

Criminal Responsibility for Torture: A Human Rights Analysis

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ABSTRACT Torture is a heinous crime that renders its victim destitute. It is prohibited under national and international human rights laws. These laws obligate the State and those who are entrusted with the responsibility to govern to ensure that no one is subjected to torture in whatever form. Ancillary to this is the responsibility not to justify the use of torture in whatever form irrespective of the circumstances. The objective of this article is to examine and critically analyse the responsibility for the crime of torture under international human rights laws particularly, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by establishing the criminal and civil responsibilities of the perpetrators in order to hold them accountable and bring them to justice.

INTRODUCTION

The crime of torture is a national and international crime (Vyver and Johan 2003). It has been condemned by the international community and prohibited by international criminal law and the international law of armed conflict (Nagan and Atkins 2001). Its condemnation has been further accelerated by the judgments of international and ad hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and by criminal prosecutions undertaken by individual states in their domestic courts acting under international universal jurisdiction (Amnesty International 2001).

Beyond condemnation, the question is whether or not the author of crimes committed deliberately or recklessly should be held responsible for the act. The answer is obvious. The author must be held accountable (Brownlie 1998). Accountability affirms the normative value of life and upholds respect for human dignity (Aceves 2002). Torture and other forms of persecution are antithetical to these values, and impunity further undermines them (Aceves 2002). Promoting accountability by bringing the culprits to justice not only deters them from repeating their crimes, but also makes it clear to others that torture and ill-treatment will not be tolerated. Similarly, promoting accountability encourages the search for truth. By pursuing cases against torturers, a public record is created that describes the human rights abuses committed by the perpetrators and the injustices suffered by the victims (Sherman 2002). The concern is that, when institutions responsible for

upholding the law routinely flout it, even when dealing with their own members, they undermine the whole criminal justice system. Combating impunity means striking at the very heart of this institutional malaise.

WHAT IS A CRIME?

An acceptable definition of crime is hard to find. Crime is often defined as conduct in violation of the criminal laws for which there is no legally acceptable justification or excuse (Schmallegger 2001). Not only is a crime the commission of an act, it can also be an omission of an act, such as the failure to prevent torture. The core objective of 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was to criminalize all instances of torture in any jurisdiction. Article 4 requires States to ensure that all acts of torture are criminal offenses, subject to appropriate penalties given their grave nature. State parties are also required to apply similar criminal penalties to attempt to commit and complicity or participation in torture (Garcia 2008).

Torture continues to be prevalent worldwide because it is allowed by those who are supposed to prevent or punish it. This constitutes the negation of the state's responsibility to guarantee the rights of those coming within its jurisdiction, and to ensure their security and well-being.

The responsibility of the state is reflected in the international system for the protection of human rights. The irony is that Non-States and

in some instances, the State have reneged in its responsibility by participating in the crime of torture (Primer 2006). Against this backdrop, a State incurs responsibility for any breach of an international obligation, such as the prohibition of torture under international human rights and international humanitarian law, which can be attributed to it. This rule will encompass private actors who act under the specific instructions of the government concerned. Responsibility will also be incurred by the States where they act jointly with Non-State actors (Primer 2006).

WHAT ARE HUMAN RIGHTS?

Human rights are international norms that help to protect all people everywhere from severe political, legal, and social abuses. Examples of human rights are the right to freedom of religion, the right to a fair trial when charged with a crime, the right not to be tortured, and the right to engage in political activity (Alston 1999). Human rights are universal legal guarantees which protect individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity (Alston 1999). Human rights are innate or inherent in human beings; they are inalienable and should be respected, protected and promoted. The full spectrum of human rights involve the respect for, and protection and fulfillment of, civil, cultural, economic, political and social rights, as well as the right to development. Human rights are universal, which means that they belong inherently to all human beings, as they are interdependent and indivisible (Sepúlveda 2003).

INTERNATIONAL HUMAN RIGHTS LAW

International human rights law is made up of what is known as the International Bill of Rights, together with a number of further subject specific human rights treaties, as well as customary international law. The International Bill of Rights is not one treaty, but refers to five documents: the Universal Declaration of Human Rights (UNDHR) (1948), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), the International Covenant on Civil and Political Rights 1966 (ICCPR), and its two Optional Protocols. Added to these are the following core universal human rights treaties of uni-

versal application: the Convention on the Elimination of All Forms of Racial Discrimination 1965 (CERD); the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW); the CAT and its optional protocol; the Convention on the Rights of the Child 1989 (CRC); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 (CPRMWM). Recently adopted are the International Convention for the Protection of All Persons from Enforced Disappearance 2005 (ICPED), and the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities 2006 (ICPRDPD). There is a growing body of subject-specific treaties and protocols, as well as various regional treaties on the protection of human rights and fundamental freedoms.

The prohibition of torture or other cruel, inhuman or degrading treatment or punishment is a universal norm that has acquired the status of a peremptory norm of both conventional and customary international law (Clarke 2009). Because of the importance of the values it protects, this principle has evolved into a peremptory norm; that is, a norm that enjoys a higher place in the hierarchy of norms. A norm of this high order cannot be derogated from by States through international treaties or customary law unless endowed with the same normative force (Cullen 2003). It is against this background that the prohibition of all such practices was explicitly included in 1948 UNDHR Pursuant to this, Article 5 of the Declaration reads: "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*"

CRIMINAL LAW AND HUMAN RIGHTS LAW

While criminal law is law at its most coercive (Cover 1986), international human rights law has been law at its most gentle (Hathaway 2002). Human rights law relies on civil and administrative mechanisms for its domestic enforcement (Bassiouni 1994). States may also be required to change domestic laws to respond to the rulings of human rights tribunals. For most human rights litigation, however, the largely symbolic finding of state wrongdoing represents the most far-reaching goal of the litigation (Danner and Martinez 2005).

Beyond the power of their distinct sanctions, human rights and criminal law differ widely in other respects. Although criminal law serves collective social goals such as deterrence, retribution, and rehabilitation, its central focus is on individual wrongdoing (Danner and Martinez 2005). Whatever broader social trends the crime may grow out of and whatever ripple effects the criminal trial might have, the legal focus of the trial is narrow: determining the past acts and the fate of the individual defendant. In civil law systems, the criminal defendant may also be required to pay compensation to the victims at the end of the trial (Kelly 1984). By contrast, human rights law is largely victim, rather than the perpetrator centered. It concentrates on establishing the veracity of allegations that individuals' human rights have been violated and, to that end, often focuses on fact-finding related to broad social phenomena (Havel 2005).

In the case of Velásquez Rodríguez (1988) the court succinctly captured the distinction between a human rights proceeding and a criminal trial: "*The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in criminal action. The objective of international human rights law is to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.*" Similarly, in the case of Prosecutor v. Kunarac, Trial Judgement (2001), the ICTY has underscored firstly, the role and position of the state as an actor is completely different in both regimes. Secondly, that part of the international criminal law applied by the Tribunal is a penal regime. It sets one party, the prosecutor, against another, the defendant. In the field of international human rights, the respondent is the State. Structurally, this has been expressed by the fact that human rights law establishes lists of protected rights while international criminal law establishes lists of offences (Randall 1988).

While both human rights law and criminal law share the deterrence of violations as a major goal (Paust 1996), they implement this goal differently. Unlike criminal law which relies heavily on the threat of punishment for its deterrent effect, human rights practice rests more heavily on the indirect punishment of public shaming and perhaps, even more importantly, on forward-looking remedies like capacity building (Danner and Martinez 2005). The United Nations Human

Rights Commission, for example, views a major part of its mission as setting standards and helping national governments implement those standards. These goals are accomplished through reporting mechanisms aimed at improving state practice by exposing them to public scrutiny. In addition, this is also accomplished through expert advice, human rights seminars, national and regional training courses and workshops, fellowships and scholarships, and other activities aimed at strengthening national capacities for the protection and promotion of human rights. Rehabilitation of the nation state offender rather than its punishment constitutes the principal focus of human rights law (Steiker 1996).

Despite these differences there are some overlap between criminal law and human rights law. For example, human rights law includes specific provisions governing criminal trials (Sluiter 2003). In certain legal systems, the defendant-centered tendencies of the criminal trial are moderated by mechanisms allowing for participation in the trial by the victim (Van Schaack 2001). In several fundamental ways, however, the working presumptions of human rights law and criminal law present mirror images of each other. In a criminal proceeding, the focus is on the defendant and the burden of proof is on the prosecuting authority to prove that the individual before the court has committed a crime. Ambiguity about that assertion is to be construed in favor of the criminal defendant, and the trier of fact is charged with a view to determine what the defendant did and what his mental state was toward the acts constituting the crime. In human rights proceedings, by contrast, the focus is on the harms that have befallen the victim and on the human rights norm that has been violated (Danner and Martinez 2005).

One consequence of this focus is that the substantive norms of international human rights law are generally broadly interpreted to ensure that harm is recognized and remedied, and that, over time, there is progressively greater realization of respect for human dignity and freedom (Helfer 2002). The analogous rules of domestic criminal law, by contrast are supposed to be strictly construed in favor of the defendant. While criminal law tends toward the specific and the absolute, human rights law embraces some contingent, aspirational norms (Danner and Martinez 2005).

CRIME OF TORTURE EXAMINED UNDER INTERNATIONAL CONVENTIONS

There are several international conventions that clearly provide for a duty to prosecute crimes against international law. Of particular note are the Geneva Conventions of 1949, the Genocide Convention, and CAT. When these conventions are applicable, the granting of amnesty to persons responsible for committing the crimes defined therein would constitute a breach of a treaty obligation for which there can be no excuse or exception (Scharf 1996).

The prerogative of a state to issue an amnesty for an offense can be circumscribed by treaties to which the state is a party (Scharf 1996). As Article 27 of the Vienna Convention on the Law of Treaties (1990) provides: “*A party may not invoke the provisions of its internal law as justification for failure to perform a treaty obligation.*” This presupposes that each State Parties to the conventions are under obligation to take steps to prevent torture from being perpetrated, where torture occurred, they are also under obligation to prosecute the crime (Wallach 2010). All states have jurisdiction over the offence irrespective of where the crime was committed. State officials and Individual could be held criminally responsible under CAT which is celebrated as one of the most successful international human rights treaties (Hathway 2004). Its adoption by the United Nations (UN) in 1984 was the culmination of an effort to outlaw torture that began in the aftermath of the atrocities of World War II. States that ratified the Convention consented not to intentionally inflict severe pain or suffering, whether physical or mental, on any person to obtain information or a confession, to punish that person or to intimidate or coerce him/her or a third person (Hathway 2004). As of May 2006, 141 states had ratified CAT. The latter stands as a symbol of the triumph of international order over disorder, of human rights over sovereign privilege and impunity (Hathway 2004).

Furthermore, in order to protect persons deprived of their liberty from being subjected to torture, in 2006, the UN came up with the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). Article 1 states: “*The objective of this Protocol is to establish a system of regular visits undertaken by indepen-*

dent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.” This measure reaffirmed the obligation of all UN member States to prohibit and prevent torture.

Definition and Punishment under CAT

Article 4 of CAT provides that each State Party shall ensure that all acts of torture are offences under its criminal law and make them punishable by appropriate penalties which take into account their grave nature. The same shall apply to an attempt to commit torture and to act by any person that constitutes complicity or participation in torture. And also includes giving an order to perpetrate torture. Asher Abraham indicated in the Amnesty International Report of 2001 that torture is a gross offence to human dignity, justice and the rule of law (Amnesty International 2001).

Article 2 of CAT provides that there are no exceptional circumstances that may be invoked to justify the use of torture, nor can orders from a superior officer or a public authority be invoked as a justification for torture. Article 4 requires that those who violate this provision, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held accountable. This presupposes that those who have refused to obey orders must not be punished or subjected to adverse treatment (Foley 2003).

At the regional level, The Inter-American Convention to Prevent and Punish Torture (1985) provide in Article 3 that: “*The States Parties shall ensure that all acts of torture and attempts to commit torture are offences under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.*” It also states in Article 3 that: “*A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so will be held guilty of the crime of torture. A person who, at the instigation of a public servant or employee, orders, instigates, or induces the use of torture, directly commits it or is an accomplice to such acts will also be held guilty of the crime.*”

According to Wendland (2002), the obligation in Article 4(1) of CAT does not extend to include specific, separate offences in national

criminal law which correspond exactly to the definition of torture laid down in Article 1 of CAT. However, state parties which do not define torture or do not recognise the offence of torture in national legal systems are confronted with the problem of the classification of a crime over which they need to establish jurisdiction, and on the grounds of which they can institute prosecutions of persons who have perpetrated torture elsewhere. In this regard, in its consideration of initial and periodic reports from States Parties, the Human Rights Committee frequently includes in its list of recommendations that a definition of torture in conformity with the definition appearing in Article 1 of CAT be inserted in domestic law as a separate type of crime. In its more recent report, the Committee has deemed the inclusion of torture as an offence defined at least precisely as Article 1 of CAT definition to be a requirement of CAT (Delaplace and Pollard 2006).

Article 4 paragraph 2 obliges States Parties to make these offences punishable by appropriate penalties. The punishment for torture provided for under the domestic law of a state party must not be trivial or disproportionate, but must take into account the grave nature of the offence. This means that torture must be punishable by severe penalties (Wendland 2002).

It is pertinent to mention that CAT provides no direction as to the expected length of sentences. However, this must be calculated in the same way as other serious offences under national law; for example, offences which seriously threaten human health or life, such as torture and murder (Wendland 2002). This is to say that penalties must be in proportion to the grave nature of the crime, but also in proportion to other penalties imposed under national legislation for similar crimes (Ingelse 2000). Invocation of punishment in CAT for justification of the death penalty would definitely be confronted by strong opposition from advocates of the right to life, more so, as CAT itself is a human rights instrument that bans torture. Various interpretations of CAT have suggested also that the imposition of the death penalty can constitute torture. Though crime of torture should be expected to receive the heaviest sentence of all crimes, but death penalty should not be considered as an option even though CAT as a whole has not commented on the appropriate level of sentence for torture, it is possible on the basis of the individual opinions of members to establish a range

within which such sentences should fall (Wilson 1983.).

Even though criminal charges will usually need to be brought against perpetrators, this may prove difficult in cases of torture, or other forms of ill-treatment, as those responsible may have concealed their identity from the victim and rely on either a protective 'wall of silence' from their colleagues, or even their active collusion in concocting a false story. Even if the victim has identified them, perpetrators may argue that it is 'one person's word against another' and that this is insufficient to prove guilt (Foley 2003).

Consequently, for successful prosecution culminating in conviction, where an individual officer has been identified by name, by physical description, or through a serial or personal identification number, it should be possible to trace the officer through the official records. If the victim has been held at an officially recognised place of detention then the custody records should identify those responsible for the torture (Michael 1964). Other records held at police stations and detention facilities may also contain relevant information which may lead to identification of individuals accused of torture. It may also help to corroborate or disprove a particular allegation (Foley 2003).

The assumption that a law enforcement officer accused of committing a crime in the course of duty may stand a better chance of subsequently being acquitted than the average criminal defendant may also make some prosecutors reluctant to pursue a case. However, these factors need to be balanced against the public interest served in order to ensure that those in positions of authority do not abuse it. This may justify bringing a prosecution even in cases where there is a greater likelihood of acquittal than would otherwise be the case (Foley 2003).

Where there is strong evidence that someone has suffered prohibited forms of ill-treatment while in custody, and strong evidence that an identified officer, or group of officers, mere presence at the time of this ill-treatment, they could either be charged jointly for carrying out or aiding and abetting the ill-treatment or individually for failing to protect someone in their care.

Although the laws governing the use of force on detainees may vary in different countries, the prohibition of torture is absolute. Neither the dangerous character of a detainee, nor the lack of security in a detention facility can be used to

justify torture (Cole 2009). According to international standards, force may only be used on people in custody when it is strictly necessary for the maintenance of security and order within the institution, in cases of attempted escape, when there is resistance to a lawful order, or when personal safety is threatened. In any event, force may be used only if other non-violent means have proved ineffective pursuant to rule 54 of the Standard Rules for the Treatment of Prisoners (1977).

Criminal charges could be brought against those in positions of responsibility who either knew or consciously disregarded information which indicated that their subordinates were committing crimes of torture or ill-treatment and failed to take reasonable measures to prevent or report it (Boelaert-Suominen 2001). Where patterns of torture or ill-treatment emerge or there is systematic failure to prevent them or hold the perpetrators to account, this could be taken as evidence that those in authority are effectively condoning such practices (Foley 2003).

In a famous passage in the Velásquez Rodríguez and Godínez Cruz cases (1988), the court observed that “*The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violation committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.*”

The case of *R v Fryer, Nichol, Lawrie* (2002) illustrates and supports the position that persons who are entrusted with and in position of responsibility must act responsibly and should not abuse their positions to the extent of violating the right not to be subjected to torture. In this case, a prisoner was subjected to torture by three prison officers. A number of other prisoners complained of similar ill-treatment at around the same time and criminal charges were eventually brought against 27 prison officers in connection with 13 separate complainants of ill-treatment and assaults, some of which were said to amount to torture. The three officers were convicted in relation to the above case and received sentences of three and a half to four years imprisonment. The court also held that prisoners are entitled to the protection of the law from assaults on them by prison officers.

DOMESTIC AND UNIVERSAL JURISDICTIONS OVER CRIME OF TORTURE

Article 5 of CAT provides that:

“Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate.

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

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.”

It further obliges states to take such measures as may be necessary to establish jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction, if it does not extradite the person to another state (Reydam 1996). The state is subject to this obligation if the offences are committed under its jurisdiction or on board of a ship or aircraft registered in the State in question, or if the suspect is a subject of the State (Ingelse 2001). In the latter case, the State must establish its jurisdiction, if the State deems this to be suitable. The state has jurisdiction not only over the territorial State within its borders, but also over occupied and overseas territories (Ingelse 2001). This obligation is regardless of where the crime was committed, the nationality of the victim and the nationality of the alleged perpetrator (Burgers and Danelius 1988).

Article 7 of CAT requires States under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite the person, submit the case to its competent authorities for the purpose of prosecution. Article 5 paragraph 2 forms the cornerstone of universal reaction under criminal law against torture (Ingelse 2001). The provision

obliges each State Party to establish universal jurisdiction for the offence of torture in its legislation for situation in which a suspect is present within its territory and the State does not extradite the suspects on the ground of Article 8 to one of the States referred to in the first section of Article 5.

According to Ingelse (2001), the idea that universal jurisdiction should be included in CAT is linked to the nature of torture. Ingelse observed that torture in Article 1 of CAT is unthinkable without the involvement of the State itself and stressed that due to state involvement, few prosecutions of torture offenders before national court are to be expected. If a State tolerates torture, there must be methods available for tackling torture. CAT offers other State Parties a basis for filling the gaps left by States who do not act against torture. State Parties are permitted to prosecute torture suspects who enter their territory (Scharf 1996).

Article 5(2) provides that whether or not any of the grounds of jurisdiction dealt with in paragraph 1 exist, a State Party shall have jurisdiction over offences of torture in all cases where the alleged offender is present in a territory under its jurisdiction and it does extradite the offenders to a State which has jurisdiction under paragraph 1 (Wendland 2002). The term 'any territory under its jurisdiction' should be read broadly. It applies to alleged offenders present in any 'territories over which a State has factual control', the actual area of its territory or its technical extension (Wendland 2002).

The phrase takes such measures as may be necessary to establish its jurisdiction in cases where the alleged offender is present' includes legislative measures, but it is not limited to such measures. It includes executive and judicial steps to arrest, investigate, prosecute, or extradite (O'Brien 2010). Therefore, even if CAT does not expressly state what measures must be taken to establish jurisdiction, the state parties must have intended that all measures be taken (Wedland 2002). The state may have the authority under international law to establish universal jurisdiction over the crimes of torture because one justification of universal jurisdiction is that violations of international law injure all states (Bradley and Goldsmith 1999). In support of this assertion, Nigel Rodley stated in 1999 at a symposium that "*it is now hard to imagine a convincing objection to any state's unilateral choice jurisdiction over torture on a*

universal basis. The permissive universality of jurisdiction is probably already achieved under general international law" (Princeton University 2001).

However, this view is disputed by the President of the International Court of Justice, who, in his separate opinion in the Congo v Belgium case (2002) wrote: "*States primarily exercise their criminal jurisdiction on their own territory. In classic international law they normally have jurisdiction in respect of an offence committed abroad only if the offender, or at least the victim, is of their nationality, or if the crime threatens their internal or external security. Additionally, they may exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. But apart from the cases, international law does not accept universal jurisdiction.*"

Nevertheless, Article 5(2) imposes an obligation on States to establish jurisdiction over all crimes of torture, irrespective of the status of the alleged offenders. The rationale of CAT is that suspects of torture must not be able to find a safe haven and escape responsibility for their acts (Amnesty International 2012; Burgers and Danelius 1988). Any suspect of torture must therefore fear prosecution always and everywhere (Silker 2004). The Committee against Torture has expressed the view that the States' obligations to bring alleged torturers to justice extend to the highest officials. In direct reference to the case involving the former president of Chile, Pinochet Ugarte, whom the United Kingdom had been requested to extradite to Spain on charges of inter alia, complicity in the torture of Spanish citizens, the Committee against Torture expressed the view that Article 5(2) of CAT "*conferred on States Parties universal jurisdiction over torturers present in their territory, whether former heads of state or not, in cases where it was unable or unwilling to extradite them*" (Brownlie 1990).

Developments in other areas of international criminal law seem to suggest a trend towards establishing jurisdiction over international crimes, even when they are alleged to have been committed by the highest officials and heads of States. This is implicit in the Rome Statute and the Statute of the International Tribunal for the Former Yugoslavia. Article 27 of the former provides: "*This Statute shall apply equally to all persons with-*

out any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.” And in the Statute of the International Tribunal for Rwanda; Article 7(1): “The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.” The international prohibition against torture compels all states to refrain from such conduct under any circumstances and imposes an obligation erga omnes to punish such conduct (Foley 2003).

DENYING IMMUNITY FOR TORTURE

Chinkin (1999), a prolific writer on the subject of torture provides a useful insight on how to treat a perpetrator of torture irrespective of the status in any jurisdiction citing as an example Pinochet’s presence in the United Kingdom where the Spanish authorities took advantage of his in the United Kingdom to seek his extradition to Spain to stand trial on a range of charges associated with his repressive regime in Chile (Chinkin 1999). After his arrest at a London clinic, an international warrant was issued accusing Pinochet of torture and conspiracy to torture. In the case of *R, v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugalte, Amnesty International and Others Intervening* (1998) the House of Lords held that Pinochet was not immune from prosecution in United Kingdom courts for crimes under international law. The Home Secretary subsequently authorized the magistrate to proceed with extradition under section 7(4) of the Extradition Act (1989).

However, the House of Lords subsequently set aside its decision because the Appellate Committee had been improperly constituted because Lord Hoffmann had failed to disclose that he was a Director of Amnesty International Charitable Trust Ltd one of the major litigants in the case. The reconstituted and expanded Appellate Committee upheld the appeal in part so as to permit extradition proceedings to take place.

These proceedings related to allegation of torture committed pursuant to a conspiracy to commit torture and the single act of torture allegedly committed after December 8, 1988, when Pinochet was deemed to have lost his immunity from prosecution for such acts (Chinkin 1999).

The question was therefore whether international crimes in the highest sense, such as torture, can ever be deemed to be official acts of a head of state? (Watts 1994). This question requires consideration of the parallel strands of the substance of international crimes and jurisdiction for their prosecution, and, in particular, the obligations undertaken by the parties to CAT.

The court in Pinochet case observed that torture had become accepted as an international crime. The purpose of CAT was not to create the offense of torture but to extend it and to deny a torturer a safe haven by providing a form of universal jurisdiction to extradite or prosecute through the principle of *aut de derea ut judicare* (Guiora and 2006). The majority of the Law Lords found that torture cannot constitute an official act of a head of state. Accordingly, a former head of state cannot successfully claim immunity irrespective of any purported waiver by the state.

It is the first time that a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes (Knuchel 2011). The ruling has been welcomed, especially by human rights activists and victims of human rights abuses, as a significant step in the process of making those who commit such crimes, answerable for their actions before a court of law (Penrose 1999). Its implications for international law are considerable and will inevitably be the subject of much detailed analysis and debate for many years ahead.

The United Kingdom authorization of extradition proceedings on the basis of the remaining charges is important. Insisting on widespread and massive violations of human rights, for example, as the requirement of torture and crimes against humanity, can minimize the gravity of a single abuse or a single instance of torture. It was emphasized in the House of Lords that CAT prohibits a single act of torture against a single person and that torture does not become an international crime only when it is committed or instigated on a massive scale. The International

Criminal Court is complementary to national courts and it is, in any case, envisaged only for the most serious crimes. The jurisdictional limitation serves to remind us that international crimes need not be on that massive scale in order to warrant criminal proceedings. Consequently, according to Donovan and Roberts (2006), international law has come to recognize that states could lawfully exercise jurisdiction over these violations even without territorial or nationality linkage.

The decisions of the courts show a remarkable willingness to explore a number of sources in order to have informed understanding of concepts such as torture and universal jurisdiction. This included treaties and their *travaux préparatoires*, UN resolutions, draft articles of the International Law Commission, and the Statutes and jurisprudence of the International Criminal Tribunals for Former Yugoslavia and Rwanda (Chenkin 1999).

Akande (2004) argued that State immunity has also come to be challenged on the grounds that it is incompatible with the principle of universal jurisdiction associated with *jus cogens* violations.

The impact of this enhanced understanding may be seen as the denial of the immunity claimed for a former head of state for official acts of torture, and represents a choice between two visions of international law: a horizontal system based upon the sovereign equality of states and a vertical system that upholds norms of *jus cogens* such as those guaranteeing fundamental human rights. Lord Hope emphasized the *jus cogens* character of the immunity enjoyed by serving heads of state which made it far from self evident that it should be removed from former holders of such office (Knuchel 2011).

In the light of such valid concerns the decision goes a long way. It represents the globalization of human rights law through the affirmation that the consequences of, and jurisdiction over, gross violations are not limited to the state in which they occur, or of the nationality of the majority of the victims (Bianchi 1999). It validates the assertion that torture is always unacceptable and unjustifiable on any grounds and provides a memorial to the thousands who did not survive. Further, obligations incurred by human rights treaties, such as CAT can be enforced extraterritorially. This is a blow to those regimes such as that of Pinochet that cynically became

bound by these treaties with contemptuous disregard for their requirements.

They remain opposable before the courts of a foreign State, even where those courts exercise such jurisdiction under these conventions. In other words, the absolute nature of the obligation to establish jurisdiction over the crime of torture in Article 5(2) which is meant to apply irrespective of the status of the alleged offender is superseded by jurisdictional immunities in customary international law enjoyed by certain representatives' of States.

The manifest intent of both conventions was to ensure that persons convicted of genocide or torture serve harsh sentences. In the view of CAT's drafters, in applying Article 4, which requires states to make torture punishable by appropriate penalties which take into account their grave nature, it seems reasonable to require that the punishment for torture be closely related to the penalties applied to the most serious offenses under the domestic legal system. Thus, this wording of CAT should not be construed to suggest the permissibility of amnesties or pardons. Even if a State is not party to CAT, this does not relieve the State of the responsibility contained in CAT.

Article 129 of Geneva Convention Relative to the Treatment of Prisoners of War (1949), require states to exercise universal jurisdiction in respect of 'grave breaches' of the Convention and bring cases before their own national courts. They also require state parties to search for people alleged to have committed or ordered grave breaches of the Conventions, such as torture and inhuman treatment, or those who have failed in their duties as commanding officers to prevent such grave breaches occurring. The 'search and try' obligation is without frontiers under the Geneva Conventions. States which are not bound by any of these Conventions are still permitted to exercise universal jurisdiction if an alleged foreign perpetrator of torture is found on their territory as general or customary international law permits the exercise of universal jurisdiction over torture. Judges and prosecutors have a particularly important role to play in ensuring that these obligations are fulfilled with respect to the prosecution of people suspected of committing acts of torture or ancillary crimes (Foley 2003). The underlying assumption is that the crimes of torture are offenses against the law of nations or against humanity and in this re-

gard, the prosecuting nation is acting for all nations. In these cases, perpetrators of human rights violations are considered *hostis humani generis*-meaning enemies of all humanity (Brierly 1963).

CONCLUSION

The creation of a worldwide net of criminal responsibility is an important practical measure for the prevention of torture. Individuals will be less likely to commit acts of torture the greater the certainty that they will ultimately be publicly and severely held responsible for such acts. Even if they act under authorisation or under orders by a regime that currently permits torture, a rigorous international and domestic criminalization of torture establishes a deterrent through the constant possibility of criminal prosecution by a subsequent regime, or in the course of travelling to another state.

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