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Jurisdiction of International Criminal Court relating to International Crimes in Domestic Law and Practice

Tin Myo Myo Swe*

Abstract

The Rome Statute, the founding treaty of the International Criminal Court (ICC) is a major development in International Criminal Law .The International Criminal Court (ICC) is an independent, permanent Court that tries persons accused of the most serious crimes of international concern, namely genocide, crime against humanity, war crimes and aggression. The term "crimes against peace" is now replaced by "aggression". All four crimes within the jurisdictions of International Criminal Court were prosecuted by Nuremberg Tribunal and the other post-war courts. ICC only has jurisdiction in accordance with Article 5 to 8, 12 and13 of Rome Statute, 1998. This paper focuses on jurisdiction of the International Criminal Court relating to international crimes.

Key words: International Criminal Law, International Criminal Court, Rome Statute, Crime against Humanity, Crime against Peace, Crime of Genocide.

Introduction

The Treaty of Rome, adopted 17 July 1998, established a permanent International Criminal Court (ICC) to try individuals responsible for genocide, crimes against humanity, and war crimes. The Court will have jurisdiction over cases alleging torture either as part of the crime of genocide, as a crime against humanity, if the torture is committed "as part of a widespread or systematic attack," or as a war crime under the Geneva Conventions of 1949. Torture is defined in the Treaty of Rome as the "international infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused.[1]

The jurisdiction of ICC is limited to the most serious crime of concern to the international community that a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with the Statute.[2] The Statute entered into force on 1 July 2002 and as of March 2016, 124 States are parties to the Statute.

The Preamble and Article 1 of the Rome Statute emphasize that the ICC's jurisdiction shall be complementary to national criminal jurisdictions. This specification prohibits the Court from exercising jurisdiction over the person have conducted. The ICC is only able to exercise jurisdiction over persons accused of crimes when States are unwilling or genuinely unable to carry out investigations or prosecutions. The status of the ICC is given existing within a regime of complementary as a court of last resort and the best form of cooperation would be to ensure that their domestic criminal laws.[3]

The Court shall exercise jurisdiction over the crime of aggression once provision is adopted by the Assembly of States Parties.[4] The Statute defines each of these crimes except for aggression.

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[1] http://www.Istanbul Protocol-Relevant International Legal Standards.ht.

[2] Malcolm N.Shaw, International Law, Sixth Edition, Cambridge University, 2008,P-411.

[3] ICRC,"Respect for International Humanitarian Law,"Handbook for Parliamentarians No.1, P-45.

[4] Article 5 of the Rome Statute of the International Criminal Court, 17 July 1998.

According to Article 121 and 123, the Court cannot, however, exercise jurisdiction over the crime of aggression until the Statute has been amended by the addition of a definition of that crime and the inclusion of preconditions for the ICC to take jurisdiction.[1]

The Court's Jurisdiction can be triggered in three ways, in accordance with article 13 of ICC. First, states parties to the Statute may refer a situation to the prosecutor. Second, the Security Council of the UN, acting under Chapter VII of the UN Charter, may refer situation to the prosecutor, and third, the prosecutor may start investigations *propriomotu*. This last possibility is quite an innovation, although in order to proceed, the prosecutor must get the green light from the ICC's pre-trial chamber.[2]

High as expectations for the ICC were, its first substantive judgment was only rendered in 2012, despite the ICC having been in existence for almost a decade at the time of writing. In March 2012 the Congolese rebel leader *Thomas Lubanga* was convicted of enlisting and conscripting child soldiers. At the time of writing, he has not been sentenced.[3]

A. The Crime of Genocide

The term 'genocide' was adopted by the prosecutors at Nuremberg.[4] In 1946, the UN General Assembly unanimously adopted Resolution 96 (1), which *inter alia* affirmed genocide as a crime under international law, carrying individual criminal responsibility. Genocide was recognized as a distinct and separate crime in its own right by way of the adoption in 1948 of the Genocide Convention.

Article I of the Genocide Convention confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law[5]and the definition of genocide in Article II clearly excludes situations where the required specific intent does not exist. It also excludes other groups from the protected categories not specifically indentified, such as social or political groups. Thus, these groups are not protected by the Convention. The Genocide Convention covers only "national, ethnical or religious" groups to exclusion of all other groups, like social or political ones.[6]

The General Assembly recognized that genocide would constitute an international crime even if it were committed in time of peace and genocide would be recognized as a crime of universal jurisdiction, subject to prosecution by courts other than those where the crime took place.

In the case of **Prosecutor v. Jelesic** with the words 'in whole or in part' the definition indicates a quantitative dimension. The quantity contemplated must be significant, and an intent to kill only a few members of a group cannot be genocide.[7]

In the case of **Prosecutor v. Krstie,** the greater number of real victims, the more logical the conclusion that the intent was to destroy the group 'in whole or in part', another interpretation has emerged by which genocide is also committed if a 'significant part' of the group is destroyed. This significant part may consist of persons of 'special significance' to the

[1] Robert Cyber, HakanFriman, Darryl Robinson, EliZabeth Wilmshurt, An introduction to the International Criminal Law and Procedure, Second Edition, 2010, p-150.
[2] Jan Klabbers, International Law, Combridge University, 2013, p-222
[3] Prosecutor v. Thomas Labanga Dyilo, ICC-01/04-01/06
[4] WILLIAM A.SCHABAS, An Introduction to the International Criminal Court, 2004, p-36
[5] Ciara Damgaard, Individual Criminal Responsibility for Core International Crimes, Selected Pertinent Issues, 2008, p-62
[6] M.CHERIF BASSIONI, De Paul University, College of law, Crime against Humanity, Historical Evolution and Contemporary Application, p-209
[7] Prosecutor v. Jelesic (case No. IT-95-10-T), Judgment, 14 December 1999, Para 82 (ICTY)

group, such as the leadership of the group. Some judgment have also established that 'in part' means the crime may be committed in a very small geographic area against a group defined by its borders, such as the Muslim population of the town of Srebrenica, which was attacked by Bosnian Serb forces in July 1995.[1]

Although Article 6, Rome Statute of the International Criminal Court refers to the possibility of an international court being available to try cases of genocide.[2]

The crime of genocide is clearly distinguishable from crimes against humanity in present day international law. Genocide is defined in legal terms by the intent to destroy in whole or in part a national, ethnical, racial, or religious group. The main substantive provisions of the Genocide Convention, including the classification of genocide as a crime under international law, are now considered to be part of customary law, binding on all states.

The International Criminal Court has jurisdiction over the crime of genocide under Article 6 of the Statute, which reiterates the terms used in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

This crime is defined in the Statute as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group.

B. Crimes against Humanity

The International Criminal Court also has jurisdiction over crimes against humanity. Under Article 7 of the Statute, these crimes comprise any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population: murder, extermination, enslavement, deportation or forcible transfer of the population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court, enforced disappearance of persons, the crime of apartheid, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

C. War Crimes

Under Article 8 of the Statute, the International Criminal Court has jurisdiction in respect of war crimes. These include most of the serious violations of international humanitarian law mentioned in the 1949 Geneva Conventions and their 1977 Additional Protocols, whether committed during international or non-international armed conflicts. A number of offences are specifically identified as war crimes in the Statute, including: rape, sexual slavery, enforced prostitution, forced pregnancy or other forms of sexual violence, using children under the age of 15 to participate actively in hostilities.

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[1] Prosecutor v. Krstic (case No.IT-98-33-T), Judgment, 2 August 2001, Para.595 (ICTY)

[2] Robert Cyber, HakanFriman, Darryl Robinson, Elizabeth Wilmshurt, An Introduction to the International Criminal Law and Procedure, 2010, p-205.

Certain other serious violations of international humanitarian law, such as unjustifiable delay in the repatriation of prisoners and indiscriminate attacks affecting the civilian population or civilian objects, which are defined as grave breaches in the 1949 Geneva Conventions and 1977 Additional Protocol I, are not specifically referred to in the Statute. There are only a few provisions concerning certain weapons whose use is prohibited under various existing treaties, and these do not apply with respect to non-international armed conflicts.

D. Acts of Aggression

As stated in Article 5 (2) of the Statute, the International Criminal Court will have jurisdiction over the crime aggression once a provision defining this crime and setting out the conditions for the exercise of such jurisdiction is adopted.[1]

The Court's Statute was adopted on 17 July 1998 and recognizes the Court's competence with regard to war crimes committed during both international and non-international armed conflicts. Article 8 defines the war crimes covered by the Statute.

Unlike the International Court of Justice, whose jurisdiction is limited to States, the International Criminal Court will be able to charge individuals. And unlike the war crimes tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY), its jurisdiction will be limited neither in time nor place. The International Criminal Court therefore represents the emergence of the first-ever overall positive duty for individuals, i.e. the obligation to respect the rule of law in situations of conflict.

Article 88 of the Rome Statute requires that States Parties ensure the existence of procedures under their domestic laws that enable them to cooperate with the Court's investigative and evidentiary matters. This duty exists in addition to the general obligation upon States Parties to cooperate fully with the investigation and prosecution of crimes within the jurisdiction of the Court.

Article 88 obliges States to adopt domestic laws to permit cooperation with the ICC. For examples, Canada's ICC legislation, entitled the Crimes against Humanity and War Crimes Act ("Canada Act"), was adopted on June 29, 2000 and enabled Canada to ratify the Rome Statute on July 7, 2000. Switzerland's Federal Law on Co-operation with the International Criminal Court ("Swiss Law") was adopted on June 22, 2001 and is one of several discrete laws that have been adopted by Switzerland to implement the Rome Statute. Switzerland ratified the Rome Statute on October 12, 2001. The United Kingdom adopted its International Criminal Court Act 2001.

The legislative experience of each of these countries provides instructive guidance for others planning to implement the Rome legislative Statute.

Article 77(2) addresses the Court's ability to order forfeiture of property derived from crimes as part of a convicted individual's sentence. In addition to imprisonment, the Court may order the forfeiture of proceeds, property, and assets derived directly or indirectly from the crime, without prejudice to the rights of bona fide third parties. Article 77(2) also enables the Court to impose fines as part of the sentences it levies.

Article 109 interrelates with Article 88 found in Part 9 of the Rome Statute which mandates that States must ensure that there are procedures available under their national law for all forms of cooperation. Article 109 (3) of the Rome Statute states that " property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is

[1] ICRC,"Respect for International Humanitarian Law,"Handbook for Parliamentarians No.1,1999,P-23

obtained by a State Party as a result of its enforcement of a judgment of Court shall be transferred to the Court."

Accordingly, under the Rome Statute and the Rules of Procedure and Evidence, States Parties must ensure that they have laws and procedures in place to perform four primary functions: (1) trace, freeze, and seize the proceeds of ICC crime; (2) effect forfeiture of the proceeds of crime; (3) collect fines; and (4) transfer to the Court any property or proceeds they obtain as a result of their enforcement of a judgment of the Court. States gave proceeded in distinct and creative manners in implementing these obligations within their domestic laws. International Criminal Court delegates are, in particular, authorized to go to all places where there are protected persons, prisoners of war or civil internees and to talk to them without witnesses. The ICC will be granted all the necessary facilities to carry out its humanitarian work.[1]

States' Obligations under International Humanitarian Law to Prosecute and Punish International Crimes

All States have a clear obligation to adopt and apply measures implementing Humanitarian Law. They are the repression of war crime, the protection of emblems and fundamental guarantees, the appointment of legal advisers in their armed forces and dissemination of international humanitarian law. These measures may need to be taken by one or more government ministries, the legislature, the courts, the armed forces or other State organs.[2]

A substantial number of the IHL rules are set out in the four 1949 Geneva Conventions and the 1977 Additional Protocols. States are obliged to put an end to all the violations set out in these texts. There are special obligations in respect of certain serious violations referred to as "grave breaches".

Grave breaches comprise some of the most flagrant violations of IHL. These are specific acts, listed in the Geneva Conventions and Protocol I, and include willful killing, torture and inhuman treatment as well as willfully causing great suffering or serious injury to body or health.[3] The annexed table provides a full list of such grave breaches. Grave breaches are considered war crimes. War crimes can also be committed in non-international armed conflicts.

Both the Conventions and the Protocol clearly stipulate that grave breaches must be punished. However, these texts do not themselves define specific penalties. Nor do they institute jurisdiction to try the perpetrators. It is up to States to take the necessary legislative measures to punish those responsible for grave breaches of humanitarian law.

Generally, the criminal law of a State applies only to acts committed on its territory or by or against its nationals. IHL goes further because it requires of States that they seek out and punish all those who have committed serious breaches, irrespective of the nationality of the perpetrator and the place of the offence. This principle, known as the principle of universal jurisdiction, is essential to ensure effective prosecution and punishment of serious breaches.

[1] Art.126 of Convention III, Art. 143 of Convention IV,1949 and Art. 81 of Protocol I, 1977

[2] Jean-Michel Monod, "Dissemination of IHL a common commitment by State, ICRC and NSs"International seminar Hong Kong, 17 th July 2000, p-8

[3] Articles 50, 130, 147 of Geneva Convention, 1949 and Articles 11, 85 of Protocol I, 1977

International Humanitarian Law imposes on States the obligation to take the following specific measures in respect of grave breaches:

Firstly, the State must promulgate national laws that prohibit and provide for prosecution and punishment of grave breaches, either by enacting laws to that effect or by amending existing laws. These laws must cover all persons, whatever their nationality, who commit or order others to commit grave breaches, including cases where the breaches resulted from dereliction of a duty to act. The laws must cover acts committed both inside and outside the State's own territory.

Secondly, the State must seek out and prosecute persons alleged to have committed grave breaches. It must prosecute these persons itself or extradite them to another State where they will be tried.

Thirdly, the State must institute a responsibility on the part of its military commanders to prevent the preparation of grave breaches, to stop them when they occur and to take measures against persons under their authority who perpetrate such offences.

Fourthly, States must provide each other with judicial assistance in any procedures relating to serious breaches.

States must perform these obligations in peacetime as well as in time of armed conflict. To be effective, the measures set out above must be adopted before the grave breaches have occurred. It can be affirmed that, with the exception of some minor differences, the same obligations apply in respect of genocide and crimes against humanity.

National Legislation

Although the Geneva Conventions enjoy practically universal adherence and ratification, the national legislation of a great many States is not in compliance with the above requirements of International Humanitarian Law. For example, several countries have not incorporated into their criminal law the provisions necessary for the prosecution and punishment of international crimes, including grave breaches, and the punishments that apply to them. If IHL is to be fully respected, it is of paramount importance that States adopt domestic legislation to implement its rules, in particular those relating to the repression of war crimes and governing the use of the Red Cross and Red Crescent emblems and other distinctive signs and signals.[1]

Where measures have been taken, the solutions adopted vary from country to country. Most of the provisions relating to the implementation of IHL, particularly as regards the prosecution and punishment of the most serious breaches, are dispersed in a number of implementing texts (Penal Code, Code of Military Justice, Code of Military Discipline, Special laws…). These provisions are rarely to be found in a single text. The relevant crimes are sometimes included in general criminal law texts or in military ones or in both. In some cases, the ordinary courts have exclusive jurisdiction to try the perpetrators of these crimes (even for members of the military, as is the case for example in South Africa, Belgium, Canada and in a number of Central European countries, such as Bosnia and Herzegovina, Estonia, Lithuania, Macedonia, Montenegro, Serbia and Slovenia), whereas in others, it is the military courts that have jurisdiction (even for civilians, as is the case in Switzerland and the Democratic Republic of the Congo (DRC)). Other systems have instituted concurrent jurisdiction, the division of labour following the status of the accused (civilian or military) or the fact that he was on duty or not.

[1] icrc.ch/web/eng/siteengo.nsf/htmlall.

Since the adoption of the Rome Statute, there has been a tendency for States to use the crimes included in the Statute as a vehicle for implementing a large part of the IHL obligations incumbent on them, even in the case of States that have not ratified the Rome Statute. This trend is particularly marked when it comes to the implementations of the criminal law provisions in respect of war crimes in non-international armed conflicts.

It is also interesting to note that the clarity of the system adopted, particularly in terms of the sharing of jurisdiction between the civil and military courts, may depend on whether or not the State has had relevant practical experience (Colombia, Peru). In the case of Columbia, for instance, it is expressly stated that international crimes may be committed on duty and therefore fall under the jurisdiction of civilian tribunals. The same observation may be made with regard to the impact of some form of international technical assistance on the degree to which domestic law is in line with international law (Rwanda, Timor Leste, Cambodia).

However, it may be observed that, regrettably, in many cases, the measures taken incomplete. For example:

- the list of crimes included in national law is frequently incomplete;

- the laws often do not contain references to the general principles of international criminal law. Consequently, the general provisions of national criminal law remain applicable to international crimes and provide a basis for obstacles to be placed in the way of criminal prosecutions. Such obstacles may be contrary to international law, for example the application of a statute of limitations (Kenya, Argentina, Peru and Poland) or the defence of superior orders (Nicaragua, Guatemala, Brazil, Thailand);

-in some cases the necessary amendments and adjustments are not made to all the relevant texts, particularly those that apply to members of the military. As a result, the door is left open to parallel prosecution on the basis of the same facts under both the law on international crimes and the law on military offences. These crimes are generally tried by distinct tribunals and give rise to very different sanctions (for example, in some instances, the serious breach committed against the civilian population is punished by life imprisonment, whereas the military offence against the civilian population based on the same facts carries a maximum sentence of two years' imprisonment).[1]

As regards punishments provided for in the case of international crimes, they cover a wide range. Almost systematically, national legislation provides the most severe punishments for genocide and crimes against humanity. Capital punishment is sometimes the only one provided for (Burkina Faso, Burundi, Congo-Brazzaville, Cote d'Ivoire, Mali, Niger). Some States reserve the most severe punishment for cases of genocide and crimes against humanity involving death (Canada, United Kingdom (UK), India). A very small number of systems provide for scales of punishments covering a significantly wide range. It is the case, for instance, for Central and Eastern European countries. Finally, some national law systems have introduced a reduced sentence for incitation to or complicity in genocide (the United States (US), El Salvador, Guatemala, Honduras, Mexico, Brazil, Nicaragua and France).

There is a wide variety in the sentencing systems for war crimes. Some systems make no distinction between the various crimes and impose the most severe sentence, be it the death penalty (Burundi, Congo-Brazzaville, Cote d'Ivoire and Mali) or life imprisonment (Congo-Brazzaville, as an alternative to capital punishment) or lifelong penal servitude (DRC). Other laws make a distinction between war crimes that have caused death and others. The death

[1] Advisory Service, ICRC Legal Division, “International Review of the Red Cross”, Vol.90, Number.870, June 2008, p-464.

penalty (Nigeria, DRC, the US, India) or life imprisonment (Uganda, Canada, the UK, and as an alternative to the death penalty in the US and India) are reserved for the former category, while limited-duration prison sentences or lifelong penal servitude (DRC) are prescribed for the latter. By the same taken, other regimes provide for differentiated penalties for the various crimes depending on whether they targeted the civilian population or prisoners or war. The former attract life imprisonment and the latter limited-duration prison sentences (Kenya). Finally, some legal systems provide a detailed scale of sentences for each of the crimes identified as war crimes (very detailed: Belgium, Colombia, Niger and Rwanda; less detailed: Poland, Slovakia, Lithuania, Bulgaria, Macedonia, Czech Republic and Russia).

Some war crimes can also be military offences under military texts and tried as such by the competent courts or tribunals. The crimes to which this dual regime applies and which are among the most frequently encountered are pillage, acts of violence against a person hors de combat with a view to despoiling him or her, and abuse of the emblem and distinctive signs. Pillage with violence attracts severe penalties, including lifelong penal servitude and life imprisonment (Burundi, Congo-Brazzaville, DRC, Honduras, Algeria, Cote d'Ivoire and Niger). In these cases, the heaviest sentence is often expressly reserved for the instigators. Other types of pillage are generally associated with limited-duration prison sentences ranging from five to 20 years. Acts of violence against a person hors de combat also carry severe penalties: death (Algeria, Cote d'Ivoire), life imprisonment (Niger), lifelong forced labour (Congo-Brazzaville) or limited-duration forced labour (Burundi) and limited-duration prison sentences (El Salvador, China). Abuse of the distinctive emblem carries a limited-duration prison sentences ranging from one to 10 year (Algeria, Congo-Brazzaville, Cote d'Ivoire, Niger, DRC and Mexico).

In some cases, a military tribunal is left full discretion regarding the sentence to be imposed for certain military offences (US, Honduras), while other legal systems provide excessively flexible sentencing scales for the same crime, ranging in some cases from 60 days to 20 years or internment (for an indefinite period) (Peru).

Some judicial systems provide for additional optional penalties, generally in the form of fines (South Africa, Timor Leste, US, Colombia, Mexico) or deprivation of certain rights (US, Peru, Honduras, Mexico, Romania). Some military texts also include accessory penalties that generally affect the individual's military grade and status (Rwanda, Colombia). Finally, some texts add remedies for and compensation of victims (Belgium, US, UK, Burundi), including the institution of a fund to provide aid for victims (Canada, Timor Leste).

National Practice

Whereas the international criminal courts and tribunals publish copious case law, the case law published by national courts in relation to international crimes is much more meager, even though the situation tends to change in some regions which were affected by conflicts (former Yugoslavia, Rwanda). It is therefore more difficult to identify trends. Furthermore, some decisions have been handed down in highly politicized contexts and should accordingly be interpreted with some caution. Others that might be relevant eliminate all discussion about international crimes, particularly war crimes, by refusing to acknowledge the existence of an armed conflict and applying the law on ordinary crime (murder, manslaughter, assault). Finally, it should be borne in mind that national courts apply national law, which limits or in some cases reduces to a minimum the exercise of discretion on the part of the judiciary when it comes to applying sentences for the most severe crimes.

Both military and civilian courts have been involved in prosecution and punishment of international crimes at national level. The choice does not seem to be systematically guided by

the status of the person being tried. It is interesting to note that, in one case, the civilian courts have been seized with cases, the purpose of which was to determine whether a civilian court or a military tribunal had jurisdiction on the merits (United State, Hamdam case (2005)). Moreover, civilian courts can also be called upon to hear cases of torture, where responsibility for the acts in question lies with superior military officers, in order to grant compensation and damages to the victims. (United States, Ford v. Garcia, 2002 and Romagoza v. Garcia, 2006).

With respect to the superior orders defence, many courts consider that such defence can be entertained where the order is not manifestly illegal. Also, in some countries (for example the United States courts, when judging the responsibility of Salvadoran commanders for acts of torture committed by their subordinates-see cases of Ford v. Garcia and Romagoza v. Garcia referred to above), the principle of command responsibility has been confirmed, even if this form of participation is not specified in the legislative texts. The US courts rely on, i.e., the case law of international criminal courts and tribunals (ICTY- Delalic case (2001)) to reaffirm the need for there to have been effective control of the superior over the subordinate.[1]

As regards the sentences applied, they depend in the first instance on national legislation and cover the death sentence and prison sentences of varying lengths. For example, the sentences handed down in the case of crimes against humanity by the Dili Special Chamber in Timor Leste are generally 10-year prison sentences, whereas the law prescribes a maximum sentence of 25 years. The Belgian courts condemned four people accused of war crimes to sentences ranging from 12 to 20 years in prison. Few of the decisions specify the objective of the sanction applied. In Timor Leste, for example, the decisions specify that the sentence aims at a deterrent effect and to further the struggle against impunity, the advent of peace and the promotion of national reconciliation. On this last point, a controversial South African decision considers that amnesty helps to serve the same objective while encouraging disclosure of the truth (Azapo case , 1996).

Several of the decisions examined accompany these sentences with other, accessory ones: payment of sums towards reparation for the damage caused (US, Philippines, Rwanda), including payments into a special fund for the victims (Belgium, Rwanda); confiscation or seizure of the condemned persons' property (Rwanda); perpetual and full deprivation of civil rights (Rwanda). Finally, whenever a soldier is sentenced, he is dismissed or stripped of his rank (Belgium, US, Philippines).

Conclusion

It can be seen that the International Criminal Court with world-wide jurisdiction for trying individuals charged with the most serious breaches. Prevention of violations requires effective measures in peacetime. This involves the adoption of various national legislative and regulative measures which give effect the provisions of the treaties. More importantly, the States must make sure that all those who have to implement such commitments are familiar with their obligations.

All States have a clear obligation to adopt and carry out measures implementing humanitarian law. However, it is the States which continue to bear primary responsibility for effectively implementing the law, and which must adopt measures at a national level. Through its Advisory Service on International Humanitarian Law, the International Committee of the Red Cross provides advice and documentation to governments on national implementation. Whereas individuals or through governments and various organizations, they can all make an important contribution to compliance with international humanitarian law. It may be noted that

[1] Advisory Service, ICRC Legal Division, "International Review of the Red Cross",Vol.90,Number.870, June 2008, p-466.

most of the countries in the world and State Parties shall abide the implementation of International Humanitarian Law. Prevention of violations requires effective measures in peace time.

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International Legal Limits on Punishments

Thu Mon Soe*

Abstract

The definition of torture is excluded pain or suffering arising only form, inherent in or incidental to lawful sanctions under International Conventions. Punishments such as corporal punishment and death penalty are not deemed to be lawful sanctions when these punishments are beyond the international legal limits. Moreover the treatment of prisoners is also considered not to be torture. Prisoners should be treated particularly in accordance with the provisions of ICCPR and standard minimum rules for the treatment of prisoner. So, except the lawful sanctions, other corporal punishment and death penalty including treatment of prisoners should be exercised in accordance with the international legal limits. This paper focuses on the lawful sanctions under International Laws and whether the corporal punishment and death penalty are amount to be torture or not.

Key words: Torture, Victims, ICCPR.

Introduction

According to the International Conventions, punishments are legally prohibited because these punishments are not amount to be torture. The definition of torture is excluded pain or suffering arising only form, inherent in or incidental to lawful sanctions under the exception of UNCAT, Article 1 (1) of Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1 of CAT and other cruel, Inhuman or Degrading Treatment or Punishment and Article 7 (2) (e) of the Rome Statute of the International Criminal Court.

Punishments under International Law

According to the International Law, some punishments are legally prohibited because these punishments are not amount to be torture. Although some punishments are lawful sanctions, these may be punished by the authority beyond the legal limits. These punishments are corporal punishment and death penalty. Judicial corporal punishment as part of a criminal sentence was ordered by a Court of Law in ancient time. Death penalty or capital punishment is a government sanctioned practice. Sometimes corporal punishment and death penalty deemed to be included concerned with torture because these punishments are being beyond the international legal limit on punishment. Moreover it is not left the treatment of prisoner because prisoners must be treated particularly in accordance with the provisions of ICCPR and standard minimum rules for the treatment of prisoner. Therefore except the lawful sanctions, other corporal punishment, death penalty and treatment of prisoners should not be exercised beyond the international legal limit on punishment.

Lawful Sanctions

Inhuman or Degrading Treatment or Punishment, for the purpose of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for 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. [1]

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[1] Article 1 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.[1]

The exception for "lawful sanctions" is explicit in United Nations Convention against Torture, where the definition of torture specifically excludes "pain or suffering arising only from, inherent in or incidental to lawful sanctions."This form of punishment is the infliction of severe pain or suffering, whether physical or mental.

Unlike the earlier Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly in 1975, the 1984 UNCAT did not elaborate the concept of lawful sanctions.

Under Article 1(1) of Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other person. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent, with the Standard Minimum Rules for the Treatment of Prisoners.

The text in the Declaration, on which the UNCAT language was based, specifically referred to "pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners," which prohibit, among other things, corporal punishment of detainees.[2]

The Inter-American Convention to Prevent and Punish Torture provides an explicit exception to the prohibition on all ill-treatment by providing in Article 2 that "the concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article."

This exception is narrower than that in the UNCAT, as it explicitly states that acts and methods falling within the definition of torture will still qualify as such if inflicted in the context of an otherwise lawful measure.

The definition in the Rome Statute of the International Criminal Court also contains this exception.

In Article 7 (2) (e) of the Rome Statute of the International Criminal Court for the purpose of paragraph 1 provides that "torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

It can be seen that provisions for lawful sanctions are mentioned in some Conventions and Rules. Obviously when the penalty in accordance with law is actual lawful measure or not concern with the definition of Torture in Article 1 of the UNCAT and Article 1(1) of Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2 of Inter-American Convention to

[1] Article 1 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
[2] Article 1, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

Prevent and Punish Torture and Article 7 (2) (e) of the Rome Statute of the International Criminal Court, it is lawful sanction. Although there is the exception of the punishment in accordance with law, it is to be assumed as torture if there is cruel or inhuman or degrading treatment beyond the limit of the punishment.

Corporal Punishment

Corporal punishment or physical punishment is a punishment intended to cause physical pain on a person. It is most often practiced on minors, especially in home and school settings. Corporal punishment remains a feature of many legal systems. Corporal punishment, involving behavior which would otherwise constitute assault, is viewed as threatening the physical integrity of the individual and affronting the inherent dignity of the person concerned.[1]

Common methods include spanking or paddling. It has also historically been used on adults, particularly on prisoners and enslaved persons. Other common methods include flagellation and caning.[2]

Many of the cases heard by the Human Rights Committee have involved corporal punishment. The issue of corporal punishment has been considered by the Human Rights Committee (HRC), Committee against Torture (CAT) and, as regards minors, the Committee on the Rights of the Child (CRC).[3]

In Article 7 of this ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. According to Article 7 of International Covenant on Civil and Political Rights (ICCPR), general comment no.2 of, the Human Rights Committee stated that the prohibition in Article 7 of this ICCPR extends to "corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.

In George Osbourne v Jamaica case,[4] George Osbourne is a Jamaican national currently detained at the General Penitentiary, Kingston, Jamaica. In October 1994, he was convicted by the Westmoreland Circuit court, Savannah-la-Mar, along with a co-accused for illegal possession of firearm, robbery with aggravation and wounding with intent. He is serving a sentence of 15 years' imprisonment with hard labour and is subject to receive 10 strokes of the tamarind switch.

The author has claimed that the use of the tamarind switch constitutes cruel, inhuman and degrading punishment, and that the imposition of the sentence violated his rights under Article 7 of the ICCPR.

Human Rights Committee stated that "Irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to Article 7 of the International Covenant on Civil and Political Rights."

It can be seen that whipping with the tamarind switch is violating the meaning of corporal punishment in Article 7 of International Covenant on Civil and Political Rights.

In the case of Malcolm Higginson v Jamaica,[5] Malcolm Higginson is a Jamaican citizen, at the time of submission an inmate at the General Penitentiary Kingston, Jamaica. He

[1]RhonaK.M.Smith, International Human Rights, Oxford University Press, 6th edition, 2014, pg.242.
[2]https://en.wikipedia.org/wiki/corporal_punishment
[3]RhonaK.M.Smith, Ibid, pg.242.
[4]George Osbourne v Jamaica, HRC Communication No. 759/1997, 15 March 2000.
[5]Malcolm Higginson v Jamaica, HRC Communication No. 792/1998, 28 March 2002.

is under detention at St. Catherine Adult Correction Centre. On 19 May 1995, he was convicted of illegal possession of a firearm, rape and robbery with aggravation by the High Court Division Gun Court, Kingston, Jamaica, and sentenced to respectively 5, 10 and 7 years imprisonment with hard labor, to run concurrently, and in addition to receive 6 strokes of the tamarind switch. He claimed that the sentence of whipping entailed a violation of Article 7 of the Covenant, because whipping constitutes cruel, inhuman and degrading punishment.

Human Right Committee confirmed that irrespective of the nature of the crime that is to be punished or the permissibility of corporal punishment under domestic law, it is the consistent opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to Article 7 of the Covenant. The Committee finds that the imposition or the execution of a sentence of whipping with the tamarind switch constitutes a violation of the author's rights under article 7. The State party should ensure that similar violations do not occur in the future by repealing the legislative provisions that allow for corporal punishment.[1]

The HRC has explicitly stated that the prohibition on corporal punishment extends to schools and hospitals,[2]and welcomes its prohibition in the private as well as the public sphere.

It can be assumed that whipping with the tamarind switch is violence by means of corporal punishment. Corporal punishment leads to cruel, inhuman and degrading which contrary to Article 7 of this ICCPR.

The Committee refrained from making explicit recommendations addressing corporal punishment by private actors, notably punishment of children by their parents, apparently considering this domain of the Child Right Convention. However, following the launch of the World Report on Violence against Children in November 2006, it would seem that the Committee is taking a more expansive view, recommending that Zambia "prohibit all forms of violence against children wherever it occurs. The State party should prohibit all forms of violence against children wherever it occurs, including corporal punishment in the schools, and undertake public information efforts with respect to appropriate protection of children from violence."[3]

The CAT considers that States must go beyond passing legislation to prohibit corporal punishment in detention centers, hospitals, schools and other public institutions; a monitoring mechanism should also be established to ensure that such laws are strictly implemented.[4]

Article 37(a) of United Nations Convention on the Rights of the Child (UNCRC) provides, in part, that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age." This is complemented by Article 19(1), which provides that "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child."

It is said that every child should not be punished by corporal punishment. In public institutions, even if the children who are under the care of parents or legal guardians or any other guardian person should not be punished by corporal punishment and should also be

[1]Malcolm Higginson v Jamaica, HRC Communication No. 792/1998, 28 March 2002.
[2]HRC, General Comment No.20, 1992.
[3]HRC, Concluding Observations on Zambia, UN Doc. CCPR/C/ZMB/CO/3, 2007.
[4]CAT, Concluding Observations on South Africa, UN Doc. CAT/C/ZAF/CO/1, 2006.

protected in accordance with the provisions of Article 37 (a) and 19 (1) of the United Nations Convention on the Rights of the Child.

In Article 3 of European Convention on Human Rights provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". There is no absolute prohibition dealing with corporal punishment. Only if any corporal punishment which is laid down is at least the minimum level of severity, it will be said as the breach of Article 3 of this ECHR.

In Mrs. Campbell and Mrs. Cosans v UK case,[1] both Mrs. Campbell and Mrs. Cosans live in Scotland. Each of them had one child of compulsory school age at the time when she applied to the Commission. Complaints of Mrs. Campbell and Mrs. Cosans concern the use of corporal punishment as a disciplinary measure in the State schools in Scotland attended by their children. For both financial and pratical reasons, they had no realistic and acceptable alternative to sending their children to State schools.

At the time of Mrs. Campbell's application to the Commission (30 March 1976), her son Gordon, who was born on 3 July 1969, was attending St.Matthew's Roman Catholic Primary School in Bishopbriggs which is situated in the Strathclyed Region Education Authority area. In that school, corporal punishment is used for disciplinary purposes, although it was disputed before the Commission and the Court whether it is applied to pupils below the age of 8. The Strathclyde Regional Council had refused Mrs. Campbell's requests for a guarantee that Gordon would not be subjected to this measure. He was, in fact, never so punished whilst at that school, where he remained until July 1979.

Mrs. Cosans' son Jeffrey, who was born on 31 May 1961, used to attend Beath Senior High School in Cowdenbeath which is situated in the Fife Region Education Authority area. On 23 September 1976, he was told to report to the Assistant Headmaster on the following day to receive corporal punishment for having tried to take a prohibited short cut through a cemetery on his way home from school. On his father's advice, Jeffrey duly reported, but refused to accept the punishment. On that account, he was immediately suspended from school until such time as he was willing to accept the punishment.

In this case, Mrs. Campbell and Mrs. Cosans claimed that, on account of the use of corporal punishment as a disciplinary measure in school, their sons Gordon and Jeffrey were victims of a violation of Article 3 of this ECHR which states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." The Commission found no such violation. The Government agreed with this conclusion.[2]

There may be the breach of the Article 3 of this ECHR and UNCRC if there is no effective provision to prohibit corporal punishment in national law.

Corporal punishment is strictly prohibited under Article 5 of the African Charter on Human and People Rights (ACHPR), in Article 5 of African Charter on Human and People Rights provides that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman of degrading punishment and treatment shall be prohibited.

In ancient time, corporal punishment is often practiced on minors especially in home and school settings. Corporal punishment is prescribed in ICCPR, ECHR, UNCRC and ACHPR. Judicial corporal punishment as part of a criminal sentence ordered by a court of law

[1]CAT, Concluding Observations on South Africa, UN Doc. CAT/C/ZAF/CO/1, 2006.
[2]Campbell and Cosans v UK, nos. 7511/76 and 7743/76, ECHR (Series A) No.48, Judgement of 25 Februar 1982.

has long disappeared from European countries. However, it remains lawful in parts of Africa, Asia and Latin America. Closely related is prison corporal punishment or disciplinary corporal punishment, ordered by prison authorities or carried out directly by staff. The 54 countries have abolished the corporal punishment such as thirty-four in European countries, five countries in African countries, ten countries in American countries but not yet in ASEAN. In Myanmar, Whipping Act is abolished in 2014.

Death Penalty

Death penalty, also known as the Capital punishment, is a government sanctioned practice whereby a person is put to death by the state as a punishment for a crime. These execution were done by several methods like crucifixion, drawing, beating to death, stoning, burning alive, impalement, hanging and so on. The mental anguish suffered by death row prisoners awaiting execution, which could be carried out without notice, constituted cruel, inhuman and degrading treatment.[1]

Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.[2]

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.[3]

While Article 6 of the ICCPR does not prohibit the death penalty, it restricts its application to the "most serious crimes" and forbids it to be used on children and pregnant women or in a manner contrary to the Convention on the Prevention and Punishment of the Crime of Genocide.The death penalty is specifically permitted in strictly limited circumstances under Article 6 of the ICCPR.

In Errol Johnson v Jamaica case,[4] Errol Johnson is a Jamaican citizen who, at the time of submission of his communication, was awaiting execution at St. Catherine District Prison, Jamaica. In early 1995, the offence of which he was convicted was classified as non-capital murder, and his death sentence was commuted to life imprisonment on 16 March 1995.

He was, together with a co-defendant, Irvine Reynolds, convicted of the murder of one Reginald Campbell and sentenced to death on 15 December 1983 in the Clarendon Circuit Court. His application for leave to appeal was dismissed by the Court of Appeal on 29 February 1988; an appeal judgement was issued on 14 March 1988. On 9 July 1992, at separate hearings, the Judicial Committee of the Privy Council dismissed the petitions for special leave to appeal of the author and of Mr. Reynolds.

It is argued that Errol Johnson was detained on death row for over 10 years, and that if he were to be executed after such a delay, this would amount to cruel and degrading treatment and or punishment, in violation of Article 7 of the ICCPR. The fact that he was held on death row for so long under the appalling conditions of detention at St. Catherine District Prison is said to amount in itself to a violation of Article 7 of this ICCPR.

It can be said as the breach of Article 7 and 10 of this ICCPR if the prisoner is kept for a long time at the death row before the execution after the decision of death penalty.

[1]https://en.wikipedia.org/wiki/capital_punishment
[2]Article 6 (4) of the International Covenant on Civil and Political Rights, 1966.
[3]Article 6 (5) of the International Covenant on Civil and Political Rights, 1966.
[4]Errol Johnson v Jamaica, HRC Communication No. 588/1994, 22 March 1996.

In particular cases, aggravating factors may render detention on death row a violation of Articles 7 or 10(1) of this ICCPR. In this regard, "each case must be considered on its own merits, bearing in mind the imputability of delays in the administration of justice on the State party, the specific conditions of imprisonment in the particular penitentiary and their psychological impact on the person concerned."[1]

Second Optional Protocol to the International Covenant on Civil and Political Rights aims at the abolition of the death penalty. States Parties to the Protocol believe that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights. This Optional Protocol requires States to cease executions and take all necessary measures to abolish the death penalty.

The HRC and the CAT has also found that the method of execution may itself amount to torture or ill-treatment, for example holding that death by stoning would violate the UNCAT.[2]

In other words, whilst the death penalty was a lawful sanction, and remains so for those States which have not ratified Protocols No. 6 and 13, in certain circumstances the "manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as conditions of detention awaiting execution" could amount to a violation of Article 3.[3]

In Soering v UK case,[4] the applicant, a West German national, alleged that the decision by the Secretary of State for the Home Department to extradite him to the United States of America to face trial in Virginia on a charge of capital murder would, if implemented, give rise to a breach by the United Kingdom of Article 3. If he were sentenced to death he would be exposed to the so-called 'death row phenomenon'. He also complained of a breach of Article 13, in Article 13 of the European Convention on Human Rights provides that everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. He had no effective remedy in the United Kingdom in respect of his complaint under Article 3, and of Article 6 of this ECHR.

In Article 3 of European Convention on Human Rights provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment. In Article 6 of European Convention on Human Rights provides that1. in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice,2. everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law and 3. everyone charged with a criminal offence has the following minimum rights:(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;(b) to have adequate time and facilities for the preparation of his defence;(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of

[1]APT and CEJIL, Torture in International Law, 2008, 1st edition, pg.35.
[2]A.S. v Sweden, CAT Communication No. 149/1999, 24 November 2000.
[3]APT and CEJIL, Ibid, pg.76.
[4]Soering v UK,Series A, No 161; Application No 14038/88, 7 JULY 1989.

justice so require;(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court. In Article 13 of European Convention on Human Rights provides that everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The Commission found a breach of Article 13 but no breach of either Article 3 or Article 6 of this ECHR.

For any prisoner condemned to death, some element of delay, between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial. Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services.[1]

However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever-present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration. Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3.[2]

In this case found that the mental anguish suffered by death row prisoners awaiting execution, which could be carried out without notice, constituted cruel, inhuman and degrading treatment.

It can be noted that death penalty should be the ultimate punishment for the severest crimes however the prisoners were killed cruel and the mental anguish suffered by death row prisoners waiting execution when they were given the death penalty. In any exception regarding imposition of the death penalty, the manner of execution or conditions on death row is therefore not relevant in the context of the International Tribunals. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant. The 83 countries have abolished the death penalty. They are the twenty-four in European countries, nine in American, seventeen in African countries and two in ASEAN. Myanmar's President commuted all death sentences to life imprisonment in early 2014.

Treatment of Prisoner

Under Article 7 of the International Covenant on Civil and Political Rights, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific

[1]Soering v UK, Series A, No 161; Application No 14038/88, 7 JULY 1989.
[2]Ibid

experimentation and Article 10 (1) of the International Covenant on Civil and Political Rights, all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Human Rights Committee usually considers general conditions of detention under Article 10(1) of the International Covenant on Civil and Political Rights, and abuses targeted against particular detainees under Article 7 of this ICCPR.

Prisoners and other detainees are particularly vulnerable to abuse. The ICCPR therefore includes an article explicitly requiring that detainees be treated with humanity,[1]and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment aims to "establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."[2]

The State party should ensure that any act of violence committed against a prisoner is duly prosecuted and punished, and that women held in police custody or in prisons are never guarded by male officers. It should provide the Committee with more detailed information on the system put in place to hear complaints of prisoners for acts of violence.[3]

In Corey Brough v Australia case,[4] Mr. Corey Brough is an Australian citizen, currently residing in Australia. He claims to be a victim of a violation by Australia of Articles 7, 10 and Article 2, paragraph 3, of the International Covenant on Civil and Political Rights. Corey is an Aboriginal. He suffers from a mild mental disability, with significant impairments of his adaptive behaviour, his communication skills and his cognitive functioning. He protested against his transfer to an adult prison and asked for a return to a juvenile detention facility.

He claims that his segregation and confinement for 72 and 48 hours, respectively, as punishment for his conduct, the absence of facilities in his cell, the lack of appropriate heating, the removal of his blanket and clothes, his camera surveillance and 24 hour exposure to artificial light, the use of force causing him physical injuries, and the prescription of medication without his free consent were unnecessary to ensure his safety or to secure order in the detention centre. The cumulative effect of these measures amounted to a violation of Article 7 in conjunction with Article 10, of this ICCPR.[5]

The Committee considers that, although in principle judicial remedies were available, in accordance with Article 2, paragraph 3, of the Covenant, it would have been futile for the author, in the circumstances of his case, to commence court proceeding. It therefore concludes that he was not required, for purposes of Article 5, paragraph 2 (b), of the Optional Protocol, to exhaust these remedies. In Article 5, paragraph 2 (b) of the Optional Protocol to the International Covenant on Civil and Political Rights provides that the individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged. The Committee concludes that the communication is admissible insofar as the author's claims raise issues under Articles 7 and 10 of this ICCPR, and to the extent that they relate to the periods of his solitary confinement, the removal of his

[1]Article 10(1), International Covenant on Civil and Political Rights, 1966.
[2]Article 1, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.
[3]HRC, Concluding Observations on Zambia, UN Doc. CCPR/C/ZMB/CO/3, 2007.
[4]Ibid
[5]Corey Brough v Australia, HRC Communication No. 1184/2003, 17 March 2006.

clothes and blanket, his continued exposure to artificial light, and the prescription of Largactil to him.[1]

In Article 10 (1) of this ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

In accordance with Article 2, paragraph 3, of this ICCPR, he is entitled to an effective remedy, including adequate compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.[2]

Without keeping the prisoners in conformity with Standard Minimum Rules causes cruel or inhuman treatment.

Keeping the prisoner with no light and inadequate ventilation and the very narrow place which an prisoner can only stand for or crouch is inconformity with the Standard Minimum Rules for the Treatment of Prisoners causes cruel or inhuman.

The decision in Van der Ven v the Netherlands case[3] demonstrates this new approach. The applicant was held in a high-security prison, and the restrictions imposed in the high-security prison had provoked a deep, and medically confirmed, depression. He was subjected to routine body searches, including anal searches, during weekly cell inspections, and before and after open visits, and visits to the dentist or hair-dresser. These searches were not in response to a concrete security need, and did not result from the applicant's conduct. Taking into consideration the fact that the applicant was already subject to a large number of security measures, the Court found that "the practice of weekly strip-searches that was applied to the applicant for a period of approximately three and a half years diminished his human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing him."

The Court therefore held that the applicant had suffered at least degrading treatment in violation of Article 3 of this ECHR. In Article 3 of European Convention on Human Rights provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".

The Court considers that each case on its merits, so it is possible for positive aspects of the prison regime to compensate for conditions of detention to such an extent that these will not constitute a violation. For example, in Valasinas v Lithuania case,[4] the Court found that the small amount of individual space allocated to the applicant within a dormitory should be considered in light of the wide freedom of movement he enjoyed between 6:30am and 10:30pm.

However, such a finding would be unlikely in a case where a number of aspects of the conditions of detention gave rise to a cumulative negative effect on detainees. Furthermore, it is not sufficient that conditions of detention be capable of giving rise to distress meeting the minimum level of severity to come within Article 3 of this ECHR; the applicant must demonstrate that he or she actually suffered such distress.[5]

In high-security prisons, the detainee was subjected to routine body searches, including and searches and such kind of searches causes inhuman and degrading.

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[1]Corey Brough v Australia, HRC Communication No. 1184/2003, 17 March 2006.
[2]Corey Brough v Australia, HRC Communication No. 1184/2003, 17 March 2006.
[3]Van der Ven v the Netherlands, no. 50901/99, ECHR 2003-II, Judgement of 4 February 2003.
[4]Valašinas v Lithuania, no. 44558/98, ECHR 2001-VIII, Judgement of 24 July 2001.
[5]Van der Ven v the Netherlands, no. 50901/99, ECHR 2003-II, Judgement of 4 February 2003.

In the case of mentally ill persons, the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms will take into consideration their particular vulnerability and their inability, in some cases, to complain about how they are being affected by a particular treatment.[1]

States' obligations under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms include a positive duty to protect the physical integrity of detainees, notably though the provision of necessary medical treatment.[2]

The prisoner who has physical and mental illness should be provided medical treatment if it is necessary.

In Kucheruk v Ukraine case,[3]the applicant was born in 1980 and lives in the city of Kharkiv. In 1998 the applicant was diagnosed as suffering from schizophrenia. Since then the applicant has undergone outpatient treatment at the City Psychoneurological Healthcare Centre no. 3. In March 2001 the applicant was convicted of theft and hooliganism and sentenced to one and a half year's imprisonment suspended on probation. On 12 April 2002 the applicant was arrested and taken into police custody at the Kominternovskyy District Police Station on suspicion of hooliganism and theft. It was held that there has been a violation of Article 3 of the Convention in respect of the prison officers' excessive use of force, of the applicant's handcuffing whilst in detention in the disciplinary cell, of the lack of adequate medical treatment and assistance, and of the lack of adequate investigation into the applicant's complaints of ill-treatment.

The Court will consider on the facts of an individual case whether the prisoner's state of health is compatible with continued detention. In Mouisel v France case,[4]the applicant needed prolonged chemotherapy for his leukaemia, and a medical report had recommended that he be placed in a specialized unit, but the prison authorities had merely transferred him to a prison closer to a hospital. Only one year after this transfer was the applicant granted conditional release based on his need for regular hospitalisation. The Court therefore examined the period between the report recommending transfer to a specialized unit and the conditional release, considering whether the continued detention of the applicant gave rise to "a situation which attained a sufficient level of severity to fall within the scope of Article 3 of the Convention," taking into account "factors showing that the applicant's illness was progressing and that the prison was scarcely equipped to deal with it, yet no special measures were taken by the prison authorities."

The Court thus found that the national authorities did not take sufficient care of the applicant's health to ensure that he did not suffer treatment contrary to Article 3 of the Convention, concluding that his continued detention under these circumstances "undermined his dignity and entailed particularly acute hardship that caused suffering beyond that inevitably associated with a prison sentence and treatment for cancer."[5]

While the Court did not establish a general obligation to release a detainee for health reasons, it approved conditional release of individuals suffering from incurable diseases which necessitate serious and regular treatment.[6]

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[1]Herczegfalvy v Austria, no. 10533/83, Judgement of 24 September 1992.
[2]McGlinchey and Others v UK, no. 50390/99, ECHR 2003-V, Judgement of 29 April 2003.
[3]Kucheruk v Ukraine, no. 2570/04, Judgement of 6 September 2007.
[4]Mouisel v France, no. 67263/01, ECHR 2002-IX, Judgement of 14 November 2002.
[5]APT and CEJIL, Torture in International Law, 2008, 1st edition, pg.80.
[6]APT and CEJIL, Ibid, pg.80.

The prisoners who suffer from AIDS and cancer should be provided continuous medical treatment for survival in accordance with humanity although the government has no responsibility to provide such kind of medical treatment for them.

According to Article 3 of Geneva Convention relative to the Treatment of Prisoners of War (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[1]

The risk of torture and other forms of ill-treatment exists within any closed facility; not only prisons and police stations but also, for example, psychiatric facilities, juvenile detention centres, immigration detention centres and transit zones in international ports. Any breach of the law must be appropriately sanctioned.

So prisoners may be mental disable person or mentally ill person, woman, juvenile person or other kinds of prisoners. Prisoners should be treated with particular treatment if it is necessary condition. The authority should treat those prisoners in accordance with Article 10(1) of the ICCPR and Rules 10, 12, 19 and 20 of the Standard Minimum Rules for the Treatment of Prisoner. Unless the authorities treat those prisoners in conformity with the principles of the Convention and the minimum requirements, this treatment will be torture in the treatment of prisoner and this is violation of Conventions and Rules.

Conclusion

It can be concluded that there are two kinds of torture. They are psychological torture and physical torture. Sometimes these tortures are arising from the punishments such as corporal punishment and death penalty. These punishments are deemed to be lawful sanctions unless beyond the international legal limits. Actually these punishments were sentenced for criminal prosecutions, the authority violate the prohibitions of the treatment of prisoners under Conventions and Rules.

It can be seen that provisions for lawful sanctions are mentioned in some Conventions and Rules. Obviously when the penalty in accordance with law is actual lawful measure or not concern with the definition of Torture in Article 1 of the UNCAT and Article 1(1) of Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2 of Inter-American Convention to Prevent and Punish Torture and Article 7 (2) (e) of the Rome Statute of the International Criminal Court, it is lawful sanction. Although there is the exception of the punishment in accordance with law, it is to be assumed as torture if there is cruel or inhuman or degrading treatment beyond the limit of the punishment.

[1]Geneva Convention relative to the Treatment of Prisoners of War, 1949.

In respect of corporal punishment, in ancient time, corporal punishment is often practiced on minors especially in home and school settings. Corporal punishment is prescribed in ICCPR, ECHR, UNCRC, ACHPR, and ICTR. Judicial corporal punishment as part of a criminal sentence ordered by a court of law has long disappeared from European countries. However, it remains lawful in parts of Africa, Asia and Latin America. Although the corporal punishment is allowed in some countries, when the corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to Article 7 of the ICCPR, it is amount to torture.

Death penalty should be the ultimate punishment for the severest crimes however the prisoners were killed cruel and the mental anguish suffered by death row prisoners waiting execution when they were given the death penalty. In these conditions, death penalty is amount to be torture.

Another type of torture is arising from treatment of prisoner. Prisoners may be mental disable person or mentally ill person, woman, juvenile person or other kinds of prisoners. Prisoners should be treated with particular treatment if it is necessary condition. The authority should treat those prisoners in accordance with Article 10(1) of the ICCPR and Rules 10, 12, 19 and 20 of the Standard Minimum Rules for the Treatment of Prisoner. Unless the authorities treat those prisoners in conformity with the principles of the Convention and the minimum requirements, this treatment will be torture in the treatment of prisoner and this is violation of Conventions and Rules.

So except the lawful sanctions, other corporal punishment and death penalty, including treatment of prisoners should be exercised in accordance with the international legal limits on these punishments.

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Comparison on Legal Protection of Intangible Cultural Heritage among China, Armenia and Myanmar

Zin Hnin Aye*

Abstract

Intangible cultural heritage is a counterpart of tangible cultural heritage. Lithuanian crosses are tangible, but the knowledge and skills to create them are intangible. Tools are tangible, but plans, if thought are not, but if drawn are tangible. Textual scripts, costumes, props and stage settings are part and parcel of a performance tradition like India's Sanskrit Kutiyattam theatre and Japanese Nogaku theatre. Armenia and China are the two countries that have intangible cultural heritage laws in their municipal legislations. Myanmar was also a member of the Convention for the Safeguarding of Intangible Cultural Heritage in May, 2014. In Myanmar, there are many intangible cultural heritage such as customs and traditions, religion and religious practices, religious and seasonal festivals, language and literature, art and artistic activities, attires and costumes. However, there are no specific provisions relating to intangible cultural heritage in Myanmar. Not to disappear Myanmar cultures and traditions in the world, this paper is focused on to provide the specific law for safeguarding Myanmar intangible cultural heritage by studying the advantages and disadvantages of specific laws for the safeguarding of intangible cultural heritage in China and Armenia,

Key words: Intangible cultural heritage, India's Sanskrit Kutiyattam theatre and Japanese Nogaku theatre

Introduction

Intangible cultural heritage is a cultural heritage that cannot be tangible. It includes ethnic languages, nursery rhythms, riddles, performing arts, festivals, carnivals, events to mark the New Year, indigenous knowledge about local fauna and flora, traditional healing systems, beliefs and traditional craftsmanship, etc that are transmitted from generation to generation. As soon as the Convention for the Safeguarding of Intangible Cultural Heritage, 2003 was adopted, safeguarding intangible cultural heritage was manifested. State parties to the Convention were adopted national laws based on the provisions of the Convention such as China and Armenia. Therefore, this paper is emphasized for studying comparison on legal framework for the safeguarding of intangible cultural heritage, types of intangible cultural heritage, legal protection on safeguarding of intangible cultural heritage, legal liabilities in the national laws of China and Armenia.

Intangible Cultural Heritage

Intangible cultural heritage is the cultural heritage that cannot be tangible. It includes oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe, and traditional craftsmanship.

Concept of Intangible Cultural Heritage

According to article 2 (1) of the Convention for the Safeguarding of the Intangible Cultural Heritage 2003,the "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills –as well as the instruments, objects, artifacts and cultural spaces associated therewith –the communities, groups and, in some cases, individuals recognize as part of their cultural heritage.[1] This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural

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[1]Article 2 (1) of the Convention for the Safeguarding of the Intangible Cultural Heritage, 2003.

heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.[1]

UNESCO's 2003 Convention for the Safeguarding of the Intangible Cultural Heritage proposes five broad domains' in which intangible cultural heritage is manifested.

(1) Oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
(2) Performing arts;
(3) Social practices, rituals and festive events;
(4) Knowledge and practices concerning nature and the universe;
(5) Traditional craftsmanship.[2]

To sum up, according to the UNESCO Convention, intangible cultural heritage is divided into five domains. However, intangible cultural heritages are divided into seven domains including traditional sports and traditional cuisine e.g. traditional sports in Thailand and traditional cuisine in the Republic of Korea.

Historical Development of Intangible Cultural Heritage

Since the Second World War, UNESCO has supported a series of world heritage initiatives, starting with tangible heritage, both immovable and movable, and expanding to natural heritage, and most recently to intangible heritage.[3] Prior to the UNESCO Convention, efforts had already been made by a number of states to safeguard their intangible heritage. Japan, with its 1950 Law for the Protection of Cultural Properties, was the first to introduce legislation to preserve and promote intangible as well as tangible culture: Important Intangible Cultural Properties are designated and "holders" recognized of these craft and performance traditions, known informally as Living National Treasures. World Conference on Cultural Policies in Mexico City, 1982 was one of the first international occasions that mentioned the preservation of "Intangible Cultural Heritage".[4] In 1989, after lengthy, laborious debates, UNESCO established the first international normative instrument: the Recommendation on the Safeguarding of Traditional Culture and Folklore.[5]

In 1997, UNESCO launched the program of Proclamation of the Masterpieces of the Oral and Intangible Heritage of Humanity, intending to raise awareness of the importance of intangible cultural heritage. The General Conference adopted another instrument, Universal Declaration on Cultural Diversity, which also includes articles dealing with the preservation of "heritage in all forms". This declaration and its Action Plan presented the basic idea of the coming convention and helped to develop it in 2001.

Intangible Cultural Heritage (ICH) is promoted by UNESCO as a counterpart to the World Heritage that focuses mainly on tangible aspects of culture. In 2001, UNESCO made a survey among states and NGOs to try to agree on a definition, and the Convention for the Safeguarding of Intangible Cultural Heritage was drafted in 2003 for its protection and promotion. The General Conference of the United Nations Educational, Scientific and Cultural Organization hereinafter referred to as UNESCO, meeting in Paris, from 29 September to 17

[1] Article 2(1) of the Convention for the Safeguarding of the Intangible Cultural Heritage , 2003.
[2] Intangible Cultural Heritage domains, UNESCO, Norwegian Ministry of Foreign Affairs, 01857-EN,p-3.
[3] Barbara Kirshenblatt-Gimblett, "Intangible Heritage as Metacultural Production", p-1, June, 2004, Museum International.
[4] https://ich.unesco.org.
[5] Noriko Aikawa, " An Historical Overview of the Preparation of the UNESCO International Convention for the Safeguarding of the Intangible Cultural Heritage,p-1, June 2004, international Museum.

October 2003, at its 32nd session.[1] It was opened for ratification since November 2003. It was ratified by 30 States on 20 January 2006. It was entered into force on 20 April 2006. It was ratified by 176 member states.

The Convention recommends that countries and scholars develop inventories of intangible cultural heritage in their territory, as well as work with the groups who maintain these intangible cultural heritage to ensure their continued existences; it also provides for funds to be voluntarily collected among UNESCO members and then disbursed to support the maintenance of recognized intangible cultural heritage .[2] The Convention for the Safeguarding of the Intangible Cultural Heritage has several systems for safeguarding at the international level. The List of Intangible Cultural Heritage in Need of Urgent Safeguarding has 31 elements, following the seventh session of the Committee for the Safeguarding of the Intangible Cultural Heritage, held in Paris, France in December 2012.There are also 302 elements on the Representative List of the Intangible Cultural Heritage of Humanity and 43 elements on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding [3]

Firstly, it is famous the term "traditional folklore" other than "intangible cultural heritage". In 1982, the term "intangible cultural heritage" was mentioned in the World Conference on Cultural Policies in Mexico City. After the Convention for the Safeguarding of Intangible Cultural Heritage, 2003, intangible cultural heritage is promoted and is a counterpart of tangible cultural heritage.

International Instruments relating to Intangible Cultural Heritage

The main convention relating to intangible cultural heritage is Convention for the Safeguarding of the Intangible Cultural Heritage, 2003. Related international instruments relating to intangible cultural heritage are convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005, UNESCO Universal Declaration on Cultural Diversity, 2001, the Universal Declaration on Human Rights of 1966 and the International Covenant on Economic, Social and Cultural Rights of 1966.

Comparison on Legal Framework for Safeguarding of Intangible Cultural Heritage

There are specific laws for the safeguarding of intangible cultural heritage in China and Armenia, e.g. Law of the People's Republic of China on Intangible Cultural Heritage, 2011 and Law of the Republic of Armenia on Intangible Cultural Heritage, 2009. In Myanmar, it is trying to make a law for preservation of the country's intangible cultural heritage.

Legal Framework for Safeguarding of Intangible Cultural Heritage in China

Republic of China on Taiwan also passed a Cultural Heritage Protection Act in 1982, though diplomatic isolation has limited its influence. China's own intangible cultural heritage law was promulgated in 2011 and related provincial and local initiatives, regulation and intangible cultural lists have proliferated ,with provinces reportedly allocating more than RMB 1 billion to ICH protection over 2005-2006.[4]There are 6 chapters and 45 articles in the law of the Republic of China on Intangible Cultural Heritage, 2011.[5]

Legal Framework for Safeguarding of Intangible Cultural Heritage in Armenia

On the other hand, by the Protocol Decision No. 46 of 23 November 2006, the Government of the Republic of Armenia approve of the "Concept on preservation of intangible

[1] https://ich.unesco.org.
[2] www.unesco.org.
[3] www.unesco.org/culture/ICH.
[4] https://cpianalysis.org.
[5] Law of the People's Republic of China on Intangible Cultural Heritage, 2011.

cultural heritage protection of it visibility "and by the protocol Decision No.17of 3 May 2007, it approved the "Timeline of the measures stemming from the concept of preservation of intangible cultural heritage, protection of it viability". On 7 October 2009, the National Assembly adopted the law of the Republic of Armenia "on intangible cultural heritage". There are 7 chapters and 29 articles in law of the Republic of Armenia on intangible cultural heritage, 2009.[1]

Legal Framework for Safeguarding of Intangible Cultural Heritage in Myanmar

In Myanmar, there are no specific law and related law for safeguarding of intangible cultural heritage. The government has taken steps to make a law for preservation of the country's tangible and intangible traditional cultural heritage. [2] There are laws relating to cultural heritage protection. They are as follows;

(1) the Antiquities Act ,1957,
(2) the Protection and Preservation of Cultural Heritage Regions Law, 1998,
(3) the Protection and Preservation of Antique Objects Law,2015 and
(4) the Protection and Preservation of Ancient Monuments Law, 2015.

Therefore, in comparison on legal framework for safeguarding of intangible cultural heritage, firstly, Republic of China passed a Cultural Heritage Protection Act in 1982 and finally, China's own intangible cultural heritage law was promulgated in 2011. In Armenia, firstly, by the Protocol Decision No. 46 of 23 November 2006 and by the protocol Decision No.17 of 3 May 2007, the government of Armenia approved the concept of preservation of intangible cultural heritage and protection of its viability and finally, the National Assembly adopted the law on intangible cultural heritage in the Republic of Armenia on 7 October 2009. In Myanmar, there is no specific law for safeguarding of intangible cultural heritage but cultural heritage laws were adopted in 1957, 2009 and 2015. In Myanmar, not to disappear intangible cultural heritage, it should be provided related provisions for intangible cultural heritage in respective Myanmar Cultural Heritage laws or a specific law for intangible cultural heritages.

Comparison on Types of Intangible Cultural Heritage

Types of intangible cultural heritage are divided into five domains such as Oral traditions and expressions, performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe and traditional craftsmanship.

Types of Intangible Cultural Heritage in China

In China, there are generally five domains such as traditional oral literature and the language as a carrier thereof; traditional fine arts, calligraphy, music, dance, drama, folk art and acrobatics; traditional artistry, medicine and calendar; traditional rituals, festivals and other folk customs; traditional sports and entertainment; and other intangible cultural heritage. [3]

Types of Intangible Cultural Heritage in Armenia

On the other hand, according to article 4(1) of law of the Republic of Armenia on intangible cultural heritage, 2009, this law shall apply to the following domains are (1) folklore; a language, dialects, sub-dialects, and all forms and types of oral traditions; (2) folk music; folk song with its varieties, and folk instrumental music with its varieties ; (3) folk dance with its varieties; (4) folk theatre performances with their varieties; (5) folk holidays; (6)

[1] Law of the Republic of Armenia on Intangible Cultural Heritage 2009.
[2] www.President-office.gov
[3] Article 2 of Law of the People's Republic of China on Intangible Cultural Heritage,2011.

folk customs associated with different stages of a person's life cycle (birth, maturity, marriage, death); (7) customs associated with social, kin, and family relations; (8) national popular beliefs and customs; (9)folk practices with its various expressions; (10) skills associated with economic life.(farming, cattle breading, finishing, hunting, trade, etc) ; (11) representations and knowledge concerning nature; (12)national cuisine; (13)national games; (14)skills and knowledge associated with traditional craftsmanship; folk craftsmanship and related skills; national costumes; and folk architecture, housing and household stuff.[1] In Armenia, there are 14 types based on five domains in the convention for the safeguarding of intangible cultural heritage, 2003.

Types of Intangible Cultural Heritage in Myanmar

In Myanmar, there are three major types of Myanmar performing arts.

(1) Folk performing arts.
(2) Traditional /dramatic performing arts.
(3) Traditional performing arts of National Races within Myanmar Union. There are eight major national races Kachin, kayah, Kayin, Chin, Bamar, Mon, Rakhine and Shan.[2]

Therefore, in comparison on types of intangible cultural heritage between China and Armenia, depending on types of intangible cultural heritage that is defined in the convention for the safeguarding of intangible cultural heritage 2003, it can be seen that traditional sports and games are defined in the intangible cultural heritage laws of China and Armenia. In law of the People's Republic of China on intangible cultural heritage, 2011, calligraphy and traditional artistry are defined as a category. In Law of the Republic of Armenia on intangible cultural heritage, 2009, folk holidays and national cuisine are defined as a category. In Myanmar, although it is not provided the national legislation relating to intangible cultural heritages, there are generally eight major national races and three major of Myanmar performing arts.

Comparison on Legal Protection of Intangible Cultural Heritage

In China, there is Law of the people Republic of China on intangible cultural heritage, 2011. It is focused on safeguarding for intangible cultural heritage by subscribing to the UNESCO. In Armenia, there is Law of the Republic of Armenia on intangible cultural heritage, 2009. It is focused on safeguarding for intangible cultural heritage by making international cooperation. In Myanmar, there is no specific law for safeguarding of intangible cultural heritage.

Legal Protection of Intangible Cultural Heritages in China

In Law of the People Republic of China on Intangible cultural heritage 2011, there are 45 articles and 6 Chapters.

The State Council shall establish the catalogue of the representative items of intangible cultural heritage at the national level and include items of intangible cultural heritage that reflect the distinguished traditional culture of the Chinese nation and has significant historical, literary, artistic or scientific value in the catalogue for protection. The people's governments of the provinces, autonomous regions and municipalities directly under the Central Government shall establish the catalogue of the representative items of local intangible cultural heritage and include items of intangible cultural heritage within their own administrative regions that reflect

[1] Article 4(1) of law of the Republic of Armenia on intangible cultural heritage,2009.
[2] www.accu.or.jp/ch/en/policies.

the distinguished traditional culture of the Chinese nation and has historical, literary, artistic or scientific value in the catalogue for protection.[1]

Ministry of Culture under the State Council shall organize the expert review team and the expert review committee to conduct preliminary evaluation and review of the item of intangible cultural heritage.[2]

The department in charge of culture shall make a public notice to publish the items intended and organize the formulation of the protection plan and protect the representative items of intangible cultural heritage at the national level.[3]

The representative inheritors of the representative items of intangible cultural heritage shall meet the following conditions: (1) Familiar with the intangible cultural heritage they inherit; (2) Are representative in the specific area and have more significant influence in certain areas; and (3) Actively carry out inheritance activities in article 29 of Law of the People Republic of China, 2011.

The department in charge of culture shall apply as the reference and the list of representative inheritors determined shall be published. The department in charge of culture shall carry out the activities of the inheritance and spread of intangible cultural heritage(1) provide the requisite inheritance premises; (2) Provide the necessary funding to support the representative inheritors to carry out activities such as teaching, imparting skills or exchanges; (3) Support the representative inheritors to participate in charitable activities in the society; and (4) Support the representative inheritors to carry out other measures for the activities of the inheritance and spread of intangible cultural heritage .[4]

As the advantage of China's Intangible Cultural Heritage Law, 2011, it was provided provisions for subscribing their intangible cultural heritages to the UNESCO lists in detail. In practice, it was subscribed many intangible cultural heritages to the UNESCO lists and so the government of the Republic of China have got subsidiaries from UNESCO for safeguarding intangible cultural heritages. Moreover, they were performed as the tourist attraction.

Legal Protection of Intangible Cultural Heritages in Armenia

By the Protocol Decision No. 46 of 23 November 2006, the Government of the Republic of Armenia approve of the "Concept on preservation of intangible cultural heritage protection of it visibility "and by the protocol Decision No.17of 3 May 2007, it approved the "Timeline of the measures stemming from the concept of preservation of intangible cultural heritage, protection of its viability". On 7 October 2009, the National Assembly adopted the Law of the Republic of Armenia on Intangible Cultural Heritage. There are 7 chapters and 29 articles in Law of the Republic of Armenia on Intangible Cultural Heritage, 2009.

. According to article 3(1) of Law of the Republic of Armenia on Intangible Cultural Heritage, 2009, "intangible cultural heritage" means the customs, traditions, rites, representations and expressions, knowledge and skills, as well as the instruments, objects, artifacts and cultural spaces associated there with as materialized carriers of intangible cultural heritage –that the public, groups and in some cases individuals recognize as part of their cultural heritage and witch have taken a sound stance in practice.[5]

[1] Article 18 of Law of the People's Republic of China on Intangible Cultural Heritage,2011.
[2] Article 22 of Law of the People's Republic of China on Intangible Cultural Heritage,2011.
[3] Article 23 and 25 of Law of the People's Republic of China on Intangible Cultural Heritage,2011.
[4] Article 29 and 30 of Law of the People's Republic of China on Intangible Cultural Heritage,2011.
[5] Article 3(1) of law of the Republic of Armenia on Intangible Cultural Heritage,2009.

Subjects of the field of intangible cultural heritage shall be; (1)the Republic of Armenia; (2) republican, territorial and local self-government bodies of public administration; (3)cultural, scientific and educational institutions, nongovernmental organizations, museums, libraries, archives; (4) legal and natural persons engaged in maintenance, identification, documentation, research, application, recreation, teaching, inventorization and propagation of intangible cultural values; (5)the bearers of intangible cultural heritage in article 13 of law of the Republic of Armenia on intangible cultural heritage, 2009.[1]

The State Body shall approve annual and long-term programmes for the preservation and use of intangible cultural heritage, the criteria for intangible cultural heritage values and intangible cultural heritage and the procedures for identification, documentation, preservation and exchange of information thereon. [2]

Public administration shall undertake measures for preservation, safeguarding and use of intangible cultural heritage and submit recommendations to the State body.

Local self-government bodies shall assist the activities of national cultural groups and ensembles and provide information on intangible cultural heritage bearers.[3]

International cooperation of the Republic of Armenia shall be carried out in accordance with the legislation of the Republic of Armenia and international treaties of the Republic of Armenia. Armenian intangible cultural heritage in foreign states shall be safeguarded in accordance with the interstate treaties of the Republic of Armenia and assist Armenian cultural institutions and organizations.[4]

Therefore, as the advantage of Armenia's Intangible Cultural Heritage Law, 2011, there is a provision for safeguarding Armenia's intangible cultural heritage in foreign states. In practice, it is assumed that this law is not very practicable for subscribing Armenia's intangible cultural heritage into the representative list of intangible cultural heritage of humanity and the list of intangible cultural heritage in need of urgent safeguarding.

Legal Protection of Intangible Cultural Heritages in Myanmar

In Myanmar, there is no legal protection on the safeguarding of intangible cultural heritage. There are legal protection on the safeguarding of tangible cultural heritages, cultural zones and ancient monuments. As Myanmar is a member of the convention for the safeguarding of intangible cultural heritage, 2003, it is trying to make inventory intangible cultural heritages in Myanmar, e.g. the festival of Shwesigon pagoda in Bagan, the festival of Shwesandaw pagoda and national cuisine and traditional craftsmanship.

Comparison on Legal Liabilities

In comparison on legal liabilities, there are civil liability for violations of article 40 and 41 of China's Intangible Cultural Heritage Law, 2011 whereas there is criminal liability for violations of article 42 of the law. As there are no specific provisions for determining civil or criminal liabilities in Armenia's intangible cultural heritage law, 2009, it may arise legal issues in municipal courts.

Legal Liabilities in China

A party that violates the provisions of this Law and damages the physical objects and premises that are a constituent part of the intangible cultural heritage shall assume civil liability

[1] Article 13 of law of the Republic of Armenia on Intangible Cultural Heritage 2009.
[2] Article 9 of law of the Republic of Armenia on Intangible Cultural Heritage 2009.
[3] Article 9 and 10 of law of the Republic of Armenia on Intangible Cultural Heritage 2009.
[4] Article 15 and 16 of law of the Republic of Armenia on Intangible Cultural Heritage 2009.

in accordance with the law. If such act constitutes an act in violation of the administration of public security, the penalty for offenses against public security administration shall be imposed in accordance with the law in article 40 of Law of the People Republic of China, 2011.

An overseas organization that violates the provisions of Article 15 of this Law shall be ordered to make rectification, issue a warning and have the illegal gains and the physical objects and information obtained in the investigation confiscated by the department in charge of culture. Under serious cases, a fine of no less than RMB100, 000 but no more than RMB500, 000 shall be imposed in article 41 of Law of the People Republic of China, 2011.

A party that violates the provision of this Law shall be subject to criminal liability in accordance with the law if such act constitutes a criminal offense according to article 42 of Law of the People Republic of China, 2011.[1]

Therefore, any party who violates the provisions of article 40 and 41 of this law shall bear civil liability. Any party who violates the provisions of article 42 of this law shall bear criminal liability.

Legal Liabilities in Armenia

In Armenia, those violating the provisions of the law on intangible cultural heritage shall bear liability as prescribed by the law of the Republic of Armenia.[2]Therefore, it was not provided for civil or criminal liability for violating the provisions of the law of the Republic of Armenia on Intangible Cultural Heritage, 2009**.**

Legal Liabilities in Myanmar

In Myanmar, there is no provisions for legal liabilities as well as there is no specific law for safeguarding intangible cultural heritage.

Safeguarding Institutions on Intangible Cultural Heritage

In many countries**,** the main institution for safeguarding intangible cultural heritage is Ministry of Culture. In some countries, there are other associations for safeguarding intangible cultural heritage, e.g. Vietnam Cultural Heritage Organization and Vietnamese Folklorists Association.

Safeguarding Institutions on Intangible Cultural Heritage in China

There are Ministry of Culture of the People's Republic of China, Expert Committee on National Intangible Cultural Heritage Protection and China Intangible Cultural Heritage Protection Center.

The responsibility of Ministry of Culture is as follows: during the unified coordination with other related ministries and commissions, to make general strategy, layout and plan of China's intangible cultural heritage protection in accordance with actual situation of China; boosting legislative progress of intangible cultural heritage; instructing, supervising, coordinating related departments and units to carry out and implement national work guidance, principle and strategic arrangement on intangible cultural heritage protection, gradually turn general target of protection into reality; carrying out organization and coordination work for the implementation of key projects.

Expert Committee on National Intangible Cultural Heritage Protection was established on July 13, 2006, with main tasks including making of protection program, making and

[1] Article 40,41 and 42 of Law of the People Republic of China on Intangible Cultural Heritage, 2011.
[2] Articles 18 of law of the Republic of Armenia on Intangible Cultural Heritage, 2009.

implementation of census, examination, comment, protection and administration of national level directory, approve of transmitter and so on.

China Intangible Cultural Heritage Protection Center is the professional organization of national level intangible cultural heritage protection, undertaking the specific work related with nation-wide intangible cultural heritage protection, performing policy consultancy on intangible cultural heritage protection work; organizing nation-wide census; instructing the implementation of protection plan; carrying out theoretical research on intangible cultural heritage protection; conducting academic, exhibition (performance) and public events, exchanging, recommending, publicizing achievements and experiences of protection work; organizing and carrying out publication of research achievements and personnel training.[1]

In China, it can be seen that the Ministry of Culture is the main responsibility for safeguarding intangible cultural heritage and Expert Committee on National Intangible Cultural Heritage Protection is to examine the intangible cultural heritage for subscribing them to the UNESCO lists. Finally, for exhibiting intangible cultural heritage, China Intangible Cultural Heritage Protection Center is the professional organization.

Safeguarding Institutions on Intangible Cultural Heritage in Armenia

Competent bodies for safeguarding intangible cultural heritage in Armenia are Ministry of Culture, Ministry of Education and Science, Institute of Archaeology and Ethnography of the National Academy of Science, Institute of Arts of the National Academy Science, Yerevan state Conservatory, History Museum of Armenia, and state Museum of Armenian Ethnography.

The documents on intangible cultural heritage are the original materials that are written, video, recorded, witnesses, certificates about intangible cultural elements, as well as the materialized bearers of Intangible cultural heritage elements, documents and other documentary materials about the intangible cultural heritages of Republic of Armenia are kept in relevant scientific and educational institutions, museums, State Archive of the Republic of Armenia.

In Armenia, it can be analyzed that the Ministry of Culture is the main responsibility for safeguarding intangible cultural heritages and for subscribing intangible cultural heritages to the UNESCO lists. Ministry of Education and Science, Institute of Archaeology and Ethnography of the National Academy of Science and Institute of Arts of the National Academy Science is the responsibility for bearing professional carrier with intangible cultural heritages such as traditional craftsmanship, traditional dance and traditional music. Finally, History Museum of Armenia and state Museum of Armenian Ethnography is the responsibility for exhibiting intangible cultural heritages.

Safeguarding Institutions on Intangible Cultural Heritage in Myanmar

Now, Myanmar presses on with fundamental steps in the inventorying of its living heritage. The government has taken steps to make a law for preservation of the country's tangible and intangible traditional cultural heritage.[2] As the leadership of Ministry of Religious Affairs and Ministry of Culture, a national workshop on community based inventorying of intangible cultural heritage has assembled various stakeholders including government officials and community practitioners in the Inle Lake region in Southern Shan State, from 27 October

[1]Luo Wei, Head, Department for Theoretical Research Institute, China Intangible Cultural Heritage Center,Country Report: China, January 2008, Tokyo, Osaka and Kyoto, Japan.

[2] www.president.office.gov.

to 3 November 2014, with the primary aim to develop and implement a framework for the inventory of its intangible cultural heritage.[1]

In Myanmar, an organization that is related intangible cultural heritage is University of Culture, Yangon, situated in South Dagon, Myothit in Yangon. It was established on 24 September 1994. Major courses offered are music, dramatic arts, painting and sculpture. The Outstanding Cultural Activities are Myanmar Traditional Costume Exhibition (2000), Myanmar Traditional Musical Instrument Exhibition (2003), Myanmar Traditional Arts and Crafts Exhibition, Graduation Ceremony including Arts Exhibition and grand stage performance of graduated students annually , publication of research works on performing arts, painting and sculpture, workshops, seminars at the local, regional and international levels are occasionally held and country papers are prepared to expose, preserve and promote Myanmar Traditional Music, Dramatic, Painting and Sculpture, Cultural exchange foreign nations have been carrying out since 1994.[2]

To sum up, now Ministry of Religious Affairs and Ministry of Culture is the main responsibility for making inventory intangible cultural heritage in Myanmar.

Issues relating to Intangible Cultural Heritage

In respect of states, there are rare issues for competing intangible cultural heritage and defining intangible cultural heritage because there is *sui generis* system in the intangible cultural heritage.

Issues relating to Intangible Cultural Heritage in China

In respect of issue in China, there are more than 350 kinds of Chinese opera, of which Peking opera is the most famous internationally. It has been argued that Chinese opera should be called theatre and music, because it concentrates not only on music but also involves recitation, acting, movement, dance, and martial arts; all these elements combine together to bring out the story. As the most representative Chinese opera genre in Guangdong province, Cantonese opera has been popular since the late 19th century. However, facing keen competition on the one hand from other art forms and entertainment such as movies, theatre, and popular songs, while on the other suffering from the fact that the younger generation lacks both knowledge and interest, its appeal has undergone a steady decline over the years. In 2009, Cantonese opera was listed as an Intangible Cultural Heritage of Humanity by UNESCO. Since then, the Hong Kong government has committed itself to the promotion of the genre through different channels.[3]

Issues relating to Intangible Cultural Heritage in Armenia

Apart from signing and ratifying the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003 , Armenia is a member of and cooperates with the Regional Research Center of Intangible Cultural Heritage in Western and Central Asia and the Sophia Centre of South- Eastern European Countries. However, the problems of replenishing the list of intangible cultural heritage and creation of a unified database remain an outstanding.[4] For example, the UNESCO Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage has added the Armenian traditional dance Kochari on its "Intangible Cultural Heritage of Humanity" list during the 12th session. During the six-day session, 24 committee

[1] https: // ich.unesco.org/Myanmar-MM.
[2] www.acu.or.jp/ich/pdf.
[3] www.theasiadialogue.com/2017/7/26.
[4] Dr Robert Pickard, "Report on Increasing the Competitiveness of the Cultural heritage Sector in Armenia," p-57,Eastern Partnership Culture Programme II, February, 2017.

members elected by the general Assembly of the 2003 UNESCO Convention discuss a number of issues that are important for the safeguarding of living heritage around the world. The committee has also noted that Kochari is one of the rare traditional dances whose chain of transmission has never been interrupted.[1]

Therefore, there are rare issues for competing intangible cultural heritages among states. There are issues for data collection, analysis of cultural heritage sector and nominating intangible cultural heritages to the UNESCO lists at each state.

Conclusion

To sum up, there are specific laws for the safeguarding of intangible cultural heritage in China and Armenia, e.g. Law of the People's Republic of China on Intangible Cultural Heritage, 2011 and Law of the Republic of Armenia on Intangible Cultural Heritage, 2009 .In Myanmar; it is trying to make a law for preservation of the country's intangible cultural heritage. Therefore, as a result, in comparison between intangible cultural heritage laws of China and Armenia, Law of the People Republic of China on Intangible Cultural Heritage, 2011 is more useful than Law of the Republic of Armenia on Intangible Cultural Heritage, 2009 in practice. As the advantages of the Law of the Republic of Armenia on Intangible Cultural Heritage, 2009, there are provisions for safeguarding Armenia's intangible cultural heritage in foreign states .In comparison on types of intangible cultural heritage between China and Armenia, the intangible cultural heritage law in Armenia is more perfect than in China. In comparison on legal liabilities, as there are no specific provisions for determining civil or criminal liabilities in Armenia's intangible cultural heritage law, 2009, it may raise legal issues in municipal courts. There are civil liability for violations of article 40 and 41 of China's intangible cultural heritage law, 2011 whereas there is criminal liability for violations of article 42 of the law. In comparison on strong points and weak points of the intangible cultural heritage laws of China and Armenia, this paper is mainly focused on to know the provisions that are included in Myanmar's intangible cultural heritage law.

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