting cell might. T-helper cell received the following information via police radio, which was connected to antibody-producing B-cell: Two additional police officers arrived at the scene. The disorder started out in this way. When the T-helper cell first responder noticed that the antigen was Black, it overreacted and released too many cytokines, which not only killed the antigen which was not a true pathogen but also attracted mast cells from the Black community, which maintained the immune response's initial phase. Mast cells release mediators that promote inflammation, and when there is an overreaction, in addition to mast cells, there is a cytokine storm that also triggers a response that directs the immune system to target host tissue. This is an example of an overactive system. The entire civilization is harmed; nothing or nobody is spared. Civil unrest followed, with shops being damaged, police being hurt, there being widespread unrest, and the National Guard was once again called into service. The hyper-immune reaction is still occurring. Police personnel are expected by the public and their superiors to use force, which is allowed. Because of a variety of factors, police personnel can occasionally be overly aggressive, it should be noted. It is believed that some cops' psychopathy makes them more likely than others to employ excessive force.

Police psychologists conducted a poll of officers who had overreacted in one research. With the help of the material they gathered, the researchers were able to create five distinct sorts of policemen, only one of which fit the stereotype of the bad apple. Personality disorders, prior traumatic work-related experiences, young, inexperienced, or autocratic police, officers who pick up ineffective patrol techniques, officers with personal issues, and officers are among these. Yet, some people view this "bad apple paradigm" as a "easy escape". It is described as "a simplistic explanation that permits the organisation and senior management to blame corruption on individuals and individual faults - behavioural, psychological, background factors, and so on, rather than addressing systemic factors" in a comprehensive report on the causes of misconduct in policing that was commissioned by the Royal Canadian Mounted Police. The systemic elements are further discussed in the paper and include:

Pressures to adhere to elements of "police culture," such as the Blue Code of Silence, which "can sustain an oppositional criminal subculture protecting the interests of police who violate the law," as well as a "'we-they' perspective in which outsiders are viewed with suspicion or mistrust," are two such factors.

- Command and control systems built on a rigorous hierarchical framework (one study analysed in the paper states that results show that the more rigid the authoritarian hierarchy, the lower the scores on a measure of ethical decision-making).

- Weaknesses in the internal accountability systems (including internal investigation processes).

The Justice Department acknowledged the racial bias of the Ferguson police force in a report that was published in response to the shooting of Michael Brown in Ferguson, Missouri. The police department claimed that in order to increase local budget revenue by way of fines and court costs, it is routinely attempted to ticket as many low-income Black citizens as possible. According to the Justice Department, when a person is being questioned by police officers and acts disrespectfully or undermines their authority, the situation may escalate into overt abuse. The Department of Justice also made a statement that addressed how vulnerable police officers are to unconscious bias: One of the things they looked for was "threat perception failure," which occurs when an officer mistakenly thinks someone is armed when they are not. When the suspect was black, it was found that these failures happened more frequently. There were 1147 deaths in 2017 that were reported to the police, and 13 of those deaths resulted in charges against police officers.

As it represents 1.1% of the cases, it is possible that more than one out of every 100 deaths caused by police would be grounds for criminal proceedings. Keep in mind that just one of the four officers involved in the George Floyd case has been charged as of this writing. Science occasionally defies logic. There were no reported crimes that year, and 640 of the deaths caused by police officers were in response to non-violent offences. 6 Passing fake currency is, in my opinion, a nonviolent crime. According to studies, black persons in the US are three times more likely than white people to be killed by police. Despite only making up 14% of the population, more unarmed black people were slain by police last year than unarmed white people. According to a research in the Proceedings of the National Academy of Sciences, police killings, which can involve shootings, chokeholds, and other forms of force, are the sixth-leading cause of death for men of all races between the ages of 25 and 29. Racial profiling was the top problem for police in the 1990s, according to Lorie Fridell, Associate Professor of Criminology at the University of South Florida. This led her to two conclusions: "Bias in policing was not just a few officers in a few departments and, overwhelmingly, the police in this country are well-intentioned." The nation as a whole establishes prejudices and stereotypes about black People, which inevitably results in a social misunderstanding of how safe Americans are when a black person is present.<sup>92</sup>

### **5.15 THE PREVALENCE OF POLICE TORTURE AND ILL-TREATMENT IN EUROPE:-**

In various situations, carried out by various law enforcement officials, and for various causes, torture and other inhuman or humiliating treatment are practised throughout Europe. The CPT primarily distinguishes between

(a) Excessive use of force, which is equivalent to inhuman or degrading treatment, at the time of apprehension,

(b) Mistreatment during transportation to police stations and in police custody, and

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<sup>92</sup>Police Brutality and Blacks <https://www.ncbi.nlm.nih.gov/> (Last Visited 28<sup>th</sup> Jan, 2023)

(c) Mistreatment, including torture as its most severe form, during police questioning in criminal investigations with the goal of extracting a confession or information.

The CPT has examined the condition of police abuse in Europe in recent years, and regional trends in the eradication of this practise differ substantially. Police reforms have significantly improved the situation in some countries while some appear to have long since eradicated police abuse. In still other nations, practically anyone complains of mistreatment when being questioned, but excessive use of force during arrest, overly tight handcuffs, or verbal abuse while being transported are still highlighted as problems. In more than half of the CoE Member States, the CPT has recently received complaints and discovered forensic medical and other evidence of both excessive use of force upon arrest and of various forms of ill-treatment, ranging from threats to primarily beatings to various parts of the body, that were used at police facilities and during questioning in order to obtain a confession or information. In several instances, the claimed mistreatment was so severe that it might have constituted torture. It is noteworthy that mistreatment used to coerce a confession or information is frequently carried out by operational police officers rather than criminal investigators at the initial stage of police detention, before the first official interviews. Another significant finding is that where separate police detention facilities are present or a system of dedicated custodial officers is in existence, abuse by police officers primarily performing custodial tasks is essentially non-existent. The purpose of this concise analysis is to draw attention to the fact that a sizable part of European nations continue to struggle with various issues related to combating police abuse, and in certain instances, the situation has even gotten worse over time. In conclusion, an inter-State debate of successes, obstacles, and best practises in preventing police abuse and torture in Europe is very important.<sup>93</sup>

## CHAPTER VI

### INTERNATIONAL LEGAL FRAME WORK AGAINST TORTURE

#### 6. CONVENTION AGAINST TORTURE AND OTHER INTERNATIONAL LAW AGAINST TORTURE:-

In the Universal Declaration of Human Rights, approved by the United Nations General Assembly in 1948, the worldwide community denounced torture and other cruel, inhuman, or degrading treatment. In response to the strong advocacy of non-governmental organisations (NGOs), the General Assembly adopted the Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in 1975. Progress was made in the 1980s and 1990s in the establishment of legal norms and instruments, as well as in the implementation of the prohibition on torture. The General Assembly established the United Nations Voluntary Reward for Torture Victims in 1981 to fund groups that assist torture victims and their families. The General Assembly adopted the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in 1984, and it entered into force in 1987. Its implementation by States parties is overseen by the Committee against Torture, an impartial group of

<sup>93</sup>Combating Torture During Police Custody and Pre-Trial Detention by Julia Kozma and Asbjørn Rachlew <https://rm.coe.int/> (Last Visited 28<sup>th</sup> Jan, 2023)

specialists. The Commission on Human Rights designated the first Special Rapporteur on Torture, an impartial expert mandated to report on the global issue of torture, in 1985. During the same time period, the Broad Assembly passed resolutions emphasising the responsibility of health personnel in protecting prisoners and detainees from torture and establishing general guidelines for the treatment of detainees. In December 1997, the General Assembly declared June 26 to be the United Nations International Day in Support of Torture Victims. The United Nations has consistently recognised the critical role that non-governmental organisations (NGOs) play in the fight against torture. They have made an important contribution to the enforcement of United Nations treaties and monitoring systems, in addition to campaigning for their development. Individual specialists, such as the Special Rapporteurs on Torture and Violence Against Women, as well as treaty monitoring agencies like as the Committee Against Torture, rely substantially on material brought to their notice by NGOs and individuals.

1. Standard Minimum Rules for the Treatment of Prisoners (1955)
2. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975)
3. Code of Conduct for Law Enforcement Officials (1979)
4. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)
5. Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982)
6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
7. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)
8. Basic Principles for the Treatment of Prisoners (1990)
9. Rome Statute of the International Criminal Court (1998)
10. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (1999)<sup>94</sup>

## 6.1 CONVENTION AGAINST TORTURE:-

The General Assembly of the United Nations adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") on December 10, 1984 (resolution 39/46). The Convention was ratified by 20 States and came into effect on June 26, 1987. The Torture Convention is the outcome of extensive effort that began immediately after the General Assembly

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<sup>94</sup> Pertinent International Instruments <https://www.ohchr.org/> (Last Visited 09 Mar, 2023)

passed resolution 3452 (XXX) on December 9, 1975, prohibiting torture and other cruel, inhuman, or degrading treatment or punishment of any person (the "Torture Declaration"). In actuality, the Torture Statement was meant to serve as the foundation for ongoing efforts to combat torture. The General Assembly encouraged the Commission on Human Rights to research the issue of torture and take any necessary actions to ensure the effective observance of the Torture Declaration in a second resolution, also adopted on December 9 of that year (resolution 3453 (XXX)). A draught treaty against torture and other cruel, inhuman, or humiliating treatment or punishment was particularly sought by the General Assembly on December 8, 1977 (resolution 32/62) two years later, in light of the principles outlined in the Torture Declaration. At its session in February–March 1978, the Commission on Human Rights started working on this issue. A working group was formed to address this matter, and a draught convention put forth by Sweden served as the major discussion point in the group. A similar working committee was formed in each of the years that followed up to 1984 to carry on the draught convention's development. On a number of subjects, it proved initially challenging to come to a consensus. The following topics in particular sparked extensive discussions:

- 1) What constitutes torture?
- 2) Jurisdiction
- 3) Implementation on a global scale
- 4) A State Party's Undertakings

### **6.1.1 WHAT CONSTITUTES TORTURE?**

The Torture Declaration's definition of torture was attacked for not being clear enough and for other reasons as well. The talks led to a more comprehensive and elaborate definition that is found in the first paragraph of article 1 of the Torture Convention.

### **6.1.2 JURISDICTION:-**

The idea of "universal jurisdiction" was the topic of discussion. In other words, the issue was whether each State should agree to assert jurisdiction over acts of torture done outside of its borders by individuals who are not its citizens, in addition to acts of torture performed within its borders by persons who are not its citizens. After being eventually adopted, the universal jurisdiction principle—which had already been acknowledged in accords against aircraft hijacking and other terrorist acts—found its place in article 5, paragraph 2, of the Torture Convention.

### **6.1.3 IMPLEMENTATION ON A GLOBAL SCALE:-**

The implementation at the international level sparked substantial discussions because the effectiveness of the Torture Convention, like that of many other human rights accords, would depend largely on the oversight mechanism. In the end, it was resolved to establish a Committee against Torture (article 17 of the Torture Convention) with the following responsibilities:

- (i) To receive, study, and comment on periodic reports from the States parties on the actions they have taken to carry out their obligations under the Convention (Article 19);
- (ii) To open an inquiry when there is reliable information that appears to contain well-founded indications that torture is being consistently practised in the territory of a State party (Article 20);
- (iii) To receive and examine complaints by one State party of violations of the Convention by another State party (article 21);
- (iv) To receive and examine complaints of violations from one State party (article 22).

The Committee Against Torture's authority under (ii), (iii), and (iv) was not made mandatory, but it still applies with the following modifications:

- (i) The Committee's competence to examine interstate complaints only applies when a State party has specifically recognised this competence (article 21); -
- (ii) The Committee's competence to examine applications by individuals only applies when a State party has specifically recognised this competence (article 21); -
- (iii) A State party may "opt out" and declare that it does not recognise the Committee's competence to initiate investigations under article 20 (article 28); (article 22).

### **6.1.4 A STATE PARTY'S UNDERTAKINGS:-**

The obligations of the States parties are covered by the majority of the clauses of the Torture Convention. This list of duties can be summed up as follows:

- (i) To prohibit acts of torture, each State party must implement efficient legislative, administrative, judicial, or other measures. Article 2 states that the rule against torture is unwavering and must be respected in all situations, including war and other extraordinary situations;
- (ii) No State party may extradite or expel a person to another State if there are good grounds to believe that doing so would put him in danger of being tortured (Article 3);
- (iii) Each State party shall ensure that acts of torture are grave crimes under its legal system (Article 4);
- (iv) Each State party shall, on certain conditions, take a person suspected of the offence of torture into custody and make a preliminary inquiry into the facts (article 6);

(v) Each State party shall either extradite a person suspected of the offence of torture or submit the case to its own authorities for prosecution (article 7);

(vi) Each State party shall ensure that its authorities make investigations when there is reasonable ground to believe that an act of torture has been committed (article 12);

(vii) Each State party shall ensure that an individual who alleges that he has been subjected to torture will have his case examined by the competent authorities (article 13);

#### **6.1.5 OPTIONAL PROTOCOL:-**

The General Assembly of the United Nations passed Resolution 57/199, an Optional Protocol to the Torture Convention, on December 18, 2002. The Optional Protocol, which became effective on June 22, 2006, creates a system of routine inspections of detention facilities by international and national bodies in an effort to stop torture and other forms of cruel, inhuman, or degrading treatment or punishment. To conduct these visits and assist States parties and national institutions in carrying out comparable tasks at the national level, a Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has been established.

#### **6.1.6 THE COMMITTEE AGAINST TORTURE:-**

Two annual sessions of the Committee against Torture are held. The Committee reviews reports from various States parties at each session. Each report is verbally reviewed in front of one or more representatives of the relevant State. The major issues the Committee desires to explore are communicated in advance to each State whose report will be examined at a session. The Committee adopts its conclusions and recommendations after reviewing each report. The Committee may also adopt broad observations on certain Convention provisions or problems with their application. A working group to prepare the investigation of specific communications received under article 22 has also been established by the Committee against Torture. The working group examines the admissibility and merits of the communications and makes recommendations to the Committee.

#### **6.2 ARTICLES OF CONVENTION AGAINST TORTURE:-**

##### Article 2: Prevention of torture

A State Party is required to take reasonable steps, including legislative, administrative, judicial, and other means, to prohibit acts of torture in any territory under its control. No exceptional circumstances, according to Article 2(2), may be used to justify the use of torture.

##### Article 3 Non-refoulement

When there are "serious grounds" to suspect that a person would be tortured, a State Party is not permitted to expel, return, or extradite that person to another State.

#### Article 4 Criminalisation of Torture

A State Party is expected to make sure that all acts of torture, including attempts to commit torture and actions by anyone that constitute complicity or participation in torture, are crimes under its criminal law.

#### Article 5 Universal jurisdiction over torture

Regardless of the accused act's location or the nationality or residence of the alleged perpetrator, a State Party must prove its jurisdiction over anyone discovered on its soil who is suspected of having committed torture.

#### Articles 6 - 9: The exercise of universal jurisdiction

A State Party must secure an alleged offender's custody in accordance with Article 6(1) if they are "certain, following an analysis of the facts available to them, that the circumstances so necessitate."

A State Party is required by article 6(2) to launch a preliminary investigation into the facts right away.

A State Party is required by Article 7 to prosecute or extradite a person who is believed to have committed torture.

When a request is made, extraditing a suspected torturer is possible under Article 8. The Convention may be used as a legal foundation for extradition in cases where there is no extradition treaty

States Parties are required by Article 9 to cooperate with one another and provide whatever evidence they may have that is required for criminal proceedings against people who have been accused of torturing others.

#### Article 10: Training Officials

A State Party is required to make sure that the rules governing their duties include the prohibition against torture and that all law enforcement officers, medical professionals, public servants, and other individuals who may be involved in the detention, interrogation, or treatment of any person have received training regarding it.

#### Article 11: Review of detention procedures

A State Party is required to routinely evaluate its policies, procedures, methods, and practises relating to interrogation as well as its plans for the care and treatment of those who are subject to any type of arrest, detention, or imprisonment.

#### Article 12: Prompt and impartial investigation

Where there is cause to think that an act of torture has been perpetrated in a territory under its control, a State Party is required to guarantee a fast and impartial investigation.

### Article 13 - Right to Complain

A State Party shall guarantee that torture victims have the right to report their experiences to the appropriate authorities and to have their claims swiftly and fairly considered. The complainant and any witnesses must be safeguarded from any mistreatment

### Article 14 Right to redress

A State Party is required to see to it that torture victims receive redress and have an enforceable right to compensation, including the right to the fullest possible rehabilitation.

### Article 15 Exclusionary rule

Any statement made as a result of torture must not be used as evidence in any proceedings, with the exception of those where the suspected torturer is being sued.

### Article 16 Ill-treatment

Each State Party is required by article 16 to prohibit acts of torture as defined in article 1 and other forms of cruel, inhuman, or degrading treatment or punishment in any territory under its jurisdiction.

### Articles 17-33

The Committee against Torture's authority is primarily addressed in articles 17 to 24, including article 22, which permits the Committee to receive and take into account particular communications in the event that the State Party makes a statement. Technical issues, such as signing or ratifying the Convention, the process for changes, or reservations, are covered in Articles 25–33.

## **6.3 NEED FOR CONVENTION AGAINST TORTURE:-**

### **6.3.1 HOLOCAUST: THE GENOCIDE OF JEWS:-**

Six million European Jews were subjected to systematic, state-sponsored persecution and murder during the Holocaust (1933–1945), which was carried out by the Nazi German regime and its allies and accomplices. The Holocaust occurred from 1933 to 1945, according to the United States Holocaust Memorial Museum. When Adolf Hitler and the Nazi Party took control of Germany in January 1933, the Holocaust era officially began. When Nazi Germany was vanquished by the Allies in World War II in May 1945, it came to an end. The Hebrew word for "catastrophe" is "the Shoah," which is another name for the Holocaust. The Nazis did not begin committing mass murder as soon as they took control of Germany. However, they soon started to target and expel Jews from German society by manipulating the government. The Nazi German government established discriminatory laws and orchestrated violence against Germany's Jews, among other antisemitic actions. Between 1933 and 1945, the Nazis' persecution of Jews grew increasingly extreme. The "Final Solution to the Jewish Question" was the product of this radicalization,

according to Nazi leaders. The "Final Solution" involved the planned and methodical mass extermination of Jews in Europe. This genocide was carried out by the Nazi German government between 1941 and 1945<sup>95</sup>.

One of the largest genocides in recorded history was the Holocaust. There were an estimated eleven million fatalities, six million of them were Jews. Thousands of people who escaped the concentration camps were left permanently damaged by the inhuman acts they witnessed, participated in, and experienced, in addition to the millions of people who were slaughtered. Elie Wiesel attempts to explain the reality of the Holocaust to those who could not accept it by recounting the spine-chillingly gruesome events of the Holocaust that directly affected him in his book "Night." The dehumanisation of Holocaust prisoners inside concentration camps was undoubtedly one of the toughest punishments they endured. Dehumanization is the taking away of qualities such as fidelity, faith, kindness, and even our love for one another and ourselves. The systematic dehumanisation of these groups provided the foundation for the Nazis' brutal treatment of the Jews and millions of other victims. Wiesel's terrifying account of his involvement demonstrates how the appalling conditions in Auschwitz not only typically resulted in death but also stole the Jews' faith, forced them to turn on one another in an effort to survive, and even tore apart the formerly unbreakable bond between family members. Although the extent of the brutality can never be fully understood by those who were not involved. Millions of people—both Jews and members of other victim groups—were subjected to cruel forced labour by the Nazis. Forced labour was a fundamental component of the concentration camp routine from the moment the first Nazi concentration camps and detention centres were established in the winter of 1933. This labour was frequently pointless and humiliating and was imposed without the proper tools, clothing, food, or rest. Jewish citizens were subjected to forced labour by the Nazis both inside and outside the concentration camps even before the war started. The Nazis began using forced labour of alleged "enemies of the state" for financial gain and to fill severe labour shortages as early as 1937. By the end of that year, the majority of Jewish men living in Germany were forced to work as slaves for various state institutions. All Jewish and Polish males were expected to undertake unpaid forced labour by the German occupation authorities when Germany seized Poland in the autumn of 1939 and formed the General Gouvernement. Jews from Poland were compelled to reside in ghettos and perform forced labour, much of it manual, by the German government. For instance, 96 firms and plants operated by German state and private businessmen in the Lodz ghetto provided commodities for the German war effort. The use of forced labour increased in the spring of 1942 as a result of changes in the way that concentration camps were run. After the Nazis started carrying out the "Final Solution," the scheme to exterminate all of Europe's Jews, the ability to work for Jews frequently meant the chance to survive. Jews who were considered physically incapable of working frequently first to be shot or deported.

As part of their purposeful "annihilation via labour" campaign, the Nazis also literally worked certain prisoners to death. Prisoners in concentration camps were required to work in situations that would inevitably result in illness, harm, and death. For instance, starving prisoners at the Mauthausen concentration camp were made to run up 186 stairs out of a stone quarry while toting large boulders. After the German

<sup>95</sup> Concentration camps by Nazi <https://encyclopedia.ushmm.org/> (Last Visited 28<sup>th</sup> Mar, 2023)

invasion of the Soviet Union in June 1941, the Germans deliberately ignored the deaths of millions of Soviet prisoners of war (POWs) (insufficient food, clothing, shelter, or medical care). However, the German government also started using Soviet POWs as forced labour in a variety of war-related sectors in the spring of 1942. Nearly three million Soviet nationals were sent as forced labourers by the Germans from 1942 to 1944 to Germany, Austria, and Bohemia-Moravia. Millions of non-German refugees remained in Germany after the war, including tens of thousands of Jews who had avoided the "Final Solution," which involved their deportation for forced labour. When Nazi Germany was defeated in World War II by the major Allied Powers Britain, the United States, and the Soviet Union the Holocaust came to an end in May 1945. Concentration camps were overrun when Allied forces advanced across Europe in a series of offensives. They freed the remaining inmates there, many of whom were Jews. Additionally, the Allies came across and freed the survivors of so-called death marches. Groups of concentration camp inmates, both Jewish and non-Jewish, who had been evacuated on foot from camps under SS Guards participated in these forced marches.

But freedom did not result in a happy ending. As they attempted to start new lives, many Holocaust survivors encountered persistent threats of violent anti-Semitism and expulsion. While some people spent years looking for their missing parents, children, and siblings, others had lost family members<sup>96</sup>.

### **6.3.2 CIVIL WAR OF LTTE TAMILS IN SRILANKA:-**

The Liberation Tigers of Tamil Eelam (LTTE) virtually established a military state with its own infrastructure in the northern section of the island, where Tamils predominate, at the end of the country's protracted civil war. And Kilinochchi, a town, served as its capital. To see the creation of an independent state known as Tamil Eelam, the LTTE had been fighting against the Sri Lankan government, which represents the interests of the Sinhalese majority. Additionally, talks for the peace process have been ongoing from 2002 to 2006. The LTTE-held territories, however, were the target of a final onslaught by the Sri Lankan military in 2008. Colombo advised the few UN employees who were remaining in Kilinochchi to leave because it couldn't ensure their safety. Tamil Eelam, a separate state for Tamils, was the proposal put out by certain Tamils in response to these discriminatory practises. The two ethnic groups previously existed in the country in slightly distinct regions: the Tamils lived in the northern and eastern parts of the island, while the Sinhalese inhabited in the southern, western, and central regions. The goal of Tamil Eelam was to formally recognise this geographical division. The movement was founded on the notion that Sri Lanka's two main ethnic groups Tamils and Sinhalese were separate from one another. Post-colonial theory, however, would contend that the motivations behind both Sinhalese and Tamil acts in the immediate post-colonial period were not based on intractable differences but rather on a desire for dominance among the nation's people and a sense of injustice frustration about the lack of opportunity caused by factors beyond the groups' control. However, Tamils' opinions on the idea of Eelam were divided. Few organisations backed Tamil Eelam, but only the Liberation Tigers of Tamil Eelam were successful (LTTE). To become the "sole representation of the Tamils," the LTTE annihilated other emerging Eelam organisations including the Tamil Eelam Liberation Organization (TELO). After that, the dispute turned into a civil war. After a day

<sup>96</sup> Introduction to the Holocaust <https://encyclopedia.ushmm.org/> (Last Visited 22 Mar, 2023)

of anti-Tamil rioting in Colombo in July 1983—a period that has since been termed "Black July"—the conflict formally started. Just under three decades of fighting came to an end in May 2009 when the Sri Lankan government said that the LTTE leader had been put to death<sup>97</sup>.

### 6.3.2.1 SEXUAL VIOLENCE:-

"One year after the change of government in Sri Lanka, the security forces continue to detain, torture, and sexually abuse Tamils in a network of facilities around the island," the International Truth and Justice Project Sri Lanka (ITJP) said in 2016. The UN Special Rapporteur's 2017 report While it is claimed that the frequency of sexual assaults by military troops has decreased with the army's shrinking in the North and East, an atmosphere of dread among Tamil women persists in a region where the military presence has persisted. According to The Oakland Institute's Executive Director, there are a large number of Tamil war widows in Sri Lanka's north who are jobless and live in fear of sexual assault and intimidation. The same source claimed that both Tamil males and Tamil women continue to be the targets of sexual abuse by the army. The Office for National Unity and Reconciliation's chairman, former president Chandrika Kumaratunga, is quoted by Agence France-Press (AFP) as saying to the Foreign Correspondent Association of Sri Lanka in February 2017 that "Tamil women who survived Sri Lanka's civil war now face widespread sexual exploitation by officials in their own community. In addition, the same source quotes Chandrika Kumaratunga as saying that "officials regularly seek sexual favours only to carry out basic paperwork," adding that "women who were widowed during the 37-year struggle were among the victims of abuse." The Sri Lankan Ministry of Defence responded by releasing a statement in which it claimed that the army "refutes the charges of sexual exploitation of Tamil women" and that it had a "Zero Tolerance Policy on sexual assaults"<sup>98</sup>.

### 6.3.2.2 INHUMAN TREATMENT ON SURVIVOURS:-

In a 2016 opinion piece for Inside Story, senior analyst Alan Keenan of the International Crisis Group wrote that recent arrests of Tamils under the draconian Prevention of Terrorism Act (PTA) and ongoing reports of detainee torture "have sown concern about the government's ability to rein in abuses." "Abductions and arrests of many Tamils in the North-East have been considerably increasing in recent weeks," PEARL reported in April 2016. Human Rights Watch claims that although the government "asserted that the PTA was an essential tool in its campaign against the LTTE," the PTA "continues to be used to arrest and jail people" as of early 2017. "Although the LTTE asserts that it is fighting on behalf of the Tamil people, it is largely to blame for the suffering of local residents in the Vanni. The treatment of the very people the LTTE claims to be fighting for is worse as they lose land to approaching government forces. The LTTE has imprisoned hundreds of thousands of civilians in a volatile conflict zone by denying them their fundamental right to freedom of movement. Ordinary Tamils are compelled to work in danger along the front lines and are forcibly recruited as fighters while being held captive by the LTTE's iron hand ". All

<sup>97</sup> Sri-lankan civil war <https://hir.harvard.edu/> (Last Visited 22 Mar, 2023)

<sup>98</sup> Sexual Violence against Tamils in Srilanka <https://www.justice.gov/> (Last Visited 22 Mar, 2023)

allegations that the Sri Lankan government's military committed war crimes have been vehemently denied. President Rajapaksa stated that his army did this in a speech in June 2010 not to kill single civilian<sup>99</sup>.

### 6.3.3 GUANTANAMO BAY AND TORTURE:-

On the 20th anniversary of the arrival of the first prisoners at the Guantanamo Bay detention facility in Cuba, UN experts\* denounced it as a place of "unparalleled notoriety" and claimed the US government's continuous support for the rule of law was compromised by its continued operation. The independent experts, who were chosen by the Human Rights Council, declared that twenty years of using arbitrary detention without charge or trial combined with torture or other cruel treatment is simply unacceptable for any government, especially one that makes a public claim to upholding human rights. The experts once more urge the United States to shut down this institution and end this repulsive chapter of persistent human rights violations as a freshly elected Member of the Human Rights Council. The facility housed 700 inmates in 2003. Twenty years later, there are still 39 prisoners, but only nine of them have been accused of or found guilty of crimes, and 13 have been given the all-clear to be transferred. Nine prisoners passed away while they were in captivity between 2002 and 2021, with two dying naturally and seven allegedly committing suicide. No one had ever been accused or found guilty of a crime. The United States continues to hold people, many of whom have never been charged with a crime, the experts said, "despite strong, repeated, and unequivocal condemnation of the operation of this horrible detention and prison complex with its related legal processes." "Guantanamo Bay is a place of unmatched notoriety, characterised by the routine use of torture and other cruel, inhuman, or humiliating treatment against hundreds of detainees taken to the camp and deprived of their most basic rights." Guantanamo Bay, according to the experts, is a potent emblem of the systemic lack of responsibility for and suppression of the practise of state-sponsored torture and cruel treatment as well as the intolerable impunity given to those who engage in it. "A State sends a signal of complacency and acquiescence to the world when it fails to hold accountable those who have approved and practised torture and other cruel, inhuman, or degrading treatment," they claimed. The specialists expressed their worry for the fate of the sick and elderly prison population, many of whom have endured the ravages of torture in the past. They denounce the absence of sufficient medical care and rehabilitation for torture victims both at Guantanamo and after transfer, both of which are obviously required under international law. They claimed that there was no end in sight to the stress that these people were vulnerable and to the suffering that their families were going through.

The experts demanded that the US Government close the facility, respect the principle of non-refoulement, return detainees to their homes or to safe third countries, provide remedy and reparation for those who were flagrantly tortured and arbitrarily detained by their agents, and hold those who authorised and participated in torture accountable as required by international law. The fact that Military Commissions are currently undertaking pre-trial processes on attempts to suppress evidence of torture causes the experts great concern. The relatives of the victims and other stakeholders would gain as well as the requirement for openness and public justice would be addressed by removing all barriers to ensuring transparency and

<sup>99</sup> War crimes during the final stages of the Sri Lankan Civil War <https://en.wikipedia.org> (Last Visited 22 Mar, 2023)

fairness of the proceedings. The experts argued that the ongoing injustice of the procedures, as well as the lack of transparency and equality of the accused, cast doubt on the United States' commitment to the rule of law and constitutional protection. We notably draw attention to the American judicial system's shortcomings in supporting the rule of law, defending human rights, and preventing the growth of a legal black hole. The experts praised the unrelenting and brave work of defence lawyers who have battled to protect the rule of law and identified the persistent human rights failures in the day-to-day operation of Commissions. The Military Commissions continues to violate the requirements of impartiality, independence and non-discrimination and should never have been used in the way they were deployed at Guantanamo, they added. The Human Rights Council's so-called Special Procedures include the Special Rapporteurs. The term "Special Procedures" refers to the Council's independent fact-finding and monitoring mechanisms that address either particular nation circumstances or global thematic issues. Special Procedures are the largest group of independent specialists in the UN Human Rights system. The experts who work on Special Procedures do so voluntarily; they are not employed by the UN and are not paid for their efforts. They act on their own behalf and are independent of any institution of power or group<sup>100</sup>.

#### **6.4 TORTURE OF ROHINGYA MUSLIMS IN MYANMAR:-**

Human Rights Watch said today that Rohingya refugees who had returned to Rakhine State from Bangladesh had been abused and imprisoned by the Burmese government. The mistreatment highlights the requirement for international protection, including UN observers on the ground, before Rohingya may return to Myanmar securely. According to Phil Robertson, deputy Asia director, "the torture of Rohingya returnees exposes the lie to Myanmar government pledges that refugees who return will be secure and protected. The reality is that Rohingya who return still experience the persecution and abuses they were forced to flee, despite Myanmar's rhetoric promising a safe and dignified return. Six Rohingya who escaped the ethnic cleansing campaign of the Myanmar army in 2017 by crossing into Bangladesh reported to Human Rights Watch that Border Guard Police (BGP) detained them at several points when they returned to Rakhine State to work before crossing back into Bangladesh. They claimed that throughout their imprisonment before to trial, security personnel tortured them. Everyone was swiftly prosecuted and given a four-year prison term for allegedly crossing the border against the law. A month later, the authorities released them and a number of other prisoners. In an effort to demonstrate that they were treating Rohingya humanely and that it was safe for them to return, the authorities presented them to visiting journalists on June 1, 2018. The six left after the visit and fled to Bangladesh. Three Rohingya men and three boys, the youngest of whom was 16 years old, who were taken into custody at various times and locations throughout Maungdaw township were all interviewed by Human Rights Watch. They claimed that BGP officials relentlessly questioned them about the terrorist Arakan Rohingya Salvation Army (ARSA) organisation while holding guns to their heads. To coerce them into confessing to a connection with ARSA, the officers utilised stress postures, beatings with fists, clubs, and rods, burning, and electric shock. They said that they didn't get enough food and clean water while they were being held. The six said that after that, they were moved to Maungdaw

<sup>100</sup>Guantanamo bay ugly chapter unrelenting human rights violations <https://www.ohchr.org/> (Last Visited 09 Mar, 2023)

town's pretrial detention facilities. During interrogations, masked military intelligence agents assaulted them with sticks and punched and kicked them. The six spoke of unfavourable prison circumstances, a lack of access to legal representation, and court hearings in Burmese, a language they hardly understood. The authorities moved them to Buthidaung jail in Maungdaw town together with hundreds of other convicts, the majority Rohingya, after a court sentenced them to four-year prison terms in groups. Many Rohingya detainees were lined up on May 23 and told by the Maungdaw district administrator that President Win Myint had pardoned them and that they would be issued a National Verification Card (NVC) and released. Many Rohingya reject the NVC because they believe it undermines their claim to Myanmar citizenship.

The 62 Rohingya were taken by officials to the BGP complex in the village of Nga Khu Ya. Officers there instructed the Rohingya to accept the NVC and warned them that they would be arrested again if they attempted to leave the area. The group was subsequently relocated to the Hla Poe Kaung transit camp, where on June 1 government representatives hosted a government-sponsored media tour to observe the 62 recently detained Rohingya. The minister of social welfare, relief, and resettlement, Win Myat Aye, assured the returnees that they would receive funds for the reconstruction of their homes, humanitarian aid, and the ability to bring their family from Bangladesh. The six refugees claimed to Human Rights Watch that they had been instructed on how to address the media. One adolescent kid said that a BGP representative interrupted and eventually ended an interview when the boy deviated from these guidelines. The Rohingya were placed under security and informed by the BGP that they were not permitted to leave Hla Poe Kaung when the media team left. Two groups, including those Human Rights Watch interviewed, escaped back to Bangladesh because of fear that they would be recaptured and subjected to torture. Human Rights Watch called the State Counselor's Office director general, Zaw Htay, who also serves as a government spokesperson many times, but was told he was not available to speak. Anyone who think the Burmese government is prepared to guarantee safe returns should take note of how these Rohingya refugees are being treated, according to Robertson. Before it can show that it is serious about enacting the necessary reforms for voluntary, safe, and dignified returns, Myanmar still has a long way to go.<sup>101</sup>

#### **6.4.1 EVIDENCE FOR ACCUSATION OF GENOCIDE AGAINST BURMESE MILITARY:-**

In a comprehensive new report outlining the evidence for their claim of genocide, UN investigators lay out horrifying allegations of alleged murders, rapes, torture, and indiscriminate shelling by the Burmese army against the Rohingya people and other minority groups. The Tatmadaw, the military of Myanmar, was accused of "the gravest crimes under international law," according to the fact-finding mission's report, which was delivered to the UN Human Rights Council (UNHRC) on Tuesday. The full 440-page report, a summary of which was made public in August, details accounts of women being tied by their hair or hands to trees before being raped, of young children being forced back inside burning homes after trying to flee, of the widespread use of bamboo sticks, cigarettes, and hot wax for torture, as well as of landmines planted along villages' escape routes that killed people fleeing army crackdowns. The mission's chair, Marzuki

<sup>101</sup> Myanmar Security Forces Torture Rohingya Returnees <https://www.hrw.org/> (Last Visited 09 Mar, 2023)

Darusman, remarked, "I have never been confronted by crimes as horrific and on such a scale as these. The Tatmadaw had created a "toxic command climate," according to the three-person panel, where severe human rights violations had become the norm. It demanded that the army be placed under civilian control, devoid of its allotted number of representatives in parliament, and, if necessary, completely disbanded and rebuilt. It demanded that senior military figures in Burma, including the head of state, Min Aung Hlaing, face charges of genocide, crimes against humanity, and war crimes. The study stated, "Any connection with the Tatmadaw, the current leadership, and its companies is untenable. When Rohingya militants attacked several Burmese police outposts in August 2017 using knives and mini-bombs, the panel was almost halfway through its mission. This attack sparked army "clearance operations" that resulted in the forced migration of over 700,000 members of the Muslim minority group into neighbouring Bangladesh. According to the research, more than 1,700 Rohingya continue to migrate into southern Bangladesh's Cox's Bazar area each month. It provided a "conservative" estimate of at least 10,000 Rohingya deaths in the two months following the army crackdown's start in August of last year, including at least 750 deaths in the Rohingya-named Tula Toli hamlet in Min Gyi. According to the report, rape and sexual assault were a "especially heinous and frequent element" of the Tatmadaw's behaviour. It highlighted eyewitness testimonies of Rohingya individuals who claim to have witnessed nude women and girls rushing through woodlands "in evident anguish" and villages littered with dead bodies with "huge amounts of blood ... visible between their legs". Around 400 "whole communities essentially wiped off the map," according to the report's satellite images, the investigators claimed. They noticed a rise in anti-Rohingya sentiment, especially from civilian officials, and a buildup of armed forces in Rakhine state in the months before the clearance operations. According to the research, the 2017 human rights crisis was foreseen, predictable, and unavoidable. The report harshly criticised the UN's involvement in Myanmar, concluding that senior officials were reluctant to advance a human rights agenda and preferred a "business as usual" strategy that prioritised development objectives and retaining access for humanitarian organisations.

Investigators were "ignored, criticised, marginalised or impeded in these efforts," several of the people who tried to advance human rights problems claimed to the report's authors. Investigators also singled out Facebook because of how simple it was for hate speech and false information to spread on its open platform. Members of the panel made an attempt to report a post in which a human rights activist was called a "national traitor" and accused of helping the fact-finding mission. "If this animal is still around, find him," stated one of the comments under the post. The panel was informed that the post did not violate Facebook's policies, and it wasn't until several weeks later that it was taken down with the help of a contact at the social media platform. In theory, Bangladesh and Myanmar had agreed that the Rohingya refugees in Cox's Bazar should go home, but the study claimed that under the existing conditions, returning home was impossible. The security of returns would be up to the security forces that committed egregious human rights crimes with impunity, it stated. In such a situation, repatriation is impossible. The report lacked "balance, impartiality, and fairness," Kyaw Moe Tun, Myanmar's envoy to the UN in Geneva, s

aid the council, criticising its reliance on refugee testimony and NGOs' reports, even though the Burmese government refused to allow the expedition entry. In addition to harming social cohesiveness in Rakhine State, he claimed that the report also jeopardised the government's efforts to advance development, national harmony, and peace throughout the entire country. Officials from Bangladesh said on Tuesday that the contentious plan to transfer thousands of Rohingya refugees to an isolated island in the Bay of Bengal was moving forward. In the first phase, which will start next month, 50 to 60 Rohingya families would be transferred, according to a government official, Habibul Kabir Chowdhury. Human rights organisations have expressed concern that the muddy strip of land, which emerged from the sea in 2006, is too vulnerable to cyclones and flooding to be inhabited in a secure manner. According to the Bangladeshi government, the island would eventually host 100,000 Rohingya people and embankments and shelters cost £212 million.<sup>102</sup>

## **6.5 INTERNATIONAL HUMAN RIGHTS LAW:-**

### **6.5.1 THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW BY NIGEL RODLEY.:-**

It will be recalled that the trend began with the Greek case, in which the European Commission of Human Rights declared that torture was inhuman treatment "which has a purpose, such as the obtaining of information or confessions, or the inflicting of punishment," as well - of course - as a number of other things as being a more severe form of inhuman torture. It would seem that the Convention's organs are serious about this aspect. In *Selmouni*, Commission member Mr. Herndl disagreed with the judgement of torture, but not for the same reasons as the other dissenters namely, that he did not believe the purposeful element had been demonstrated. The Court has recently cited a purposive element in cases after adopting the UNCAT terminology. The Court has recently cited a purposive element in cases after adopting the UNCAT terminology. In fact, it appears that the Court's determination of an article 3 breach of inhuman or humiliating treatment in two cases involving Cyprus was largely based on the argument that the treatment in question was not sufficiently directly related to the pertinent goal, namely eliciting a confession. The Human Rights Committee has refrained from providing a rationale for any distinction it may draw between torture and other forms of cruel treatment in terms of intent as well as relative level of suffering. Nonetheless, it is important to keep in mind that the element of aim was absent in respect of one judgement of inhuman treatment and another of degrading treatment. This may have been the case of deciding factor. In one instance, the Special Rapporteur of the UN Commission on Human Rights on the issue of torture appears to have given special consideration to the factor of aim. After travelling to the Russian Federation and concentrating especially on pre-trial detention facilities, he discovered that the conditions there were "torturous," which is a word that accurately describes them. However, he did say that "To the extent that suspects are confined there to facilitate the investigation by breaking their wills with a view to eliciting confessions or information" qualified the use of the noun "torture" even though he lacked sufficient evidence to draw the conclusion that the relevant purposive element existed.

<sup>102</sup>Tied To Trees And Raped UN Report Details Rohingya Horrors <https://www.theguardian.com/> (Last Visited 09 Mar, 2023)

There would seem to be a purposeful component that is essential to the inter-American system. In addition to being covered under article 2 of the Inter-American Torture Convention's definition of torture, the Inter-American Commission on Human Rights determined that rape constituted torture, at least in part because it was done with the intention of punishing and intimidating the victim. The definition of torture as stated in the ban of "torture or cruel, inhuman, or humiliating treatment or punishment" has been extensively analysed in the literature. It primarily concentrates on the criteria included in three international human rights documents (the 1975 UN Declaration against Torture, the 1984 (UN) Even though the treaties may not themselves contain a definition of torture, they should be based on the case law of bodies established under human rights treaties prohibiting torture, particularly the European Convention on Human Rights (UNCAT) and the 1985 Inter-American Convention to Prevent and Punish Torture. In spite of the fact that they all forbid torture and other forms of cruel treatment, no general human rights treaty really includes such a definition. In actuality, case law has influenced definitions' content, which in turn has influenced subsequent case law. The need to review the subject is necessitated by the emergence of new case law from international criminal tribunals, particularly the International Tribunal for the Former Yugoslavia, and new definitions in instruments of international criminal law (ICTY). As a result, three fundamental tenets of our understanding of torture and, to a lesser extent, other forms of cruel treatment, are called into doubt or made more evident.

Evidently, the three pillars are:

1. The relative degree of suffering or anguish endured: it must not only be severe but also an aggravation of an act of cruel, inhuman, or degrading treatment or punishment that is already unlawful (albeit not specifically specified);
2. The element of purpose, such as acquiring data or a confession;
3. The status of the perpetrator: The pain or suffering must be inflicted by or initiated by a public official.

Hence, the question of whether there is any cohesive definition of torture under general international law is put up. Of course, it would be conceivable for there to be distinctions between the definitions that apply to the prohibition of torture under international human rights law, which establishes state responsibility, and the offence of torture under international criminal law, which establishes individual criminal responsibility. The acceptable burdens of proof for an alleged victim of an international human rights violation vs a prosecutor attempting to prove individual accountability for an offence under international criminal law are a few examples of where such disparities may arise. The potential that a breach of one arm of the law may not always correctly imply a violation of the other branch; or the legality of drawing conclusions about mental aspects from the facts. 10 Nevertheless, no such clear-cut, elegant explanation will be shown to present itself. Before delving deeper into each of the pillars, let's take a quick look at an example from the Components of Crimes section, which identifies "purpose" as the primary component of torture in relation to war crimes under article 8 of the Rome Statute. Let's now examine each of the three pillars in more detail. The Greek case that was brought before the European Commission of Human Rights in 1969 was where the

topic of the degree of pain or suffering and its relative character in regard to torture first came up. Article 3 of the European Convention on Human Rights, which states that "[n]o one shall be subjected to torture or to cruel or degrading treatment or punishment," was called upon by the Commission to be applied in that case. The Commission notably made the unnecessary decision to break down the overall prohibition into its constituent pieces, with an indication of its comprehension of each, even though no specific legal repercussions followed from it. 'Inhuman treatment with a purpose, such as the gaining of information or confessions, or the application of punishment, and it is often an aggravated form of inhuman treatment,' it said, is defined as torture. To be thorough, it should also be noted that the Commission also considered "degrading treatment" of a person to be a part of torture. According to the Commission, this type of treatment "grossly humiliates him before others or compels him to act against his will or conscience" is considered to be degrading treatment. It is clear that the Commission's methodology, which led it to deem falanga to be a type of inhuman treatment, was flawed.

Putting aside the question of the implied potential justification of inhuman treatment, which the European Court of Human Rights has abandoned and rejected elsewhere. The European Convention case law was directly influenced by the Declaration in turn. The European Court of Human Rights examined the five interrogation methods that the UK security forces used on IRA suspects in the case of *Ireland v. United Kingdom*<sup>103</sup>. The European Commission of Human Rights determined that they constituted torture, but the Court determined that they were inhuman and degrading rather than torture. The Court claimed that "a unique stigma" associated with "deliberate inhuman treatment producing very serious and painful suffering" was what distinguished torture from other forms of cruel treatment. Then, carelessly ignoring the paragraph's obvious roots in the Commission's treatment of the subject in the UN Declaration, it prayed in support of article 1(2) of the UN Declaration, which it repeated, emphasising the phrase "aggravated." If there has been a focus on European Convention case law thus far, it is because the Convention's organs were the first to be asked to apply a treaty-based ban on torture. The International Covenant on Civil and Political Rights was also in a position to help clarify these difficulties once it came into effect in 1976 and its Human Rights Committee was founded a year later. In actuality, the way it operates makes things murky. This was largely supported by the case law of the Committee under the (first) Optional Protocol to the Covenant, which frequently found violations of article 7 without specifying whether the conduct in question should be classified as torture or not. It classified the treatment in question in a number of instances as torture. It called the treatment "inhuman and demeaning" in one instance. In none of these instances did it provide a doctrinal justification for why it chose one word over another. The difference between situations where the word "torture" was used in the finding and those where no category was mentioned makes it impossible to draw any meaningful conclusions because, normally, the treatment in question would be the same or comparable regardless of which group the case came into. In fact, the majority were about Uruguay utilising the same methods. Hence, situations in which the term "torture" was used or in which no specific term was connected involved acts like electric shocks, burning, being on the verge of suffocation or drowning, and receiving heavy beatings - frequently in tandem and frequently for extended periods of time.

<sup>103</sup> Ireland v. United Kingdom (1979-80) 2 ECHR 25

If there is any justification at all, it might be that the Committee refrained from using the term "torture" in *Boutón v. Uruguay*<sup>104</sup> because to the relative severity of the treatment. In that instance, Esther Soriano de Boutón's suffering appears to have been demonstrated by the fact that she was made to stand for 35 hours without any breaks, that her wrists were bound with a painful piece of coarse fabric, and that her eyes were continuously bandaged. She could hear the cries of other prisoners being tortured both during the day and at night. She was allegedly threatened with "more effective means than ordinary torture to make her talk" during interrogation. It would be unwise to draw the conclusion that the Human Rights Committee had adopted the theory of the relative severity of pain or suffering as the foundation for a distinction between torture and other forms of cruel treatment based solely on this one instance. Most Uruguayan cases were determined between 1979 and 1984; Boutón was settled in 1981. In addition, Article 16 expressly mentions "cruel, inhuman, and humiliating treatment or punishment not amounting to torture" (emphasis added), allowing for the application of several Convention articles to various forms of abuse in addition to torture. The words that were underlined were a compromise. Two non-governmental organisations, primarily Amnesty International and the International Council of Jurists, supported the claim that certain actions do not constitute torture on one side. They desired the complete eradication of the notion that the degree of pain or suffering is greater than that of other forms of ill-treatment. Medical documentation revealed "serious" injuries for one person and "major" injuries for another. All of this amounted to cruel treatment rather than torture. This strategy was used in the 1992 case of *Tomasi v. France*<sup>105</sup>, when beatings on numerous body areas resulted in trauma that was validated by a doctor. Similar circumstances occurred in Ribitsch v. Austria in 1995 (blows resulting in bruises on the inside and outside of the right arm). It should be recalled that in both these situations petitioners' counsel had 'only' complained of ill-treatment. Again in 1998, the Court concluded in *Tekin v. Turkey*<sup>106</sup> that "the manner in which he must have been treated in order to leave wounds and bruises on his body, amounted to inhuman and degrading treatment" (following the Commission's "cautious" findings of fact that "the applicant had been kept in a cold and dark cell, blindfolded and treated in a way which left wounds and bruises on his body in connection with his interrogation"). It appears that the Court was continuing its pattern of classifying severe beatings as cruel but not as torture. *Selmouni v. France*<sup>107</sup>, which was decided in 1999, marked a change. The path was forged by the Commission. Court determined that numerous medically verified injuries to many different body areas, consistent with days of beatings involving punches, kicks, and hits with a truncheon and baseball bat, as claimed by the applicant, constituted evidence of torture. With language that was obviously meant to signal a break from the line of decisions that began for the Commission with the Greek case and for the Court with *Ireland v. UK*<sup>108</sup>, the Court unanimously concurred. Invoking its belief that the Convention is a living document, it claimed believes that several behaviours that were formerly categorised as "inhuman and degrading treatment" as opposed to "torture" could be categorised in the future differently. It holds that greater rigour in evaluating violations of the core principles of democratic societies is inevitably necessary

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<sup>104</sup> Boutón v. Uruguay (1857)

<sup>105</sup> Tomasi v. France Eur. Ct. HR, Judgment, Ser.A, No. 241-A, paras. 108, 115.

<sup>106</sup> Tekin v. Turkey Eur. Ct. HR, Judgment, 9 Jun. 1998.

<sup>107</sup> Selmouni v. France (Application No. 25803(94), Eur. Ct. HR, Report, 11 Dec. 1977.

<sup>108</sup> Ireland v. UK (1979- 80) EHRR 5

given the increasingly high standards being demanded in the field of the protection of human rights and basic liberties.<sup>109</sup>

### 6.5.2 INTERNATIONAL CRIMINAL LAW:-

Now of how the ICTY interprets article 3 of its Statute (violations of the laws and customs of war) or article 5 of its Statute, both have a purpose at their core (crimes against humanity). Trial chambers may have taken different approaches to the UNCAT definition's significance applying it with the right contextual modifications or using it only as a tool for interpretation and there may have been some variation as to precisely which purposes are relevant (see below). Nevertheless, trial chambers have consistently required the element. The difference between being guilty as a perpetrator or as an aider or abetter lies precisely in whether the person shared in the purpose of the activity; if not, the person could only be an accomplice, not a co-perpetrator. This is true for the trial chamber in Furundzija, where, as is often the case, more than one person may be involved in the acts that constitute torture. The ICTR hasn't had a need to proceed beyond the Akayesu case, where it previously accepted the UNCAT concept. For the time being, the sole element that separates the war crime of torture from the war crime of inhuman treatment under the Rome Statute for the ICC is the use of torture. The trial chamber in Kunarac lists a number of purposes that happen to be similar to those listed in Delalic, expressing "doubts as to whether other purposes have come to be recognised under customary international law," the issue not needing to be resolved in the present case. The trial chamber in Delalic accepts the purposes referred to in UNCAT as "representative". Although the trial chamber is likely referring to the IATC's formulation, particularly its use of the phrase "or for any other reason," it is unclear to what additional uses it is referring. It might have also been thinking about the Furundzija list, which was also similar to the UNCAT list with the addition of of 'humiliating the person or a third person'. Yet humiliation has once again been recognised as a qualifying objective by the Trial Chamber in Kvocka. The Delalic trial chamber thought it "essential" to distinguish between a forbidden goal and "one which is simply private," which is perhaps noteworthy. By defining "such goals as" those actually mentioned in UNCAT article 1, the Components of Crime for the ICC likely put an end to the debate. At the end, the issue of why torture is not considered a crime against humanity under the ICC because there is no requirement for a purposive element will be addressed. Unlike international human rights law, which assigns a specific status to the violator, international criminal law does not. This holds true for both the provisions of Additional Protocol I and the Geneva Conventions for serious violations of international armed conflict. Similar to all of Additional Protocol II, Common Article 3 of the Geneva Conventions establishes minimal norms of conduct in domestic armed conflict, the breach of which is not accompanied by the imposition of criminal liability. Nonetheless, the International Criminal Tribunal for the former Yugoslavia (ICTY) has construed the scope of its authority under Article 3 of its Statute to include violations of Common Article 3. In each case, victim status (protected person, one hors de combat, etc.) determines liability. In any case, the victim's position (protected person, hors of combat, under the control of an adversarial party, etc.) determines responsibility. The same is predictably true of the Rome Statute,

<sup>109</sup> NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 45-69 (3<sup>rd</sup> edition, 2009)

whose articles 8(2)(a) and (b) primarily codify grave violations of the Geneva Conventions and Additional Protocol I and whose articles 8(2)(c) and (e) do the same for violations of common article 3 and Additional Protocol II. This is supported by the document Elements of Crimes, It is normal. The question of whether a person is a member of an entity that is a party to an armed conflict (which may be international as well as non-international) eludes effective determination, with the exception of that nearly extinct species of conflict involving a battle between the organised armed forces of two or more states. As a result of the victim's protected status or other defined status, the context of the existence of an armed conflict with which the act must be associated, and the mental requirement requiring awareness of the factual circumstances that established an armed conflict, there is an implicit assimilation of the individual to a party to the conflict instead. While a connection to an armed conflict was a crucial precondition for the International Military Tribunal at Nuremberg<sup>82</sup> and the International Criminal Tribunal for the Former Yugoslavia (ICTY) to have jurisdiction over crimes against humanity, this was not the case for the ICTR and will not be the case for the ICC. It is sometimes asserted that anyone can now commit crimes against humanity in times of peace. This might be oversimplified.

It is obvious that if it is difficult to designate someone to a party to an armed war, it would be even more difficult to do so for a group other than a government committing crimes against humanity. Nonetheless, in order for private acts to generally not qualify as such crimes, certain conditions must be met. So, the actions must have been carried out willfully or purposefully as part of a broad or organised assault on a civilian population. Any attack against a civilian population suggests a significant level of organisation; this is especially true if the attack must be widespread or systematic. The requirement that the victim of torture must be "in the custody or under the control of the perpetrator" is particularly telling in terms of the crime against humanity that constitutes torture. Such custody and control in the circumstances of the assault go a long way to excluding the brutal deed being committed in private. A requirement of custody or control was added to article 7 in order to establish some sort of link of power or control between the perpetrator and the victim, according to an authoritative commentary written by a Canadian delegate to the drafting process: "Given the deletion of the relevant language of UNCAT on which the Rome Statute is "loosely based" of any link to a public official."

In conclusion, the reality of the environment requires discarding an explicit parallel with international human rights legislation regarding the standing of the culprit in regards to torture as a war crime and a crime against humanity. On the other hand, additional conditions must exist, and their combined effects may impose restrictions. All legal definitions and case law agree that the only thing that constitutes torture is severe pain or suffering, with the possible exception of the Inter-American system. The European Court of Human Rights has continued to argue that the degree of pain or suffering must be a more severe version of what is already severe enough to qualify as inhuman treatment. We are unable to definitively state that the Human Rights Committee does not support the idea of aggravation due to its cryptic wording and ambiguous practises. Two ICTY cases show a preference to adhere to European Court practise. Nothing in the Rome Statute on the Elements of Crime's phrasing suggests that the pain or suffering must be made

worse. Contrarily, in terms of war crimes, the only distinction between the elements of crimes that apply to torture on the one hand, and to inhuman treatment or purposefully inflicting great suffering (during international armed conflict) or cruel treatment (during non-international armed conflict) on the other, is the element of purpose. What has come before will make clear that I would prefer to regard the intentional component as the only factor separating torture from cruel or inhumane treatment, and it's possible that the train is not that far from the station that it may not be recalled. However, it will not be simple for the ICC judges to read the element of aggravation into the war crime of torture as opposed to the war crimes of inhuman or cruel treatment or wilfully causing great pain or suffering. While one can sympathise with judges who find certain practises inhuman, and therefore condemnable, but who nevertheless fear to debase the currency of the word "torture," especially when there may be some uncertainty about the acts that have caused the severe pain or suffering. Making the same distinction between "other inhumane acts" and "torture" will also be more difficult when dealing with crimes against humanity. This appears to be a choice at first look. Inflicting "extreme physical or mental pain or suffering" qualifies as torture, whereas "great suffering, or substantial injury to body or to mental or physical health" qualifies as other inhumane actions. There is still another barrier to the ICC judges following this path, even if it were assumed—which is far from obvious—that "great suffering" or "serious injury" is somehow less serious than "severe suffering" the same language is used to "distinguish" the war crime of inhuman treatment from the war crime of wilfully causing great suffering. The act must have "character similar to any other act referred to in article 7" in order to establish the crime against humanity of "other inhumane actions." Also, a footnote to this element explains that "'character" refers to the nature and seriousness of the deed" (emphasis added). The implication is that an inhumane act that resembles torture must be of a similar gravity to that necessary for torture.<sup>110</sup>

## **6.6 THE INTERNATIONAL LAW OF TORTURE: FROM UNIVERSAL PROSCRIPTION TO EFFECTIVE APPLICATION AND ENFORCEMENT BY WINSTON P. NAGAN & LUCIE ATKINS:-**

### **6.6.1 TORTURE IN INTERNATIONAL AND REGIONAL LAW:-**

Systematic or widespread torture is included in the second definition of torture as one of a particular class of crimes known as "crimes against humanity" in accordance with international law. The practise of systematic or widespread murder, forceful disappearances, deportations and transfers, arbitrary incarceration, and persecutions for political or other reasons are also included in this category. These crimes are recognised as crimes against humanity by a variety of international conventions or protocols. Torture abolition efforts take place at many decision-making levels at the global, regional, and national levels, and they frequently entail complementing efforts from the public and civil society. The ability to respond to torture by sanctioning it has been extended to the institutions of private law in addition to the present international law and practice's prohibition against it. As a result, torture is considered to be both a criminal and a civil wrong with a tortious nature in several regional authorities. This latter area reflects a significant shift in the ability of civil society institutions to control and punish torture. This has sparked a number of

<sup>110</sup> NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 82-143 (3<sup>rd</sup> edition, 2009)

initiatives headed by regional and international organisations that deal with human rights law. The project that stands out the most is the development of a private law component that gives private enforcement agencies significant leverage over public actors who engage in torture. This development exemplifies the expansion of public to private penalties for torture. Modern human rights law is widely acknowledged to have developed in response to the atrocities committed during World War II and the need to offer a moral as well as judicial reckoning and comprehension of that conflict's legacy. The United Nations Charter was drafted in 1945 as part of an effort to formally impose certain duties on governments. These revolutionary duties, which were tied to issues of aggression, peace and security, and basic human rights, impliedly acknowledged that the notions of statehood and sovereignty are not unbounded. Another important development was the formation of rights for the individual that could be used against a sovereign state, specifically with the creation of the Universal Declaration of Rights. The 1949 Geneva Conventions<sup>35</sup> and associated protocols continued to advance the field of humanitarian law. Additionally, the expansion of regional human rights law demonstrates the world community's strong and compelling determination to put the perspectives and actions envisioned in the Universal Declaration of Human Rights into practical practice. Moreover, the International Declaration of Human Rights has frequently served as a model for normative constitution-making. Post-war constitutions have incorporated numerous human rights protections. Interdiction of all forms of torture

The universal prohibition of torture is one of the cornerstones of human rights legislation. No one shall be "subjected to torture or to cruel, inhuman, or degrading treatment or punishment," according to Article 5 of the Universal Declaration of Human Rights. Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms both reflect a similar idea. Article 5 of the American Convention on Human Rights, Article 5 of the African Charter on Human and Peoples' Rights, and Article 99 of the 1949 Geneva Convention, all of which deal with the protection of prisoners of war. Notwithstanding verbal agreements against torture and other similar acts, there is still a strong willingness for state governments to employ violence when necessary. Although there is a clear majority in support of condemning torture, the international community continues to face challenges due to the limitations of these regulations in actuality. The international community's aim to enforce adherence to human rights standards through centralised, bureaucratic United Nations institutions has had minimal success in trying to curb and outlaw torture on a global scale. In fact, the founding of the voluntary organisation Amnesty International in 1961 was one of the significant events related to the outlawing of torture. Amnesty International made a significant contribution to the advancement of human rights law in general and, more specifically, in the creation of a global grassroots initiative to support and supplement the work of the United Nations. Amnesty International's emphasis on individual participation for individual victims was a significant innovation. The General Assembly adopted the Declaration on Protection of All Persons from Being Subjected to Torture and other Cruel, Inhumane or Degrading Punishment in 1975 as a result of Amnesty International's early monitoring of torture on a global scale, which helped to articulate interests, exert pressure, and support for governmental initiatives (especially in Sweden and Denmark). In addition to the Convention Against Torture itself, the U.N. General

Assembly has passed a number of other resolutions under pressure from the international civil society. The Body of Principles for the Protection of All People Under Any Type of Detention or Imprisonment, the Code of Conduct for Law Enforcement Authorities, and the Principles of Medical Ethics were among the advancements mentioned in paragraph six. The office of the Special Rapporteur on Torture was established by the United Nations Committee on Human Rights in 1985. The United Nations' attempts to systematically abolish torture are greatly aided by the treaty-making process and the enforcement measures it has established.

In addition to the Convention Against Torture itself, the U.N. General Assembly has passed a number of other resolutions under pressure from the international civil society. The Body of Principles for the Protection of All People Under Any Type of Detention or Imprisonment, the Code of Conduct for Law Enforcement Authorities, and the Principles of Medical Ethics were among the advancements mentioned in paragraph six. The office of the Special Rapporteur on Torture was established by the United Nations Committee on Human Rights in 1985. The United Nations' attempts to systematically abolish torture are greatly aided by the treaty-making process and the enforcement measures it has established.

#### **6.6.2 COMMITTEE AGAINST TORTURE:-**

The Committee against Torture's main responsibility is to keep an eye on how the Convention is being put into practise. Ten specialists who are nationals of the state parties make up this body, which is chosen in a secret vote. The processes outlined in Articles 19, 20, and 21 of the Convention Against Torture are used by the Committee to carry out its duties. Pursuant to Article 19, the parties to the Convention submit reports on the actions they have taken in accordance with the Convention to the Committee via the U.N. Secretary-General. The information from these reports may then be used in the Committee's annual report after being revised and commented upon by the Committee. A trip to the locations where suspected torture is taking place may be part of the investigation. 6 The Committee notifies the concerned state party of the findings of the investigation, as well as the opinions and recommendations of the Committee Against Torture. However, the power granted to the Committee by Article 20 is optional; a state party may indicate that it does not recognise this capacity when ratifying or joining the Convention Against Torture. A extraordinary session of the Committee may be called at the request of a majority of its ten members or a state party to the Convention Against Torture. The Committee typically meets two regular sessions each year. The Committee invites the concerned state party to collaborate with it at all times and maintains the confidentiality of all of its proceedings. The Committee must also engage the relevant state party before it may include a summary of the investigation's findings in its annual report. The state parties to the Convention Against Torture are responsible for covering all costs associated with the Committee's activity. 68 The Committee establishes its own operating guidelines. Individuals have the right to file a complaint directly with the Committee Against Torture under Article 22 of the Convention Against Torture. The alleged offending state party must acknowledge the Committee's authority to review individual allegations, and as of January 1, 2000, only forty out of 119 states have made such a declaration. Individual complaints are further restricted by the Committee's rules of procedure, which provide that an anonymous communication cannot be accepted. However, this is lessened by the need that the Committee evaluate each

individual complaint in private sessions. The Committee Against Torture notifies the communication's author after determining that the communication is admissible, notifies the state in question of its judgement, and then moves on to the merits. The state that is accused of violating the Convention is then required to provide the Committee with justifications or statements that explain the situation and detail any corrective actions that have been implemented.

Individual communication concerning the existence or impending use of torture probably results in an urgent situation requiring prompt response. It's possible that the Committee's tactics in particular circumstances simply give the impression that it can act under duress because it doesn't function as a standing committee with an executive director structure and staff that can continuously respond to complaints and reports. Another flaw in the Committee's process is the six-month time limit for states to respond to an individual's communication. Due to the fact that torture victims who have died cannot share their stories, this wait gives the chance for the victim to vanish or be executed extra judicially. Therefore, while the United Nations-created structures give the campaign against torture symbolic weight, a crucial component of legitimacy, and a certain amount of efficacy, institutional flaws show that the United Nations' structures do not exhaust all potential avenues for ensuring global accountability for torture. Budgetary restraints, political restraints, and other obstacles that hinder the fight to end torture are to blame for the Committee Against Torture's lack of institutional clout. The following illustrates these limitations: Budgets are constrained, and the numbers listed for work related to torture rehabilitation are nearly laughable. (1) The enforcement mechanism, which mainly relies on official state collaboration, is very problematic. Apart from the victimisation of the victim, the most significant component of torture is that it is an act of power and, from a legal standpoint, an act of official power. Because torture is so common, particularly in nations that are frequently authoritarian and unwilling to uphold the law, it will be impossible for the state to negotiate or address its own agents' systematic use of torture without also having to discuss its own practises foundation for legitimacy and authority. The crucial question is whether the Committee's methodology

Whether those who are opposed to torture take into account societal reality or if they simply believe what the accused state says. Estimates show that the Committee's techniques are just ineffective in solving the issues of power and authority generated by those who routinely practice torture. The futility produced by the combination of the Committee's structures and procedures is a key flaw. Its organisation includes a team of experts who have been carefully vetted by state parties themselves, creating a conflict of interest for those whose objectivity is most important to the process, of interest. Although the Committee's affiliation with the United Nations necessitates a bureaucratic culture, this culture has advantages such as professionalism, broad discretion, and general respect. For instance, the Committee's ability to effectively implement a higher level of independent-minded action is threatened by oppressive state authority. The issue of confidentiality poses the Committee with yet another procedural challenge. Private diplomatic discussions between bureaucrats and the authorities of the accused state may fail to address the victim's perspective's sense of urgency or the practical issue that the state party will want to block any probe the more at fault it is. 73 This

list of obstacles is by no means comprehensive, but it does show that the Committee Against Torture faces major structural and procedural challenges that jeopardise its effectiveness despite its symbolic significance.

### 6.6.3 THE SPECIAL RAPPORTEUR ON TORTURE:-

The United Nations Special Rapporteur was created as an additional tool to the Committee Against Torture in the fight against torture. A Special Rapporteur was appointed by the U.N. Committee on Human Rights to gather trustworthy data regarding torture and to react as soon as possible. The Rapporteur keeps track of claims of torture while the Committee investigates particular allegations. The Rapporteur may request information on a state party's legislative and administrative efforts to outlaw torture and to address its effects from the government of that specific state party. Additionally, the Special Rapporteur has the authority to investigate allegations of torture in all UN members, UN observer states, and Convention party nations. Lastly, the Rapporteur may bring allegations of torture to the attention of the relevant authorities, speak with government representatives, and make on-site consultation visits in an effort to safeguard the right to physical and mental integrity. The creation of the U.N. Special Rapporteur and its intended mandate were hopeful steps against torture, but the Rapporteur shares the Committee's shortcomings in effectiveness. Lack of finance is a significant issue for the Special Rapporteur, in addition to the weight of a staggering task. Despite an increase in funding from the United States, the Special Rapporteur still receives a little amount of funds. To give the Rapporteur the entire authority to end torture, other states should take a similar approach.

### 6.6.4 LITIGATION STRATEGIES TO ERADICATE TORTURE:-

Courts play an equally significant role in upholding the rule of law as the U.N. procedures do in assisting the process of abolishing torture on a worldwide scale. In the era of globalisation, the law gives domestic courts a more assertive role in creating and enforcing international law. The legal system, including domestic courts, regional courts, ad hoc tribunals, and the International Criminal Court, must implement these norms firmly and consistently in places where U.N. procedures have only served as symbolic in establishing the principles of international law against torture. This section will examine various courts' rulings regarding the fight against torture. The two most significant developments in American case law regarding victims of torture may have been evidential in nature. The two aspects of this transformation are the arguments that universal jurisdiction must apply in civil proceedings and the admissibility of confessions in criminal trials. A development in both criminal and civil torture legislation can be seen in US case law. The topic of police interrogation techniques and the legal restrictions on gathering evidence and confessions is the one that is most pertinent to the subject of torture. In accordance with the basic evidentiary norm, which was established by English common law, utterances must be voluntary in order to be admitted. The courts would not recognise claims "obtained via promise of advantage or fear of prejudice, exercised or held forth by a person in authority, or by oppression.

*Williams v. United States*<sup>111</sup>

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<sup>111</sup> *Williams v. United States*, 341 U.S. 97 (1951)

Established the illegality of brutal tactics by police to coerce confessions from a defendant. The totality of the circumstances test for determining whether confessions are voluntary provides unclear criteria for finding the line between permissible and impermissible conduct. To determine such distinctions, United States' courts could look to the Torture Convention for supplemental prescriptive guidance in defining minimum standards

### *Filartiga v. Pena-Irala*<sup>112</sup>

This leading case in expanding the role of domestic courts in the application of human rights law in general and in the law relating to the prohibition of torture, in particular. This case emerged prior to the United States' ratification of the Convention Against Torture. *Filartiga* determined that, based on the Alien Tort Claims Act, torture constitutes a civil wrong simply because it violates customary international law. It expanded the scope of the legal remedies to include private litigants as plaintiffs, providing an important vehicle through which a torturer could be subject to legal proceedings.

### *Kadid v. Karad*<sup>113</sup>

Another U.S. appellate court held that mass rape, coerced prostitution, and other forms of physical violence directed at Croatian women by the Bosnian Serb military constituted torture as defined in the Convention Against Torture. One important aspect of this case was that the level of "state action" required for "official" torture entailed not actual authority but merely the "semblance of official authority."

### *Ortiz v. Gramajo*<sup>114</sup>

The District Court of Massachusetts held that the kidnapping, beating, and rape of a nun constituted torture. In order to qualify as an official act, the torture need not occur while the defendant has direct custody over the victim; rather the torture need only the "consent or acquiescence of a public official."

## **6.6.5 THE STRATEGIC IMPORTANCE OF CIVIL SOCIETY FOR ERADICATION OF TORTURE:-**

Many actors must be involved in strategies. Being the aggressor, the perpetrator, if not the enabler of torture in rogue regimes, governments must be at the forefront of such activities. The international non-governmental organisation, on the other hand, is a vital player in getting the subject of torture and other human rights on the world community's attention. The legislative framework required to realise the aim of entirely abolishing torture has been developed thanks to the activism of international non-governmental organisations (INGOs). These groups, however, make only a small part of the global civil society network. Civil society members must be aware of their own vulnerability and support efforts to outlaw torture. The broad array of organisations that make up the global civil society have all been impacted by the communications revolution, notably the Internet. The improvement in global communication has wide-ranging effects on human rights activism, networking, and solidarity since it can lead to previously unheard-

<sup>112</sup> *Filartiga v. Pena-Irala*, 630 E2d 876 (2d Cir. 1980).

<sup>113</sup> *Kadi6 v. Karad.i6*, 70 E3d 232 (2d. Cir. 1995).

<sup>114</sup> *Ortiz v. Gramajo*, 886 E Supp. 162 (D. Mass. 1995)

of levels of coherence in the world's civil society. Additionally, they can support INGOS' cooperation in public awareness initiatives to support and supplement more official efforts to end torture globally. The communications revolution, particularly the Internet, has an effect on all of the various organisations that make up the global civil society. Since it can result in previously unheard-of levels of coherence in the global civil society, the improvement in global communication has wide-ranging consequences for human rights activity, networking, and solidarity. Additionally, they might encourage INGOS' participation in public awareness campaigns to assist and support greater official efforts to put an end to torture throughout the world. An essential strategic endeavour for mobilising public support and pressure for the crucial work of ending torture would be to understand and connect the institutions of civil society. The creation of methods for ensuring that international legislation prohibiting torture is universally enforced and applied is one area that still presents difficulties. Two crucial stages towards achieving this goal are making torture a civil as well as a criminal offence and exposing torturers to universal civil jurisdiction. Furthermore, the effectiveness of these remedies will grow with universal acceptance of both civil and criminal judgements. Other tactics for improving the enforcement of laws against torture include pressuring diplomats to confront foreign leaders in nations that violate anti-torture laws, encouraging prosecutors to carry out their duty to prosecute cases of torture, and tightening extradition standards so that torturers will not escape responsibility. The monitoring of human rights abuses will support the Special Rapporteur's commitment to conduct an exhaustive analysis of the social mechanisms that lead to torture. A key component of an international strategy to abolish torture will be coordinating the actions of INGOs, professional organisations, and other institutions.<sup>115</sup>

## **6.7 TORTURE TEAM BY PHILIPPE SANDS:-**

### **6.7.1 THE PROSCRIPTION ON TORTURE AND THE MEMO OF 2 DECEMBER 2002:-**

The United States took the lead in developing a new set of international laws after the Second World War. New rules of international law were established along with the creation of the United Nations to safeguard everyone's basic rights. The Nuremberg Charter helped shape international criminal law, which was swiftly followed by the Geneva Conventions' gradual advancement of international humanitarian law. Common Art 3 of those Conventions forbids the use of interrogation methods that violate human dignity, are harsh, or amount to torture. The UN approved the Torture Convention in 1984, criminalising torture as well as collaboration and participation in it. It also established a complex structure of universal criminal jurisdiction intended to eliminate any potential havens for torture be available to the torturer and their aides. There is a strong corpus of international law that, by the middle of the 1980s, had solidified into an outright ban against torture under all circumstances. Nonetheless, the widespread acceptance of that general restriction has been called into question by the events of September 11, 2001. As shown in the Rumsfeld Memo, they have created a pathway for a new direction. On their face, the methods adopted that day are obviously at odds with Common Article 3 of the Geneva Conventions and the Torture Protocol, giving rise to the accusation of war crimes. Three categories were used to group the desired approaches, starting with

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<sup>115</sup> Winston P. Nagan & Lucie Atkins: The International Law of Torture: From Universal Proscription to Effective Application and Enforcement, UF Law Scholarship Repository (Last seen 23<sup>rd</sup> Jan 2023) <https://scholarship.law.ufl.edu>

Category 1 (yelling) and moving up to Category 3 (nudity, forced grooming, use of dogs, etc). (shoving, poking and the use of water to create the misperception of suffocation, more commonly nowadays known as waterboarding). The US Army Field Manual FM 34-52 had, up until that point, forbade using these tactics since they were obviously against the Geneva Conventions. The Rumsfeld Note, however, noted: I have spoken about this with the Deputy Mr. Wolfowitz, the Undersecretary of Defense for Policy (Doug Feith), and the Chairman of the Joint Chiefs of Staff (General Meyers). I believe everyone concurs with my recommendation that, as a matter of policy, you permit the Commander of USSOUTHCOM to use only categories I and II and the fourth technique listed in category III (the "Use of mild, non-injurious physical contact such as grabbing, poking in the chest with a finger, and light pushing") at his discretion. The use of the latter three techniques, including water boarding, was not authorised generally but was kept open for potential future use on a case-by-case basis How did this text come to be? It was initially disclosed on June 22, 2004. The Administration's attempts to address the issue that was enveloping it in the wake of the publishing of the photographs showing torture at Abu Ghraib in Iraq provided the setting. James Haynes, the author of the Rumsfeld Memo, and Alberto Gonzales, two of the administration's top attorneys, delivered the paper during a news conference (who was at that time the White House Counsel to President Bush and later became Attorney General). A number of additional documents were also made public for the first time together with the Rumsfeld Note. Three categories might be used to classify the important papers. The first was a collection of papers that were included with the Rumsfeld Memo. These included, in addition to the list of tactics, the formal request from the Commander of Joint Task Force 170 at Guantánamo Bay, Diane Beaver's legal opinion endorsing the additional techniques, Major General Michael Dunlavey, a judge and two-star Reserve intelligence officer, was chosen by Mr. Rumsfeld to oversee the interrogations at Guantánamo Bay; a memo asking General James T. Hill, Commander of the US Southern Command, to conduct a more thorough legal examination of these tactics. The second category consisted of a paper carrying the complete text of President Bush's ruling from February 7, 2002, which said that none of the detainees at Guantánamo Bay may assert rights under common art. 3 or any other Geneva Convention. The third category included the now-famous "Torture Memo," a legal opinion signed on August 1, 2002, by Jay S. Bybee, head of the Department of Justice's Office of Legal Counsel, but mostly produced by his staff deputy, John Yoo, on leave from Berkeley Law School

### **6.7.2 THE ADMINISTRATION'S NARRATIVE:-**

On June 22, 2004, Haynes and Gonzales gave a news conference in the Old Executive Office building near to the White House. They detailed the conditions under which the Administration had approved these novel interrogational tactics. Secondly, the Administration has always operated legally and properly, with care and consideration. The second part of the Administration's story focused on where the new interrogation methods came from. What had spurred the initiative? The Administration specifically mentioned Major General Dunlavey, who Mr. Haynes later referred to as a "aggressive Major General" in his testimony before the Senate Judiciary Committee. The inference was that the Pentagon or the Department of Defense had neither mandated or supported the practises. From the bottom up, they emerged. The legal basis for the new questioning methods was the third component of the Administration's

explanation. Politically appointed lawyers in the highest levels of the Administration, and most definitely not the Department of Justice, did not take legal views that led to this. The legal opinion that the Administration had relied upon was that issued by Beaver on October 11, 2002. It had not relied on the Bybee and Yoo's Torture Memo from the Department of Justice, which was merely a star-gazing exercise. The fourth and last part of the Administration's official story was to make it obvious that the Guantánamo Bay-related clauses had no influence on what happened in Abu Ghraib or anywhere else. Mr. Gonzales made a special effort to clarify the situation. Abu Ghraib's abuses were committed by a few bad apples there, and they had nothing to do with legal memos or administration decisions. As these records were carefully examined, maybe with the barrister's critical eye, it became apparent that the Administration's story was not entirely credible. When I first read the transcript of the press conference held by Mr. Haynes and Mr. Gonzales, it immediately occurred to me that they were acting in the capacity of advocates and that they were reading from a common, meticulously prepared script that articulated a specific narrative, from which the four points I've just mentioned had emerged. I thus made the decision that I would make an effort to identify and contact the important people who were engaged in the decision-making process. Instead of what the Administration wanted us to believe had occurred, I sought to ascertain what had actually occurred based on their own words. I had lengthy conversations with practically all of the important participants. The fact that a stranger may phone the Chairman of the Joint Chiefs of Staff, General Meyers, and ask to speak with him is a tribute to the character of contemporary American culture. Maybe go see Doug Feith, who was the third Pentagon official. Instead, speak with Diane Beaver, the Guantánamo Bay attorney who was one of the first people I spoke to. Or, finally, receive two invitations to the Pentagon to meet with Haynes. American society is more open than British or perhaps maybe Australian society is.

### **6.7.3 REVISITING NUREMBERG: THE *JUSTICE TRIALS* AND LAWYERS' RESPONSIBILITY:-**

Josef Alstötter, the main defendant in the Justice Trials, interested me, so I tried to obtain as many case-related materials as I could, including the written petitions and the oral arguments. I ultimately was able to compile much of this information with the aid of the archivist at the Holocaust Museum in Washington. Nevertheless, I was unable to locate any of the essential paperwork, so I made an effort to contact some of the attorneys who could have been engaged in the case. I tracked out Ludwig Alstötter, Josef Alstötter's son and a retired partner in a Nuremberg legal company. He was living there. I eventually got to meet him. Ludwig still thinks his dad was wrongfully imprisoned. He was characterised as a respectable, common-law attorney who had attended the top legal schools, was a devout Christian, and had been carrying out his official duties as the Permanent Secretary in the Civil Justice Division of the Reich Ministry of Justice. As common as you or I, I imagine, or any of the attorneys I came into contact with in the course of my research on the Rumsfeld Note. He had arranged all of the trial materials when I arrived at his Nuremberg legal office and entered the conference room. Everything was maintained by him. I was seeking for the supporting papers that I couldn't discover in the US or in Britain. Josef Alstötter was found not guilty of war crimes or crimes against humanity, but he was found guilty of belonging to the Schutzstaffel (or "SS") with knowledge of its wrongdoing. The ruling was significant because it established the idea that judges and attorneys in a governmental system are especially accountable for the crimes committed by the regime,

allegedly for the first time in proceedings of that nature. Due to his name, Mr. Altstötter had the unfortunate distinction of being the first defendant mentioned among the 16 defendants. Even though he was one of the ten found guilty, he wasn't the most significant or the worst (four were acquitted, one committed suicide and there was one mistrial). He was a respected member of society and a prominent attorney. In 1943, he started working for the Reich Ministry of Justice, where he oversaw the division's civil law and procedure. He joined the SS in 1937, and the US military trial declared him guilty of belonging to a criminal organisation as a result. Yet his conviction was not only based on his affiliation with that group. Joseph Altstötter was found guilty by the Tribunal in large part because of two letters that showed he was aware of the SS's misdeeds. I enquired about Ludwig's possession of the letters. He did. He looked for duplicates of the originals in the orderly piles on his desk. The first letter, dated May 3, 1944, was written to Joseph Altstötter by the Chief of the Intelligence Service pleading with him to intervene with the regional court of Vienna to prevent it from ordering the transfer of Jews from the camp at Thereisenstadt back to Vienna to testify in court proceedings. The second letter was Altstötter's reply to the President of the Court in Vienna from a month later, stating that "these demands cannot be granted" due to security concern. The US military tribunal operated under the assumption that Altstötter would be aware of the purposes of the camps and the repercussions of his letter to the President of the Vienna Tribunal. After being found guilty, he spent five years behind bars. The reference to "security grounds" made me think of the language Haynes used to describe the circumstances surrounding the writing of his memorandum to Mr. Rumsfeld in his news conference on June 22, 2004. According to him, "military necessity" occasionally permits the waging of war in ways that may otherwise violate the pertinent provisions of the Convention. Mr. Haynes did not offer any legal support for that claim, thus he is not allowed to. The norms expressed in common art 3 or the duties outlined in the Torture Convention cannot be disregarded due to military necessity. It would be outside the scope of this article to investigate whether the senior Administration attorneys may be held criminally liable for their approval of interrogation methods that might qualify as war crimes. So I'll go right to the point and talk about another trip I took, this time to see a court and a prosecutor in Europe.

In conclusion not just our client is under our duty. In addition to that, it extends to the legal framework that supports our system, as articulated by Malcolm Fraser in remarks he made at the Human Rights Law Resource Centre in Melbourne. It is a justice system to which we have a special obligation. We run the risk of straddling the line separating good advice from bad advice, bad advice from unprofessional advice, or even unprofessional advice from advice that permits a crime to occur if we cross it, rubber stamp a policy that has already been decided, or act on an invitation to give advice when it is known that we will only give the advice that our client wants. It appears that there may be a solid foundation for inquiry based on the documents that have previously come to light, particularly those that did so during the congressional hearings that took place after the book's publication. This isn't because the behaviour of the attorneys discussed in Torture Team is comparable to that of the defence attorneys in the Justice Trials or the Nuremberg movies. Instead, the criteria set forth in the international legal norms that were established in the wake of World War II, rules that guaranteed fundamental rights for all inmates and forbade any room for exceptions, were violated by their activities. The facilitators, or those who provided the legal weapon that

permitted the crimes to happen, were their attorneys, even if those most accountable for these activities are found at the political level or even at the very top echelons of the Administration, it seems. The 15 methods utilised on Detainee 063 would never have been made public if it weren't for the attorneys. Spencer Tracey's character said, "How easy that may happen," anticipating a day when people would even "talk of the preservation of nation, of survival [to justify utilising] the tools of the adversary to rest survival upon what is expedient" in the US.<sup>116</sup>

## CHAPTER XII

### CONCLUSION AND SUGGESTION

#### 7. CONCLUSION AND SUGGESTION:-

Every country and its government think they are above law when it comes to torture. The authorities think they are outlaws. Equality is the key to abolish torture, why because if a human being considers another human being as equal as him there will be no inhuman or cruel treatment or torture can be done. Police department and Prison department of every nation considers them as judge, jury and executioner. Torture in police custody against accused/suspect or Torture in Prison against under trail prisoners and the convict was overseen by Court and Judges. Manekha Gandhi case specially delivers the meaning of right to life. Life with dignity is called Living, without dignity it cannot be consider as living, it is called just being alive. Even though India has constitution provisions regarding the protection of accused against torture and other penal laws to stop torture, it is still happening. For example Pheonix and Jeyraj case, a father and son duo was killed in the police custody to in the time of COVID-19. The reason for the custodial death is frivolous. The father and son duo refused to give the police a smart phone for free and the police authorities take them both in unlawful custody and killed them in the name of investigation by inserting a huge rode inside of their anus and beat them blue. There is no use for Article 20, 21 & 22, Sections 41A, 41B, 41C, 41D, 49, 55A, 163 of Crpc, Section 24, 25, 27 of Indian Evidence Act, Section 348 of Indian Penal Code. On 27<sup>th</sup> March, 2023 an IPS officer in Tamil Nadu named Balveer Singh has been removed from his position after he was accused of torturing suspects by pulling their teeth and allegedly crushing the testicles of two men.

*D.K. Basu v. State of West Bengal* (1997)<sup>117</sup> has given enough guidelines regarding the arrest of the accused and the arrestee must have a medical examination every 48 hours while they are being held by a licensed physician chosen by the Director of Health Services of the State or Union and By mandating that the accused appear in front of the magistrate within 24 hours of the arrest, the Constitution has given the magistrate's position significance.

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<sup>116</sup> PHILIPPE SANDS, TORTURE TEAM: THE RESPONSIBILITIES OF LAWYERS FOR ABUSIVE INTERROGATION 121-198 (1<sup>st</sup> edition, 2008)

<sup>117</sup> DK Basu v. the State of Bengal (1991) 1 SCC 416

*State of Gujarat v. Manubhai Ratilal Patel* (2013)<sup>118</sup> case gave a judgement regarding unbiased organisations like the state Criminal Investigation Departments and the Central Bureau of Investigation must look into cases of death, rape, and torture committed while a person is being held captive. The police cannot establish their own laws. None of the police officials are following the order and they always had reason for the brutality and third degree treatment. Police will use force and third degree treatment even though the accused or suspect didn't resist at the time of arrest.

The Allegation of torture with pliers to pull out teeth and hurting private parts were made by people from different police stations, which prima facie indicated commission of serious cognizable offence. The supreme court has said the only option for the police in such cases is to register a first information report and get the cases investigated by an independent agency.<sup>119</sup>

*PUCL v State of Maharashtra*<sup>120</sup>

In the cases of violence inflicted by police personnel, including an encounter, not only an FIR should be registered but the victims should also be protected from being threatened or coerced into retracting their statements or withdrawing complaints.

Custodial Deaths in Tamil Nadu, 2022:

1) On April 18, 2022 - Vignesh arrested for possession of Ganja, Vignesh developed seizures after breakfast and doctors declared him dead. An autopsy report which indicted 13 injuries on the body of Vignesh, the case was altered to that of a murder.

2) On June 11, 2022 – Appu alias S. Rajasekar, 33 was picked up by Kodungaiyur police in theft case. He reportedly complained uneasiness in custody the next and died while being taken to a hospital. The case transferred to the CB-CID.

3) On September, 29, 2022 – Akash, 21, of Ayanavaram, who had 11 Criminal cases against him for offences, including robbery, theft and assault, died at a hospital after he was taken to the Otteri police station for inquiry in case of damage to a car.

4) On September, 20, 2022 – A 44 year old man, accused of attempting to snatch a mobile phone from one of the devotee in the Samayapuram temple, was caught by members of the public and handed over to the police. Later, the suspect was found dead in the police station toilet.

5) Before the Sattankulam incident in 2020, the Madurai bench of the Madras Bench of the Madras High Court had taken a serious view of the 2019 custodial torture and death of a 17-year old boy, Muthu Karthik, at the S.S Colony police station in Madurai. He was tortured at the police station and he sustained grievous injuries. He died at a hospital at a day later.

<sup>118</sup> State of Gujarat v. Manubhai Ratilal Patel (2013) 1 SCC 314

<sup>119</sup> A force with teeth flexes muscles <https://www.hindu.com> (Last Visited on 07 Mar, 2023)

<sup>120</sup> PUCL v State of Maharashtra WP(C) No. 316

6) Another case of alleged custodial torture is that of K. Ramesh in 2020 at Saptur in Madurai district. The family alleged that he was picked up by the police and tortured in custody. Ramesh was found dead, hanging from a tree.

The police are adopting new methods of torture. They are now opening fire in the process of apprehending suspects causing bullet injury on their legs.

These are the newest cases on custodial torture and custodial death. I had a report in the dissertation on the data of custodial death in India Between 2019 to 2020. The ranking of custodial death is Gujarat - 42, Madhya Pradesh - 34, Maharashtra - 27, Tamil Nadu - 25. Tamil Nadu the peaceful park is in 4<sup>th</sup> Place when it comes to custodial death. Even though south India has less human rights violation then north India, This highest percentage of custodial death in Tamil Nadu made me question the security of people in Tamil Nadu and the trust against the Tamil Nadu Police department. The intelligence department across the state and a sufficient number of staff members including a Deputy superintendent of police and a constable, are deployed in all cities/districts to monitor the developments in their jurisdictions and report any unusual activity to the chief of intelligence.

My suggestion is the parliament should enact an act called Internal Affairs Act, with that Act and an independent Internal Affairs Department should be formed to investigate the custodial torture and custodial death by police. A higher official will oversee the investigation without the intervention of the police department and CB-CID and CBI.

Custodial Rape in India:-

Section 376 of the Indian Penal Code covers "Sexual intercourse by a person in authority." Custodial rape is a type of rape that occurs when the victim is "in custody" and unable to leave, and the rapist or rapists are agents of the power keeping the victim in custody.<sup>121</sup>

The Supreme Court in of *Omkar Prasad Verma v. State of Madhya Pradesh*<sup>122</sup> defined "custody" as guardianship. When someone is in custody, that person is subject to rigorous control and supervision of another person or institution, who is known as the custodian. Control involves movement, liberty, freedom, food, water, and the individual's outer relationships with the world.

In criminal law, the burden of proof often rests with the prosecution to show that the defendant committed the crime. Until a person is shown to be guilty, they are considered innocent. However, due to variables like evidence manipulation and destruction in cases of custodial rape, this created a greater problem. The Evidence Act was amended to incorporate an exception to the presumption rule as a result. According to Section 114A of the Evidence Act of 1872, which was added by the Criminal Law (Amendment) Act of 1983, if sexual activity is established and the victim claims that it happened without

<sup>121</sup> Indian Penal Code, 1860, No. 12, Acts of Parliament, 1891 (India)

<sup>122</sup> *Omkar Prasad Verma v. State of Madhya Pradesh Appeal (crl.)* 293 of 2007

her consent, the court will determine that there was no consent. The onus is therefore on the offender to prove that there was permission and that the sexual activity took place with the permission of the woman.

The Human Rights commissions and Protection of Human Rights Act cannot sanction against the perpetrators. Human Rights commissions cannot impose punishment to the accused or the suspect. It can only direct or recommend the court or the executives to push the proceedings for the departmental and criminal action.

“As it is, in the matters wherein a criminal action is involved under the IPC, the NHRC neither has the powers to pronounce nor it recommend sentence to the guilty: It rests with courts only. In all such cases, the NHRC, at the most, pushes for initiating proceedings for a departmental or a criminal action by the respective governments against its officials found guilty of human rights violation.”<sup>123</sup>

*State Of U.P. and 2 Others vs National Human Rights Commission*<sup>124</sup>

An authority or a government which is aggrieved by the order of the Commission is entitled to challenge the order. Since no appeal is provided by the Act against an order of the Commission, the power of judicial review is available when an order of the Commission is questioned.

NHRC has significantly contributed to bringing a human rights approach to legislation, policy, and programmes in our nation despite its obvious flaws in the Act. Mentioning that NHRC has performed admirable job as a watchdog in advancing and defending human rights would not be out of place. It has made contributions to India that go beyond the typical duties of looking into alleged violations, holding public inquiries, exercising advisory jurisdiction, advising and assisting governments, raising awareness, encouraging communication, exchange, and improved coordination between other national and international human rights institutions, and publishing annual reports. It has been important for advancing our nation's human rights legal framework. At a global level as well, NHRC has set the agenda towards a rights-based approach. In the age of globalisation, the National Human Rights Commission (NHRC) has a crucial role to play in ensuring that all facets of society may contribute to the growth of opportunities. The NHRC can create a level playing field for all of our citizens and contribute to the moulding of our nation by ensuring equal opportunities and safeguarding citizens against discrimination and inaction. The people of India, whom the Commission seeks to serve in all of their rich diversity and varied situations, must provide the Commission with an objective evaluation of its efforts. A national institution's performance must be evaluated in terms of both its successes in accomplishing its stated goals and the limits it has had to work within.

Proposed solutions:-

There must be adjustments made to make human rights commissions in India more effective institutions if they are to really defend and advance human rights. Many suggestions are:

<sup>123</sup> Press release editors desk As it rest with the courts only <https://nhrc.nic.in/> (Last visited 15<sup>th</sup> April, 2023)

<sup>124</sup> State Of U.P. and 2 Others vs National Human Rights Commission WRIT - C No. - 7890 of 2014

### Adding teeth:

If government judgements made by human rights commissioners are instantly enforceable, their effectiveness will be considerably increased. As a result, commissions won't have to waste time and effort reminding government agencies to follow the recommendations or, alternatively, approaching High Courts through a time-consuming judicial process to force the government to comply. Additionally, commissions must have definite and defined authority to take legal action against government agencies that provide incorrect information. This would help avoid the numerous instances where the departmental account of events is typically a cover-up, especially in situations where the police have been accused of infractions.

### Adding the armed forces to their purview:

In places where there is insurgency and internal conflict, there are a lot of human rights breaches. Denying commissions the right to objectively look into complaints about the armed forces and other security personnel just exacerbates the issues and fosters impunity cultures. Instead of the current system, where the National Commission is limited to requesting reports from the national Government, it is imperative that commissions have the ability to summon witnesses and documents.

### Membership of commissions:

The claim that commissions are more like extensions of the government than independent oversight bodies is given validity as non-judicial member posts are increasingly filled by former bureaucrats. Commissions must have members from the civil society and the human rights movement if they are to have any real impact on society. Numerous activists can benefit the Commission by sharing their in-depth knowledge of current developments in the human rights movement and their practical experience.

### Independent hiring of staff:

Human rights commissioners must create a cadre of independent employees with the necessary qualifications. Since the majority of persons on deputation from various government departments have limited expertise and comprehension of human rights problems, the current system of having to respond to them is not satisfactory. Using specifically selected and skilled personnel to help sort through the large volume of complaints can solve this issue.

### Separate agency to look into complaints about the police:

Human rights commissioners spend the majority of their time investigating complaints against the misconduct and abuses of the police. Perhaps it's time to consider a different organisation that would oversee the police in a civilian capacity only. We can draw lessons from other countries' experiences in this area, such as the UK's Independent Police Complaints Commission, South Africa's Independent Complaints Directorate, and Brazil's Police Ombudsmen offices, which are specifically designed to handle police complaints. Governments all across the world are eager to keep things as they are. Governments frequently implement ineffective accountability measures because their existence serves to quell popular demands

without unduly eroding official authority. Hence, civil society organisations must utilise focused advocacy techniques to mobilise citizens across the country. Reform efforts can only succeed when regular people take a keen interest in human rights and good governance. It may be common knowledge that these initiatives would contribute to a qualitative improvement, but persuading the government to approve these and other progressive ideas is a difficult task.

The work of the United Nations covers five main areas:

- Maintain International Peace and Security
- Protect Human Rights
- Deliver Humanitarian Aid
- Support Sustainable Development and Climate Action
- Uphold International Law

In the Middle East and its environs, the United States has engaged in a number of serious transgressions of international law, including war crimes, crimes against humanity, arbitrary detention, use of torture, torture of detainees, and indiscriminate unilateral sanctions. These crimes represent systematic violations of human rights that have long-lasting and severe consequences. The U.S. crimes have seriously undermined local people's rights to life, health, personal dignity, freedom of religion, survival, and development in addition to frequently and repeatedly starting wars in the Middle East and other regions, plunging them into a maze of conflicts and security issues. In the Middle East and its environs, the United States has engaged in a number of serious transgressions of international law, including war crimes, crimes against humanity, arbitrary detention, use of torture, torture of detainees, and indiscriminate unilateral sanctions. These crimes represent systematic violations of human rights that have long-lasting and severe consequences. A significant number of deaths resulted from the U.S. military's egregious torture of prisoners at Abu Ghraib Prison in Iraq beginning in 2003, which was a flagrant violation of international human rights law. A total of over 780 "terrorists" from the Middle East and other regions were imprisoned at the Guantanamo Bay detention facility, many of whom have been kept without being charged with a crime. More than 30 elderly and vulnerable persons are still being held in the jail, denied their freedom on a regular basis, and tortured physically and mentally without end. The media uncovered American jail and inmate maltreatment practises at Bagram Air Base in Afghanistan in September 2021. Evidence from the International Criminal Court investigation showed that American forces in Afghanistan ignored international law, violated norms, and subjected detainees to "torture, cruel treatment, outrages upon personal dignity, rape and sexual abuse" for an extended period of time. Examples of this behaviour include placing at least 30 prisoners in a cage, leaving tortured prisoners to die in secret locations, and parading naked prisoners while wearing blindfolds. According to international human rights law, the United States is required to prevent torture and other cruel, inhuman, or degrading treatment of people. The humiliating and harsh treatment of captives by the American military is a significant breach of their fundamental right to human dignity.

First, some parallels. Both the Russian invasion of Ukraine and the Anglo-US invasion of Iraq were unlawful wars that were waged without a fictitious United Nations endorsement. They are just wars of aggression. At least according to Tony Blair, the primary justification for the Iraq War turned out to be wrong. There were no WMD (weapon of mass destruction) in the hands of the Saddam regime. Despite not being easily refutable, Putin's arguments on NATO and the Donbass are obviously insufficient to justify taking military action in accordance with international law. According to what is known, neither an attack on Russia's own integrity nor a genocide against Russian speakers were imminent or even being considered. Along with Britain, Poland, Australia, and other nations, George Bush also had allies. Any plan to use NATO to carry out the war (as had been done in the similarly unlawful attack on Yugoslavia a few years earlier) was doomed to failure because France and Germany opposed the conflict. However, there was the infamous "coalition of the willing," a group that disregarded popular opinion.

If Belarus's Lukashenko, a guy with a strong sense of self-preservation, is not taken into account, Putin practically operates alone. That does not imply that he seeks pity. The majority of the world's population is represented by the governments that did not participate in the United Nations' condemnation vote. Only a small fraction of people outside of Europe are supporting him. China is an unarmed party. As if there had ever been any thought of punishing the US and Britain for their illegitimate actions! Blair and Bush have not each received a Hague summons for their offences. Since it may be inferred that increasing Iran's influence over its neighbour was not one of their goals, the invaders did not succeed in achieving their strategic aims. Particularly Britain retreated from the occupation in shame. The big western nations, however, got away with it without any remorse. We deal with the effects every day. The primary group waging both pre- and post-war campaigns against the Iraq invasion was the Stop the War Coalition.

UN Hypocrisy:

Days after the Russian invasion, Western nations cited international law, enacted severe penalties, started to welcome refugees with open arms, and supported Ukraine's armed resistance. Outrage at the response has spread throughout the Middle East, where many people perceive an obvious double standard in how the West handles foreign issues. This month marks the beginning of the U.S.-led war in Iraq, which was largely viewed as an illegitimate invasion of one state by another. While refugees escaping to the West were frequently turned away and considered possible security hazards, Iraqis who battled the Americans were labelled terrorists. The Iraq War is a prime illustration of how the US may use human rights as a tool for aggression, claiming UD breaches among other justifications. For instance, Chomsky finds it cynically hilarious that the Bush administration's condemnations of Saddam Hussein's well publicised torture facilities led to domestic support for war action and portrayed the US as the enlightened defender of freedom and democracy. There is virtually no significant change in the core historic belief that if we can dominate Middle Eastern energy resources, then we can rule the globe, as he calls the war on Iraq "a major crime," completely in line with the interests of the US inside the Grand Area.

## UN Hypocrisy on Torture in Guantanamo Bay:

On the 20th anniversary of the arrival of the first prisoners at the Guantanamo Bay detention facility in Cuba, UN experts denounced it as a place of "unparalleled notoriety" and claimed the US government's continuous support for the rule of law was compromised by its continued existence. The independent experts, who were chosen by the Human Rights Council, declared that twenty years of using arbitrary imprisonment without charge or trial combined with torture or other cruel treatment is simply unacceptable for any government, especially one that makes a public claim to upholding human rights. The experts once more urge the United States to shut down this institution and end this repulsive chapter of persistent human rights violations as a freshly elected Member of the Human Rights Council. The United States, which has no regard for the diversity of civilizations, has been hostile to Islamic civilization, destroyed the Middle Eastern region's historical and cultural heritage, carelessly imprisoned and tortured Muslims, and gravely violated the fundamental human rights of people there and elsewhere. First, the "Islamic threat theory" has been widely disseminated by the United States. It has promoted Western and Christian civilisation as being superior, detested non-Western civilization, and stigmatised Islamic civilization by calling it "backward," "terrorist," and "violent." The United States has inflated the "Islamic threat theory" in the world, purposefully misled or even incited people to be hostile to Islam and discriminate against Muslims, and provoked a "clash of civilizations," mobilising public opinion and inventing a justification for its global war on terror. All of these actions were done using the 9/11 attack as an excuse. The "Islamophobia" that the United States generated was previously pervasive in the country and other Western nations, severely impairing the national honour and reputation of Islamic countries as well as their ability to practise their religion freely and violating their right to personal liberty. The legitimate national rights and demands of the Palestinian people, in addition to peace, development, and human rights, have been obstructed by the United States for a very long time. Guantanamo Bay, according to the experts, is a potent emblem of the systemic lack of responsibility for and suppression of the practise of state-sponsored torture and cruel treatment as well as the intolerable impunity given to those who engage in it. "A State sends a signal of complacency and acquiescence to the world when it fails to hold accountable those who have authorised and practised torture and other cruel, inhuman, or degrading treatment," they claimed. The specialists expressed their worry for the fate of the sick and elderly jail population, many of whom had endured the ravages of torture in the past. They denounce the absence of sufficient medical care and rehabilitation for torture victims both at Guantanamo and after transfer, both of which are obviously required under international law. They said that there was no end in sight to the stress that these people were vulnerable and to the suffering that their families were going through. The experts demanded that the US Government close the facility, respect the principle of non-refoulement, return detainees to their homes or to safe third countries, provide remedy and reparation for those who were flagrantly tortured and arbitrarily detained by their agents, and hold those who authorised and participated in torture accountable as required by international law. However, the CIA created a new "torture paradigm" following the 1984 UN Convention against Torture in an effort to ignore international agreements. The paradigm, which emphasises mental rather than physical suffering, was especially designed to be effective. The Reagan administration raised several objections to the Convention

against Torture while it was first being formed, focusing on the word "mental" to reinterpret and redefine torture and permit the infliction of other forms of stress and sensory deprivation. In 1994, when Clinton delivered the Torture Convention to Congress with the identical revisions that Reagan had done, he followed in Reagan's footsteps by "exempting the core of the CIA torture paradigm from the US interpretation of the Torture Convention." The unlawful rendition and imprisonment of several people accused of supporting terrorism or having ties to terrorism, as well as the confinement of "enemy combatants," at Guantanamo Bay, resulted in the suspension of the right to habeas corpus. These actions have enhanced the sanctimonious notion of "American exceptionalism," in addition to breaching the US Constitution and the rights outlined there, and have once more altered the context of US-sanctioned torture. Chomsky says this in reference to interventions in Latin America: "Bush-Cheney-Rumsfeld et al. did make key novelties. Typically, subsidiaries instead than Americans themselves carry out torture in government established torture chambers. Obama quickly put into effect a "Torture Ban" after taking office, which has in principle made this practise illegal. However, it has just reinstated the pre-Bush II standard of utilising proxy forces with US guidance and assistance. Obama's restriction is mainly symbolic in a similar way. After all, during Bush's contentious presidency, torture had not been legally legalised; rather, the definition had been contested. Finally, the Obama restriction is pointless in light of the Geneva Conventions, which the US has repeatedly broken. Despite Obama's presidential order to dismantle Guantanamo Bay, his government has been detaining people without trial and using "extraordinary renditions." Here, i brings up the instance of Lakhdar Boumediene, a citizen of Bosnia and Herzegovina by naturalisation who was detained in Guantanamo Bay from 2002 to 2008. He was charged with supporting Al Qaeda despite scant proof. The Supreme Court concluded in *Boumediene v. Bush* in 2008 that the inmates at Guantanamo were entitled to habeas corpus and that the Bush administration's conduct had been illegal after receiving a habeas corpus petition. The US military is able to hold suspects abroad without interference since the judgement only related to those held at Guantanamo. Bush's replacement for Bagram Airbase in Afghanistan as a result became the new detention facility for enemy combatants, and Obama has continued to detain foreign nationals there without any access to legal procedures or due process. The setting has changed, but the procedure has not. According to Chomsky, the choice by the Obama administration to effectively maintain the Bush strategy has very negative ramifications since it would prolong the cycle of bloodshed and human rights abuses between Islamic extremists and Washington. He specifically provides proof that US policy produces the terrorists it now claims to have defeated. Trump has been open about wanting to bring back water boarding. In one of the Republican presidential primary debates when the candidates fought on who would be more willing to use torture and commit war crimes, Trump said he would be willing to bring back "a hell of a lot worse than water boarding." The wrong legal reasoning that such a method would not constitute torture and would, therefore, be acceptable in detention facilities during times of war was used by the George W. Bush administration to justify water boarding in 2002. *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees* by Human Rights Watch, published in 2011, makes clear that "courts in the US and other tribunals have repeatedly found that water boarding, or variations of it, constitute torture and is a war crime." In reality, "near-drowning" and "submersion of the head in water"

were considered forms of torture in the US Department of State's yearly Human Rights Reports on Sri Lanka (from 2003 to 2007) and Tunisia (from 1996 to 2004). In light of this, using utilitarian justifications for torture in 2017 is a stark break from the leaders of the so-called "free world" who have consistently condemned it.

Consider this statement by Trump in his interview on ABC News Network on 25 January 2017:

*"I have spoken as recently as 24 hours ago with people at the highest level of intelligence, and I asked them the question 'Does it work? Does torture work?' And the answer was 'Yes, absolutely.'"*

Not merely the fact that some individuals think torture is a useful tool for law enforcement and investigation is disturbing in this case. Sadly, this viewpoint will always be held by certain people and officials, notwithstanding the agreement among experts that it is ineffective and in violation of international law. Professor Michael O'Flaherty, the director of the European Union Fundamental Rights Agency, relates how a top Middle Eastern law enforcement officer responded to his hypothetical inquiry, "Is it ever acceptable to torture someone?" by responding, "Yes, if that is the only way to get the suspect to talk." Although this point of view is widespread in some areas, individuals who support international standards and norms vehemently disagree with it. It is typically sufficient to mention that torture is categorically forbidden by international law (as a *jus cogens* requirement). Torture is both unacceptable and prohibited, and this is universally acknowledged by academics and professionals in 2017. The novelty and risk offered by the incoming US president is that he is either unaware of or unconcerned about the fact that the rule against torture is seen as being so basic that even addressing the subject is a rejection of its absolute prohibition.

Imagine someone posing the questions,

"Is rape ever justified? ",

"Does genocide work? ", or

"Are some forms of slavery acceptable?"

If one were to give the asker of such questions the benefit of the doubt, asking about their potential benefits or effectiveness would be a sign of complicity or, if one were to give the benefit of the doubt, a sign of blatant ignorance about fundamental values and legal norms that should be common knowledge for everyone, not least the 45-year-old. Such questions by their very nature would seem to indicate an attempt to whitewash violations of the most serious and grave nature (rape, genocide, slavery), where Rodley's "outstanding achievement, earning him a place in history as an architect of the process leading to the international treaty which establishes acts of torture and other cruel, inhuman, or degrading treatment or punishment as crimes under international law," was praised by Amnesty International.

It takes time to put policies in place that both give victims with reparation and work to prevent and end torture and other types of ill-treatment. Ratification of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) is just the beginning of a process of ongoing

implementation and improvement that will lead to a safer and more liberated society, improved rule of law and governance, strengthened judicial independence, and more effective and fair administration of justice. Each State party is allowed to create laws, policies, practises, and processes that reflect and respond to their own particular national context and character because UNCAT does not specify how its many provisions are to be implemented. It might be helpful to define and prepare the precise short-, mid-, and long-term activities recommended to prevent torture and other forms of cruel treatment or punishment by developing a strategy (or action plan).

Sometimes during reform attempts, in reaction to a specific incidence that highlighted a flaw in policy or practise, or to bring about good change during a moment of transition, strategies for the prevention of torture have been established. To reinforce the rule of law, protect people, and foster positive relationships between the general public and the government, torture prevention techniques have been used even in the absence of such triggers. States have embraced a variety of strategy techniques. Some States have created national plans to avoid torture, either as a stand-alone policy or as a component of a larger national action plan for human rights. Others, notably those involved in the implementation of the Sustainable Development Goals (SDGs), have incorporated components linked to the avoidance of torture into national development plans. Strategies may be created at the federal level and/or at the sub-national levels in federal or other decentralised States. Additionally on a practical level, focused goals and activities for the avoidance of torture have been included into operating strategies of certain departments or services. These methods aid in the reduction of torture and other cruel treatment or punishment. They are referred to as "torture prevention strategies" for the purposes of this instrument.

Implementation:

- 1) Increase public knowledge of the plan's objectives
- 2) Create alliances and undertake implementation consultations
- 3) Conduct training
- 4) Update or put into effect laws, rules, or regulations
- 5) Examine and, if required, modify methods
- 6) Distribute resources and increase employee and institution capabilities
- 7) Create or find resources for tools and materials to help in implementation
- 8) Ask for outside technical assistance.

Relevant areas to review may include:

- 1) Justice
- 2) Policing and law enforcement

- 3) Prisons/Corrections
- 4) Security
- 5) Military
- 6) Health
- 7) Women
- 8) Children/Juvenile justice
- 9) Migration and asylum
- 10) Extradition

Creating or updating a torture prevention plan can help in identifying and reinforcing practises that are effective as well as indicating places where further action may be needed. This usually entails a review of a variety of already in place laws, rules, policies, procedures, and practises. Specific problems affecting socially disadvantaged groups must also be taken into account and represented in the approach. Following an investigation into a specific occurrence or a number of issues, torture prevention plans may be devised as part of a process of taking stock. Other times, a strategy may be created as a part of a process of institutional improvement, resource development, or organisational reform. Ratifying UNCAT is a good time to start planning out the actions that will need to be done to put the Convention into practise, which may be structured within a strategy. Some States have used recommendations from international review processes, including those accepted or noted as part of the Universal Periodic Review (UPR) process, to develop their strategies. Examples include the concluding observations and recommendations made by the UN Committee against Torture under the State Party Reporting Procedure, as well as recommendations from other international and regional human rights bodies and experts.

Giving wide-ranging power to the penal system is making the Police and Armed Forces considered themselves above the Law and “OUTLAWS”. A person can be treated ill only by a person who thought he/she are supreme from others. The starting point of torture is Inequality. Every person is equal in spite of Gender, Nationality, Linguistic, Employment and others. If penal system thought torture is the only solution to get information from a suspect or accused, that is not a right way to approach the investigation. The innocents will suffer more than the accused. Even though USA did ratify the Torture convention, it didn't stop the death of Lloyd who died on the road, while he was arrested by the cops by kneeling in his neck for straight 9 minutes. India didn't ratify the Torture convention but even if India ratified the convention there will be no changes. The police brutality will continue, the police department will treat the complainant just like they treat the accused. The armed force will exploit and torture the Assam and Nagaland Indigenous people and exploit them sexually. Nothing is going to change even if India ratified the torture convention. As a said earlier India need a Separate penal system to investigate and punish the public servants who

involved in torture and the state representative who ordered the torture. That is the only solution to stop torture against the innocent and primitive people.

**“IT IS MORE DANGEROUS THAT EVEN A GUILTY PERSON SHOULD BE PUNISHED WITHOUT THE FORMS OF LAW THAN THAT HE SHOULD ESCAPE.”**

— THOMAS JEFFERSON

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