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apt association for the prevention of torture

Anti-torture legislation: what elements best protect persons at risk from torture?

Report of the IHEID LL.M. Law Clinic
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1. Introduction

Our clinic group's assignment is to determine which elements of domestic anti-torture legislation (hereinafter ATL) best protect individuals at risk of torture. This project addresses the practical problems states encounter in fulfilling their obligations under the Convention against Torture to implement ATL in an effective manner. Non-governmental organisations (hereinafter NGOs) and scholars have published extensively on the elements discussed below, primarily in the state obligation context. It is an open question which legislative elements make for the strongest possible torture prevention and therefore offer the best protections. The goal of this report is to provide information that the Association for the Prevention of Torture can turn into a toolkit for national actors to consult when drafting their domestic ATL.

This report is split into three parts: Part 2 is brief preliminary remarks, including our methodology, the scope of this report, and the challenges of using legislation as prevention. Part 3 is an assessment of each element of domestic ATL we have identified as offering the best possible protections to persons at risk of torture. We have divided these elements of ATL into three areas to draw out themes: Criminal Law, Criminal Procedure, and Non-Criminal Legislation. For each element the analysis centres on its scope and requirements under international law, and determines how a state can best implement each, culminating with a list of recommendations to states in enacting its ATL. Part 4 of this report then compares and contrasts selected domestic ATL to the previously identified elements. Part 5 synthesises our findings from Parts 3 and 4 to express good practice approaches in domestic ATL.

2. Preliminary Remarks

2.1. Methodology

In order to best identify the elements that provide meaningful protections, we used as our starting point the state obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[1] (hereinafter the Convention). As a multilateral treaty with the object and purpose of eradicating torture and avoiding impunity, the Convention is a primary source for extracting norms to prevent torture. Our primary target is to identify those obligations which are best able to protect people at risk, for this project defined as "anyone in state custody or detention."

Our first source for substantiating the obligations on states under the Convention is the Committee against Torture (hereinafter the Committee), whose mandate is to interpret the Convention and monitor its implementation.[2] The Committee output provides a useful source for a broad understanding of each element's importance under international law.

Relevant to this report, the Committee produces general comments, jurisprudence, and concluding observations based on state reports. The general comments are a codification of the Committee's jurisprudence, meaning they are a "reasonably authoritative interpretation" of international law.[3] The older comments enjoy increased persuasiveness, and they act as a type of soft law on states' obligations under the Convention. The International Court of Justice (hereinafter ICJ), while in no way bound by Committee output, "believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty."[4] Concluding observations by the Committee are it's least authoritative output, given that they are state-specific and drafted within a short timeframe of the consideration of the state reports.

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[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Convention).

[2] OHCHR, 'The United Nations Human Rights Treaty System: Fact Sheet 30 / Rev.1' (United Nations 2012) 19.

[3] Interview with Sir Nigel Rodley, former Special Rapporteur on Torture of the UN Commission on Human Rights and Member of the UN Human Rights Committee (Geneva, Switzerland, 13 March 2015).

[4] *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) (Merits) [2010] ICJ Rep 639 para 66.

Next we reviewed recommendations from sources outside the Convention framework. While the Committee output is crucial for understanding a state's obligations under the Convention, it is inherently circumscribed due to its status as a treaty body chiefly interpreting the Convention. The reports are therefore general recommendations to states rooted in the language of the Convention, which can cause repetition of terminology and an unfortunate lack of concrete guidance on how a state can incorporate the Convention obligations into its domestic ATL. Our procedure, then, was to assess the obligations under the Convention using both Committee and external sources in order to fully understand where international law stands on each element, complementary to the Committee's evaluation.

These external sources included the output of other human rights treaty bodies, which is not binding but may be highly influential and is not easily dismissed by states.[5] Of special guidance as a comparison was the Human Rights Committee (hereinafter CCPR), the body tasked with interpreting the International Covenant on Civil and Political Rights (hereinafter ICCPR), including the covenant's Article 7 prohibition against torture. We also referenced the jurisprudence of courts, scholarly articles, NGO reports, and reports arising out of expert meetings. Having a holistic understanding the status of each of our elements under general international law is vital for interpreting states obligations outside the Convention. That said, awareness of the coercive value of our sources affected our conclusions on the status of each element within international law.

2.2. Scope of this Report

Following our assignment, this report focuses on the protection of people at risk from torture. We will therefore be addressing cruel, inhuman, or degrading treatment or punishment (hereinafter CIDT) only as it is distinguished from torture, or as specific obligations under the Convention. The Committee focuses much of its output to states on substantive issues that stem from obligations regarding CIDT. These issues will not be addressed in this report, as they are too far beyond the scope of ATL.

Two highly relevant elements of torture protection are transparency in detentions, and the education and training of state actors involved in the custody, interrogation or treatment of at risk individuals. These elements are recognisably important both because of the attention the Committee pays to them, and the obvious role they play in implementation of the Convention. However, as this project is specifically constrained to legislative elements, we will not be analysing them. These elements straddle social and cultural paradigms, and a thorough study of the effectiveness of these elements is beyond the scope of this report.

2.3. The Dissonance of Using Legislation as Prevention

Following the approach taken by the creators of the Convention, our project has a strong focus on criminalisation of torture and the prosecution of torturers. This leads to the question whether punishing the offenders is actually capable of preventing torture and thereby protecting individuals at risk. Obviously, criminalisation is not always preventing the crime, bicycles are still stolen in Switzerland despite of Article 139 of the *Schweizerisches Strafgesetzbuch* criminalising this offence. Still, criminalisation is an important part of the preventive framework. It is part of the deterrent tertiary prevention,[6] together with the obligations to investigate and prosecute alleged cases of torture. Legislation is a primary step in eradicating torture and having well-written laws allows the best protections when it comes to later implementation.

In contrast to punishment approach, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter ECPT) subscribes to a primary preventive approach.[7] Primary prevention reduces the opportunities and motivation to commit a crime.[8] The Committee for the Prevention of

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[5] Rodley Interview (n.3).

[6] Malcolm Evans and Rod Morgan, 'Torture: Prevention versus Punishment' in Craig Scott (ed), *Torture as Tort – Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing 2001) 136.

[7] Ibid 138.

[8] Ibid 136.

Torture (hereinafter CPT), created by the ECPT, conducts visits of sites of detention, thereby directly reducing the opportunities to commit torture. The CPT sees itself as the preventive counterpart to the European Court of Human Rights (hereinafter ECtHR), who is the punitive institution on this issue.[9] More recently, the Subcommittee on Prevention of Torture and other CIDT created under the Optional Protocol to the Convention, follows a similar approach of primary prevention by conducting regular visits, in cooperation with independent international and national bodies, to places where people are deprived of their liberty, in order to prevent torture and other CIDT.[10]

We recognise that the elements punishing torture are not the most direct means of protecting at risk persons, as is the work of the ECPT and the Subcommittee. That said, elements of punishment form a part of the "extensive prevention regime" created by the Convention.[11] Not least of which is the consideration that the concerted campaign for criminalisation of torture paved the way for the general condemnation of torture in the international community.[12]

3. The Elements

In the following sections we identify the elements of domestic ATL that are potentially providing the best protections to potential torture victims. The elements, extracted mainly from the Convention, are introduced, discussed, and weighed for their importance under international law. Each section concludes with a checklist that a state can follow to fulfil its obligations under the Convention.

3.1. Criminal Law

3.1.1. Definition of Torture

Introduction

The requirement that a state criminalise the act of torture is a basic obligation under the Convention. Under Article 4 every state party "shall ensure that all acts of torture are offences under its criminal law." For states not under the Convention obligations, prohibition of torture is a *jus cogens* norm.[13] A strong domestic criminal statute against torture has both a preventative and normative effect, by acting as a deterrent to offenders and bolstering the state's commitment to eliminate the offence from its borders. Criminalisation is an integral part of the prohibition of torture, and a key step in combating impunity.[14]

Article 4 of the Convention is understood to oblige its members to criminalise torture as a specific crime, separate from general person-to-person crimes. While the wording of the Convention does not make this obligation explicit, this interpretation is now nigh unquestioned by experts and commentators, and is fully endorsed by the Committee.[15] The Committee is clear that making torture a distinct crime will "directly advance the Convention's overarching aim" by alerting all as to the gravity of the crime, emphasising the need for

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[9] Lecture by CPT member Prof. Haritini Dipla (26 March 2015).

[10] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (OPCAT) Article 1.

[11] Richard Carver, 'Torture, international law and the enigma of prevention' (Instituciones Nacionales de Derechos Humanos (INDDHH) y la Implementación de las Recomendaciones del EPU Relacionadas a la Prevención de la Tortura, Universidad de Palermo, Buenos Aires, December 2011).

[12] Malcolm and Evans (n.6) 138.

[13] *Questions Relating to the Obligations to Prosecute or Extradite* (*Belgium v. Senegal*) (Merits) [2012] ICJ Rep 422 para 99; *Furundzija* Case (Judgment) ICTY-95-17/1-T (10 December 1998) para 153; UNCAT 'General Comment No. 2: Implementation of Article 2 by states Parties' (24 January 2008) UN Doc CAT/C/GC/2 para 1.

[14] Article 5 Initiative, *Practical Monitoring Tools to Promote Freedom from Torture* (2013) 28ff.

[15] See e.g. UNCAT 'Concluding observations on Bulgaria' (14 December 2011) UN Doc CAT/C/BGR/CO/4-5 para 8; UNCAT 'Concluding observations on Sweden' (6 June 2002) UN Doc CAT/C/CR/28/6 para 7(a).

appropriate punishment, strengthening the deterrent effect, and enhancing the ability to track and monitor violations.[16] Conversely, where torture is not a separate offence, the penalties are woven into various sections of the criminal law and are often inadequate.[17]

That said, the means and ways of criminalisation law vary greatly from state to state in practice, and international law is unclear on the exact requirements under the Convention. The manner in which a state defines torture in its ATL is an integral element of how well it can prevent the occurrence of the crime and protect persons at risk. While the state obligation to criminalise torture is well-acknowledged under international law including the Convention, the definition of torture within that law is open.

The Convention

Therefore, the first step in understanding how a state can best draft its ATL is to clarify the definition of torture under the Convention framework. Convention Article 1 represents the first definition of torture under international human rights law.[18] It contains three cumulative factors, each discussed in this section:

- The intentional infliction of severe mental or physical suffering,
- Done for a specific purpose,
- By a public official, who is directly or indirectly involved.

Article 1 also explicitly excludes from the definition "pain or suffering arising only from, inherent or incidental to lawful sanctions." Today, it is resolved that this exclusion refers to sanctions that are considered lawful as determined by both national and international standards, and should be interpreted narrowly.[19] A narrow interpretation of lawful sanctions protects at risk persons by ensuring that detainees are only subjected to punishments as legitimate exercises of state authority. For guidance as to international standards, a state can look to the United Nations Standard Minimum Rules for the Treatment of Prisoners.[20] This paper will not discuss the variances of national laws on penal sanctions, but states must be aware of the issues raised by the unsettled status of corporal punishment and the death penalty under international law.[21]

Under the Convention and peripherally part of the definition of torture, the defences of public emergency and military or superior orders may not be raised in a criminal prosecution as a justification for torture. Found in Articles 2(2) and 2(3) of the Convention, these unequivocal prohibitions derive from the absolute and non-derogable character of the prohibition against torture.[22] Although this is still an area receiving much attention from the Committee and Special Rapporteurs for state non-compliance,[23] recognition of this norm is fully

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[16] UNCAT General Comment No. 2 (n.13) para 11.

[17] See e.g. UNCAT 'Concluding observations on Latvia' (23 December 2013) UN Doc CAT/C/LVA/CO/3-5 para 8; UNCAT 'Concluding observations on Lithuania' (17 June 2013) UN Doc CAT/C/LTU/CO/3 para 8.

[18] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press 2008) 28.

[19] Nigel Rodley and Matt Pollard 'Criminalisation of torture: state obligations under the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment' [2006] E.H.R.L.R. 115, 120–1; Association for the Prevention of Torture, *The Definition of Torture: Proceedings of an Expert Seminar (Geneva, 10–11 November 2001)* (2001) 28; Sarah Joseph, Katie Mitchell, Linda Gyorki and Carin Benninger-Budel, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (OMTC 2006) 213–4.

[20] Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

[21] For more on the status of corporal punishment and the death penalty in relation to Convention obligations, see Rodley and Pollard (n. 19) 120–1, and Joseph, Mitchell, Gyorki, and Benninger-Budel (n.19) 228–9.

[22] UNCAT General Comment No. 2 (n.13) paras 5, 26; See also UNCAT 'Concluding observations on United States' (25 July 2006) UN Doc CAT/C/USA/CO/2 para 14 [asserting that the prohibition applies in times of armed conflict].

[23] See e.g. UNCAT 'Concluding observations on Republic of Korea' (25 July 2006) UN Doc CAT/C/KOR/CO/2 para 7; UNCAT 'Concluding observations on Georgia' (25 July 2006), CAT/C/GEO/CO/3 para 9.

supported in international law. The prohibition of justifications for torture is explicit in regional treaties,[24] the CCPR has held that the same principle holds true for the prohibition of torture in the ICCPR,[25] and international criminal law severely limits the individual defence of superior orders.[26] This obligation has seen pushback from states since September 11 and the rise of anti-terrorism legislation, but states must be aware that under international law there are no derogations for "national security" or "necessity."[27] Prohibiting defences for torture is an important normative element for protecting at risk persons: the personal and professional consequences for the potential torturer can be a determinative factor in whether or not torture will occur,[28] and disallowing defences in ATL can be a strong deterrent.[29] States are advised to review their criminal code to confirm it contains no general defences that will conflict with this prohibition, and to make the prohibition explicit in their ATL.[30]

Although there is no mention in the Convention of torture as a crime of omission, it is presumed in international law that the definition does include this offence out of respect for the object and purpose of the Convention.[31] The CCPR has explicitly found that omissions may violate the ICCPR Article 7.[32] While torture typically refers to a positive action, this does not exclude the special case where failure to act would cause severe pain and suffering, as long as all the other elements are met.[33] The example of an intentional failure to provide a prisoner with food or drink is repeatedly referenced throughout the commentary.[34] States should be advised to consider omissions of this type as falling under the definition of torture in their ATL, and would be well served to proscribe such omissions explicitly.

The Convention definition has become a benchmark in international law,[35] representing the primary definition under human rights law and crossing over into other disciplines.[36] The next question that must be answered is whether or not the Convention definition in Article 1 should be adopted verbatim in ATL as well.

The Committee

The output of the Committee clearly advocates for domestic ATL to follow in line with the definition in Article 1. In nearly every concluding observation released, the Committee has recommended a state to enact the crime of torture "as defined by the Convention,"[37] or that a state "ensure that its definition encompasses all the

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[24] Inter-American Convention to Prevent and Punish Torture (entered into force 28 February 1987) OAS Treaty Series, No. 67 (1985) Articles 4 and 5; League of Arab States, Arab Charter on Human Rights (adopted 15 September 1994) Article 4.

[25] UNCCPR, 'General Comment 20, Article 7' in 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (29 July 1994) UN Doc HRI/GEN/1/Rev.1.

[26] Yoram Dinstein, *War, Aggression and Self-Defence* (4th edn, Cambridge University Press 2005) paras 407–12.

[27] See generally Association for the Prevention of Torture, *Defusing the Ticking Bomb Scenario – Why we must say No to torture, always* (2007).

[28] Rodley Interview (n.3).

[29] 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.* (M. Nijhoff, 1988) 124.

[30] Association for the Prevention of Torture, *Report: Experiences, Advice and Good Practices – Key Isses in Drafting Anti-Torture Legislation, Expert Meeting 2–3 November 2012* (2013) 45.

[31] Ahcene Boulesbaa, *The UN Convention against Torture and the Prospects for Enforcement* (M. Nijhoff 1999) 15; Rodley and Pollard (n.19) 120.

[32] Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd edn, OUP 2004) para 9.08.

[33] Burgers and Danelius (n.29) 118; Nowak and McArthur (n.18) 66.

[34] Ibid.

[35] Nigel Rodley, 'The definition(s) of Torture in International Law' [2002] Current Legal Problems 467, 474.

[36] Joseph, Schultz and Castan (n.32) para 9.04; *Akayesu* Case (Judgement) ICTR-96-4-T (2 September 1998) para 593 [using Article 1 to define torture as a crime against humanity at the ICTR].

[37] UNCAT 'Concluding observations on Bosnia and Herzegovina' (20 January 2011) UN Doc CAT/C/BIH/CO/2-5 para 8.

elements of Article 1 of the Convention."[38] In its General Comment No. 2 instructing states how to introduce effective measures to prevent torture, the Committee asserted that state parties must write their domestic offence of torture "in accordance, *at a minimum*, with the elements of torture as defined in Article 1 of the Convention."[39] From this practice it is apparent that the Committee strongly recommends states adopt the exact language of Article 1, but they also leave room for states to deviate from the Convention definition by providing a definition that is even more protective and "advances the object and purpose of the Convention."[40]

General International Law

Experts on torture are less insistent that states adopt the exact definition from Article 1 into their ATL. In their handbook on interpreting the Convention, Burgers and Danelius observed that Article 1 "gives a description of torture for the purpose of understanding and implementing the Convention rather than a legal definition for direct application in criminal law."[41] This explanation is bolstered by Convention Article 1(2), the saving clause allowing that other areas of international law may provide greater protections to at risk persons than are found in Article 1. As will be discussed later in this section, other international instruments do offer greater protections than the Convention. If a state desires to create ATL that offers the most protections possible, and the Convention does not require direct incorporation of Article 1, then states are in theory free to vary their ATL as long as it reaches the minimum standards of the Convention.

Rodley and Pollard take a slightly more restrained view, noting that while the Committee will often recommend direct incorporation of Article 1 into ATL, what is necessary is that the domestic definition cover at a minimum the "same conduct" as Article 1.[42] The Robben Island Guidelines, a resolution on measures to effect the implementation of the African Charter, address this well by recommending a definition of torture "based on" the Article 1 definition.[43] The related instruction materials by the Article 5 Initiative suggest that while it may be "good practice" to adopt the exact wording, it is not an obligation on state parties and the ATL should instead include the "main parts" of Article 1.[44] These suggestions are not far off from the Committee's General Comment No. 2 requiring that states enact ATL that covers the Article 1 definition at a minimum.

As a counterargument, a universal definition of torture may be desirable in practice. As the Committee has pointed out, serious discrepancies between ATL and Article 1 can create loopholes for impunity, and judicial interpretation can introduce deviations into domestic provisions.[45] A universal definition would reduce that chance while proving for clarity and predictability in criminal law.[46] At a 2012 meeting of experts on key issues in ATL drafting, the members discussed the desirability of homogeneity as a means of increasing legitimacy and allowing for comparison of state practice.[47] If a state is in favour of using the Article 1 definition for the sake of uniformity, it is free to copy the definition verbatim.

Another practical concern over diverging definitions on the same offence is that the scope of applications between treaties can overlap, creating difficulties for legislative drafters. For example, the Rome Statute of the

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[38] UNCAT 'Concluding observations on Germany' (12 December 2011) CAT/C/DEU/CO/5 para 9.

[39] UNCAT General Comment No. 2 (n.13) para 8 (emphasis added).

[40] Ibid para 9.

[41] Burgers and Danelius (n.29) 122.

[42] Rodley and Pollard (n.19) 119–120.

[43] ACHPR, 'Robben Island Guidelines: Resolution On Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment In Africa' (2008) No. 4.

[44] Article 5 Initiative (n.14) 30.

[45] UNCAT General Comment No. 2 (n.13) para 9.

[46] See UNCAT 'Concluding observations on France' (20 May 2010) UN Doc CAT/C/FRA/CO/4-6 para 13.

[47] APT Key Issues (n.30) 33.

International Criminal Court (hereinafter ICC) defines torture differently from the Convention.[48] While there is no explicit obligation to enact domestic legislation covering the crimes under the Statute, the complementarity principle in the Rome Statute[49] encourages states to do so, because without effective legislation a state may be unable to adequately prosecute and the ICC would then by rights step in on a given case. The question that must be answered by a state legislature that is a member both of the Convention and the Rome Statute is: which definition to use in ATL and still maintain international obligations?

The same problem arises for states that are members of both the Convention and the Inter-American Convention on the Prevention and Punishment of Torture (hereinafter IACPPT), and it is unclear at this time how the overlapping membership affects a state's obligations under the Convention. states that are members of all three instruments, such as Chile and Guatemala, will be interesting to follow to see if a situation arises. As it stands now, Chile has declared upon ratifying the Convention that when dealing with other members of the IACPPT and the provisions of the Convention are incompatible, it will apply the IACPPT, which has slightly broader protections.[50] Nevertheless the Committee continues to recommend that Chile bring its ATL definition "fully in line" with Article 1.[51]

Despite the policy arguments for a universal definition and the practical issues arising from divergence, states are able to depart from the Article 1 definition. If ATL contains the main elements of Article 1 and a state merely adds to the definition, risks of impunity and confusion should be minimised while allowing a state to broaden the definition of torture. It should be clear that Convention Article 2(1) allows deviation strictly in the form of widening the application; ATL may not restrict the protections that individuals are offered under the Convention.[52]

Given that there is room under international law to alter the definition of torture contained in the Convention, specific questions arise as to where deviation from Article 1 is then appropriate. The following sections each discuss the elements of the definition as addressed by different international instruments, to determine where it is appropriate for a state to diverge from Article 1 in its ATL in order to provide the best protection possible to at risk persons.

Discussion of the Three Cumulative Factors

Severity of mental or physical suffering

As outlined above, the first element of torture under the Convention is that it is an act inflicting "severe" mental or physical suffering upon the victim. This phrase is considered to convey that only acts of a certain gravity shall be considered to constitute torture.[53] That said, there is no clear rule under international law where that measure of gravity lies. Under one theory the intensity is measured by reference to a "systematic, calculated (and so deliberate) and prolonged infliction of treatment."[54] However, the additional criterion of a systematic infliction

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[48] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, last amended 2010) Article 7(2)(e). The differences are explored in the below sub-sections.

[49] Ibid Article 17.

[50] Convention (n.1), Declarations and Reservations: Chile.

[51] UNCAT 'Concluding observations on Chile' (23 June 2009) UN Doc CAT/C/CHL/CO/5 para 10; UNCAT 'Concluding observations on Chile' (14 June 2004) UN Doc CAT/C/CR/32/5 para 7(a).

[52] Burgers and Danelius (n.29) 122.

[53] Ibid 117.

[54] Francisco Forrest Martin et al, *International Human Rights and Humanitarian Law: Treaties, Cases, and Analysis* (Cambridge University Press 2006) 320.

of pain was raised at the drafting of the Convention.[55] As the element is not in the text, it can be inferred that a single, isolated act can constitute torture, at least under the Convention framework.[56]

There is extended debate over whether to understand torture is an aggravated form of CIDT vis-à-vis intensity, which this report will not rehash other than to say the argument currently receives lessening support,[57] and may in fact be harmful to the protection regime.[58] The Committee has not addressed the distinction between the two offences as a severity issue, other than to recognise that the threshold between the two is often not clear.[59] The CCPR also does not make clear distinctions in its case law on intensity grounds when interpreting the ICCPR, leaving little guidance as to how to gauge "severity" as a constitutive element of torture.

While this doctrine is unhelpfully vague, it is all evidence of the rule that severity of suffering is an essential element of torture under international law. The one outlier is the IACPPT, the drafting of which was influenced by the Convention yet which is notably missing the word "severe" in its definition.[60] Given this missing term in a definition that is structurally quite similar to Convention Article 1, one can infer that any level of pain or suffering will meet the threshold of torture under the IACPPT, as long as the other elements are present. No pain or suffering at all needs to be shown for the added element to the IACPPR, "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."[61] This element (or lack thereof) is an interesting possibility for states to consider in their ATL, but the IACPPT stance on the severity element should not be considered the norm under international law. It is worth remarking that of the states that do include a definition of torture in their ATL who are members of both the Convention and the IACPPT, the inclusion or exclusion of the severity element are fairly evenly split.[62]

In light of the above, a state should define torture using the severity element in its ATL, but it has little guidance on how to assess said severity. One helpful notion that came out of an expert seminar in 2001 was the suggestion that subjective criteria, rather than objective, should be used to establish the level of severity in a given case. The brainstorm here is that pain and suffering should be evaluated in context, looking at each specific situation and each particular victim and his / her vulnerability.[63] Examples raised at the seminar suggested that the suffering of an individual might be increased by knowledge that her torturer is immune from prosecution, or that the defencelessness of an asylum seeker could exacerbate the trauma he feels.[64] This suggestion to focus on subjective criteria makes practical sense and following this guidance is a way that states can increase protections and avoid the pitfalls in the conflicting doctrine.

Done for a Specific Purpose

The Convention defines torture as not just the infliction of pain, but an act done with a special motive or purpose behind it. In this, purpose is distinguished from intent: torture is an "intentional act" in that the torturer must intentionally inflict pain and suffering on the victim. The "purpose" by comparison is the reason

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[55] Burgers and Danelius (n.29) 117–8.

[56] Ibid.

[57] For more on severity as a distinguishing factor between torture and CIDT, see Rodley Definition of Torture (n.35) 470–81.

[58] See below in this section on Obligation to criminalise CIDT.

[59] UNCAT General Comment No. 2 (n.13) para 3.

[60] IACPPT (n.24) Article 2.

[61] Ibid.

[62] Association for the Prevention of Torture, 'Compilation of Torture Laws' <http://www.apt.ch/en/compilation-of-torture-laws/>.

[63] APT Definition of Torture (n.19) 18.

[64] Ibid.

motivating the torturer's act.[65] Like severity, there is much commentary on this element being the dispositive factor that separates torture from CIDT, and in this instance commentators today appear to agree more readily.[66]

Article 1 defines torture as the intentional infliction of severe suffering "for such purposes as":

- To get information or a confession (from the victim or third person);
- Punishment for an act already committed or suspected of being committed (by the victim or third person);
- Intimidation or coercion (of the victim or third person); or
- Any reason based on discrimination of any kind.

Burgers and Danelius indicate that the above list represents a compromise during drafting, by listing the most commonly found purposes. The list is not exhaustive, as indicated by the preface "such purposes as."[67] Burgers and Danelius note that each item on the list is at least somewhat connected to interests of state agents (e.g. "to get a confession"), due to the fact that elimination of torture by the state is one of the primary objectives of the Convention.[68] In theory, additional motives a state chose to add to its ATL would not need to have this nexus to state action. Nowak and McArthur point out that a common thread to this list is the powerlessness of the victim, and suggest this usually means deprivation of personal liberty, which they associate with police custody.[69] Their observation suggests an additional criterion of police involvement within the purpose element, but there is no reason conceptually why a private actor could not have one of the above-proscribed purposes and also affect the powerlessness of the victim.

Determining that the above list is not exhaustive raises the question of what other purposes could or should be included. To achieve the maximum protection for at risk persons possible, one possibility is to consider that any malicious purpose could be the motivation for torture.[70] The problem with this suggestion for purposes of the Convention is that the words in Article 1 "for such purposes as" imply that additional purposes must have something in common with the purposes already listed.[71] The Committee has not confirmed whether it adopts this strict view of the purpose criterion. Rather it recommends that ATL include the Article 1 purposes "at a minimum."[72] It currently appears that punishing a victim for purely sadistic reasons cannot be an act of torture under the Convention, but states are not so limited if they wish to define purposes broader than the Convention's parameters. One suggestion that seems to be in line with the theory behind the purposive elements yet broader than the Convention obligations is "the breaking of a person's will in order to force him to do something which he would not otherwise do."[73]

Other international instruments that differ from the Convention may serve as inspiration on what other purposes ATL should include. As with the severity element above, the IACPPT and the Rome Statute of the ICC both have different provisions. The IACPPT definition reads, "for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other

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[65] Rodley and Pollard (n.19) 124–5.

[66] Nowak and McArthur (n.18) 74; Rodley Definition of Torture (n.35) 489; APT Definition of Torture (n.19) 2, 19.

[67] Burgers and Danelius (n.29) 118; Joseph, Mitchell, Gyorki and Benninger-Budel (n.19) 209.

[68] See below in this section on By a public official.

[69] Nowak and McArthur (n.18) 76.

[70] Joseph, Schultz and Castan (n.32) paras 9.09–9.10.

[71] Burgers and Danelius (n.29) 118. *Contra* see Joseph, Schultz and Castan (n.32) para 9.09.

[72] See e.g. UNCAT 'Concluding observations on Belgium' (3 January 2014) UN Doc CAT/C/BEL/CO/3 para 8; UNCAT 'Concluding observations on Latvia' (23 December 2013) UN Doc CAT/C/LVA/CO/3-5 para 7; UNCAT 'Concluding observations on Uruguay' (10 June 2014) UN Doc CAT/C/URY/CO/3 para 7.

[73] Martin et al (n.54) 320.

purpose."[74] Burgers and Danelius observed that the final catchall "for any other purpose" cannot be understood as falling within the delimitations allowed by the Convention,[75] meaning the IACPPT casts a wider net than the Convention. Like the severity element, it is unclear as yet how this changes the obligations for IACPPT member states, other than making drafting ATL more difficult. But for members of both Conventions, adopting the broader definition of the IACPPT should not cause conflict with the Convention obligations, recalling that the Convention does not take issue with international instruments that contain provisions of wider application.[76]

As for the Rome Statute, the Article 7 provision on crimes against humanity is the only definition of torture in international law that does not contain a purposive element.[77] Rodley explains that because there is no provision for CIDT as a crime against humanity in the Rome Statute, the purpose element was kept out in the drafting to allow the offence to cover both torture and CIDT.[78] By not listing purposes, crimes against humanity can in fact cover more behaviours, but this is not a solution to be recommended to states in drafting ATL, where clarity is to be preferred.

An important warning to states on the drafting of the purposive element came out of the 2001 experts seminar. "Purpose" should remain an open concept, because extensive listing can lead to the impression of exhaustive lists, leading to certain acts falling outside the definition.[79] The experts unanimously agreed that enumerating purposes beyond those listed in the Convention should be avoided, and states should keep this in mind when drafting ATL. While they are able to expand the definition of torture merely by enumerating additional proscribed purposes, there may be policy reasons for restraint.

By a public official, directly or indirectly involved

The definition of torture in Article 1 does not encompass private acts by persons that have no connection to the state. It was the intention of the drafters that the Convention cover instances of torture that the authorities of a country were themselves involved with, and provide a framework for such times that "the machinery of investigation and prosecution might therefore not function normally."[80] As such the Convention does not obligate states to criminalise acts of torture unless the 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."[81]

The Committee has clarified that the Article 1 definition covers quite a lot of ground, and has expressed concern where states define "public official" too narrowly.[82] Article 1 encompasses abuses committed by non-state actors if public officials fail to step in to prevent them,[83] and where the state fails to exercise due diligence to prevent, investigate, prosecute, and punish such acts where it has a duty to do so.[84] The Committee has also interpreted the language "acting in an official capacity" quite broadly to include *de facto* authorities, encompassing rebel and insurgent groups which "exercise certain prerogatives that are comparable to those normally exercised by

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[74] IACPPT (n.24) Article 2.

[75] Burgers and Danelius (n.29) 118.

[76] Convention (n.1) Article 1(2).

[77] Finalized Draft Text of the Elements of Crimes, Preparatory Commission for the International Criminal Court, UN Doc PCNICC/2000/1/Add.2 (2000) Article 7(1)(f) fn.14 ["It is understood that no specific purpose need be proved for this crime."]

[78] Rodley Definition of Torture (n.35) 491–93.

[79] APT Definition of Torture (n.19) 19.

[80] Burgers and Danelius (n.29) 119–20.

[81] Convention (n.1) Article 1. See also below §3.1.2. Modes of Liability.

[82] See myriad references in UNCAT 'Report of the Committee Against Torture, 51st – 52nd sessions' (2013-2014) UN Doc A/69/44.

[83] See e.g. UNCAT, 'Hajrizi Dzemajl et al. v. Yugoslavia' (21 November 2002) UN Doc CAT/C/29/D/161/2000 para 9.2. See also below §3.1.2. Modes of Liability.

[84] UNCAT General Comment No. 3 (n.84) para 7.

legitimate governments."[85] All told, as long as there is some nexus to a state or state-like organisation, Convention obligations are engaged.

But the bottom line is that the Convention is concerned about linking torture back to the state. Other human rights treaties also require state responsibility to be engaged in some way, though the link can be quite tenuous.[86] The exception is the ICCPR, which the CCPR has interpreted to create the obligation on state parties to create protections against torture and CIDT "whether inflicted by people acting in their official capacity, outside their official capacity *or in a private capacity*."[87] The CCPR requests parties to report on their ATL, including laws addressing private persons, indicating that the body envisions a regime that could include such criminalising legislation.[88]

International criminal law and customary international humanitarian law, both with goals other than engaging state responsibility, also address private acts of torture. The ICTY held in *Kunarac* that a nexus to a state official or "any other authority-wielding person" is not necessary for the offence to be classified as torture under international humanitarian law.[89] Similarly, the Rome Statute articles that address torture do not expressly limit the crime by the requirement of state involvement.[90] However, Rodley points out that the context in which crimes against humanity and war crimes occur, and the additional elements needed to prove atrocity crimes, have the practical effect of "excluding private acts for purely personal ends."[91]

Given that states are free to create liability for non-state actors in their ATL,[92] the question is whether they should. As we can pull from above practice, whether "state actor" is part of the torture definition depends on the goals of criminalisation. Between international humanitarian law, human rights law and international criminal law, all disciplines have the goal of ending impunity. But whereas international humanitarian law is concerned with regulating armed conflicts and human rights law is concerned with engaging state responsibility, international criminal law offers its protections through an individual deterrent function, and therefore may be the best analogy to state practice and ATL.

It is proposed that ATL should follow the model of international criminal law: do not make the definition of torture dependant upon a state actor, but rather in practice the crime as defined will mostly involve acts of public officials regardless. Recalling that this project defines "at risk persons" as "anyone in state custody or detention" due to the inherent vulnerability of detainees, it is to be expected that the vast majority of abuses of at risk persons will be committed by someone connected to the state in some way. The suggestion of this paper is that the state actor limitation is unnecessary in ATL, and that deleting it from domestic criminalisation will increase the protective power of state laws by broadening its scope within confined parameters.

The 2012 expert meeting to discuss issues in drafting ATL proposed that where ATL does criminalise purely private acts of torture, the penalty should be less than when the same behaviour is committed by public

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[85] UNCAT, 'Elmi v. Australia' (25 May 1999) U.N. Doc. CAT/C/22/D/120/1998 para 6.5.

[86] See e.g. ECtHR *A v. United Kingdom* App no 25599/94 (23 September 1998) para 22–4 [State responsibility was engaged when a jury acquitted a man for the caning of his step-son].

[87] UNCCPR General Comment 20 (n.25) para 2 (emphasis added).

[88] Ibid para 13.

[89] *Kunarac et al. Case* (Judgement) ICTY-IT-96-23 & 23/1 (22 February 2001) para 496; See also Jean-Marie Henckaerts and Louise Doswald-Beck, *ICRC Customary International Humanitarian Law*, vol 1 (Cambridge University Press 2005) 315.

[90] Rome Statute (n.48) Article 7 (Crimes Against Humanity) and Article 8 (War Crimes).

[91] Rodley Definition of Torture (n.35) 492–3.

[92] Convention (n.1) Article 1(2) [Saving Clause]; See also Andrew Clapham, 'Non-state Actors' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris (eds), *International Human Rights Law* (OUP Forthcoming). ["[E]ven though the jurisdictional clauses of the treaty bodies preclude complaints against non-state actors, the substantive norms themselves may easily be adapted to apply to non-state actors"].

officials.[93] This solution addresses the argument that the presence of the state actor as the perpetrator of ill-treatment is part of what makes torture so heinous a crime, and that without the ingredient of an abuse of authority the suffering will lack the requisite severity. Severity is an independent element of the crime that must still be proved in a domestic prosecution; ATL without the state actor element would therefore encompass only the gravest of private abuses. As one expert noted at the meeting: the choice of whether to include non-state actors is a policy decision based on what a state considers "draws the stigma of torture": the content of the act or the identity of the perpetrator. Given that the purpose of ATL is not to create state responsibility but to prevent torture and protect at risk persons, there is no conceptual reason why states must limit the definition to require state involvement.

Obligation to criminalise CIDT

A related concern to the criminalisation of torture is whether there is an obligation on states to criminalise CIDT, and if not what steps are required to prevent it. The wording of Convention Article 16 requires that state parties "shall undertake to prevent […] other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." The separation of torture and CIDT into distinct articles in the Convention was deliberate, because the drafters intended some of the state obligations to apply only to torture.[94] In particular, the obligation in Article 4 to criminalise torture through domestic legislation was not meant to apply to CIDT.[95] In rare concluding observations, the Committee has commented on the absence of national law provisions criminalising CIDT,[96] but the Convention is not generally considered to require that states criminalise such treatment.[97]

Despite being separated in the Convention, Articles 1 and 16 are meant to be read together to convey the overall object and purpose of the Convention.[98] As a conceptual model, torture and CIDT are joined because over-concern with distinctions and thresholds "prove limiting in a preventive framework, where it is not always necessary to categorise the act but instead to indicate the existence of a problem."[99] In practice delimitating the two on bases of severity or purpose can be problematic, and creating a hierarchy between torture and other forms of ill-treatment is not advised by experts.[100] In this vein, the practice of the Committee is to address these notions together in its concluding observations and jurisprudence, with no clear distinction as to which of the crimes it makes reference to. The CCPR follows a similar practice, and "often fails to specify which aspect of [ICCPR] Article 7 has been breached."[101] This merging, while an understandable policy, means states parties also face difficulties in knowing where international law standards trigger the Convention obligation to criminalise, or merely "prevent."

Additionally, the Convention recognises that other treaties or general customary international law might require criminalisation of CIDT, and Article 16(2) contains the same "saving clause" as in Article 1, declaring that the Convention stands without prejudice to other instruments that do prohibit CIDT. The question then is if a state

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[93] APT Key Issues (n.30) 37.

[94] Nowak and McArthur (n.18) 28.

[95] Ibid.

[96] UNCAT 'Concluding observations on Ukraine' (11 December 2014) UN Doc CAT/C/UKR/CO/6 para 134; UNCAT 'Concluding observations on Sweden' (6 June 2002) UN Doc CAT/C/CR/28/6 para 7(a); UNCAT 'Concluding observations on Kazakhstan' (12 December 2014) UN Doc CAT/C/KAZ/CO/3 para 7(a).

[97] Rodley and Pollard (n.19) 118.

[98] Nowak and McArthur (n.18) 28–9.

[99] APT Definition of Torture (n.19) 19.

[100] Ibid 18.

[101] Joseph, Schultz and Castan (n.32) para 9.20. See also UNCCPR General Comment 20 (n.25) para 4 ["nor does the Committee consider it necessary to … establish sharp distinctions between the different kinds of punishment or treatment"].

desires or is obligated to criminalise CIDT, how does it know what practices amount to ill-treatment under international standards?

While there is no satisfactory definition of CIDT in international law, the 2012 expert meeting on drafting ATL produced suggestions for state implementation of one. Representatives from Uganda, which has criminalised CIDT, explained their solution of inserting a clause into ATL which advised judges to "have regard to the definition of torture […] and the circumstances of the case, and to give the court discretion to convict the person of CIDT where the court is of the opinion that the act complained of does not amount to torture."[102] Another suggestion involved looking to international humanitarian law for elements of the crime, because there is overlap between some war crimes and parts of CIDT.[103]

While at the international level torture and CIDT are purposefully linked and jurisprudence does not differentiate the offences, the Committee recommends that at the state level practice must keep the two notions separate. Whether a state chooses to criminalise or otherwise prevent CIDT, both the Committee and the state can better monitor offences when it is clear how the state in internally identifying said acts of abuse.[104] Along the same lines, it is advised that ATL be more explicit than the Convention as to which elements do and do not apply to CIDT. While Convention Article 16 confirms that certain Articles shall apply to ill-treatment that does not amount to torture, it is unclear whether many of the substantive obligations in the Convention apply to CIDT.[105] States should confirm these applications in their ATL to remove doubt.

Conclusions & Recommendations

Creating the crime of torture in ATL is an element that can potentially have a great impact on the protection of at risk persons. How broadly or narrowly a state defines torture will determine what offences are capable of being prosecuted, and which will go unpunished. A strong definition in ATL is an initial step toward deterring torture and preventing offences before they occur.

Some definitional obligations are fairly well settled under international law. A state must criminalise torture as a separate, specific crime, it must interpret the "lawful sanctions" exception under international standards as well as national, and it must recognise no defences to justify torture. It is also certain that the elements contained in Convention Article 1 are the minimum standards a state can provide in its ATL.

More open to the discretion of the state is whether it chooses to increase the protections offered in Article 1. The Convention foresees that increased protections will be available in other international instruments and allows those elements to influence national legislation. In pulling definitional language from various instruments, a state should keep in mind the purpose of the instrument it is sourcing: definitions in human rights treaties exist to invoke state responsibility, whereas international criminal law statutes exist to create individual criminal responsibility. Considering that the crime of torture in ATL exists to deter torture by creating individual criminal responsibility and protect at risk persons from the threat of torture, states should be incorporating the most protective definitions possible.

Along these lines, the severity element should be assessed in accordance with international standards: not requiring systematic abuses and using a subjective analysis of each victim's individual suffering in recognition that each person's vulnerability will be different. States are free to do away with the severity element altogether à la the IACPPT, as long as the other elements are met. States are also free to expand on the proscribed purposes listed in Article 1 in order to catch more abusive situations, keeping in mind that too detailed a list can backfire and paradoxically deny protections. States may expand the Article 1 definition by deleting the requirement of nexus to a state actor, bearing in mind that international law probably does not go so far as to criminalise private

[102] APT Key Issues (n.30) 47–8.

[103] Ibid 48.

[104] See e.g. UNCAT 'Concluding observations on Germany' (12 December 2011) CAT/C/DEU/CO/5 para 9.

[105] Each of these open questions will be dealt with in the following sections.

acts for purely personal ends (i.e. sadism). Finally, states are encouraged to criminalise CIDT even though it is not an obligation under the Convention, and they must ensure that it is treated distinctly from torture. By incorporating all the elements of Article 1, and optional additions, into its ATL, a state takes the first step toward creating a domestic system that actively prevents torture.

Checklist:

1. States shall criminalise torture as a separate, specific crime;
2. States shall define torture in a manner that, at a minimum, adopts all the elements of Convention Article 1;
3. States should make torture by omission an explicit crime;
4. States shall assess the severity of suffering in line with international standards, using a subjective test on a case-by-case basis;
5. States should, if adding to the proscribed purposes listed under Convention Article 1, ensure the list is non-exhaustive;
6. States may definite torture to include non-state actors;
7. States shall, if including a "lawful sanctions" exception to the definition of torture, clarify that "lawful" is understood by both national and international standards;
8. States shall explicitly affirm that no defences are allowed to justify torture;
9. States may criminalise CIDT, keeping the offence distinct from torture.

3.1.2. Modes of Liability

Introduction

Both domestic and international law endorse the application of various modes of liability for offences beyond the actual commission of the crime. Statutes that create criminal liability for auxiliary participation in a crime help to limit systemic impunity and emphasise the gravity of the crime at issue. Explicitly criminalising forms of liability outside of commission in its ATL is a strong means states can take to deter the offence and prevent torture before it occurs.

The Convention

Article 4(1) obliges all state parties to the Convention to make torture an offence under their criminal law.[106] In the same Article, the obligation extends to encompass attempts to commit torture and acts that constitute complicity or participation in torture.[107] The wording of the Convention applies the obligations evenly, so that a state's obligation to criminalise the "lesser" forms of torture are equally binding with the duty to criminalise the offence itself.

The obligation to criminalise other modes of liability is less clear. The definition of torture in Article 1 outlines that torture is considered an act done under the instigation, consent, or acquiescence of a public official. This suggests that these acts may constitute proscribed acts under the Convention, but it does not create a clear obligation to include these modes of liability in ATL.

The Committee

In its concluding observations and general comments, the Committee regularly includes mention of modes of liability in addition to commission. As part of the Article 4 obligation, the Committee has flatly stated that a

[106] See above §3.1.1. Definition of Torture.

[107] Convention (n.1) Article 4.

state party should make the "necessary modifications […] to explicitly criminalise attempts to commit torture and acts constituting complicity or participation in torture and to define them as acts of torture."[108] For these forms of liability, the Committee does not draw a distinction between the gravity of the offence; "any person committing such an act, whether perpetrator or accomplice, shall be personally held responsible before the law."[109] The Committee has also referenced the terminology in Article 1, and has pulled out of the definition a recommendation to specifically criminalise the act by a public official of instigating, consenting, or acquiescing to torture.[110]

Confusingly, the Committee will occasionally include additional terminology in its recommendations. It is unclear where these terms derive from and whether or not they are intended to be illustrative of the terms in the Convention, or distinct additional modes of liability. As a case in point, the Committee included in its General Comment No. 2 the terms "inciting" and "encouraging" in the context of proscribed acts by public authorities, concluding that state parties are in violation of the Convention for not adopting effective measures on this issue.[111] A conclusion can be made that the Committee is attempting to cover every possible mode of liability under various legal systems in an attempt to fill all gaps for impunity and offer the strongest protections. Another conclusion is that the Committee considers these terms to be synonymous.[112] Unfortunately, without explanation by the Committee the ambiguity in wording leaves confusion for a state to know what explicit terms to include in its ATL.

General International Law

International sources outside the Convention framework support the obligation to criminalise various modes of liability beyond the commission of torture. The reasoning is similar to that behind criminalising the act of torture itself: explicitly including forms of liability in domestic legislation means that such acts can be properly investigated, prosecuted and punished, thus closing gaps for impunity.[113]

The UN General Assembly's Declaration against Torture and CIDT in 1975 suggests that acts of participation, complicity, incitement, and attempt to commit torture should be defined as offences under criminal law.[114] The CCPR has asserted that a member state must hold responsible persons who violate the ICCPR prohibition on torture "whether by encouraging, ordering, tolerating or perpetrating prohibited acts."[115]

Regional sources also address modes of liability. The IACPPT obligates member states to criminalise the attempt to commit torture, treating it of a similar magnitude to the act itself.[116] Interestingly, the IACPPT asserts that a public official who orders, instigates or induces the use of torture, or who fails to prevent it if he would be able to do so, is actually guilty of the crime of torture.[117] The Article 5 Initiative also references the need to legislate

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[108] UNCAT 'Concluding observations on Gabon' (17 January 2013) UN Doc CAT/C/GAB/CO/1 para 8; UNCAT 'Concluding observations on Morocco' (21 December 2011) UN Doc CAT/C/MAR/CO/4 para 5.

[109] UNCAT 'Concluding observations on Guinea (20 June 2014) UN Doc CAT/C/GIN/CO/1 para 7.

[110] UNCAT 'Concluding observations on Kyrgyzstan' (20 December 2013) UN Doc CAT/C/KGZ/CO/2 para 6; UNCAT 'Concluding observations on Andorra' (20 December 2013) UN Doc CAT/C/AND/CO/1 para 6.

[111] UNCAT General Comment No. 2 (n.13) para 17.

[112] Nowak and McArthur (n.18) 78 ["Instigation means 'incitement, inducement, or solicitation'"].

[113] UNCAT 'Amnesty International Submission on Sweden to the UN Committee against Torture, 53rd Session, 3-28 November 2014' (October 2014) UN Doc CAT/NGO/SWE/18651.

[114] UNGA Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 3452 (XXX), Annex, 9 Dec. 1975 Article 7.

[115] UNCCPR General Comment 20 (n.25) para 13.

[116] IACPPT (n.24) Article 6.

[117] Ibid Article 3.

against complicity in torture and attempts to commit torture "as equally punishable as committing acts of torture."[118]

International standards on the inclusion of acquiescence and consent to torture are more difficult to find. At the 2012 expert discussion on the key issues in drafting ATL, the issue arose concerning how broadly a state should interpret the crime of acquiescence to torture, and the inherent difficulty over where to draw the line on a crime of mere knowledge.[119] This question becomes especially problematic if states choose to apply the definition of torture to private actors in their ATL. A possible solution discussed by the experts was to analogise the crime of acquiescence or consent to the concept of negligence in common law systems: a person is only liable if he had a legal duty of care to prevent the act. However, where states do maintain the requirement of a nexus to the state in their ATL,[120] criminalising the acquiescence or consent to torture can act to deter the offence by encouraging state agents to assiduously prevent private acts of torture, on pain of their own personal liability.

Conclusions & Recommendations

In order to combat impunity for acts that support or complement torture, a state's ATL must include modes of liability beyond the direct commission of the offence. Incorporating additional forms of liability into legislation catches more behaviours that violate the general prohibition against torture, thus broadening the deterrent effect of ATL and increasing protections to at risk persons. A state can easily implement additional modes of liability by listing them in its Criminal Code, or directly into its ATL.[121] International law and the Convention in particular require the prohibition of modes beyond the commission of torture to be in a state's legislation.

Because reasoning is uniformly lacking as to why a source lists certain modes of liability, it is difficult to understand which modes are required and why. However, guidelines can be assumed based on the repetition of how often and how strenuously sources recommend each mode. Attempt, complicity, and participation in torture appear to be set obligations. Criminalisation of instigation and incitement also receive strong support. Beyond these the obligations are less clear, but for member states to the Convention it is advisable to include all the modes the Committee has discussed, out of respect for the object of the Convention to make the fight against torture more effective.[122] It is suggested that, at a minimum, states apply all the modes of liability included in their Criminal Code to the act of torture.

Checklist:

10. States shall criminalise the attempt to commit torture, complicity in torture, participation in torture, instigation of, and incitement to torture;

11. States should criminalise acts by public officials that acquiesce or consent to torture.

3.1.3. Penalties for Torture

Introduction

This section will discuss the penalties that should apply for the crime of torture, taking into consideration the patterns developed by the Committee, especially in view of the fact that the punishment of this crime must be in line with its gravity and the severe consequences for the victims. The Committee and scholars developed some practices and theories that focus on the assumption that the gravity of the crime cannot be overlooked and therefore the punishment incorporated by domestic legislation must follow the gravity pattern.

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[118] Article 5 Initiative (n.14) 31.

[119] APT Key Issues (n.30) 38.

[120] See above §3.1.1. Definition of Torture: By a public official.

[121] Participants from the group of experts at the 2012 Key Issues meeting asserted that the inclusion of modes of liability in a state's Criminal Code is sufficient to meet international obligations. APT Key Issues (n.30) 40.

[122] Convention (n.1) Preamble.

The Convention

Article 1, dealing with the definition of the crime of torture, enshrines the gravity of the crime and the acts amounting to it, as discussed in Section 3.1.1. above. Article 2 creates the obligation upon states to, *inter alia*, pass legislative measures to prevent the occurrence of this crime in their territories. More specifically, Article 4 of the Convention creates the obligation upon states to "make these offences punishable by appropriate penalties which take into account their grave nature."

Therefore, the effective punishment for the crime of torture depends on states parties not including trivial penalties in their domestic legislation. Indeed, the penalties provided for in national legislation shall reflect the extreme gravity of the crime in question, and discourage any practice of torture to occur.

The Committee

General Comment No. 2 from the Committee emphasises that "States parties must make the offence of torture punishable as an offence under its criminal law, in accordance, at a minimum, with the elements of torture as defined in article 1 of the Convention, and the requirements of article 4."[123] Along those lines, the Committee clarifies that "serious discrepancies between the Convention's definition and that incorporated into domestic law create actual or potential loopholes for impunity."[124] While making important points on the necessity of ensuring severe punishment in line with the gravity of the crime, there is no formal standard to follow in terms of a quantity of years or whether, for instance, ascribing punishments equal to the domestic provisions on murder would suffice.

The Committee's approach from 2002 raised pattern of recommending sentences of between six and twenty years.[125] After this 2002 pattern, it seems that a new pattern has not been developed by the Committee although it keeps the approach of reminding states parties that some measures do not suffice or are not in line with the gravity of the crime.

In the Concluding Observations of Kazakhstan in 2014, while not establishing a concrete parameter, the Committee pointed out that a criminalisation of acts tantamount to torture being punished by five years of detention, was not in accordance with the gravity of the crime.[126]

In 2005, in the case *Guaridi v. Spain,* the Committee emphasised the duty on state parties to impose severe penalties, in line with the suffering caused to the victim. "With regard to the alleged violation of article 4, the Committee recalls its previous jurisprudence to the effect that one of the purposes of the Convention is to avoid allowing persons who have committed acts of torture to escape unpunished. The Committee also recalls that article 4 sets out a duty for States parties to impose appropriate penalties against those held responsible for committing acts of torture, taking into account the grave nature of those acts. The Committee considers that, in the circumstances of the present case, the imposition of lighter penalties and the granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment. The Committee further notes that the civil guards were not subject to disciplinary proceedings while criminal proceedings were in progress, though the seriousness of the charges against them merited a disciplinary investigation. Consequently, the Committee considers that there has been a violation of article 4, paragraph 2, of the Convention."[127] Therefore, from the passage above one may infer that there is a duty on state parties to impose appropriate measures through a functioning penal system.

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[123] UNCAT General Comment No. 2 (n.13) para 8.

[124] Ibid para 9.

[125] UNCAT, 'Summary Report of the 93rd Meeting of the Committee' UN Doc. CAT/C/SR.93 [this document, while cited by scholars for the numerical parameter, is not available in the records of the Committee and they were not able to provide further information].

[126] UNCAT 'Concluding observations on Kazakhstan' (12 December 2014) UN Doc UN Doc CAT/C/KAZ/CO/3.

[127] UNCAT, 'Guridi v. Spain' (17 May 2005) UN Doc CAT/C/34/D/212/2002.

Further, the Committee has stated that the acts of torture shall "incur the heaviest punishments."[128] This statement reinforces the idea that the penalties shall be a matter taken seriously by the states, and that at least the minimum parameters raised in the 2002 jurisprudence shall be respected. Otherwise, without any standard to recall, the obligations on the state parties would be undermined, opening a huge margin of discretion. In relation to the duty of impose severe penalties, it is important to provide states with a minimum concrete pattern to follow, so that they can be assessed with regards to the effective implementation of the correspondent obligation.

General International Law

According to scholars, the proportion of the penalty shall be kept not only in relation to the gravity of the crime, but also as to achieve cohesion within the system, so that similar grave crimes, must bear similar standards of punishment.[129] It follows that "the sanction for torture has to be similar to 'the most serious offences under the domestic legal system'."[130]

Some views went further on saying that the crime of torture should receive the most severe penalty of all the domestic crimes, as stated by Sporensen, acting as Rapporteur of Czech and Slovakian Federal Republic.[131] However, each domestic system has different modes of liability and therefore different degrees of punishment in relation to the participation perpetrated and to the circumstances that can be invoked.[132]

In terms of objective patterns, also scholars seem to follow the Committee's report of 2002, and reinforce custodial sentences between six to twenty years, whose variation will be dependent upon the forms of liability and the aggravated or mitigated circumstances. In this sense, "it has been suggested that a sentence of at least six years is needed to account for the gravity of the crime of torture."[133]

Normally the minimum penalties apply to those acts of torture that inflict a lesser degree of suffering, whereas the closer we get to aggravated result of death, the more penalties shall be increased. For Instance, in France, "the basic offence of torture and inhumane acts is punished within 15 years imprisonment, a penalty that can be increased to 20 years, 30 years or life imprisonment when specific cases or aggravating circumstances occur."[134] Similarly, "it is permissible to accord different penalties for different components of the crime such as complicity, participation, and attempt. In terms of aggravation and mitigation, if the crime of torture covers acts committed by private actors, then it is essential to provide for aggravation when the act is committed by a public official."[135]

However, the penalties provided for in domestic legislation shall also be respectful of human rights. Therefore there is an increased debate as to whether death penalties could be accepted as a penalty for the crime of torture. Taking into consideration the progressive development of international human rights law, especially the increased numbers of ratifications to the 2nd Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, this report recommends that the death penalty should not be available as a penalty for torture inasmuch as there are allegations that capital punishment is a *per se* violation of human rights.

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[128] Article 5 Initiative (n.14).

[129] Lene Wendland, *A Handbook on State Obligations under the UN Convention against Torture* (APT 2002).

[130] Burgers and Danelius (n.29) 129.

[131] Chris Ingelse, *United Nations Convention Against Torture: An Assessment* (Kluwer Law International 2001) 342.

[132] Silvia D'Ascoli, *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC* (Hart Publishing 2011) 81.

[133] Ingelse (n.131) 342.

[134] D'Ascoli (n.132) 85.

[135] APT Key Issues (n.30) 41.

States shall not provide for death penalty in their domestic system, since this would be tantamount to a violation of those eminent principles. "In 1997, the U.N. High Commission for Human Rights approved a resolution stating that the 'abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights.' That resolution was strengthened in subsequent resolutions by a call for a restriction of offences for which the death penalty can be imposed and for a moratorium on all executions, leading eventually to abolition."[136]

Along those lines, Brazilian scholars say that the gravity of crime does not justify the punishment through death penalties or other extremely severe penalties, which *per se* inflicts torture or ill-treatment to the convicted perpetrators, conflicting with the purposes of the Convention.[137]

With relation to mitigation, Professor Rodley recalls that since a "person who threatens someone with torture in order to find and save the life of a child who has been kidnapped should not receive the same sentence as someone who actually inflicts the torture and tortures someone to death. The only way to defend the principle that there is no defence to torture is to allow for flexibility when it comes to sentencing."[138]

In relation to sentencing, Article 5 Initiative, an NGO committed to the preventions of torture in Africa, supports the Committee approach and declares that a custodial sentence of six to twenty years in case of torture would be a good parameter. It should be noted though, that they have a tendency to push further for life imprisonment as the correct punishment in cases in which torture practices lead to death.[139] Life imprisonment itself is not a possible penalty in several countries such as Brazil, Portugal, Costa Rica, El Salvador, Spain, therefore it would be hard to create a universal approach without colliding with the fundamental criminal principles under these jurisdictions.

Moreover, there is also debate around life imprisonment as such amounting to ill-treatment. The ECtHR has been confronted with this constraint, and it seems that possibilities of revision of past sentences are being granted, transforming life imprisonment into a hot potato subject since these sentences can be regarded as violations of human rights.[140] Under the same token, the ECtHR stated that: "The Court found in particular that, for a life sentence to remain compatible with Article 3, *there had to be both a possibility of release and a possibility of review*. It noted that there was *clear support in European and international law and practice for those principles, with the large majority of Convention Contracting States not actually imposing life sentences at all* or, if they did, providing for a review of life sentences after a set period (usually 25 years' imprisonment)."[141]

Domestic law mechanisms and human rights debates seem to pave the way for scholars and general international law to stick to the Committee's recommendation of six to twenty years sentences, depending on the forms of liability and aggravated and mitigated circumstances. This 2002 jurisprudence would so be more adapted to the difficulties evinced above.

Conclusions & Recommendations

In view of the above, we may infer that it is not possible to find new parameters in the concluding observations of the Committee and also from the studies provided by the doctrine. Therefore, the actual pattern seems to be

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[136] Richard C. Dieter, 'The Death Penalty and Human Rights: U.S. Death Penalty and International Law' (Oxford Round Table U.S. Death Penalty and International Law) 4.

[137] Eduardo Luiz Santos Cabette, 'A definição do crime de tortura no ordenamento jurídico penal brasileiro' (2008) 13 vol 1789 Revista Jus Navigandi.

[138] APT Key Issues (n.30) 41.

[139] Article 5 Initiative (n.14).

[140] Simon Hattenstone and Eric Allison, 'Are whole-life prison sentences an infringement of human rights?' (The Guardian, 5 December 2012) <http://www.theguardian.com/law/2012/dec/05/whole-life-prison-sentence-human-rights> accessed 12 May 2015.

[141] ECtHR *Vinter and other v. UK* App no 66069 (09 July 2013) (emphasis added).

the one from the 2002 report of the Committee, which agrees that a punishment ranging from six to twenty years would be an efficient tool in order to protect at risk persons. This raises the theory of tertiary punishment, as serious penalties – within human rights guidelines – can act as a deterrent to torture.

The continuation of the 2002 pattern is a good expedient to accommodate differences in domestic legislations with regards to different modes of liability and aggravated and mitigated circumstances. More specifically, the minimal penalty shall be of six years in the case of a less severe torture crime and the maximum shall be, at least, twenty years in case of severe suffering or whether death so results.

From what was demonstrated above, in cases such as those of France, in which the maximum penalty is higher than twenty years, there is no difficulty to overcome, since the pattern of the Committee is a minimum one, in order to ensure compliance with the Convention. So nothing seems to impede a state to provide for more severe punishment, as long as human rights patterns are respected.

Finally, since the aim of this study is elucidating which elements best protect at risk persons, it is important to recall the state duty to enact legislation that reflects the gravity of the crime of torture, bearing in mind the serious consequences inflicted on the victims.

Checklist:

12. States shall penalise torture with punishments ranging from the minimum of six to the maximum of twenty years of imprisonment;

13. States may provide for higher penalties, as long as they are respectful of human rights;

14. States should not assign the death penalty and life imprisonment for torture.

3.2. Criminal Procedure

3.2.1. Universal Jurisdiction

Introduction

This section of the report discusses the requirements under the Convention to establish criminal jurisdiction. This element provides that any domestic court which finds an alleged torturer in a territory under its jurisdiction should have the power to prosecute, regardless of his nationality or the existence of a territorial link to the crime.[142]

> The Torture Convention was agreed not to create an international crime which had not previously existed but to provide an international system under which the international criminal – the torturer – could find no safe haven.[143]

This "international system" is found in the Articles 5-9 of the Convention. Following this finding, we understand the provisions of the Convention relating to universal jurisdiction and to the principle of extradite or prosecute as an integrated system. Universal jurisdiction – the idea to prosecute crimes regardless of where they were committed – is at the core of the venture to dry out all safe havens.

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[142] See also below §3.3.2. on Redress and Compensation.

[143] *House of Lords. Regina v. BartIe and the Commissioner of Police for the Metropolis and Others (appellants), Ex Parte Pinochet (respondent)(On Appeal from a Divisional Court of the Queen's Bench Division); Renina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (appellants), Ex Parte Pinochet (respondent)(On Appeal from a Divisional Court of the Queen's Bench Division)(No. 3)*, Judgment of 24 March 1999, reported as *R. v. Bartle and Commissioner of Police for the Metropolis, ex parte Pinochet (No. 3)* [1999] 2 All E.R. 97 (Lord Browne-Wilkinson).

The Convention

The stipulations of the Convention with regard to universal jurisdiction are found in Article 5, which distinguishes between cases of obligatory and facultative establishment of jurisdiction. States do not only have the right to establish jurisdiction but are under the duty to establish jurisdiction in the following cases:[144]

- The torture was (allegedly) committed on territory under its jurisdiction (Article 5(1)(a));
- On aircraft or ships registered in the respective state (Article 5(1)(a));
- When the alleged offender has the nationality of the respective state (Article 5(1)(b));
- When the alleged offender is present in territory under its jurisdiction (Article 5(2)).

Optionally, states may establish jurisdiction when the victim has their nationality "if that state considers it appropriate" (Article 5(1)(c)).

The wording of Article 5(3), initially only regulating the relationship with general international law, makes clear that the scope of Article 5 is criminal jurisdiction.

The Committee

The focus of the work of the Committee in relation to universal jurisdiction is on Article 5(2) – the duty to establish jurisdiction over any offender merely present on its territory. In this context the term "cornerstone" of the Convention is often used, either by the Committee or by those commenting on its work.[145] This is in line with the idea of the Convention creating a system where torturers cannot find a place to hide.

The Committee insists unambiguously on the implementation of universal jurisdiction,[146] going beyond the criminal procedure law by requesting administrative regulations also to support the implementation,[147] and questions in places with legally fully implemented universal jurisdiction the lack of cases in which it is applied. For example, the Committee urged in its 2012 Concluding Observations on Canada to ensure the exercise of the state's universal jurisdiction law by actually investigating allegations of torture, and either prosecuting or extraditing where facts indicate torture occurred.[148] This illustrates the connection between the duty to establish universal jurisdiction, the obligation to prosecute or extradite, and the requirement of prompt and impartial investigations.

The Committee clarified Article 5(1)(a), the territory under its jurisdiction includes not only the actual territory of the state, but also all territory over which it exercises *de jure* or *de facto* effective control.[149]

It should be noted that the Committee is sometimes interpreting Article 5 beyond its wording. In the Concluding Observations on Germany, the Committee took up the case of Khalid El-Masri, demanding Germany to establish jurisdiction in this and similar cases. The only link between the Khalid El-Masri case and Germany

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[144] Peter Burns and Sean McBurney, 'Impunity and the United Nations Convention against Torture: A Shadow Play Without an Ending?' in Craig Scott (ed), *Torture as Tort – Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing 2001) 282.

[145] UNCAT 'Suleymane Guengueng et al. v. Senegal' (18 April 2001) UN Doc CAT/C/36/D/181/2001 5; Lene Wendland, *A Handbook on State Obligations under the UN Convention against Torture* (APT 2002) 37; It seems the term comes from the Swedish delegation drafting the Convention: Burgers and Danelius (n.29) 58.

[146] UNCAT 'Concluding observations on Mexico' (11 December 2012) UN Doc CAT/C/MEX/CO/5-6 11.

[147] UNCAT 'Concluding observations on United Kingdom of Great Britain and Northern Ireland' (24 June 2013) CAT/C/GBR/CO/5 8.

[148] UNCAT 'Concluding observations on Canada' (25 June 2012) UN Doc CAT/C/CAN/CO/6 5.

[149] UNCAT 'Concluding observations on United Kingdom of Great Britain and Northern Ireland' (24 June 2013) CAT/C/GBR/CO/5 3.

being his German citizenship, the case is one of optional jurisdiction under Article 5(1)(c),[150] Germany not being obliged to establish jurisdiction. In the Concluding Observations for United Kingdom of Great Britain and Northern Ireland the Committee recommends to extend universal jurisdiction over civil claims.[151] These examples illustrate the importance the Committee puts on the universal jurisdiction.

General International Law

In general international law, the concept of universal jurisdiction is conflicting with the principle of state sovereignty. Applied, domestic courts decide unilaterally whether another state or its agents have violated international law.[152] Theories basing the infringement to state sovereignty on the presumed violation of *jus cogens* norms cannot solve the problem of domestic courts interpreting international law to this end and assume a violation of *jus cogens* before a court has found so.[153] In the realm of international criminal law, this has been largely overcome by establishing an international court to decide these cases and thereby avoiding to have equal states deciding over each other.[154]

Increased criminalisation, especially increased risk for prosecution abroad might lead to more secrecy surrounding torture and thereby hinder the primary prevention, prevention before the *actus reus*, and make it more difficult to evidence torture in order to seek civil redress.[155] Pushing for extensive universal jurisdiction might be detrimental to the idea of preventing torture from happening in the first place.[156] As states have mostly no choice in establishing jurisdiction, this is relevant in the context of Article 5(1)(c), the cases where only the victim is of the nationality of the state.

Although universal jurisdiction does not find strong support in general international law, the jurisdiction over alleged offenders which are just present is the crucial element in reducing safe haven for torturers,[157] and, as Judge Browne-Wilkinson found, the core of the Convention. It is also crucial to protect at risk persons. When a potential offender only faces repercussions of the respective domestic judicial system, in which he might himself be located, this creates a comparatively weak deterrent. Potentially being prosecuted anywhere around the globe is a stronger deterrent and therefore necessary to effectively protect at-risk persons.

Conclusions & Recommendations

Universal jurisdiction is one of the strongest tools of the Convention to protect at risk persons by creating a strong deterrent to torture. Any non-establishment of jurisdiction over alleged offenders present in the territory is also a violation of one of the core provisions of the Convention.

Checklist:

15. States shall establish jurisdiction over any alleged case of torture committed on territory under its jurisdiction, or a ship or plane under its flag, or by one of its nationals;

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[150] UNCAT 'Concluding observations on Germany' (12 December 2011) CAT/C/DEU/CO/5 10.

[151] UNCAT 'Concluding observations on United Kingdom of Great Britain and Northern Ireland' (24 June 2013) CAT/C/GBR/CO/5 8.

[152] Wendy Adams, 'In Search of a Defence of the Transnational Human Rights Paradigm: May *Jus Cogens* Norms Be Invoked to Create Implied Exceptions in Domestic State Immunity Statutes?' in Craig Scott (ed), *Torture as Tort – Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing 2001).

[153] Ibid 273.

[154] See also below §3.3.2. on Redress and Compensation.

[155] Evans and Morgan (n.6) 148f., 153.

[156] Ibid.

[157] Rodley and Pollard (n.19) 129.

16. States shall establish universal jurisdiction over any alleged offender present in the territory under its jurisdiction;

17. States may, as far as feasible, protect its nationals by establishing jurisdiction over cases where their nationals have been victim of torture.

3.2.2. Extradite or Prosecute / Investigate

Introduction

Whenever a state is obliged to establish jurisdiction under Article 5(2)[158] this triggers a primary duty of the state is to investigate, and potentially prosecute, allegations of torture. A potential secondary obligation may also arise to extradite, under certain circumstances. The obligation to extradite or prosecute is complementary to the obligation to establish universal jurisdiction, ensuring that states who have established jurisdiction also make use of it to prosecute alleged torturers. This section discusses the duty to investigate and prosecute, the question of impartial or independent investigations is discussed in the respective section.[159]

The Convention

The Convention addresses the obligation to extradite or prosecute in Article 7. Article 7(1) of the Convention leaves the states a choice between prosecuting or extraditing alleged offenders of torture, but establishes the duty to do one of the two in any case of alleged torture. This mirrors the requirement of Article 5(2) to either establish jurisdiction or extradite and further defines the state obligation – the state has to investigate and, if evidence permits, prosecute in the cases where he has established jurisdiction. This is also backed up by Article 6. Article 6(1) stipulates a duty to take alleged torturers in custody or ensure otherwise they remain present and Article 6(2) includes the duty to investigate the allegations.

The potential extradition has to remain in line with the non-refoulement requirements of the Convention in Article 3.[160]

Following Article 8(2), the potential extradition may not be dependant on the existence of an extradition treaty.

The Committee

The Committee addresses the obligation to prosecute on several occasions, most prominent in the General Comment No. 3.[161] Most other references to prosecution and investigation are not referencing the Article 6 obligations to investigate and detain, but Article 12 and will be discussed below.[162]

With regard to the alternative obligation either to extradite or to prosecute the Committee is of the view that the existence of the obligation to perform one is not dependant on the existence of an extradition request.[163] The state party has to investigate and prosecute when they receive information of the allegation, not only if they also receive a request for extradition. The alternative possibility to fulfil its obligations under Article 7 only comes to live if another state requests the extradition.

The Committee also made clear that only an extradition on the request of another state with the purpose to prosecute the alleged offender in the receiving state is able to fulfil the obligation under Article 7. Merely

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[158] See above §3.2.1. on Universal Jurisdiction.

[159] See below §3.3.3. on Impartial and Independent Investigations.

[160] See below §3.3.1. on Non-Refoulement.

[161] UNCAT General Comment No. 3 (n.84) para 22.

[162] See below §3.3.3. on Impartial and Independent Investigations.

[163] UNCAT 'Suleymane Guengueng et al. v. Senegal' (18 April 2001) UN Doc CAT/C/36/D/181/2001 14.

deporting alleged offenders abroad does not relieve the state of the duty to prosecute.[164] This is seen by the Committee as part of the Convention system to avoid any "safe havens" for torturers.

General International Law

In general international law, the ICJ has discussed the question of extradition or prosecution in detail in the ICJ *Extradite or Prosecute* Case,[165] in which it interpreted the Convention.

The ICJ found the primary duty of the states to be the one of investigation and potentially prosecution.[166] In the event of an request for extradition, the state can relieve itself of the duty to prosecute by fulfilling its duty to extradite. But the duty to extradite is not a duty of the same weight as prosecution, non-prosecution could entail state responsibility while extradition is a mere option for the state, in the case of neither extradition nor prosecution taking place, the non-prosecution would be the breach of international law.[167]

The ICJ also discussed the content of the duty to prosecute. The obligation to prosecute has been read together with the duty to instigate a preliminary inquiry from Article 6(2). In the opinion of the Court, the Convention is not requiring bringing the case to trial, but it requires the case to be treated as diligently any other criminal law case by the competent authorities.[168] In effect this means, for states which have the institution of a prosecutor's office, the case has to be referred to the prosecutor. For states without such an institution, the investigation has to be exercised by the state attorney or the criminal investigation department of the police.

The Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) of the International Law Commission also found the Convention using the so-called "Hague formula", named after the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft which provisions became a model for many later Conventions.[169] The "Hague formula" requires the state to submit the case to the competent authorities if it does not extradite the alleged offender. Normally, this is embedded in a system of criminalisation of the respective conduct, establishing universal jurisdiction, ensuring the presence of the alleged offender for the proceedings, instigating preliminary investigations and making the extradition possible, all to the end to avoid impunity.[170] All these elements are found in the Convention. For this reason, the Working Group concluded that the obligation to extradite or prosecute should be interpreted to fulfil its object and purpose, avoiding impunity.[171] This is in line with both the ICJ finding of an absolute obligation to investigate as well as with the Committee standpoint relating to extraditions only for the purpose of prosecution abroad.

The Working Group also discussed the question whether transferral to an international court is also able to fulfil the state obligations to extradite and prosecute. Considering that most conventions, as the Convention, antecede the creation of the ICC, the option was not taken into account during the drafting. The object and purpose – avoid impunity – would also be served by transferring the case to the ICC, therefore the Working Group saw this option as equal to extradition to another state. This finding was also supported by Article 11 of the 2006

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[164] UNCAT 'Concluding observations on Canada' (25 June 2012) UN Doc CAT/C/CAN/CO/6 5.

[165] Belgium v. Senegal (n.13).

[166] Ibid paras 94–95.

[167] Ibid para 95.

[168] Ibid paras 83–88, 94.

[169] International Law Commission 'Report on the work of its sixty-fifth session' (6 May to 7 June and 8 July to 9 August 2013) UN Doc A/68/10 132.

[170] Ibid 125, 132.

[171] Ibid 137.

Convention for the Protection of All Persons from Enforced Disappearance, which expressly includes this possibility.[172]

Also the Amnesty International 12-Point Program for the Prevention of Torture[173] includes two points which emphasise the importance of investigations and prosecution for the prevention of torture. Point 6 involves the necessity of prompt, impartial and effective investigations, point 7 the requirement to prosecute torturers, regardless of the nationalities of perpetrator and victim.

Conclusions & Recommendations

To complement the universal jurisdiction in the system to erase safe havens for torturers, thereby avoiding impunity and creating a strong deterrent against torture, it is imperative to investigate all allegations of torture. Only then the deterrent is strong enough to protect persons at risk.

Checklist:

18. States shall ensure investigation and prosecution of all allegations of torture;

19. States shall enable the extradition of alleged torturers;

20. States shall ensure extraditions only take place for prosecution abroad or by an international court.

3.2.3. Immunities from Prosecution

Introduction

This section discusses immunities which might act as barriers to effective criminal prosecution. As a state as an abstract unit cannot face criminal charges, the present question is whether and how far state officials, those representing the state or exercising its functions, enjoy immunity from criminal prosecution.[174]

The Convention

State immunity from criminal prosecution is not explicitly addressed in the Convention, but the requirement of state involvement in the definition of torture[175] indicates the Convention implicitly opposes state immunity in torture cases.

The Committee

The Committee has expressed this view – the incompatibility of the duties to prosecute in cases of alleged torture, which requires state involvement, with state immunity – in the context of the *Pinochet* Cases in the United Kingdom – state parties to the Convention may not recognise state immunity in torture cases.[176] The view of the Committee is not legally binding, but it is the only interpretation which does not lead to absurd results.[177]

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[172] International Law Commission 'Final report: Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)' (5 June 2014) UN Doc A/CN.4/L.844 6.

[173] Amnesty International, '12-Point Programme for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Agents of the State' (2005) (revised).

[174] International Law Commission 'Report on the work of its sixty-sixth session' (5 May to 6 June and 7 July to 8 August 2014) UN Doc A/69/10 231.

[175] See above §3.1.1. Definition of Torture: By a public official.

[176] Adams (n.152) 262.

[177] Ibid.

General International Law

In general international law two types of state immunity are distinguished – immunity *ratione personae* and immunity *ratione materiae*.[178] Immunity *ratione personae* applies to heads of states, foreign ministers, heads of governments and potentially other ministers who may bind the state by their word, represent the state by virtue of their office.[179] The reason for granting immunity *ratione personae* is same as for diplomatic immunities – without immunity, the individual could not fulfil its function as high representative of the state.[180] The immunity *ratione personae* was recently upheld by the ICJ in the *Arrest Warrant Case (Belgium v. Congo)* for an incumbent foreign minister.[181] Immunity *ratione materiae* applies to those who act on behalf of the state.[182] The International Law Commission assessed the national and international case law with relation to *ratione materiae* immunity and found a diverse list of functions which were granted immunity.[183] For the purpose of this report, the cases of prison personnel, border guards, detectives in the police forces and security force members are the most relevant.[184]

Interpreting state immunity in this way leads to the absurd outcome that all cases of torture within the scope of the Convention would be not prosecuted, as the offenders would enjoy immunity *ratione materiae*.[185]

To overcome this dilemma, the House of Lords applied a tempered approach to state sovereignty *ratione materiae* (immunity *ratione personae* was not applicable as the criminal claim was not brought against an incumbent head of state) in the *Pinochet* Cases.[186] They based the limitation of immunity either on the Chilean ratification of the Convention, constituting an implicit waiver of immunity[187] or by balancing immunity with other norms of international law, stating that state immunity is no "blanket defence" in case of international crimes touching upon *jus cogens*.[188] A similar approach – disregarding potential sovereign or diplomatic immunities – is taken by ICC and the two *ad hoc* international criminal tribunals.[189]

The issue of how non-party states to the Convention are treated in the respect of the waiver theory is neither discussed nor resolved as far as our research determined. States who exercise jurisdiction and prosecute foreign nationals on the basis of universal jurisdiction might face repercussions, these actions might be considered as internationally wrongful acts and lead to countermeasures. The ICJ has found so in the *Arrest Warrant* Case[190] and Chilean reaction to the arrest of Pinochet abroad also indicates their understanding of the arrest as violating

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[178] ILC 66th Session (n.174) 236ff.; Craig Forcese, 'De-immunizing Torture: Reconciling Human Rights and State Immunity' (2007) 52 McGill Law Journal 127, 136ff.

[179] ILC 66th Session (n.174) 234; Forcese (n.178) 137.

[180] Ibid.

[181] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, 3.

[182] ILC 66th Session (n.174) 234ff.

[183] ILC 66th Session (n.174) 233.

[184] Ibid.

[185] *Opinions of the Lords of Appeal for Judgment in the cause Jones (Respondent) v. Ministry of Interior Al -Mamlaka Al -Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants) Mitchell and others (Respondents) v. Al-Dali and others and Ministry of Interior Al -Mamlaka Al -Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants) Jones (Appellant) v. Ministry of Interior Al -Mamlaka Al -Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Respondents)*, [2006] UKHL 26, United Kingdom: House of Lords (Judicial Committee), 14 June 2006 para 19.

[186] Forcese (n.178) 143.

[187] Forcese (n.178) 143, 147.

[188] Burns and McBurney (n.144) 283.

[189] Rome Statute (n.48) Article 27; Statute of the International Criminal Tribunal for the Former Yugoslavia, SC res. 827 (1993) Article 7; Statute of the International Criminal Tribunal for Rwanda, SC res. 955 (1994) Article 6.

[190] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, 3.

international law.[191] Pointing towards the approach of the international criminal courts is not helpful in this respect because, unlike national courts, they are not on an equal level with other sovereign states.

This puts state parties to the Convention in the uncomfortable position having to fulfil contradicting obligations. If they accept immunity as a defence, they violate their obligations under the Convention, if they prosecute despite the invocation of immunity, they violate one of the core principles of international law. The suggestion to use the non-allowance of immunity as countermeasure, developed in the civil law realm, is only helpful as far as the torturous practices are still ongoing and requires action not only from the judiciary but also from the foreign ministry.[192] It also encompasses a very liberal understanding of the concept of countermeasures, which, in addition, is targeted at assuring cessation and redress, not criminal justice.[193]

Considering the perspective of the protection of at risk persons, prosecution despite the invocation of immunity is crucial in the system of erasing safe harbours and avoiding impunity. As state conduct is part of the definition of torture under the Convention, allowing the defence of state immunity would render the whole system futile.

Conclusions & Recommendations

Any limits to the possibilities of investigating, prosecuting and penalising torture are a violation of the Convention. To ensure effective deterrence and thereby protection of persons at risk, immunities should not be allowed as a reason the dismiss claims in cases of torture.

Checklist:

21. States shall limit the application of immunity, both *ratione materiae* and *ratione personae*, to exclude torture.

3.2.4. Amnesties

Introduction

This section discusses which barriers to effective criminal prosecution might be created by amnesties and pardons for acts of torture. Unlike state immunity there is no right to amnesty or anything similar in general international law, therefore the discussion is focused on the effect of amnesties and pardons on the obligations under the Convention.

The Convention

Amnesties are not once mentioned in the Convention but they might violate several obligations, especially the requirement of adequate penalisation in Article 4(2),[194] and the duty to investigate and prosecute cases of torture.

The Committee and General International Law

To assess the impact of amnesties on the prosecution of torture, we will distinguish between three cases:

- Pardon or clemency granted by a head of state or parliament;
- Amnesties in the context of regime changes;
- Amnesties granted by truth and reconciliation commissions.

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[191] James Reynolds, 'Talks set to ease Pinochet rift' (BBC News, 20 June 2000) <http://news.bbc.co.uk/2/hi/americas/798114.stm> accessed 15 May 2015.

[192] Forcese (n.178) 167.

[193] International Law Commission 'Draft articles on Responsibility of states for Internationally Wrongful Acts, with commentaries' (2001) UN Doc A/56/10 128–9.

[194] See above §3.1.3. on Penalties for Torture.

Pardon or clemency granted by a head of state or a parliament

In cases where the head of state or the parliament may grant pardon, typically the perpetrator has gone through trial, and the pardon only removes the sentence, not the determination of his guilt. This is not in conflict with the duties to investigate and prosecute under the Convention, but likely violates Article 4(2) of the Convention, the requirement of adequate penalisation.

The Committee asked in the deliberations of the first state report of the Republic of the Congo whether there were any cases in which perpetrators of torture have been convicted and not immediately been pardoned,[195] thereby indicating this practice was reported to them by NGOs. Systemic pardoning of torturers is a violation of the Convention at least in Article 4(2); no penalty is hardly an adequate penalisation.

Apart from actual pardons granted to individual torturers, the issue of pardons for torturers has been discussed in the United States of America in the second term of George W. Bush as President and in the terms of Barack Obama. While conservatives pushed for a pardon of those who committed torture in the so-called War on Terror by George W. Bush in his last days in office,[196] the American Civil Liberties Union suggested Barack Obama should "pre-emptively" pardon George W. Bush and several members of his administration. As granting a pardon presupposes the guilt of the pardonee, pre-emptive pardoning would give the perception of guilt without charges being brought. This would be a strong statement by the government of their condemnation of torture, as prosecution in the United States of America is close to impossible.[197] While the idea seems to be striking to distance the incumbent government from and condemn torture, it violates the Convention not only in Article 4(2) (adequate penalisation) but also in the requirement of investigation and prosecution. The pre-emptive pardon is therefore not acceptable in states which ratified the Convention. These cases can only be solved by interpreting the immunities of former heads of states following the concept laid out before, not allowing immunity for violation of *jus cogens* norms.

It remains unclear whether most states have even the possibility to regulate for which offences pardon may be granted. Usually pardon is fully at the discretion of those who may grant it, its very nature is incompatible with the concept of the rule of law.

Amnesties in the context of regime changes

Amnesties in the context of regime changes are legally more clear to grasp and, arguably, more common in practice. Amnesties in this context are either granted to themselves by the old regime (*autoamnistia*)[198] or by the new government, as part of a deal with the former to avoid bloodshed in the transition or to leave old conflict lines behind and end a possible cycle of revenge and violence. But in all these cases, no investigation, prosecution or conviction takes places, thereby irreconcilably violating core provisions of the Convention. This is also the longstanding position of the Committee, which is also expressed verbatim in the General Comments No. 2 and 3.[199] The CCPR came to the same conclusion, it found in its General Comment No. 20 relating to

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[195] Committee against Torture, 54th session (Geneva, Switzerland, 23 April 2015).

[196] William Kristol, 'Before He Goes' (Weekly Standard, 08.12.2008) <http://www.weeklystandard.com/Content/Public/Articles/000/000/015/876qyutv.asp?pg=2> accessed 15 May 2015.

[197] Anthony D. Romero, 'Pardon Bush and Those Who Tortured' (New York Times, 08 December 2014) <http://www.nytimes.com/2014/12/09/opinion/pardon-bush-and-those-who-tortured.html?_r=0> accessed 15 May 2015.

[198] Burns and McBurney (n.144) 278.

[199] UNCAT General Comment No. 3 (n.84) 9.

Article 7 of the ICCPR (the prohibition of torture) amnesties being "generally incompatible [...] with such acts."[200]

Amnesties granted by truth and reconciliation commissions

More recent is the concept of truth and reconciliation commissions in times of transition. These are often endowed with the right to grant amnesties to facilitate their task to investigate and find the truth about what happened.[201] People fearing criminal prosecution are most likely less open about their own wrongdoing than those who can profit from an amnesty.

The potential of conflict with the provisions of the Convention depend on the exact mandate of the truth and reconciliation commission. Assumed the commission would conduct extensive investigation and prosecution in a similar manner for allegations of torture as well as for other severe crimes in the same period, only a violation of Article 4(2) – the punishment must fit the crime – would be left.

The Special Court for Sierra Leone had to face this issue, as the Lomé Agreement included an amnesty, and decided that an amnesty cannot cover crimes against humanity and other peremptory norms (of which torture is a part).[202] We suggest following this decision and not allow any amnesties which would cover torture, also not in cases granted by a truth and reconciliation commission.

Conclusions & Recommendations

Any limits to the possibilities of investigating, prosecuting and penalising torture are a violation of the Convention. Even though the trade-offs, especially in the case of truth and reconciliation commissions, are considerable, effective deterrence and thereby protection of persons at risk is only possible when no exceptions whatsoever are allowed.

Checklist:

22. States should not allow any discretion to grant pardon for torture;

23. States shall not enact any amnesties which extend to cases of torture;

24. States shall limit the mandate for truth and reconciliation commissions with regard to torture.

3.2.5. Statutes of Limitation

Introduction

This section will treat the mains difficulties posed by the existence of those statutes of limitations in domestic legislation, especially by taking into account the gravity of the crime of torture and the need to ensure that impunity will not appear as a means of allowing those criminal practices to occur.

Statutes of limitations (hereinafter SOL) – and its Civil Law correspondent, Prescription – can be defined as a law that prohibits a claim to be brought after a set period of time after the relevant injury occurs. The time frame in which a claim may be brought under such a statute, usually measured in a period of years, will vary by jurisdiction and gravity of the crime. In criminal law, SOL ensure that prosecutions will be brought in a timely manner, while evidence and witnesses remain available. As a due process issue, SOL "provide predictability by

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[200] "The Committee has noted that some states have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of states to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible." UNCCPR General Comment 20 (n.25) para 30.

[201] Lyal S. Sunga, 'Ten principles for reconciling truth commissions and criminal prosecutions' in Jose Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court – Essays in Honour of Professor Igor Blishchenko* (Brill 2009) 1082f.

[202] *Prosecutor v. Morris Kallon and Brima Buzzy Kamara,* Special Court for Sierra Leone, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber, 13 March 2004).

specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced."[203]

SOL are inserted in legislations in order to preserve evidence, meaning, the idea that the prosecutions shall be developed while the access to evidence is more practical. However, as discussed in Section 3.1.1. with regards to the definition of the crime of torture, this shall be conceived as an aggravated offence whose impunity shall be fought strongly. Thus, the abolishment of SOL is an important tool against impunity through time.

However, fighting impunity is not a matter restricted to legislation, and, especially, to statutes of limitations. Actually, one must focus on a broader view, so that the whole body of national laws shall reflect the willingness of states in establishing severe provisions in terms of torture criminalisation, and such a trend shall be accompanied by the inexistence of statutes of limitations.

The Convention

Although the Convention contains no specific provision on statute limitations, the committee against torture stresses in its general comments and concluding observations that this kind of provision hinders the compliance of state parties with the Convention.

The provisions seen as especially relevant on this matter are Articles 1, 4, and 12. Their importance stands for the gravity of the crime of torture and the consequent necessity of avoiding impunity. Thus, states shall be able to enable effective legislation taking into account that the existence of statutes of limitations, even whether they are long-term ones, somewhat shields the perpetrators of the crime of torture and allow for impunity through time. Therefore, when criminalising torture, states parties shall not undermine its scope by allowing for the preclusion of the prosecution of torture, based on statutes of limitation.

The Committee

The Committee has a crystallised pattern towards the complete elimination of statutes of limitations in domestic ATL in order to ensure compliance with the purposes of the Convention.

The Committee stresses, *inter alia,* that the existence of SOL with regards to torture within domestic systems enables acts of excessive use of force and brutality,[204] and, along with the existence of definitions not encompassing all the elements of Article 1 of the Convention, leave a room for impunity,[205] ultimately conflicting with states parties' obligations under the Convention.

The statutes of limitations is subject of concern not only with regards to the definition of the crime of torture itself, but also with regards to its interaction with other articles of the Convention. The General Comment No. 3 from the Committee spells out that the right of redress inserted in Article 14 can be severely impacted through the existence of SOL. Such an approach is linked to the fact that the existence of those limitations also undermines the possibility of the victim to achieve redress by virtue of time course as discussed below.

Along those lines, the Committee demonstrates special attention to the interplay with Article 4 of the Convention, so that in order for individuals to be prosecuted and convicted under the gravity of the offence perpetrated, no statutes of limitation shall be provided for in national laws.[206]

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[203] *United States v. Marion*, 404 U.S. 307 (1971) 321–2.

[204] UNCAT 'Concluding observations on United States (19 December 2014) UN Doc CAT/C/USA/CO/3-5.

[205] UNCAT 'Concluding observations on Sweden' (12 December 2014) UN Doc CAT/C/SWE/CO/6-7 para 6.

[206] See e.g. UNCAT 'Concluding observations on Japan' (28 June 2013) UN Doc CAT/C/JPN/CO/2 para 8.

Apart from Canada, this study could not find countries which really abolished statutes of limitations for torture. So far, it seems more likely to call examples of countries which still apply them, inter alia, Sweden,[207] Japan, Thailand, USA, Brazil, Latvia,[208] Slovenia,[209] Sierra Leone, and Germany.

General International Law

As regards to other international law instruments, it is noteworthy to mention the UN Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, which was borne out of the fear in the 1960's that in 1969 unapprehended German war criminals would no longer be prosecutable due to existing statutory limitations.[210]

In the beginning of its discussions, there was struggle among states as whether the elimination of SOL was a new rule or an existent one. States against such an approach raised the argument over the collision between the strict legality principle and the retroactivity in criminal law. Besides, they also claimed to the fact that the statutes of limitations was an essential principle within their domestic systems.[211]

Also customary international law reinforced the trend of elimination of SOL in relation to war crimes.[212] The aim was to enforce the international community machinery against impunity. More recently, the Rome Statute of International Criminal Court aligned its provision with such an understanding, safeguarding in Article 29, *verbis*: "The crimes within the jurisdiction of the Court shall not be subject to any statutes of limitations." It is important to clarify, however, that there is no retroactivity within the Rome Statute since the Court only has jurisdiction over crimes committed after the entry into force of the Statute on 1 July 2002.[213] Since this is a more recent instrument, it also strengthens this pattern towards elimination of those limitations.

With regards to the European Convention on Statutory Limitations of 1974, one must note that even though the amount of ratifications was not significant, this shall not be seen as a general trend that European states reject the non-applicability of statutory limitations to international crimes. In this sense, European states have adopted domestic legislation excluding the application of statutory limitations to some crimes, for instance, the crimes against humanity, and they have also ratified the Rome Statute which brings in its Article 29 no statutory limitations[214] for the related crimes.

The Inter-American Convention on Forced Disappearance of Persons, in its Article VII regulates that the "criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations."

Differently, neither the European Convention on Human Rights nor the American Convention on Human Rights has provisions regulating statute limitations. However, the case law of both ECtHR and the Inter-American Court of Human Rights (hereinafter IACtHR) seem to have an approach towards the necessity of not applying these limitations, in order to be compliant with Human Rights principles.[215]

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[207] UNCAT 'Concluding observations on Sweden' (12 December 2014) UN Doc CAT/C/SWE/CO/6-7 para 6.

[208] UNCAT 'Concluding observations on Latvia' (23 December 2013) UN Doc CAT/C/LVA/CO/3-5 para 8.

[209] UNCAT 'Concluding observations on Slovenia' (20 June 2011) UN Doc CAT/C/SVN/CO/3 para 7.

[210] Robert H. Miller, 'The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity' (1971) 65 American Journal of International Law 476, 480.

[211] Jean-Marie Henckaerts and Louise Doswald-Beck, *ICRC Customary International Humanitarian Law*, vol 1 (Cambridge University Press 2005) 614.

[212] Ibid.

[213] Rome Statute (n.48) Article 11.

[214] Ruth Alberdina Kok, 'Statutory Limitations in Criminal Law' (PhD thesis, Amsterdam Center for International Law 2007) 93–94.

[215] Ibid 95–103.

The most common argument *pro* statutes of limitations deals with the very issue of evidence. It is often said that evidence tends to disappear through the course of time, and that the more distant one is from the commission of the crime, the more unlikely to find satisfactory grounds of evidence in order to support the prosecution.

On the other hand, arguments *contra* statutory limitations construe the same evidence approach through different contours. Therefore, the evolution of DNA and other forensic techniques compensates the lapse of time, and provide for more accurate data and the capacity to gather substantial proof means not already disclosed for the international community when the arguments in favour were first raised. Nonetheless, the special character of the international criminality purports the idea that the passage of time may contribute to the evidence disclosure, especially with regards to dictatorial regimes whose torture features shall only be revealed to the public once the regime is over or that an open-access procedure has been set forth by the government.[216]

Yet it is important to mention how the matter is regulated with regards to the Genocide Convention. The treaty itself has no specific provision of SOL, however it shall benefit from a teleological interpretation. Therefore, it can be deemed incompatible with the Convention the enactment by states parties of legislation allowing for the applicability of statutes of limitations,[217] which would be tantamount to legitimate the evasion of criminals from their responsibility of having committed such a grave crime.

In terms of example, in the Concluding Observations for Latvia, the parameter of 10 years as a statute of limitation was deemed to be insufficient, and the state in question was said to amend its legislation in order to make sure that no statute of limitations would be allowed under national laws.[218]

In summary, we may say that from the practice of the Committee, the position of scholars and the practice arising from other international law instruments, it is important to have the entire abolishment of statutes of limitations. Hence, by eliminating these limitations they will be able to satisfactorily fight against impunity and to have the criminalisation of torture itself taken seriously by states.

From what was demonstrated above the existence of statutory limitations collides with the purposes of the Convention and therefore shall be eliminated from states' national laws. Nonetheless, as was evinced above, other important instruments of international law had eliminated SOL, meaning that this is an important compromise vis-à-vis the Convention in order to ensure effective systems of criminalisation and punishment within the domestic legal order.

The longest prescription within the domestic system as a paradigm

In dealing with this problematic, a common question raises in terms of understanding whether applying the longest prescription within the domestic legislation would suffice or whether states shall entirely eliminate statute of limitations from their torture legislation.

In accordance with our research, the answer might seem that in order to have states parties compliant with the purposes of the Convention it is crucial to entirely abolish statutory limitations. This position is reflected in the Committee's concluding observations and general comments, as well by the scholars' works. For instance, in the Concluding Observations for Sierra Leone, it stated "[i]n the light of its general comments No. 2 (2008) on the implementation of article 2 by states parties and No. 3 (2012) on the implementation of article 14 by states parties, the Committee reiterates to the state party the long-established *jus cogens* prohibition of torture, according to which the prosecution of acts of torture should not be subjected to any condition of legality or statute of limitation."[219] In addition, the Committee stated in the Concluding Observations for Sweden that the "party

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[216] Ruth Alberdina Kok, 'Statutory Limitations in Criminal Law' (PhD thesis, Amsterdam Center for International Law 2007) 208–211.

[217] See William Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge University Press 2000) 414.

[218] UNCAT 'Concluding observations on Latvia' (23 December 2013) UN Doc CAT/C/LVA/CO/3-5.

[219] UNCAT 'Concluding observations on Sierra Leone' (20 June 2014) UN Doc CAT/C/SLE/CO/1 para 9.

should ensure that acts amounting to torture, as defined in article 1 of the Convention, are not subject to any statute of limitations in its law."[220]

Besides, from the research undertaken, neither the scholars nor the Committee show any tendency to accept the longest prescription as a paradigm. From what was demonstrated above, the entire exclusion of SOL in domestic law in the only way to fight impunity in relation to a crime whose consequences cannot be erased through the course of time.

In other words, it is difficult to reconcile the suffering imposed by torture practices with the existence of SOL. We also have to take into account the perspective of the victims and the potential at risk persons. Surely, for those, the consequences will never be completely erased over time and the laws must reflect this factual reality as well.

Conclusions & Recommendations

In view of the above, it is possible to state how crucial the elimination of SOL is for states parties in order to fight impunity within their own jurisdiction contours.

It is self-evident that this one of the elements that still requires a strong work on the part of the states, calling upon a dramatic review of their own laws in order to remove internal obstacles.

Even from a Constitutional approach there might be constraints since some major laws of states requires the existence of SOL, for all the crimes regulated by their criminal codes or special criminal legislation. Thus, the changes which are imposed by the Convention can be very demanding in this regard and so deserve a special compromise in order to achieve its the desired purposes.

Finally, although this seem to be a very contentious point, in view of the gravity of the offence at stake, the statutes of limitations must not be part of nationals legislation, and this is a fundamental element for strengthening the Conventional obligations assumed by states.

Checklist:

25. States shall not provide for statutes of limitations with regards to the crime of torture;

26. States should revise the whole set of criminal legislations to ensure no provision would provide for statutes of limitations with regards to the crime of torture;

27. States should not use the highest prescription within their national system as a satisfactory statute of limitation.

3.2.6. The Exclusionary Rule

Introduction

The exclusionary rule is a legal safeguard for detainees, providing that evidence seized by law enforcement in an unlawful manner shall not be subsequently used in any proceeding. Evidence derived by torture is unquestionably tainted given the absolute condemnation of torture, and this section will show that the exclusionary rule in such cases is an absolute evidentiary bar. By explicitly stating the exclusionary rule in its ATL, a state takes a large step in protecting at risk persons. As a normative function, following the exclusionary rule ensures that domestic courts are untainted by the illegality of individual actors and endorses the respect for human rights inherent in the prohibition of torture. As a practical function, the exclusionary rule bars a potential torturer from benefiting from his offence since any evidence produced will be unusable, and thus acts as a deterrent to torture.

[220] UNCAT 'Concluding observations on Sweden' (12 December 2014) UN Doc CAT/C/SWE/CO/6-7.

The Convention

Article 15 explicitly mandates that member states must enact the exclusionary rule in relation to statements that are procured by means of torture.[221] This evidentiary bar applies to all proceedings, except against a person accused of torture in order to prove that the statement was in fact elicited. The text requires that the statement be "established to have been made as a result of torture," leaving unanswered who has the burden of proving the existence of torture. The Convention is also silent on evidence beyond elicited statements, leaving open the question whether derivative and physical evidence are similarly excluded from proceedings. Finally, it is not explicit whether the Convention requires that the prohibition be applied to CIDT as well as torture.

The Committee

Concluding observations and jurisprudence by the Committee reiterate the exclusionary rule, recommending that state legislation should explicitly provide that statements obtained as a result of torture may not be used or invoked as evidence in any proceedings.[222] In the aftermath of September 11, the Committee reminded all state parties in its General Comment No. 2 that the obligation in Article 15 is non-derogable.[223] States should ensure that their legislation, "including anti-terrorism laws," is in line with the rule's provisions.[224]

The Committee has made suggestions to states to enact laws that will bolster respect for the exclusion of tainted evidence. Is has recommended that judges be required to ask persons arriving from police custody how they have been treated, in order to promptly elicit from detainees any evidence of ill-treatment that would require application of the exclusionary rule.[225] Also, the Committee has recommended that states "take all steps necessary" to ensure that convictions are based on evidence other than a confession by the person charged, in order to reduce the systemic potential for extracting coerced confessions.[226]

General International Law

The international community outside the Convention framework is in line with the Committee. Many treaties and authoritative documents explicitly reference the absolute prohibition, including the UN General Assembly's Declaration against Torture in 1975,[227] the IACPPT,[228] and the Robben Island Guidelines.[229] While there is no mention of the exclusionary rule in many general human rights conventions, the prohibition of torture as a rule of customary international law creates implicit treaty obligations on member states. Thus, the CCPR has read the prohibition of torture-tainted evidence into the ICCPR's Article 7's prohibition of torture,[230] and the ECtHR has similarly read an implicit rule into the ECHR Article 3 prohibition of torture, as intrinsic to its Article 6 fair

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[221] Convention (n.1) Article 15: "Each state Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.".

[222] See myriad examples in the 'Report of the Committee Against Torture' 47th – 48th sessions (2011-2012) UN Doc A/67/44, and 'Report of the Committee Against Torture' 51st – 52nd sessions (2013-2014) UN Doc A/69/44; See also UNCAT, 'Ali Aarrass v. Morocco' (24 June 2014) CAT/C/52/D/477/2011 para 10.8.

[223] UNCAT General Comment No. 2 (n.13) para 6.

[224] UNCAT 'Concluding observations on Sri Lanka' (8 December 2011) UN Doc CAT/C/LKA/CO/3-4 para 11.

[225] UNCAT 'Concluding observations on Belarus' (7 December 2011) UN Doc CAT/C/BLR/CO/4; UNCAT 'Concluding observations on Sri Lanka' (8 December 2011) UN Doc CAT/C/LKA/CO/3-4 para 11.

[226] UNCAT 'Concluding observations on Morocco' (21 December 2011) UN Doc CAT/C/MAR/CO/4 para 17.

[227] UN Declaration (n.114) Article 12.

[228] IACPPT (n.24) Article 10.

[229] Robben Island Guidelines (n.43) No. 29.

[230] UNCCPR General Comment 20 (n.25) para 12.

trial guarantee.[231] The exclusionary rule also receives understandably broad support from NGOs, due to its inherently protective quality.[232]

Special Rapporteur Manfred Nowak referenced the twofold rationale behind Article 15:

> Firstly, confessions or other information extracted by torture is usually not reliable enough to be used as a source of evidence in any legal proceeding. Secondly, prohibiting the use of such evidence in legal proceedings removes an important incentive for the use of torture and, therefore, shall contribute to the prevention of the practice.[233]

The importance of the exclusionary rule is clarified in Nowak's statement. The rule is not just a reflection of the general prohibition against torture. It is a practical tool of prevention. An integral concern over whether or not torture will exist in a society is the professional ramifications on a potential torturer – if it becomes proportionally "worth it" for a law enforcement officer to engage in torture to obtain convictable evidence, she will use it.[234] Nowak's statement points out how the exclusionary rule functions as a deterrent by removing that incentive to use torture at the individual level, both because it's outcome cannot be used in court, and such evidence will likely not be reliable regardless. While there is logically a dearth of studies on the actual deterrent effect of the rule, "common-sense assumptions" tell us "with some confidence that […] excluding evidence obtained through torture would have an impact on its incidence."[235] In effect, the exclusionary rule is a valuable preventative tool because it renders one of the primary aims of torture redundant.

There is consensus that the inclusion of the exclusionary rule as related to evidence obtained through torture is a requirement under international law. The rule is a fundamental due process issue and is directly linked to ensuring the spirit of the Convention. The exclusionary rule also binds states that are not party to the Convention, ICCPR or any other human rights or humanitarian treaty, since the general prohibition of torture and other ill-treatment is itself a rule of customary international law.[236] The issue remains, though: what is the required scope of the protection in a state's ATL? Three primary questions arise, each discussed below.

Which party has the burden of proof over the existence of torture?

Convention Article 15 requires that a statement be excluded if it is "established" to be elicited by torture, but does not address which party holds the burden of proof on this issue. The Committee places the burden on the state to ascertain whether or not statements were made under torture, where an individual makes such an allegation.[237] In *P.E. v. France*, the Committee found that the state party bears the burden of proof as an implicit consequence of the absolute prohibition of torture on states.[238] According to the Committee, a state party is under an obligation to verify the content of a complainant's allegations, and where it does not refute the

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[231] ECtHR *Harutyunyan v. Armenia* App no 36549/03 (28 June 2007) para 63.

[232] See e.g. Amnesty International 12–Point Program (n.173) No. 8; UNCAT 'Human Rights Watch: Submission to the United Nations Committee against Torture' (17 October 2011) UN Doc CAT/NGO/DEU/47/8556 8ff.

[233] Note by the Secretary-General transmitting the interim report of the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment (14 August 2006) UN Doc A/61/259 para 45.

[234] Rodley Interview (n.3).

[235] Carver (n.11) 4.

[236] Nigel Rodley, *The Treatment of Prisoners Under International Law* (2nd edn Oxford University Press, 1999) 74.

[237] UNCAT, 'P.E. v. France' (19 December 2002) UN Doc CAT/C/29/D/193/2001 para 6.3; UNCAT, 'G.K. v. Switzerland' (15 May 2003) UN Doc CAT/C/30/D/219/2002 para 6.10.

[238] UNCAT, 'P.E. v. France' (19 December 2002) UN Doc CAT/C/29/D/193/2001 para 6.3.

allegations nor include any information on this question in its observations to the Committee, it may be found to have violated its obligations under Article 15 of the Convention.[239] The IACtHR follows the same reasoning.[240]

The CCPR also places the burden on the state, as rooted in ICCPR Article 7's prohibition against torture and Article 14(3)(g)'s guarantee that in a criminal case an individual may not be compelled to testify against himself or to confess guilt. In *Chiti v. Zambia* the Committee held that the "right not to testify against oneself must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities," and that the state party had the burden to prove that statements made by the accused were given of his own free will.[241] The ECtHR and the African Commission on Human and Peoples' Rights also follows this reasoning.[242] The CCPR also noted that the state party is in a much more effective position than an individual to conduct investigations and gather evidence, and has a duty to do so in good faith.[243] In his 2002 general recommendations, the Special Rapporteur on Torture even recommended that the burden on the state is to prove a confession was not obtained by unlawful means "beyond reasonable doubt."[244]

Treaty bodies and other experts are in agreement that the burden should be on the state party to prove that statements by detainees are provided of their own free will, suggesting an international obligation of states, regardless of their membership to the Convention, to follow this norm. states should not reverse this burden in practice, and most certainly not enact legislation that rests the burden on the complainant. Both the Committee and the CCPR took issue with Section 16 of Sri Lanka's Prevention of Terrorism Act No. 48 of 1979, which effectively reversed the burden of proof and violated the state's international obligations even though the threshold of proof required by the individual was "placed very low."[245] Where an individual alleges his statements obtained during detention were elicited through torture, states must take up the burden of proof to show otherwise, and best practice would be for its ATL to explicitly endorse said burden.

Does the exclusionary rule cover derivative evidence?

Convention Article 15 explicitly bans "statements" made as a result of torture, but is silent as to evidence otherwise derived from those statements, or "derivative evidence." It is worth noting that in common law domestic systems, these types of evidence are covered under two separate legal doctrines: the exclusionary rule, and "fruit of the poisonous tree." The fruit of the poisonous tree doctrine (hereinafter FOPT) bolsters the exclusionary rule by ensuring that evidence subsequently derived from unlawful methods is additionally barred from court.[246] While the exclusionary rule is an absolute protection against the direct abuse of a detainee in most domestic systems, FOPT can be derogated where law enforcement can show they would have "independently" or "inevitably" found the disputed evidence without the illegal behaviour, or generally acted "in good faith."[247]

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[239] UNCAT, 'Ktiti v. Morocco' (5 July 2011) UN Doc CAT/C/46/D/419/2010 para 8.8.

[240] IACtHR, *Teodoro Cabrera Garcia and Rodolfo Montiel Flores v. Mexico* Case No. 12, 449 (26 November 2010) paras 134–6.

[241] UNCCPR, 'Chiti v. Zambia' (28 August 2012) UN Doc CCPR/C/105/D/1303/2004 para 12.6, *citing* UNCCPR 'General Comment 32: Article 14, Right to equality before courts and tribunals and to fair trial' (23 August 2007) UN Doc CCPR/C/GC/32.

[242] ECtHR *El Haski v. Belgium* App no 649/08 (25 September 2012) para 86; ACtHPR, *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Communication 334/06, 1 March 2011 para 218.

[243] UNCCPR, 'Aleksandr Butovenko v. Ukraine' (19 July 2011) UN Doc CCPR/C/102/D/1412/2005 para 7.3.

[244] UNCCPR 'Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38' UN Doc E/CN.4/2003/68 para 26.

[245] UNCCPR, 'Nallaratnam Singarasa v. Sri Lanka' (23 August 2004) UN Doc CCPR/C/81/D/1033/2001 para 7.4. See also UNCAT 'Concluding observations on Sri Lanka' (8 December 2011) UN Doc CAT/C/LKA/CO/3-4 para 11.

[246] See *Silverthorne Lumber Co. v. US*, 251 U.S. 385 (1920); compare to *Weeks v. United States*, 232 U.S. 383 (1914) [establishing the modern United States exclusionary rule].

[247] See e.g. *Nix v. Williams*, 467 U.S. 431 (1984), *United States v. Leon*, 468 U.S. 897 (1984).

Possibly because international law is not so developed as domestic common law on this issue, sources rarely distinguish between the exclusionary rule and FOPT. As such the question of whether international law requires the exclusion of derivative evidence, or indeed any evidence beyond statements made by the torture victim, is muddled. It is clear in practice that the Convention, and general international law, require the exclusion of more than statements made during illegal interrogation. The Committee and various NGOs all regularly comment on the procedural requirement of suppressing all evidence obtained by the use of torture, even where the relevant interpretive document only mentions "statements."[248]

There is also support for the broad exclusion of derivative evidence, although this interpretation is not universal. The Committee addressed its concern to the United Kingdom in 1999 that rules of evidence in Northern Ireland permitted admission of derivative evidence, even where the confession was excluded, but little has been suggested since.[249] The IACtHR has been more robust, stating that "the absolute character of the exclusionary rule is reflected on the prohibition of granting probative value not only to the evidence obtained directly under duress, but also to evidence deriving from the said act."[250] But the ECtHR, which applies the evidentiary ban through a "fair trial" framework, appears willing to allow derogation of the ban on derivative evidence when it has little bearing on the victim's conviction or sentence, and is obtained as a result of CIDT rather than torture.[251]

The exclusionary rule appears to ban all forms of evidence derived from torture, but international law may allow for derogation of derivative evidence. Given that the practice of using derivative evidence powerfully weakens both the deterrent and normative value of the exclusionary rule, a complete ban on derivative evidence is a solid means of protecting detainees from torture. The best practice would be for a state's ATL to explicitly provide for a ban on all evidence (verbal, physical, direct and derivative), rather than copying the ambiguous language of Convention Article 15.

Does the exclusionary rule apply to evidence obtained through CIDT?

While the Convention Article 15 only references the exclusion of statements obtained through torture, the Committee has taken the strong stance that Article 15 is obligatory "as applied to both torture and ill-treatment."[252] This view is strongly supported outside the Convention framework as well.[253] The ECtHR explicitly answered that the use of statements obtained as violation of Article 3 render the proceedings an automatic breach of the right to fair trial, "irrespective of the classification of the treatment as torture, inhuman or degrading treatment."[254] The IACtHR has not been so explicit, but has read CIDT to be part of their Article 10 exclusionary rule.[255] Other authoritative documents on torture, including the Robben Island Guidelines and the 1975 GA Declaration against Torture, explicitly include CIDT as well.[256]

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[248] See myriad examples in the 'Report of the Committee Against Torture' 47th – 48th sessions, (2011-2012) UN Doc A/67/44, and 'Report of the Committee Against Torture' 51st – 52nd sessions, (2013-2014) UN Doc A/69/44; Article 5 Initiative (n.14) 31, 42.

[249] 'Report of the Committee Against Torture' 21st – 22nd sessions (1998-1999) UN Doc A/54/44 para 76(d).

[250] IACtHR, *Teodoro Cabrera Garcia and Rodolfo Montiel Flores v. Mexico* Case No. 12, 449 (26 November 2010) para 167.

[251] ECtHR *El Haski v. Belgium* App no 649/08 (25 September 2012) para 85; See also ECtHR *Gäfgen v. Germany* App no 22978/05 (1 June 2010) para.73 [citing United States case law on exceptions allowing derivative evidence], and 178.

[252] UNCAT General Comment No. 2 (n.13) paras 3, 6; Supported by Article 5 Initiative (n.14) 42; See also myriad examples in the 'Report of the Committee Against Torture' 47th – 48th sessions (2011-2012) UN Doc A/67/44, and 'Report of the Committee Against Torture' 51st – 52nd sessions (2013-2014) UN Doc A/69/44.

[253] *Contra*, Burgers and Danelius (n.29) 148.

[254] ECtHR *El Haski v. Belgium* App no 649/08 (25 September 2012) para 85.

[255] IACtHR, *Teodoro Cabrera Garcia and Rodolfo Montiel Flores v. Mexico* Case No. 12, 449 (26 November 2010) paras 134–6.

[256] Robben Island Guidelines (n.43) No. 29; UN Declaration (n.114) Article 12.

Currently, international jurists and academics will read CIDT into treaty provisions on the exclusionary rule that only refer to torture. This demonstrates a strong obligation on states to also bar evidence from domestic proceedings that is obtained through use of CIDT. The best practice for states, then, is to include CIDT in its ATL exclusionary rule for clarity.

Conclusions & Recommendations

The exclusionary rule is a requirement under international law and the Convention specifically, and a state's ability to protect at risk persons will be strengthened by adding basic provisions in its ATL. The Committee has found in regard to Article 15 that "states parties may choose the measures through which they fulfil these obligations, so long as they are effective and consistent with the object and purpose of the Convention."[257]

That said, the exclusionary rule should be explicit in a state's ATL. At a minimum, where a state already has the rule in its procedural code, the code should make explicit reference to the prohibition of coercion during interrogations. Ideally, ATL should explicitly put the burden on the state to prove that challenged evidence was received of the complainant's free will, but explicit mention is not required as long as the state applies this burden in practice. ATL should explicitly state that the exclusionary rule applies to all evidence, not just statements or confessions, and applies to evidence gained through CIDT. It is suggested that the exclusionary rule applies to all derivative evidence as well, but this may not be an international obligation on states. Finally, states are encouraged to enact procedural laws bolstering respect for the exclusion of torture-tainted evidence.

Checklist:

28. States shall explicitly exclude evidence derived by torture in all proceedings;
29. States shall place the burden on the prosecution to prove that statements by detainees are provided of their own free will;
30. States shall apply the exclusionary rule to all forms of evidence: physical and verbal, direct and derivative;
31. States should apply the exclusionary rule to evidence derived by CIDT;
32. State laws should ensure that a confession by the person charged may not be the sole basis of his conviction.

3.3. Non-Criminal Legislation

3.3.1. Non-Refoulement

Introduction

Non-refoulement is a customary principle of international law reaching beyond the Convention into refugee law and general human rights law. The principle interacts with torture law in that a state has a positive duty not to expel an individual from its territory to a receiving state where he is at risk of being tortured. As such, non-refoulement is one of the strongest ways a state can prevent torture from occurring: by not acting to deport an at risk person.

The Convention

The principle of non-refoulement is enshrined in Article 3(1). The wording of the text places an obligation on state parties to not "expel, return ('*refouler*') or extradite" a person from its territory to a state where there are "substantial grounds for believing that he would be in danger of being subjected to torture." While there is some guidance in Article 3(2) on how to interpret this principle in practice, the concept of "substantial grounds" requires looking outside the Convention for a proper understanding of obligations. Also, Article 3 does not mention CIDT, so there is question whether a state has a duty not to *refouler* a person who faces ill-treatment that does not amount to torture.

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[257] UNCAT General Comment No. 2 (n.13) para 6.

The Committee

There are numerous concluding observations and considerable Committee jurisprudence on the principle of non-refoulement in the face of torture, all reiterating the state obligation under the Convention.[258] Observations on non-refoulement are one of the most frequent comments by the Committee, and regularly appear as "concerns" even for states with admirable torture records within their territories.[259] Typically, treatment will arise in the context of asylum procedures for refugee status, as these procedural hearings are the domestic point at which individual cases of deportation and extradition are decided. In this context, the Committee frequently has call to express "concern" over a state party's existing extradition and deportation procedures, and emphasise the obligation to "take all necessary measures" to ensure respect for the principle of non-refoulement.

General International Law

Non-refoulement is a well-established principle of international law that arguably reaches the status of a peremptory norm from which no derogation is possible.[260] The principle is most prominent in refugee law, and is famously found in the 1951 Geneva Convention on the Status of Refugees (hereinafter Refugee Convention).[261] The principle of non-refoulement specifically in the face of torture is also explicit in human rights instruments, both international and regional.[262]

Where the principle is not explicit, treaty bodies and courts have read an implicit recognition into human rights instruments. The CCPR has asserted that the obligation to respect and ensure the rights under the ICCPR entails the obligation to respect non-refoulement in the face of "irreparable harm," such as torture.[263] The ECtHR produces consistent case law holding that the prohibition of torture in the European Convention implicitly includes an absolute duty of non-refoulement.[264] In the *Furundziia* case at the ICTY, the Trial Chamber stressed that human rights law contains not only an absolute duty on states to not torture, but also to take positive actions to avoid torture, reflected here as not sending individuals to places where they will be at risk.[265]

It is important to note, in the context of understanding state obligations regarding non-refoulement, that the protections are substantively different between refugee law and human rights law. To be a person with a right to non-refoulement under the Refugee Convention, one must face a "well-founded fear of persecution" in the receiving state, based on one's race, religion, nationality, or membership in a particular social group or political opinion.[266] The protection can be denied under refugee law based on exceptions of national security.[267] Under

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[258] See myriad examples in 'Report of the Committee Against Torture' 47th – 48th sessions (2011-2012) UN Doc A/67/44 and 'Report of the Committee Against Torture' 51st – 52nd sessions (2013-2014) UN Doc A/69/44.

[259] UNCAT 'Concluding observations on Germany' (12 December 2011) UN Doc CAT/C/DEU/CO/5, para 25; UNCAT 'Concluding observations on France' (20 May 2010) UN Doc CAT/C/FRA/CO/4-6, paras 14–5; UNCAT 'Concluding observations on Switzerland' (25 May 2010) UN Doc CAT/C/CHE/CO/6 para 10.

[260] Jean Allain, 'The *jus cogens* Nature of Non-refoulement' [2001] Int J Refugee Law 533, 541; For the customary nature of the principle, see Vincent Chetail, 'The Transnational Movement of Persons Under General International Law - Mapping the Customary Law Foundations of International Migration Law' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 36.

[261] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

[262] IACPPT (n.24) Article 13(4); Charter of Fundamental Rights of the European Union, 26 October 2012, Article 19(2); Robben Island Guidelines (n.43) No. 15.

[263] UNCCPR 'General Comment 31: The Nature of the General Legal Obligation Imposed on states Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 12; See also UNCCPR General Comment 20 (n.25) para 9.

[264] ECtHR *Soering v. United Kingdom* App no 14038/88 (7 July 1989) paras 88–91; ECtHR *H.L.R. v. France* App no 24573/94 (29 April 1997) paras 34–5; ECtHR *Saadi v. Italy* App no 37201/06 (28 February 2008) para 125.

[265] *Furundziia* (n.13) para 148.

[266] Refugee Convention (n.261) Article 33(1).

[267] Ibid Article 33(2).

human rights law an individual is covered by non-refoulement if there is sufficient likelihood of human rights violations (most commonly torture) in the receiving state regardless of the reasons for his ill-treatment, and no exceptions are recognized.[268] These separate protections can be confused, because both will arise during domestic asylum procedures. It is therefore highly important to keep clear that an asylum seeker who alleges that he faces torture in the receiving state is not required to meet the grounds for asylum protections under the Refugee Convention in order to be protected by non-refoulement under human rights law.[269]

The principle of non-refoulement where the individual faces torture in the receiving state is plainly an obligation under international law and the Convention specifically. It is next necessary to define the scope of the protection, which is left open by the Convention. The positive obligation under Article 3 falls upon a state when "substantial grounds" exist for believing torture will occur in the receiving state. Therefore the next step is to define this trigger, and how to know when it is met.

How to determine whether "substantial grounds" exist

The notion of "substantial grounds" under Article 3 has been the focus of much jurisprudence and reporting. Convention Article 3(2) is a starting point, stating that the reviewing body shall take into account all relevant considerations, including where applicable "the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights." The wording of Article 3(2) suggests that a state being known as a systematic violator of human rights would be one step toward a finding of "substantial grounds" that an individual sent there would be at risk of torture, but that there are other grounds that must also be considered.

The Committee's source on point in this issue is their General Comment No. 1, which guides the determination of whether a state has breached its Article 3 duties.[270] The Committee has held that non-refoulement obligations must be assessed on the merits of each individual case[271] and provides a non-exhaustive list of factors that may be relevant, including the grounds in Article 3(2).[272] The jurisprudence of the Committee is consistent that the grounds in Article 3(2) are not alone sufficient, and the risk of torture must also be "foreseeable, real and personal" to the individual,[273] meaning existing personally in the author and being a currently-felt risk. Significant case law reiterates the two-pronged political/personal test, and the wording is regularly copied into concluding observations,[274] so further guidance is valuable to interpret these standards.

The case law of the ECtHR is useful to help refine the duties under the Convention by analogy, as they also use a "substantial grounds" test that focuses on foreseeability of harm. The ECtHR has determined that the body reviewing an individual's case must assess the foreseeable consequences of removal in light of the general situation in the receiving state at the time, based on facts "which were known, or ought to have been known, at the time of the expulsion."[275] The Court in *Chahal v. UK* acknowledged a state's well-established right to control

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[268] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection under International Law* (Cambridge University Press 2003) 155.

[269] For a discussion on the interplay between human rights law and refugee law in asylum applications, see Vincent Chetail 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marin (ed), *Human Rights and Immigration, Collected Courses of the Academy of European Law* (Oxford University Press 2014).

[270] UNCAT 'General Comment No. 1: Implementation of Article 3 of the Convention on the context of article 22' (16 September 1998) UN Doc A/53/44, annex IX.

[271] UNCAT 'Concluding observations on Mongolia' (20 January 2011) UN Doc CAT/C/MNG/CO/1 para 13.

[272] UNCAT General Comment No. 1 (n.270) para 8.

[273] UNCAT, 'X.Q.L. v. Australia' (20 June 2014) UN Doc CAT/C/52/D/455/2011 para 9.3; UNCAT, 'Y.G.H. et al v. China' (17 December 2013) UN Doc CAT/C/51/D/434/2010 para 8.2; UNCAT, 'A.R. v. Netherlands' (14 November 2003) UN Doc CAT/C/31/D/203/2002 para 7.3.

[274] See myriad examples in 'Report of the Committee Against Torture' 47th – 48th sessions (2011-2012) UN Doc A/67/44 and 'Report of the Committee Against Torture' 51st – 52nd sessions (2013-2014) UN Doc A/69/44.

[275] ECtHR *Cruz Varas and Others v. Sweden* App no 15576/89 (20 March 1991) para 76.

the entry, residence and expulsion of aliens, but also asserted that this right is subject to their treaty obligations.[276] It emphasised that national interests – here, suspicion of terrorism – cannot override the interests of the individual where substantial grounds have been shown for believing he would be subjected to ill-treatment if expelled.[277]

The Special Rapporteur on Torture in 2004 further clarified the 2-pronged "political considerations" / "personal circumstances of the applicant" test by providing measurable standards.[278] To test the situation prevailing in the receiving state, the Special Rapporteur advocated turning to an earlier Committee definition on "systematic practice of torture" which, in sum, described circumstances in a state that encompass torture "both as a state policy and as a practice by public authorities over which a Government has no effective control."[279] A reviewing body can take this definition and apply it to the determination of whether an individual might be endangered by said violations of human rights if deported to that state. This more objective test would then be matched by an assessment of how personally vulnerable the person is whose removal is at stake, looking at factors such as whether the individual had previously been tortured, or had recently engaged in controversial political activities.[280] These two factors together may provide an assessment over whether there are sufficient grounds to believe an individual would be tortured in the receiving state, thus triggering the assessing state's obligation of non-refoulement.

The burden of proof over whether "substantial grounds" exist

As the preceding question shows, proving whether substantial grounds exist to believe that an individual would be subjected to torture if he were returned to the receiving state is a difficult task. Between this procedural difficulty, and in line with the fact that non-refoulement is a state obligation rooted in the absolute prohibition of torture, one could expect that international law would place the burden of proof on the state to negate the allegation of substantial grounds. However, the practice of treaty bodies and courts tends to follow the traditional notion that the proponent of evidence bears the burden to prove its truth.

When a case reaches the Committee, it is in the form of an individual complaint that the state has breached its Article 3 obligations in a prior domestic hearing by attempting to expel, return or extradite him.[281] Committee General Comment No. 1 places the initial burden on the applicant, which is reinforced by jurisprudence.[282] It is the responsibility of the author of the complaint to establish a prima facie case of admissibility, and to present an arguable case on the merits. The author must plead a factual basis for his position sufficient to require a response from the state party. The grounds must go beyond mere theory or suspicion in establishing a danger, but the risk "does not have to meet the test of being highly probable." Only when the author has provided a sufficient level of credible detail may the burden of proof shift to the state.[283] At all times, the state is obliged under the Convention to cooperate fully with the Committee and make available all relevant and necessary information.[284]

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[276] ECtHR *Chahal v. United Kingdom* App no 22414/93 (15 November 1996) para 73.

[277] Ibid paras 78–80.

[278] UNCHR 'Report of the Special Rapporteur' in 'Torture and other cruel, inhuman or degrading treatment or punishment' (1 September 2004) UN Doc A/59/324 para 34.

[279] Ibid para 37, *citing* UNGA 'Official Records of the General Assembly' Forty-eighth Session, Supplement No. 44, Addendum 1 UN Doc A/48/44/Add.1 para 39.

[280] UNCHR Report of the Special Rapporteur (1 September 2004) (n.278) para 38.

[281] Convention Article 22 authorizes the individual complaints procedure. This is an opt-in Article to the Convention that states are encourages to ratify to allow nationals access to Committee review.

[282] UNCAT General Comment No. 1 (n.270) paras 4–6; Reiterated in UNCAT, 'Zare v. Sweden' (12 May 2006) UN Doc CAT/C/36/D/256/2004 para 9.5.

[283] UNCAT, 'A.S. v. Sweden' (15 February 2001) UN Doc CAT/C/25/D/149/1999 para 8.6.

[284] Convention (n.1) Article 22(4); See also UNCAT, 'Agiza v. Sweden' (20 May 2005) UN Doc CAT/C/34/D/233/2003 para 13.10.

Outside the Convention framework, decisions are limited on the burden of proof in refoulement claims. The ECtHR also places the burden on the applicant to prove there are substantial grounds for believing he would be exposed to a real risk upon being expelled from the state.[285] In *R.C. v. Sweden* the Court found that where the applicant produces medical reports that show a strong possibility that an applicant's injuries were caused by torture, it is the duty of the state to "remove any doubts" about the risk of his being subjected to ill-treatment again if his expulsion proceeds.[286] In its Handbook on the determination of refugee status, the UN High Commissioner for Refugees notes that while the burden of proof rests on the applicant, given the vulnerable circumstances of asylum seekers the duty to ascertain and evaluate the relevant facts is shared between the applicant and the examiner, who is in a better position to do so.[287] In some circumstances the allegations of the applicant may not be susceptible to proof even through independent investigation, in which case if the applicant's account appears credible he should be given the benefit of the doubt, absent strong reasons to the contrary.[288]

Does non-refoulement also apply to the risk of CIDT?

In one of the few areas that the Committee draws a marked distinction between torture and CIDT,[289] the Committee asserted explicitly in its General Comment No. 1 that Article 3 only applies to deportations exposing an individual to a real risk of torture, not breaches of his rights under Article 16.[290] The Committee has reiterated this distinction in case law[291] unfortunately without offering reasons.

Unlike the Committee, other human rights bodies apply the principle of non-refoulement where an individual faces a real risk of CIDT in the receiving state. The CCPR views that states parties to the ICCPR "must not expose individuals to the danger of torture or [CIDT] upon return to another country by way of their extradition, expulsion or refoulement."[292] The ECtHR held the same in *Soering v. UK*, finding that the United Kingdom would violate Article 3 of the European Convention if the applicant were to be extradited, because he would be exposed to a "real risk" of inhuman or degrading treatment.[293] While there is no case law to develop it, Article 13 of the IACPPT provides that a person shall not the extradited nor returned to a state when there are grounds to believe he will be subjected to CIDT.[294] In reference to state obligations under human rights law on the issue, the ICTY Trial Chamber has held that "international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment)."[295]

International law is quite consistent in opposition to the Committee's stance on this issue. Having made no justification for its reasoning as yet, the Committee's decision to not allow non-refoulement protections to potential victims of CIDT is problematic. Therefore, while non-refoulement in the face of CIDT may not

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[285] ECtHR *N.A. v. United Kingdom* App no 25904/07 (17 July 2008) para 111.

[286] ECtHR *R.C. v. Sweden* App no 41827/07 (9 March 2010) paras 53, 55.

[287] UNHCR 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status' (2011) UN Doc HCR/1P/4/enG/Rev. 3 para 196.

[288] Ibid.

[289] See above §3.1.1. Definition of Torture: Obligation to criminalise CIDT.

[290] UNCAT General Comment No. 1 (n.270) para 1.

[291] UNCAT, 'B.S. v. Canada' (14 November 2001) UN Doc CAT/C/27/D/166/2000 para 7.4.

[292] UNCCPR General Comment 20 (n.25) para 9.

[293] ECtHR *Soering v. United Kingdom* App no 14038/88 (7 July 1989) paras 91–2; see also ECtHR *Chahal v. United Kingdom* App no 22414/93 (15 November 1996) para 96.

[294] IACPPT (n.24) Article 13.

[295] *Furundzija* (n.13) para 148.

currently be a direct obligation under the Convention, it is the trend in international law and states are advised to be aware of this when considering deportation cases.

The obligation to have adequate review procedures

The principle of non-refoulement means more than just having a provision against refoulement in domestic legislation. "Non-refoulement is an obligation on state Parties to establish procedural safeguards and to make sure that extradition practices do not undermine the principle of non-refoulement, and that decisions to expel individuals are a result of due process and fair hearings."[296] As such, Article 3 "implies the establishment of a competent administrative body in that field."[297] A state has an obligation to ensure that its domestic asylum procedures will respect the principle of non-refoulement. The Committee has held that if an individual is deported without proper procedures, the act can breach a state's Article 3 obligations regardless of the substantive risk of torture in the receiving state.[298]

Concluding observations of the Committee have suggested that states should set up procedures with a view to providing time for thorough consideration of appeals and an assessment of whether the principle of non-refoulement is being violated, and lend such appeals suspensive effect.[299] The requirement to enact laws that establish clear procedures for extradition hearings that follow the rule of law is supported by NGOs and the Special Rapporteur on Torture.[300] The Committee has also recommended that states may cooperate with the UNHCR, who will review a state's refugee status determination procedures.[301] However, recalling that the domestic asylum procedure combines a state's obligations under both human rights and refugee law, it is important that the reviewing body maintains awareness of the different burdens at issue. Complaints under Article 3 should be constructed around the risk of torture, rather than an attempt to establish a right of asylum under the terms of the Refugee Convention.[302]

Conclusions & Recommendations

The principle of non-refoulement as a protection of at risk persons is unmistakable: detainees awaiting deportation or extradition are uniquely vulnerable and at the mercy of the state, who has the capacity to remove them from safe haven and expel them to places where they are endangered. Quite obviously, by respecting non-refoulement and not expelling an individual alleging a danger of torture, a state directly protects that individual from being tortured.

All states should incorporate the principle of non-refoulement in the face of torture into their domestic law; it is required under human rights law and the Convention specifically. states must also ensure that their domestic procedures for determining risks during extradition and deportation procedures are adequate: reviewing bodies should follow the international standard of "substantial burden" and where proven they must not secure removal. Asylum procedures may place the burden of proof on the applicant, but should also take into account the vulnerability of asylum seekers and not place that burden too high. In keeping in mind the distinction between human rights and refugee law standards for non-refoulement, state procedures may not require individuals who face torture in the receiving state to meet the elements of persecution, nor shall they allow the protection to be derogated by the exceptions allowed under refugee law. Finally, states should consider ascribing

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[296] Article 5 Initiative (n.14) 45, *citing* generally ECtHR *Chahal v. United Kingdom* App no 22414/93 (15 November 1996).

[297] Nowak and McArthur (n.18) 153.

[298] UNCAT, 'Brada v. France' (24 May 2005) UN Doc CAT/C/34/D/195/2002 13.1–13.5; see also UNCAT, 'Agiza v. Sweden' (20 May 2005) UN Doc CAT/C/34/D/233/2003 para 13.8.

[299] UNCAT 'Concluding observations on Switzerland' (25 May 2010) UN Doc CAT/C/CHE/CO/6 para 10; UNCAT 'Concluding observations on Andorra' (20 December 2013) UN Doc CAT/C/AND/CO/1 para 15.

[300] Article 5 Initiative (n.14) 45; UNCHR Report of the Special Rapporteur (1 September 2004) (n.278) para 29.

[301] UNCAT 'Concluding observations on Mozambique' (10 December 2013) UN Doc CAT/C/MOZ/CO/1 para 12.

[302] Joseph, Mitchell, Gyorki and Benninger-Budel (n.19) 222.

to the prevailing theory under international law that non-refoulement obligations apply to real risks of CIDT as well as torture, even though the Convention does not require as such.

Checklist:

33. States shall incorporate the principle of non-refoulement in the face of torture, and allow no exceptions;

34. States shall ensure adequate asylum review procedures for determining risks of torture in the receiving state;

35. States shall not carry out deportation or extradition of an individual where "substantial grounds" are proven;

36. States shall not place the burden of proof on the applicant higher than international standards;

37. States should apply the principle of non-refoulement to risk of CIDT in the receiving state;

38. States should ratify Convention Article 22 so nationals may access the Committee complaints procedure to bring non-refoulement cases.

3.3.2. Redress and Compensation

Introduction

While the full understanding of redress and compensation encompasses restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, this section of the report focuses on the issues of compensation, rehabilitation, and redress. The questions of satisfaction and guarantees are connected to the criminal prosecution of torture and the fundamental issue of prevention.

The Convention

Article 14 of the Convention contains the right for redress, compensation, and rehabilitation for victims of torture. These rights must be enforceable (Article 14(1)) and the right to compensation is inherited in case the torture leads to death of the primary victim.

The Committee

The Committee has laid out its understanding of Article 14 in detail in the General Comment No. 3, following mostly the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[303]

First, it extends the wording of the Convention to include victims of cruel, inhuman or degrading treatment or punishment (para 1). In line with the scope of this report, we will only discuss victims of torture. Victim includes for the Committee all those who suffered harm, their immediate family and dependants and those who were harmed when trying to stop torture.

Following closely the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (para 6),[304] it defines as full redress and compensation restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (para 2).

It should be noted that the scope of restitution is limited in the context of torture, re-establishing the victims situation before the torture is not as feasible as in the other cases of human rights violations where freedom or property can be restored.[305] Therefore the obligation of restitution in the context of the Convention is almost

[303] UNCAT General Comment No. 3 (n.84).

[304] UNGA Res 60/147 (21 March 2006) UN Doc A/RES/60/147.

[305] Ibid.

identical with the guarantee of non-repetition, all possible measures listed by the Committee are in fact not restituting, undoing, the torture but aim to prevent the reoccurrence.

While the Committee sees solely monetary compensation as typically inadequate to fulfil all duties under Article 14 (para 9), it needs to be accompanied by measures of satisfaction and guarantees of non-repetition, compensation still needs to cover all economically assessable damage, pecuniary or not (para 10). This includes damages for the physical and mental harm, all costs incurred for medical and other treatment, legal assistance, lost actual and potential earnings and lost opportunities.

Satisfaction is centred around the idea to publicly restore the dignity of the victims. This requires an impartial investigation into the allegations which is then followed by, *inter alia*, official apology, commemoration of the victims and inclusion of the story of their fate in school curricula (para 16).[306] The crucial element is transparency to let the truth be known publicly (para 16).[307] As non-investigation and non-prosecution would prevent satisfaction, these are not only violations of the respective Articles 5, 6, 7, and 12, but also of the right to redress from Article 14 (para 17). Only disciplinary measures are not enough to satisfy Article 14 (para 26).

In line with Article 14(1) (enforceable rights) the Committee sees the right for redress to create a twofold obligation. The victim has both procedural rights, an actual legal course of action to claim compensation and redress must be open to him, as well as substantive rights to compensation and redress. This links the right to redress to the to the impartial and independent investigations and is stressed by the Committee, it gives impartiality and independent proceedings the same importance for the right to redress as in the criminal realm (paras 20, 21, 23, 24, and 25). Nevertheless, the Committee prefers the civil redress to be independent of the outcome of a criminal investigation to assure quick redress to victims (para 26).

The guarantee of non-repetition is understood rather broad as encompassing all the preventive obligations of the Convention (para 18).

As a whole, the Committee regards the right to reparations and redress as an important incentive to prevent torture and a deterrent for future violations (para 6).

Apart from the General Comment No. 3, the Committee has emphasised the importance of the right to redress and restated its definitions in several concluding observations. Especially in the Concluding Observations on Canada and Germany the Committee also insisted on providing redress for torture victims who were neither tortured in a territory under the jurisdiction of the respective state nor its nationals.[308] Finland is an example of a Concluding Observation in which the Committee specifically assessed the scope of Article 14 – it creates a right for redress also for non-pecuniary damages and the right for dependants of a victim killed by torture to receive compensation.[309]

General International Law

Apart from the Convention, it is a basic principle of international law that the breach of a Convention entitles the suffering party to reparation and compensation, even when the Convention does not stipulate this consequence explicitly.[310]

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[306] Article 5 Initiative (n.14) 132.

[307] Ibid.

[308] UNCAT 'Concluding observations on Canada' (25 June 2012) UN Doc CAT/C/CAN/CO/6 5; UNCAT 'Concluding observations on Germany' (12 December 2011) CAT/C/DEU/CO/5 10.

[309] UNCAT 'Concluding observations on Finland (29 June 2011) UN Doc CAT/C/FIN/CO/5-6 7.

[310] "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a Convention and there is no necessity for this to be stated in the Convention itself." *Factory at Chorzów*, Jurisdiction, 1927 PCIJ Reports, Series A, No 9, 4, 21.

Further testament of the importance of the right to redress is its inclusion in the Amnesty International 12-Point Program for the Prevention of Torture[311] and the General Comment No. 20 on Article 7 of the HRC which does not allow for individuals to deprive them of their right to effective remedy.[312]

But states following the recommendation by the Committee to also enable claims for reparation against foreign states or its agents are likely to face issues relating to jurisdiction and immunities.

In terms of jurisdiction, the bringing civil claims against individuals or groups of individuals in domestic courts might face obstacles. On a positive note, the common law doctrine of "jurisdiction as of right" extends in civil cases to anyone found, temporary or not, within the territorial jurisdiction of the respective court.[313] But the jurisdictional objection of *forum non conveniens* might reduce this advantage to cases where also the *actus reus* took place within the territorial jurisdiction of the respective court. In a parallel system to create civil accountability for multinational corporations this doctrine has created huge gaps in the accountability.[314] Courts have regularly rejected cases on the basis that the state in which the *actus reus* took place would be the more convenient place to decide about the claims for compensation. In the realm of redress for torture this might limit the chances of a victim to actually receive compensation, it is not assured that the courts in the state where the torture happened will decide fully impartially and many victims who left the state after being tortured might be reluctant to return to press charges. Therefore the proper application of the aforementioned doctrine is crucial to protect victims. The determination whether there exists a more convenient forum[315] should be based on clearly laid out rules on which to test the alternative forum to ensure fair and impartial treatment of the claimant.

The issue of state immunity – no state may be tried in the courts of another state – is more virulent in the civil realm than it was in the context of criminal jurisdiction. While a state – at least in the current system – cannot be criminally liable, he might be sued for reparations and redress as a state. Unlike in criminal cases, where it has been held at least since the *Pinochet* Cases that former heads of state can be held responsible, also reflected in the creation of the international criminal courts system, state immunity in civil claims cases has always been paramount. The most recent example is the *Jurisdictional Immunities of the State Case* of 2012.[316] Serious human rights violations were not enough to overthrow the principle of state immunity. The court also stresses the difference between criminal and civil cases.[317] Even assuming the validity of the argument of *jus cogens* violations overthrowing the state immunity paradigm, domestic courts would have to assume what they are supposed to investigate in the proceedings (the *actus reus*) to be able to commence with the proceedings in the first place.[318] The less precise wording of Article 14 of the Convention, compared to the Articles on criminal proceedings, is also not supporting an extensive interpretation leading to a different assessment.

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311 Amnesty International 12–Point Program (n.173) No. 10.

312 "The Committee has noted that some states have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of states to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible." UNCCPR General Comment 20 (n.25) para 30.

313 Anne C. McConville, 'Taking Jurisdiction in Transnational Human Rights Tort Litigation: Universality Jurisdiction's relationship to Ex Juris Service, Forum Non Conveniens and the Presumption of Territoriality' in Craig Scott (ed), *Torture as Tort – Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing 2001) 161.

314 Upendra Baxi, 'Geographies of Injustice: Human Rights at the Altar of Convenience' in Craig Scott (ed), *Torture as Tort – Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing 2001) 209.

315 McConville (n.313) 189, 195f.

316 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, 99.

317 "Pinochet concerned the immunity of a former Head of State from the criminal jurisdiction of another state, not the immunity of the state itself in proceedings designed to establish its liability to damages." *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, 99, para 87.

318 Adams (n.152) 273.

Unfortunately this leads to the same deplorable situation already discussed in the section about immunity from criminal jurisdiction. States are immune to civil claims brought against them in the courts of other states, also in cases of redress and compensation for torture. While this legal situation might change with the rise of concepts of accountability in international law,[319] presently states allowing for the enforcement of civil judgements against other states face the risk of having to reimburse the other state for the damage incurred.[320]

Conclusions & Recommendations

The right to redress and compensation adds a financial dimention to the deterrance against torture. The right to redress, not limited to only monetary compensation, is an impotant element for the reintegration of victims of torture into society.

Checklist:

39. States shall ensure a cause of action for civil redress;

40. States shall ensure material rights of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition;

41. States should define as victims entitled to redress all those who suffered from torture, suffered while trying to prevent torture and family and dependents of immediate victims;

42. States shall ensure compensation for all pecuniary and non-pecuniary damage to enable compensation;

43. States shall ensure independent investigations to enable satisfaction;

44. States shall allow the doctrine of *forum non conveniens* only in cases where the impartial decision of the claim abroad is ensured.

3.3.3. Impartial and Independent Investigations

Introduction

The issue of impartial and independent investigations is at the heart of the fight against impunity. The provisions which penalise torture, ensure jurisdiction and prosecution need complementarily impartial and independent investigations to eradicate impunity. It comes down to the question who is enforcing the ATL against the state in cases where the state is both the lawmaker and the offender. This is crucial for the protection of at-risk persons, already a feeling of impunity creates an atmosphere in which torture is likely to happen[321] Without pre-empting the discussion, allowing impunity is a violation of the Convention and general international human rights law.[322]

The Convention

Article 12 of the Convention requires states to ensure impartial investigation in cases where an act of torture has allegedly been committed on territory under their jurisdiction. Article 13 stipulates the requirement of the state to impartially investigate any individual complaint. As assessed before, Article 14 requires the awarding of redress and fair and adequate compensation to victims of torture by the legal system, thereby presupposing

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[319] Philippa Webb, 'Jones v UK: The re-integration of State and official immunity' (EJIL: Talk! 14 January 2014) <http://www.ejiltalk.org/jones-v-uk-the-re-integration-of-state-and-official-immunity/> accessed 17 May 2015.

[320] Theodor Schilling, 'The Dust Has Not Yet Settled: The Italian Constitutional Court Disagrees with the International Court of Justice, Sort of' (EJIL: Talk! 12 November 2014) <http://www.ejiltalk.org/the-dust-has-not-yet-settled-the-italian-constitutional-court-disagrees-with-the-international-court-of-justice-sort-of/> accessed 17 May 2015.

[321] Polina Levina, 'Links between Criminal Justice Procedure and Torture: Learning from Russia' (2013) 16 New Crim. L. Rev. 104, 106.

[322] Burns and McBurney (n.144) 275.

impartial and independent investigations. While Article 6 contains a duty to investigate, it is mute on the question of impartiality and independence.

The Committee

The Committee has affirmed these requirements in its General Comment No. 3 and linked the Articles 12, 13, and 14 to each other.[323]

The Committee addressed the issues in several concluding observations, also towards countries which have a generally good record on independent and impartial justice, e.g. Germany,[324] Canada,[325] Portugal,[326] and Switzerland.[327] In these cases the Committee suggested to create an independent body to investigate allegations of torture committed by state agents. The police shall not investigate against their own colleagues.

General International Law

In general international law the requirements of independent and impartial investigations are often stipulated. The ECtHR interprets Article 3 of the ECHR to encompass a duty to impartially investigate respective allegations.[328] The Amnesty International 12-Point Program for the Prevention of Torture also incorporates these requirements, #6 and #7.[329] Again, also in the General Comment No. 20 in relation to Article 7 of ICCPR, the CCPR[330] emphasises the importance of impartial and independent investigations.

Nigel Rodley[331] sees the autonomous and independent investigation as crucial in the prevention of torture: only when these investigations lead to repercussions on the career of the torturer, their personal cost/benefit analysis will tip toward the avoidance of torture. Internal investigations will most likely not lead to any palpable effects for the torturer, the solidarity among colleagues would hinder the impartiality. This supports the recommendation of the Committee to establish completely independent bodies to investigate allegations of torture.

While the issue of autonomous courts and independent jurisprudence is crucial for the prevention of torture, it is difficult to address for the states, as it touches upon complex structural issues. A starting point must be to follow the suggestion of the Committee to separate the investigation of torture allegations from other criminal investigations, either by the creation of a completely autonomous body or by strong separation and safeguards inside the existing investigative authorities. This includes the protection of witnesses.

The issue of autonomous courts and independent jurisprudence is both relevant for criminal proceedings as well as the civil right to redress and compensation, but needs different solutions in both areas, also taking the suggestions by the Committee into consideration to separate civil and criminal proceedings.

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[323] UNCAT General Comment No. 3 (n.84) paras 23, 25.

[324] UNCAT 'Concluding observations on Germany' (12 December 2011) CAT/C/DEU/CO/5, 6, 12.

[325] UNCAT 'Concluding observations on Canada' (25 June 2012) UN Doc CAT/C/CAN/CO/6 7.

[326] UNCAT 'Concluding observations on Portugal' (23 December 2013) UN Doc CAT/C/PRT/CO/5-6 4.

[327] UNCAT 'Concluding observations on Switzerland' (25 May 2010) UN Doc CAT/C/CHE/CO/6 4.

[328] Walter Kälin and Jörg Künzli, *Universeller Menschenrechtsschutz* (2nd edn, Helbing Lichtenhahn Verlag 2008) 368, 379, 505; See myriad examples Association for the Prevention of Torture and Center for Justice and International Law, *Torture in International Law, a Guide to Jurisprudence* (2008) 31–33.

[329] Amnesty International 12–Point Program (n.173).

[330] UNCCPR General Comment 20 (n.25) para 30.

[331] Rodley Interview (n.3).

Conclusions & Recommendations

To help the other obligations of the Convention into full efficiency, independent and impartial investigations are indispensable. To archive these, they should be handled by an independent body.

Checklist:

45. States shall establish an independent body to investigate allegations of torture.

3.3.4. Select Preventative Safeguards

Introduction

Article 11 of the Convention evokes the duty on states to proceed to a systematic review on the core rules, instructions and methods related to persons who are at any form of arrest, detention or imprisonment, in view of preventing the occurrence of torture. Article 16(1) also brings preventative duties in relation CIDT.

In general terms, a systematic review process is one that "sum up the best available research on a specific question […] by synthesising the results of several studies. A systematic review uses transparent procedures to find, evaluate and synthesise the results of relevant research. Procedures are explicitly defined in advance, in order to ensure that the exercise is transparent and can be replicated. This practice is also designed to minimise bias."[332]

Whereas some other provisions of the Convention are linked to punishment of torture and redress, Article 11 calls upon state parties to implement within their domestic laws the capability of protecting the potential victims before torture or CIDT crimes may find room to be perpetrated by state officials.

In order to keep this study as straightforward as possible and to ensure the gathering of the most important preventative safeguards that shall be present in domestic legislation, this section will give more focus on the analysis of the elements enshrined by General Comment No. 2 from the Committee. This document elucidates fundamental rules and practices, though not exhaustively listing them.

The language from the General Comment allows it to be construed in a wider manner, so as to encompass other effective measures able to perform the required prevention. Therefore, *verbis*: "Certain basic guarantees apply to all persons deprived of their liberty. Some of these are specified in the Convention, and the Committee consistently calls upon states parties to use them. The Committee's recommendations concerning effective measures aim to clarify the current baseline and *are not exhaustive*. Such guarantees include, *inter alia*, maintaining an official register of detainees, the right of detainees to be informed of their rights, the right promptly to receive independent legal assistance, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment."[333]

In view of the above, the next topics will treat how these obligations are addressed by the Convention, the Committee and through general international law in order to ensure that effective mechanisms are put in place by states. This section aims at stressing the importance of these mechanisms, especially in protecting an important at risk group consisting of those that are under custody and, as such, directly under the authority of state officials.

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[332] Campbell Collaboration, 'What is a systematic review?' <http://www.campbellcollaboration.org/what_is_a_systematic_review/ > accessed 19 May 2015.

[333] UNCAT General Comment No. 2 (n.13) para 13.

The Convention

Article 11 is a fundamental provision of the Convention, because it creates upon states obligations towards the explicit prevention of the crime of torture. Under the same token, Article 16(1) plays the same role with regards to CIDT practices. Hence, by keeping mechanisms of prevention under systematic review, states parties are able to evaluate whether they are acting compliant with the Conventional duties, and whether the rules and practices put forward meet the purposes of an efficient prevention system.

In addition, "the obligations under Article 11 and 2(1) are related to each other. On the basis of Article 11, states must check whether the measures that they have taken on the basis of Article 2 para. 1 are effective."[334] Nonetheless, the mechanisms set forth in Article 11 should comply with the United Nations Standard Minimum Rules for the Treatment of Prisoners and the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

The mechanisms deriving from Article 11 can encompass different levels of practices, *inter alia*, access to doctor, access to counsel, the right to contact their families and some inspection processes in detention facilities. Put together, this set of rules and practices play an increased role in the prevention of torture for those who are under the direct authority of state officials.

The Committee

As stated in the introduction of this section, the General Comment No. 2 from the Committee recalls states parties' obligations of applying "certain basic guarantees […] to all persons deprived of their liberty. […] The Committee's recommendations concerning effective measures aim to clarify the current baseline and are not exhaustive. Such guarantees include, *inter alia*, maintaining an official register of detainees, the right of detainees to be informed of their rights, the right promptly to receive independent legal assistance, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment."[335]

The attention given to those safeguards is evident throughout the Committee's concluding observations. It is largely accepted that the inclusion of those provisions in ATL strengthen the scope of prevention of torture, and inhibits the occurrence of situations in which torture practices are more likely to take place.

In the Concluding Observations on Mexico, for instance, the Committee stresses its concerns when the state party does not guarantee to the detainees access to counsel or medical examination, and therefore fails to perform its obligations under the Convention.[336] The Committee is emphatic to affirm that these safeguards shall be operative from the very outset of the detention, and expresses its regrets when state parties do not prosecute or investigate cases of unjustified delays of detention before judgment.

The Committee, in the same General Comment, stresses that nowadays there is even more knowledge on how these practices of torture may occur, as well as evolving measures in order to prevent them. Moreover, the Committee is convinced that the safeguards provisions do play a very relevant role in terms of the prevention of torture, and therefore should be seen as an essential way of addressing this matter.

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[334] Wendland (n.129) 50.

[335] UNCAT General Comment No. 2 (n.13) para. 13.

[336] UNCAT 'Concluding observations on Mexico' (11 December 2012) UN Doc CAT/C/MEX/CO/5-6.

Thus, criminalisation and punishment are important tools as to ensure that those responsible for the commitment of acts of torture will receive severe penalties, and will not escape prosecution due to vague provisions. On the other hand, safeguards are indispensable tools towards the prevention of torture, since they take care of the situation before those acts may occur and impose duties on authorities in relation to detainees or any other person subject to their control.

Likewise, in the Concluding Observations on Ukraine, the Committee states that in order for those safeguards to be effective, they shall be present in laws but also in practice, meaning that states parties have an obligation to make sure that the respective provisions are being observed by the authorities, and report to the Committee about those improvements.[337] According to the Committee, states shall inform the detainees their rights, so that no abuses will take place, and they will have prompt access to their relatives, counsel and also medical examination.[338] The same observations were also raised with regards to Kenya.[339]

Another important feature is addressed in the Concluding Observations on Qatar, in relation to the implementation of the safeguards. The Committee clarified that although some provisions are present in the legislation, the records demonstrate that they are not fulfilled in practice, especially in relation to non-citizens.[340] Thus, it seems to be discrimination in terms of how the laws are applied in practice and non-citizen detainees are in a more risky situation and so more likely to be subject of torture. In addition, the Committee also calls the attention to the creation of a unified record of detainees, including minors, so that access to the implementation of the obligations under the Convention can be facilitated.

A different point was raised in the Concluding Observations on Cyprus stating that the access to medical examination shall be provided *free of charge* for the detainees.[341] Besides, the Committee pays special attention to provisions in national laws that undermine the scope of the safeguards since they create mechanism to punish persons that abuse of the right to medical assistance. It follows that in order to have effective safeguards legislation, the access to medical assistance and to counsel shall be offered free of charge, and there shall not exist conflicting norms able to impeach the enjoyment of those rights.

Under the same token, in the Concluding Observations on Thailand, the Committee stress the need to implement a free legal system, so that the detainees can promptly be informed about the charges against them, and have access to a counsel without paying fees.[342] Besides, the Committee stresses the fact that enforcement mechanisms shall be put in place, guaranteeing the effectiveness of the implementation of the safeguards.

General International Law

Some NGO's documents note in relation to the jurisprudence of the Committee that is has "emphasised that governments must exercise supervision of *all* places in which persons can be detained or deprived of liberty and of *all* regulations to which such persons are subject. This must be done systematically, prison inspection must be carried out, preferably without prior notice, and the supervision must be separate from police and judiciary. In this context, the Committee has expressed satisfaction with the presence of, and supervision by, the International Committee of the Red Cross or other non-governmental organisations or independent national human rights commissions."[343]

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[337] UNCAT 'Concluding observations on Ukraine' (11 December 2014) UN Doc CAT/C/UKR/CO/6 para 9.

[338] UNCAT 'Observations finales concernant le rapport initial de la République du Congo – version avancée non éditée' (7 May 2015) UN Doc CAT/C/COG/CO/1 para 11.

[339] UNCAT 'Concluding observations on Kenya' (19 June 2013) UN Doc CAT/C/KEN/CO/2 para 10.

[340] UNCAT 'Concluding observations on Qatar' (25 January 2013) UN Doc CAT/C/QAT/CO/2 para 10.

[341] UNCAT 'Concluding observations on Cyprus' (16 June 2014) UN Doc CAT/C/CYP/CO/4 para 7.

[342] UNCAT 'Concluding observations on Thailand' (20 June 2014) UN Doc CAT/C/THA/CO/1 para 13.

[343] Wendland (n.129) 51.

Therefore, it is important to stress that not only the supervision procedures must be carried out, but they might also be part of an independent action, allowing for the impartial character of the assessment.

Scholars more focused on the medical aspects of the protection, deal with the importance of some of the safeguards evinced above, while stressing some additional enforcements to them, namely "access to a lawyer from the *outset of the arrest*; access to a doctor – *of one's own choice*; right to inform, without delay, a close relative or a third party of their choice of their situation, *either directly or through a police officer*. In the case of foreign *nationals consular notification should be granted.*"[344] By highlighting those aspects, they aim to demonstrate that even from a more medical perspective, there is the need to implement rigid preventative measures in order to avoid physical or mental abuses practices amounting to torture or CIDT.

Nonetheless, the quoted statement demonstrates the relevance of preventative measures within the system provided for by the Convention, *verbis*: "The duty to prevent torture is perhaps among the most dynamic features of the Convention, requiring states parties to explore multiple solutions to effectively eliminate the risk of torture. This positive duty to prevent impropriety enables states parties to explore institutional reform among other measures, professionalising its law enforcement and security sectors, and to undertake systematic reviews of practices and procedures which might create the risk of abuse. Such a process of internal review serves to entrench good practices and gives states the opportunity to reflect on ways in which the prohibition might be better achieved in practice."[345]

Conclusions & Recommendations

From the above, it is noteworthy to say that the safeguards related above, especially, but not exhaustively conceived, maintaining an official register of detainees, the right of detainees to be informed of their rights, the right promptly to receive independent legal assistance, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment shall be construed as of an essential prevention nature, and therefore claim meaningful implementation in law and in practice.

Hence, such an effective implementation must be ensured through enforcement mechanisms preventing authorities to resort to torture or inhuman practices once they have persons under their direct custody and authority.

Furthermore, no provisions can be fully effective whether they do not purport for these safeguards *free of charge and at the outset of the detention*. High costs, unjustified delays, conflicting laws and the existence of discrimination among citizens and non-citizens can be identified as the main obstacles to good provisions, leading states to fail to perform their obligations vis-à-vis the Convention. Thus, it is remarkable that such a protection cannot be achieved through a virtual manner: good drafted provisions that, in the end of day, do not correspond to the practice within the state party's authorities, are not enough for the cause at stake.

When it comes to safeguards, the protection shall be extensively granted, so that authorities shall bear the burden of reporting the measures taken as well as informing every person under their custody about his rights. Effective national legislations shall be sensitive to financial limitations, cultural diversity and human rights standards, providing for a system of mutual reinforcement laws, instead of conflicting rules which undermine the scope of the safeguards.

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[344] Ole Vedel Rasmussen, 'Medical Aspects of Torture: Torture types and their relation to symptoms and lesions in 200 torture victims, followed by a description of the medical profession in relation to torture' (1990) 37 Danish Medical Bulletin, Supplement No. 1, 1 (emphasis added).

[345] Mark Thomson, 'Promoting universal ratification' (Celebration of the 30th anniversary of the UNCAT, Geneva, 4 November 2014).

Checklist:

46. States shall ensure that detainees are informed of their rights in a very outset manner;

47. States shall ensure that persons deprived of their liberty have the right to receive prompt, independent legal assistance and independent medical assistance;

48. States shall provide for the right of persons deprived of their liberty to contact their relatives in a very outset manner;

49. States should set forth independent mechanisms for inspection and visits of places of detention and confinement, preferably without prior notice;

50. States shall set forth judicial and administrative mechanisms for complaints to be filed by persons at risk of torture or ill-treatment, providing for their prompt examination and the capacity to challenge the legality of their detention or treatment;

51. States may provide for other preventative safeguards designed to protect persons deprived of their liberty.

4. Existing Anti-Torture Legislation

As outlined above and seen in the body of this project, the scope of this work is to identify the most relevant elements of domestic legislation to protect at risk persons. This part of the analysis is devoted to targeted research on the ATL of select countries to examine how the elements are reflected in their domestic law. This section is not meant to assess how well the ATL is working in practice, nor any implementation of the domestic laws, but purely to get an overview of how the language of the drafted ATL has maintained the states' obligations under the Convention for the elements that we have identified as most relevant for the protection of at risk persons.

For this overview we have selected five countries, not indented as an exhaustive analysis, but allowing for some differentiation of level of development, legal and political systems, and maturity of the ATL. The selection was also guided to make strength of the authors' specific legal and language backgrounds. While not a meta-analysis, this examination can lead us to some preliminary conclusions at to potential problems that arise for countries in incorporating the obligations of the Convention, and identifying positive achievements in drafting.

4.1. Assessment of Select Domestic Law

4.1.1. United States of America

The United States of America (US) established its Constitution-based federal government in 1788. Today each State of the union maintains their own criminal code and Constitution, whose provisions cannot offer fewer protections than the federal code and federal Constitution.[346] The nation is a strong military and political force worldwide and has maintained a separation of powers, including the system of judicial review, since the country's founding. The US ratified the Convention against Torture in 1994.

Constitutional Framework

The United States Constitution is the highest form of law in the US legal system,[347] and the first ten Amendments contain most of the fundamental rights of US citizens. Due to the federalist system, any finding on the protections under these amendments must separately be found to bind the states for the rights to apply at the relevant local level.[348]

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[346] This report will address only the federal laws.

[347] United States Constitution, Article 1, § 2 ("The Supremacy Clause"). The Clause also lists treaties as the "supreme law of the land," but the US Supreme Court has held the Constitution to supercede international treaties (*Reid v. Covert*, 354 U.S. 1 (1957)).

[348] This is termed "the incorporation doctrine" and was first applied to the 1st Amendment in *Gitlow v. New York*, 268 U.S. 652 (1925).

The Constitution does not explicitly prohibit torture, but the US Supreme Court has interpreted the 8th Amendment's prohibition of "cruel and unusual punishments" to render state-enacted punishments that involve torture as unconstitutional.[349] The Special Rapporteur on Torture in 1986 referenced this provision as at least "the equivalent" of a prohibition on CIDT.[350] Additionally, the text of the 5th Amendment that "[n]o person… shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law" was created as a condemnation of coerced confessions using torture during interrogations.[351]

Criminalisation of Torture

The US has not enacted a separate, specific crime of torture that applies in its territory.

The definition of torture in the US must be understood through the qualifications that the US declared upon its ratification of the Convention. In 1988, the Reagan administration sent the US Senate a memorandum of understanding for its consent to ratification of the Convention, outlining the strictly limited interpretation that the US put on the definition.[352] Final negotiations at the Senate's Foreign Relations Committee hearing, which were later submitted as a Declaration upon Ratification, settled on an understanding of the "mental suffering" factor that is narrower than Convention Article 1.[353]

The US understands that mental pain or suffering refers to "prolonged mental harm," i.e. the torture must cause lasting effects in the victim. In addition, the suffering must be caused by, or result from:

(1) The intentional infliction or threatened infliction of severe physical pain or suffering;

(2) The administration or application or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(3) The threat of imminent death; or

(4) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.[354]

In its 2014 review of the US, the Committee found that the level of severity required in §2340 is restrictive to the point of undermining application of the Convention,[355] and strongly recommended an understanding of severity of suffering in line with international standards.

Also upon ratification, the US declared that the provisions of Articles 1 through 16 of the Convention against Torture are not self-executing.[356] The implementing legislation required for the Convention to take effect is 8 Code of Federal Regulations §208.18, which is under a subchapter governing asylum procedures and

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[349] *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878).

[350] UNCHR, 'Report of the Special Rapporteur on Torture' (19 February 1986) UN Doc E/CN.4/1986/15 para 72.

[351] Applied to states in *Brown v. Mississippi*, 297 U.S. 278 (1936).

[352] 'Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' S. TREATY Doc. No. 100-20 (1988) 2.

[353] *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations,* 101st Congress at 10 (1990) (statement of Abraham D. Sofaer, Legal Advisor, U.S. Dep't of State).

[354] *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations,* 101st Congress at 10 (1990) (statement of Abraham D. Sofaer, Legal Advisor, U.S. Dep't of State).

[355] UNCAT 'Concluding observations on United States (19 December 2014) UN Doc CAT/C/USA/CO/3-5 para 9.

[356] Convention (n.1) Declarations and Reservations: United States §III(1).

immigration regulations. This section implements the definition including the limitations on the mental factor.[357] The link to State action is also more pronounced that in Article 1, requiring that the act "must be directed against a person in the offender's custody or physical control."[358]

Two provisions of the US Code also include a definition of torture. 18 U.S.C.A. §2340 and §2340A criminalises torture for acts committed outside US territory. It contains a definition of torture similar to §208.18, with an additional "specific intent" requirement, and also that the person committing the offence be "acting under the color of law."[359] 28 U.S.C.A. §1350 is a civil remedy statute described below, with a definition that is substantially the same as in §208.18.

In 2009, President Obama declassified memoranda written by the Office of Legal Counsel during the Bush administration including, *inter alia*, the Office's advice to the Central Intelligence Agency on the legal standards governing interrogations outside the United States in §2340 and §2340A. In addition to advice and guidelines on acceptable "enhanced interrogation techniques," the memos offered the advice that "under the current circumstances, necessity or self-defence may justify interrogation methods that might violate Section 2340A."[360] The Obama administration repudiated these missives in 2009, but in its 2014 review the Committee continued to express serious concerns in these areas.[361]

Modes of Liability

18 U.S.C.A. §2340 criminalises both the commission and the attempt of torture, and §2340A criminalises the conspiracy to torture. In general domestic criminal cases, the US recognises attempt, conspiracy, and solicitation as additional modes of liability.

Penalties for Torture

18 U.S.C.A. §2340 lists penalties for torture that vary significantly. Commission, attempt, and conspiracy to torture may be punished with a fine, imprisonment of maximum 20 years, or both. If death results from the torture, the offender may receive a sentence of any term of years, including life, or the death penalty.[362]

Statutes of Limitation

The statute that provides civil redress to torture victims includes a 10-year statute of limitations to file the claim.[363] The majority of US federal crimes receive a 5-year statute of limitations, but the length will vary up to 20 years or receive no limitation depending on the gravity of the crime.[364]

Universal Jurisdiction

Under §2340A the US will have jurisdiction over the crime of torture committed, attempted, or conspired outside the US, where the alleged offender is a US national or is present in the US irrespective of nationality.[365] The US has no statute generally authorising universal jurisdiction.

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[357] 8 CFR §280.28(a)(4).

[358] 8 CFR §280.28(a)(6).

[359] 18 U.S.C.A. §2340(1).

[360] Jay S. Bybee (2002) 'Memorandum for A. Gonzales, Counsel to the President [Re:] Standards for Conduct for Interrogation under 18 U.S.C. 2340-2340A. United States, Department of Justice, Office of Legal Counsel.

[361] UNCAT 'Concluding observations on United States (19 December 2014) UN Doc CAT/C/USA/CO/3-5 paras 11–17.

[362] The death penalty does not apply to conspiracy (18 U.S.C.A. §2340A(c)).

[363] 28 U.S.C.A. §1350.

[364] Charles Doyle, 'Statutes of Limitation in Federal Criminal Cases: An Overview' Congressional Research Service, Library of Congress, 2002.

[365] 18 U.S.C.A. §2340A(b).

On a related issue, the extent of de facto control over territories under US jurisdiction but remaining under the sovereignty of another state is a hot issue. The US Supreme Court had begun issuing case law establishing constitutional protections and judicial review power over these territories,[366] which the Committee has commended,[367] but concerns remain high.[368]

Extradite or Prosecute / Investigate

18 U.S.C. §3184 mandates that extraditions from the US may only be granted if an extradition treaty exists between the US and the country of destination. The exception is 18 U.S.C. §3181, which allows the surrender of persons "who have committed crimes of violence against nationals of the United States in foreign countries" without a treaty in existence, but citizens, nationals, and permanent residents of the US may not be extradited under this provision.

The US does not have a system of compulsory prosecution.

Exclusionary Rule

A mandatory and robust exclusionary rule has developed through case law under the 4th, 5th, and 6th Amendments to the Constitution, holding that "coerced confessions" are unconstitutional and the evidence garnered is inadmissible.[369] The US also excludes derivative evidence of constitutional violations under the separate fruit of the poisonous tree doctrine.[370] The rule does not apply in civil cases, including deportation hearings.[371]

Non-Refoulement

8 Code of Federal Regulations §208.16-18, the sections of code surrounding the Convention implementation statute, govern asylum procedures and the risk of torture on deportation. The regulations put the burden of proof on the applicant to demonstrate it is "more likely than not that he would be tortured,"[372] contrary to the standard established by the Committee and general international law.

In 2005 a federal court upheld a removal decision to Haiti despite the fact that conditions in the prison to which he would be sent would probably be "miserable and inhuman" and "brutal and deplorable," because there was no evidence that Haitian officials had a "specific intent" to use prison conditions as a means of inflicting severe pain or suffering.[373] This case demonstrates how having a strict definition of torture in one state may have repercussions internationally. It also shows that the US will *refouler* an asylum seeker in the face of CIDT in the country of origin.

Redress and Compensation

§1350 (the "Torture Victim Protection Act of 1991") provides for civil remedy to victims of acts "committed in violation of the law of nations or a treaty of the United States," and done by persons acting in an official

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366 *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008).

367 UNCAT 'Concluding observations on United States (19 December 2014) UN Doc CAT/C/USA/CO/3-5 para 4(a).

368 Ibid para 10.

369 *Mapp v. Ohio*, 367 U.S. 643 (1961) [4th Amendment unreasonable search and seizure]; *Miranda v. Arizona*, 384 U.S. 439 (1966), [5th Amendment improperly elicited self-incriminatory statements and 6th Amendment violation of right to counsel].

370 *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

371 *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

372 See *In re M-B-A*, 23 I&N Dec. 474 (BIA 2002).

373 *Auguste v. Ridge*, 395 F.3d 123, 128, 154 (3d Cir. 2005).

capacity of any foreign nation. However, recent case law has curtailed the ability to bring claims under §1350 extraterritorially,[374] severely limiting this avenue of remedy.

Preventative Safeguards

The right to counsel and access to the judicial system are well developed in US case law.

The 6th Amendment has been interpreted to require the government to provide counsel in criminal cases to represent defendants who are unable to afford to pay their own attorneys.[375] This right is not always guaranteed for civil trials.

4.1.2. Canada

Canada has a bi-jurisdictional system of laws: "The Parliament of Canada and the provincial and territorial legislatures both have the authority or jurisdiction to make laws. Parliament can make laws for all of Canada, but only about matters the Constitution assigns to it. A provincial or territorial legislature can only make laws about matters within the province's borders."[376]

Therefore, "the federal Parliament deals mainly with issues that concern Canada as a whole: trade between provinces, national defence, criminal law, money, patents, and the postal service. It is also responsible for the three territories: Yukon, the Northwest Territories, and Nunavut. Federal law allows territories to elect councils with powers like those of the provincial legislatures."[377]

"The provinces have the authority to make laws about education, property, civil rights, the administration of justice, hospitals, municipalities, and other local or private matters within the provinces."[378]

Moreover, the Canadian Constitution provides the most fundamental rules and rights of the country, it "includes the Constitution Act, 1867, and the Constitution Act, 1982. It is the supreme law of Canada. It reaffirms Canada's dual legal system and also includes Aboriginal rights and treaty rights."[379]

When it comes to Human Rights the first federal instrument of protection was The Canadian Bill of Rights, passed in 1960. "The Canadian Human Rights Act, passed in 1977, also protects human rights in the federal public and private sectors (for example, banking, rail, telecommunications, inter- provincial transportation), particularly the right to equality and non-discrimination in the areas of employment, housing and the provision of services."[380] The provinces and territories can also legislate on Human Rights guarantees although they cannot diminish the protection already granted by the Constitutional Acts.

Relevant enough, it was only with the Canadian Charter of Rights' and Freedoms that Human Rights were protected in the written Constitution. "The Constitution says that the Charter *takes priority over all other legislation in Canada because it is part of the "supreme law of Canada*." It applies to all government action, meaning to the provincial legislatures and Parliament, and to everything done under their authority. *This means that governments must take the Charter into account in developing all laws and policies*. It also means that when an individual goes to court because he or she believes that Parliament or a legislature or a government official has violated rights or

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374 *Kiobel v. Royal Dutch Petroleum Co.,* 133 U.S. 1659 (2013).

375 *Powell v. Alabama*, 287 U.S. 45 (1932); applied to states in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

376 Government of Canada, Department of Justice, *Canada's System of Justice* (2015) 10.

377 Ibid.

378 Ibid 11.

379 Ibid 9.

380 Ibid 13.

fundamental freedoms guaranteed in the Charter, the court may declare the law invalid if it conflicts with the Charter or provide any other "appropriate and just" remedy."[381]

This being said, we now come to another important conclusion in terms of anti-torture legislation. The general prohibition of cruel treatment is part of the Canadian Charter and Freedoms, and this instrument as such cannot be derogated by federal and provincial laws can derogate from, for the reasons explained above. Article 12 of the Canadian Charter states that: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." Although the provision, does not mention expressly the word torture, it is addressing the issue through constitutional lens, granting it an increased status, and neither the federal neither the provincial law can derogate from them.

Having presented the mean features, in relation to Canadian laws and the general prohibition of torture – more specifically the general prohibition on cruel and unusual treatment – it is now possible to focus on Anti-torture legislation taking into account the following factors: first, since the federal law has the sole competence to regulate criminal matters we will analyse the elements that were encompassed by the Criminal Code facing whether the domestic legislation is in line with Committee's recommendations. Second, it is important to reinforce the that idea the ten Canadian provinces and its three territories cannot derogate the protection granted by the constitution, for instance, eliminating the prohibition on torture, but they are free to enact some Human Rights instruments, as long as it does not provide for a lesser protective degree.[382]

Constitutional Framework

The Canadian Charter of Rights and Freedoms brings the general prohibition on torture in its Section 12. This text is included in the Canadian Constitutional Act of 1982, and, as explained herein, the Charter applies to the federal government in general, but also to each province and territory, and those collective entities cannot derogate from that general prohibition.

Section 12, however, has not an extensive and clear wording with regards to torture itself, and such a prohibition can only be inferred by analysing the Charter along with the prohibition stated in the Criminal Code.

Criminalisation of Torture

Article 269.1 of the Canadian Criminal Code brings a very efficient provision with regards to the definition of the crime of torture, encompassing all the elements required by the Convention in its Article 1 and also bringing the exclusion of exceptional circumstances in order to justify torture practices, as required in Article 2 of the Convention.

The provision is well subdivided in sections, establishing the perpetrators as being state officials, "or every person acting at the instigation of or with the consent or acquiescence of an official," as well as providing for the penalties, the exclusionary rule and a precise definition of acts of torture either of a physical or a mental nature.[383]

Modes of Liability

According to Article 21 of the Canadian Criminal Code, aiding, abetting and counselling the crime of torture are also punishable offences. Therefore, Article 21 sets forth the *Parties to the offences*, stating that those who commit the offence, those who aid or abet, those who have a common intention, and those who counsels another person to commit an offence shall be liable. This general provision is also applicable to the crime of torture present in Article 269.1 of the same Code.

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[381] Government of Canada, Department of Justice, *Canada's System of Justice* (2015) 14 (emphasis added).

[382] Government of Canada, 'Rights and Freedoms in Canada' (Department of Justice 7 May 2015) <http://www.justice.gc.ca/eng/csj-sjc/just/06.html> accessed 17 May 2015.

[383] Canadian Criminal Code, Article 269.1 (1) and (2).

Penalties for Torture

The same Article 269.1 of the Criminal Code establishes a punishment of "imprisonment for a term not exceeding fourteen years."[384] Therefore, this provision is not in line with the parameters oriented by the Committee, namely, a sentencing of imprisonment ranging from six to twenty years, depending on the gravity of the circumstances and the consequent result to the victim. In this regard, we notice that in relation to penalties there is the need to adapt the legislation in order for it to be complaint with the Convention.

Statutes of Limitation

In relation to torture, no statutes of limitations apply in Canada. Actually, as per Article 269.1 of the Criminal Code, the crime of torture is considered to be an indictable offence, being one of the "Crimes Involving Threats or Violence." Since no statutes of limitation apply to the crimes considered as indictable offences they do not apply to torture as well.[385]

Exclusionary Rule

The Exclusionary rule is present in Article 269.1 of the Criminal Code, which reads under the Heading 'Evidence' in paragraph 4: "In any proceedings over which Parliament has jurisdiction, any statement obtained as a result of the commission of an offence under this section is inadmissible in evidence, except as evidence that the statement was so obtained."

It is noticeable that this a complete prohibition in terms of evidence obtained through torture means, comprising any of the acts describe as torture in the criminalisation section (Article 261.1 (1)). Therefore, in this regard the exclusionary rule is in line with the Convention and the requirements from the Committee as well.

Preventative Safeguards

The Preventative Safeguards are not inserted in the Federal Criminal Code, but in the Canadian Charter of Rights and Freedoms. Section 9 of the Charter establishes that "Everyone has the right not to be arbitrarily detained or imprisoned." "Section 10 of the Charter guarantees rights for persons who have been arrested or detained, including the right to be informed promptly of the reasons for detention, the right to retain and instruct counsel without delay and to be informed of that right, and the right to be promptly presented to a judge for review of the validity of detention. […] Law enforcement agents are trained on the need to respect these rights in practice. Should there be a failure to do so in a particular case, individuals can seek legal redress through the courts."[386]

On Canada's responses to the list of issues adopted by the Committee against Torture in advance of the examination of Canada's Sixth Periodic Report on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the state party informed that these provisions are largely applied by the Courts, even by the Supreme Court of Canada. Besides, Canada also argues that the provinces also implemented some practical procedures in order to ensure the rights enshrined in the Charter, such as video cameras in police facilities and additional funding to vulnerable communities.

In terms of access to a medical doctor, despite the fact that are no special provision on this regard, in the federal corrections context, Canada the relevant Correctional Service of Canada directive. This directive "provides that

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[384] Canadian Criminal Code, Article 269.1(1).

[385] Canada Legal Research Center Inc., 'How to Understand the Criminal Offence Penalty Chart' <http://canadianlegal.org/calgary-fingerprinting/criminal-offence-penalty-chart/> accessed 16 May 2015.

[386] UNCAT, 'Canada's responses to the list of issues adopted by the Committee against Torture in advance of the examination of Canada's Sixth Periodic Report on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' UN Doc CAT/C/CAN/Q/6 Add.1, para 14.

within 24 hours of initial arrival at any federal correctional institution, every offender must undergo a nursing assessment. The nurse must make any necessary referrals to the appropriate licensed health care professional."[387]

Nonetheless, "there is no constitutionally-protected" right to contact a relative upon detention."[388] The only instrument providing for some sort of protection in this regard is Youth Justice Criminal Act, Section 26(1), but this instrument only applies to arrested youth.

In addition, there is no specific provision guaranteeing these rights to be afforded free of charge, and the other provisions mentioned above are not part of a unique instrument, making the system a very complex one. This being so, it is necessary that Canada amend its laws so as to include effective preventative safeguards from the very outset of the detention, and free of charge in order to be in accordance with its duties vis-à-vis the Convention.

Non-Refoulement

Article 115 of the Immigration and Refugee Protection Act sets forth the Principle of Non-Refoulement, so that a person "shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment."[389]

Nonetheless, as noted in the Concluding Observation of 2012, there are some constraints regarding this provision sing it allows for some exceptions to the principle, namely, that the principle does not apply in the case of a person: "(*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or (*b*) who is inadmissible on grounds of security, violating human or international rights or organised criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada."[390]

As a justification, Canada clarified to the Committee that the exceptional situations are "merely theoretical" and as such are very unlikely to apply in a concrete case. However, the Committee is not convinced by such an argumentation, and recalls some previous communications in relation to the cases *Dadar v. Canada* and *Sogi v. Canada*, which refer to deportation and extradition, in relation to which complaints were opened and not respected by the state party.[391]

In line with of the arguments advanced by the Committee, "the Supreme Court of Canada has ruled that an asylum-seeker who is a suspected terrorist may be deported unless he or she can prove a substantial risk of torture at home. If this substantial risk is proven, it is unconstitutional for the Canadian government to deport other than in *'exceptional circumstances'. Accordingly, deportation to torture is constitutional in Canada in exceptional circumstances, even when a substantial risk of it has been proven.*"[392]

Thus, it is fundamental that Canada amend its legislation in relation to the Non-Refoulement Principle, eliminating the existent exceptions in order to meet its obligations under Article 3 of the Convention.

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[387] UNCAT, 'Canada's responses to the list of issues adopted by the Committee against Torture in advance of the examination of Canada's Sixth Periodic Report on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' UN Doc CAT/C/CAN/Q/6 Add.1, para 23.

[388] Ibid para 29.

[389] Immigration and Refugee Protection Act, Article 115(1).

[390] Immigration and Refugee Protection Act, Article 115(2).

[391] UNCAT 'Concluding observations on Canada' (25 June 2012) UN Doc CAT/C/CAN/CO/6 para 10.

[392] Laura Barnett, 'Extraordinary Rendition: International Law and the Prohibition of Torture' (Library of the Parliament 17 July 2008) (emphasis added).

Redress and Compensation

There is no provision granting the right of redress, "including compensation, through civil jurisdiction to all victims of torture."[393] This creates a difficult situation to overcome, especially in relation to the restriction of the provisions of state Immunity Act, in Article 14.

Therefore, the Committee emphatically reiterated that this deserves special attention from Canada so as to enact effective laws enabling the right of redress and this shall be provided for regardless of the nationality of the perpetrator.[394]

4.1.3. Congo

The Republic of the Congo (Congo) is a state in central-west Africa, independent from France since 1960 and technically democratically governed since 1992. The present constitution was adopted by referendum in 2002, following a period of civil war starting in 1997 and installing a presidential republic system of governance.[395] The Congo ratified the Convention against Torture on 30 July 2013.

Constitutional Framework

The Congolese Constitution of 2002 stipulates in its preamble that all duly ratified human rights treaties are an integral part of the Constitution. As it was emphasised by the delegation of Congo during the review of their state report by the Committee this indeed means the Convention could be invoked in Congolese courts as any other Article of the constitution.[396]

Criminalisation of Torture

The Law on the definition and punishment of genocide, war crimes and crimes against humanity contains a prohibition of torture and CIDT, when they are committed as part of a racially, politically or religiously motivated attack on civilian population which follows a plan for a concerted attack.[397] Both are punishable by the death penalty. Considering the death penalty has not been applied in Congo since 1982,[398] 16 years before the enactment of the law, the law is factually not applied. The law expresses that no excuse on the basis of following orders is possible, however this would lead to a reduced sentence.[399]

The government of the Congo is of the opinion that torture is already criminalised by general criminal law as homicide or assault.[400] This is in conflict with the obligations under the Convention against Torture.

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[393] UNCAT 'Concluding Observations on Canada' (25 June 2012) UN Doc CAT/C/CAN/CO/6 para 15.

[394] Ibid.

[395] CIA, 'Congo, Republic of the' (The World Factbook 2014) <https://www.cia.gov/library/publications/the-world-factbook/geos/cf.html> accessed 21 april 2015.

[396] Aime Emmanuel Yoka, Minister of Justice and Human rights of the Congo, 54th session of the Committee against Torture (Geneva, Switzerland, 23 April 2015).

[397] Loi No. 8 - 98 of 31 Octobre 1998, portant définition et répression du génocide, des crimes de guerre et des crimes contre l'humanité Article 7.

[398] UNCAT 'Observations finales concernant le rapport initial de la République du Congo – version avancée non éditée' (7 May 2015) UN Doc CAT/C/COG/CO/1 2.

[399] Loi No. 8 - 98 of 31 Octobre 1998, portant définition et répression du génocide, des crimes de guerre et des crimes contre l'humanité Article 13.

[400] Yoka (n.396).

Modes of Liability

The Law on the definition and punishment of genocide, war crimes and crimes against humanity extends the criminalisation of torture and CIDT to all "instigators."[401]

Penalties for Torture

The crimes under the Law on the definition and punishment of genocide, war crimes and crimes against humanity in relation to torture and CIDT carry the death penalty.[402] In addition, the loss of all civil rights and the forfeiture of property may be applied as penalty.[403] This is in conflict with the obligations under the Convention against Torture.

Statutes of Limitation

No statutes of limitation apply for the crimes from the Law on the definition and punishment of genocide, war crimes and crimes against humanity.[404]

Universal Jurisdiction and Extradite or Prosecute / Investigate

As far as the Committee against Torture could determine, Congolese Law contains no legislation relating to these elements.[405] This is in conflict with the obligations under the Convention against Torture.

Amnesties

The Congo seems to employ a scheme where anyone convicted for torture is immediately pardoned.[406] This is in conflict with the obligations under the Convention against Torture.

Exclusionary Rule

The government of the Congo is of the opinion that the exclusionary rule would be applied by the trial judges without specific legislation.[407] Civil society organisations[408] and the Committee against Torture[409] indicate the unwritten rule is in practice often disregarded and evidence extracted by torture is used on a regular basis. This is in conflict with the obligations under the Convention against Torture.

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[401] Loi No. 8 - 98 of 31 Octobre 1998, portant définition et répression du génocide, des crimes de guerre et des crimes contre l'humanité Article 10.

[402] Loi No. 8 - 98 of 31 Octobre 1998, portant définition et répression du génocide, des crimes de guerre et des crimes contre l'humanité Article 7.

[403] Loi No. 8 - 98 of 31 Octobre 1998, portant définition et répression du génocide, des crimes de guerre et des crimes contre l'humanité Article 11.

[404] Loi No. 8 - 98 of 31 Octobre 1998, portant définition et répression du génocide, des crimes de guerre et des crimes contre l'humanité Article 14.

[405] UNCAT 'Observations finales concernant le rapport initial de la République du Congo – version avancée non éditée' (7 May 2015) UN Doc CAT/C/COG/CO/1 5.

[406] Committee against Torture, 54th session (Geneva, Switzerland, 23 April 2015).

[407] Yoka (n.396).

[408] UNCAT 'Rapport alternatif conjoint présenté par la Fédération Internationale de l'Action des Chrétiens pour l'Abolition de la Torture (FIACAT) et l'Action des Chrétiens pour l'Abolition de la Torture au Congo (ACAT Congo) sur la mise en oeuvre de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants par la République du Congo' (March 2015) UN Doc CAT/CSS/COG/20089 40.

[409] Committee against Torture, 54th session (Geneva, Switzerland, 23 April 2015).

Non-Refoulement

The Congo has no legislation with regard to non-refoulement.[410] Although the delegation of the Congo at the 54th session of the Committee against Torture insisted there would be regulations in place, they were unable to name any specific provisions or actual cases in which deportation did not take place.[411]

Independent / Impartial Investigations

According to the submission of the delegation of the Congo at the 54th session of the Committee against Torture, independent inquiries are ensured by the principle that the *Gendarmerie* investigated in cases of alleged misconduct of *Policiers* and vice versa. Civil society organisations and the Committee against Torture criticise the lack of actual investigations taking place in Congo.[412]

Preventative Safeguards

The legislation of the Congo lacks preventative safeguards.[413] The situation is aggravated by corruption within the law enforcement system and racketeering by detention personal.[414]

Proposed reforms

The Congolese criminal code is is undergoing extensive revisions at the moment. The European Union supports the efforts within the project PAREDA ("Projet d'Actions de Renforcement de l'Etat de Droit et des Associations").[415] According to the answers of the delegation of the Congo it will include a new definition of torture as a punishable offence and the first draft is expected in December 2015.[416]

4.1.4. Brazil

The Brazilian Constitution of 1988, was the first democratic Constitution voted after twenty years of a bloody Military Dictatorship that was in place from 1964 to 1985. Throughout this period many Institutional Acts were imposed by the military government and those Acts were responsible for the suppression of all democratic rights and institutions: suspension of constitutional rights, censure and political persecution were the principal features of a period that marked a black chapter of the Brazilian history.

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[410] UNCAT 'Observations finales concernant le rapport initial de la République du Congo – version avancée non éditée' (7 May 2015) UN Doc CAT/C/COG/CO/1 6.

[411] Yoka (n.396).

[412] UNCAT 'Rapport alternatif conjoint présenté par la Fédération Internationale de l'Action des Chrétiens pour l'Abolition de la Torture (FIACAT) et l'Action des Chrétiens pour l'Abolition de la Torture au Congo (ACAT Congo) sur la mise en oeuvre de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants par la République du Congo' (March 2015) UN Doc CAT/CSS/COG/20089; UNCAT '"Laissez tomber, le pays marche ainsi" – Rapport annuel de la Situation des droits de l'Homme en Republique du Congo de l'Observatoire Congolais des Droits de l'Homme (Januar 2015) UN Doc CAT/CSS/COG/20000; Committee Against Torture, 54th session (Geneva, Switzerland, 23 April 2015).

[413] UNCAT 'Observations finales concernant le rapport initial de la République du Congo – version avancée non éditée' (7 May 2015) UN Doc CAT/C/COG/CO/1 5.

[414] UNCAT 'Rapport alternatif conjoint présenté par la Fédération Internationale de l'Action des Chrétiens pour l'Abolition de la Torture (FIACAT) et l'Action des Chrétiens pour l'Abolition de la Torture au Congo (ACAT Congo) sur la mise en oeuvre de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants par la République du Congo' (March 2015) UN Doc CAT/CSS/COG/20089; UNCAT '"Laissez tomber, le pays marche ainsi" – Rapport annuel de la Situation des droits de l'Homme en Republique du Congo de l'Observatoire Congolais des Droits de l'Homme (Januar 2015) UN Doc CAT/CSS/COG/20000; Committee Against Torture, 54th session (Geneva, Switzerland, 23 April 2015).

[415] UNCAT 'Observations finales concernant le rapport initial de la République du Congo – version avancée non éditée' (7 May 2015) UN Doc CAT/C/COG/CO/1 2.

[416] Yoka (n.396).

Throughout these two decades of dictatorship, torture practices were widespread and the chain of command was responsible to inflicting those big atrocities on suspects and prisoners, who were kept under secret detention for many years. Some of them disappeared and their relatives never managed to receive any news about their whereabouts.

Moreover, politic prisoners were exposed to the cruelest methods of torture, some of them, having their inspiration taken from the Medieval Age. It is important to stress that during the military regime there was no freedom of speech and so any act, book, song or manifestation against the imposed order was severely punished through torture methods conducted in official military offices and prisons.[417]

Torture practices were also commonly used as means to obtain confessions and accusation of other alleged "subversive participants" of acts and meetings against the dictatorship. Those practices were so aggressive that many of these tortured prisoners committed suicide after years of detention, since they were not able to resist the mental and psychiatric consequences of those tortures. Many of them died before knowing that a democratic Constitution would be voted and change dramatically the paradigm.[418]

Constitutional Framework

The main provision against Torture and other cruel, inhuman and degrading treatment is Article 5, III, XLIII e XLVII which deals with the complete prohibition on those crimes. According to the domestic Constitutional Law, the aforementioned provision establishes the rights and guarantees that enjoy the status of indelible clauses, meaning that this set of rights cannot be amended by the Parliament and solely through the implementation of a new Constitutional order can these guarantees be altered.[419]

Along those lines, some scholars go further in saying that the prohibition of torture not only enjoys the highest status within the Brazilian legal order, but it shall be seen as the only absolute right existing in Brazil. This approach leads to the assumption that the prohibition of torture cannot be undermined by any limitation, probably due to the fact that this prohibition stands as a bastion of the existing democratic system of law, therefore marking the awaken of an important constitutional momentum in the history of that country.

However, this important step was neither sufficient nor efficient in order to criminalise torture practices and ensure severe penalties sentencing to its perpetrators. Therefore, in 1997 it was enacted in Brazil the Law Against Torture, a separate instrument which defines the crime of torture and implement the applicable punishments.

Criminalisation of Torture

Article 1 of the Law Against Torture defines the crime in accordance with the Convention Against Torture, and by taking the definition inserted in the original Portuguese text, we may infer that the core elements were included in the so-called "*tipificação da conduta*" – which means the description of the conduct prohibited by the law, in attention to the Principle of Legality.

Modes of Liability

Besides, the existing law also establishes the modes of liability, namely, perpetration, attempt and the responsibility of co-perpetrators. It is also enlightened in the law that the authorities shall be responsible for inflicting torture on detainees and other persons who are under the custody of the State officials.

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[417] Jéssica Chiareli, 'As 15 técnicas de tortura mais brutais da história' (Fatos Desconhecidos, February 2015) <http://www.fatosdesconhecidos.com.br/as-15-tecnicas-de-tortura-mais-brutais-da-historia/> accessed 11 March 2015.

[418] Ibid.

[419] Constituição da Republica Federativa do Brasil (adopted in 1988), Article 5.

Penalties for Torture

Brazilian legislation sets a standard between two to eight years, whereas, according, to the Committee, the penalty for this crime must range from six to twenty years, minimally. Therefore, Brazilian legislation Against torture does not embody a severe penalty for the crime in question, raising the problems discussed in section 3.1.3. above.

Statutes of Limitation

Another noteworthy incompliance arises when it comes to statute of limitations. As observed by the Committee in a number of concluding observations, no statute of limitations at all shall be incorporated since this leads to the unwanted consequence of impunity through time.

Nonetheless, Brazilian Criminal Code provides for a statute of limitations of twelve years for the crime of torture as per its Article 109, III. In other words, the general provisions with regards to statutory limitations are also applicable to the crime of torture and there is nothing in other instruments or even in the Federal Constitution allowing for this conduct to be exempted from prescription.[420]

Exclusionary Rule

With regards to the exclusionary rule, it is important to stress that the Federal Constitution in Article 5, LVI prohibits evidences obtained through illegal means. Thus, this provision shall be construed as to prohibit torture practices as a means of obtaining confessions or declarations. Along those lines, it is possible to state that even though there is not a special provision treating the exclusionary rule under the special label of the crime of torture, this provision blocks the use of confessions or other elements of proof deriving from torture.

Preventative Safeguards

Whilst encompassing the definition contained on the convention, the Law Against Torture does not go any further in important themes, *inter alia*, access to counsel and doctors and the non-refoulement principle. As a matter of fact, the general provisions of the Criminal and Procedural Criminal codes, the Federal Constitution or other ordinary laws will regulate these matters and those provisions are applicable to all the crimes encompassed by Brazilian legislation.

Article 5, LXIII of the Brazilian Federal Constitution enshrines the right of the detainees to have access to counsel and to the notification of his family, and those rights apply to the crime of torture, without reservations.

In addition, Articles 261 and 263 of the Criminal Procedural Code and Articles 15 and 16 para. 3 of the Penal Execution Law also set forth that the access to a lawyer is a mandatory condition to the prosecution. Besides, in 2011 the Law 12.403, amended Article 306 para. 1 of the Criminal Procedure Code so that in case of flagrant arrest the judge must be communicated in 24 hours about the name of the lawyer of the accused and, in case he has no lawyer, the Public Defensory shall be communicated about the arrest.[421]

Access to a doctor is regulated by Article 14 of the Penal Execution Law as a right available for all the detainees, including preventive and curative measures. Besides, Article 306 of the Criminal Procedural Code, with the new drafting from Law 12.403/11, sets forth that in case of prison, the judge, the prosecutor and the detainee's family shall be immediately informed about the place where the accused is under custody.[422]

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[420] Codigo Penal Brasileiro (adopted in 7 December , 1940) Law 2848/40, Article 109, III.

[421] Codigo de Processo Penal Brasileiro (adopted in 3 October, 1941) Law 3689/41, Articles 261 and 263. See also Article 306.

[422] Lei de Execução Penal (adopted in 11 July, 1984) Law 7210/84, Article 14 and Codigo de Processo Penal Brasileiro (adopted in 3 October, 1941) Law 3689/41, Article 306.

Non-Refoulement

The Brazilian legislation deals with this prohibition in respect to the refugees, in Law 9474/97. This principle is enshrined in Articles 33 and 34 of this statute which explicit the prohibition of extradition or devolution of a refugee to the country where he may be subject to severe breaches of human rights. Thus, one may assume that the prohibition related to human rights violations clearly encompasses the impossibility of refoulement in case of persons at risk of torture.[423]

Redress and Compensation

There is no special provision in connection with the crime of torture in the domestic legislation, but general civil law provides for the right to start proceedings before a civil court in order to seek for redress, especially whether a final decision condemning the accused was already obtained through criminal proceedings.

Therefore, Articles 387, IV of the Criminal Procedural Code and art. 475-N of the Civil Procedural Code establish the right to claim civil reparation before a Civil Court based on the final decision of a Criminal Tribunal.[424]

Amnesties

In 2010 the Brazilian Amnesty Law of 1979 was interpreted by the Brazilian Supreme Court (STF – Supremo Tribunal Federal) to encompass also the crimes of torture committed by military officials during the military dictatorship (1964-1985). This interpretation was requested by the Brazilian Bar through the ADPF 153 procedure and as a result the military officials cannot be prosecuted by torture crimes committed through that period.

However, a few months after this decision, the Inter-American Court of Human Rights, in the *Case Gomes et al. Lund v. Brazil (Case "Guerrilha do Araguaia")* decided that during the military dictatorship severe violations of Human Rights and Crimes Against Humanity took place, and therefore, the Amnesty Law is contrary to the obligation of Brazil vis-à-vis the Inter-American Convention on Human Rights.[425]

As a result, the controversy remains open in Brazilian Law, and according to the most eminent constitutionalists' scholars, the Brazilian Supreme Court will need to re-analyze its decision in order to be compliant to the findings on the Inter-American Court of Human Rights.[426] So far, it is still argued that the amnesty law reaches the crimes committed by military officials during the dictatorship regime, granting them the amnesty to the torture crimes committed.

4.1.5. Germany

The Federal Republic of Germany (Germany) is since 1948 a federal parliamentary republic. The present borders were established in 1990 at the reunification with the German Democratic Republic. Legally, the Federal Republic of Germany enlarged its territory so all memberships in international organisations and ratifications of treaties by the Federal Republic of Germany were retained. As the Federal Republic of Germany ratified the Convention against Torture on 1 October 1990, two days before the reunification on 3 October 1990, it applies to the whole of Germany.

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[423] Lei 9474/ 97 (adopted in 22 July, 1987), Articles 33 and 34; Carina de Oliveira Soares, 'O Direito Internacional dos Refugiados e o Ordenamento Juridico Brasileiro: Análise da Efetividade da proteção Nacional' (Postgraduate thesis, Universidade Federal de Alagoas 2012).

[424] Codigo de Processo Penal Brasileiro (adopted in 3 October, 1941) Law 3689/41, Article 387 IV and Codigo de Processo Civil (adopted in 11 January 1973) Law 5869/73, Article 475-N.

[425] IACtHR, *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* (24 November 2010).

[426] Luciano Nascimento, 'Barroso diz que Supremo deveria voltar a discutir validade da Lei da Anistia' (EBC, 10 December 2014) < http://www.ebc.com.br/cidadania/2014/12/barroso-diz-que-supremo-deveria-voltar-a-discutir-validade-da-lei-da-anistia> accessed 16 May 2015.

Constitutional Framework

The German Constitution of 1949 ("Grundgesetz" meaning Basic Law) is the highest law in the German legal framework. All legislative, executive and judicative acts have to adhere to the fundamental rights guaranteed by the Constitution.[427]

Important for the prevention of torture are the following legal guarantees:

- Absolute and non-derogable protection of human dignity and the derived non-derogable human rights;[428]
- Right to life and physical integrity;[429]
- Application of the general rules of international law directly and hierarchically above German law;[430]
- A vague prohibition of torture and/or CIDT of persons in custody ("not subjected to mental or physical mistreatment");[431]
- Limits to the duration of police detention and the rights of detainees in the review of their detention;[432]
- Procedural safeguard of informing relatives or persons of confidence of the detention.[433]

All these legal guarantees apply equally to the federal states and all other levels of administration.[434]

As a remedy for violations of these guarantees, individuals have the possibility to appeal to the Constitutional Court, provided they exhausted all other available remedies and are immediately affected by the violation.[435]

Criminalisation of Torture

Apart from the constitutional guarantees, torture is partly criminalised in Germany.

The Code of Crimes against International Law ("Völkerstrafgesetzbuch") of 2002 criminalises torture as part of crimes against humanity[436] or war crimes,[437] following the definition of the Rome Statute. The definition is more protective than the one from the Convention against Torture, but the necessary connection to a widespread or systematic attack against civilian population or the existence of an armed conflict limits the applicability of the criminalisation from the Völkerstrafgesetzbuch.

The Völkerstrafgesetzbuch allows the defence of superior military command for torture as part of war crimes.[438]

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[427] Grundgesetz für die Bundesrepublik Deutschland, Artikel 1(3).

[428] Grundgesetz für die Bundesrepublik Deutschland, Artikel 1(1) and 1(2).

[429] Grundgesetz für die Bundesrepublik Deutschland, Artikel 2(2).

[430] Grundgesetz für die Bundesrepublik Deutschland, Artikel 25.

[431] Grundgesetz für die Bundesrepublik Deutschland, Artikel 104(1) second part.

[432] Grundgesetz für die Bundesrepublik Deutschland, Artikel 104(2) and 104(3).

[433] Grundgesetz für die Bundesrepublik Deutschland, Artikel 104(4).

[434] Grundgesetz für die Bundesrepublik Deutschland, Artikel 1(3) and 28(1).

[435] Grundgesetz für die Bundesrepublik Deutschland, Artikel 93(1) 4a.

[436] Völkerstrafgesetzbuch, §7(1) 5.

[437] Völkerstrafgesetzbuch, §8(1) 3.

[438] Völkerstrafgesetzbuch, §3.

While general criminal law does not specifically criminalise or even define torture, German criminal courts applied the lesser crime of coercion[439] in at least one decision for threatening a detainee with pain.[440] The judgement expressed the absolute prohibition of torture following from the Grundgesetz, which allows no defence whatsoever for acts deemed to be torture or CIDT.

This is not in line with the obligations under the Convention against Torture.

Modes of Liability

To both the Völkerstrafgesetzbuch and the Criminal Code apply the same rules concerning modes of liability.[441] Attempt to,[442] complicity[443] and participation in,[444] and instigation and incitement[445] are criminalised for the respective crimes. The sub-element of acquiescence or consent by the state is not part of general criminal law. A private person, as well as a state actor, can commit the crime of coercion, but the criminal code knows a crime of active instigation of a crime in an official function.[446] The Völkerstrafgesetzbuch explicitly criminalises the omission of preventing crimes by subordinates.[447]

This is not fully in line with the obligations under the Convention against Torture.

Penalties for Torture

The crime of coercion carries a maximum penalty of 5 years imprisonment if committed by someone in an official function.[448] The crimes from the Völkerstrafgesetzbuch carry minimum penalties between 1 and 10 years and a maximum penalty of life imprisonment. This is not fully in line with the obligations under the Convention against Torture.

Statutes of Limitation

No prescription applies to the crimes from the Völkerstrafgesetzbuch.[449] The prescription for the crime of coercion is 3 years.[450] This is not fully in line with the obligations under the Convention against Torture.

Universal Jurisdiction

All crimes defined in the Völkerstrafgesetzbuch can be prosecuted in Germany without any territorial nexus.[451] Crimes defined in the Criminal Code can be equally prosecuted without any territorial nexus, if they are implementing obligations of international treaties and conventions.[452] As torture is not a specific crime in the

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[439] Strafgesetzbuch, §240.

[440] *Daschner Case* (Judgement) LG Frankfurt am Main 5/27 KLs 7570 Js 203814/03 (4/04) (20 December 2004).

[441] Völkerstrafgesetzbuch, §2.

[442] Strafgesetzbuch, §23.

[443] Strafgesetzbuch, §27.

[444] Strafgesetzbuch, §25.

[445] Strafgesetzbuch, §26.

[446] Strafgesetzbuch, §357.

[447] Völkerstrafgesetzbuch, §4.

[448] Strafgesetzbuch, §357.

[449] Völkerstrafgesetzbuch, §5.

[450] Strafgesetzbuch, §357(3) 5.

[451] Völkerstrafgesetzbuch, §1.

[452] Strafgesetzbuch, §6 1.

German Criminal Code, universal jurisdiction is only exercised if the act meets the additional requirements as being part of a crime against humanity or war crime.

Extradite or Prosecute / Investigate

The principle of compulsory prosecution applies to all crimes, unless the law provides explicitly for prosecution only upon application of the victim. Compulsory prosecution applies to both coercion and the crimes from the Völkerstrafgesetzbuch. Upon receiving any kind of knowledge, the police and state attorneys have to promptly investigate and, if the results permit, bring charges in court.

On the basis of the principles of compulsory prosecution and universal jurisdiction, investigations are commenced in Germany on a regular basis, also to preserve evidence when witnesses are present in Germany.[453]

Amnesties

The possibility to grant pardon exist for the President[454] and the heads or governments of the federal states, but is not employed in the context of torture as far as our research determined.

Immunities

Germany follows general international law in the application of immunity *ratione personae* or *ratione materiae*.[455] This is in conflict with the obligations under the Convention against Torture.

Exclusionary Rule

The exclusionary rule in Germany is derived from the constitutional principles of proportionality and rule of law[456] and for torture and CIDT it is expressly included in the Code for Criminal Procedure.[457] In cases where evidence was extracted by torture or CIDT, the protection is equally strong to the one in the United States of America.[458] This is in line with the obligations under the Convention against Torture.

Non-refoulement

Refugees and other non-Europeans lack basic procedural rights in the process of assessing their residence status and potential deportation,[459] also through the application of the Dublin Regulation.[460]

Independent / Impartial Investigations

The German executive and judicial system do not contain provisions for a structurally independent body to execute impartial investigations.[461] This is not in line with the obligations under the Convention against Torture.

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[453] Deutscher Bundestag Drucksache, 'Zehn Jahre Völkerstrafgesetzbuch' (2012) 17/11339 11.

[454] Anja Eiard and Sarab Borhanian, 'Das Begnadigungsrecht des Bundespräsidenten' [2007] Aktueller Begriff/Wissenschaftlicher Dienst Deutscher Bundestag.

[455] Deutscher Bundestag Drucksache, 'Zehn Jahre Völkerstrafgesetzbuch' (2012) 17/11339 12.

[456] Craig M. Bradley, 'The Exclusionary Rule in Germany' (1983) 96 Harvard Law Review 1032, 1034.

[457] Strafprozeßordnung, §136a(1).

[458] Craig M. Bradley, 'The Exclusionary Rule in Germany' (1983) 96 Harvard Law Review 1032, 1064.

[459] UNCAT 'Concluding observations on Germany' (12 December 2011) CAT/C/DEU/CO/5 7.

[460] Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31.

[461] UNCAT 'Concluding observations on Germany' (12 December 2011) CAT/C/DEU/CO/5 6.

Redress and Compensation

The system of government liability in Germany is discombobulated. Our research has turned up one case in which a victim of CIDT was able to receive monetary compensation via the provisions for public liability.[462] There are no provisions for redress other than monetary compensation. This is in conflict with the obligations under the Convention against Torture.

Preventative Safeguards

Apart from the preventative safeguards in the constitution, the Code for Criminal Procedure contains the right for every suspect to be informed about the charges, the right to remain silent, the right to a lawyer, and the possibility to request to present evidence.[463]

4.2. Conclusions on Anti-Torture Legislation

From the above overview of the ATL of five states, preliminary assessments can be made on the difficulties of incorporating certain elements into domestic legislation, and basic patterns of compliance.

- Definition in Article 1: Whether or not it is advisable to have a universal definition of torture, it is not happening. From this brief assessment, there is an example of full incorporation (Canada and Brazil), incorporation with certain strict limitations (US), adoptions of the Rome Statute definition (Germany), and a proscription without definition (Congo).
- Allowing Defences: Defences against torture are a deviation from the absolute *jus cogens* prohibitions against torture. Allowing such derogations for war crimes (Germany) or necessity (US) conveys a respect for national agendas that supercedes international norms.
- Penalties for Torture: Despite the Committee's fairly authoritative 6-20 year imprisonment pattern, there is wide deviation in ATL, both low (Germany, Canada, and Brazil) and high (Congo).
- Statutes of Limitation: Of the states assessed, only one (Canada) has fully abolished SOLs. One other has as well (Germany), but the comparable crime of coercion allows SOLs, which lessens the affirmation somewhat.
- Universal Jurisdiction: Four of the five states (minus Congo) recognise the principle of universal jurisdiction, however the Committee has noted problems with the lack of utilisation for all of them.
- Amnesties & Pardons: For the two countries assessed that have recently transitioned from dictatorship to democracy, the granting of amnesties and pardons are prevalent.
- Exclusionary Rule: The presence and respect of the exclusionary rule appears to be tied to level of development and respect for rule of law.
- Non-Refoulement: Each of the five states assessed have issues with respect for the principle of non-refoulement, including putting the burden of proof on the applicant (US), failure to assess on a case-by-case basis (Germany), allowing exceptions (Canada), and general disregard (Congo).
- Redress and Compensation: This assessment reflects the obvious issue that lack of criminalisation in reflected by a lack of civil redress. Where there is a strong criminalisation law there can be a strong civil redress statute (Brazil). Where the criminalisation is limited in definition and scope, redress in similarly limited (US). Where there is vague criminalisation, redress is very unlikely to be addressed in ATL (Congo).
- Preventative Safeguards: Like the exclusionary rule, there appears to be a strong respect for safeguards regarding fair trial and initial detention conditions in developed countries.

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[462] Bürgerliches Gesetzbuch, §839; (Judgement) OLG Frankfurt am Main Az. 1 U 201/11 (10 October 2012).

[463] Strafprozeßordnung, §136.

As we can see from this list a large majority of the elements we have identified are problematic in incorporation into ATL. One possible reason that can be explained by the structure inherent to civil law systems.

Problems will arise with incorporating specific obligations (SOL, penalties, defences) when criminalising due to the general provisions that are already established to apply to all crimes in the statutory framework. Incorporating each of the elements within the Convention would require great deviation from and alteration of already existing code.

The above observation also represents a difficulty in recommending any one piece of ATL as an example to be followed. The vast differences between legal systems necessitate each state's individual situation to be taken into account, and no state could directly incorporate another's ATL in whole. That said, the definition of torture that a state enacts, which can incorporate modes, penalties, SOLs, and potentially more, could find guidance in the very thorough definition by Canada, which is annexed to this report.

5. Conclusion

The task of this project has been to identify which legislative elements make for the strongest possible torture prevention and therefore offer the best protections. We have accomplished this by extracting elements, from the Convention against Torture and beyond, and assessing their ability to provide for strong ATL, using existing examples. The ultimate concern of ATL is that it provides an effective tool for states to apply in its jurisdiction. The Convention holds the obligation for states to take all effective measures to prevent acts of torture,[464] both to "eliminate any legal or other obstacles that impede the eradication of torture," and to "take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented."[465] This project demonstrates how a state may give effect to the legislative requirement of this obligation: by applying the substance of the elements we have identified.

Member-states to the Convention will understandably have difficulties not only in separating the obligations from recommendations under international law on torture, but also the Convention provisions that are most conducive to protecting individuals from the risk of torture. The Committee performs a vital role in opening a dialog with member-states on the application of these elements on the ground, but it is not their function to explicitly differentiate obligations from recommendations. Nor is it their role to couch their language in a protective framework, when their task is to report on a state's compliance with the Convention. The aim of our analysis, and especially the annexed checklist, is to present the provisions above in such a way that states have guidance in these concerns.

Our research has arrived at the elements that national frameworks should include at a minimum. We focused our analysis on the elements that are crucial to protect persons at risk. From our conclusions, based on recommendations by treaty bodies, scholars, courts and NGOs, the elements that are identified above all have a specific function in the prevention of torture, but are interdependent.

From a cross-sectional assessment of the obligations, we found they to fall in two broad categories. The first group is mainly preoccupied with the eradication of torture within the respective state. The criminalisation of torture with adequate penalties, the possibility for victims to gain redress, as well as the independent investigation of allegations of torture all create a strong deterrent on the national level. The transposition of these obligations into domestic legislation should therefore be the core endeavour of states which still experience incidences of torture within their jurisdiction.

The second group of elements extends the scope of protection to the international prevention of torture, creating a system where there is no safe haven for perpetrators of torturers anywhere. Establishing universal jurisdiction, investigating allegations of torture wherever the suspects are found, and extraditing them when

[464] Convention (n.1) Article 2(1).

[465] UNCAT General Comment No. 2 (n.13) para 4.

necessary, work together to this end. Implementing these obligations into their national legislation should be the vocation of all states which have largely eradicated torture within the confinements of their own borders.

The question of universal jurisdiction shows the relationship between the two groups. Even when universal jurisdiction is established, it cannot be exercised without first torture being criminalised. This shows this importance of states not picking and choosing the elements to incorporate. Best protection of all individuals at risk of torture, wherever they are found, can only be established where states take into account the interrelated system of protections envisioned by the Convention.

Beyond legislation, there are myriad factors affecting the actual practice of torture that are beyond the scope of this report. Assessment of actual state practice is the only way to see the full picture of the realities of torture. The next step in assessing legislative protections is to study how those laws, incorporating the elements we have identified, are applied in practice. Establishing criminal responsibility and the accompanying legal framework is the first step in this process and enacting strong domestic legislation paves the way for the eradication of torture.

Annex I Checklist of Recommendations to States in Drafting Anti-Torture Legislation

1. States shall criminalise torture as a separate, specific crime;
2. States shall define torture in a manner that, at a minimum, adopts all the elements of Convention Article 1;
3. States should make torture by omission an explicit crime;
4. States shall assess the severity of suffering in line with international standards, using a subjective test on a case-by-case basis;
5. States should, if adding to the proscribed purposes listed under Convention Article 1, ensure the list is non-exhaustive;
6. States may definite torture to include non-state actors;
7. States shall, if including a "lawful sanctions" exception to the definition of torture, clarify that "lawful" is understood by both national and international standards;
8. States shall explicitly affirm that no defences are allowed to justify torture;
9. States may criminalise CIDT, keeping the offence distinct from torture;
10. States shall criminalise the attempt to commit torture, complicity in torture, participation in torture, instigation of, and incitement to torture;
11. States should criminalise acts by public officials that acquiesce or consent to torture;
12. States shall penalise torture with punishments ranging from the minimum of six to the maximum of twenty years of imprisonment;
13. States may provide for higher penalties, as long as they are respectful of human rights;
14. States should not assign the death penalty and life imprisonment for torture;
15. States shall establish jurisdiction over any alleged case of torture committed on territory under its jurisdiction, or a ship or plane under its flag, or by one of its nationals;
16. States shall establish universal jurisdiction over any alleged offender present in the territory under its jurisdiction;
17. States may, as far as feasible, protect its nationals by establishing jurisdiction over cases where their nationals have been victim of torture;
18. States shall ensure investigation and prosecution of all allegations of torture;
19. States shall enable the extradition of alleged torturers;
20. States shall ensure extraditions only take place for prosecution abroad or by an international court;
21. States shall limit the application of immunity, both *ratione materiae* and *ratione personae*, to exclude torture;
22. States should not allow any discretion to grant pardon for torture;
23. States shall not enact any amnesties which extend to cases of torture;
24. States shall limit the mandate for truth and reconciliation commissions with regard to torture;
25. States shall not provide for statutes of limitations with regards to the crime of torture;
26. States should revise the whole set of criminal legislations to ensure no provision would provide for statutes of limitations with regards to the crime of torture;

27. States should not use the highest prescription within their national system as a satisfactory statute of limitation;
28. States shall explicitly exclude evidence derived by torture in all proceedings;
29. States shall place the burden on the prosecution to prove that statements by detainees are provided of their own free will;
30. States shall apply the exclusionary rule to all forms of evidence: physical and verbal, direct and derivative;
31. States should apply the exclusionary rule to evidence derived by CIDT;
32. State laws should ensure that a confession by the person charged may not be the sole basis of his conviction;
33. States shall incorporate the principle of non-refoulement in the face of torture, and allow no exceptions;
34. States shall ensure adequate asylum review procedures for determining risks of torture in the receiving state;
35. States shall not carry out deportation or extradition of an individual where "substantial grounds" are proven;
36. States shall not place the burden of proof on the applicant higher than international standards;
37. States should apply the principle of non-refoulement to risk of CIDT in the receiving state;
38. States should ratify Convention Article 22 so nationals may access the Committee complaints procedure to bring non-refoulement cases;
39. States shall ensure a cause of action for civil redress;
40. States shall ensure material rights of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition;
41. States should define as victims entitled to redress all those who suffered from torture, suffered while trying to prevent torture and family and dependents of immediate victims;
42. States shall ensure compensation for all pecuniary and non-pecuniary damage to enable compensation;
43. States shall ensure independent investigations to enable satisfaction;
44. States shall allow the doctrine of *forum non conveniens* only in cases where the impartial decision of the claim abroad is ensured;
45. States shall establish an independent body to investigate allegations of torture;
46. States shall ensure that detainees are informed of their rights in a very outset manner;
47. States shall ensure that persons deprived of their liberty have the right to receive prompt, independent legal assistance and independent medical assistance;
48. States shall provide for the right of persons deprived of their liberty to contact their relatives in a very outset manner;
49. States should set forth independent mechanisms for inspection and visits of places of detention and confinement, preferably without prior notice;
50. States shall set forth judicial and administrative mechanisms for complaints to be filed by persons at risk of torture or ill-treatment, providing for their prompt examination and the capacity to challenge the legality of their detention or treatment;
51. States may provide for other preventative safeguards designed to protect persons deprived of their liberty.

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Annex III Canada Criminal Code: Definition of Torture

Criminal Code (R.S.C., 1985, c. C-46) April 27, 2015

Torture

269.1 (1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Definitions

(2) For the purposes of this section,

"official"

« fonctionnaire »

"official" means

(*a*) a peace officer,

(*b*) a public officer,

(*c*) a member of the Canadian Forces, or

(*d*) any person who may exercise powers, pursuant to a law in force in a foreign state, that would, in Canada, be exercised by a person referred to in paragraph (*a*), (*b*), or (*c*),

whether the person exercises powers in Canada or outside Canada;

"torture"

« torture »

"torture" means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

(*a*) for a purpose including

(i) obtaining from the person or from a third person information or a statement,

(ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and

(iii) intimidating or coercing the person or a third person, or

(*b*) for any reason based on discrimination of any kind,

but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.

No defence

(3) It is no defence to a charge under this section that the accused was ordered by a superior or a public authority to perform the act or omission that forms the subject-matter of the charge or that the act or omission is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.

Evidence

(4) In any proceedings over which Parliament has jurisdiction, any statement obtained as a result of the commission of an offence under this section is inadmissible in evidence, except as evidence that the statement was so obtained.

R.S., 1985, c. 10 (3rd Supp.), s. 2.

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