

CODIFYING THE CRIME OF TORTURE

A central aspect of domestic implementation of the United Nations Convention Against Torture (UNCAT) is to ensure that its national criminal law criminalises the act of torture in line (at a minimum) with the definition in Article 1 of the UNCAT, as a specific and distinct crime.¹ It is not sufficient to solely have a prohibition in constitutional law.² (see further 'Defining Torture' factsheet) Distinct codification advances recognition of the 'special gravity of the crime of torture', thereby enhancing punishment, deterrence and monitoring.³ Some states have legislated to define torture more broadly to include acts by private actors.⁴

MODES OF CULPABILITY

Article 4 (1) of the UNCAT requires states to 'ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.'⁵ Different modes of liability need to be included in national anti-torture legislation including: commission; attempt; complicity and other degrees of participation; encouragement; incitement; acquiescence.⁶

APPROPRIATE PENALTIES

Article 4 (2) of the UNCAT requires states to 'make these offences punishable by appropriate penalties which take into account their grave nature'.⁷ Whilst not establishing a firm rule, the Committee Against Torture has generally recommended that torture be punished with a minimum of six to a maximum of twenty years of imprisonment, depending on the severity.⁸

The difficulty here lies in the particularity of what severe punishment means in different jurisdictions. In any case, punishment where torture is proven should be equal to that of the most serious offences in that jurisdiction, except the death penalty.⁹

NO JUSTIFICATIONS: DEROGABILITY, DEFENCES, IMMUNITIES & AMNESTIES

There are no exceptional circumstances, such as state or threat of war, political or public emergency, or defences, such as obeying orders or 'necessity', under which torture can legitimately be inflicted.¹⁰ Resort to torture and CIDT has been observed to increase in exceptional circumstances which further underscores the need to reject derogations.¹¹ Traditional or religious justifications are equally rejected.¹²

Relatedly, immunities and amnesties are also not applicable to the crime of torture.¹³ Statute of limitations (i.e. a time limit on prosecution) also do not apply.¹⁴ If still enshrined in the domestic law, such limitations to the absolute nature of the prohibition must be repealed.

ESTABLISHING JURISDICTION

Article 5 of the UNCAT requires states to establish jurisdiction over the crime of torture committed on any territory under its jurisdiction and over perpetrators and victims who are its nationals.¹⁵ Article 7 embodies the extradite or prosecute principle (*aut dedere, aut judicare*), requiring states to either extradite or prosecute alleged perpetrators of torture.

The domestic law should also provide for universal jurisdiction over torture. In other words, a state should be able to prosecute non-nationals for the crime of torture, if they are present on its territory.¹⁶ Customary international law permits the exercise of universal jurisdiction over torture, including when committed in states not party to the UNCAT.¹⁷ (For exercise of jurisdiction, see the factsheet on 'Prosecuting Torture'.)

MOREOVER

- The obligations to criminalise torture do not apply to CIDTP. Instead, Article 16 of the UNCAT merely requires states 'undertake to prevent' acts amounting to CIDTP.
- Article 11 of the UNCAT requires states to systematically review 'interrogation rules, instructions, methods and practices as well arrangements for the custody and treatment of person subjected to any form of arrest, detention or imprisonment'.
- Discrepancies between Article 1 and domestic law are seriously scrutinized by the Committee Against Torture as they are seen to create 'loopholes for impunity'.¹⁸ The UNCAT requires that national laws and performance are continually reviewed and, if ineffective, revised.¹⁹
- It is corollary that persons be protected against any retaliation who resist what they view as unlawful orders or who cooperate in the investigation of torture or ill-treatment, including by superior officials.²⁰

REFERENCES

¹ UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/, paras. 8 and 11. ('GC II')

² Report to Togo CAT/C/TGO/CO/1, para. 10.

³ GC II, para 11.

⁴ Uganda *Prevention and Prohibition of Torture Act*, Section 7.

⁵ See also similar provision in Article 6, *Inter-American Convention to Prevent and Punish Torture*.

⁶ GC II, para. 17.

⁷ For a detailed discussion, see Manfred Nowak and Elizabeth McArthur (eds.). *The United Nations Convention Against Torture, A Commentary* (Oxford University Press, Oxford: 2008), p. 241. ('Nowak')

⁸ Nowak, p. 250.

⁹ Burgers and Danelius, *The UN Convention Against Torture* (1988), p. 129.

¹⁰ Article 2 (2) and (3) of UNCAT; see also Articles 4 and 5 of the *Inter-American Convention to Prevent and Punish Torture*.

¹¹ CAT/C/PER/CO/4, para. 15.

¹² GC II, para. 5.

¹³ GC II, para. 5: CAT stated that "amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability"; see also UN Human Rights Committee, General Comment No. 20, para. 15: "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". See also *Case of Barrios Altos (Chumbipuma Aguirre and other v. Peru)*, Inter-American Court of Human Rights, 14 March 2011, para. 41: 'it is unacceptable to use amnesty provisions, statutes of limitations or measures designed to remove criminal liability as a means of preventing the investigation and punishment of those responsible for gross violations of human rights such as torture, summary, extra-legal or arbitrary executions and disappearances, all of which are prohibited as breaches of non-derogable rights recognized under international human rights law.'

¹⁴ See Concluding Observations of CAT: Andorra, UN Doc. CAT/C/AND/CO/1 (2013) §7; Latvia, UN Doc. CAT/C/LVA/CO/3 (2013) §8; Guatemala, UN Doc. CAT/C/GTM/CO/5-6 (2013) §8; Japan, UN Doc. CAT/C/JPN/CO/2 (2013) §8. See also Prosecutor v Furundzija, Yugoslavia Tribunal (1998) §157; Principle 23 of the Updated Impunity Principles; Basic Principles on Reparation, §6; Article 29 of the Rome Statute.

¹⁵ Article 5 of UNCAT: 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

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

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

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

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

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

¹⁶ UNCAT, Article 5 (2): See Concluding Observations of CAT: Andorra, UN Doc. CAT/C/AND/CO/1 (2013) §7; Latvia, UN Doc. CAT/C/LVA/CO/3 (2013) §7; Estonia, UN Doc. CAT/C/EST/CO/5 (2013) §8; Kenya, UN Doc. CAT/C/KEN/CO/2 (2013) §8; UK, UN Doc. CAT/C/GBR/CO/5 (2013) §17; Tajikistan, UN Doc. CAT/C/TJK/CO/2 (2012) §6; Armenia, UN Doc. CAT/C/ARM/CO/3 (2012) §10; Rwanda, UN Doc. CAT/C/RWA/CO/1 (2012) § 7

¹⁷ Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998) §140

¹⁸ GC II, para 9.

¹⁹ GC II, para 4.

²⁰ GC II, para 26; UN Human Rights Committee, General Comment No. 20, para 13.