

# Torture as Crime under International Law & Torture Victims' Rights

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## Abstract

Since the emergence of human rights, torture has received considerable attention and is being prohibited under a number of international and regional treaties and instruments, including the International Human Rights Law, International Humanitarian Law, and International Criminal Law. Despite the great attention paid to torture, results remain below expectations and torture is being committed on a large scale in many countries of the world, according to international and regional committees and non-government organizations. Hence, this study came to cast light on the world community's interest in protecting the individual's rights against torture and to emphasize that protecting individuals against torture in the present is incommensurate with the growing scope of torture, which confirms the wide gap between international regulations formulated over 40 years ago and actual practices in several countries.

## Limitations of the Study

There were some limitations of the study as follows:

- 1- Effective the beginning of the 19<sup>th</sup> century, torture was officially stopped in all advanced countries of Europe and it was prohibited by all laws and constitutions. However, torture reemerged in the 20<sup>th</sup> century in different forms and for different purposes.<sup>1</sup>
- 2- Despite the endorsement of several regional and international agreements prohibiting torture, the gap is widening between international regulations and actual practices across the world due to the failure to implement these regulations. There is a clear difference between legal texts and implementation thereof. While legal texts incriminate torture, member states do not abide by them and sometimes exercise the most hideous forms of torture.
- 3- Although international agreements prohibit torture, they do not provide texts that specify international judicial points of reference for the prosecution of persons who exercise torture, which causes the perpetrators to escape punishment.
- 4- Another issue is the definition of torture. Although many states have been committed to international conventions and treaties and integrated them in their national legislation, they chose to take the narrow interpretation of torture that is restricted to the use of violence, and many states did not state other forms of inhuman treatment in their national legislation.

## Significance of the Study

Examining torture as a crime under international law is particularly significant in relation to the right to protection against torture and giving it top priority by the world community. The issue of torture is becoming increasingly significant because torture continues and is taking place on a larger scale and because of the psychological and physical impact of torture, which is degrading human dignity and leads to taking criminal justice systems off course.

The study is also significant because it is not limited to legal frameworks or torture-related theories, as it addresses the practical aspects of the issue and the international community's efforts to safeguard respect for human rights, particularly the individuals' right to protection against torture in a world that witnesses the cruelest forms of torture in history.

**Keywords :** Torture / torture victims / international law / humans rights

## Introduction

The practice of torture is viewed as one of the most brutal crimes violating human dignity and the individuals' right to life and physical safety. Torture as a crime against humanity and undermines the victims' identity and dignity and weakens their ability to live a normal life.

Torture is incriminated and punishable by all legislation, laws, and international rules, agreements, and conventions. Therefore, severe punishment should be handed down to whoever commits torture or mistreats other persons; hence, emergencies, exceptional cases, national security reasons should not be used as excuses for committing torture because it denigrates human dignity.

The prohibition of torture and mistreatment has specific requirements that are considered as binding by

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<sup>1</sup> In 2000, Amnesty International issued a report making references to acts of torture and mistreatment recorded in more than 130 states. See Al-Madud, Hibah Abd-al-Aziz, *Protection Against Torture Under International and Regional Agreements*, Al-Halabi Publications, 2009, p14.

the international law, and authorities of states should take effective legislative, executive, and administrative measures and sufficient preventive steps to ensure that employees do not commit torture and that urgent and effective investigations into torture claims are conducted, implement penalties and make compensations to victims of torture. In this respect, law enforcement bodies are expected to take measures to protect individuals against such violations and to cooperate with civil society organizations in the effort to end torture.

The Universal Declaration of Human Rights states that no individual may be subjected to torture, cruel or inhuman treatment or punishment, and under the International Covenant on Civil and Political Rights endorsed in 1996 this right shall not be restricted even in the name of emergencies that endanger people's lives. Moreover, the International Humanitarian Law, known as the law of wars, prohibits torture and mistreatment at any time and in all circumstances, and all types of torture and mistreatment shall be prohibited by local or national constitutions and laws.

Fighting torture and mistreatment largely involves the implementation of the principle stating that the actions of officials should be in full compliance with the provisions of the law and that officials are not above the law and should be subject to law like all other citizens.

In the following two sections we will discuss the definition of torture and the rights of torture victims according to international law.

### **Section One: Definition and Elements of Torture**

We need to acknowledge first that the concept of torture has a number of definitions that are applicable by international legal rules. The definition of torture according to the International Convention Against Torture was more inclusive and received consensus by legal experts. The same definition was applied at international and national courts, as we will see in the Subsection 1 below. Regional and international conventions have provided a similar definition for torture, as we will discuss in Subsection 2, while Subsection 3 will address the meaning of torture according to the International Criminal Court (ICC). Torture also has broad definitions, as we will see in Subsection 4 below:

#### **Subsection 1 : Definition of Torture According to Convention Against Torture for 1984<sup>1</sup>**

Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment states the following:

1. For the purpose of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for the purpose of obtaining from the victim or a third person information or a confession, punishing him or her for an act he/she or a third person has committed or is suspected of having committed, or intimidating or coercing him/her or a third person, or for any reason that is 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. The term "torture" does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

The definition provided in Article 1 of the Convention Against Torture is very significant because:

- It identifies the elements that make torture considered to be a crime with the purpose of bringing its perpetrators to justice in accordance with the provisions of the law.
- There is increase in the number of states that have integrated the elements of the aforementioned definition in their national laws banning torture.
- Regional human rights courts and the two special tribunals for Rwanda and former Yugoslavia are increasingly referring to the definition when drawing conclusions related to torture.

#### **Elements of Torture:**

The definition mentioned in Article 1 of the Convention Against Torture carries five elements:<sup>2</sup>

- 1- The act must cause severe physical or mental pain or suffering; including the mental pain in the definition of torture is specifically important because it does not limit torture to physical pain.
- 2- The pain or suffering must be severe; otherwise, the act may not be tantamount to torture under the Convention, although it may constitute a mistreatment.
- 3- The act must be intentionally inflicted, and any pain or suffering that is unintentional may not constitute an act of torture.
- 4- The act must be inflicted for a proscribed purpose like the one set forth in Article 1 or for any reason based on any type of discrimination.
- 5- The act must be inflicted by or at the instigation of or with the consent or acquiescence of a public official

<sup>1</sup> Approved and submitted for signing under UN General Assembly Resolution 39/46 of 10 December 1984, to be effective 26 June 1987.

<sup>2</sup> Sharif Basyuni, *Crimes Against Humanity in International Criminal Law*, 2<sup>nd</sup> Edition, Dar al-Fikr, 1998, p 64.

who has custody or physical control of the victim, and in this regard the person acting in his “official” capacity may not necessarily act on behalf of the state.<sup>1</sup>

### **Subsection 2: Concept of Torture Under International, Regional Conventions**

The concept of torture can be viewed by examining how human rights organizations in the two Americas and Europe approach the concept of torture and identify it in accordance with regional and international conventions and legal regulations.

#### **First: Inter-American Convention To Prevent and Punish Torture**

Article 2 of the Inter-American Convention To Prevent and Punish Torture states that:

“For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.”

Contrary to the definition set forth in Article 1 of the Convention Against Torture, this definition has not addressed the status of the perpetrator, while Article 3 of Inter-American Convention To Prevent and Punish Torture states that the following persons shall be held guilty of the crime of torture:

- a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
- b. “A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.”

#### **Second: European Court of Human Rights**

The European Convention on Human Rights, as amended by Protocol 11, provides that individuals may lodge official complaints of human rights violations under this Convention. Until November 1998, complaints used to be lodged at the European Commission of Human Rights, which could not issue binding verdicts. However, it was possible for the commission to make recommendations to the European Court of Human Rights which issues verdicts that are binding to states parties. After November 1998, complaints were lodged and referred directly to the Court. The opinions of the Commission and the Court’s provisions have considerably developed a meaning for the prohibition of inhuman and degrading torture and mistreatment under Article 3 of the European Convention on Human Rights.<sup>2</sup>

The European Commission of Human Rights, regarding political prisoners held in Greece following the April 1967 coup – acknowledged that the Athena military police committed acts of mistreatment that mostly included the use of clubs (to beat leg hinds of prisoner) or other forms of painful beating for the purpose of obtaining confessions and other types of information. The Commission also noted that there are clearly types of treatment to which all of these descriptions apply because all forms of torture are inhuman and degrading.<sup>3</sup>

In later provisions, the European Court of Human Rights continued to provide specific definitions for “torture and inhuman treatment.” In the case filed by Ireland against the United Kingdom, for instance, the Court introduced the concept of torture that involves “very dangerous and cruel torture” and the Court stated that “the Convention aims to differentiate between torture and intentional inhuman treatment resulting in very cruel and severe pain.”<sup>4</sup>

The Court also acknowledged that subjecting victims to humiliation, threat, sexual suffering, and frequent beating during interrogation in police stations can be labeled as violence that results in severe pain and suffering under the provisions of the Convention Against Torture, and should be considered an act of torture. The Court also stressed that repeated beating by wardens for several days for the purpose of obtaining confessions can clearly be classified as torture in the sense set forth in Article 3 of the European Convention on Human Rights.

The Court maintained that a penalty may be considered humiliating and violating Article 3 of the Convention “if humiliation or insult reaches a specific level and, in any case, the penalty should be other than the usual element of humiliation practices stated in lawful sanctions.”

The European Court of Human Rights’ current approach to the definition of mistreatment under Article 3 of the European Convention on Human Rights can be summarized as follows:

- Mistreatment must reach the minimum level of severity so that it can be included in the scope of Article 3, and the assessment of the minimum threshold is relative and depends on all the circumstances of the case, including the duration of treatment, physical or mental effects, as well as the sex, age and health

<sup>1</sup> Tariq Izzat, *Incrimination of Torture and Related Practices*, Dar al-Nahda al-Arabia, Cairo, 1999, p30

<sup>2</sup> Sharif Basyuni, *Crimes Against Humanity in International Criminal Law*, 2<sup>nd</sup> Edition, 1998, p 68.

<sup>3</sup> Amnesty International, Putting an End to Impunity: Justice for Torture Victims, unpublished report, p 11.

<sup>4</sup> Amnesty International, Putting an End to Impunity: Justice for Torture Victims, unpublished report, p 11.

condition of the victim.

- Torture means “intentional inhuman treatment that causes very serious and cruel suffering.” The Court noticed that torture involves inflicting severe physical or mental pain and suffering and the Court views this “severity” as relative and depending on circumstances. The Court added the element of “purpose” as acknowledged by the UN Convention Against Torture; the Court also took into account the element of “the purpose of obtaining information” and noticed strong inferences from the pieces of evidence indicating that torture took place during investigation into the victim’s suspicious activities.
- On whether a certain treatment is a humiliating act under Article 3 of the European Convention on Human Rights, the Court paid special attention to the purpose of that treatment, stressing that a certain treatment is considered humiliating if the purpose of which is to humiliate and degrade the person in question.<sup>1</sup> The Court also stressed that any violation of Article 3 shall not be completely ruled out concerning the detention conditions because poor conditions constitute a form of humiliating treatment.
- Cruel suffering is considered a humiliating act, and the Court stated that excessive use of force may be considered an act of torture.<sup>2</sup>
- In 2001, the European Union’s Public Affairs Council approved the “guiding principles of the European Union policies toward other states with regard to torture and other forms of cruel, inhuman, or degrading punishment. The guiding principles stress the need “to prevent and eliminate all forms of torture and mistreatment in EU states and across the world.”<sup>3</sup>

In order to enhance this policy, the European Union has continuously urged relevant states to take effective measures against torture and mistreatment, ensure physical safety, prevent violations, and provide necessary information as well as legal guarantees for the persons deprived of their freedom. The European Union also calls on these states to bring to justice the persons responsible for acts of torture and mistreatment and pay compensations to the victims and take measures that are suitable for women, children, asylum seekers, internally displaced persons, immigrants, and other groups that need protection against torture and mistreatment, and to improve conditions in the places where individuals are deprived of freedom, and in accordance with international standards. The European Union also stresses the need for the states to cooperate on legal issues and on training staff for the purpose of preventing torture and mistreatment of any person by official employees or individuals in their official capacity.<sup>4</sup>

### **Subsection 3: Torture Under Rome Statute of the International Criminal Court**

#### **First: Torture as War Crime**

Torture is considered a war crime under the International Human Rights Law and under the Rome Statute of the International Criminal Court.<sup>5</sup>

Torture-related war crime under the Rome Statute of the International Criminal Court consists of the following elements:

- Infliction of severe pain or suffering, whether physical or mental, upon one person or more.
- Infliction of severe pain or suffering for purposes such as obtaining information or a confession, punishment, threat, coercion, or for any reason that is based on any form of discrimination.
- The draft on crime elements provides definitions of other acts of mistreatment that can be classified as war crimes. These definitions include the following:
  - a- Inhuman and cruel treatment (Article 8-2-a) that involves inflicting severe pain or suffering, whether physical or mental, on one person or more.
  - b- Intentional infliction of severe suffering (Article 8-2-c), which includes degrading, humiliating, or attacking one person or more.
  - c- Subjecting persons to physical mutilation, particularly permanent mutilation that is incurable, or inflicting permanent disabilities or removing secondary body organs without being justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest.

#### **Second: Torture as Crime Against Humanity**

For the purpose of defining crimes against humanity, Article 2-6-f of the Rome Institute states that: “Torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”

<sup>1</sup> Sharif Basyuni, *Crimes Against Humanity in International Criminal Law*, 2<sup>nd</sup> Edition, Dar al-Fikr, 1998, p 70.

<sup>2</sup> Walter Kalin, *Fighting Torture*, *International Journal of the Red Cross*, 61<sup>st</sup> Issue, 1998, P428.

<sup>3</sup> Shafi’i, Muhammad Bashir, “*Human Rights Law: Sources, National& International Applications*, 3<sup>rd</sup> Edition, Al-Ma’arif Establishment, 2004, p33.

<sup>4</sup> Shafi’i, Muhammad Bashir, “*Human Rights Law: Sources, National& International Applications*, 3<sup>rd</sup> Edition, Al-Ma’arif Establishment, 2004, p35.

<sup>5</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Held at the Food and Agriculture Organization in Rome on 15 June-17 July 1998.

Contrary to the definition set forth in the Convention Against Torture, this definition of torture as a crime against humanity does not include the element of “specific purpose,” and the draft on elements of crime states that the perpetrator (of a crime) “knows that the conduct is part of – or meant to be part of – this attack.”

### **Third: Rape as Act of Torture**

Committing rape against a prisoner by the prison staff or any security or military official is always considered to be an act of torture, and other forms of sexual suffering that prisoners are subjected to by official employees are always considered to be acts of torture or mistreatment. Sexual suffering includes sexual threats, test of virginity, foreplay, and intentional use of physical search, or the use of explicit sexual language for the purpose of humiliating and degrading others. Sexual violence committed by prisoners may also be an act of torture or mistreatment if authorities fail to abide by regulations such as the one requiring separation between male and female prisoners -- or take suitable measures.<sup>1</sup>

The Rome Statute has defined the elements of the crime of rape to be considered torture as follows:

- 1- “The perpetrator invaded the body of a person by a conduct resulting in penetration, however slight, of any part of the body of the victim or the perpetrator with a sexual organ or of the anal or genital opening of the victim with any object or any other part of the body.”
- 2- “The invasion was committed by force, or by the threat of force or coercion, such as that was caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or another person, or by taking advantage of a coercive environment or the invasion was committed against a person incapable of giving genuine consent.”

It is common knowledge that a person may not be able to give genuine consent if he or she was affected by natural or self-inflicted disability or for a reason related to age.

It is noteworthy that there is a tremendous international effort to prevent the exploitation of legal measures to commit rape on the pretext of detention or interrogation, which shall be considered an act of torture and a violation of international law.

### **Subsection 4: Broad Definition of Torture**

The general understanding of the scope of torture and mistreatment has expanded vastly since the approval of the Universal Declaration of Human Rights in 1948. In addition to the traditional use of torture as a means of interrogation, there are other ways to inflict harm on the victim which are classified as acts of torture and mistreatment according to human rights international bodies, courts, regional commissions of human rights, and the special tribunals for Rwanda and former Yugoslavia. Hence, certain behaviors can be described as torture as follows:

#### **1. Intimidation**

The notion of mental suffering is one of the key elements of the definition of torture, and intimidation is one of the possible purposes of torture under the Convention Against Torture, and fear of physical torture may itself constitute psychological torture. The UN Human Rights Committee maintained that “intimidation and coercion can be tantamount to torture or cruel, inhuman, or degrading treatment.”<sup>2</sup>

#### **2. Sensory Deprivation**

Sensory deprivation involves hooding, wall-standing, subjecting victims to continuous noise, deprivation of sleep, food, and drink. The European Commission of Human Rights has decided that “joint employment of methods that prevent the use of body senses, including eyes and ears, directly affects the persons involved, both physically and mentally, and resistance in such circumstances and conditions cannot continue because the persons who put up more resistance may give up at an early stage when they are subjected to advanced techniques aimed to break their will or even crush it.”<sup>3</sup>

#### **3. Detention Conditions:**

Overcrowding, insufficient amenities -- including heating, ventilation, sewage networks, accommodation, food, entertainment, and communication with the outer world -- as well as the lack of medical care, basic needs for personal health of women, and prolonged solitary confinement are some of the issues that international human rights bodies and mechanisms, as well as regional human rights courts, referred to as possible forms of mistreatment.

#### **4. Enforced Disappearance**

Enforced disappearance deprives the persons subjected thereto from the protection of law and inflicts on the victim and his or her family extreme suffering, and it violates international law regulations that guarantee the person the right to be treated as an individual under the law and the right to freedom and security and not to be

<sup>1</sup> Shafi'i, Muhammad Bashir, “Human Rights Law: Sources, National & International Applications, 3<sup>rd</sup> Edition, Al-Ma'arif Establishment, 2004, p 38.

<sup>2</sup> Karima Bennoune, “A Practice Which Debases Everyone Involved”: Corporal Punishment Under International Law, in 20 ANS CONSACRS A LA REALISATION D'UNE IDtE 203(1999), unpublished, p 7.

<sup>3</sup> Karima Bennoune, “A Practice Which Debases Everyone Involved”: Corporal Punishment Under International Law, in 20 ANS CONSACRS A LA REALISATION D'UNE IDtE 203(1999), unpublished, p 8.

subjected to torture or any other form of cruel, inhuman, or degrading treatment. Enforced disappearance also violates the right to life or poses a serious danger to the person's life.<sup>1</sup>

The suffering that the victim's relatives may experience could reach the level of torture and mistreatment because depriving them of any official information about detention circumstances and charges leveled against the victim is considered a failure on the part of authorities to address the distress and pain of the relatives, which may constitute an act of torture.

#### **5. Medical and Scientific Experimentation Without Consent**

Article 7 of the International Covenant on Civil and Political Rights states that no person may be subjected to medical or scientific experimentation without his or her free consent. Hence, biological experiments were identified by the four Geneva treaties of 1949 as acts of torture or mistreatment and shall be punishable as serious violations of such conventions.

#### **6. Excessive Use of Force in Law Enforcement**

The United Nations has adopted two important conventions to restrict the use of force in the enforcement of law; 1. Code of Conduct for Law Enforcement Officials, 2. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.<sup>2</sup>

The two instruments explicitly emphasize the principles of necessity and guiding proportionality whereby the use of force shall only be used to achieve two purposes: 1. Avoid committing crimes or 2. Carry out legal arrests of criminals or suspected criminals or help in doing so, and force may not be used in any case in a manner that is not commensurate with the legitimate purpose desired.

In this regard, all law enforcement officials should be selected by proper screening procedures; have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training with special attention to issues related to police ethics and human rights, especially during investigations, and be informed of alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviors, as well as the methods of persuasion, negotiation and mediation, and technical means, with a view to limiting the use of force and firearms.

Meanwhile, law enforcement officials often need restraint instruments to control the movement of dangerous prisoners or prevent them from escaping during their transfer from one location to another. However, the restraint instruments are subject to misuse and, if used improperly, can cause pain, injuries, and even death; and they may be used for the exercise of torture or as a support tool for that purpose, and some restraint instruments and means are used in a cruel, inhuman, or degrading manner.

There were several cases in which restraint instruments were used when there was no real security necessity for this. For example, dying prisoners were handcuffed and female prisoners in labor were also cuffed, and in other cases pregnant women were handcuffed and had their wastes tied up, putting their life at risk.

Restraint instruments, such as handcuffs, chains, irons and strait-jackets, shall not be applied as a punishment. Furthermore, chains or irons shall not be used as restraints.<sup>3</sup>

In any case, the instruments the use of which is cruel, inhuman, or degrading such as leg iron, sharp and pointed cuffs, electric shock belts, as well as manufacturing and promoting these instruments should be banned.

#### **7. Violations Committed in Armed Conflicts**

Using civilians as human shields and forcing them to carry out acts to be used for military operations such as digging tunnels and in dangerous circumstances in the battlefield, taking them hostage, and any other acts shall be considered acts of torture that violate the individual's dignity and humanity. For example, the special international tribunal for former Yugoslavia had condemned violations of laws of war and exercise of torture against unarmed civilians.

#### **Section Two: International Law Resources to Prevent and Punish Torture**

Torture and mistreatment are prohibited under the International Human Rights Law, the International Humanitarian Law (war laws), and the Public International Law.

The exercise of torture or mistreatment of individuals shall be prohibited if committed as part of war crimes, crimes against humanity, or genocide. International standards of human rights provide measures that governments should take to prevent torture and mistreatment, investigate into alleged cases thereof, bring to justice officials responsible for committing these crimes, and make compensations for the victims. Generally, prohibition and punishment of torture can be reflected in a set of international legal rules that we will discuss in the following subsections.

<sup>1</sup> Karima Bennoune, "A Practice Which Debases Everyone Involved": Corporal Punishment Under International Law, in 20 ANS CONSACRS A LA REALISATION D'UNE IDÉ 203(1999), unpublished, p 18.

<sup>2</sup> UN General Assembly, Resolution No. 34/169 of December 1976, Resolution No. 45/166 of December 1990.

<sup>3</sup> Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955, Resolution No. 2076 of 1966.

### **Subsection 1: General Instruments on Human Rights:**

The Universal Declaration of Human Rights is considered a very important instrument that applies to all states, and the International Covenant on Civil and Political Rights is the most prominent international convention on civil and political human rights and it is binding to states parties, whose number amounted to 148 as of 2003.<sup>1</sup>

The articles set forth in the International Covenant on Civil and Political Rights stress the danger of torture, like in Article 2 on respecting and safeguarding human rights; Article 6 on the right to life; and Article 9 on the right to liberty and safety; Article 10 on the right of individuals deprived of liberty to be treated with humanity and respect for the inherent dignity of the human person; and Article 14 on the persons' right to fair trials. Moreover, torture and mistreatment are prohibited under the approved four regional treaties on human rights, African Convention on Human Rights and Peoples (Article 5), Inter-American Convention on Human Rights (Article 5); the European Convention on Human Rights (Article 3); and the Arab Charter on Human Rights (Article 13), which has not come into force yet.

### **Subsection 2: Instruments on Prohibition and Prevention of Torture**

The UN Convention Against Torture obligates states parties, who numbered 130 until 2003, to apply a number of measures related to preventing torture, investigating it, bringing to justice the persons responsible for committing it, both on the national level or in accordance with the international judicial jurisdiction, and making compensations for victims. The articles of the convention apply to torture and other forms of mistreatment.

There are two regional conventions that are specifically related to torture:

- Inter-American Convention To Prevent and Punish Torture provides that states parties of the two Americas shall undertake judicial jurisdiction on torture and identify other measures related to preventing torture, investigating into it, bringing perpetrators to justice, and making compensations for the victims. The number of states parties was 16 until 2003. This convention does not dedicate a separate monitoring body similar to the UN Commission Against Torture; rather, Article 17 of the Convention provides that states parties shall undertake to inform the Inter-American Commission on Human Rights of any measures they adopt in implementation of this Convention.

- The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (European Convention Against Torture) which states that a European committee shall be formed to prevent torture and that the committee shall be entitled to inspecting places where persons are deprived of their liberty in the states parties, which numbered 44 until 2003. Under the first protocol annexed to the Convention, states other than states parties in the Council of Europe may be invited to become states parties to the Convention, and since 1994 committing to signing the Convention has been a condition for joining the Council of Europe.<sup>2</sup>

### **Subsection 3: International Humanitarian Law**

Torture and mistreatment are prohibited in all circumstances under the International Humanitarian Law that constitutes the international law regulating the behavior of armed conflict parties, also known as the war laws. Moreover, the four Geneva treaties of 12 August 1949 prohibit torture or inhuman mistreatment, including biological experimentation or intentional infliction of severe pain or seriously endangering physical safety or health of persons who are protected under these conventions. These acts shall be considered "serious violations of the Convention" if committed against persons who are under protection.

The two additional protocols annexed to the Geneva conventions, both approved in 1977, expand the list of prohibited acts. The first additional protocol on international armed conflicts expands the list of serious violations (Articles 58, 11) and reiterates the prohibition of "endangering the life, health, and physical or mental safety," and particularly "all forms of torture, whether physical or mental, corporal punishment, mutilation, enforced prostitution, or any form of indecent assault (violation of honor) committed against persons who are under the control of any party to the conflict (Article 75). The protocol also states that women shall be protected against rape, enforced prostitution, or any form of violation of honor (Article 76), and that children should be protected against indecent assault (Article 77). The second additional protocol on non-international armed conflict prohibits "endangering the life, health, and physical or mental safety of persons," particularly murder, let alone cruel mistreatment such as torture, mutilation, or any other form of corporal punishment against persons who are not directly involved in or stopped from participating in hostilities, whether the liberty of these persons has been restricted or not (Article 4). The Geneva conventions and their additional protocols (Article 4) provide guarantees and standards related to arrest and measures to protect women and children, many of which are similar to the ones stated by the international standards for human rights.

The International Court of Justice has stated that, under the general basic principles of the International

<sup>1</sup> Abu-alWafa, Ahmad, Mediator in Public International Law, 4<sup>th</sup> Edition, Dar al-Nahda al-Arabia, 2004, p 26.

<sup>2</sup> Evans, Malcolm. Preventing Torture: A Study of the European Convention for the Prevention of Torture & Inhuman or Degrading Treatment or Punishment (Oxford University Press), 1993, p 12.

Humanitarian Law, “the rules set forth in joint Article 3 of the four Geneva treaties shall constitute” the minimum standards that “apply to international and non-international armed conflicts.”<sup>1</sup> Based on this rule, torture and other forms of mistreatment shall be prohibited under Article 3 as it contravenes the Public International Law, the rules of which apply to all states, whether they are parties to the treaty or not, because the provisions of international norms are final and constitute the source of the general rules of international law, so a state does not have to be party to the convention in order to abide by its provisions.

#### **Section Four: International Crimes: War Crimes, Crimes Against Humanity, Genocides**

The crimes stated in the international law are the crimes committed by individuals and provided by the international law that allows or requires states parties to make these crimes punishable.

The adoption of the Rome Institute for the International Criminal Court has led to the establishment of a permanent international court tasked with the prosecution of perpetrators of war crimes, crimes against humanity, and genocides.

Under the Rome Institute, the court’s jurisdiction shall cover the following crimes, many of which involve the commission of torture or mistreatment:

1. War crimes under the Rome Institute (Article 8) include torture, inhuman mistreatment -- “both of which constitute a serious violation of the Geneva conventions,” and cruel mistreatment – which violates Article 3 that is common among the Geneva conventions. Another form of war crimes is infringement on personal dignity, particularly humiliating and degrading treatment.
2. Torture can be tantamount to a crime against humanity, not a war crime, if committed as part of a large-scale or systematic offensive that targets any civilian population, with the knowledge of the offensive; that is, when torture involves committing multiple acts against civilian population based on a state policy or an organizational policy, but the offensive shall not involve any military action, otherwise it will become a war crime.
3. Genocide is defined under Article 6 as a series of specific acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group,” and under the Convention Against Genocide the “specific acts” list includes “the intent to cause serious damage to the group’s physical or mental safety.”

To sum up, perpetrators of any act of torture or mistreatment that falls in the category of prohibited acts under Article 8 of the Rome Institute may be tried before the International Criminal Court for committing war crime if committed during international or non-international armed conflicts.

The perpetrator of any act of torture or mistreatment that falls in the category of prohibited acts under Article 7 may be prosecuted for committing a crime against humanity if “committed as part of a large-scale or systematic offensive targeting any civilian population with the knowledge of the offensive.”

The perpetrator of any act of torture or mistreatment that inflicts serious physical or mental suffering on a national, ethnical, racial or religious group may be prosecuted for committing genocide in the event of committing the act with the intent to destroy the group in whole or in part.

A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person commits such a crime, whether as an individual, jointly with another or through another person, orders, solicits or induces the commission of such a crime (Article 25), and the defense on the ground that orders were received from superiors may not be accepted (Article 33). Leaders or superiors may not be relieved of criminal responsibility for acts committed by persons under their control or command (Article 28), nor shall any person be relieved of criminal responsibility because of his or her official capacity even if that person enjoys immunity under the applicable national laws (Article 27).

#### **Conclusion**

The individual’s right to protection against torture is a basic, constitutional, and legislative right that has received considerable attention by international conventions that emphasized the prohibition and incrimination of torture even in emergencies or armed conflicts to the extent that this right has become one of the key subjects of international law. The prohibition of torture and grounds of this prohibition have gone through several phases of development, particularly through social realization and awareness of such phases, which later developed as social benefits or concepts integrated in laws or other common social aspects, locally and then internationally.

These concepts culminated internationally in the establishment of the Universal Declaration of Human Rights, the provisions and resolutions of the International Court of Justice, and related international treaties.

The researcher came up with a number of conclusions and recommendations that he hopes will be implemented on the ground.

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<sup>1</sup> Abu-alWafa, Ahmad, Mediator in Public International Law, 4<sup>th</sup> Edition, Dar al-Nahda al-Arabia, 2004, p 31.



## Conclusions and Recommendations

1. Torture and its definition under national legislation should be considered a serious crime the commission of which should receive maximum penalty, and in states where the law does not grant authorities jurisdiction to prosecute and punish the perpetrators of torture, the age of such legislation should be taken into account whenever a crime is committed, regardless of the nationality of the perpetrator or victim (full jurisdiction).
2. The states should be parties to the Convention Against Torture or any other form of cruel, inhuman, or degrading treatment or punishment, the International Covenant on Civil and Political Rights, and the Rome Institute for the International Criminal Court for the purpose of prosecuting perpetrators of torture within the framework of genocides, crimes against humanity, or war crimes, and at the same time ensure that national courts have the jurisdiction necessary for prosecuting and punishing the perpetrators of these crimes.
3. All forms of torture should be prevented and condemned whenever they occur, and law enforcement bodies should emphasize that the persons in charge of detention places where violations took place should be personally responsible for such violations, and for the purpose of implementing these recommendations, these bodies should specifically make surprise inspection visits to police stations and pre-trial detention centers and prisons known for such types of mistreatment. Moreover, public awareness campaigns should be organized to enable the population to particularly file complaints about the treatment they receive from law enforcement officials.
4. Interrogation should only take place in official centers and secret detention centers should be shut down by the law. The detention of any person in secret and/or unofficial detention places should be considered a crime punishable by law and no piece of evidence presented to the court should be accepted if obtained from detainees held in unofficial detention places.
5. Most acts of torture take place during solitary confinement, and for the purpose of avoiding the occurrence of torture, the detainee's relatives should be informed of the place where he or she is held and of his or her detention circumstances. In exceptional cases when immediate contact with the detainee could allegedly raise genuine security concerns, and provided that the judiciary approves the ban on the contact, the detainee should at least be allowed to meet with an independent lawyer or one recommended by the local bar association. Moreover, in the circumstance of solitary confinement, blindfolding and hooding should be prohibited because the victim would not be able to recognize the identity of the person subjecting him or her to torture.
6. Whenever a person, relative, or lawyer files a complaint of torture, an investigation should be conducted immediately, and unless the claims are conspicuously groundless, the officials involved should be suspended pending the investigation results or any subsequent legal or disciplinary measures, and when the claims of torture or any form of mistreatment are made during the prosecution process, the local public prosecution should be responsible for proving without any doubt that the detainee's confessions were not obtained by using illegal means, including torture or any similar act of mistreatment.
7. During the training of staff concerned, it should be particularly emphasized that the principle of prohibiting torture is absolute and irreducible and that the officials in charge should not obey their superiors' orders to commit torture, and in all circumstances law enforcement officials should be well informed of the rules they are expected to apply.

## References

1. Abu AlWafa, Ahmad, Mediator in Public International Law, 4<sup>th</sup> Edition, Dar al-Nahda al-Arabia, 2004.
2. Evans, Malcolm. *Preventing Torture: A Study of the European Convention for the Prevention of Torture & Inhuman or Degrading Treatment or Punishment* (Oxford University Press).
3. Karima Bennoune, "A Practice Which Debases Everyone Involved": Corporal Punishment Under International Law, in 20 ANS CONSACRS A LA REALISATION D'UNE IDEE 203(1999).
4. Al-Shafi'i, Muhammad Bashir, "Human Rights Law: Sources, National & International Applications, 3<sup>rd</sup> Edition, Al-Ma'arif Establishment, 2004.
5. Sharif Basyuni, Crimes Against Humanity in International Criminal Law, 2<sup>nd</sup> Edition, 1998.
6. Tariq Izzat, Incrimination of Torture and Related Practices, Dar al-Nahda al-Arabia, Cairo, 1999, p3.
7. Walter Kalin, Fighting Torture, International Journal of the Red Cross, 61<sup>st</sup> Issue, 1998, P428.
8. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, UN General Assembly, Resolution No. 39/46 of December 1984.
9. Code of Conduct for Law Enforcement Officials, UN General Assembly, Resolution No. 34/169 of December 1976.
10. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Resolution No. 45/166 of

December 1990.

11. Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.
12. Human Rights Reporting Guide, UN Center for Human Rights, Bonitar, United Nations, 2003.
13. Amnesty International, Putting an End to Impunity: Justice for Torture Victims, International Journal of Red Cross, Issue 87, August 2001, p 123.