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The Evidentiary Basis of The Prohibition of Torture as Jus Cogens and its Legal Implications for Indonesian National Law

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ABSTRACT

Although the status of which norms qualify as jus cogens remains debated, the International Law Commission (ILC) has identified the prohibition of torture as jus cogens. Establishing the prohibition of torture as a jus cogens norm is crucial, as it reflects fundamental values upheld by the international community and holds the highest legal status. Despite Indonesia's ratification of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UNCAT), torture practices continue. This paper analyzes and argues that the prohibition of torture qualifies as a jus cogens norm, while also exploring its legal implications for Indonesia's national law. By applying the six criteria outlined by the UN Special Rapporteur on Torture, it is demonstrated that the prohibition of torture satisfies the requirements of a jus cogens norm. Consequently, states are obligated to exercise jurisdiction over violations prohibited by international law within their territories, including the duty to prevent torture, whether perpetrated by state or non-state actors. As a state that has ratified UNCAT, Indonesia is bound to ensure that torture is recognized as a criminal offense under its national legal framework.

Keywords: torture; jus cogens; international law; peremptory norm, Indonesia.

INTRODUCTION

The concept of binding norms that must be adhered to by states in international law has a long and complex history. Various legal theories attempt to explain the concept of jus cogens as a fundamental norm with mandatory characteristics.[1] Classical writers of natural law theory, for instance, distinguished between *jus strictum* (strict and binding law) and jus *dispositivum* (voluntary law).[2] Some scholars refer to it as *jus natural necessarium* (necessary natural law), which essentially refers to customary law that is universally accepted and then recognized and adhered to by the international community. International treaties and customary international practices that do not conform to this "necessary natural law" are considered invalid.[3] This idea is based on the principle that norms derived from a higher source cannot be altered, even by God.[4] Jus cogens is often equated

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[1] Evan J. Criddle dan Evan Fox-Decent, "A Fiduciary Theory of Jus Cogens," *Yale Journal of International Law*, Vol. 34, 2009, p. 333, https://openyls.law.yale.edu/handle/20.500.13051/6596

[2] Erika De Wet, "Chapter 23: *Jus Cogens and Obligations Erga Omnes*," dalam Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law*, Oxford University Press, Oxford: 2015, p. 543; Alfred Verdross, "*Jus Dispositivum and Jus Cogens in International Law*", dalam Leo Gross (ed), *International Law in the Twentieth Century,* Appleton-Century-Crofts, New York: 1969, p. 217.

[3] *Ibid*., p. 218

[4] Rafael Nieto-Navia, "Chapter 28: *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*," dalam Lal Chand Vohrah et al. (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, Kluwer Law International, the Hague: 2003, p. 597.

with good morals by proponents of natural law theory, as they believe there exists a moral ethics that carries a mandatory character. [5]

Other scholars apply positivist theory, viewing jus cogens in a positive light, emphasizing state consent. [6] This binding norm is considered to originate from state practice, gaining peremptory status through acceptance or consent (*opinio juris*).[7] Meanwhile, the public order theory holds that the existence of *jus cogens* norms is crucial as rules that are inseparable from interstate relations and the broader normative agenda of international law.[8] Using an analogy from the hierarchical nature of domestic legal systems is generally inappropriate, as there are fundamental differences between the two systems.[9] Therefore, jus cogens norms play two main roles: ensuring the existence of states as part of a peaceful international community and upholding the foundational principles that underpin the normative commitment of the international system.

However, the three theories mentioned above have limitations in clearly defining *jus cogens*. These theories tend to conflate legal norms with moral principles, overly rely on state consent, or struggle to balance state sovereignty with international interests. As a result, the nature and scope of peremptory norms remain unclear. Therefore, a comprehensive analysis is required regarding the formal recognition of *jus cogens*, which can be observed through various international treaties as well as decisions of international courts.

Currently, the concept of *jus cogens* has been recognized as positive law through the Vienna Convention on the Law of Treaties 1969 (VCLT), which states that a peremptory norm is "a fundamental principle of international law that is accepted and recognized by states as a whole, and which may not be violated and can only be modified by another international law norm of equal authority."[10] Furthermore, if a new norm with *jus cogens* status arises, any pre-existing international treaties conflicting with that jus cogens norm become void. Such norms are usually first recognized as customary international law, after which the international community declares its agreement that the norm cannot be waived in any form.[11] As such, states as a whole will be bound by the norm

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[5] Levan Alexidze, "*The Legal Nature of Jus Cogens in Contemporary International Law* (Volume 172)" dalam *Collected Courses of the Hague Academy of International Law,* 1981, p. 243; See also: Ernest K. Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts*, Springer, New York: 2005, p. 297.

[6] Oliver Dörr dan Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, Springer, New York: 2012, p. 908.

[7] Michael Byers, "Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules," *Nordic Journal of International Law*, Vol. 66, No. 2-3, 1997, p. 212, https://doi.org/10.1163/15718109720295265

[8] Evan J. Criddle dan Evan Fox-Decent, *Op. Cit.,* (Note 1), p. 344.

[9] Martti Koskenniemi, "*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International"*, Report of the Study Group of the International Law Commission, Fifty-eighth session, A/CN.4/L.682, Geneva, 2006, p.20

[10] Article 53 Vienna Convention on the Law of Treaties ["Konvensi Wina tentang Hukum Perjanjian"], 23 May 1969, 1155 UNTS 331, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[11] *Ibid*

through dual acceptance.[12] Even the concept of a persistent objector, known in customary international law, cannot be applied in the case of *jus cogens*.[13]

In its development, although there is still debate over which norms can be classified as jus cogens, several norms have been recognized and accepted as meeting this category. Some of these include the prohibition of the aggressive use of armed force, the right of self-defense, the prohibition of slavery, the prohibition of genocide, the prohibition of crimes against humanity, the prohibition of piracy, as well as the prohibition of racial discrimination, apartheid, and including the prohibition of torture.[14] However, proof of how these norms can be recognized as jus cogens is still needed. This study will focus on examining the norm prohibiting torture, as torture is considered one of the most brutal human rights violations and is inherently morally wrong. Torture is an affront to human dignity and has a global impact that urgently needs to be prevented.

The prohibition of torture has been regulated in both regional and international human rights instruments. Following the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), on 10 December 1984, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) was adopted by the United Nations General Assembly. After being ratified by the 20th state party, this convention came into force on 26 June 1987.[15] UNCAT is an international human rights treaty aimed at preventing and eradicating the practice of torture, requiring member states to take effective measures to prevent torture within any territory under their jurisdiction.

Although the prohibition of torture has frequently been referenced as jus cogens,[16] the process of proving its status under international law is necessary to clarify and affirm its position. Furthermore, analyzing the legal implications of the prohibition of torture as jus cogens is crucial, not only in the context of international law but also within national law. An important question that arises is how to operationalize jus cogens norms, such as the prohibition of torture, at the national or domestic level. To what extent must states enact laws that incorporate international legal norms, and can jus cogens norms override domestic laws that conflict with these norms?

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[12] Erika De Wet, "Chapter 29: *Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law*," dalam *Jean d'Aspremont dan Samantha Besson* (eds), The Oxford Handbook of the Sources of International Law, Oxford University Press, Oxford: 2017, p. 625-639.

[13] Hugh Thirlway, *The Sources of International Law,* Oxford University Press, Oxford: 2014, p. 159.

[14] Report of the International Law Commission, Seventy-first session, United Nations, A/74/10, 2019, https://documents.un.org/doc/undoc/gen/g19/243/93/pdf/g1924393.pdf
Articles on Responsibility of States for Internationally Wrongful Act with commentaries, adopted by the International Law Commission at its 53rd session, U.N. Doc. A/56/10 (2001).

[15] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment General Assembly Resolution ["UNCAT"], https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_39_46.pdf

[16] M. Cherif Bassiouni, "International Crimes: 'Jus Cogens' and 'Obligation Erga Omnes,'" Law and Contemporary Problems, Vol. 59, No. 4, 1996, p. 68, https://doi.org/10.2307/1192190; Erika De Wet, "The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law," *European Journal of International Law* Vol. 15, No. 1, January 2004, p. 97-121, https://doi.org/10.1093/ejil/15.1.97

This research is highly relevant because, despite the recognition of the prohibition of torture as a jus cogens norm, there has been limited research addressing its application within national law. Proving its status as jus cogens is essential to affirm the state's obligation to implement the prohibition of torture without exception. This is significant because, even though international human rights conventions have been ratified, many states still face challenges in accommodating and actualizing these norms into domestic law, which risks overlooking human rights protections.

METHODS

This research is a normative study[17] that explores the development of the concept of torture in both international law and Indonesian law. The legal materials are sourced from regulations at the international and national levels, court decisions, and the development of legal doctrines. This study employs both a regulatory[18] and conceptual[19] approach to examine the views and legal doctrines concerning torture in international law. This approach allows the researcher to investigate how the prohibition of torture is recognized and implemented within the broader legal system, both at the international and national levels

It should also be noted that the practice of torture has distinguishing elements compared to other forms of cruel, inhuman, or degrading treatment or punishment (other forms of arbitrary treatment), which can be identified through an analysis of the context and specific facts concerning the intent and severity of the treatment. Therefore, this research focuses specifically on the act of torture and excludes analysis of other forms of cruel, inhuman, or degrading treatment or punishment.

DISCUSSION

Proof of the Prohibition of Torture as Jus Cogens

In the history of the development of international law, various theoretical approaches have been proposed to explain the obligatory nature inherent in jus cogens norms. Generally, natural law theory and positivist theory are the two main schools of thought that attempt to explain the nature of jus cogens norms.[20] It is not surprising that support for both approaches can be found in various international judicial practices. However, based on the first report on jus cogens by the Special Rapporteur, the International Court of Justice (ICJ) itself has often been inconsistent in its approach to the concept of jus cogens. At times, the ICJ appears to prioritize the natural law approach, while at other times, it seems to rely on positivist thinking and consent-based reasoning.[21] Moreover, the

[17] Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, Rajawali Press, Jakarta: 2009, p. 13-14; Bachtiar, *Metode Penelitian Hukum*, UNPAM Press, Banten: 2018, p. 57.
[18] Peter Marzuki, *Penelitian Hukum*, Prenada Media Group, Jakarta: 2005, p. 93.
[19] *Ibid*, p. 94.
[20] Asif Hameed, "Unravelling the Mystery of Jus Cogens in International Law," *British Yearbook of International Law*, Vol. 84, No. 1, 2014, p. 52-102, https://doi.org/10.1093/bybil/bru023
[21] See First Report on Jus Cogens by Dire Tladi, Special Rapporteur, International Law Commission Sixty-eighth Session, Geneva, A/CN.4/603, 8 March 2016, <https://digitallibrary.un.org/record/830720/files/A_CN-4_693-EN.pdf?ln=en>, [accessed on 10/10/2023].

views of its judges also vary, with some adopting the immutable natural law approach, while others favor the positivist approach to jus cogens.[22]

Although there is no theory that clearly and adequately explains the uniqueness of jus cogens in international law, according to the Special Rapporteur, there are several common characteristics that are accepted as essential elements of jus cogens, namely:[23] they cannot be diminished under any circumstances; they are universal; they are accepted and recognized by the international community as a whole; they apply universally; they take precedence over other norms of international law; and they function to provide protection for the fundamental values of the international community as a whole. These six characteristics are then used to prove that the prohibition of torture meets the criteria for jus cogens.

The definition of torture is "any act that inflicts severe pain or suffering, whether physical or mental, intentionally imposed on a person in order to obtain information or a confession from that person or a third person, to punish them for an act they have committed or are suspected of having committed, or to intimidate or coerce them 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."[24] Based on this definition, the analysis of the prohibition of torture as a jus cogens norm is as follows.

1. The Norm is non-Derogable

   In international law, the prohibition of torture is absolute.[25] This means that the prohibition of torture cannot be limited under any circumstances. This norm is also considered a non-derogable right,[26] meaning that governments cannot reduce or suspend the fulfillment of this right under any circumstances, even during times of war, terrorist threats, or public emergencies. The concept of non-derogable rights is explicitly addressed in Article 2 of the UN Convention Against Torture (UNCAT), which states, "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability, or any other public emergency, may be invoked as a justification for torture." This non-derogable nature is the core or foundation that grants a norm its jus cogens status. [27]
2. The Norm is General Internasional Law Norm

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[22] *Ibid,* para. 54.
[23] *Ibid,* Core Elements of *Jus Cogens*, para. 61-63.
[24] Article 1 UNCAT.
[25] Reports, comments on statements, decisions in individual cases, and court cases at the international, regional, and domestic levels have repeatedly affirmed this general prohibition. See: Association for the Prevention of Torture dan Center for Justice and International Law, Torture in International Law: A Guide to Jurisprudence, the Association for the Prevention of Torture (APT) and the Center for Justice and International Law (CEJIL), Geneva/ Washington: 2008, <https://www.apt.ch/sites/default/files/publications/jurisprudenceguide.pdf>, [accessed on 10/10/2023].
[26] Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007).
[27] Robert Kolb, Peremptory International Law - Jus Cogens: A General Inventory, Hart Publishing, Oxford/Portland: 2015, p. 2.

A jus cogens norm is a type of norm that applies universally across all legal systems around the world.[28] In the international context, the prohibition of torture has been explicitly regulated in various multilateral treaties, both soft law (non-legally binding) and hard law (legally binding). Several international instruments that regulate the prohibition of torture include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[29] Additionally, the United Nations (UN) has standards such as the Mandela Rules, the Mendez Principles, and the Havana Rules.[30] At the regional level, this norm is recognized in Europe, Africa, the Americas, the Arab region, and ASEAN.[31] All of this demonstrates that the prohibition of torture is a universally applicable and recognized norm throughout the world.

3. The Norm is Accepted and Recognized by the International Community as a Whole

A jus cogens norm implies broad consensus among the members of the international community.[32] All states, without exception, must accept and apply this norm, regardless of their background or conditions. The acceptance and recognition of a norm can be seen through several means, including: ratification of international treaties, acceptance (or lack of objection) to customary international practices by other states, or recognition through national court decisions.

Domestically, the prohibition of torture has been incorporated into national laws in nearly every country.[33] This is in line with the practices of states, particularly international treaties like UNCAT, which has been ratified by 173 countries.[34] This fact indicates that the majority of countries around the world have recognized and accepted the norm prohibiting torture as a norm that must be implemented.

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[28] Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, Manchester: 1973, p. 110.

[29] Others include the Convention on the Rights of the Child; the Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Rome Statute of 1998; the International Convention for the Protection of All Persons from Enforced Disappearance; and the Optional Protocol to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[30] "The United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rule), The UN Code of Conduct for Law Enforcement Officials, Principles on Effective Interviewing for Investigations and Information Gathering (Mendez Principles), 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, UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, dan UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 (Havana Rules). "

[31] "European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights, and the American Convention on Human Rights, Arab Charter on Human Rights 2004; Cairo Declaration on Human Rights in Islam 1990; Inter-American Convention to Prevent and Punish Torture 1985; ASEAN Human Rights Declaration 2013"

[32] Report of the International Law Commission, Seventy-first session, United Nations, A/74/10, 2019, https://documents.un.org/doc/undoc/gen/g19/243/93/pdf/g1924393.pdf

[33] Dalam *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422. ["Kasus Belgium v. Senegal"]. para. 99.

[34] United Nations Treaty Collections, UNCAT, <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en> [accessed on 12/10/2023].

At the international level, the international community has demonstrated its willingness to prohibit torture in all forms. This is underscored by the International Criminal Tribunal for the Former Yugoslavia (ICTY), which stated that, "The existence of a body of general rules and treaties prohibiting torture shows that the international community, which has recognized the importance of prohibiting this heinous phenomenon, has decided to suppress every manifestation of torture, operating at both the state and individual levels. No legal loophole remains."[35] The Court explicitly linked the status of the prohibition of torture as a jus cogens norm to the importance of the values it protects, noting that the jus cogens nature of the prohibition of torture articulates the idea that this prohibition has now become one of the most fundamental standards of the international community.[36]

In the context of customary international law, for a norm to acquire the status of jus cogens, absolute consensus among all states is not required. Although one state cannot prevent the recognition of a compelling norm, the acceptance of the majority of states is crucial.[37] The collective will, supported by shared values of the international community, can override the will of a single state acting individually.[38] Therefore, the norm will be subject to a double acceptance by the international community as a whole.[39]

The prohibition of torture has now become part of customary international law,[40] meaning that this norm binds all members of the international community, regardless of whether a state has explicitly ratified international treaties prohibiting torture. Several international courts, such as the International Court of Justice (ICJ), have declared that the prohibition of torture is part of customary international law and has attained the status of jus cogens.[41] This was also affirmed in the decision of the International Criminal Tribunal for the former Yugoslavia (ICTY), which noted that the prohibition of torture is a customary international law norm and, subsequently, a jus cogens norm.[42]

Meanwhile, the Kenyan Court of Appeal noted that even though Kenya has not ratified the UNCAT, the country is still bound to prohibit torture within its territory based on

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[35] *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Judicial Reports 1998. ["Prosecutor v. Furundžija"]. para 146. <https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf> [accessed on 12/10/2023].

[36] *Ibid,* para. 153 dan 154.

[37] Erika De Wet, *Loc. Cit*.

[38] Dinah Shelton, "Normative Hierarchy in International Law," *American Journal of International Law*, Vol. 100, No. 2, 2006, p. 299, https://doi.org/10.1017/s0002930000016675.

[39] See: Ulf Linderfalk, "The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?", *European Journal of International Law*, Vol. 18, No. 5, 2008, p. 862.

[40] Torture in International Law, A Guide to Jurisprudence, CEJIL, 2008; Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007); See Also: Press Releases, Torture is here, there and everywhere – UN rights experts reminds Governments, United Nations Human Rights Office of the High Commission, 2015.

[41] The International Court of Justice Passes Landmark Verdict on the Duty of States Regarding the Prosecution and Extradition in Belgium v Senegal Case, https://www.aalco.int/Belgium%20v%20Senegal%20brief%202012.pdf

[42] The Prosecutor v. Zejnil Delalic, Zdravko Mucic (a/k/a/ "Pavo"), Hazim Delic, Esad Landzo (a/k/a "Zenga") Case No. IT-96-21-T, 16 November 1998, para. 454.

customary international law and norms upheld in international law.[43] Such customary obligations must have the same binding force for all members of the international community.[44] Therefore, the term "general" in the context of customary international law norms under Article 53 appears to refer to the scope of application that applies to all existing legal systems. Torture is universally condemned, and no state openly supports the practice or opposes efforts to eradicate it. In fact, the prohibition of torture has also become part of customary international law, both in international and non-international armed conflicts. [45]

4. The Norm is Observed and Applicable under Universal Jurisdiction

The jus cogens norm, distinct from jus dispositivum, is universally recognized and applied across all international legal systems. Universal jurisdiction refers to the principle that national courts have the authority to prosecute individuals involved in serious violations of international law. This principle applies to various grave crimes, such as torture, as part of international public policy, given the severity of such crimes and the importance of enforcing these laws in the eyes of the international community.[46] Universal jurisdiction may be invoked even in the absence of a direct connection between the prosecuting state and the alleged crime.[47] This concept acknowledges that certain international crimes, which severely harm the international order, must be subject to prosecution anywhere. Therefore, every state bears the obligation to act in protecting these international values, including in the case of the crime of torture.

The United Nations Convention Against Torture (UNCAT) has been interpreted as imposing a duty on states to apply universal jurisdiction wherever necessary to combat such crimes. Under UNCAT, every state party is obligated, whenever an individual suspected of committing torture is found within its territory, to either refer the case to the competent authorities for prosecution or to extradite the individual.[48] The state remains bound by this obligation, even in the absence of a direct link to the events or perpetrators involved.[49] Furthermore, it is now widely acknowledged that states, even those not parties to these treaties, may exercise universal jurisdiction over torture under international law.[50]

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[43] Koigi Wamwere v. The Attorney-General, Judgment of the Court of Appeal of Kenya of 6 March 2015, para. 6., https://new.kenyalaw.org/akn/ke/judgment/keca/2015/917

[44] North Sea Continental Shelf (Germany v. Denmark), Judgment, I.C.J. Reports 1969, p. 3, para. 72.

[45] Jean-Marie Henckaerts dan Louise Doswald-Beck, *Customary International Humanitarian Law* Volume I, Cambridge University Press, New York: 2005, Rules 90, <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> [accessed on 12/10/2023].

[46] ICRC, Advisory Service on International Humanitarian Law, 2014, https://www.icrc.org/sites/default/files/document/file_list/universal-jurisdiction-icrc-eng.pdf

[47] Devika Hovell, Mara Malagodi, Universal Jurisdiction: Law out of Context, *The Modern Law Review*, Vol. 87, No. 6, 2024, doi: 10.1111/1468-2230.12898; See also The Princeton principles on Universal Jurisdiction, 2001, https://www.icj.org/wp-content/uploads/2001/01/Princeton-Principles-Universal-Jurisdiction-report-2001-eng.pdf

[48] Article 5-9 UNCAT.

[49] *Ibid.*

[50] Amnesty International, *Torture: The legal basis for universal jurisdiction*, 2001, https://www.amnesty.org/es/wp-content/uploads/2021/06/ior530122001en.pdf

5. The Norm Holds a Higher Status Than Other Norms

   The fact that a jus cogens norm holds a higher hierarchical status than other norms of international law is both a characteristic and a consequence of this norm. This characteristic highlights the supremacy of this peremptory norm within the international legal order, while its consequence is that this norm can override other international legal rules that are in conflict with it.[51]

   One aspect of the prohibition of torture relates to the hierarchy of norms within the international normative order. Several international courts, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), have recognized the superiority of jus cogens norms within the international normative framework, regarding these norms as "higher" than other sources of international law.[52] Similar statements have been made by the Inter-American Court of Human Rights andthe European Court of Human Rights.[53] The European Court of Human Rights has described the norms binding international customary law (jus cogens) as norms with a higher rank within the hierarchy of international legal sources.[54] Meanwhile, the Court of First Instance of the European Communities has depicted the norms binding international customary law (jus cogens) as constituting a higher body of public international law rules.[55]

   This superiority indicates that states must prioritize the application of the prohibition of torture, even if there are other international norms that may conflict with it. Thus, the obligation to comply with this norm strengthens its enforcement within the international legal system and reaffirms the importance of the absolute protection of human rights.

6. The Norm Functions to Protect the Fundamental Values of the International Community

   A jus cogens norm must have a clear subject and a definite purpose, as this norm serves as a boundary for state behavior and a guarantee of fundamental justice. As stipulated in the UN Convention Against Torture (UNCAT), each state party must ensure that its legal system provides access for victims of torture to obtain fair and adequate compensation, including provisions for maximum rehabilitation. [56] In cases where torture leads to death, the victim's family is entitled to compensation. This provision aligns with the principle of formal moral

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[51] Antonio Cassese, "*For an Enhanced Role of Jus Cogens*", in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford: 2012, p. 159.
[52] Prosecutor v. Furundžija, *Op. Cit*., p. 569, para. 153.
[53] García Lucero, et al. v. Chile, Judgment 28 August 2013, Inter-American Court of Human Rights, Series C, No. 267, para. 123, note 139.
[54] Al-Adsani v. the United Kingdom, ECHR, Application no. 35763/97, para. 60.
[55] Judgment of the Court (Grand Chamber) of 3 September 2008. Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, para. 87, 282, https://curia.europa.eu/juris/document/document.jsf?text=&docid=67611&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=25690322.
[56] Article 14 UNCAT.

equality,[57] which mandates equal treatment for all individuals, without exception. In other words, this norm functions to ensure that every individual receives equal and fair protection. The principle of justice, as emphasized by Lon Fuller through the principle of integrity,[58] asserts that a jus cogens norm must have a purpose that benefits society as a whole. At the same time, states are not permitted to deviate from this norm, as respecting this norm is part of the effort to achieve a legal order that is secure and just for the common good.

It should be noted that although compensation is an important step in providing redress for victims of torture, it is not sufficient to offer comprehensive protection for the fundamental values guaranteed by jus cogens norms. Such protection encompasses not only the rehabilitation of the individual victim but also preventive measures that ensure states do not engage in or permit acts of torture in the future. In this context, compensation is indeed part of the efforts to restore victims, but the jus cogens norm requires states to take concrete actions in prevention, investigation, and prosecution of acts of torture. States must ensure that their legal systems not only provide compensation to victims but also comply with international obligations to prevent torture and protect human dignity and personal integrity. Thus, the jus cogens norm serves as a guarantee of comprehensive and sustainable protection of human rights.

Table 1. Proof of the Torture Prohibition Norm as Jus Cogens

No	*Jus Cogens* Criteria	Description
1	Non-Derogable Norm	The norm prohibiting torture is absolute, meaning it cannot be restricted or excluded under any circumstances. Due to its non-derogable nature, the prohibition of torture cannot be diminished or delayed in any situation.
2	General International Law Norm	The prohibition of torture is regulated in various international and regional treaties, both soft law and hard law.
3	Accepted and Recognized by All States	The prohibition of torture has become customary international law. The acceptance and recognition by states can be seen through the ratification of international treaties as well as rulings from international and national courts.
4	Universally Adhered to Norm	The application of universal jurisdiction over the prohibition of torture, regardless of where the crime occurred or by whom (nationality).
5	Superior to Other Norms	The prohibition of torture overrides other norms such as international treaties and customary international law. There is no justification for the practice of torture.
6	Protects Fundamental Values of the International Community	The prohibition of torture has a clear subject and objective: to protect human dignity and personal integrity, with the obligation of states to prosecute perpetrators and provide compensation to victims.

[57] Ken Coghill, Charles Stamphord, dan Tim Smith, *Fiduciary Duty and the Atmospheric Trust*, Ashgate Publishing Limited, London: 2012, p. 258.
[58] Criddlet dan Fox-Decent, *Op. Cit*., p. 363.

The table above demonstrates that based on the six criteria proposed by the UNCAT Special Rapporteur as essential elements in forming a jus cogens norm, the prohibition of torture can be classified as a jus cogens norm. This is evidenced by the fact that the prohibition of torture meets all six criteria: it cannot be derogated under any circumstances; it is part of widely applicable general international law; it is accepted and recognized by all states; it is universally adhered to, both through international treaties and customary international law; it possesses superior status compared to other norms of international law, thereby occupying the highest rank in the hierarchy of international legal norms; and it serves to protect the fundamental values of the international community, particularly the states, within the broader international legal order.

After establishing that the prohibition of torture exhibits the characteristics and traits of a jus cogens norm, it is essential to analyze the legal implications of this norm within the context of national law in various countries. The following section will theoretically examine these implications and then analyze them in the context of national law, particularly Indonesia.

Konsep Implikasi Hukum Norma *Jus cogens* terhadap Hukum Nasional

Fundamentally, the Vienna Convention on the Law of Treaties (VCLT 1969) does not specifically regulate the implications of jus cogens norms on the national law of a state. Instead, the Convention focuses more on the consequences that arise when a state's domestic legislation conflicts with a jus cogens norm, which is specifically addressed in Articles 53 and 64. According to these two articles, the obligations of states in enforcing jus cogens norms in the world are as follows:[59]

a. States are obligated to prosecute any actions that contravene jus cogens norms, whether committed by their nationals or occurring within their territories; [60]
b. States are obligated to eliminate regulations that contain discrimination, combat all forms of discrimination, and enforce laws that aim to ensure the application of the principle of equality before the law for every individual; [61]
c. Considering that aggression, war crimes, and crimes against humanity are prohibited by jus cogens norms, other states have the obligation to prosecute heads of state involved in any of these crimes. [62]

In addition to the obligation of states to enforce jus cogens norms, Articles 53 and 64 of the VCLT 1969 provide two legal consequences regarding the applicability of jus cogens norms. First, if an

[59] Ulf Linderfalk, "The Legal Consequences of Jus Cogens and the Individuation of Norms," *Leiden Journal of International Law*, Vol. 33, No. 4, 2020, p. 894, https://doi.org/10.1017/s0922156520000357
[60] Third report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur, Report of the Special Rapporteur of the International Law Commission Report on Jus Cogens, A/CN.4/714, 12 February 2018, https://digitallibrary.un.org/record/1483378/files/A_CN-4_714-EN.pdf?ln=en [accessed on 14/10/2023].
[61] Hal ini disebutkan Inter-American Court of Human Rights, Case of YATAMA v. Nicaragua, Judgment of 23 June 2005, *(Preliminary Objections, Merits, Reparations and Costs),* para. 185, https://www.corteidh.or.cr/docs/casos/articulos/seriec_127_ing.pdf
[62] Louis Rene Beres, "Prosecuting Iraqi Crimes against Israel during the Gulf War: Jerusalem's Rights under International Law", *Arizona Journal of International and Comparative Law*, Vol. 9, No. 337, 1992, p. 351-358

international treaty has been made and the applicable national law conflicts with a jus cogens norm, the provisions of the treaty cannot be enforced (Article 53); [63] and second, if a new jus cogens norm contradicts an existing treaty, that treaty is automatically void (Article 64).[64]

In line with this provision, international law practitioners have formulated additional legal consequences (secondary jus cogens obligations) that arise from the implementation of jus cogens norms, including the following:[65]

a. Any reservation to a treaty that contradicts a jus cogens norm, whether made by a state or an international organization, is null and void by law; [66]
b. If a state makes a unilateral declaration to modify a jus cogens norm, other states are not permitted to act based on such a declaration; [67]
c. If a jus cogens norm conflicts with customary international law, the state must adhere to the jus cogens norm; [68] and
d. A state has an obligation to prosecute any violations of a jus cogens norm, whether committed by its nationals or occurring within its territory.[69]

Although the implications mentioned above primarily focus on the legal consequences of the application of jus cogens in a state's national law, the jus cogens norm also implicitly governs the implications related to a state's actions in relation to the enforcement of this norm. Jus cogens norms are provisions in international law that obligate states to act in accordance with norms classified as jus cogens, clearly indicating their superior position over ordinary international law.[70] Therefore, national law must reflect the forms of compliance by states with jus cogens norms.

In this regard, the implications of the jus cogens norm on a state's national law, specifically in the context of the prohibition of torture, result in an obligation for each state to avoid any acts that involve elements of torture.[71] This obligation represents the most fundamental standard, where the international community as a whole has a legal interest (*erga omnes*) in providing protection against the practice of torture.[72] As a consequence of this erga omnes nature, each state has a legal interest

[63] Article 53 of the Vienna Convention on the Law of Treaties.
[64] *Ibid,* Article 64.
[65] Linderfalk, *Op. Cit.,* p. 897.
[66] See Art. 4.4.3(2) of the Guide to Practice on Reservations to Treaties, Report of the ILC on the work of its 63rd session, UN Doc A/66/10, at 35; Tladi, *Op. Cit.,* p. 67.
[67] See Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, Report of the ILC on the work of its 58th session, UN Doc A/61/10, p. 161.
[68] Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), Judgment of 3 February 2012, I.C.J. Rep. 2012, 99, at para. 92.
[69] Dire David Tladi, *Op. Cit.,* p. 68.
[70] See Article 53 of the Vienna Convention on the Law of Treaties, where the phrases "a norm accepted and recognized by the international community of States as a whole as a norm," "no derogation is permitted," and "can be modified only by a subsequent norm of general international law having the same character," indicates the position of jus cogens as the highest norm of international law, where no violation of this norm is permitted, it has been recognized by all states and the international community, and it can only be altered or replaced by another norm of the same character. This implies an obligation for every state to comply with the jus cogens norm without exception.
[71] See Belgium v. Senegal case, *Loc. Cit*; Prosecutor v. Furundžija, *Op. Cit*., para. 155; Servellon García v. Honduras, Merits, Reparations and costs, Ser C No 152, Judgment of 21 September 2006, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_152_ing.pdf , para. 97.
[72] The obligation erga omnes cannot be reduced to a bilateral or multilateral relationship of rights and obligations in the usual sense; rather, it is an obligation owed to the international community as a whole. Therefore, every state has a legal

in ensuring that the obligations arising from the prohibition of torture are properly implemented. Furthermore, because this norm is both jus cogens and erga omnes, no circumstances or justifications can be accepted by a state for violating the prohibition of torture.

The jus cogens nature of the prohibition of torture and the erga omnes character of the obligations arising from this prohibition have significant consequences. These consequences pertain to the state's obligations for prevention, as well as the state's duty not to support, adopt, or recognize actions that violate the prohibition of torture. This can be observed in the case of *Prosecutor v. Anto Furundzija*, decided by the International Criminal Tribunal for the former Yugoslavia (ICTY), where the tribunal emphasized that every state has the obligation to investigate, prosecute, punish, or even extradite individuals suspected of committing torture within its jurisdiction.[73] Since the prohibition of torture is a jus cogens norm, states cannot refuse the extradition of torturers on the grounds of any political offense exception. Furthermore, the prohibition of torture aims to provide a deterrent effect, signaling to the international community, including individuals in positions of authority, that the prohibition against torture is an absolute value that cannot be violated by anyone.

In addition to the implications for state obligations, the jus cogens norm also has implications for state immunity. International practice shows that states must waive their immunity if a violation of a jus cogens norm occurs. This statement is reflected in the case of *Princz v. The Federal Republic of Germany*, where the District Court for the District of Columbia ruled that under the Foreign Sovereign Immunities Act of 1976, when a case involves another state, the United States government must recognize that violations of jus cogens norms can waive the state's immunity, whether explicitly or implicitly.[74]

In addition, in the 1997 *Distomo* case, decided by the Court of First Instance of Livadia, it was stated that a sovereign state cannot claim immunity for violations of international law norms that possess the characteristics of jus cogens.[75] Sovereign immunity cannot be used as an excuse for a state to evade responsibility for violating a jus cogens norm, as such violations are also illegal under the national laws of other countries. Sovereign immunity should, in fact, encourage states to be accountable for violations of international law, including jus cogens norms. By granting immunity to states that violate jus cogens norms, a court would be effectively recognizing a sovereign right that does not truly exist. This would imply that the state is not acting as a legitimate sovereign, and the

interest in ensuring the fulfillment of this obligation. Article 42 and 48 of the Articles on State Responsibility by the International Law Commission (ILC) highlight this distinction.

[73] In the Trial Chamber, Prosecutor v. Anto Furundžija, Judgement of 10 December 1998, para 156, https://www.icty.org/x/cases/furundzija/tjug/en/

[74] Princz v. The Federal Republic of Germany, United States Court of Appeals, District of Columbia Circuit, 26 F.3d 1166 (D.C. Cir. 1994), at 1168.

[75] Separate Opinion of Judge Cancado Trindade, Jurisdictional Immunities of the State (Germany v. Italy) - Application for permission to intervene submitted by Greece - The Court grants Greece permission to intervene in the proceedings as a non-pa, 2011' See also Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice Jurisdictional Immunities Of The State (Germany *V.* Italy) [Application By The Hellenic Republic For Permission To Intervene], 2011.

court and the international community might be seen as turning a blind eye to the state's freedom to evade accountability for violations of jus cogens norms in the future. This undermines the very principle that the prohibition of actions like torture, which fall under jus cogens, should have universal and non-derogable protection, ensuring that no state can escape its obligations under these norms.[76]

Legal Implications of the Prohibition of Torture as Jus Cogens in Indonesian Law

The prohibition of torture as a jus cogens norm is binding on all states, including Indonesia. In 1998, Indonesia ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) through Law No. 5 of 1998 on the Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This ratification reflects Indonesia's commitment to recognizing and protecting the right of every individual to be free from torture, cruel, inhuman, or degrading treatment or punishment.

As a State Party, Indonesia is obligated to ensure that all acts of torture are considered violations under national criminal law. UNCAT mandates that "Each State Party shall take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction."[77] Additionally, States are required to incorporate the crime of torture into domestic law and adopt a definition of torture that includes all the elements contained in Article 1 of the Convention.[78] Therefore, Indonesia is obligated to investigate, prosecute, punish, or even extradite individuals suspected of involvement in torture, whether committed within the jurisdiction of Indonesia or by Indonesian nationals abroad.

Indonesia has indeed recognized and guaranteed the right to be free from all forms of torture through various legislative measures. This right is a constitutional right acknowledged by the 1945 Constitution of the Republic of Indonesia (UUD 1945), which affirms that "the right not to be subjected to torture is a human right that cannot be diminished under any circumstances."[79] The Constitution further emphasizes that "everyone has the right to be free from torture and treatment that demeans the dignity of the human being."[80] In addition, Law No. 1 of 1946 on the Indonesian Criminal Code (Old Criminal Code) also addresses the prohibition of torture.[81] Meanwhile, Law No. 39 of 1999 on Human Rights underscores that "everyone has the right to be free from torture, punishment, or treatment that is cruel, inhuman, or degrading to the dignity and humanity of a person."[82]

The prohibition of torture is also enshrined in several other regulations. For example, the Law on Sexual Violence Crimes stipulates that torture occurs when an official or individual acting in an official capacity, or acting with the encouragement or knowledge of an official, commits sexual

[76] Elena Vournas, Prefecture of Voiotia v. Federal Republic of Germany: Sovereign Immunity and the Exeption for Jus Cogens Violations, *NYLS Journal of Internasional and Comparative Law*, Vol. 21, 2002.
[77] UNCAT, Article 2 paragraph (1).
[78] *Ibid*, Article 4.
[79] Article 28I paragraph 1 of the Constitution of the Republic of Indonesia 1945.
[80] Article 28G paragraph 2 of the Constitution of the Republic of Indonesia 1945.
[81] Article 351, Article 352, Article 442 of Indonesian Criminal Code.
[82] Article 33 of Law No. 39 of 1999 on Human Rights, State Gazette of the Republic of Indonesia 1999, Number 135.

violence against a person with the intention of: "intimidating to obtain information or confessions from the victim or a third party; persecution or punishment for suspected or alleged actions; and/or humiliating or degrading the dignity of the victim based on discrimination and/or sexual orientation in any form."[83] Furthermore, the rights of torture victims are also regulated, including the right to protection, justice, compensation, restitution, and medical and psychosocial recovery assistance.[84] The Child Protection Law also prohibits any person from committing cruelty, violence, or threats of violence, or maltreatment of children.[85] The importance of the protection and promotion of human rights, as it concerns human dignity, is similarly reinforced in Law No. 2 of 2002 on the Indonesian National Police.[86]

In practice, cases of torture in Indonesia have often been handled under the abuse provisions in the old Criminal Code (KUHP), which are inadequate to address the complexities of torture as a crime and the involvement of various actors. Consequently, many torture cases are treated as ordinary crimes, resulting in relatively light penalties.[87]

However, the enactment of Law No. 1 of 2023, which revises the Criminal Code, now specifically addresses torture in Articles 529 and 530. These articles define torture as follows: "coercion by an official to obtain a confession in a criminal case, punishable by up to four years in prison,"[88] and "any official or other individual acting in an official capacity, or at the direction or with the knowledge of an official, who inflicts physical or mental suffering on a person to obtain information or a confession from them or a third party, to punish them for an alleged or actual act, or to intimidate or coerce them based on discrimination in any form, shall be subject to a maximum prison sentence of seven years."[89]

The new Criminal Code (KUHP) refers to the definition of torture as outlined in the UN Convention Against Torture (UNCAT), reflecting a positive step by the Indonesian government to align with international human rights law. This is a commendable move as it demonstrates Indonesia's commitment as a state party to the convention. However, although the definition of torture in the new KUHP adheres to international standards, it remains somewhat general and requires further elaboration. A more detailed explanation of the elements of torture, including both physical and psychological violence, as well as the conditions and contexts in which torture may occur, should be added to ensure it aligns more closely with the ongoing developments in international law.

On the other hand, despite Indonesia's normative steps to accommodate various forms of torture, the implementation of criminal law enforcement remains inadequate. Torture continues to

[83] Article 4 and Article 11 of Law No. 12 of 2022 on Sexual Violence Crimes.
[84] Article 6 and Article 7 of Law No. 13 of 2006 on Witness and Victim Protection, as amended by Law No. 31 of 2014 on Amendments to Law No. 13 of 2006 on Witness and Victim Protection.
[85] Article 80 of Law No. 23 of 2002 on Child Protection.
[86] Preamble of Law No. 2 of 2002 on the Indonesian National Police.
[87] Zainal Abidin, *Tindak Pidana Penyiksaan dalam RKUHP*, Institute for Criminal Justice Reform, 2017
[88] Article 529 of Law No. 1 of 2023 on the Indonesian Criminal Code.
[89] Article 530 of Law No. 1 of 2023 on the Indonesian Criminal Code.

occur within the cycle of law enforcement in Indonesia. Some of the issues currently surrounding torture in Indonesia include the death penalty as a form of torture, the waiting list phenomenon, prison overcrowding, and torture occurring outside of incarceration, such as in social institutions, asylum seekers, and gender-based torture.[90]

The main causes of torture practices in Indonesia are due to several factors, such as the government's low commitment, unclear normative legal frameworks that effectively combat torture, and a lack of accountability mechanisms for perpetrators.[91] According to data collected by Amnesty Indonesia, the majority of torturers are members of the National Police (75%), personnel from the Indonesian National Army (19%), a combination of the Indonesian National Army and National Police (5%), and correctional officers (1%). In addition, data gathered by the National Commission on Human Rights (Komnas HAM) between January 2020 and June 2024 recorded 282 cases of torture, with the majority of perpetrators being members of the National Police (176), Indonesian National Army (15), correctional facilities (10), judiciary institutions (1), non-ministerial state institutions (4), and the central government (3).[92] This data indicates that the state has not sufficiently ensured the protection of its citizens from torture.

Furthermore, reports from various NGOs only reflect a small portion of the larger issue within Indonesia's criminal justice system, which suffers from a lack of oversight and intervention from civil society.[93] The increasing number of torture cases, according to monitoring data from KontraS in 2023, indicates that the culture of violence in various state institutions remains a problem that needs to be addressed comprehensively. The ongoing practice of torture is also caused by the absence of an adequate legal system and legal culture to prevent and eradicate all forms of torture. Therefore, the government must take serious steps to prevent the recurrence of torture and create a law enforcement environment grounded in human rights principles.

Normative guarantees alone are not enough. Although Indonesia has regulated the right to be free from torture in its Constitution and various laws, this recognition has not been effective enough to ensure genuine law enforcement. Adequate law enforcement requires strong mechanisms to prevent, investigate, and prosecute perpetrators of torture, as well as provide effective protection for victims. This also includes the establishment of independent institutions that can monitor and follow up on torture cases, training for law enforcement officers to handle such cases, and the application of firm and consistent sanctions against perpetrators. Without concrete efforts in the

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[90] See: The National Commission on Human Rights, *Standar Norma dan Pengaturan Hak untuk Bebas dari Penyiksaan, Perlakuan atau Penghukuman yang Kejam, Tidak Manusiawi atau Merendahkan Martabat Manusia, Komisi Nasional Hak Asasi Manusia*, Jakarta: 2022.

[91] Yoan Barbara Runtunuwu, *Penyiksaan dan Upaya Paksa: Tinjauan Hukum Positif di Indonesia*, Tahta Media Group, 2023, https://tahtamedia.co.id/index.php/issj/article/view/412.

[92]Amnesty Indonesia, "Penyiksaan oleh aparat penegak hukum kian mengkhawatirkan", 26 June 2024, https://www.amnesty.id/kabar-terbaru/siaran-pers/penyiksaan-oleh-aparat-penegak-hukum-kian-mengkhawatirkan/06/2024/.

[93] Indonesia: Torture is still big homework for Indonesia, Asian Human Rights Commission, 28 June 2024, http://www.humanrights.asia/news/ahrc-news/AHRC-STM-006-2024/; See also Indonesia 2023, Amnesty Internasional, https://www.amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/indonesia/report-Indonesia/; Rights Group, Child Torture by Indonesian Police Rose Threefold in a Year, Benar News, 28 June 2024; Alifia Sekar, Indonesian Police most reported for torture in law Enforcement: Komnas HAM, The Jakarta Post, 28 June 2024.

application of law and improvements to the justice system capable of addressing human rights violations, the existing guarantees and recognition will not be sufficient to eliminate the practice of torture or provide real protection for individuals.

Based on the above, although the criminalization steps taken by Indonesia represent progress, further revisions are needed to align more closely with international developments. Emerging trends indicate that torture can occur both inside and outside detention facilities, as well as in both public and private spaces. There is now international recognition that rape can be classified as a form of torture if committed by a public official, at their order, or with their consent.[94] Additionally, domestic violence[95], violence against pregnant women, abortion denial,[96] female genital mutilation (FGM)[97], forced virginity tests, child marriage, and other forms of violence are developments of the torture concept that need to be anticipated and punished according to the violations that occur.[98] It is hoped that Indonesia's legislation will adapt to these developments, so that all more complex and diverse forms of torture are covered by the national legal system. With such steps, Indonesia could be more effective in eliminating the practice of torture and ensuring better human rights protection for all its citizens.

Furthermore, Indonesia has yet to ratify the Optional Protocol to the Convention Against Torture,[99] even though this protocol is crucial to adopt and ratify. If the Protocol were ratified, Indonesia would have a system for monitoring places of detention, linked to human rights protection and oversight institutions. The implementation of this protocol would also allow for regular visits by both international and national bodies to places of detention or punishment, in order to prevent torture and other forms of cruel, inhuman, or degrading treatment or punishment. Without ratifying this protocol, efforts to eliminate torture practices in Indonesia are likely to continue facing significant barriers, given the current limitations in monitoring mechanisms.

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[94] Ryan M. McIlroy, *Prosecuting Rape and Other Forms of Sexual Violence as Acts of Torture Under § 2340*, Stanford Law School: Law and Policy Lab, 2016; See also UN News, Rights expert calls for recognition of sexual violence as torture to strengthen legal protections, 2024, https://news.un.org/en/interview/2024/10/1156141.

[95] United Nations, A/74/148: Domestik Violence and the Prohibition of torture and ill-treatment, 12 July 2019, https://www.ohchr.org/en/documents/thematic-reports/a74148-domestic-violence-and-prohibition-torture-and-ill-treatment.

[96] See: Alyson Zureick, Gendering Suffering: Denial of Abortion as a Form of Cruel, Inhuman, or Degrading Treatment, *Fordham International Law Journal*, 2015.

[97] World Heath Organization, Female Genital Mutilation, 2025, https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation.

[98] United Nations General Assembly, A/HRC/3/57/ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 2016, https://documents.un.org/doc/undoc/gen/g16/000/97/pdf/g1600097.pdf

[99] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

CLOSING

Based on the analysis conducted, it can be concluded that the prohibition of torture holds a significant position in the international legal system, including within the context of Indonesian national law. As a jus cogens norm, the prohibition of torture is binding and carries erga omnes obligations, meaning that all states, including Indonesia, are obligated to prevent and eradicate the practice of torture in all its forms.

Indonesia has ratified the Convention Against Torture (UNCAT) and recognized the prohibition of torture as an internationally binding norm, which is also a jus cogens norm. As a jus cogens norm, the prohibition of torture is binding and cannot be set aside by any state, including Indonesia. Although Indonesia has taken significant steps by criminalizing torture through the 2023 Criminal Code (KUHP), which addresses acts of torture, there are still major challenges in its implementation and enforcement. Some of the obstacles include the lack of effective oversight mechanisms, low accountability of law enforcement officials, and insufficient protection for victims of torture.

Therefore, in addition to formal legal regulations, Indonesia needs to strengthen its criminal justice system and enhance the capacity of law enforcement officials to ensure that the prohibition of torture can be effectively implemented in line with international legal developments. Steps that need to be taken include strengthening independent oversight mechanisms, applying strict and consistent sanctions, and implementing concrete measures to support the rehabilitation of torture victims' rights. Without coordinated and systematic efforts, the elimination of torture practices in Indonesia will continue to face significant barriers, especially if law enforcement officials remain involved in such violations.

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