

**UNIVERSAL
JURISDICTION:**

**The duty of states to enact and
implement legislation**

Chapters Nine

(Torture: The legal basis)

“... at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States’ universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime.”

Prosecutor v. Furundžija, Judgement, Case No. IT-95-17/1-T, Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, 10 December 1998, para. 156

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UNIVERSAL JURISDICTION:

The duty of states to enact and implement legislation -

Chapter Nine (Torture: The legal basis for universal jurisdiction)

As stated above in Chapter Three, Section II.B.1 and C.1, torture as a war crime is subject to universal jurisdiction, whether committed in an international or non-international armed conflict. In addition, as explained in Chapter Five, Section I, torture is also subject to universal jurisdiction as a crime against humanity when it is committed as part of a pattern of crimes against humanity. This section demonstrates that in addition to the obligation of states parties under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)¹ and the Inter-American Convention to Prevent and Punish Torture (Inter-American Convention on Torture),² to exercise jurisdiction over persons found in their territory suspected of torture abroad, to extradite them to other states able and willing to do so or to surrender them to an international criminal court, other states may exercise universal jurisdiction over them as a matter of customary international law.

There is also support for the view that no state - whether a party to the Convention against Torture or not - may shield a person suspected of torture from international justice, but *must* either exercise jurisdiction over persons found in their territory suspected of torture or extradite that person to a state able and willing to do so or surrender the suspect to an international criminal court with jurisdiction over torture and the suspect. To the extent that this principle may not yet be fully recognized as customary international law for torture, Amnesty International believes that general principles of law, logic and morality all dictate that it should be so recognized and implemented. Of course, the easiest way to do this would be for those states which have not yet ratified the Convention against Torture and - members of the Organization of American States (OAS) - the Inter-American Convention on Torture to do so as quickly as possible and to implement their obligations in national law and practice. As of 1 September 2001, 126 states were parties to the Convention against Torture and nine other states had signed, but not yet ratified, the Convention.³ As of 1 March 2001, 16 of the 35 member states of the OAS

¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res 39/46, 39 U.N. G.A.O.R. Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* 26 June 1986.

² Inter-American Convention to Prevent and Punish Torture, O.A.S. Gen. Ass. Res. XXX, 15th Sess., 9 December 1985, *entered into force* 28 February 1987.

³ As of 1 September 2001, the following 126 states were parties to the Convention against Torture: Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Côte d'Ivoire, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, the Federal Republic of Yugoslavia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Honduras, Hungary, Iceland, Indonesia, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Macedonia (The former Yugoslav Republic of), Malawi, Mali, Malta, Mauritius, Mexico, Monaco, Morocco, Mozambique,

had ratified the Inter-American Convention on Torture, without any reservations to the jurisdictional provisions, and a further four had signed it.⁴

I. DEFINITION

Article 1 of the Convention defines the crime of torture as follows:

“For the purposes 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 intimidation of any kind, when such pain or suffering is inflicted by or at the instigation of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

The definition of torture in the Convention against Torture reflects customary international law. The definition of torture in the Inter-American Convention on Torture is similar.⁵

The Convention against Torture and the Inter-American Convention on Torture require all parties to enact legislation prohibiting torture and providing appropriate punishment.⁶ Both treaties lay out detailed

Namibia, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom, United States of America, Uruguay, Uzbekistan, Venezuela, Yemen and Zambia.

The following nine states had signed, but not yet ratified the Convention, as of the above date: Comoros, Dominican Republic, Gambia, Guinea-Bissau, India, Ireland, Nicaragua, Sao Tome and Principe and Sudan.

⁴ As of 1 March 2001, the following states had ratified the Inter-American Convention on Torture: Argentina, Brazil, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Panama, Peru, Paraguay, Suriname, Uruguay and Venezuela. As of this date, the following states had signed, but not yet ratified the Convention: Bolivia, Haiti, Honduras and Nicaragua.

⁵ Article 2 of the Inter-American Convention on Torture defines torture as follows:

“For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

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.”

⁶ Article 4 of the Convention against Torture provides:

“1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall

obligations for states parties to prevent and punish torture and to exercise jurisdiction over suspects in their territory regardless of the nationality of the suspect or the victim, no matter where the torture is alleged to have taken place or to extradite suspects to states requesting extradition. The obligations related to jurisdiction are described below.

II. UNIVERSAL JURISDICTION OVER TORTURE

All states parties to the Convention against Torture and the Inter-American Convention are obliged whenever a person suspected of torture is found in their territory to submit the case to their prosecuting authorities for the purposes of prosecution, or to extradite that person. In addition, it is now widely recognized that states, even those which are not states parties to these treaties, may exercise universal jurisdiction over torture under customary international law.

A. THE duty of states parties to the Convention against Torture and the Inter-American Convention on Torture to prosecute or extradite suspects

The jurisdictional provisions of the Convention against Torture are modelled on those of the Hague and Montreal Conventions (see discussion of these treaties below in Chapter Thirteen).

Duty of states parties to take necessary measures to establish jurisdiction. Article 5 (1) of the Convention against Torture requires each state party to provide for territorial and active personality jurisdiction over torture and permits any state party to exercise passive personality jurisdiction “if that State considers it appropriate”.⁷ In addition, Article 5 (2) of the Convention against Torture requires each

apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”

The first two paragraphs of Article 6 of the Inter-American Convention on Torture impose a similar obligation:

“In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdictions.

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.”

⁷ Article 5 of the Convention against Torture reads:

“1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

state party to take measures to establish universal jurisdiction over persons suspected of torture, unless it does not extradite the suspect. It provides:

“Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 [concerning extradition] to any of the States mentioned in paragraph 1 of this article.”⁸

The term “any territory under its jurisdiction” should be read broadly. According to the leading commentary on the Convention against Torture, it applies to any “territories over which a State has factual control”.⁹ The phrase “take such measures as may be necessary to establish its jurisdiction in cases where the alleged offender is present” includes legislative measures, but it is not limited to such measures. It includes executive and judicial steps to arrest, investigate, prosecute or extradite. Several considerations support this conclusion. First, the concept of jurisdiction under international law is not limited to legislative jurisdiction, but also includes executive and adjudicative jurisdiction (see Chapter One, Section I.A).¹⁰ Second, when states have wished to specify the type of measures to establish jurisdiction, they have expressly identified the particular measures required.¹¹ Third, the Committee against Torture

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.” Article 12, para. 1 of the Inter-American Convention on Torture contains a similar jurisdictional provision: “Every State Party shall take the necessary measures to establish its jurisdiction over the crime described in this Convention in the following cases:

- a. When torture has been committed within its jurisdiction;
- b. When the alleged criminal is a national of that State; or
- c. When the victim is a national of that State and it so deems appropriate.”

⁸ Article 12, para. 2 of the Inter-American Convention on Torture also provides for universal jurisdiction: “Every State Party shall also take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within the area under its jurisdiction and it is not appropriate to extradite him in accordance with Article 11.”

⁹ J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 131 (Dordrecht/Boston/London: Martinus Nijhoff Publishers 1988).

¹⁰ This point has been recognized in commentary on other treaties using the 1970 Hague Convention model. One commentator has argued that the similar provision in the Hostage-Taking Convention (and, by necessary implication, similarly worded provisions in other treaties) not only imposes an obligation to take legislative measures, but also to take judicial measures to deal with actual offenders. Sami Shubber, *The International Convention against the Taking of Hostages*, 52 Brit. Y. B. Int'l L. 205, 220 (1981) (criticizing the narrow reading given to this obligation in Michael Wood, *The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*, 23 Int'l & Comp. L. Q. 791 (1974)).

¹¹ For example, Article IV of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, adopted by U.N. G.A. Res. 3068 (XXVIII) of 30 November 1973, 28 U.N. G.A.O.R. Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973), expressly lists what types of measures states parties are obliged to take to establish jurisdiction over persons suspected of the crime of *apartheid*:

has interpreted the obligation under Article 5 (2) to “take such measures as may be necessary to establish its jurisdiction” as extending beyond legislative measures to judicial or executive measures. In the case of Hissène Habré, after victims submitted a communication to the Committee urging that it require Senegal to take measures to ensure his presence in the country pending a determination whether the decision by the *Cour de cassation* that Senegal did not have jurisdiction over charges against him of torture in Chad, the Committee on 23 April 2001, requested Senegal “not to expel Mr. Hissène Habré and to take all necessary measures to prevent Mr. Hissène Habré from leaving Senegalese territory except pursuant to an extradition procedure.”¹² Given the urgency of the request, it is clear that the Committee did not believe that the obligation of the state party was limited to enacting legislation. Therefore, when the treaty does not expressly state what measures must be taken to establish jurisdiction, the parties must have intended to require that all types of measures be taken.

Other forms of jurisdiction not excluded. Article 5 (3) makes clear that the Convention against Torture “does not exclude any criminal jurisdiction exercised in accordance with internal law.”¹³ Thus, each state party remains free to exercise any form of jurisdiction over torture and ancillary crimes permitted under international law. For example, as in the case of states parties to the Geneva Conventions, national prosecutors and investigating judges could exercise universal jurisdiction by opening a criminal investigation of a person suspected of torture who was not in the forum state and request that person’s extradition.

“(a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crimes of *apartheid* and similar segregationist policies or their manifestations and to punish persons guilty of that crime.

(b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or some other State or are stateless persons.”

In contrast, Article 16 of the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, *reprinted in* Adam Roberts & Richard Guelff, *Documents on the Laws of War 700* (Oxford: Oxford University Press 2000), simply requires states parties to take legislative measures to establish universal jurisdiction over violations of the Convention in international and non-international armed conflict:

“(1) “Without prejudice to paragraph 2, each Party shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 [identifying what conduct must be made crimes under national law] in the following cases:

...

(c) in the case of offences set forth in Article 15 sub-paragraphs (a) to (c), when the alleged offender is present in its territory.”

¹² Human Rights Watch, *United Nations asks Senegal to Hold Ex-Chad Dictator: Victory for Hissène Habré’s victims*, 23 April 2001 (obtainable from <http://www.hrw.org/press/2001/04/habre-cat0423.html>). See also letter by Hamid Gaham, Chief Support Services Branch, to Mr. Reed Brody, dated 27 April 2001 (obtainable from http://www.hrw.org/french/themes/images/guengueng_small.jpg).

¹³ Similarly, Article 12, para. 3 of the Inter-American Convention on Torture provides that “[t]his Convention does not exclude criminal jurisdiction exercised in accordance with domestic law.”

Duty to ensure presence for criminal or extradition proceedings. Article 6 of the Convention requires that each state party detain persons present in their territory alleged to have committed torture or an ancillary crime or other legal measures to assure their presence long enough to permit criminal or extradition proceedings to be instituted and to conduct a preliminary inquiry into the allegations. The first paragraph states:

“Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.”

The second paragraph states that “[s]uch State shall immediately make a preliminary inquiry into the facts”.¹⁴

Duty to extradite or submit case for prosecution. Article 7 (1) of the Convention against Torture provides that any state party which does not extradite a person found in territory under its jurisdiction alleged to have committed torture must submit the case for the purpose of prosecution. It reads in full:

“The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”¹⁵

Failure to fulfil this obligation is a violation of international law. It is clear from the *travaux préparatoires* that the try or extradite obligation in Article 7 (1) does not depend on a request for extradition followed by a refusal. The drafters of the Convention expressly rejected a proposal to impose

¹⁴ The second paragraph of Article 8 of the Inter-American Convention on Torture has a somewhat similar obligation:

“Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.”

¹⁵ Article 14 of the Inter-American Convention on Torture provides that when a state party does not extradite a person suspected of torture, it must submit the case to its authorities for the purpose of investigation and, if warranted, prosecution:

“When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the crime had been committed within its jurisdiction, for the purposes of investigation, and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State that has requested the extradition.”

such a requirement, which is found in some treaties and national legislation.¹⁶ Instead, they decided to follow the model of the Hague Convention and similar treaties which do not impose such a requirement (see discussion of such treaties in Chapter Thirteen).¹⁷

As in the Hague Convention model, the Convention against Torture did not establish a system of priority among states with jurisdiction.¹⁸ Instead, it left the decision with the state in whose territory or territory under its jurisdiction a suspect was located whether to extradite the suspect to another state or to submit the case to its authorities for the purpose of prosecution. As the leading commentary on the Convention against Torture has pointed out, Article 5 (2) is an independent basis for jurisdiction which may be invoked regardless whether another basis of jurisdiction exists:

“Paragraph 2 [of Article 5] provides that, whether or not any of the grounds of jurisdiction dealt with in paragraph 1 exist, a State Party shall have jurisdiction over offences of torture in all cases where the alleged offender is present in a territory under its jurisdiction and it does not extradite him to a State which has jurisdiction under paragraph 1.”¹⁹

The obligation in Article 7 (1) to “submit the case to its competent authorities for the purpose of prosecution”, as in similar provisions in treaties following the Hague Convention model, is designed to safeguard the rights of the accused. Article 7 (2) makes this point clear by requiring, first, that “[t]hese

¹⁶ Burger & Danelius, *supra*, n. 9, 137 (“It has been argued that a State basing its jurisdiction exclusively on article 5, paragraph 2, should not be obliged to prosecute, unless it has first refused extradition to one of the States referred to in article 5, paragraph 1. During the *travaux préparatoires* regarding the *Convention*, proposals were made to include specific provisions to this effect in the Convention. However, these proposals were not accepted and most States did not consider this to be a satisfactory solution.”) (emphasis in original). See also Ahcene Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement* 222-223 (The Hague/Boston/London: Martinus Nijhof Publishers 1999).

¹⁷ *Ibid.*, 131, 136.

¹⁸ A recent study of the Convention against Torture has recognized that the Convention did not provide for any order in which the different principles of jurisdiction reflected in Articles 5 and 7 should be applied. Boulesbaa, *supra*, n.16, 233. The *travaux préparatoires* indicate that there was no consensus among the drafters on a priority of jurisdictions. *Ibid.*, 189-232. However, the author’s proposals for resolving conflicting jurisdictions on the basis of balancing the interests of each state - a method used in commercial civil litigation - are wholly inappropriate when a crime under international law of equal concern to all members of the international community is at stake. It could lead in many cases to the territorial state - the one whose officials are implicated in the crime - having a prior claim, even if the trial were to be a sham or unfair. As defined by the author, “[t]he interests of the State where the torture was committed in exercising its jurisdiction and punishing the offender are far greater than the interests of the State where the offender was found.” The jurisdiction of the latter may be exercised only if the former refuse to do so.” *Ibid.*, 202. As indicated in the Introduction, in an ideal world, as a general rule it would be better for the trial to take place in the territorial state, but the very reason states exercise or seek to exercise universal jurisdiction is because the territorial state has failed to fulfill its obligations under international law to investigate and, if there is sufficient admissible evidence, to prosecute the suspect.

¹⁹ Burger & Danelius, *supra*, n. 9, 132.

authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State”.²⁰ This requirement should not, however, be read to permit a state party to excuse itself from its obligations to bring persons to justice for crimes under international law because of outdated restrictions on the scope of universal jurisdiction over ordinary crimes.²¹ Read together with absolute obligation in Article 5 (2) to “take such measures as may be necessary to establish its jurisdiction”, it is clear that states parties must eliminate such outdated restrictions with respect to torture.²² A second provision of Article 7 (2) safeguards the rights of suspects in cases of universal jurisdiction by providing that “the standards of evidence required for prosecution shall in no way be less stringent than those which apply in the cases [based on other forms of jurisdiction]”.²³ Similarly, Article 7 (3) guarantees a person accused of torture “fair treatment at all stages of the proceedings”.

The obligation in Article 7 (1) to extradite or to submit the case for the purpose of prosecution is absolute and one that must be fulfilled in good faith.²⁴ Therefore, restrictions in national legislation on

²⁰ According to Burger and Danelius, “This means that the normal procedures relating to serious offences . . . shall be applied.” *Ibid.*, 138.

²¹ It is a fundamental principle of international law that a state party “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), reprinted in 63 Am. J. Int’l L. 875 (1969), Art. 27 (Internal law and observance of treaties).

²² For example, the following types of restrictions in national legislation on the ability to prosecute persons suspected of these crimes are inconsistent with the obligations of states parties to the Convention: double criminality, geographic limits, temporal limits, statutes of limitations, recognition of the binding effect of a foreign judgment even in the case of a sham trial, recognition of foreign national amnesties and recognition of official immunities.

²³ According to Burger and Danelius, “This means that the normal procedures relating to serious offences as well as the normal standards of evidence shall be applied. It is specifically indicated in the second sentence of paragraph 2 that the standards of evidence shall in no be less stringent than those applicable in the cases referred to in article 5, paragraph 1. The lack of evidence may frequently be a serious obstacle to bringing proceedings in a country other than that in which the torture took place. It may be difficult to call witnesses and collect other evidence, in particular where the State in which the offences were committed is not willing to cooperate in investigating the case. The second sentence makes it clear, however, that although the principle of universal jurisdiction has been regarded as an essential element in making the Convention an effective instrument, there has been no intention to have the alleged offenders prosecuted or convicted on the basis of insufficient or inadequate evidence.” *Ibid.*, 138.

²⁴ The suggestion by one commentator, Boulesbaa, *supra*, n. 16, 220, that if a state party submitted the case of a suspected torturer to its competent authorities for the purpose of prosecution and they declined to prosecute for a legitimate reason, such as lack of evidence in the forum state, that state would have fully satisfied its obligations under the Convention, seems to be unwarranted and inconsistent with the object and purpose of the treaty to end any safe haven for torturers. Surely, the state party would still have the duty, first, to seek cooperation from other states in obtaining evidence and, if it were unable to prosecute, to comply with a renewed or subsequent request for extradition, subject to appropriate safeguards in the requesting state. Once it was established in the forum state that a prosecution was impossible, the state party could not, when faced with a renewed or subsequent

the scope of that obligation with respect to torture and ancillary crimes are contrary to the Convention against Torture.

B. Permissive universal jurisdiction

Individual acts of torture are crimes under international law.²⁵ Evidence in the form of international and national jurisprudence and scholarly writings indicates that, independently of the Convention against Torture and the Inter-American Convention on Torture, customary international law permits states to exercise universal jurisdiction over the crime of torture. The prohibition of torture, whether it is committed on a widespread and systematic basis and, therefore, a crime against humanity, or committed against a single victim, is part of *jus cogens*.²⁶ The prohibition of torture is also an obligation *erga omnes* owed to the entire international community which all states have a right to enforce through the exercise of universal jurisdiction over suspects found in their territory.²⁷

A Trial Chamber of the International Criminal Tribunal for the former Yugoslavia recently stated:

“ . . . at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it

extradition request plead that it met its duty under Article 7 (1) when it knew that it was impossible to prosecute in the forum state. Otherwise, torturers could easily find refuge in states where those states did not have sufficient evidence, and were among the majority of states without adequate mutual legal assistance or extradition treaties. Such a restrictive interpretation could seriously undermine the effectiveness of the Convention in ending impunity.

²⁵ *R. V. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (Pinochet No. 3)*, [1999] 2 All ER 97, Hutton (“acts of torture were clearly crimes against international law” as of 1988) 164; Browne-Wilkinson, 114 (“international crime of torture”); Millet (“The 1984 Torture Convention did not create a new international crime. But it redefined it.”).

²⁶ That the prohibition of torture is part of *jus cogens* is recognized both by scholarly authority and national courts: *See, for example, Restatement (Third) of the Foreign Relations Law of the United States* § 702, comment n (prohibition of torture is *jus cogens*) (1986); *Pinochet* (No. 3), Browne-Wilkinson, 108 (noting that Chile had accepted that “the international law prohibiting torture has the character of *jus cogens* or a peremptory norm”); Hutton, XXX (“the prohibition of torture had [ac]quired the status of *jus cogens* by that date [1988]”); Hope, XXX (“there was already widespread agreement that the prohibition against official torture had achieved the status of a *jus cogens* norm” by 1988); *In re Estate of Ferdinand Marcos, Human Rights Litigation (Hilao v. Estate of Marcos)*, 25 F.3d 1467, 1473, 1475 (2d Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (“[T]he right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*.”).

²⁷ *Restatement (Third) of the Foreign Relations Law of the United States* § 702, comment o (violations of the prohibition of torture “are violations of obligations to all other states”). Lord Browne Wilkinson expressed the view in his opinion in the *Pinochet* case that “[t]he *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed.” *Pinochet* (No. 3), Browne-Wilkinson, 109.

would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime."²⁸

Nigel Rodley, concluded more than a decade ago that "permissive universality of jurisdiction [over torture] is probably already achieved under general international law".²⁹ He repeated this conclusion in 1999, stating that "it is now hard to imagine a convincing objection to any state's unilateral choice to exercise jurisdiction [over torture] on a universal basis".³⁰ More recently, he urged: "In countries where legislative provisions do not exist which give authorities jurisdiction to prosecute and punish torture, wherever the crime has been committed and whatever the nationality of the perpetrator is (universal jurisdiction), the enactment of such legislation should be made a priority."³¹ Other authorities have also recognized this principle, which is independent of the Convention against Torture.³² A doctor from the Sudan, which is not a party to the Convention against Torture, was charged with torture in a Scottish court and a Mauritanian military officer was arrested in France on charges of torture, although Mauritania is not a party to the Convention against Torture (see discussion below in Chapter Ten, Section II).

²⁸ *Prosecutor v. Furundžija*, Judgement, Case No. IT-95-17/1-T (Trial Chamber, 10 December 1998), para. 156.

²⁹ Nigel Rodley, *The Treatment of Prisoners under International Law* 107 (Oxford: Clarendon Press 1987).

³⁰ Nigel Rodley, *The Treatment of Prisoners under International Law* 130; 133 (Oxford: Clarendon Press 2nd ed. 1999).

³¹ Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43, U.N. Doc. E/CN.4/2001/66, 25 January 2001, para. 1316 (a).

³² Daniel Bodansky, *Human Rights and Universal Jurisdiction*, in Mark Gibney, ed., *World Justice: U.S. Courts and International Human Rights* (Boulder/San Francisco/Oxford: Westview Press 1991) ("[U]niversal jurisdiction over torture is permitted as a matter of customary international law."); Geoff Gilbert, *Crimes Sans Frontières: Jurisdictional Problems in English Law*, 63 Brit. Y.B. Int'l L. 415, 423-424 n. 61 (1992); Robert Jennings & Arthur Watts, 1 *Oppenheim's International Law* 470 (London: Longman 9th ed. 1996); Menno T. Kamminga, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Rights Law and Practice, International Law Association, London Conference 2000 (*Final ILA Report*) 8 ("States not parties to the Convention against Torture are entitled, but not obliged, to exercise universal jurisdiction in respect of torture on the basis of customary law. . . . Perpetrators of torture committed in states that are not parties to the Convention against Torture may therefore be brought to trial elsewhere on the basis of universal jurisdiction."); Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 Tex. L. Rev. 785, 791 (1988); Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* 111 (Oxford: Clarendon Press 1997); *Restatement (Third) of the Foreign Relations Law of the United States* (1987), § 404; see also André Huet & Renée Koering-Joulin, *Droit pénal international* 191 (Paris: Presses Universitaires de France 1994) (noting the emerging system of repression of torture).

C. Obligation to prosecute or extradite

There is also some authority, as reflected in the interpretation of international treaty monitoring bodies and international experts for the view that all states - whether parties to the Convention against Torture or not - may not harbour persons suspected of torture, but *must* either exercise universal jurisdiction over suspects found in their territory or extradite them to a state able and willing to do so.

The Committee against Torture, an expert body established under that treaty to monitor its implementation, has declared that all states are under an independent duty to investigate and prosecute the crime of torture even if they are not parties to the Convention against Torture, as there exists “a general rule of international law which should oblige all States to take effective measures to prevent torture and to punish acts of torture”, recalling the principles of the Nuremberg judgment and the Universal Declaration of Human Rights.³³ The Committee against Torture did not limit the obligation to investigate and prosecute to cases where states had territorial jurisdiction. Similarly, as noted above, the UN Special Rapporteur on torture has urged that in all states lacking universal jurisdiction legislation, “the enactment of such legislation should be made a priority”, in effect suggesting a moral, if not legal, obligation.³⁴

Other intergovernmental organization bodies have reached similar conclusions. The UN Commission on Human Rights has stressed “in particular that all allegations of torture or other cruel, inhuman or degrading treatment or punishment be promptly and impartially examined by the competent authority, that those who encourage, order, tolerate or perpetrate acts of torture must be held responsible and severely punished,” without limiting that duty of all states to cases of torture or ill-treatment committed in its own territory.³⁵ Principle 5 of the Van Boven-Bassiouni Principles provides that “States shall incorporate within their domestic law appropriate provisions providing for universal jurisdiction over crimes under international law”.³⁶ Further support for an *aut dedere aut judicare* obligation concerning torture independent of conventional law is found in the resolution adopted by the Inter-American Commission on Human Rights on 20 October 2000 recommending to the Member States of the OAS that

³³ UN Committee against Torture, decision of 23 November 1989, Communication Nos. 1/1988, 2/1988 and 3/1988, Argentina, decisions of November 1989, para. 7.2.

³⁴ See footnote 31, above.

³⁵ UN Commission on Human Rights, Res. 2000/43, para. 6.

³⁶ UN Commission on Human Rights Independent Expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law (Final Draft), 18 January 2000 (Van Boven-Bassiouni Principles), U.N. Doc. E/CN.4/2000/62/Rev.1 (2000), Principle 5.

they “refrain from granting asylum to any person alleged to be the material or intellectual author of international crimes”, including torture.³⁷

³⁷ Inter-American Commission on Human Rights, *Asylum and International Crimes*, 20 October 2000, obtainable from <http://www.cidh.oas.org/asylum.htm> (for the full text of this statement, see Chapter Four, Section I).