

## **OBLIGATION OF BANGLADESH UNDER ARTICLE 4 OF THE UN CONVENTION AGAINST TORTURE AND OTHER CRUEL INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 1984: A PERFORMANCE AUDIT**

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### **1. Introduction**

Torture is universally condemned, and whatever its actual practice, no country publicly supports torture or opposes its eradication<sup>1</sup>. Therefore, one of the most fundamental aspects of human rights law is the universal proscription of torture. The Universal Declaration of Human Rights, 1948 holds that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'<sup>2</sup>. This sentiment is similarly expressed in the 1966 International Covenant on Political and Civil Rights<sup>3</sup> and the 1949 Geneva Convention dealing with the protection of the prisoners of war<sup>4</sup>. Regional human rights instruments like the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>5</sup>, the 1969 American Convention on Human Rights<sup>6</sup> and the 1981 African Charter on Human and Peoples' Rights also carry the same sentiment<sup>7</sup>.

The General Assembly of the United Nations adopted in 1975 the Declaration on Protection of All Persons from Being Subjected to Torture and other Cruel, Inhumane or Degrading Punishment<sup>8</sup> and later, in 1977 the General Assembly mandated the UN Commission on Human Rights to

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<sup>1</sup> REDRESS, Bringing the International Prohibition of Torture Home (National Implementation Guide for the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), January 2006, p. 11, available at: <<http://www.redress.org/publications/CAT%20Implementation%20paper%2013%20Feb%202006.pdf>> (accessed on April 22, 2006).

<sup>2</sup> Article 5.

<sup>3</sup> See, Article 7.

<sup>4</sup> See, Article 99.

<sup>5</sup> See, Article 3.

<sup>6</sup> See, Article 5.

<sup>7</sup> See, Article 5.

<sup>8</sup> G.A. Res. 34/52, U.N. GAOR, 39th Sess., Supp. No. 34, UN Doc. A/10034 (1975).

draft a convention against Torture<sup>9</sup>. Accordingly, the drafting commenced in 1978<sup>10</sup>. Finally in 1984, the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (hereinafter referred to as CAT) was adopted<sup>11</sup>. In its final form, the CAT was based substantially, but not exclusively, on the Declaration Against Torture<sup>12</sup>. The CAT entered into force on 26 June 1987<sup>13</sup>. This is the first binding international instrument exclusively dedicated to the struggle against torture<sup>14</sup>. It is one of the most widely ratified human rights conventions with 141 state parties as of 26 January 2006<sup>15</sup>. The CAT itself is supplemented by several other UN General Assembly initiatives promulgated in part as a result of pressure from global civil society<sup>16</sup>. These developments included the drafting of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment<sup>17</sup>, the Code of Conduct for Law Enforcement Officials<sup>18</sup>, and the 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<sup>19</sup>. In 1985, the UN Commission on Human Rights established the office of the Special Rapporteur on Torture. The treaty-making process and the enforcement mechanisms created by the

<sup>9</sup> See G.A. Res. 32/62, U.N. GAOR, 32d Sess., Supp. No. 45, UN Doc. A/32/355 (1977).

<sup>10</sup> Nagan, Winston P. & Atkins Lucie, 'The International Law of Torture: From Universal Proscription to Effective Application and Enforcement', *Harvard Human Rights Journal*, Vol. 14, Spring 2001, pp. 97-98, available at: <<http://www.law.harvard.edu/students/orgs/hrj/iss14/nagan.shtml>> (accessed on April 16, 2006).

<sup>11</sup> G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, UN Doc. A/39/51 (1984).

<sup>12</sup> *Supra* note 10, at p. 98.

<sup>13</sup> Website: <<http://www.ohchr.org/english/countries/ratification/9.htm>>(accessed on February 11, 2006).

<sup>14</sup> *Supra* note 1, at p. 12.

<sup>15</sup> *Supra* note 13.

<sup>16</sup> See, G.A. Res. 3218, UN GAOR, 29th Sess., Supp. No. 31, at 82, UN Doc. A/9631 (1974) (is exemplifying the enactment of a resolution resulting from sustained pressure by national and international non-governmental organizations).

<sup>17</sup> G.A. Res. 43/173, U.N. GAOR, 43rd Sess., Supp. No. 49, UN Doc. A/43/49 (1988).

<sup>18</sup> G.A. Res. 34/169, U.N. GAOR, 34th Sess., Supp. No. 46, at 185, UN Doc. A/34/46 (1979).

<sup>19</sup> G.A. Res. 37/194, U.N. GAOR, 37th Sess., Supp. No. 51, at 210, UN Doc. A/37/51 (1982).

United Nations are in itself an extremely important part of the efforts to universally eradicate torture<sup>20</sup>.

Under international law, states parties are required to ensure that their domestic laws are in line with their obligations under the Conventions<sup>21</sup>. By now, many states have enacted specific laws to implement their obligations under the CAT. References, for examples, can be made to the Australian Crimes (Torture) Act of 1988, the Mexican Federal Act to Prevent and Punish Torture of 1991, the Netherlands Act of 29 September 1988 for the implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment<sup>22</sup>, the Sri Lankan Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act<sup>23</sup>, the Torture Prohibition Act of 1988 of Yukon Territory in Canada, the Crimes of Torture Act of 1989 in New Zealand and the Torture Act of 2000 in the United States<sup>24</sup>. Nevertheless, there are serious shortcomings in national laws purporting to implement Convention (CAT) obligations<sup>25</sup>. This is primarily because; the implementation of the Convention has not attracted a high degree of public international interest and has in most countries not been a policy priority. Accordingly, less work and attention has been devoted to furthering the incorporation of the Convention into domestic law<sup>26</sup>. In such a backdrop of international scenario, audit on implementation of the CAT or any of its provision in the domestic arena of a country is utmost importance.

Bangladesh acceded to the CAT on October 5, 1998 but it has taken hardly any steps to see it implemented<sup>27</sup>. According to the Bangladesh Rehabilitation Center for Trauma Victims, there were 2,297 victims of

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<sup>20</sup> Supra note 10, at p. 97.

<sup>21</sup> See, The Vienna Convention on the Law of Treaties, 1969, Article 26.

<sup>22</sup> Now stands repealed by the International Crimes Act of 19 June 2003.

<sup>23</sup> Act No.22 of 1994.

<sup>24</sup> 18 U.S.C. §§ 2340, 2340A, and 2340B.

<sup>25</sup> Supra note 1, T p. 3.

<sup>26</sup> Ibid., pp. 108-109.

<sup>27</sup> 'Civil and Political Rights, Including the Questions of Torture and Detention' (Written statement submitted by the Asian Legal Resource Centre (ALRC), a non-governmental organisation in general consultative status, to the Commission on Human Rights, 61st Meeting), available at: <[http://www.alrc.net/doc/doc/chr61/ALRC-11a-Torture\\_in\\_Bangladesh.rtf](http://www.alrc.net/doc/doc/chr61/ALRC-11a-Torture_in_Bangladesh.rtf)> (accessed on April 29, 2006).

torture and 15 deaths due to torture by security forces during 2005<sup>28</sup>. This figure poses a very legitimate question, i.e., to what extent the CAT has brought about domestic change in Bangladesh. Search for an answer to this question at international level is, to a great extent, jeopardized since Bangladesh has not submitted its initial reports to the Committee against Torture, overdue since 4 November 1999. Any initiative to find out an answer to this question or any partial element of this question is, therefore, a significant step towards making the international commitment to eradicate torture a domestic reality, at least so far Bangladesh is concerned.

This article audits the discharge of obligation of Bangladesh arising out of one provision of the CAT, namely, Article 4 which runs as such: '[1] Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person, which constitutes complicity or participation in torture. [2] Each State Party shall make these offences punishable by appropriate penalties, which take into account their grave nature'. In doing so, the nature and extent of the obligations of Bangladesh under Article 4 of the CAT have been outlined, to what extent these obligations are carried out by Bangladesh are assessed and thereafter a humble conclusion is drawn with some recommendations.

## **2. Obligations of Bangladesh under Article 4 of the CAT**

Article 4 of the CAT runs as follows: '[1] Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person, which constitutes complicity or participation in torture. [2] Each State Party shall make these offences punishable by appropriate penalties, which take into account their grave nature'. Bangladesh which has ratified the CAT is therefore bound by Article 4 of the CAT to ensure two different things, namely, criminalization of and appropriate penalties for torture.

### **Criminalization of Torture**

The first obligation of Bangladesh under Article 4 of the CAT is to ensure that all acts of (i) torture, (ii) attempt to torture and (iii) complicity or participation in torture are offences under its criminal law. The primary condition for discharge of this obligation is to define torture under the domestic criminal law. What is the international norm of this definition? A number of prior international agreements and declarations condemned and/or prohibited torture, but the CAT appears to be the first international

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<sup>28</sup> Website: <<http://www.ircct.org/Default.aspx?ID=632>> (accessed on March 22, 2006).

agreement to actually attempt to define the term<sup>29</sup>. Consequently, when a definition of this concept is needed, it is usually referred to this treaty<sup>30</sup>. CAT defines torture as ‘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 from, inherent in or incidental to lawful sanctions’<sup>31</sup>. This definition has been held to constitute customary international law<sup>32</sup>. The broad convergence of international instruments and international jurisprudence suggests a general acceptance of the main elements contained in the definition set out in Article 1 of the CAT<sup>33</sup>. However, it is increasingly widely recognized that the definition in Article 1 is not necessarily applicable in its totality in other sphere of international law<sup>34</sup>. In a decision by the International Criminal Tribunal for the former Yugoslavia, it was stated, ‘the definition of torture contained in the convention cannot be regarded as the definition of torture under customary international law, which is binding regardless of the context in which it is applied’<sup>35</sup>. Consequentially, definition of torture under customary international law may be different from that under the CAT. But so far the obligation of Bangladesh under Article 4 of the CAT is concerned, the most effective way to ensure the compliance of this obligation is to insert a definition of torture in conformity with Article 1 of

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<sup>29</sup> *UN Convention Against Torture (CAT): Overview and Application to Interrogation Techniques* (CRS Report for Congress, USA, updated February 10, 2005), p.1, available at: <<http://www.fas.org/sgp/crs/misc/RL32438.pdf>> (accessed on April 15, 2006).

<sup>30</sup> See, Eur. Ct. H.R., *Selmouni vs. France*, Judgment of 28 July 1999, at p. 97

<sup>31</sup> See, The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 1, Paragraph 1.

<sup>32</sup> Prosecutor vs. Anto Furundzija, Judgment of the International Criminal Tribunal for the former Yugoslavia, 10 December 1998, para 160.

<sup>33</sup> *Ibid.*, para 160-161.

<sup>34</sup> See, Evans, Malcolm, ‘Getting to Grips with Torture’ (Background Paper 1, Seminar on ‘The Definition of Torture’ organized by the Association for the Prevention of torture, November 2001).

<sup>35</sup> See, Prosecutor vs. Kunarac, Kovac and Vukovic, Case No. IT-96-23/1-T, 22 February 2001, para 482.

the CAT in the criminal law of Bangladesh and make it punishable. Inserting a clear definition of torture into the relevant national law minimizes the possibility that courts will fail to interpret the crime in line with international requirements<sup>36</sup>. The Committee against Torture has repeatedly called on states to list torture as a specific offence in domestic criminal codes<sup>37</sup> and/or to ensure that the offence of torture is consistent with Article 1 of the Convention against Torture<sup>38</sup>. In its consideration of initial and periodic reports from state parties, the Committee Against Torture frequently includes in its list of recommendations that ‘a definition of torture in conformity with the definition appearing in Article 1 of the CAT’ be inserted into domestic law as a separate type of crime<sup>39</sup>. In its more recent reports, the Committee has opined that such a definition is a requirement of the CAT<sup>40</sup>. However, it is not the explicit opinion of the Committee Against Torture that the definition of torture as offered by the CAT should be reproduced exactly in national criminal legislation. Rather, states parties must include a definition of torture, which covers the CAT definition<sup>41</sup>. Nevertheless, even many national laws enacted to implement

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<sup>36</sup> Supra note 1, at p. 38.

<sup>37</sup> See, for example, the Concluding Observations of the Committee against Torture in respect of: Denmark, CAT/C/CR/28/1 28 May 2002; Russian Federation, CAT/C/CR/28/4 28 May 2002; Saudi Arabia, CAT/C/CR/28/5, 28 May 2002; Sweden, CAT/C/CR/28/6, 28 May 2002; Zambia, CAT/C/XXVII/Concl.4, 23 November 2001; Kazakhstan, A/56/44, paras. 121-129, 17 May 2001; Costa Rica A/56/44, paras.130-136, 17 May 2001; Belarus, A/56/44, 20 November 2000; Paraguay, A/55/44, 10 May 2000; Poland, A/55/44, 5 May 2000; Kyrgystan, A/55/44, 18 November 1999; Azerbaijan, A/55/44, 17 November 1999; Austria, A/55/44, 12 November 1999; Finland, A/55/44, 12 November 1999; Bulgaria, A/54/44, 7 May 1999.

<sup>38</sup> See, for example, the Concluding Observations of the Committee against Torture in respect of: Israel, CAT/C/XXVII/Concl.5, 23 November 2001; Indonesia, CAT/C/XXVII/Concl.3, 22 November 2001; Slovakia, A/56/44, paras.99-105, 11 May 2001; Bolivia, A/56/44, paras. 89-98, 10 May 2001; Uzbekistan, A/55/44, 19 November 1999; Canada, A/56/44, paras.54-59, 6 December 2002; Armenia, A/56/44, 17 November 2000; Slovenia, A/55/44, 16 May 2000; USA, A/55/44, 15 May 2000; El Salvador, A/55/44, 12 May 2000; China, A/55/44, 9 May 2000; Morocco, A/54/44, 17 May 1999.

<sup>39</sup> Burgers, J.H. and Danelius, H., *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, 1988), at p.130.

<sup>40</sup> See, e.g., Initial Report of Armenia (1995), Official Records of the General Assembly, 51st Session, Supplement No. 44 (A/51/44).

<sup>41</sup> CAT/C/SR.268 ART.2. See also the Conclusions and Recommendations to the Report of Poland (CAT/C/25/Add.9).

the CAT obligations of the concerned states do not define the act of 'torture' in full conformity with Article 1 of the CAT<sup>42</sup>. Many states have anti-torture provisions in their constitutions or criminal codes. However, in most cases such provisions and the limited national jurisprudence that interprets them, do not provide a comprehensive anti-torture framework and their application has often been piecemeal and inconsistent<sup>43</sup>. The concluding observations of the Committee Against Torture in respect of the latest report of Sweden were that 'While the specific arrangements for giving effect to the Convention in the domestic legal system are left to the discretion of each state party, the means used must be appropriate, that is, they should produce results which indicate that the state party has fully discharged its obligations. Sweden has opted for the dualistic system as regards incorporation of international treaties into domestic law, and should therefore adopt appropriate legislation for the incorporation of the Convention against Torture. The Committee notes that Swedish domestic law does not contain a definition of torture in keeping with Article 1 of the CAT. Above all, neither torture nor cruel, inhuman and degrading treatments are identified as specific crimes and offences in domestic criminal law'<sup>44</sup>. France was also criticised by the UN Committee Against Torture for failing to adopt a definition of torture in line with Article 1 of the Convention<sup>45</sup>.

However, the CAT specifically notes that its definition of torture is 'without prejudice to any international instrument or national legislation, which does or may contain provisions of wider application'<sup>46</sup>. It is to be noted here that the Rome Statute of the International Criminal Court, 1998 has slightly extended the definition of torture as provided by the CAT in that it does not explicitly require the consent or acquiescence of a public official or any other person acting in an official capacity. It defines torture as 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused;

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<sup>42</sup> See, for examples, the Torture Act of 2000 of the United States, the Sri Lankan Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act and the Mexican Federal Act to Prevent and Punish Torture of 1991.

<sup>43</sup> Supra note 1, at p. 3.

<sup>44</sup> CAT/C/CR/28/6 28 May 2002.

<sup>45</sup> Conclusions and recommendations of the Committee against Torture on the second periodic report of France, May 1998, UN doc CAT/C/17/Add.18.

<sup>46</sup> See, The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 1, Paragraph 2.

except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions'<sup>47</sup>. Bangladesh has signed but to date not ratified the Statute of the International Criminal Court. Therefore, the international obligation of Bangladesh under Article 4 of the CAT does not extend to criminalize the act of or attempt to or the complicity or participation in torture with a definition as broad as the Statute of the International Criminal Court. As a minimum, the crime of torture can be defined according to Article 1 of the CAT. If, with a view to outline the obligation of Bangladesh to define torture, we analyze the essences of the definition of torture as offered by Article 1 of the CAT, we come across several elements of the definition of torture, namely –

**A. Torture is An Intentional Act Inflicting Severe Pain and Suffering, Whether Physical or Mental:**

The act of torture in the CAT refers to the deliberate infliction of severe pain or suffering upon a person which can be either mental or physical in nature and caused by either a single isolated act or a number of such acts. The CAT does not provide an exhaustive list of acts that are severe enough to satisfy the threshold of what is meant by 'torture'. This is because the severity of the act must be analyzed in view of the context in which it is carried and the impact it has on the victim, and because it would be impossible to exhaustively list all of the different forms of torture. While drafting the CAT, the issue as to what constitutes 'severe pain' was elaborately discussed by the Working Group of the Commission on Human Rights. However, the framers of the Draft Convention for the Prevention and Suppression of Torture<sup>48</sup> did address the problem and offered explanation to the effect that "The scope of 'severe' encompasses prolonged coercive or abusive conduct which in itself is not severe, but becomes so over a period of time"<sup>49</sup>.

The test to be employed for determining what constitutes 'severe' under the CAT is a subjective one that takes account of the circumstances of each case<sup>50</sup>. Many describe torture as the highest point of a continuous

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<sup>47</sup> See, The Rome Statute of International Criminal Court, 1998, Article 7, Paragraph 2.

<sup>48</sup> For the text of the draft Convention, see The Draft Convention for the Prevention and Suppression of Torture, submitted by the International Association of Penal Law, UN Doc. E/CN/4/NGO/213 (1978).

<sup>49</sup> Boulesbaa, Ahcene, *The UN Convention on Torture and Prospects for Enforcement* (Martinus Nijhoff publishers, 1999), at p. 17.

<sup>50</sup> *Ibis.*, at p. 18.



development, which comprises cruel, inhuman or degrading treatment<sup>51</sup>. As a result, a cruel, inhuman or degrading treatment could be considered as a form of ill treatment that is not sufficiently serious as to constitute torture. Under such a threshold, once a certain level of gravity is reached, an act can be qualified as degrading treatment. Degrading treatment, when it reaches a certain severity can be re-classified as inhuman treatment which, in turn, if particularly serious can be classified as torture. The distinction between these concepts depends on the circumstances and on the gravity of each case. Therefore, once an act crosses this entry-level threshold, a distinction can be drawn between acts of torture, acts amounting to inhuman treatment and acts amounting to degrading treatment. This distinction is based upon a threshold of severity: the first one presents a higher degree of seriousness than the second one, which is more severe than the last one<sup>52</sup>. The assessment of this minimum is relative: as the European Court of Human Rights deemed in *Ireland vs. United Kingdom*, it depends on the duration of the treatment, its physical or mental effects and on the sex, age and state of health of the victim<sup>53</sup>. In this case it was held that the level of pain and suffering is the distinguishing factor between torture and cruel, inhuman or degrading treatment.

Different cultures, and indeed individuals within a particular culture, may have different perceptions of what amounts to torture. Such perceptions can be relevant in two ways. On the one hand, it can mean that behavior which is thought of as torture by a given culture or individual victim may not normally constitute torture in the eyes of the international bodies. On the other hand, it can mean that treatment, which is consistently considered by the international community to amount to torture, is not viewed as such by the person who has been subjected to it<sup>54</sup>. However, irrespective of cultural or individual perceptions, the international standard for what constitutes torture is not relative to the particular culture of the victim.

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<sup>51</sup> OMCT, *Save the Children*, (London, 2000), at p. 13.

<sup>52</sup> Eur. Ct. H.R., *Tyrer vs. The United Kingdom*, Judgement of 25 April 1978, § 29; Eur. Ct. H.R., *Ireland vs. The United Kingdom*, Judgement of 18 January 1978, § 167.

<sup>53</sup> Eur. Ct. H.R., *Ireland vs. The United Kingdom*, Judgement of 18 January 1978, § 162; See also, Eur. Ct. H.R., *Soering vs. The United Kingdom*, Judgment of 07 July 1989, § 100.

<sup>54</sup> Giffard, Camille, *The Torture Reporting Handbook* (Human Rights Centre, University of Essex, 2000), at p.14.

In the case of a child, the threshold of pain and suffering amounting to torture or ill treatment will vary with the age, sex, health, maturity and personal circumstances of the victim. Without denying the need for a threshold, this threshold is likely to be lower than that of an adult. Consequently, the assessment of this minimum must be relative. In this respect, the Inter-American Court of Human Rights considers that “in order to establish if torture has been inflicted and its scope, all the circumstances of the case should be taken into consideration, such as the nature and context of the respective aggressions, how they were inflicted, during what period of time, the physical and mental effects and, in some case, the sex, age and state of health of the victims”<sup>55</sup>. The European Court of Human Rights deemed, in the *Ireland vs. United Kingdom*<sup>56</sup>, that it depends on the duration of the treatment, its physical or mental effects and on the sex, ages and state of health of the victim<sup>57</sup>. However, although this case did not implicate minor victims but grown up men, the ruling of the Court may also be applied in cases where the victim is a minor. Moreover, in the case *Aydin vs. Turkey*<sup>58</sup> the European Court of Human Rights deemed that the level of pain and suffering imposed on a 17 year-old girl by Turkish security forces had to be evaluated “having regard to her sex and youth and the circumstances under which she was held”.

However, the UN Human Rights Committee stated that it does not consider necessary to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied<sup>59</sup>. Moreover, some human rights experts consider that creating a hierarchy between torture and the different forms of ill treatment should be avoided<sup>60</sup>. Some scholars argues that torture, as the most serious violation of the human right to personal integrity and dignity, presupposes a situation where the victim is powerless i.e. is under the total control of another person. This is usually the case

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<sup>55</sup> Inter-Am. Ct. H.R., Villagran Morales et al., Judgment of 19 November 1999, § 74.

<sup>56</sup> Eur. Ct. H.R., Series A, No. 25, para 167.

<sup>57</sup> ASSOCIATION FOR THE PREVENTION OF TORTURE, *The Definition of Torture* (Proceedings of an Expert Seminar, APT, Geneva, 2001), at p. 18.

<sup>58</sup> Eur. Ct. H.R., *Aydin vs. Turkey*, Judgment of 25 September 1997, § 84.

<sup>59</sup> UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), Human Rights Committee, General Comment 20, Article 7, § 4.

<sup>60</sup> Supra note 57.

with deprivation of personal liberty<sup>61</sup>. In December 2005, the UN Special Rapporteur Manfred Nowak, in his first report to the Commission on Human Rights, observed that a thorough analysis of the relevant provisions of the CAT the practice of the Committee against Torture leads one to conclude that the decisive criteria for distinguishing torture from CIDT (cruel, inhuman and degrading treatment) may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted, as argued by the European Court of Human Rights and many scholars<sup>62</sup>.

The CAT, like other conventions referring to torture, includes the prohibition of 'mental torture' within the scope of the prohibition of torture<sup>63</sup>. Mental torture can be defined as: "The infliction of mental suffering through the creation of a state of anguish and stress by means other than bodily assault"<sup>64</sup>. The former UN Special Rapporteur on the Torture, Sir Nigel Rodley, has also emphasized that the prohibition of torture relates not only to acts that cause physical pain but also to acts that cause suffering to the victim, such as intimidation and other forms of threats<sup>65</sup>. The UN Special Rapporteur on Torture, Theo Van Boven, observes that prolonged solitary confinement may amount to mental torture<sup>66</sup>. Furthermore, the mere fear of physical torture may itself constitute mental torture<sup>67</sup>. A non-exhaustive list of examples of mental pain or suffering amounting to torture includes prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering; the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality of the victim; the threat of imminent death; or the threat that

<sup>61</sup> Burgess, J.H. and Danelius, H., *The UN Committee Against Torture: An Assessment* (London, 2001), at p.211.

<sup>62</sup> E/CN.4/2006/6, available at: <<http://daccessdds.un.org/doc/UNDOC/GEN/G05/168/09/PDF/G0516809.pdf?OpenElement>> (accessed on April 30, 2006).

<sup>63</sup> Supra note 49, at p. 19.

<sup>64</sup> See, *Denmark et. al vs. Greece*, Report of the European Commission on Human Rights, 5 November 1969.

<sup>65</sup> See, A/56/156 of 3rd July 2001, at p.3.

<sup>66</sup> E/CN.4/2003/68, para. 26. Available at: <<http://www.ohchr.org/english/issues/docs/recommendations.doc>> (accessed on April 29, 2006).

<sup>67</sup> See, E/CN.4/2001/66, para 4-11.

another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly his or her senses or personality<sup>68</sup>.

Article 1 of the CAT does not refer specifically to sexual assault as a form of torture. However, the devastating impact of sexual assault behind bars clearly satisfies the requirement of inflicting 'severe physical or mental pain'<sup>69</sup>. Rape can be resorted to either by the interrogator or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing, or humiliating the victim, or obtaining information, or a confession, from the victim or a third person. In human rights law, rape under this circumstance amounts to torture. Victims of women rape are in prison usually left beaten, bloodied, and in some cases dead. They are also at risk for contracting sexually transmitted diseases such as HIV/AIDS, syphilis, gonorrhea, chlamydia, and hepatitis A and B, and they frequently suffer long-term psychological harm, including a risk of post-traumatic stress disorder, depression, substance abuse, and suicide<sup>70</sup>. In 1992, United Nations Special Rapporteur on Torture Peter Kooijamans observed that rape or other form of sexual assault in detention constitutes an act of torture<sup>71</sup>. Decisions of international legal bodies such as the International Criminal Tribunal for the Former Yugoslavia and the European Court of Human also upheld this proposition of law<sup>72</sup>. The International Tribunal for the Former Yugoslavia has formulated the issue of rape in the context of torture as follows: '...Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in

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<sup>68</sup> Supra note 49, at p. 19.

<sup>69</sup> 'Prisoner Rape Is Torture under International Law', available at: <<http://www.spr.org/en/factsheettorture.html>> (accessed on April 16, 2006).

<sup>70</sup> Dumond, Robert W. & Dumond, Doris A., 'The Treatment of Sexual Assault Victims' in *Prison Sex: Practice & Policy* (Christopher Hensley ed., Lynne Rienner Publishers, Inc., 2002), at p.82.

<sup>71</sup> Summary Record of 21st Meeting, UN ESCOR, Comm'n Hum. Rts, 48th Sess., para 35, UN Doc. E/CN.4/1992/SR.21 (1992).

<sup>72</sup> Anker, Deborah, *Law of Asylum in the United States* (Refugee Law Center, Inc, 1999), pp.490-492.

some way, involve punishment, coercion, discrimination or intimidation...Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet these criteria<sup>73</sup>.

While it is clear that torture may result from an 'act', it is not sufficiently clear from Article 1 of the CAT whether torture can result from an 'omission'. There was no reference to this question at any stage in the preparatory work of the Convention<sup>74</sup>. However, since negative acts may inflict as much physical and mental harm as positive acts, it has been held that torture may result even from an omission<sup>75</sup>.

There are also many 'grey areas' which either do not clearly amount to torture or about which there is still disagreement. Examples include judicial corporal punishment, some forms of capital punishment and the death-row phenomenon, solitary confinement, certain aspects of poor prison conditions and disappearances including their effect on the close relatives of the disappeared persons<sup>76</sup>. Many of these areas may be considered as other forms of ill treatment, which is distinguished in the CAT from torture by the degree of sufferings involved therein<sup>77</sup>.

In 1997, the Committee against Torture concluded that "methods of interrogation [including]: (i) restraining in very painful conditions, (ii) hooding under special conditions, (iii) sounding of loud music for prolonged periods, (iv) sleep deprivation for prolonged periods, (v) threats, including death threats, (vi) violent shaking, and (vii) using cold air to chill. ... constitute torture as defined in Article 1 of the CAT<sup>78</sup>. The UN Special Rapporteur on Torture Peter Kooijamans, in his 1986 report, provided a detailed catalogue of those acts which involve the infliction of suffering severe enough to constitute the offence of torture, including: beating; extraction of nails, teeth, etc.; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; administration of drugs in detention or psychiatric institutions; prolonged

<sup>73</sup> Prosecutor vs. Delalic et al, Case No. IT-96-21-T, 16 November 1998, para 495-496.

<sup>74</sup> Supra note 49, at p. 9.

<sup>75</sup> Denmark et al. vs. Greece, Report of the European Commission on Human Rights, 5 November 1969.

<sup>76</sup> Supra note 54, at p.14.

<sup>77</sup> Ibid., pp.13-14.

<sup>78</sup> See, General Comments No. 20 (1992), para. 3, and No. 29 (2001), para. 7, adopted by the Human Rights Committee. See also Official Records of the General Assembly, Fifty-second Session, Supplement No. 44 (A/52/44) para 257.

denial of rest or sleep; prolonged denial of food; prolonged denial of sufficient hygiene; prolonged denial of medical assistance; total isolation and sensory deprivation; being kept in constant uncertainty in terms of space and time; threats to torture or kill relatives; total abandonment; and simulated executions<sup>79</sup>.

**B. The act must be 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:**

To be amounting as torture, an act is to be 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..."<sup>80</sup>. The legislative history of the CAT indicates that the list of purposes was meant to be 'indicative' rather than 'all-inclusive'<sup>81</sup>. The use of the words 'for such purposes' indicates that the various listed purposes do not constitute an exhaustive list, and should be regarded as merely illustrative.

The International Tribunal for the Former Yugoslavia has distinguished acts of torture from other acts causing physical and mental suffering as such: "The offence of willfully causing great suffering or serious injury to body or health is distinguished from torture primarily on the basis that the alleged acts or omissions need not be committed for a prohibited purpose such as is required for the offence of torture"<sup>82</sup>. In other words, the distinction between torture and other related offences is the purpose, if any, for which the suffering or serious injury is caused<sup>83</sup>. However, there is no requirement that the conduct be affected solely for a prohibited purpose. Thus, in order to meet this requirement, the prohibited

<sup>79</sup> E/CN.4/1986/15. para 119.

<sup>80</sup> See, The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 1, Paragraph 1.

<sup>81</sup> Supra note 49, at p. 21.

<sup>82</sup> Prosecutor vs..Delalic et al, Case No. IT-96-21-T, 16 November 1998, para 442.

<sup>83</sup> 'Aspects of the definition of torture in the regional human rights jurisdiction and the international criminal tribunals of the former Yugoslavia and Rwanda' (Background Paper No. 2 of the seminar on 'The Definition of Torture' organized by the Association of the Prevention of Torture, November 2001).

purpose must simply be a part of the motivation behind the conduct and need not be the predominating or sole purpose<sup>84</sup>.

**C. The act should be 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 most important aspect of torture, apart from victimizing the victim, is that it is an exercise of power and, from a legal point of view, an exercise of official power<sup>85</sup>. Therefore, the definition of torture in Article 1 of the CAT has sketched it as an official act<sup>86</sup>. This is a reflection of the problem which the Convention is meant to address, namely that of torture in which the authorities of a country are themselves involved and in respect of which the machinery of investigation and prosecution might therefore not function normally<sup>87</sup>. According to the CAT, torture is an act ‘...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’<sup>88</sup>. It follows from the text of Article 1 that it does not apply to private acts of cruelty. International concern arises only where cruelty has official sanction, the rationale being that private conduct is normally sanctioned under national law.

Despite lengthy discussion, the Working Group drafting the CAT was unable to decide upon a definition of the term ‘public official’<sup>89</sup>. Both the USA and the Federal Republic of Germany proposed that the term be defined. Germany felt, in particular, that it should be made clear that the term ‘public official’ contained in Article 1 refers not only to persons, who, regardless of their legal status, have been assigned public authority by government organs on a permanent basis or in an individual case, but also to persons who, in certain regions or under particular conditions, actually hold and exercise authority over others and whose authority is comparable to government authority<sup>90</sup>. While neither this nor other proposals were

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<sup>84</sup> Supra note 82, para 470.

<sup>85</sup> Supra note 10, pp. 105-106.

<sup>86</sup> Supra note 34.

<sup>87</sup> Supra note 39, at p. 120.

<sup>88</sup> See, The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 1, Paragraph 1.

<sup>89</sup> Supra note 49, at p. 27.

<sup>90</sup> See, Summary Prepared by the Secretary General in Accordance with Commission Resolution 18 (xxxiv) containing the comments received from Governments on

incorporated in the CAT by the Working Group, the Committee Against Torture, in the decision of *Elmi vs. Australia*<sup>91</sup>, found that warring factions operating in Somalia, which have set up quasi-governmental institutions and which exercise certain prerogatives that are comparable to those normally exercised by legitimate governments, can fall within the phrase ‘public officials or other persons acting in an official capacity’ contained in Article 1 of the CAT<sup>92</sup>.

The UN Human Rights Committee considers, in its General Comment No. 20, that Article 7 of the International Covenant on Civil and Political Rights, 1966 dealing with prohibition of torture leads to a positive action on the part of the States Parties and ‘it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7’<sup>93</sup>. This positive action is worthy of consideration in interpreting the phrase ‘at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. Therefore, recently there has been a growing emphasis placed upon the positive obligation of States to protect individuals. States have an obligation to fulfill the protected rights. The obligation to fulfill requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right<sup>94</sup>. Therefore, a broadening of what falls within the scope of ‘an act of a public official’ has taken place and is now largely accepted. It certainly includes torture by a police officer or prison warden. But, there is an increased tendency to focus on what the State can legitimately be held responsible for and to present its reasoning through the lens of state responsibility. Some authors and jurists still cling to the notion that in order to amount to torture, an act must have been meted out by state actors themselves. But, it is now quite clear that a State may in certain circumstances be in breach of its obligation when it fails to prevent forms of torture that attain the requisite degree of seriousness

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the Draft Articles of the Convention on Torture, Commission on Human Rights, 35th Session, UN Doc.E/CN.4/1314/120/add 2 (1979), at p. 2.

<sup>91</sup> *Elmi vs. Australia*, Communication No. 120/1998, para 65.

<sup>92</sup> The Human Rights Committee has interpreted the scope of Article 7 of the ICCPR to extend to acts committed by private persons. See, Human Rights Committee General Comments 20 of 10 April 1992 (replacing General comment 7 of 30 July 1982), para 2.

<sup>93</sup> *Supra* note 59, Article 7, §2.

<sup>94</sup> UN Doc. E/C.12/2000/4 (2000), *Committee on Economic, Social and Cultural Rights, General Comment No. 14* (The Right to the Highest Attainable Standard of Health), at p. 33.



from occurring. This conclusion ensues from the CAT since Article 1 incriminates violations resulting from actions committed with the consent or acquiescence of the State. Thus, the mere fact that the perpetrator is a private individual rather than a state official does not lead to the exclusion of this violence from the scope of the definition of torture as prescribed by the CAT<sup>95</sup>. In the case of *Velasquez Rodriguez vs. Honduras*, the Inter-American Court of Human Rights concluded that the test for establishing whether a State has carried out its duties responsibly is whether the state has acted with 'due diligence', either to prevent or to investigate violations<sup>96</sup>. Consequently, State responsibility for acts of torture and ill-treatment has been engaged, even though the act has been committed by a private actor, because there was a real risk of a future violation or because there has been a lack of an effective investigation<sup>97</sup>. Therefore, States must be held responsible not only for intentional acts but also for negligence. Obligation of due diligence means that States must examine the adequacy and implementation of legal safeguards to address and counter torture. It imposes various possible measures that States must adopt.

The element of official sanction is stated in very broad terms and extends to officials who take a passive attitude, or who turn a blind eye to torture committed against opponents of the government in power, be it by unofficial groups or by the authorities<sup>98</sup>. Failure to act in such cases could well be interpreted at least as acquiescence<sup>99</sup>. The Committee Against Torture makes it clear that the failure of the State authorities to react to torture amounts to unlawful acquiescence, which falls under the definition of torture<sup>100</sup>. Therefore, States must be held responsible not only for intentional acts but also for negligence. Obligation of due diligence means that States must examine the adequacy and implementation of legal

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<sup>95</sup> UN Doc. E/CN.4/2001/66/Add.1, *Civil and Political Rights Including the Questions of Torture and Detention* (Report of the Special Rapporteur, Sir Nigel Rodley submitted pursuant to Commission on Human Rights Resolution 2000/43 - Visit to Azerbaijan), at p. 73

<sup>96</sup> Inter-Am. Ct. H.R., *Velasquez Rodriguez vs. Honduras*, Judgment of 29 July 1988, at p.187.

<sup>97</sup> Long, D., 'Aspects of the Definition of Torture in the Regional Human Rights Jurisdictions and the International Criminal Tribunals of The Former Yugoslavia and Rwanda' (Proceedings of an Expert Seminar on The Definition of Torture, organised by Association For Prevention of Torture, Geneva, 2001), at p. 61.

<sup>98</sup> Rodley, Nigel S., *The Treatment of Prisoner Under International Law* (2nd edition, Oxford, 1999), at p.100.

<sup>99</sup> Ibid.

<sup>100</sup> CAT/C/29/D/161/2000, Communication No 161/2000: *Hajrizi Dzemajl vs. Yugoslavia*, § 9.2

safeguards to address and counter torture. It imposes various possible measures that States must adopt. The International Criminal Tribunal for the Former Yugoslavia, in *Prosecutor vs. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, has ruled that the characteristic of the offence of torture is ‘to be found in the nature of the act committed, rather than in the status of the person who committed it’<sup>101</sup>. In the Case of *Velasquez Rodriguez vs. Honduras*, the Inter-American Court of Human Rights took the view that the State can also be responsible for acts by private persons: ‘an illegal act which violates human rights and which is initially not directly imputable to a State (for example because it is an act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as is required by the Convention’<sup>102</sup>. Moreover, the UN Special Rapporteur on Torture, about the notion of ‘with the consent or acquiescence of a public official’ included in the article 1 of the CAT, noted that: ‘Under international law, this element of the definition makes the State responsible for acts committed by private individuals which it did not prevent from occurring or, if need be, for which it did not provide appropriate remedies’<sup>103</sup>.

**D. Torture does not include pain or suffering arising from, inherent in or incidental to lawful sanctions:**

Pain and suffering arising from, inherent in, or incidental to, a lawful sanction falls outside the ambit of torture. Manfred Nowak, the UN Special Rapporteur on Torture points out that the term ‘lawful sanctions’ in Article 1, Paragraph 1 of the CAT must be interpreted as referring both to domestic and international law<sup>104</sup>. Therefore, the ‘lawful sanctions’ exclusion must necessarily refer to those sanctions that constitute practices widely accepted as legitimate by the international community, such as deprivation of liberty

<sup>101</sup> ICTY, 22 February 2001, *Prosecutor vs. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23-T, P. 495. (This statement was made, however, in the context of a Humanitarian Law Case).

<sup>102</sup> Supra note 96, at p. 172.

<sup>103</sup> UN Doc. E/CN.4/2001/66/Add.1, Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43 - Visit to Azerbaijan, § 73.

<sup>104</sup> Website:  
<<http://daccessdds.un.org/doc/UNDOC/GEN/N05/476/51/PDF/N0547651.pdf?OpenElement>> (accessed on April 30, 2006).

through imprisonment, which is common to almost all-penal systems. Deprivation of liberty is a lawful sanction, provided that it meets basic internationally accepted standards, such as those set forth in the United Nations Standard Minimum Rules for the Treatment of Prisoners.

### **Appropriate Penalties for Torture**

The second obligation of Bangladesh under Article 4 of the CAT is to ensure that all acts of (i) torture, (ii) attempt to torture and (iii) complicity or participation in torture are punishable by appropriate penalties, which take into account their grave nature. Though the CAT demands 'appropriate penalties' for torture, attempt to torture and complicity or participation in torture, it doesn't outline the exact gravity of the penalties. Similarly, the Committee against Torture has not prescribed a rule for the required punishment by specifying a minimum or maximum length of imprisonment. It has, however, indicated the limits of appropriate sentences, finding on the one hand that short sentences of three to five years imprisonment are inadequate, and on the other that too serious penalties might deter the initiation of prosecutions<sup>105</sup>. States must provide appropriate penalties that reflect the grave nature of torture. The punishment for torture provided for under the domestic law of a State Party must not be trivial or disproportionate, but must take into account the grave nature of the offence. This means that torture must be punishable by severe penalties<sup>106</sup>. So far the expected length of sentence for the offence of torture is concerned, one commentator argues that it must be calculated in the same way as other serious offences under national law, e.g., offences that seriously threaten human health or life, such as murder<sup>107</sup>. Lenient penalties may fail to deter torture, while rigid and draconian penalties, such as a seven years minimum, may result in courts being unwilling to apply the law as it fails to flexibly take into account individual circumstances<sup>108</sup>. The practice of the Committee Against Torture indicates that a significant custodial sentence is generally appropriate<sup>109</sup>. Although the Committee as a whole has not commented on the appropriate level of sentence for torture, it is, according to one

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<sup>105</sup> Supra note 1, at p. 38 (footnote no.87).

<sup>106</sup> Ingels, Chris, *The UN Committee Against Torture – An Assessment* (Kluwer Law International, 2001), at p. 340.

<sup>107</sup> Supra note 61, at p.129.

<sup>108</sup> See, e.g., *The Sri Lankan Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act* (Act No. 22 of 1994).

<sup>109</sup> Supra note 106, at p.342, referred to in Supra note 1, at p. 38.

commentator, possible on the basis of the individual opinions of members to establish a range within which such sentences should fall, i.e., a custodial sentence of between six and twenty years<sup>110</sup>.

### 3. To what extent Bangladesh has carried out its obligations under Article 4 of the CAT: An Assessment

International treaties do not automatically become part of national law and consequently have to be incorporated by a legislative Act<sup>111</sup>. Bangladesh has not yet adopted any specific implementing legislation incorporating the provisions of the CAT despite its ratification of this convention<sup>112</sup>. Therefore, discharge of the obligation of Bangladesh under Article 4 of the CAT is to be audited by exploring the existing penal laws of Bangladesh. The Penal Code, 1860<sup>113</sup> is the principal penal legislation of Bangladesh. It defines and prescribes punishments for various offences. Besides, there are other penal laws. But, the criminal laws prevailing in Bangladesh do not have the definition of torture in particular<sup>114</sup>. There are a number of offences that penalise conduct that may amount to torture but there is no specific offence of torture in line with Article 1 of the CAT<sup>115</sup>. An overview look at the existing penal laws of Bangladesh that partially address the offence of torture can expose the level of performance of Bangladesh in discharging its obligation under Article 4 of the CAT.

#### Hurt and Grievous Hurt

The Penal Code, 1860<sup>116</sup> criminalizes 'hurt' and 'grievous hurt'. This penal law defines 'hurt' as an act, which causes bodily pain, disease or infirmity to any person<sup>117</sup>. As per this law, some kinds of hurt are designated as 'grievous hurt', namely, (a) emasculation (b) permanent

<sup>110</sup> CAT/C/SR.93, 75.

<sup>111</sup> Per Bimalendu Bikash Roy Choudhury J., *Hussain Mohammad Ershad vs. Bangladesh & others*; 21 BLD (AD) (2001) 69, para.2.

<sup>112</sup> REDRESS, *Torture in Bangladesh 1971-2004: Making International Commitment A Reality and Providing Justice and Reparations to Victims*, August 2004, p.16, available at: <<http://www.redress.org/publications/Bangladesh.pdf>> (accessed on April 28, 2006).

<sup>113</sup> Act No. XLV of 1860.

<sup>114</sup> Amin, Arafat, 'Criminal Responsibility for Torture under Bangladesh Law', available at: <<http://www.thedailystar.net/law/2004/06/04/opinion.htm>> (accessed on April 16, 2006).

<sup>115</sup> Supra note 112, at p. 20.

<sup>116</sup> Act No. XLV of 1860.

<sup>117</sup> See, The Penal Code, 1860 (Act No. XLV of 1860), Section 319.

privation of the sight of either eye (c) permanent privation of the hearing of either ear (d) privation of any member or joint (e) destruction or permanent impairing of the powers of any member or joint (f) permanent disfiguration of the head or face (g) fracture or dislocation of a bone or tooth and (h) any hurt which endangers life or which causes the sufferers to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits<sup>118</sup>.

The Penal Code, 1860<sup>119</sup> provides that voluntarily causing hurt<sup>120</sup>, unless caused in consequence of grave and sudden provocation, is punishable with imprisonment, either simple or rigorous<sup>121</sup>, for a term which may extend to one year or with fine which may extend to one thousand taka or with both<sup>122</sup>. The punishment of this offence, when caused in consequence of grave and sudden provocation, is imprisonment, either simple or rigorous<sup>123</sup>, for a term which may extend to one month or fine which may extend to five hundred taka or both<sup>124</sup>. The punishment of voluntarily causing grievous hurt, when caused in consequence of grave and sudden provocation, is imprisonment, either simple or rigorous<sup>125</sup>, for a term which may extend to four years or fine which may extend to two thousand taka or both<sup>126</sup>.

The punishment of voluntarily causing hurt<sup>127</sup>, when caused by dangerous weapons or means and not in consequence of grave and sudden provocation, is imprisonment, either simple or rigorous<sup>128</sup>, for a term which may extend to three years or fine or both<sup>129</sup>. The Penal Code, 1860<sup>130</sup> also provides that voluntarily causing grievous hurt<sup>131</sup>, unless caused in consequence of grave

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<sup>118</sup> See, *Ibid.*, Section 320.

<sup>119</sup> *Supra* note 116.

<sup>120</sup> See, *Supra* note 117, Section 321 for interpretation of the term 'voluntarily causing hurt'.

<sup>121</sup> Rigorous imprisonment means imprisonment with hard labour; See, *Supra* note 117, Section 53.

<sup>122</sup> See, *Supra* note 117, Section 323.

<sup>123</sup> *Supra* note 121.

<sup>124</sup> See, *Supra* note 117, Section 334.

<sup>125</sup> *Supra* note 121.

<sup>126</sup> See, *Supra* note 117, Section 335.

<sup>127</sup> *Supra* note 120.

<sup>128</sup> *Supra* note 121.

<sup>129</sup> See, *Supra* note 117, Section 334.

<sup>130</sup> *Supra* note 116.

<sup>131</sup> See, *Supra* note 117, Section 322 for interpretation of the term 'voluntarily causing grievous hurt'.

and sudden provocation, is punishable with imprisonment, either simple or rigorous<sup>132</sup>, for a term which may extend to seven years and also with fine<sup>133</sup>. The punishment of this offence, when caused by dangerous weapons or means and not in consequence of grave and sudden provocation, is imprisonment, either simple or rigorous<sup>134</sup>, for a term which may extend to ten years as well as imposition of fine<sup>135</sup>. Voluntarily causing hurt<sup>136</sup> with the intention to extort property or to constrain to an illegal act is punishable with imprisonment, either simple or rigorous<sup>137</sup>, for a term which may extend to ten years and also with fine<sup>138</sup>. Similarly, voluntarily causing grievous hurt<sup>139</sup> with this intention is punishable with imprisonment for life or with imprisonment, either simple or rigorous<sup>140</sup>, for a term which may extend to ten years and also with fine<sup>141</sup>. Voluntarily causing hurt<sup>142</sup> with the intention to extort confession or to compel restoration of property is punishable with imprisonment, either simple or rigorous<sup>143</sup>, for a term which may extend to seven years and also with fine<sup>144</sup>. Similarly, voluntarily causing grievous hurt<sup>145</sup> with this intention is punishable with imprisonment, either simple or rigorous<sup>146</sup>, for a term which may extend to ten years and also with fine<sup>147</sup>. In cases of the offences stated in this paragraph, no limit of fine is prescribed and as such the amount of fine to which the offender is liable is unlimited though it shall not be excessive<sup>148</sup>.

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<sup>132</sup> Supra note 121, Section 53.

<sup>133</sup> See, Supra note 117, Section 325.

<sup>134</sup> Supra note 121, Section 53.

<sup>135</sup> See, Supra note 117, Section 326.

<sup>136</sup> Supra note 120.

<sup>137</sup> Supra note 121, Section 53.

<sup>138</sup> See, Supra note 117, Section 327.

<sup>139</sup> Supra note 131.

<sup>140</sup> Supra note 121, Section 53.

<sup>141</sup> See, Supra note 117, Section 329.

<sup>142</sup> Supra note 120.

<sup>143</sup> Supra note 121, Section 53.

<sup>144</sup> See, Supra note 117, Section 330.

<sup>145</sup> Supra note 131.

<sup>146</sup> Supra note 121, Section 53.

<sup>147</sup> See, Supra note 117, Section 331.

<sup>148</sup> See, Ibid., Section 63.

If we look at the provisions of the Penal Code, 1860<sup>149</sup> dealing with hurt and grievous hurt, we see that these offences are widely categorised for the purpose of punishments. Different categories of hurt and grievous hurt consist of, amongst others, (i) voluntarily causing hurt not in consequence of grave and sudden provocation; (ii) voluntarily causing hurt with dangerous weapons or means; (iii) voluntarily causing hurt in consequence of grave and sudden provocation; (iv) voluntarily causing hurt with the intention to extort property or to constrain to an illegal act; (v) voluntarily causing hurt with the intention to extort confession or to compel restoration of property; (vi) voluntarily causing grievous hurt not in consequence of grave and sudden provocation; (vii) voluntarily causing grievous hurt with dangerous weapons or means; (viii) voluntarily causing grievous hurt in consequence of grave and sudden provocation; (ix) voluntarily causing grievous hurt with the intention to extort property or to constrain to an illegal act; and (x) voluntarily causing grievous hurt with the intention to extort confession or to compel restoration of property. All these offences may in certain circumstances cover the offence of torture as defined by the CAT. But these cannot exhaustively deal with torture since these penal provisions have nothing to do while dealing with torture inflicted by mental pain or sufferings. So far the punishments for hurt and grievous hurt are concerned, we see that the maximum punishment, i.e., imprisonment for life or imprisonment for a term which may extend to ten years and fine, is prescribed for 'voluntarily causing grievous hurt with the intention to extort property or to constrain to an illegal act'. This offence may in certain circumstances cover the offence of torture. If it is so, the punishment is adequate as per the obligation of Bangladesh under Article 4 of the CAT. But in Bangladesh most of the occasions of torture fall under the offences of 'voluntarily causing hurt with the intention to extort confession or to compel restoration of property' and 'voluntarily causing grievous hurt with the intention to extort confession or to compel restoration of property'. The former offence carries a punishment of maximum seven years' imprisonment plus fine whereas the latter one carries a punishment of maximum three years' imprisonment plus fine. The definition of grievous hurt as stated before being very restrictive, the most occasions of torture fall under the offence of 'voluntarily causing hurt with the intention to extort confession or to compel restoration of property'. The punishment for this offence is very limited and fall remarkably below the international standard as promised by Bangladesh in Article 4 of the CAT.

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<sup>149</sup> *Supra* note 116.

### **Wrongful Confinement to Extort Confession**

Wrongful confinement<sup>150</sup> of a person to extort from him or from any other person interested in him any confession or any information which may lead to the detection of an offence or misconduct is an offence punishable under the Penal Code, 1860<sup>151</sup>. The prescribed punishment is imprisonment, either simple or rigorous<sup>152</sup>, for a term, which may extend to three years and fine<sup>153</sup>. Herein no limit of fine is prescribed and as such the amount of fine to which the offender is liable is unlimited though it shall not be excessive<sup>154</sup>.

To some extent, certain acts of torture can be punished under this penal provision. However, this provision has no manner of application when the act of torture is committed in a legally authorised custody. Similarly, an act of torture committed with a purpose other than the purposes mentioned in this penal provision cannot be addressed under this provision. Moreover, punishment for wrongful confinement is not adequate enough to take into account the gravity of the offence of torture.

### **Criminal Force and Assault**

The Penal Code, 1860<sup>155</sup> criminalizes ‘criminal force’ and ‘assault’. Criminal force is defined as an intentional use of force<sup>156</sup> to any person, without that person’s consent, in order to the committing of any offence, or with the intention or knowledge of causing injury, fear or annoyance to that person<sup>157</sup>. As per this penal law, the term ‘criminal force’ includes what in English law is called ‘battery’<sup>158</sup>. On the other hand, the offence of assault is defined as an act of making any gesture or any preparation with the intention or knowledge of causing any person present to apprehend that he who makes that gesture or preparation is about to use criminal

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<sup>150</sup> Wrongful confinement means restraining a person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits. See, Supra note 117, Section 340.

<sup>151</sup> Supra note 116.

<sup>152</sup> Supra note 121, Section 53.

<sup>153</sup> See, Supra note 117, Section 348.

<sup>154</sup> See, Ibid., Section 63.

<sup>155</sup> Supra note 116.

<sup>156</sup> See, Supra note 117, Section 349 for definition of ‘force’.

<sup>157</sup> See, Ibid., Section 350.

<sup>158</sup> Ranchhoddas, Ratanlal and Thakore, Dhirajlal Keshavlal, *The Indian Penal Code* (Wadhwa and Company, Nagpur, India, 1996), at p.395.



force to that person<sup>159</sup>. It is to be noted here that mere words do not amount to an assault unless the words used by a person gives to his gestures or preparations such a meaning as may make those gesture or preparations amount to an assault<sup>160</sup>.

The Penal Code, 1860<sup>161</sup> provides that commission of assault or criminal force, unless caused in consequence of grave and sudden provocation, is punishable with imprisonment, either simple or rigorous<sup>162</sup>, for a term which may extend to three months or with fine which may extend to five hundred taka or with both<sup>163</sup>. Assault or criminal force, when caused in consequence of grave and sudden provocation, is punishable with simple imprisonment for a term, which may extend to one month or with fine, which may extend to five hundred taka or with both<sup>164</sup>. Assault or criminal force to a person in attempting to wrongfully confine that person is punishable with imprisonment, either simple or rigorous<sup>165</sup>, for a term which may extend to one year or with fine which may extent to one thousand taka or with both<sup>166</sup>.

Assault or criminal force to woman with an intention to outrage her modesty is punishable with imprisonment, either simple or rigorous<sup>167</sup>, for a term which may extend to two years or with fine or with both<sup>168</sup>. Assault or criminal force, unless caused in consequence of grave and sudden provocation, with an intention to dishonour a person carries the same punishment<sup>169</sup>. In cases of the offences stated in this paragraph, no limit of fine is prescribed and as such the amount of fine to which the offender is liable is unlimited though it shall not be excessive<sup>170</sup>.

On an analytical look at the penal provisions of Bangladesh concerning ‘criminal force’ and ‘assault’, it is evident that these provisions, being very

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<sup>159</sup> See, Supra note 117, Section 351.

<sup>160</sup> See Ibid. Explanation to Section 351.

<sup>161</sup> Supra note 116.

<sup>162</sup> Supra note 121.

<sup>163</sup> See, Supra note 117, Section 352.

<sup>164</sup> See, Ibid., Section 358.

<sup>165</sup> Supra note 121.

<sup>166</sup> See, Supra note 117, Section 357.

<sup>167</sup> Supra note 121.

<sup>168</sup> See, Supra note 117, Section 354.

<sup>169</sup> See, Ibid., Section 355.

<sup>170</sup> See, Ibid., Section 63.

limited in application, are not wide enough to deal with the offence of torture although on some occasions some particular aspects of torture can be punished under these provisions. The punishments of criminal force and assault are so negligible that it will betray the international obligation of Bangladesh as committed in Article 4 of the CAT, if torture is tried under these penal provisions.

### **Sexual Offences**

Rape<sup>171</sup> is punishable under the Suppression of Violence to Women and Children Act, 2000 (Nari-O-Shishu Nirjatan Daman Ain, 2000)<sup>172</sup>. The punishment for rape is imprisonment for life plus fine<sup>173</sup>. In case of gang rape, the punishment is death penalty or imprisonment for life plus fine of an amount not less than taka one Lac<sup>174</sup>. If any woman is raped while in police custody, the person or persons under whose custody such rape was committed and who were directly responsible for the safe custody of the woman, unless otherwise proved, for failure of proper custody, be punishable with rigorous imprisonment for a term not exceeding ten years but no less than five years and shall also be liable to be fined<sup>175</sup>. Sexual assault other than rape is punishable with rigorous<sup>176</sup> imprisonment for a term, which may extend to ten years but shall not be less than three years and also with fine<sup>177</sup>. In case of all these offences, upper limit of fine is not prescribed and as such the amount of fine to which the offender is liable is unlimited though it shall not be excessive<sup>178</sup>.

International jurisprudence and juristic opinions make it clear that sexual offences may be regarded as torture. The penal provisions of Bangladesh ensure that torture in the form of sexual assault are made offences and punishable with adequate penalties under the domestic laws. But these provisions being limited only to sexual offences are not enough to address the broader spectra of torture and as such they are not enough to ensure the full compliance of Bangladesh with Article 4 of the CAT.

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<sup>171</sup> See, for definition of rape, *Supra* note 117, Section 375.

<sup>172</sup> *Supra* note 116.

<sup>173</sup> The Suppression of Violence to Women and Children Act, 2000 (Nari-O-Shishu Nirjatan Daman Ain, 2000), Section 9 (1).

<sup>174</sup> *Ibid.*, Section 9 (3).

<sup>175</sup> *Ibid.*, Section 9 (5).

<sup>176</sup> *Supra* note 121.

<sup>177</sup> *Supra* note 174, Section 10.

<sup>178</sup> See, *Supra* note 117, Section 63.

### **Criminal Intimidation**

The Penal Code, 1860<sup>179</sup> criminalizes ‘criminal intimidation’. Criminal intimidation means threatening a person with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with an intention to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat<sup>180</sup>. The punishment for criminal intimidation is imprisonment, either simple or rigorous<sup>181</sup>, for a term, which may extend to two years and/or fine<sup>182</sup>. When the threat constituting criminal intimidation is of causing death or grievous hurt or of causing destruction of any property by fire or of causing an offence punishable with death or imprisonment for life or imprisonment for a term which may extend to seven years or of imputing unchastity to a woman, the offence of criminal intimidation demands aggravated punishment - imprisonment, either simple or rigorous<sup>183</sup>, for a term which may extend to seven years and/or fine<sup>184</sup>. No limit of fine is prescribed for the offence of criminal intimidation and as such the amount of fine to which the offender is liable is unlimited though it shall not be excessive<sup>185</sup>.

Torture, primarily arising out of severe mental pain or suffering may fall under the offence of criminal intimidation. But, torture arising out of physical pain or suffering is foreign to the penal provisions of Bangladesh concerning criminal intimidation. Moreover, punishments prescribed for criminal intimidation are not as grave as the punishment of torture should be. Therefore, Bangladesh cannot plead the offence of criminal intimidation as the discharge of her international obligation under Article 4 of the CAT.

### **Personal Violence or Threats by a Police Officer against any Person in his Custody**

The Police Act, 1861<sup>186</sup> provides that every police officer who shall offer any unwarrantable personal violence to any person in his custody

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<sup>179</sup> Supra note 116.

<sup>180</sup> See, Supra note 117, Section 503.

<sup>181</sup> Supra note 121.

<sup>182</sup> See, Supra note 117, Section 506, 1st Para.

<sup>183</sup> Supra note 121.

<sup>184</sup> See, Supra note 117, Section 506, 2nd Para.

<sup>185</sup> See, Supra note 117, Section 63.

<sup>186</sup> Act No. V of 1861.

shall be liable to a penalty not exceeding three months' pay or to imprisonment, with or without hard labour, for a period not exceeding three months or to both<sup>187</sup>. However, this provision does not apply to Dhaka Metropolitan Area<sup>188</sup>, Chittagong Metropolitan Area<sup>189</sup>, Khulna Metropolitan Area<sup>190</sup> and Rajshahi Metropolitan Area<sup>191</sup>. Alternatively, Dhaka Metropolitan Police Ordinance<sup>192</sup>, Chittagong Metropolitan Police Ordinance<sup>193</sup>, Khulna Metropolitan Police Ordinance<sup>194</sup> and Rajshahi Metropolitan Police Act<sup>195</sup> provide that a police officer offering personal violence or threats against any person in his custody shall be punished with imprisonment for a term which may extend to one year and/or with a fine which may extend to two thousand taka.

Offer of personal violence to any person in custody may amount to torture. In that sense, these offences under the laws regulating the police forces may amount to torture. Nevertheless, making this offence punishable cannot be taken as the discharge of obligation of Bangladesh under Article 4 of the CAT. This is because the definitions of these offences do not fully cover the definition of torture as given in Article 1 of the CAT. This is also because the punishments of these offences are trivial.

### **Culpable Homicide**

Culpable homicide means causing death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that the doer of the act is likely by such act to cause death<sup>196</sup>. Under certain aggravating circumstances, culpable homicide may amount to murder<sup>197</sup>. The punishment for murder is death penalty or imprisonment for life plus

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<sup>187</sup> See, Section 29.

<sup>188</sup> See, Dhaka Metropolitan Police Ordinance, 1976 (Ordinance No. III of 1976), Section 3.

<sup>189</sup> See, Chittagong Metropolitan Police Ordinance, 1978 (Ordinance No. XLVIII of 1978), Section 3.

<sup>190</sup> See, Khulna Metropolitan Police Ordinance, 1985 (Ordinance No. LII of 1985), Section 3.

<sup>191</sup> See, Rajshahi Metropolitan Police Act, 1992 (Act No. XXIII of 1992), Section 3.

<sup>192</sup> *Supra* note 189, Section 53.

<sup>193</sup> *Supra* note 190, Section 55.

<sup>194</sup> *Supra* note 191, Section 55.

<sup>195</sup> *Supra* note 192, Section 55.

<sup>196</sup> See, *Supra* note 117, Section 299.

<sup>197</sup> *Ibid.*, Section 300.

fine<sup>198</sup>. On the other hand, culpable homicide not amounting to murder carries, depending on the circumstances, a punishment ranging from a term of imprisonment up to imprisonment for life and a fine<sup>199</sup>.

In fact, an act of torture cannot be punished as a culpable homicide. The definitions and jurisprudentially basis of these offences are altogether different from each other. Nevertheless, the statutory provisions relating to culpable homicide can be relevant and accordingly employed when death is caused as a consequence of torture. The offence of culpable homicide does not relieve Bangladesh of its obligation under Article 4 of the CAT since an act of torture cannot be punished as culpable homicide unless torture is ended in death of the victim.

#### **Attempt to Commit Torture**

In the absence of an express provision penalizing an attempt to commit a specific offence, attempt to commit an offence is generally punishable with half of the punishment provided for the offence<sup>200</sup>. Therefore, an attempt to commit torture is punishable under the laws of Bangladesh only to the extent torture is addressed as a criminal offence under the laws of Bangladesh.

#### **Complicity or Participation in Torture**

According to the Penal Code, 1860<sup>201</sup>, complicity or participation to an offence, depending on the circumstances of a case, can be punished as a joint liability or abetment of the offence. The principle of joint liability states that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone<sup>202</sup>. On the other hand, abetment of an offence means instigating any person to do the offence or engaging with one or more other person or persons in a conspiracy to commit the offence or intentionally aiding a person to commit the offence<sup>203</sup>. When an offence is committed, its abetment is punishable with punishment provided for the offence<sup>204</sup>. Therefore, complicity or participation in torture is punishable under the laws of Bangladesh only to

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<sup>198</sup> Ibid., Section 302.

<sup>199</sup> Ibid., Section 304.

<sup>200</sup> Ibid., Section 511.

<sup>201</sup> Supra note 116.

<sup>202</sup> Supra note 117, Section 34.

<sup>203</sup> Ibid., Section 107.

<sup>204</sup> See, Ibid., Section 109.

the extent torture is addressed as a criminal offence under the laws of Bangladesh.

The discussion made hereinbefore clearly demonstrates the law relating to torture in Bangladesh is very inadequate to cover the crime of torture<sup>205</sup>. As a ratifying state of the CAT, Bangladesh has not yet enacted legislation making torture as a criminal offence. The absence of a law against torture is a tremendous impediment to those who wish to pursue the prevention of torture.

#### **4. Conclusion**

Torture is expressly prohibited by the Constitution of Bangladesh. One of the fundamental rights guaranteed by this constitution is that '[n]o person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment'<sup>206</sup>. Nevertheless, domestic laws of Bangladesh fall far below the international obligation under Article 4 of CAT to which the country has committed itself. Therefore, it is recommended that torture should be designed and defined as a specific crime of the utmost gravity in national legislation. The offence of torture should be characterised as a specific and separate offence; to subsume torture within a broader, more generic offence (e.g., assault, hurt, grievous hurt, criminal intimidation etc.) fails to recognise the particular odious nature of the crime and frustrates the discharge of obligation of a state under the CAT.

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<sup>205</sup> Supra note 114.

<sup>206</sup> See, The Constitution of Bangladesh, Article 35 (5).