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# Exploring the Right to Protection Against Torture in the International Human Rights Law and Indian Law with a Security Exceptionalism

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# Exploring the Right to Protection Against Torture in the International Human Rights Law and Indian Law with a Security Exceptionalism

## ABSTRACT

*The right to life is the most basic right available to any individual. This right is not merely about having a life, rather it is about living a life with dignity. Human dignity is a fundamental value which none of us should ever have to compromise upon. The act of torture impedes upon the right to a dignified life in the most grotesque manner. Under the Universal Declaration of Human Rights (UDHR) and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), torture and other cruel and inhuman treatment have been prohibited. Further the Domestic law of India gives paramount importance to the Right to Life provided under the Constitution of India. The principle of prohibition of torture is not merely a right, but has been given the status of non-derogable right in the international domain. It carries the special status of a jus cogens principle. The paper aims to examine the inconsistency in the enforcement of the international standards due to the lack of a domestic framework for the same in India.*

## KEYWORDS

*International Human Rights Law, Domestic Law, Torture, Kashmir.*

## INTRODUCTION

*“In extreme situations when human lives and dignity are at stake, neutrality is a sin. It helps the killers, not the victims.” - Elie Wiesel.*

The practice of torture has undoubtedly been the gravest assault on the existence of human being. While it has been practiced since long, it was after the World War II, that the practice and the grave brutality that accompanied it was brought into limelight at a larger level.<sup>1</sup> With the implementation of the Universal Declaration of Human Rights (UDHR) in the year 1948, the right to inherent dignity was recognised.<sup>2</sup> The

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<sup>1</sup> United Nations, History of the Declaration, <https://www.un.org/en/about-us/udhr/history-of-the-declaration> (Last visited on June 6,2026).

<sup>2</sup> The Universal Declaration of Human Rights, art. 1, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

UDHR strengthened the extent of human rights all over the globe and subsequently, conventions (ICESCR, ICCPR) were made in furtherance to the protection of the rights enshrined in the UDHR.

This paper primarily focuses on the Right to protection against Torture. This paper has been divided into three parts; under Part I the paper shall seek to explore and understand the standing of the Right to Protection against Torture in the domain of the International Human Rights Law. Part II of the paper seeks to explore and understand the protection of the same right in the framework of the Indian Law and Part III of the paper explores the inconsistency between the International Human Rights Law and the Indian Law to ensure the right of individuals to be protected against torture by providing a security exceptionalism in the region of Jammu and Kashmir.

### RESEARCH QUESTIONS

- a) What is the position of the Right to Protection against torture in the context of the International Human Rights Law?
- b) What is the legal standing of the Right to Protection against Torture in the Domestic law of India?
- c) How well is the right protected by the international and the national framework?

### RESEARCH METHODOLOGY

The research for this paper is purely based on the non-empirical method, whereunder secondary data was collected from sources such as articles, case laws, reports, documents, books and the legal provisions of the International Human Rights Law and the Domestic Law of India.

### RIGHT TO PROTECTION AGAINST TORTURE IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS LAW

#### *1. The Concept and Its Early Evolution*

The concept of torture has been there since long, presently deriving its meaning from three main instruments, first being the UN Declaration against Torture of 1975, the United Nations Conventions against Torture (UNCAT) of 1985 and the Inter-American Convention to Prevent and Punish Torture of 1985. However, with the evolution of times, new meanings and newer understanding have been attributed to it.<sup>3</sup>

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<sup>3</sup> Nigel S. Rodley, *THE DEFINITION(S) OF TORTURE IN INTERNATIONAL LAW* 55

For the understanding of torture, the issue of the intensity of pain and suffering in its relative nature has undergone various judicial interpretations. For the first time, the issue of the relative nature of the intensity of pain and suffering arose in the *Greek case* in 1969 before the European Commission of Human Rights, where torture was described to be inhuman treatment-Treatment that deliberately causes severe physical or mental suffering which is unjustifiable in the circumstances, which is accompanied with a purpose which can be obtaining of information or confessions or the infliction of punishments and is an aggravated form of inhuman treatment.<sup>4</sup> In the case of *Ireland v. United Kingdom*<sup>5</sup>, the European Court of Human Rights held that the that the UK's use of the "Five Techniques" on detainees in Northern Ireland constituted inhuman and degrading treatment under Article 3 of the European Convention on Human Rights, however the Court did not classify it to be torture. *The Court justified the same by stating that to constitute torture there needs to be a special stigma attached to the deliberate inhuman treatment causing very serious and cruel treatment.*<sup>6</sup> It was in 1999, when for the first time in *Selmouni v. France*<sup>7</sup>, the Court unanimously agreed that the medically certified trauma on various parts of the body, due to the application of beatings over a period of days, which involved kicks, punches and blows from baseball ball, was a proof of torture. Here the Court accepted the severe physical and psychological abuse inflicted on Ahmed Selmouni while in police custody amounted to torture under Article 3 of the European Convention on Human Rights.<sup>8</sup>

### ***I. The Protection under International Human Rights Law***

The Universal Declaration of Human Rights (UDHR) under Article 5 provides that "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment of punishment*" and this text is reproduced by Article 7 of the International Convention on Civil and Political Rights (ICCPR).<sup>9</sup> Under Article 4 of the ICCPR, the right against torture has been given the status of a non-derogable right.<sup>10</sup> The view that the right to protection

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Current Legal Problems 465 (2002).

<sup>4</sup> European Court of Human Rights, THE GREEK CASE - DENMARK v. GREECE ; NORWAY v. GREECE ; SWEDEN v. GREECE ; NETHERLANDS v. GREECE - Part I of V, [https://hudoc.echr.coe.int/eng#%7B%22itemid%22:\[%22001-167795%22\]%7D](https://hudoc.echr.coe.int/eng#%7B%22itemid%22:[%22001-167795%22]%7D) (Last visited on June 6,2026).

<sup>5</sup> App No 5310/71 (Application No) A/25

<sup>6</sup> European Court of Human Rights, Case of Ireland v. The United Kingdom, [https://hudoc.echr.coe.int/eng#%7B%22itemid%22:\[%22001-57506%22\]%7D](https://hudoc.echr.coe.int/eng#%7B%22itemid%22:[%22001-57506%22]%7D) (Last visited on June 6,2026).

<sup>7</sup> App. No. 25803/94, 29 Eur. H.R. Rep. 403 (Eur. Ct. H.R. 1999).

<sup>8</sup> *Supra* note 3 at 476.

<sup>9</sup> International Covenant on Civil and Political Rights, art. 7 opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>10</sup> International Covenant on Civil and Political Rights, 1967, art. 4(2) opened for

against torture is a non-derogable right emerges from the moral assumption which believes that torture is inherently and evidently the worst for of violation of human dignity and autonomy, it is the worst kind of subordination, harm or suffering which is possible to be inflicted upon anyone.<sup>11</sup>

In *Zinaida Mukhortova v. Kazakhstan*<sup>12</sup>, where a lawyer and human rights defender was forcibly hospitalized and treated in a psychiatric facility, the Committee held that the illegal and arbitrary committal to a hospital amounts to inhuman and degrading treatment within the meaning of Article 7 of the Covenant.<sup>13</sup> The Human Rights Committee while adopting the comments on Article 7 of the Covenant provided that the purpose of this Article is to protect the dignity and integrity of the individual, and even in the case of public emergency, this right cannot be derogated from.<sup>14</sup>

The Convention against Torture and other Cruel Inhuman or degrading Treatment or Punishment (UNCAT) adopted in December 1984, under Article 2 requires the State parties to take effective measures to prevent the acts of torture in any territory in their jurisdiction, and further provides that in no circumstances can be invoked in order to justify torture.<sup>15</sup> The Convention provides the State parties ensure that all acts of torture, attempts to commit torture, are offences punishable under the criminal law of the States.<sup>16</sup>

The European Convention for the Protection of Human Rights and Fundamental freedoms under Article 3 deals with torture, it provides that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>17</sup> Article 5 of the American Convention of Human Rights, as a result of the recognition of human dignity, provides the right to

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signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>11</sup> Kees Wouters, *Editorial: How Absolute is the Prohibition on Torture?* 8 European Journal of Migration and Law 4 (2006).

<sup>12</sup> CCPR/C/127/D/2920/2016

<sup>13</sup> Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2920/2016 (2019).

<sup>14</sup> a) General Comment No. 20: Prohibition of torture or other cruel, inhuman or degrading treatment or punishment (article 7) (1992), available at:

<https://www.ohchr.org/en/resources/educators/human-rights-education-training/general-comment-no-20-prohibition-torture-or-other-cruel-inhuman-or-degrading-treatment-or> (Last visited on June 6, 2026).

<sup>15</sup> Manoj Kumar Sinha, *Implementation of Basic Human Rights* 43 (LexisNexis Gurgaon, India, 5<sup>th</sup> edn., 2023).

<sup>16</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4 Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>17</sup> *Supra* note 13 at 44.

humane treatment.<sup>18</sup> The Inter-American Torture Convention provides the state parties to undertake to prevent and punish torture in accordance with the terms of the Convention.<sup>19</sup>

## RIGHT TO PROTECTION AGAINST TORTURE IN CONTEXT OF INDIAN LAW

### *I. Introduction*

The oppressive torture practices which were common during the British rule, continue in India even after independence, with the National Human Rights Commission Chairman, in the year 2002 stating that it received petitions daily alleging torture and even custodial deaths.<sup>20</sup> The practice of torture, which virtually is a worldwide phenomenon has become so common that people take torture to be a routine police practice.<sup>21</sup> Amnesty International's July 2024 report on the policing of protests in Europe documented numerous instances of the misuse of less-lethal weapons, many of which resulted in serious injuries. The report highlighted evidence from video footage and witness testimonies showing the aggressive use of batons in France, Germany, and Portugal; the excessive and indiscriminate deployment of tear gas and water cannons in Slovenia; the direct firing of tear gas grenades at protesters and baton assaults in Serbia; the loss of an eye due to the improper use of kinetic impact projectiles in Spain; and the use of electric shock devices against peaceful demonstrators in Hungary.<sup>22</sup>

While law in all countries authorizes the police to use force under certain circumstances, the authority is limited by the specific laws of the country and is subject to the Rule of Law.<sup>23</sup> The Supreme Court laid down a list of 11 requirements to be followed in all cases of arrest and detention in 1996, which included the medical examination of the detained person every 48 hours by an approved doctor, in the case of *D.K. Basu v. State of West Bengal*.<sup>24</sup>

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<sup>18</sup> The American Convention on Human Rights, art 5 (1) Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

<sup>19</sup> The Inter-American Convention to Prevent and Punish Torture, art. 1 Dec. 9, 1985, O.A.S.T.S. No. 67, 25 I.L.M. 519 (1986).

<sup>20</sup> A. Mark Weisburd, *Customary International Law and Torture: The Case of India* 2 Chicago Journal of International Law 83 (2001).

<sup>21</sup> R.S. Saini, *CUSTODIAL TORTURE IN LAW AND PRACTICE WITH REFERENCE TO INDIA* 36 Journal of Indian Law Institute 166 (1994).

<sup>22</sup> Amnesty International, "Global Trends and Developments on Torture and other ill-treatment" 4 (2024).

<sup>23</sup> Mohd. Yousuf Bhat, *MENACE OF TORTURE: PROHIBITION IN INTERNATIONAL LAW* 67 The Indian Journal of Political Science 560 (2006).

<sup>24</sup> (1997) 6 SCC 642 (Ind.)

## II. The Provisions for Protection

The concept of Rule of Law has been the cornerstone of the Indian democracy. The absence of arbitrary power is *sine qua non* to rule of law with confined and defined discretion, both of which are essential facets of Article 14.<sup>25</sup> “Wherever there is arbitrariness in State action, whether it be of the legislature or of the executive or of an “authority” under Article 12, Article 14 immediately springs into action and strikes down such State action.”<sup>26</sup> The spirit of man is the root of Article 21 of the Indian constitution.<sup>27</sup>The procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish carefully designed to effectuate and not subvert the substantive right itself.<sup>28</sup> Article 20(3) protects the individuals choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory and the rights guaranteed under Article 20 and 21 of the Constitution have been given a non-derogable status.<sup>29</sup> The requirement to communicate the grounds of arrest or the grounds of detention in writing with an offence or a person placed under preventive detention under Article 22(1) and 22(5) of the Constitution is sacrosanct and cannot be breached under any situation.<sup>30</sup> Section 120 of the Bharatiya Nyaya Sanhita, 2023 provides protection against hurt or grievous hurt which is caused for extorting from the sufferer any confession or any information which may lead to the detection of offence or misconduct, with punishment for the same being imprisonment of either a term which may extend for a term of 10 years and fine.<sup>31</sup> Under Section 127(8) the punishment for the wrongful confinement is provided to be imprisonment for a term which may extend to three years and also fine.<sup>32</sup> Section 53 of the Bharatiya Nyaya Suraksha Sanhita (BNSS), 2023, as a safeguard against the infliction of custodial torture or violence, provides the accused the right to examination by a medical officer.<sup>33</sup> Section 181 of the same Code, provides protection against the use of any statements made by any person in the course of investigation to a police officer.<sup>34</sup> Now while that is so, we need to look into the ground reality of the protection against torture and for the same we shall look into the

<sup>25</sup> S.G. Jaisinghani v. Union of India, (1967) 2 SCR 703 (Ind.)

<sup>26</sup> Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 (Ind.)

<sup>27</sup> Maneka Gandhi v. Union of India, (1978) 1 SCC 24 (Ind.)

<sup>28</sup> *Supra* note at 27.

<sup>29</sup> Selvi v. State of Karnataka, (2010) 7 SCC 263 (Ind.)

<sup>30</sup> Pankaj Bansal v Union of India, (2024) 7 SCC 576 (Ind.)

<sup>31</sup> The Bharatiya Nyaya Sanhita, s. 120 (Ind.)

<sup>32</sup> The Bharatiya Nyaya Sanhita, s. 127(8) (Ind.)

<sup>33</sup> Ameena Begum v. State of Telangana, (2023) 9 SCC 587 (Ind.)

<sup>34</sup> The Bharatiya Nyaya Suraksha Sanhita, 2023, s.181 (Ind.)

Human Rights violation in the region of Jammu and Kashmir.

### THE SECURITY EXCEPTIONALISM IN JAMMU AND KASHMIR.

“When torture becomes the routine practice of the government, the state does not represent the moral order of the community but instead is the repository of the authorized violence and impermissible coercion.”<sup>35</sup> While reasonable restrictions on rights may be justified, national security has often been invoked to legitimize arbitrary detention, intrusive surveillance, denial of judicial remedies, torture, and other serious infringements of individual liberties.<sup>36</sup> The National Crime Records Bureau (NCRB) data reveals a total of 65 custodial deaths in 2024.<sup>37</sup> A total of 9,448 people were killed in conflict areas during 2009 to 2019 including 3,747 persons in the Left-wing extremism (LWE) affected areas, 3,070 persons in the North East) and 2,631 persons in Jammu and Kashmir.<sup>38</sup> The police use brutal techniques like hammering iron nails in the body, applying roller on legs and burning, stabbing with screwdriver, electric shocks, pouring petrol in private parts, applying chili powder in the private parts, beating after tying upside down with hands and legs tied.<sup>39</sup>

The partition of the subcontinent in 1947 helped trigger the India-Pakistan war over the princely state of Jammu and Kashmir. For more than three decades, Kashmir has remained under extensive security arrangements, giving rise to sustained debates regarding human rights compliance and institutional accountability.<sup>40</sup>

The Armed Forces (Jammu and Kashmir) Special Powers Act (AFSPA), enacted in 1990, grants sweeping powers to the armed forces, including the authority to use lethal force and to arrest without warrant.<sup>41</sup> The use of Cordon-and-Search Operations (CASO) further exemplifies this

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<sup>35</sup> Thom Brooks, *On F.H. Bradley's Some Remarks on Punishment* 125 *Ethics* 223-225 (2014).

<sup>36</sup> Teferra ZM, *National security and the right to liberty in armed conflict: The legality and limits of security detention in international humanitarian law* *International Review of the Red Cross*. 971 (2016.)

<sup>37</sup> National Crime Records Bureau, *Deaths in Police Custody/Lockup (Persons in Remand)-2024*, <https://ncrb.gov.in/uploadsa/files/TABLE16A21.pdf> (Last visited on June, 2026).

<sup>38</sup> Asian Centre for Human Rights, *INDIA: 20 YEARS OF THE UNSC RESOLUTION 1325* 10 (2020).

<sup>39</sup> A. Nirmal Singh Heera, Rajasathya K.R. and N. Prabhavti, *Police Brutality and Custodial Torture in Technological Era: Need for Anti-Torture Law in India- A Critical Analysis* 15 *Indian Journal of Forensic Medicine & Toxicology* 18 (2021).

<sup>40</sup> Sameer P. Lalwani and Gillian Gayner, *India's Kashmir Conundrum: Before and After the Abrogation of Article 370* *JSTOR* 4 (2020).

<sup>41</sup> Association of Parents of Disappeared Persons (APDP) and Jammu and Kashmir Coalition of Civil Society (JKCCS), *Torture: Indian State's Instrument of Control in Indian Administered Jammu and Kashmir*, (2019).

structural problem. While ostensibly aimed at counter-insurgency, these operations often involve detentions and prolonged interrogations, where the line between lawful force and coercive abuse becomes blurred.<sup>42</sup> These legislative frameworks, when examined in light of international law, raise serious concerns. Preventive detention under the PSA, particularly when accompanied by denial of legal representation before advisory boards<sup>43</sup>, stands in direct tension with procedural safeguards implicit in Articles 7, 9, and 14 of the ICCPR,<sup>44</sup> thus potentially conflicting with obligations under the ICCPR and the fundamental rights guaranteed under the Constitution of India. While the prohibition of torture under international law enjoys the status of a *jus cogens* norm and is recognized as a non-derogable right under Article 7 of the International Covenant on Civil and Political Rights (ICCPR)<sup>45</sup>, the contradiction emerges when the domestic security architecture comes into play. It may be argued that the extraordinary security situation of the region necessitates the measures undertaken by the state, however the concern arises at the extent to which the measures are exercised by the State.

Data of National Crime Record Bureau (NCRB) reveals the application of the Unlawful Activities Prevention Act, 1967 (UAPA) across the country, with the number of persons arrested under the Act in Jammu and Kashmir rising from 227 in 2019 to 1206 in 2023, while convictions increased only marginally from 0 in 2019 to a mere 10 in 2023.<sup>46</sup>

While India ratified the ICCPR in 1979 and follows the Constitutional mandate of the right to life under Article 21 of the Constitution with the judiciary being the pioneer in upholding this fundamental right, the operational realities in Kashmir demonstrate a pattern wherein preventive detention laws function as *de facto* derogations from non-derogable rights, thereby undermining the normative supremacy of the prohibition against torture as provided under the International Law. Furthermore, India's failure to ratify the United Nations Convention against Torture (UNCAT) which absolves the State from bringing any measure to bring into effect the provisions of the Convention and the absence of a standalone domestic anti-torture legislation exacerbate this

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<sup>42</sup> *Supra* note 45.

<sup>43</sup> The Public Safety Act, 1978 (Act no. VI of 1978), s. 16(5) (Ind.)

<sup>44</sup> United Nations Human Rights Committee, General Comment No.35 on Article 9, Liberty and Security of person CCPR/C/GC/35 (2014).

<sup>45</sup> The International Covenant on Civil and Political Rights, art.7 opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>46</sup> Lok Sabha Debates on December 2, 2025, <https://elibrary.sansad.in/items/02478c47-4b65-447f-b0e7-942caf25f2ad> (Last visited June, 2026).

gap between obligation and enforcement.<sup>49</sup> What the scenario represents is a structural dissonance between the commitments of international law and the domestic practice. The continuance of laws like the AFSPA, PSA and the UAPA question the effectiveness of the international framework and puts out the reality that unless the domestic framework is aligned with the international standards, the right against torture will be a mere normative ideal.

## CONCLUSION

Despite the existence of a robust international and domestic legal framework prohibiting torture, cruel, inhuman, and degrading treatment, and affirming the right to life, the practical enforcement of these guarantees often remains inconsistent. Instruments such as the ICCPR, along with constitutional protections under Article 21 of the Indian Constitution, establish clear and non-derogable obligations on the State to safeguard individual dignity and bodily integrity. However, empirical evidence and human rights documentation suggest a persistent gap between normative commitments and their implementation. Allegations of custodial violence, arbitrary detention, and ill-treatment continue to surface despite the presence of legal prohibitions and oversight mechanisms.

Consequently, rights that are firmly entrenched in international conventions and domestic constitutional law may, in practice, lose their substantive force and be reduced to declaratory assurances. This tension between legal normativity and institutional practice highlights a structural challenge in human rights enforcement whereunder the formal guarantees need to be transformed into effective and justiciable protections.