



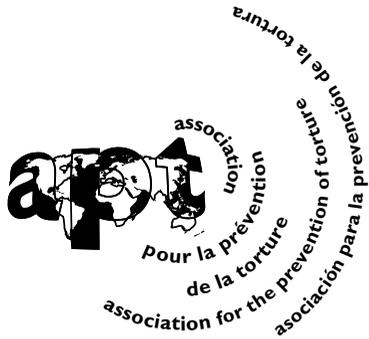
A Handbook on State Obligations under the UN Con- vention against Torture

"Desiring to make
more effective the
struggle against
torture and other
cruel, inhuman or
degrading treatment
or punishment
throughout the
world."

by Lene Wendland

The United Nations Convention against Torture (UNCAT) is the only legally binding convention at the universal level concerned exclusively with the eradication of torture. The main objective of the Convention is to lay down obligations on States Parties to establish and exercise jurisdiction over the crime of torture. The Convention furthermore imposes significant obligations on States to take measures to prevent torture and to facilitate redress to torture victims and survivors.

The Association for the Prevention of Torture (APT), in publishing this Handbook, aims to provide easily accessible, yet comprehensive information about the substantive provisions of the Convention to people concerned with the issue of torture, be it in a professional or a private capacity. The Handbook is a useful reference for NGOs in the understanding of the UN Convention against Torture, as well as a tool by relevant national and international actors in the implementation of the obligations assumed by the States Parties.



A Handbook on State Obligations under the UN Convention against Torture

by Lene Wendland

Geneva, May 2002

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INTRODUCTION

Starting with the Universal Declaration of Human Rights (1948), the **prohibition against torture** and “cruel, inhuman or degrading treatment or punishment” now pervades the extensive network of international and regional instruments constituting human rights and humanitarian law.¹ However, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment² (hereafter: “the Convention”) is the only legally binding convention at the international level concerned exclusively with the eradication of torture.³

The main objective of the Convention is to lay down **obligations on States Parties** to establish and exercise jurisdiction over the crime of torture. The Convention furthermore imposes significant obligations on States to take measures to prevent torture and to facilitate redress to torture victims and survivors.

While most people working on torture-related issues know of the Convention in broad terms, the legal implications of the Convention’s provisions are not necessarily well-known outside the circles of specialised non-governmental organisations and academics. The present Handbook seeks to remedy this situation. The aim of the Handbook is to provide easily accessible, yet comprehensive information about the substantive provisions of the Convention to people concerned with the issue of torture, be it in a professional or a private capacity.

The Handbook is targeted at groups and individuals working in government or non-governmental sectors, with some prior knowledge of the Convention provisions, but who would like to know more. It should be stressed, however, that for legal or other experts on the Convention, the Handbook may not offer much additional information.

The structure of the Handbook is as follows:

- The first section gives a general overview of **the content of the Convention, together with a brief introduction to the Committee against Torture.**
- The second section, which contains the primary focus of the Handbook, considers in more detail **the substantive provisions of the Convention. Each article is subject to analysis and interpretation.**
- The third section presents **a thematic summary of some central issues pertaining to the Convention.**

The handbook format was chosen in order to enable readers who are only looking for information about particular articles of the Convention to find quick access to such information. However, the Handbook can also be read in its entirety.

It is hoped that this Handbook would not only be a useful reference in the understanding of the UN Convention against Torture, but would also be a tool in the implementation of the obligations assumed by the States Parties. National actors, including non-governmental organisations, are encouraged to make use of the material contained herein as part of their education and training activities, as well as campaigning and lobbying efforts. Moreover, the Handbook could be very useful in the drawing up of reports intended to analyse the situation of torture in the countries; likewise, States Parties and non-government organisations may use the Handbook when drawing up their respective reports for the UN Committee against Torture.

In the drafting of this Handbook, the Association for the Prevention of Torture (APT) wishes to acknowledge the comments and contributions of the following persons: Heema Dawoonauth, Claudine Haenni, Prof. Malcolm Evans, Prof. Peter Thomas Burns and members of the APT Secretariat (2001 – 2002). Annex IV was drafted by Marie-Eve Friedrich. The final Handbook was drafted by Lene Wendland and edited by Cecilia Jimenez.

Geneva, May 2002



LIST OF ABBREVIATIONS

CAT: Committee against Torture

ICC: International Criminal Court

ICCPR: International Covenant on Civil and Political Rights

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the Former Yugoslavia

HRC: Human Rights Committee

UNCAT: The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

**I
OVERVIEW,
RATIFICATION,
AND THE
COMMITTEE
AGAINST
TORTURE**

I. OVERVIEW, RATIFICATION, AND THE COMMITTEE AGAINST TORTURE

1. SUMMARY OF THE OVERALL STRUCTURE AND SUBSTANTIVE PROVISIONS OF THE CONVENTION

The Convention against Torture is divided into three parts:

- Articles 1 to 16 contain the substantive provisions which States Parties must implement in their national laws. These substantive articles are the primary focus of this Handbook.
- Articles 17 to 24 deal mainly with the mandate of the Committee against Torture, which is the treaty monitoring body responsible for overseeing the implementation of the Convention by States Parties.
- Articles 25 to 33 deal with technical matters relating to the signature or ratification of the Convention, procedure for amendments, reservations by States Parties regarding parts of the Convention, etc.

As for the **substantive content**, the core provisions concern criminal enforcement. These require States Parties to ensure that torture, the attempt to commit torture, and complicity in torture are offences under their criminal law and to make these offences punishable by appropriate penalties which take into account their grave nature. States must furthermore prescribe laws to punish torture committed on their territory, as well as by their nationals even outside this territory, and, if appropriate, against their nationals, and in any other situations where they choose not to extradite offenders. They must also detain any alleged torturers in their territory (regardless of the location of the offence) and either submit them to the prosecuting authorities or extradite them. Finally, States are obliged to prevent torture through various means and provide victims with the right to make legal complaints about torture.

Article 1 provides a **definition** of the term “torture” for the purposes of the Convention.

Article 2 obliges States Parties to take effective **measures of prevention** with respect to torture.

Article 2 also stipulates that torture cannot be justified under any circumstances (the right of protection against torture is a **non-derogable right**). The absolute ban on torture extends to situations where it is ordered by a superior officer or public authority.

Article 3 prohibits the expulsion of individuals to a State where there are substantial grounds for believing that they would be in danger of being subjected to torture (this principle is also called **non-refoulement**.)

Article 4 obliges States Parties to **define acts of torture as crimes** in their national legislation and punish perpetrators of torture. The same applies to attempts to commit or complicity in committing torture.

Article 5 obliges States Parties to **establish universal jurisdiction** in cases of torture where the alleged offenders are not extradited to face prosecution in another State.

Articles 6-8 govern the **exercise of universal jurisdiction** as established in Article 5. This includes, among other important things, the duty to take suspected persons into custody, to undertake inquiries into allegations of torture, and to submit suspected torturers to the prosecuting authorities.

Article 9 provides that States Parties **assist** one another **in criminal proceedings** concerning torture.

Article 10 obliges States Parties to **disseminate information** on the prohibition against torture and to **train law enforcement officials** and others in this subject.

Article 11 stresses that States Parties must continually **review their interrogation rules** and arrangements for custody with a view to preventing torture.

Article 12 provides for **prompt and impartial investigation** where there are reasonable grounds to believe that torture has been committed.

Articles 13 and 14 provide victims and their dependants **the right to redress, protection, and compensation**.

Article 15 **prohibits the use of evidence obtained through torture**.

Article 16 obliges States Parties to prevent public officials from committing or acquiescing in other acts of **cruel, inhuman, or degrading treatment**.

■ 2. RATIFICATION AND IMPLEMENTATION OF THE CONVENTION

By ratifying⁴ the Convention, States become bound to give effect to its provisions as from the thirtieth day after the date when they deposit a copy of their instruments with the Secretary-General of the United Nations⁵, showing that domestic formalities for ratification have been complied with. Once ratified, conflicting national norms may not be invoked as justification for failing to meet the Convention's obligations.⁶

As of May 2002, 129 States had ratified the Convention. It still remains the least universally ratified of the six core international human rights treaties.

It is possible for States to make **reservations** respecting certain articles of the Convention at the time of ratification or accession.⁷ However, such reservations must not be incompatible with the object and purpose of the Convention.⁸

There is no standard method for **implementing international treaties in national law** in the variety of legal systems prevailing in the international community. Methods include incorporation, adoption, transformation, passive transformation, and reference.⁹ Internal legislation or constitutional provisions may prescribe the methods of harmonising national laws or the effect of international law on national jurisdiction. As long as these do not erode the substance of the Convention, it is the State's prerogative to choose which domestic process it undertakes. Nevertheless, the Committee against Torture has expressed fairly specific opinions on how States Parties to the Convention against Torture should implement its provisions in their national laws (see, for example, the section below on Article 4 of the Convention).

■ 3. THE COMMITTEE AGAINST TORTURE

The Committee against Torture (hereafter: "the CAT" or "the Committee") is one of the United Nations treaty bodies created **to supervise the implementation** by States Parties of their obligations under the respective parent convention.¹⁰

Articles 17-18 of the Convention contain detailed provisions for the workings and membership of the CAT.

The Committee consists of ten experts of "high moral standing" and with recognised competence in the field of human rights. Members serve in their personal capacity, meaning that they are not there as representatives of any government or organisation.

Members of the CAT are elected by the States Parties, from among nominees proposed by the States Parties, for terms of four years. They are eligible for re-election if re-nominated. The Committee establishes its own rules of procedure.

The Committee is responsible for **monitoring** the extent to which States Parties respect their **obligations** to implement the Convention, i.e. **to prevent, to prohibit, and to punish torture**. The main procedure for monitoring the implementation of the Convention is through the State Party reporting procedure under Article 19 of the Convention. The purpose of this procedure is to help the Committee gain a clear picture of the extent to which States Parties are respecting their treaty obligations, by asking them to describe how they are implementing those obligations in practice. States have an obligation to submit reports on a regular basis¹¹, although in practice many countries delay the submission of these reports for months or even years.

Once the CAT has received a State Party report, it must examine it carefully in order to identify any areas of concern. The report is discussed in a formal meeting, which the public may attend. During this meeting, the State whose report is being considered is given an opportunity to introduce its report, and will normally be asked by the Committee to answer further questions prompted by the report. Finally, the Committee will draw conclusions and make recommendations to the State on ways to better implement its obligations, if necessary.

In addition to the examination of State Party reports, the Committee can carry out a **confidential inquiry** into allegations of a systematic practice of torture.¹² An inquiry can be initiated when “reliable information” is received which “appears to contain well-founded indications that torture is being systematically practised.”¹³ If the State Party agrees, the inquiry could involve a fact-finding visit to the country. Even the mere fact that the visit takes place is confidential, before and afterwards, at this stage. In such cases, the CAT may make contact with local NGOs, on the understanding that they will maintain the highest respect for the confidential nature of the visit.¹⁴

Following an inquiry and a possible fact-finding visit, the Committee’s findings, along with any appropriate recommendations, will be transmitted to the State Party. The proceedings remain confidential, but once they have been concluded, the Committee may, following consultation with the State Party, decide to include a summary account of the outcome in its annual report.

According to Article 22, a State can make a declaration accepting the competence of the CAT to receive and consider **communications from or on behalf of individuals** subject to its jurisdiction who claim to be victims of a violation of the Convention.¹⁵ Such communications can be about specific incidents of torture, including cases involving the imminent expulsion of individuals to a country where they are believed to be at risk of torture, or about having been denied redress in a case of torture.¹⁶

An individual complaint is inadmissible if it is anonymous, if it is considered by the CAT to be an abuse of the complaint procedure, or if it is incompatible with the provisions of the Convention.¹⁷ The Committee is also unable to consider an individual communication which has been or is being examined under another procedure of international investigation or settlement.

The CAT considers individual complaints in closed meetings. After examining the individual complaint “in the light of all information made available to it by or on behalf of the individual and by the State Party concerned”¹⁸, the Committee forwards its views to the individual and the State Party concerned.

The Convention contains no provision obliging States to implement the Committee decisions, and there is no enforcement mechanism. However, States Parties must offer redress and compensation to a complainant when the

Committee finds that there has been a violation of the Convention¹⁹, and the State Party is obliged to indicate how it will offer redress.²⁰

In its **annual report** to the General Assembly, the CAT can include a summary of the complaints and a list of the observations and comments of the States in question and of the Committee's decisions.²¹ The Committee can also decide to include the full text of its decisions as well as the text of the inadmissibility decisions in the report.²² This has now become the normal procedure.

Article 21 provides for an **inter-State complaints** procedure which has never been used.

**II
INDIVIDUAL
ANALYSIS OF
ARTICLES 1–16
OF THE
CONVENTION**

II. INDIVIDUAL ANALYSIS OF ARTICLES 1–16 OF THE CONVENTION

1. METHODOLOGY

In order to achieve uniformity in the analysis of the substantive provisions of the Convention, each article will be considered the following way:

- 1) The article is cited;
- 2) Key elements of its provisions are summarised;
- 3) The article is interpreted subsection by subsection.

The interpretation of certain articles will be more detailed than that of others. This may be a reflection of the fact that certain articles are of more practical importance than others, and may therefore more frequently give rise to cases and comments. In some cases, however, it may merely reflect a lack of available information or discussion about the article.

A number of Convention articles cross-reference other articles; thus some information may be repetitive.

2. ANALYSIS OF SUBSTANTIVE PROVISIONS

Article 1

1. *For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*
2. *This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.*

Features: Definition of torture, scope of application, lawful sanction exception, minimum level of protection

Interpretation

§ 1. It is possible to extract from §1 **three essential factors** necessary for an act to qualify as torture:

- The infliction of severe mental or physical pain or suffering;
- By or with the consent or acquiescence of the State authorities;
- For a specific purpose, such as gaining information, punishment or intimidation.

A substantially similar definition can be found in the Inter-American Convention to Prevent and Punish Torture²³. The UN Special Rapporteur has applied the same definition. It is in line with the definition suggested or acted upon by such international bodies as the European Court of Human Rights and the Human Rights Committee .

However, while the broad convergence of international instruments and international jurisprudence suggests a general acceptance of the main elements contained in the definition set out in Article 1 of the Convention²⁴, it is increasingly widely recognised that the definition in Article 1 is not necessarily applicable in its totality in other spheres of international law.²⁵ For example, in a 2001 decision by the International Criminal Tribunal for the former Yugoslavia (hereafter: “the ICTY”), it was stated that:

“the definition of torture contained in the Convention cannot be regarded as the definition of torture under customary international law, which is binding regardless of the context in which it is applied.”²⁶

The Act of Torture

The act of torture in the Convention refers to **the deliberate infliction of severe pain or suffering** upon a person, which can be either mental or physical in nature and caused by either a single isolated act, or a number of such acts.

The nature and degree of suffering experienced by an individual may be difficult to verify objectively. It may depend on many personal characteristics of the victim—for example sex, age, religious or cultural beliefs, or health. In other cases, certain forms of ill-treatment or certain aspects of detention which would not constitute torture on their own may do so in combination with each other.

There was little substantive discussion on the issue of what constitutes “**severe**” by the Working Group of the Commission on Human Rights which drafted the Convention. However, the framers of the Draft Convention for the Prevention and Suppression of Torture²⁷ did address the problem. Although this draft was rejected by the Working Group, its deliberations led to the formalising of this terminology²⁸:

“The scope of ‘severe’ encompasses prolonged coercive or abusive conduct which in itself is not severe, but becomes so over a period of time.”

For the purpose of determining what constitutes “severe” under the Convention, reference may be made to the above definition. The test to be employed for so doing is a subjective one that takes account of the circumstances of each case.²⁹

The UN Special Rapporteur on Torture, in his 1986 report, provided a detailed, although not exhaustive, catalogue of those acts which involve the infliction of suffering severe enough to constitute the offence of torture, including: beating; extraction of nails, teeth, etc.; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; administration of drugs in detention or psychiatric institutions; prolonged denial of rest or sleep; prolonged denial of food; prolonged denial of sufficient hygiene; prolonged denial of medical assistance; total isolation and sensory deprivation; being kept in constant uncertainty in terms of space and time; threats to torture or kill relatives; total abandonment; and simulated executions.³⁰

Different cultures, and indeed individuals within a particular culture, may have different perceptions of what amounts to torture. This can be relevant in two ways: On the one hand, it can mean that behaviour which is thought of as torture by a given culture or individual victim may not normally constitute torture in the eyes of the international bodies. On the other hand, it can mean that treatment which is consistently considered by the international community to amount to torture is not viewed as such by the person who has been subjected to it.³¹ However, irrespective of cultural or individual perceptions, the international standard for what constitutes torture is not relative to the particular culture of the victim.

There are also many “**grey areas**” which either do not clearly amount to torture or about which there is still disagreement. Examples include:

- Judicial corporal punishment;
- Some forms of capital punishment and the death-row phenomenon;
- Solitary confinement;
- Certain aspects of poor prison conditions, particularly if experienced in combination;
- Disappearances, including their effect on the close relatives of the disappeared persons;
- Treatment inflicted on a child which might not be considered torture if inflicted on an adult.³²

Many of these areas may be considered as **other forms of ill-treatment**, which is distinguished in the Convention from torture by the degree of suffering involved and the need for a purposive element.³³ This clear distinction between torture and other forms of ill-treatment is different from the approach adopted

in the European Convention on Human Rights. The European Convention, while not providing any definition of torture, links the prohibition of torture with the notions of “inhuman” and “degrading” treatment. Nevertheless, the practice of the European Court of Human Rights tends to distinguish between the different concepts.

The European Court of Human Rights has ruled that in order to fall within the scope of Article 3 of the ECHR, an act of ill-treatment must attain a “**minimum level of severity**”.³⁴ The assessment of this “entry level” threshold of severity is relative and the Court has noted the following aspects:

- The duration of the treatment;
- The physical effects of the treatment;
- The mental effects of the treatment;
- The sex, age, and state of health of the victim.

While this “entry level threshold” applies to all acts coming within the scope of Article 3, the Court went on to draw a distinction between inhuman and degrading treatment and torture. It was held that such a distinction was necessary because a “special stigma” attaches to torture.³⁵ Accordingly, the Court held that in order to be classified as torture, the treatment must cause “serious and cruel suffering”. The Court decided that the “measuring stick” for assessing whether an act amounts to torture is similar to the minimum entry level threshold required for Article 3 of the ECHR, i.e. a subjective decision based upon the severity of pain and suffering occasioned by the act.

The Convention, like other conventions referring to torture, includes the prohibition of “**mental torture**” within the scope of the prohibition of torture³⁶. Mental torture has been defined by the European Commission on Human Rights as:

“The infliction of mental suffering through the creation of a state of anguish and stress by means other than bodily assault.”³⁷

A non-exhaustive list of examples of mental pain or suffering amounting to torture includes prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering; the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality of the victim; the threat of imminent death; or 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 his or her senses or personality.³⁸

The former UN Special Rapporteur on the Torture, Sir Nigel Rodley, has also emphasised that the prohibition of torture relates not only to acts that cause

physical pain but also to acts that cause suffering to the victim, such as intimidation and other forms of threats.³⁹ Furthermore, the mere fear of physical torture may itself constitute mental torture.⁴⁰

A number of decisions by human rights monitoring mechanisms have referred to the notion of **mental pain or suffering**, including suffering through **intimidation and threats**, as a violation of the prohibition of torture and other forms of ill-treatment.⁴¹ Similar interpretations of the prohibition of torture have been made with respect to the relevant provisions found in international humanitarian law.⁴²

Article 1 of the Convention does not refer specifically to **rape** as a form of torture. However, international case law and the reports of the UN Special Rapporteur evince a momentum towards considering, through legal process, the use of rape in the course of detention and interrogation as a means of torture. Rape can be resorted to either by the interrogator or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing, or humiliating the victim, or obtaining information, or a confession, from the victim or a third person. In human rights law, rape under these circumstances amounts to torture, as demonstrated by the finding of the European Court of Human Rights in the case of *Aydin*⁴³ and the Inter-American Court of Human Rights in *Mejija*.⁴⁴

The International Tribunal for the Former Yugoslavia has formulated the issue of rape in the context of torture as follows:

“...Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation...Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet these criteria.”⁴⁵

While it is clear that torture can result from an “act”, it is not similarly clear from Article 1 whether torture can result from an “**omission**”. There was no reference to this question at any stage in the preparatory work of the Convention.⁴⁶ However, negative acts may inflict as much physical and mental harm as positive acts and have been found to amount to torture.⁴⁷

The Purpose of the Act

In order to be prohibited, the conduct must be intentionally inflicted “...for such purposes as obtaining from him or a third person information or a confession,

punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind...”.

The legislative history of the Convention indicates that **the list of purposes** was meant to be “**indicative**” rather than “all-inclusive”.⁴⁸ The use of the words “for such purposes” also indicates that the various listed purposes do not constitute an exhaustive list, and should be regarded as merely illustrative.

The ICTY has distinguished acts of torture from other acts causing physical and mental suffering;

“The offence of wilfully causing great suffering or serious injury to body or health is distinguished from torture primarily on the basis that the alleged acts or omissions need not be committed for a prohibited purpose such as is required for the offence of torture.”⁴⁹

In other words, the distinction between **torture and other related offences** is the purpose, if any, for which the suffering or serious injury is caused.⁵⁰ However, ill-treatment not inflicted for any of the prohibited purposes may amount to cruel, inhuman, or degrading treatment or punishment as prohibited by Article 16 of the Convention.

The distinction between acts of torture and acts of assault or cruel, inhuman, or degrading treatment is critical, because under the Convention the State Party is obliged to establish its jurisdiction over acts of torture and either prosecute or extradite those suspected of committing such acts.⁵¹

There is no requirement that the conduct be effected solely for a prohibited purpose. Thus, in order for this requirement to be met, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominant or sole purpose.⁵²

Instigation

The term “instigation” means incitement, inducement, or solicitation and as such it requires the direct or indirect involvement and participation of a public official in the act of torture in order to give rise to State responsibility and the application of Article 1.

Public official

The definition of torture in Article 1 is very closely tied to the idea of torture — and inhuman and degrading treatment— being a **purposive official act**.⁵³ This is a reflection of the problem which the Convention is meant to address, namely that of torture in which the authorities of a country are themselves involved and

in respect of which the machinery of investigation and prosecution might therefore not function normally.⁵⁴

It follows from the text of Article 1 that it does not apply to **private acts of cruelty**: International concern arises only where cruelty has official sanction⁵⁵, the rationale being that private conduct is normally sanctioned under national law.

The element of **official sanction** is stated in very broad terms and extends to officials who take a passive attitude, or who turn a blind eye to torture committed against opponents of the government in power, be it by unofficial groups or by the authorities.⁵⁶ Failure to act in such cases could well be interpreted at least as acquiescence.⁵⁷

Despite lengthy discussion, the Working Group drafting the Convention was unable to decide upon a definition of the term “**public official**”.⁵⁸ Both the USA and the Federal Republic of Germany proposed that the term be defined. Germany felt, in particular, that it should be made clear that the term “public official” contained in §1 refers not only to persons, who, regardless of their legal status, have been assigned public authority by government organs on a permanent basis or in an individual case, but also to persons who, in certain regions or under particular conditions, actually hold and exercise authority over others and whose authority is comparable to government authority.⁵⁹

While neither this nor other proposals were incorporated in the Convention by the Working Group, the CAT, in the decision of *Elmi v. Australia*⁶⁰, found that warring factions operating in Somalia, which have set up quasi-governmental institutions and which exercise certain prerogatives that are comparable to those normally exercised by legitimate governments, can fall within the phrase “public officials **or other persons** acting in an official capacity” contained in Article 1 of the Convention.⁶¹

Lawful sanction

Pain and suffering arising from, inherent in, or incidental to a lawful sanction falls outside the ambit of torture. In the view of the UN Special Rapporteur on Torture, the “lawful sanctions” exclusion must necessarily refer to those sanctions that constitute **practices widely accepted as legitimate** by the international community, such as deprivation of liberty through imprisonment, which is common to almost all penal systems. Deprivation of liberty is a lawful sanction, provided that it meets basic internationally accepted standards, such as those set forth in the United Nations Standard Minimum Rules for the Treatment of Prisoners.⁶²

However, a procedurally correct sanction could still fall within the scope of Article 1 of the Convention.⁶³ The administration of such punishments as stoning to death, flogging, and amputation – acts which would be unquestionably unlawful in, say, the context of custodial interrogation – cannot be deemed lawful simply

because the punishment has been authorised in a procedurally legitimate manner, i.e. through the sanction of legislation, administrative rules, or judicial order. "To accept this view would be to accept that any physical punishment, no matter how torturous and cruel, can be considered lawful, as long as the punishment had been duly promulgated under the domestic law of a State. Punishment is, after all, one of the prohibited purposes of torture." ⁶⁴

Minimum standard

§ 2. This paragraph makes it clear that the definition of torture in no way affects the protection which can be derived from other international instruments or from national legislation of wider application. In other words, insofar as other international instruments or national laws give the individual better protection, he or she is entitled to benefit from it; however, other international instruments or national law can never restrict the protection which the individual enjoys under the Convention.

■ Article 2

1. *Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*
2. *No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.*
3. *An order from a superior officer or a public authority may not be invoked as a justification of torture.*

Features: Prevention, non-derogability, no justification on the basis of superior orders

Interpretation

§ 1. This paragraph imposes a general, but basic obligation on States Parties to take **effective measures to prevent torture**. The character of these measures is left to the discretion of the States concerned, but it includes making whatever changes are necessary in order to harmonise their internal order with international standards on prevention.

The Article raises the question of whether States are required to adopt these measures before or upon ratification, or whether they are allowed a certain period of time during which they may invoke their national law against the Convention. The question was not discussed in the preparatory work, and therefore must be answered by reference to State practice and general principles of international law.⁶⁵

Some States consider that the adaptation of domestic law to comply with international obligations is a condition precedent to becoming a Party to a treaty. This, however, is a minority view and does not represent the prevailing State practice.⁶⁶ In other States, a ratified treaty automatically becomes part of the law of the land. According to the general rules of international law, a State is under a duty to execute the provisions of a treaty from the date at which the treaty becomes binding upon it, unless the terms of the treaty itself provide otherwise.⁶⁷

States are **not allowed to plead their own law** against implementing the Convention.⁶⁸ Thus, if a State Party to the Convention fails to adopt the measures called for to execute the Convention after its ratification, such State Party may not cite its own laws which do not conform to the Convention to justify its policy of torture or its failure to prevent it.⁶⁹

The obligation of States is not absolute, i.e. they have no obligation to prevent absolutely or to ensure or guarantee the prevention of torture. The obligation is rather **to take reasonable steps** to prevent torture. If nevertheless such acts occur, other obligations under the Convention become applicable, and the State may then be obliged under Article 2 §1, to take further effective measures in order to prevent a repetition. Such measures may include changes of personnel in a certain unit, stricter supervision, the issue of new instructions, etc.⁷⁰

Any **test of the effectiveness** of the measures required to be adopted by States under Article 2 §1 seems to be left to the discretion of the States themselves.⁷¹ However, a State Party's declaration that it has fulfilled its obligations under Article 2 of the Convention is subject to supervision by the CAT.

There are no requirements in international law as to the specific manner in which the prescribed measures must be implemented. However, mere adoption of preventive measures by States without any efforts directed toward their implementation is not fulfilment in good faith of the obligations under the Convention. A policy of doing nothing to implement the measures taken by the States would undoubtedly prevent the achievement of **reasonable results in the prevention of torture**, which is one of the objects of the Convention⁷², and could thus constitute a violation of the Convention.

There is some uncertainty about the **point of time** by which preventive measures adopted in accordance with Article 2 §1 must be implemented. There is some suggestion that it should be done within one year of adopting the Convention, i.e. before the initial State Party report is submitted to the CAT under Article 19. However, this argument should not be taken as prohibiting gradual improvement in the measures taken by States. All legislation is improved gradually in response to new problems as they emerge in practice. The argument is intended rather to foreclose the possibility of progressive implementation of preventive measures.⁷³

§ 2. The prohibition of torture is absolute and non-derogable. While a large number of international instruments contain provisions that the exercise and enjoyment of rights and freedoms otherwise protected can be limited or restricted by States on specific grounds⁷⁴, Article 2 §2 allows for **no justification** of torture in any circumstances.⁷⁵

The list of exceptional circumstances referred to in the paragraph is not exhaustive. The drafters of the Convention used the word “whatsoever” to close the door to a construction of the Article which could lead to an interpretation that the exceptional circumstances referred to herein are exhaustive. What the drafters tried to say is that torture is not allowed even in time of “public emergency”, and they merely gave examples of circumstances which might otherwise give rise to it.⁷⁶

§ 3. In line with the absolute character of the ban on torture, an **order from a superior officer** or a public authority may not be invoked as justification of torture. The Nuremberg Principles had already established that to act under order was no justification for the perpetration of serious international crimes, among them torture⁷⁷. This principle has thus been enshrined in the Convention.

However, according to the general principles of international law established by the Charter of the Nuremberg and Tokyo Tribunals and their judgments, the fact that someone was under order to conduct an illegal act may be **considered in mitigation of punishment**.

Article 6 of the Tokyo Charter provides as follows:

“Neither the official position, at any time of an accused, nor the fact that an accused acted pursuant to an order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”⁷⁸

These principles are well-established and were affirmed by the United Nations General Assembly in its Resolution 177(II).⁷⁹ The same principles are found in the Statute of the International Tribunal for Rwanda⁸⁰ and in the Statute of the International Criminal Tribunal for the Former Yugoslavia⁸¹.

In contrast, the Rome Statute of the International Criminal Court deviates somewhat from the well-established principles by relieving a person acting pursuant to orders to commit a crime as defined in the Statute from criminal responsibility, when the person was under a legal obligation to obey orders of the government or a superior, or when the person did not know that the order was unlawful when the order was not manifestly unlawful.⁸² Nevertheless, Article 33 §2 clarifies that orders to commit genocide or crimes against humanity are manifestly unlawful.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities 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.

Features: Duty not to expel individuals at risk of torture (non-refoulement), all relevant considerations assessed

Interpretation

§ 1. States are obliged to **refrain from transferring persons to another State** where they would be at a personal risk of torture. This provision was inspired by the case-law of the European Commission of Human Rights with regard to Article 3 of the European Convention.⁸³ Most of the individual cases dealt with by the CAT pursuant to Article 22 concern the application of Article 3 of the Convention.

Article 3 overrides any **conflicting provisions of an extradition treaty** which may have been concluded between the States. It is not necessary for the other State also to be a Party to the Convention. Future extradition treaties concluded between these States would breach the Convention if they contained provisions conflicting with it.

It is not necessary for the person at risk to be a political refugee under the UN Convention relating to the Status of Refugees.

The nature of the activities in which the person is engaged is not a relevant consideration, since the protection offered by Article 3 is absolute.⁸⁴ This means that subjecting a person to a risk of torture cannot be justified on the basis of anything that person may or may not have done. There are **no exceptions** to the rule on *non-refoulement*⁸⁵.

Article 3 is confined in its application to cases where there are **substantial grounds** for believing that the person would be subjected to torture as defined in Article 1 of the Convention if expelled.⁸⁶ A substantial ground for believing that a person would be at risk of torture means a factual one. The risk must be assessed on grounds that go beyond mere theory or suspicion, although it does not have to meet the test of being highly likely.⁸⁷

The **burden of proof** is upon the potential victim to present an arguable case.⁸⁸ The potential victim must establish that the danger of torture is personal and present.⁸⁹ The potential victim must also establish that the grounds for believing so are substantial.

Although there may be some doubts about the facts adduced by the person, it is not necessary that all the facts invoked be proved; it is sufficient that they can be considered to be sufficiently substantiated and reliable.⁹⁰ The principle of strict accuracy does not necessarily apply when the inconsistencies are not of a material nature and do not raise doubts about the general veracity of the person's claims.⁹¹

"Another State" refers to the State to which the individual concerned is being expelled, returned, or extradited as well as any State to which the individual may subsequently be expelled, returned, or extradited.⁹²

§ 2 The **general human rights situation** of the recipient State has to be considered to see whether a consistent pattern of gross, flagrant, or mass violations exists. However, the existence of a consistent pattern of gross, flagrant, or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a specific person would be in danger of being subjected to torture upon his or her return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk.⁹³

Similarly, the **absence of a consistent pattern** of gross violations of human rights does not mean that a person cannot be considered in danger of being subjected to torture in his or her specific circumstances.⁹⁴ The person's family background or political activities and affiliation, any history of detention and torture, as well as indications that the person is at present wanted by the authorities are elements to be taken into account when determining whether substantial grounds exist for believing that he or she is in danger of being subjected to torture.⁹⁵ Past torture is another element to be taken into account, although the aim of the examination is to discover whether the person would risk being subjected to torture in the future.⁹⁶ A personal risk includes a risk to members of the person's family.⁹⁷

"A consistent pattern of gross, flagrant, or mass violations of human rights" refers to violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, and not rooted purely in private groups or individuals.⁹⁸ However, **private groups** which, *de facto*, exercise certain functions that are comparable to those normally exercised by legitimate governments may fall, for the purposes of the application of the Convention, within the phrase "public officials or other persons acting in an official capacity" contained in Article 1, and thereby give rise to a prohibition of *refoulement* in particular cases.⁹⁹

Substantial grounds for believing that return or expulsion would expose the applicant to the risk of being subjected to torture may be based not only on acts committed in the country of origin, in other words before a person's flight from the country, but also on activities subsequently undertaken by the person in the receiving country.¹⁰⁰

The CAT has elaborated a non-exhaustive list of information which may be pertinent when an individual communication is being presented before the Committee concerning a possible violation of Article 3¹⁰¹:

- Any evidence of a consistent pattern of gross, flagrant, or mass violations of human rights in the State concerned;
- Previous torture or maltreatment by or at the instigation or with the consent or acquiescence of a public official or other person acting in a public capacity; in particular, whether this was in the recent past; medical or other independent evidence to support the claim, such as after-effects;
- Changes in the internal situation of human rights;
- Political or other activities of the individual within or outside the State concerned which would make the individual particularly vulnerable to the risk of being placed in danger of torture, were he or she expelled, returned, or extradited to the State in question;
- Credibility of the author; factual inconsistencies and their relevance.

The Committee's finding of a violation of Article 3 of the Convention does not affect the decision(s) of the competent national authorities concerning the granting or refusal of **asylum**. The finding of a violation of Article 3 has a declaratory character. On the other hand, the State does have a responsibility to find solutions that will enable it to take all necessary measures to comply with the provisions of Article 3 of the Convention. These solutions may be of a legal nature (e.g. decision to admit the applicant temporarily), but also of a political nature (e.g. action to find a third State willing to admit the applicant to its territory and undertaking not to return or expel him or her in its turn).

■ Article 4

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

Features: Definition as crime (criminalisation), appropriate punishment

Interpretation

§ 1. Article 4 provides that States Parties must ensure that all forms of torture are **punishable offences** under their criminal law. The same applies to attempted torture and to any act which constitutes complicity or participation in torture. This is also deemed to include giving an order to perpetrate torture.¹⁰² Article 4 is inspired by similar articles in conventions concerning hijacking, sabotage against aircraft, attacks on diplomats, and taking of hostages.¹⁰³

The obligation in §1 was not extended to include a specific, separate offence in national criminal law which corresponds exactly to the definition of torture laid down in Article 1 of the Convention.¹⁰⁴ However, States Parties which do not define torture or do not recognise the offence of torture in national law 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. For this reason, in its consideration of initial and periodic reports from States Parties, the CAT frequently includes in its list of recommendations that “a definition of torture in conformity with the definition appearing in Article 1 of the Convention” be inserted into domestic law as a separate type of crime.¹⁰⁵ In its more recent reports, the CAT has deemed the inclusion of torture as an offence defined at least as precisely as Article 1 of the Convention definition to be a *requirement* of the Convention.¹⁰⁶

In other words, while it would not seem that the CAT’s explicit opinion is that the Convention definition of torture should be reproduced exactly in national criminal legislation, States Parties must include a definition of torture which covers the Convention definition and make it punishable in national legislation.¹⁰⁷

§2. 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.¹⁰⁸

The Convention 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 murder.¹⁰⁹ 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.¹¹⁰ Some commentators have stressed that the Convention, being a human rights instrument, should not be invoked as justification for the application of the death penalty.¹¹¹

Members of the CAT have made it clear that very short sentences, from several days to two years, were insufficient.¹¹² Members have expressed the opinion that torture should receive the heaviest sentence of all crimes.¹¹³ Although the CAT as a whole has not commented on the appropriate level of sentence for torture, it is, according to one commentator, possible on the basis of the individual opinions of members to establish a range within which such sentences should fall: The penalty for the offence of torture should be a custodial sentence of between six and twenty years.¹¹⁴

Victims of torture should also have the possibility to pursue a monetary claim for damages (see Article 14).

Article 5

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.

Features: Universal jurisdiction, extradition or prosecution

Interpretation

Article 5 is a cornerstone of the Convention, as it concerns the obligation **to establish jurisdiction** over the crime of torture. Based upon the recognition that torture was already prohibited under international law¹¹⁵, the Convention was established in order to provide a system of enforcement under which the torturer can find no safe haven.¹¹⁶ Article 5 requires and facilitates the assertion of jurisdiction by States over acts of torture, including instances involving non-nationals in third States, when the alleged offender is present in their territories—that is, on the basis of so-called universal jurisdiction.¹¹⁷ The exercise of the jurisdiction is governed by Articles 6-8, as is outlined below.

§ 1. Article 5 §1 requires that each State Party take any **necessary measures** to establish jurisdiction in its national laws regarding the offence of torture, as referred to in Article 4. The State Party is subject to the obligation in Article 5 §1 if torture is committed **in any territory under its jurisdiction** or on board a ship¹¹⁸ or aircraft registered in the State in question; in its territorial sea or in the airspace above its territory¹¹⁹; or on installations such as oil rigs which may be outside its territorial sea. In other words, jurisdiction over the crime of torture must cover torture committed in *all* of the territory under the factual control of the State.¹²⁰ To a limited extent it is also applicable to certain maritime areas outside the territorial sea over which a State has limited jurisdiction. If, for instance, torture is committed on an oil-rig or other installation placed on the continental shelf of a State Party, that State is required to establish jurisdiction over the offence.¹²¹

The obligation to establish jurisdiction also applies to cases where the **alleged offender is a subject of the State**. Thus, even where a State Party is accus-

tomed to exercising jurisdiction solely on the basis of territoriality, it is required to extend its jurisdiction over persons holding its nationality.¹²²

When the **victim is a national of the State**, the State may establish its jurisdiction over the crime if, in view of the wording of the Convention, the State deems this to be appropriate. It follows from the wording that this is merely a discretionary option and not an obligation.

§ 2. Article 5 §2 forms a foundation stone for **universal reaction** to torture under criminal law.¹²³ The provision imposes an obligation on each State Party to establish jurisdiction in its domestic legislation over any alleged torturer who is found within its territory and who is not extradited pursuant to Article 8 or to any of the States listed in Article 5 §1. It should be noted that the provision does not prescribe the establishment of **universal jurisdiction in absentia**, meaning that States are not obliged under the Convention to extend their jurisdiction over cases not falling under Article 5 §1 to cover cases where the alleged offender is not present in their territory. It also follows that if the offender is not present in such territory, the States are under no obligation to establish jurisdiction upon which a request for extradition could be based.¹²⁴

The decision to include universal jurisdiction in the Convention over persons accused of torture was linked to the nature of torture as defined in Article 1 of the Convention. With the involvement of the State being a necessary element of torture, few successful prosecutions of torture offenders before national courts can be expected. The Convention therefore offers other States Parties a basis for filling the gaps left by States which do not act against torture.¹²⁵

The involvement of a State in torture was also thought to justify the breach of its sovereignty by other States engaging in criminal prosecution of the offending State's nationals.

Article 5 §2 is an independent basis for jurisdiction which may be invoked regardless of whether another basis of jurisdiction exists. According to recognised authorities on the subject:

“Paragraph 2 [of Article 5] provides that, whether or not any of the grounds of jurisdiction dealt with in paragraph 1 exist, a State Party shall have jurisdiction over offences of torture in all cases where the alleged offender is present in a territory under its jurisdiction and it does not extradite him to a State which has jurisdiction under paragraph 1.”¹²⁶

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”.¹²⁷

The phrase “take such measures as may be necessary to establish its jurisdiction in cases **where the alleged offender is present**” includes legislative measures,

but it is not limited to such measures. It includes executive and judicial steps to arrest, investigate, prosecute, or extradite.¹²⁸ In the case of the former President of Chad, Hissène Habré, the CAT indicated that it did not believe the obligation of the State Party was limited to enacting legislation. Therefore, when the Convention does not expressly state what measures must be taken to establish jurisdiction, the Parties must have intended to require that all types of measures be taken.¹²⁹

From the wording of Article 5 §2, it is not clear whether the obligation to establish universal jurisdiction is thought to exist only on the basis of the Convention. However, outside the context of an armed conflict, there appears to be insufficient basis in customary international law to assume an *obligation* on behalf of States not Parties to the Convention to establish universal jurisdiction over the crime of torture.¹³⁰

Some observers have expressed the view that States may have the *authority* under international law to establish universal jurisdiction over the crimes of torture, without reference to the Convention. Sir Nigel Rodley stated in 1999 that

“It is now hard to imagine a convincing objection to any state’s unilateral choice to exercise jurisdiction [over torture] on a universal basis. Thus, permissive universality of jurisdiction is probably already achieved under general international law.”¹³¹

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 wrote:

“16. 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 these 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 the Convention is, after all, that suspects of torture must not be able to find a safe haven, and that any suspect of torture must fear prosecution always and everywhere.¹³²

The CAT 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 CAT expressed the view that Article 5 §2 of the Convention

“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...”.¹³³

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. The Rome Statute of the International Criminal Court¹³⁴, the Statute of the International Tribunal for the Former Yugoslavia¹³⁵, and the Statute of the International Tribunal for Rwanda¹³⁶ all extend their jurisdiction to the highest officials and heads of States. The UN International Law Commission has expressed the view that the rule that heads of States and public officials may be held criminally responsible when they commit crimes under international law is an essential part of the international legal system.¹³⁷

Immunity from jurisdiction: The Yerodia Case

Despite these recent trends in international criminal law, a judgment by the **International Court of Justice** in February 2002 upheld the immunity from jurisdiction of an incumbent minister of foreign affairs for alleged crimes against humanity and war crimes. The majority of the Court observed that in international law it is firmly established that, similarly to diplomatic and consular agents, certain holders of high-ranking office in a State, such as the head of State, head of government and minister of foreign affairs, enjoy immunity from jurisdiction in other States, both civil and criminal.¹³⁸ No exception to this position on the basis of the nature of the alleged crimes as being serious international crimes was found by the Court.

The Court went on to note that although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal prosecution, such extension of jurisdiction in no way affects immunities under customary international law. These remain opposable before the courts of a foreign State, even where those courts exercise such jurisdiction under these conventions.¹³⁹ 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.

Having outlined such a robust notion of immunity, the Court noted that jurisdictional immunity under international law in certain circumstances does not represent a bar to criminal prosecution. The Court referred to the following circumstances:

- a. Where such persons are tried in their own countries; or
- b. Where the State which they represent or have represented decides to waive that immunity; or
- c. Where such persons no longer enjoy all the immunities accorded by international law in other States after ceasing to hold the position qualifying them for jurisdictional immunity; or
- d. Where such persons are subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.¹⁴⁰

Of most practical importance is the exception listed in (c), as the situations in (a) and (b) will probably rarely occur, and the scope of (d) is as yet extremely limited.

As upheld by the Court, certain incumbent representatives of States, including diplomatic agents, enjoy complete immunity (so-called immunity *rationae personae*) in conventional and customary international law, based on a notion that such immunities are necessary to ensure the efficient performance of their functions on behalf of their respective States.¹⁴¹ According to (c), the same group of State representatives, after leaving office, enjoys functional immunity for all acts performed in the exercise of an official capacity (so-called immunity *rationae materiae*). It is thus not the nature of the acts which determines whether or not jurisdictional immunity applies to former State representatives, but whether or not the acts in question were performed in an official or private capacity.

There is nothing in the judgment of the International Court of Justice to indicate that the Court was of the view that crimes under international law, which include the crime of torture, necessarily can be assimilated to acts committed in a “private capacity”.¹⁴² Added to the fact that the definition of torture in Article 1 requires an element of **official involvement**, the universal jurisdiction in Article 5 §2 against former State officials enjoying functional immunity may in fact be subject to severe limitations under international customary law, as interpreted by the International Court of Justice in *Congo v. Belgium*.

In other words, if an act of torture in a particular case is considered to have been carried out in an official capacity, a former State representative accused of this act may in fact enjoy life-long immunity. Indeed, although the Court emphasised that immunity from jurisdiction does not mean impunity¹⁴³, the end result in some cases may nevertheless amount to *de facto* life-long impunity.

A fundamental precept of international criminal law is the prohibition in international and domestic law on assigning guilt for acts not considered as crimes when committed, the so-called principle of *nullum crimen sine lege* (no crime without law). However, the establishment and exercise of universal jurisdiction, without reference to the obligation in the Convention, does not contravene the principle because **torture is a crime under customary international law**, independent of the Convention.¹⁴⁴ It should, however, be kept in mind that the definition of the crime of torture under customary international law is linked to

the definition found in international humanitarian law, and not identical to the definition of torture contained in the Convention against Torture.

The Convention does not establish a system of priority among States with jurisdiction.¹⁴⁵ Instead, it leaves the decision with the State in whose territory a suspect is located whether to extradite the suspect to another State or to submit the case to its authorities for the purpose of prosecution.

§ 3. In §3 it is made clear that Article 5 must not be interpreted so as to exclude the application of any further ground of jurisdiction which may exist in **domestic law**.¹⁴⁶ In other words, the Convention does not prevent States Parties from establishing a more extensive jurisdiction under criminal law according to national legislation.¹⁴⁷ However, other aspects of international law may impose limitations on the right of States to exercise extended universal jurisdiction in their national laws beyond the ambit of the Convention.¹⁴⁸

■ Article 6

1. *Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.*
2. *Such State shall immediately make a preliminary inquiry into the facts.*
3. *Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.*
4. *When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.*

Features: Custody, other legal measures, preliminary inquiry, notification

Interpretation

§ 1. States Parties are not only obliged to establish jurisdiction for the crime of torture by means of national legislation; they must actually ensure that alleged offenders are handed over to the competent authorities for the purpose of **pros-**

ecution. Articles 6 and 7 oblige States Parties to take specific measures in that regard.

States are required to detain any persons suspected of committing acts of torture as referred to in Article 4 found in their territories, when they are “satisfied, after an examination of information available to them, that the circumstances so warrant”, or to take other legal measures permitted by law and in the circumstances deemed as necessary to secure the continuing custody of the accused. States have a wide degree of freedom in assessing whether the circumstances justify pre-trial detention. This assessment depends in part on the domestic rules concerning evidence.¹⁴⁹

Under the State’s own laws, there may exist **time limits** for custodial measures. However, these limits should not make it impossible to obtain extradition or prosecution of the accused. Custody and other legal measures should not be for excessively lengthy periods, but only for the period of time required for criminal or extradition proceedings to be instituted.

§ 2. States Parties are obliged immediately to initiate a **preliminary investigation** into the facts. This obligation applies primarily when the State itself will be prosecuting the suspect. After all, if a suspect is to be extradited, the State requesting the extradition will usually carry out such an investigation.¹⁵⁰

It is not obvious what elements are sufficient to trigger the obligation to investigate and possibly prosecute a suspected torturer. It must be assumed that, while there is an obligation to initiate a preliminary investigation into the facts, a certain minimum of probability that torture has been committed must exist for an investigation to be launched. The Convention does not provide a minimum threshold for the obligation to investigate. It must be assumed that the decision to start an investigation will be made according to the general criteria in this regard laid down in national laws for similar serious crimes.

§ 3. Each detainee must be offered **assistance** in contacting the nearest authorised representative of the State of which he or she is a citizen. If the person in custody is by legal definition stateless¹⁵¹, i.e. is not considered as a national of any particular State, he or she should be assisted by the authorities of the country where he or she is resident most of the time, or the place where he or she has acquired a residence permit. The person in custody must not be forced against his or her will to contact the concerned national authorities, but should be given the option to do so.

§ 4. The State Party must immediately **notify States** which have or may have jurisdiction over the offence of any of the grounds referred to in Article 5 §1, i.e. States having jurisdiction over any territory where offences are committed, when the alleged offender is a national of such States, or when the victim is a national of such States. This obligation applies irrespective of whether the holding State intends to prosecute or extradite. The information transmitted must contain a

full explanation and justification for keeping the person in custody (e.g. the facts of the case, the reasons for suspicion against the detainee, the allegations against him or her).

The State Party carrying out the preliminary investigation must immediately issue a **report** to the aforementioned States (i.e. Article 5 §1 States) and inform them of whether it intends to exercise its jurisdiction.

The State which initiates an investigation has a duty to provide **up-to-date information** to other States entitled to exercise jurisdiction. It must also provide these other States with any information pertinent to the case and clearly indicate to other States whether it intends to commence prosecution in its own law courts.

■ Article 7

1. *The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.*
2. *These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.*
3. *Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.*

Features: Obligation to commence criminal proceedings or to extradite offender, standard of evidence, due process and right to a fair trial

Interpretation

§ 1. States Parties are obliged to prosecute suspected torturers present in an area under their jurisdiction, unless the suspected torturers are to be extradited to a State which has jurisdiction over the crime under Article 5 and which intends to prosecute them itself. This is called the principle of *aut dedere aut judicare*, meaning “**either extradite or prosecute**”.¹⁵² Failure to fulfil this obligation is a violation of international law.¹⁵³ As the main purpose of the Convention is to ensure that there are no safe havens for torturers, Article 7 §1 is a key component in achieving the primary aim of the Convention.

The Convention does not establish a system of priority among States with jurisdiction. Instead, it leaves the decision of whether to extradite or prosecute with the State under whose jurisdiction a suspect is located.¹⁵⁴

It is clear from the preparatory work on the Convention that the obligation to prosecute is not dependent on whether an **extradition request** has been made and eventually refused. The drafters of the Convention expressly rejected a proposal to impose such a requirement, which is found in some treaties and national legislation.¹⁵⁵ In many cases, the only State having jurisdiction under Article 5 §1 is the State whose authorities themselves have accepted, or at least tolerated, that torture occurred on its territory and which may accordingly be most reluctant to ask for the extradition of the offenders to bring them to trial. If a request for extradition from such a State were a condition for the exercise of the jurisdiction of the State in whose territory the alleged offender is present, the principle *aut dedere aut judicare* would only have a very limited application and the effectiveness of the Convention would be considerably weakened.¹⁵⁶

If **no request for extradition** is made or the State decides not to grant a request for extradition, the case must be submitted to the prosecuting authorities. There are no further options: This submission must take place.¹⁵⁷ It is clear that the purpose of the submission is the prosecution and, where appropriate, conviction of the suspected torturer.¹⁵⁸ Any restrictions in national legislation on the scope of the obligation to prosecute with respect to torture and ancillary crimes are contrary to the Convention.¹⁵⁹ However, the possibility of prosecution may be limited if jurisdictional immunities in international law are enjoyed by alleged offenders, as discussed under Article 5 §2.

Prosecution can only take place after it has become clear that no extradition will take place (if a request for extradition is not granted or if no such request is made).¹⁶⁰

No time limit is indicated for extradition requests, which means that the holding State has a certain discretion. However, it must make a judgment based on what is fair and reasonable. Postponement of decisions is contrary to the overall object and purpose of the Convention.

The CAT has expressed criticism in situations involving national **amnesties and impunity**¹⁶¹ and stressed that in such situations the Convention must prevail over national laws resulting in impunity for torturers. Thus, it must be assumed that the duty to prosecute under the Convention extends to alleged offenders who may have been granted amnesty from criminal prosecution elsewhere.¹⁶²

Military personnel in active service should not be shielded from prosecution by a military court. Military personnel who have been accused of gross human rights violations during active service should be tried under ordinary criminal courts. **Police officers** accused of torture should be prevented from taking part in activities such as interrogation and other duties where the risk of their repeating the crime is present.

§ 2. The prosecuting authority in a State Party is obliged to make its **decision** on whether **to prosecute** in the same way as in the case of any ordinary crime of a

serious nature under the law of that State. This leaves some room for discretion, which is nevertheless subject to certain limitations: The prosecuting authority must ensure that its decisions are in line with the decisions taken with respect to similar serious crimes.¹⁶³

Standards of evidence should in all circumstances be the same. They should not be applied less strictly for States which have jurisdiction by virtue of the presence of the accused on their territory (Article 5 §2) than for States which have jurisdiction on the basis of where the offence took place, nationality of the accused, or nationality of the victim (Article 5 §1).

It may be difficult to call **witnesses** and collect other evidence, in particular where the State in which the offences were committed is not willing to cooperate in investigating the case. The second sentence of this paragraph makes it clear, however, that although the principle of universal jurisdiction has been regarded as an essential element in making the Convention an effective instrument, there has been no intention to have the alleged offenders prosecuted or convicted on the basis of insufficient or inadequate evidence.¹⁶⁴

Article 7 does not offer any clarity concerning **sham trials**, where a suspect of torture is prosecuted but given an unusually short sentence or granted pardon or amnesty almost immediately, i.e. cases where it is clear that prosecution was not intended to result in actual punishment. The question is whether a new prosecution in another State in which the suspect shows up would be in conflict with the principle of **ne bis in idem** (the right not to be tried or punished more than once for the same offence), as guaranteed by Article 14 of the International Covenant on Civil and Political Rights (hereafter: "ICCPR"). In such situations, the Statute of the ICTY allows for the suspect still to be prosecuted before the Tribunal.¹⁶⁵ Under the Convention against Torture, it can be argued that in such cases, the (sham) prosecution cannot be considered to be an "effective measure" against torture as provided by Article 2 §1,¹⁶⁶ and indeed the State would be responsible for violating its obligation under Article 2 §1. As no actual prosecution can be deemed to have taken place the first time, there can be no conflict with the principle of *ne bis in idem* if another State were to prosecute again.

§ 3. States are obliged to guarantee **fair treatment** of each person against whom proceedings are instituted in the context of the crimes referred to in Article 4, in all phases of the procedure. This means that the appropriate process guarantees implemented by the State apply to a suspect of torture.

If the State is a party to the ICCPR, Articles 9, 10, 14, and 15 similarly apply to a suspect of torture.¹⁶⁷ This includes the right not to be arbitrarily detained, the right to a fair trial, and the right to have the case heard before an independent tribunal with a presumption of innocence until proven guilty.

Article 8

1. *The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.*
2. *If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party, with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.*
3. *States Parties which do not make extradition conditional on the existence of a treaty shall recognise such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.*
4. *Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.*

Features: Torture an extraditable offence, legal basis in Convention, recognition without Treaty, offence constructed as committed on territory having jurisdiction in order to remove legal obstructions to extradition

Interpretation

Article 8 is a technical development of the possibility of **extraditing** a suspect of torture **when a request is made** to this effect. The objective of this provision is to prevent there being no possibility of extradition, for example because a State makes extradition dependent on a relevant treaty, and the State requesting extradition is not bound to the other State by an extradition treaty. Article 8 offer solutions for such gaps in extradition law.¹⁶⁸ Article 8 corresponds to similar articles found in other conventions concerned with establishing jurisdiction over international crimes.¹⁶⁹

The text of Article 8 does not suggest that States Parties must extradite their **own citizens**. However, if a State Party does not meet a request to extradite in the context of torture, it would be obliged under the Convention to prosecute the suspect itself.

There has not been much practical experience of application of Article 8. The practice of the CAT in respect of Article 8 has therefore mainly been limited to asking whether States Parties consider torture to be an extraditable offence by one of the methods stipulated in Article 8.¹⁷⁰ Some members have emphasised that extradition cannot be dependent on any **reciprocity**.¹⁷¹

§ 1 Crimes referred to in Article 4 must be deemed to be **crimes** for which **extradition** can be permitted in all existing extradition treaties between States Parties to the Convention. States are also obliged to categorise these crimes as crimes for which extradition can be permitted in all extradition treaties to be entered into between them.

§ 2. A State Party can use the **Convention as a legal basis for extradition** in respect of torture in the event that a State makes extradition dependent on the existence of a treaty and receives a request for extradition from another State Party with which it does not have an extradition treaty. However, the holding State may also stipulate domestic rules regulating extradition.

§ 3. States Parties which do not make extradition dependent on the existence of a treaty must **mutually acknowledge torture** to be an offence for which extradition is provided, subject to the conditions set down in the legislation of the requested State.

§ 4. In order to facilitate extradition between States Parties, the offence of torture must be deemed to have been perpetrated not only on the **territory of the State** in which it was actually perpetrated, but also on the territory of the State which must establish jurisdiction, in accordance with Article 5 §1. The purpose of this provision is to enable States which normally make extradition dependent on the condition that the suspect has committed an offence which is punishable in both the requesting and requested State (the so-called double criminality criterion) to be permitted to extradite even if this criterion has not substantively been met.¹⁷² This will primarily be the case when a State requests the extradition of one of its citizens who is suspected of torture which was not committed on the territory of the requesting State, but on that of another State.¹⁷³

■ Article 9

1. *States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.*
2. *States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.*

Features: Assistance in criminal proceedings, supplying all evidence, mutual judicial assistance

Interpretation

§ 1. States Parties are **obliged to co-operate** with each other and supply all information to the relevant authorities for the purposes of instituting criminal

proceedings against persons accused of torture, an attempt to commit torture or complicity in torture. This includes taking measures which make it easier for witnesses to give testimony. States Parties must also assist in gathering any evidence of which they have knowledge or are aware. Equally, they must assist with the removal of burdensome procedures or obstacles.

Members of the CAT have emphasised that the application of Article 9 may not be made dependent on the existence of “any treaties on **mutual judicial assistance** that may exist between them” (§2). If there are no treaties in place, cooperation is required in the area of prosecution of the offences referred to in Article 4 on the basis of the Convention itself.¹⁷⁴ The duty to co-operate is not discretionary.¹⁷⁵

§ 2. States Parties are obliged to fulfil their obligations under §1 in accordance with any treaties existing between them regarding mutual judicial assistance. In this context, the law of the requesting State determines the admissibility of evidence. One consequence of this is that a State is required to supply evidence even if it is deemed inadmissible in the State in question.¹⁷⁶

The practice of the CAT with regard to Article 9 has been limited mainly to requesting information from States.

■ Article 10

1. *Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.*
2. *Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.*

Features: Education, information and training, ethical codes of conduct

Interpretation

§ 1. States Parties are obliged to ensure that **education and information** regarding the prohibition against torture are fully included in the **training** of all persons who come into contact with detainees, be they law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation, or treatment of any individuals subjected to any form of arrest, detention, or imprisonment.

The effectiveness of the way in which personnel are educated and trained with regard to the consequences of engaging in torture or acquiescence in torture

should be regularly assessed. Everyone must know what the rules are, and what not to do.

The provisions of this article are relevant not only in the context of torture but also, on the basis of Article 16 §1, in the context of **cruel, inhuman, or degrading treatment or punishment**.

§ 2. States are obliged to include the prohibition of torture in the **rules or instructions** issued in regard to the duties and functions of any such persons, regardless of rank or category. The list of categories of personnel who must be given instruction is not exhaustive. It applies to all other persons involved in the treatment of prisoners and other individuals deprived of their liberty. Instruction and education are not limited to official channels, but must also be given through non-official channels, such as non-governmental organisations.¹⁷⁷

The instructions should include provisions which make it absolutely clear that torture and acts of cruel, inhuman, or degrading treatment or punishment are not permitted under any circumstances whatsoever, even if a state of emergency or war exists.

■ Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Features: Continuous review of interrogation and detention rules and practices

Interpretation

Article 11 obliges States to keep under **continual systematic review** interrogation rules, instructions, methods, and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention, or imprisonment in any territory under its jurisdiction. This must be done with a view to preventing any cases of torture, and also, on the basis of Article 16 §1, any cases of cruel, inhuman, or degrading treatment or punishment.

The obligations under Articles 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 §1 are effective. Moreover, States are obliged to improve the instruction in such provisions in relation to Article 10 if torture or other cruel, inhuman, or degrading treatment or punishment appears to take place.¹⁷⁸

A number of **UN standards and principles** regulate the area of custodial and non-custodial measures. These instruments provide some guidelines on how to prohibit and prevent torture.¹⁷⁹

The CAT has regularly asked whether prison regulations were in agreement with the Standard Minimum Rules for the Treatment of Prisoners, as Committee members have expressed the view that they consider the application of these rules to be important.¹⁸⁰ However, the CAT has not as yet been as clear on the issue as the Human Rights Committee. The Human Rights Committee, in its individual complaints procedure and a general comment, has gone further by stating that the conditions of imprisonment in general must be in compliance with the Standard Minimum Rules. Depending on the level of development in a State, the Human Rights Committee has been inclined to give States some leeway, but the most important norms must always be complied with.¹⁸¹

The CAT 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.¹⁸² Prison inspection must be carried out, preferably without prior notice¹⁸³, and the supervision must be separate from police and judiciary.¹⁸⁴ In this context, the CAT has expressed satisfaction with the presence of, and supervision by, the International Committee of the Red Cross¹⁸⁵ or other non-governmental organisations¹⁸⁶ or independent national human rights commissions.¹⁸⁷

■ Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Features: Prompt and impartial investigation, ex officio investigation

Interpretation

States Parties are obliged **to take immediate action** when they have reasonable grounds to believe that torture and other acts of cruel, inhuman, and degrading treatment (the latter as regulated in Article 16 §1) have been committed within their jurisdiction. The decision on whether to conduct an investigation is not discretionary.¹⁸⁸ The authorities have the obligation to proceed with an investigation *ex officio*, whatever the origin of the suspicion, since the obligation to start an investigation is independent of the submission of a complaint in the sense of Article 13.¹⁸⁹ One member of the CAT has commented that "...allegations emanating from a respected non-governmental organisation certainly constituted 'reasonable ground'..." in the sense of Article 12.¹⁹⁰

Article 12 requires that the **investigation be prompt and impartial**. Promptness is essential both to ensure that the victim cannot continue to be subjected to such acts and also because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman, or degrading treatment, soon disappear.¹⁹¹

In order to ensure impartiality, it is necessary to avoid entrusting the investigation to persons who have close personal or professional links with those suspected of having committed such acts, or who may have an interest in protecting those suspects or the particular entity to which they belong.¹⁹² For example, if a complaint is made against a police official, close colleagues or any professional with a personal interest in the case should not be assigned to any part of the investigation team.

All persons who are aware of or acquire knowledge about the allegation have an obligation to submit this information to the investigation.

One important difference from the investigation obligation under Article 6 §2 is that the investigation must take place irrespective of whether the suspect is known or present.¹⁹³

States Parties are obliged to make the outcome of investigations public.¹⁹⁴

The CAT has provided greater insight into Article 12 (and 13) on the basis of an individual complaint only in three particular situations¹⁹⁵, by considering which **period** was too long for initiating an investigation in the sense of these provisions. In one case, the complainant in *Halimi-Nedzibi v. Austria* alleged that he had been ill-treated, beaten, and tortured after an arrest. It was also alleged that the State in question, Austria, had not started an investigation immediately after his complaint had been lodged. The Committee decided that a delay of fifteen months before an investigation into the case was launched was unreasonably long and was in violation of the requirement of Article 12.¹⁹⁶

■ Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Features: Victim's right to complain and recourse, protection of complainants and witnesses

Interpretation

States Parties are obliged to ensure that any individual who claims to have been subjected to torture or treated or punished in a cruel, inhuman, or degrading way (as in Article 16 §1) has a **right to lodge a complaint**. All persons have a right to lodge a complaint without any hindrance or discrimination. The individual's right under Article 13 is two-fold: it consists of the right to lodge a complaint to the competent authorities, and of the right to have the complaint investigated by the authorities promptly and impartially.

The **form of the complaint** is not important. According to the CAT, Article 13 of the Convention does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of intent to institute and sustain a criminal action. It is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as an implied, but unequivocal expression of the victim's wish that the facts be promptly and impartially investigated.¹⁹⁷

A person making such a complaint has a right to have the complaint examined thoroughly and seriously, which means undertaking a formal investigation of the facts. The investigation must take place irrespective of whether the suspect is known or present.¹⁹⁸

A **criminal investigation** must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any persons who might have been involved therein. Although forensic medical reports are important as evidence of acts of torture, they are often insufficient and have to be compared with and supplemented by other information.¹⁹⁹

States Parties should **protect the complainant** and prevent any victimisation and reprisals. Authorities should be made sensitive to the consequences of making a complaint and the vulnerable situation of the complainant. States should eliminate the risk of victimisation by ensuring that the complainant is in a safe place, which could include changing the personnel in contact with him or her, moving the individual to a different place, or ensuring the presence of a witness during further interrogations. In case the complainant is a detainee, the individual should be moved to a safer place of detention.

States are further required to **protect any witnesses** that give evidence to the investigation.

In the case of *Baraket v. Tunisia*, the CAT considered that the magistrate, by failing to investigate the complaint of torture more thoroughly, committed a breach of the duty of impartiality imposed on him by his obligation to give equal weight to both accusation and defence during the investigation, as did the public prosecutor when he failed to appeal against the decision to dismiss the case. The minister of justice could also have ordered the public prosecutor to do

so, but the Committee noted that he too had failed. As a consequence, the State Party had breached its obligation under Articles 12 and 14 to proceed to an impartial investigation whenever there is reasonable ground to believe that an act of torture has been committed.²⁰⁰

■ Article 14

1. *Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.*
2. *Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.*

Features: Victim's right to redress and reparation, right of dependants to compensation

Interpretation

§ 1. If the investigation referred to in Articles 12 and 13 forms the start of possible penal (and often also disciplinary) measures, Article 14 provides for civil legal recourse for victims of torture. States Parties are obliged to guarantee in their national laws that a victim of an act of torture obtains redress and also has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.²⁰¹

Redress involves official recognition that harm has been done to the person in question. **Compensation** generally, but not always, takes the form of payment of an amount of money.²⁰² Members of the CAT have emphasised regularly that the obligation of Article 14 involves not only the provision of material compensation and redress, but also physical, mental, and social rehabilitation.²⁰³ One member has spoken of "...the three M's of rehabilitation: Moral, monetary and medical."²⁰⁴

Any amount paid in compensation must be fair and adequate and therefore not symbolic. The State is left to decide what is fair and adequate. Immaterial damage must also be compensated. However, the CAT has called various States to account on inadequate provisions for compensation and rehabilitation of torture victims.²⁰⁵

If a victim dies as a result of torture then his **next of kin** are entitled to compensation.²⁰⁶ Spouses and children are normally considered as next of kin. However, next of kin can also include other relatives, if they can show that they depended upon the financial support of the deceased.

Members of the Committee have emphasised that the right to compensation and redress is given not only to a person who has the **nationality** of the State from which compensation and redress are sought or who is resident in that State. Non-residents and non-nationals are also entitled to compensation and redress after being subjected to torture.²⁰⁷

Members of the CAT have considered it a matter of concern when a person responsible for torture was only ordered to compensate the victim after **criminal liability** had been established. A civil procedure should also be available, regardless of the outcome of any criminal procedure.²⁰⁸

It is unlikely that Article 14 imposes an obligation on States to facilitate jurisdiction over civil claims for compensation in third States.

The wording of Article 14 may not exclude an obligation on States to open procedures for redress to a victim who, for example, reaches the State as a refugee having undergone torture elsewhere, while the perpetrator also came from another State.²⁰⁹

The instances in which a successful **individual complaint** to the CAT has been followed by adequate reparation are very rare. In theory, where the individual complaints procedure has been successful, but no compensation has been paid by the offending government, a further complaint of a violation of Article 14 could be made. In practice this has never happened.²¹⁰

§ 2. Existing domestic laws may have a better system of compensation, for example, by awarding larger amounts of compensation than those implied by the Convention. Domestic laws may also entitle a wider range of persons to be considered as victims and thus entitled to sue for compensation. There is no strict definition of who is considered a victim, but by reading this article in conjunction with Article 1, a victim should be any person who has suffered physically or mentally because of any act of torture.

Article 14 is not expressly applicable in cases of **cruel, inhuman, or degrading treatment or punishment**. This does not mean, however, that States may not be bound under other instruments to offer compensation in the case of a cruel act that is not considered to be torture. The ICCPR provides in Article 7 § 3 para. 3 a comparable, but more generally worded provision on the issue of redress, which is equally applicable to crimes of torture and to crimes of cruel, inhuman, or degrading treatment or punishment.

Despite the wording of the provision, the CAT has also considered Article 14 to be applicable in cases of cruel, inhuman, or degrading treatment or punishment:

“In all situations where reasonable grounds exist to believe that these disappearances amounted either to torture or to other forms of cruel, inhuman or degrading treatment, the dependants of the deceased vic-

tims should, according to article 14 of the Convention, be afforded fair and adequate compensation.”²¹¹

Having thus applied Article 14 to a case of cruel, inhuman, or degrading treatment despite the wording of the article, there appears to be no substantial reason why the CAT should not seek to apply Article 14 to other cases of cruel, inhuman, or degrading treatment not arising from disappearances.

■ 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.

Features: Evidence obtained through torture inadmissible at trial

Interpretation

States Parties are obliged to 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. This also indirectly gives the provision a preventive effect: Declaring that such statements are worthless removes an important motive for the use of torture.²¹²

The rule that evidence of this kind cannot be accepted does not apply if the statement is invoked against the alleged torturer in order to prove that the statement was made.

Members of the CAT have pointed out to States Parties that a range of **supplementary measures** must be taken in order to implement Article 15 effectively. For example, Committee members have been critical of judicial procedures based solely or principally on the basis of **confessions** of witnesses and suspects. Such procedures invite the extortion of crucial statements by force.²¹³ The right of a person not to make statements against him- or herself must be guaranteed (**non self-incrimination**). Furthermore, he or she must be informed of this right.²¹⁴

The problem of evidence of torture also arises in connection with Article 15. Committee members have suggested that it would be “more in keeping with the spirit of the Convention” to place on the prosecuting authority the burden of proving that a statement has not been made under duress. This could, for example, be achieved by means of a medical investigation before and after the interrogation.²¹⁵

Article 15 applies only to statements made under torture and not to statements made under **cruel, inhuman, or degrading treatment**. However, the CAT has

suggested that statements made under cruel, inhuman, or degrading treatment, nor statements made under threat of torture or under duress, may not be put forward as evidence in any proceedings.²¹⁶ In other words, while Article 15 mentions only statements made under torture, the CAT has had no objection to condemning less serious ways of imposing pressure, thus implicitly declaring the article to be applicable to cruel, inhuman, or degrading treatment or punishment.²¹⁷

The Human Rights Committee has also emphasised the obligations of States Parties to the ICCPR to prohibit the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.²¹⁸

■ Article 16

1. *Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.*
2. *The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.*

Features: Duty to prevent cruel, inhuman or degrading actions of officials, provisions applying to cruel, inhuman, and degrading treatment, respect for other protection mechanisms

Interpretation

§ 1. The provisions of Article 16 extend the scope of application of the Convention, since they oblige States Parties to take **measures to prevent** not only torture, but also cruel, inhuman, or degrading treatment or punishment which does not amount to torture as defined in Article 1. Forms of ill-treatment other than torture do not have to be inflicted for a specific purpose, but there does have to be an **intent** to expose individuals to the conditions which amount to or result in ill-treatment. In order to fall within the ambit of Article 16 an act must —like an act of torture under Article 1— be committed by, at the instigation of, or with the consent or acquiescence of a **public official** or other person acting in an official capacity.

In other words, an act of ill-treatment fails to qualify as torture for the purposes of the Convention if it either did not involve a sufficiently severe degree of pain

or suffering or because it was not inflicted for a purpose. The **essential elements** which constitute ill-treatment not amounting to torture are therefore:

- Intentional exposure to significant mental or physical pain or suffering;
- By or with the consent or acquiescence of the State authorities.

While some commentators suggest that the victims of acts referred to in Article 16 are only those persons who have actually been deprived of their freedom by the authorities²⁷⁹, this limited approach does not appear to be based on the text of Article 16.

In general, it is not possible to make a **distinction between measures** aimed at the prevention of torture and those aimed at the prevention of cruel, inhuman, or degrading treatment or punishment. Measures taken by States will be aimed at preventing both evils, because torture is in any case a form of cruel, inhuman, or degrading treatment or punishment. This is shown by the word “other” in Article 16 §1.

The article specifically provides that “in particular” the **obligations** in Article 10 (dissemination of information and training), Article 11 (continuous review of interrogation and detention rules and practices), Article 12 (prompt and impartial *ex officio* investigation), and Article 13 (victims’ right to complaint and recourse) apply also to cruel, inhuman, and degrading treatment and punishment, and not only torture as defined in Article 1. The words “in particular” do not exclude the obligations flowing from other articles also applicable to acts under Article 16, such as Article 15 and possibly Article 14.

However, the distinction in the Convention between the different categories of ill-treatment is critical in one important respect: States Parties are obliged to establish their **jurisdiction** over acts of torture and either prosecute or extradite those suspected of committing such acts (see Articles 4, 5, and 7). This obligation does not apply to those who have committed acts as defined in Article 16.

§ 2. Any **wider protection mechanism** relating to cruel, inhuman, or degrading treatment or punishment in national or international law is not affected by the provisions of the Convention. A similar clarification is included with regard to international or national law relating to extradition or expulsion.

**III
THEMATIC
SUMMARY
OF SOME
CENTRAL ISSUES
PERTAINING TO
THE CONVENTION**

III. THEMATIC SUMMARY OF SOME CENTRAL ISSUES PERTAINING TO THE CONVENTION

The purpose of this section is to summarise some of the fundamental issues pertaining to the Convention. The list of issues singled out for discussion is admittedly purely subjective, and it does not pretend to be in any way exhaustive.

The summaries will not include any information beyond that already presented in the article-by-article analysis of the previous section, but it will present that information according to themes, rather than according to articles.

1. UNIVERSAL JURISDICTION

Universal jurisdiction is generally described as the ability to prosecute persons present in the territory of a State for crimes committed outside the State's territory which are not linked to that State by the nationality of the suspect or of the victim or by harm to the State's own national interests.²²⁰ The Convention against Torture is the first treaty to provide universal jurisdiction with regard to the offence of torture outside the context of an armed conflict. The system was inspired by various earlier treaties against aircraft hijacking, hostage-taking, and the protection of diplomats.²²¹

There are a number of legal, philosophical, and moral rationales which have been advanced in support of the exercise of universal jurisdiction over international crimes, including the crime of torture. These rationales include the threat these crimes pose to the international legal fabric as well as to the national legal fabric in States where suspects are found without steps being taken to investigate and, if appropriate, prosecute or extradite them. These crimes are likewise considered as an attack on the fundamental legal values shared by the international community and, in some cases, the threat they pose to international peace and security.²²²

An essential purpose of the Convention is to ensure that a torturer does not escape the consequences of his or her acts by going to another country.²²³ Thus, the Convention provides a system under which the international criminal—the torturer—can find no safe haven. As with previous conventions against terrorism²²⁴, the Convention provides that the country where the suspected offender happens to be shall either extradite him or her for the purpose of prosecution or proceed against him or her on the basis of its own criminal law. It should be noted that the provision does not prescribe the establishment of universal jurisdiction *in absentia*, meaning that States are not obliged under the Convention to establish jurisdiction over cases not falling under Article 5 §1, where the alleged offender is not present in the territory of the State.²²⁵

To be in a position to bring criminal proceedings against the offender, torture must firstly be a crime in the domestic law of the State concerned. This issue is addressed in Article 4 of the Convention, which obliges States Parties to ensure that all acts of torture are offences under their criminal law. Secondly, the State must have jurisdiction over the offence. This is ensured in Article 5, which provides that States Parties shall establish their jurisdiction, including universal jurisdiction, for the offence of torture. In other words, a State Party shall take any necessary measures to establish its jurisdiction over the crime of torture, not only in cases where the crime of torture is linked to the State by territoriality (the torture was committed on the territory of the State) or nationality (the offender is a national of the State), but also in cases where the only link to the State concerned is the presence of the alleged offender on territory under the effective control of the State. The States Parties are only allowed discretion concerning the question of the establishment of universal jurisdiction in cases where the victim of torture is their own national.

Having ensured that torture is a crime in national law and that the States Parties have established jurisdiction, including universal jurisdiction, over the crime, Article 7 obliges States Parties to *exercise* such jurisdiction. The main provision regarding the exercise of (universal) jurisdiction is Article 7 §1. It provides that States Parties are obliged to either hand over suspected torturers in their territories to the prosecuting authorities for the purpose of prosecution, unless the suspected torturers are to be extradited to another State with jurisdiction which intends to prosecute them. This is also called the principle of *aut dedere aut judicare*, meaning “either extradite or prosecute”.

One important question is whether States Parties to the Convention may exercise universal jurisdiction over nationals from non-States Parties. However, there now appears to be a significant body of practice indicating that such jurisdiction is permissible under international law.²²⁶

■ 2. IMMUNITY TO HEADS OF STATES AND DIPLOMATS?

Article 5 §2 of the Convention imposes an obligation on States to establish jurisdiction over all crimes of torture, irrespective of the status of the alleged offenders. The rationale of the Convention is, after all, that suspects of torture must not be able to find a safe haven, and that any suspect of torture must fear prosecution always and everywhere.²²⁷

The CAT has expressed the view that the States’ obligations to bring alleged torturers to justice extends 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 CAT expressed the view that Article 5 §2 of the Convention

“conferred on States Parties universal jurisdiction over torturers present in their territory, whether former heads of State or not, in cases where it [the State Party] was unable or unwilling to extradite them...”²²⁸

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. The Rome Statute of the International Criminal Court²²⁹, the Statute of the International Tribunal for the Former Yugoslavia²³⁰, and the Statute of the International Tribunal for Rwanda²³¹ all extend their jurisdiction to the highest officials and heads of States. The UN International Law Commission has expressed the view that the rule that heads of States and public officials may be held criminally responsible when they commit crimes under international law is an essential part of the international legal system.²³²

Despite these recent trends in international criminal law, a judgment by the International Court of Justice in February 2002 upheld the immunity from jurisdiction for an incumbent minister of foreign affairs for alleged crimes against humanity and war crimes. The majority of the Court observed that in international law it is firmly established that, similarly to diplomatic and consular agents, certain holders of high-ranking office in a State, such as the head of State, head of government, and minister of foreign affairs, enjoy immunity from jurisdiction in other States, both civil and criminal.²³³ No exception to this position on the basis of the nature of the alleged crimes as being serious international crimes was found by the Court.

The Court went on to note that although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal prosecution, such extension of jurisdiction in no way affects immunities under customary international law. These remain opposable before the courts of a foreign State, even where those courts exercise such jurisdiction under these conventions.²³⁴ 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.

After having outlined such a robust notion of immunity, the Court then noted that jurisdictional immunity under international law does not represent a bar to criminal prosecution in the following circumstances:

- a. Where such persons are tried in their own countries; or
- b. Where the State which they represent or have represented decides to waive that immunity; or
- c. Where such persons no longer enjoy all the immunities accorded by international law in other States after ceasing to hold the position qualifying them for jurisdictional immunity; or

d. Where such persons are subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.²³⁵

Of most practical importance is the exception listed in (c), as the chances of (a) and (b) happening must be considered very limited, and the scope of (d) is as yet extremely limited.

As upheld by the Court, certain incumbent representatives of States, including diplomatic agents, enjoy complete immunity (so-called immunity *rationae personae*) in conventional and customary international law, based on a notion that such immunities are necessary to ensure the efficient performance of their functions on behalf of their respective States.²³⁶ According to (c), the same group of State representatives, after leaving office, enjoys functional immunity for all acts performed in the exercise of an official capacity (so-called immunity *rationae materiae*). It is thus not the nature of the acts which determines whether or not jurisdictional immunity applies to former State representatives, but whether or not the acts in question were performed in an official or private capacity.

There is nothing in the judgment of the International Court of Justice to indicate that the Court was of the view that crimes under international law, which include the crime of torture, necessarily can be assimilated to acts committed in a "private capacity".²³⁷ Added to the fact that the definition of torture in Article 1 requires an element of official involvement, the universal jurisdiction in Article 5 §2 against former State officials enjoying functional immunity may in fact be subject to severe limitations under international customary law, as interpreted by the International Court of Justice in *Congo v. Belgium*.

In other words, if an act of torture in a particular case is considered to have been carried out in an official capacity, a former State representative accused of this act may in fact enjoy life-long immunity. Indeed, although the Court emphasised that immunity from jurisdiction does not mean impunity²³⁸, the end result in some cases may nevertheless amount to *de facto* life-long impunity.

■ 3. THE PROHIBITION OF TORTURE AS A NORM OF JUS COGENS

There are indications that the prohibition of torture, whether it is committed on a widespread and systematic basis, a crime against humanity, or committed against a single victim, constitutes a norm of *jus cogens*.²³⁹

The major distinguishing feature of the rule of *jus cogens* is its indelibility. It is a norm of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule or another norm of *jus cogens* of contrary effect.²⁴⁰ The concept of *jus cogens* was accepted by the International Law Commission, and incorporated in the final draft on the law of treaties in 1966, Article 50 of which provides that:

"A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

While the rule of *jus cogens* in theory only implies that provisions of other treaties are void if they conflict with a norm of *jus cogens*, there have been some suggestions that the consequence of the *jus cogens* status of the prohibition of torture is that States are justified in exercising universal jurisdiction over the crime of torture irrespective of whether they are Parties to the Convention against Torture.²⁴¹ A Trial Chamber of the International Criminal Tribunal for the former Yugoslavia recently stated that:

"...at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime."²⁴²

However, a judgment by the European Court of Human Rights in November 2001 appears to limit the legal implications of this *jus cogens* status. At issue in the case was whether a national law, which granted immunity to a foreign government in a civil suit claiming compensation for torture, constituted a violation of Article 3 of the European Convention of Human Rights.²⁴³ By a narrow majority the Court, while accepting that the prohibition of torture has achieved the status of a peremptory norm in international law, found that it was unable to discern:

"61. ... in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged."

Similarly, there is nothing in *Congo v. Belgium* to suggest that the International Court of Justice would find that a *jus cogens* norm supersedes jurisdictional immunities in international law.

4. RELATIONSHIP BETWEEN THE CONVENTION AND OTHER INSTRUMENTS OF INTERNATIONAL CRIMINAL LAW

Rather than being a norm-setting human rights treaty along the lines of, for example, the International Covenant on Civil and Political Rights, the Convention against Torture belongs primarily to the category of international criminal law instruments. One may therefore ask how the Convention relates to other bodies of international criminal law which have jurisdiction over the crime of torture. The following section aims to provide a brief overview of the relationship between the Convention and other international criminal law instruments with jurisdiction over torture offences.

4.1. The Convention in Relation to the International Criminal Court

The International Criminal Court (ICC) will be a permanent Court trying individuals accused of committing genocide, war crimes, crimes against humanity, and, possibly in the future, the crime of aggression. The definition in the Rome Statute of the International Criminal Court (hereafter: "ICC Statute") of the crimes is broadly consistent with that elaborated by international law, though the Statute also reflects some progressive development in defining certain crimes, notably gender-related offences.²⁴⁴

The crime of torture falls within the jurisdiction of the ICC when it is committed in the context of crimes against humanity, i.e. when it is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack²⁴⁵. Torture, when it is committed in the context of crimes against humanity means:

"...the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;"²⁴⁶

The term "war crimes" denotes grave breaches of the Geneva Conventions, namely, *inter alia*, torture or inhuman treatment of, including biological experiments upon, persons protected under the provisions of the relevant Geneva Convention in the context of armed conflict.²⁴⁷

Contrary to this definition of torture in the ICC Statute, the definition in the Convention against Torture is not concerned with the context in which the torture—as defined in Article 1 of the Convention—occurs.

While the Convention against Torture is concerned with the establishment and exercise of jurisdiction over torture in national laws, the ICC will be an independent international body with jurisdiction over a range of the most serious interna-

tional crimes. However, a central attribute of the ICC is that it will be complementary to national criminal jurisdictions. Thus, national tribunals will continue to have primary jurisdiction over criminal offences falling under the Statute, and the ICC will hear cases only where national tribunals are unable or unwilling to do so.²⁴⁸

It is possible to imagine a situation where torture committed in the context of a conflict also falls within the definition of torture in both the Convention and international humanitarian law. In that case, national tribunals could have a choice between prosecuting a suspect according to laws establishing jurisdiction according to the Convention against Torture or according to the norms of individual criminal responsibility under international humanitarian law.

Article 25 of the ICC Statute establishes individual criminal responsibility for any person who commits a crime within the jurisdiction of the ICC. The Statute also addresses command responsibility and the full range of possible defences.²⁴⁹ The ICC will be formally established after 60 countries have ratified the Rome Statute of the International Criminal Court.²⁵⁰ It will have jurisdiction only over crimes committed after the Statute's entry into force, and in the case of States which adhere after that point, only for crimes committed after the Statute's entry into force for those States, unless the latter declare otherwise. Articles 12 and 13 set out certain other conditions for the exercise of jurisdiction.

4.2. The Convention in Relation to the International Criminal Tribunals for the Former Yugoslavia and Rwanda

Since the prosecutions of war criminals after the end of the Second World War, no prosecutions before international tribunals occurred until the advent of the respective tribunals for the former Yugoslavia and Rwanda in the 1990s. Both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were created by UN Security Council resolutions.

The Statute of the ICTY (hereafter: "the ICTY Statute") limits the Tribunal's jurisdiction to serious violations of international humanitarian law committed in the former Yugoslavia since 01 January 1991.²⁵¹ Articles 2 through 5 set forth the crimes over which the Tribunal has jurisdiction: war crimes, genocide, and other crimes against humanity. The Statute's rules concerning individual responsibility and defences are generally consistent with the Nuremberg principles and the 1949 Geneva Conventions and Protocol I.²⁵²

The Tribunal's personal jurisdiction extends only to natural persons and is concurrent with that of national courts, although, importantly, it enjoys primacy and may request that a national court defer to its jurisdiction over a case.²⁵³

Torture is a crime under the ICTY Statute in the context of grave breaches of the Geneva Conventions²⁵⁴ and crimes against humanity.²⁵⁵

The Rwanda Tribunal is similar to the Yugoslavia Tribunal, and its Statute (hereafter: the “ICTR Statute”) is based closely on the ICTY’s. The ICTR’s jurisdiction is limited to serious violations of international humanitarian law committed in Rwanda or committed by Rwandan nationals in neighbouring States between 1 April and 31 December 1994.²⁵⁶

As with the ICTY, the Rwanda Tribunal’s jurisdiction extends to genocide, crimes against humanity, and war crimes, with adjustments to reflect the conflict’s particular circumstances, such as its internal character. Like the ICTY, the ICTR’s personal jurisdiction extends only to natural persons. In addition, its jurisdiction is concurrent with national courts, with the Tribunal enjoying primacy. The Statute’s provisions on individual responsibility, defences, immunities, and double jeopardy are identical to those in the ICTY Statute.²⁵⁷

Jurisdiction over the crime of torture as defined in the Convention against Torture is not subject to the geographic and time limitations set forth in the ICTY and ICTR Statutes. Furthermore, the definition of torture in Article 1 of the Convention does not correspond exactly to torture as defined in international humanitarian law.

ANNEX

■ ANNEX

■ ANNEX I

■ **List of the 129 countries which have ratified the UNCAT as of May 2002:**

Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkino Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Cote d'Ivoire, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Honduras, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Malawi, Mali, Malta, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Niger, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, The Former Yugoslav Republic of Macedonia, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Uzbekistan, Venezuela, Yemen, Yugoslavia, Zambia.

■ ANNEX II

■ **List of the 49 countries which have recognised the competence to receive and process individual communications of the CAT under Article 22 as of May 2002:**

Algeria, Argentina, Australia, Austria, Belgium, Bulgaria, Cameroon, Canada, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Russian Federation, Senegal, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Togo, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Yugoslavia.

■ ANNEX III

■ List of countries which have made reservations concerning the competence of the CAT under Article 20:

Afghanistan, Belarus, China, Cuba, Israel, Kuwait, Morocco, Saudi Arabia, Ukraine.

■ ANNEX IV

■ Survey of the Human Rights Committee's Pronouncements on the Definition of Torture (A background paper to the APT Expert Seminar on the Definition of Torture), November 2001

Introduction

The purpose of this study is to summarise the views of the Human Rights Committee (hereafter: the "HRC") concerning the definition of torture as related to Article 7 of the International Covenant on Civil and Political Rights (hereafter: the "ICCPR")²⁵⁸. The HRC has never provided a theoretical definition of torture, but has, instead referred to the definition given by the UN Convention against Torture (UNCAT)²⁵⁹ and has urged all States to ratify the Convention. Nevertheless, the HRC has had numerous occasions to consider the definition of torture in its General Comments, Concluding Observations and jurisprudence or case law provided by the individual communications procedure.

In its General Comment 20, the HRC has specified that it considers the prohibition in Article 7 as a whole and does not distinguish between the different acts mentioned in the provision. This approach has subsequently been adopted in the jurisprudence of the Committee²⁶⁰. It represents a departure from the approach adopted previously by the HRC in General Comment 7 (16th session), where a distinction was made between the type, purpose and severity of each particular act²⁶¹. Out of 122 Concluding Observations between 25 September 1992 and 04 May 2000, the HRC referred to 34 cases involving torture. These General Comments and Concluding Observations do not provide any definition of torture nor do they refer to elements constituting torture.

It is the case law of the HRC which provide the most detailed references to elements that the Committee considers as constituting torture. Out of 285 individual communications received between 1977 and July 2000, 24 involved allegations of torture. Among them, the HRC found that torture had been inflicted in 15 cases.

At this point, it must be noted that the jurisprudence of the HRC concerning torture has evolved over time. In the beginning, the HRC in many cases concluded

that torture had been committed; however, in recent cases (since the 62nd session), there has been no reference to torture. One hypothesis could explain this development. The HRC has remarked that “acts of torture usually go unpunished and that in many cases a lack of confidence in the authorities keeps the victims from lodging complaints”²⁶². Given the admissibility requirement of exhaustion of domestic remedies in individual communications to the HRC, complainants may have found it difficult, in time, to lodge such complaints of torture to the HRC.

Elements in the Definition of Torture

It is the aim of this study, based on these available cases and using the Concluding Observations, General Comments and case law of the HRC, to underline the three elements mostly referred to when considering the definition of torture.

I. Severity of the Treatment

Apart from specifying that the acts covered by Article 7 concern acts that cause physical pain as well as mental suffering, the HRC has never theoretically distinguished between the acts referred to in Article 7²⁶³. The HRC has therefore been free to qualify or not to qualify the act committed as torture.

In its concluding observations and case law, the HRC has analysed several situations where torture was considered to have been committed. With this jurisprudence it is possible to determine in which cases **ill-treatment amounts to torture** and in which one act is not severe enough to be qualified as such. The severity of the treatment plays an important role in the definition of torture.

In its case law, the HRC explains **the elements and the means leading to the definition of torture**. According to the HRC, certain practices are in themselves severe enough to amount to torture. It is generally the case for electric shocks²⁶⁴, “submarino” (immersing the head of the victim in water usually fouled with substances such as blood or vomit)²⁶⁵ and “planton” (being forced to stand upright with eyes blindfolded through the day)²⁶⁶. The latter, nevertheless, cannot be considered as torture *per se* but, added to other practices such as beatings, would amount to torture. In other cases, the treatments inflicted are so severe that as a whole they amount to torture. For instance, when the victim is threatened, beaten, and drowned, the HRC has considered that torture was inflicted²⁶⁷.

Moreover, in several cases, the HRC qualified the treatment inflicted on the victim as torture because the victim was physically and also mentally ill-treated. The combination of these ill-treatments was severe enough to constitute torture. The HRC has even stated in another case that keeping detainees “incomunicado” was “conducive to torture”.

In one of the cases, the HRC did not consider some acts as amounting to **psychological torture** but rather as “cruel and inhuman treatment within the

meaning of Art. 7 and Art. 10 §1 of the ICCPR²⁶⁸. This was the only time the HRC has had to deal with the question of psychological torture. Nevertheless, the HRC has reproached a State Party to the ICCPR for not having included in its criminal code psychological torture as part of the definition of torture.

In its concluding observations, the HRC has never given examples of treatment which amounts to torture but rather distinguishes certain forms of treatment from torture. For instance, excessive force²⁶⁹, illegal or secret detention²⁷⁰ or rape and sexual assaults²⁷¹ are to be distinguished from torture. The HRC adds that one must “avoid treating cases of torture as simple cases of voluntary infliction of blows and wounds”²⁷².

In considering the merits of each case, the HRC seldom established rules out of the cases it has considered. One can only say that generally the HRC concluded that torture was inflicted when special means have been used to make the victim suffer (electric prod, for instance) or when the treatment was too severe to be considered as a mere “voluntary infliction of blows and wounds”.

II. The Purpose and the Reason

A person is said to be tortured if he or she is severely ill-treated for a specific reason. Most often, the HRC qualifies a situation as torture when the victim was ill-treated for political reasons such as participation in an opposition movement to a dictatorship, acknowledgement of the organisation of political activities, or even support of a political party²⁷³. Not only political opponents are concerned here, but also journalists²⁷⁴.

According to the HRC, torture is inflicted not only in order to **extract confessions**²⁷⁵ but also to punish, for instance, persons who belong to or participate in political movements²⁷⁶. The HRC confirms its position in its concluding observations²⁷⁷ stating that torture is inflicted on individuals deprived of their liberty “including for the purpose of extracting confessions”.

The HRC, in its concluding observations and case law, has only had to deal with torture committed for political reasons (cases of dictatorships in the 1980s)²⁷⁸, except in one case where the HRC considered that even street children were subjected to torture,²⁷⁹ without explaining in which way. Nevertheless, the HRC specifies that torture is not limited to political matters since it explains in one of its concluding observations that torture is committed “also for political matters”. This phrasing leaves an open interpretation of the reasons leading to the infliction of torture²⁸⁰. Moreover, since the HRC has urged all States to ratify the UNCAT and has referred to the definition of torture as provided by Article 1 of the Convention against Torture, this means that the HRC has recognised that among the purposes for which torture could be inflicted is “any reason based on discrimination of any kind” (e.g. racial or social reasons).

III. The Perpetrator of the Infliction

The position of the HRC is constant in the definition it gives of the perpetrator of the act of torture. It includes not only the public authorities but also groups and individuals acting within the State Party's territory with its open or tacit consent.

In its General Comment 20 (44th session), in qualifying the author of violations of Article 7, the HRC has distinguished among perpetrators acting in their official capacity, outside their official capacity, or in a private capacity. The HRC added that this definition also extends to law enforcement personnel, medical personnel, police officers, and "any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment".

The HRC has recognised that torture is defined as such when committed by the police, security forces²⁸¹ and members of the army²⁸² as well as by "paramilitary and other armed groups or individuals"²⁸³ and "foreign soldiers operating within the State Party's territory"²⁸⁴. In its early jurisprudence, the HRC had included bi-national commandos in the definition of authors of acts of torture.²⁸⁵

Conclusion

The HRC has underlined that these elements could lead to torture only when they are all taken together. A person who is severely ill-treated is not tortured if the perpetrators do not have a specific intention when they inflict pain on him or her²⁸⁶. In the same way, a person who is ill-treated for political reasons but who is not subjected to severe ill-treatment is not considered to have been tortured²⁸⁷.

In the beginning the HRC used to refer to torture when examining allegations of such acts; it later then considered Article 7 as a whole without distinguishing between the terms of the provision. In so doing, the HRC decided to pronounce only on the provision as a whole based on its understanding of the task to "give effect to the provisions of the Covenant". After having made its conclusions on each article, the HRC, once it has proven that the State Party has violated the provision, proceeded to recommend that the government provide for effective remedies in response to the violation of the article as a whole²⁸⁸. If the HRC has specified that the victim was subjected to severe ill-treatment, it was only to stress the significance of the violation²⁸⁹.

With its jurisprudence, the HRC clearly shows that its position on Article 7 can vary depending on the case examined and has not established any firm rules. It is also very hard to predict how the HRC will deal with future cases of torture. This position, therefore, differs from the Committee against Torture's, whose jurisprudence is more predictable, having to give effect to very precise articles.

■ ANNEX V

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- 1 See provisions which prohibit torture: Article 5 of the Universal Declaration of Human Rights (1948); Common Article 3 of the four Geneva Conventions (1949); Article 7 of the International Covenant on Civil and Political Rights (1966); Article 37 of the Convention on the Rights of the Child (1989); Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); Article 5 of the Inter-American Convention on Human Rights (1978); Article 5 of the African Charter on Human and People's Rights (1981); Article 13 of the Arab Charter on Human Rights (1994). A number of recent instruments establish jurisdiction to international bodies over torture committed, *inter alia* in the context of war crimes and crimes against humanity: See the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (1993); the Statute of the International Tribunal on Rwanda (1994); and the Rome Statute of the International Criminal Court (1998).
- 2 Adopted by the United Nations General Assembly by Resolution 39/46 of 10 December 1984. Entered into force on 26 June 1984.
- 3 At the regional level, two conventions are dedicated to the issue of torture: The European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (1987), which establishes a mechanism aimed at preventing torture, and the Inter-American Convention to Prevent and Punish Torture (1985).
- 4 Whether a State becomes bound by the Convention by means of ratification, accession, or succession, the obligation remains the same. By signing the Convention, the State undertakes to act in good faith with the Convention, and not in a manner incompatible with its object and purpose. See Articles 18 and 31 (1) of the Vienna Convention on the Law of Treaties (1969).
- 5 See Article 27 of the Vienna Convention on the Law of Treaties.
- 6 *Ibid.*
- 7 See chapter 2 of the Vienna Convention on the Law of Treaties.
- 8 See Article 19 of the Vienna Convention on the Law of Treaties.
- 9 For a general discussion of the various means of implementation, see Ian Brownlie, "Principles of Public International Law", 5th edition, Clarendon Press, Oxford, 1998.
- 10 Other UN treaty bodies include the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee for the Elimination of All Forms of Racial Discrimination; the Committee on the Rights of the Child; and the Committee for the Elimination of All Forms of Discrimination Against Women.
- 11 The States Parties shall submit to the Committee a report on the measures they have taken to give effect to their undertakings under the Convention within one year after the Convention entered into force for the State Party concerned. Thereafter, the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request (Article 19 § 1 UNCAT).
- 12 Article 20 of the Convention. According to Article 28, a State Party may, at the time of signature or ratification of the Convention, declare that it does not recognise the competence of the Committee to carry out investigations under Article 20. Nine countries have made reservations concerning Article 20 of the Convention as of May 2001.
- 13 Article 20 § 1 UNCAT.
- 14 Camille Giffard, "The Torture Reporting Handbook", Human Rights Centre, University of Essex, 2000, p. 97.
- 15 As of May 2002, 49 States had made declarations accepting the competence of the CAT to consider individual complaints under Article 22. See Annex II for the list of countries.
- 16 As of October 2001, there had been 183 registered communications with respect to countries.
- 17 Article 22 § 2 UNCAT.
- 18 Article 22 § 4 UNCAT.
- 19 Article 14 UNCAT.
- 20 Chris Ingelse, "The UN Committee against Torture—An Assessment", Kluwer Law International, 2001, p. 196.
- 21 Article 112 § 1 of the Rules of Procedure of the Committee against Torture, CAT/C/3/Rev. 1 of 29 August 1989.
- 22 Article 112 § 2 of the Rules of Procedure, *ibid.*
- 23 See definition of torture in Article 2 of the Inter-American Convention to Prevent and Punish Torture (1985).
- 24 Prosecutor v. Anto Furundzija, Case no. IT-95-17/1, 10 December 1998, para. 160-161.
- 25 See Malcolm Evans, "Getting to Grips with Torture", Background Paper 1, APT Seminar on the Definition of Torture, Association for the Prevention of Torture, November 2001.

- 26 See Prosecutor v. Kunarac, Kovac and Vukovic, Case no. IT-96-23/1-T, 22 February 2001, para. 482.
- 27 For the text of this draft convention, see The Draft Convention for the Prevention and Suppression of Torture, submitted by the International Association of Penal Law, UN Doc. E/CN.4/NGO.213 (1978).
- 28 Ahcene Boulesbaa, "The UN Convention on Torture and the Prospects for Enforcement", Martinus Nijhoff Publishers, 1999, p. 17.
- 29 Boulesbaa, *ibid.* p. 18.
- 30 E/CN.4/1986/15, para. 119.
- 31 Giffard, *ibid.* note 14, p. 14.
- 32 Giffard, *ibid.* note 14, p. 14.
- 33 Giffard, *ibid.* note 14, p. 13. See *infra* under Article 16 for an analysis of "other cruel, inhuman or degrading treatment or punishment which does not amount to torture as defined in Article 1".
- 34 Ireland v. UK, 1978, 2 Eur.Ct.H.R. (series A), para. 162.
- 35 *Ibid.* para. 167.
- 36 Boulesbaa, *ibid.* note 28, p. 19, with reference to the UN Commentary, chapter VI, para. 13 (1955), p. 31.
- 37 See Denmark et al. v. Greece, Report of the European Commission on Human Rights, 5 November 1969.
- 38 Boulesbaa, *ibid.* note 28, p. 19.
- 39 A/56/156 of 3 July 2001, p. 3.
- 40 See E/CN.4/2001/66, paras. 4-11.
- 41 One example is the view expressed by the Human Rights Committee in the case of Estrella v. Uruguay. The alleged victim, Miguel Angel Estrella, an Argentine concert pianist, complained of having, *inter alia*, been threatened with death, mock amputation of his hands with an electric saw, and violence to his relatives or friends. The Committee concluded that the applicant had been subjected to severe psychological torture, in an effort to force him to admit to subversive activities.
- 42 A/56/156, para. 5.
- 43 Aydin v. Turkey, (1997), Judgment of the European Court of Human Rights of 25 September.
- 44 Mejia v. Peru, (1996), Inter-Am.Ct.H.R. (Ser C), no. 5; Furundzija judgment, *ibid.* note 24, para. 163.
- 45 Prosecutor v. Delalic et al., Case No IT-96-21-T, 16 November 1998, paras. 495-496.
- 46 Boulesbaa, *ibid.* note. 28, p. 9.
- 47 See the European Commission on Human Rights, which, in the case of Denmark et al. v. Greece, *ibid.* note 37, held that the failure of the government of Greece to provide food, water, heating in winter, proper washing facilities, clothing, medical and dental care to prisoners constitutes an "act" of torture in violation of Article 3 of the ECHR. See also Prosecutor v. Deladic, *ibid.* note 45, which found that imprisonment in an unlit manhole with insufficient air and without food or water for a least a day and a night constitutes torture (para. 1007).
- 48 Boulesbaa, *ibid.* note 28, p. 21.
- 49 Prosecutor v. Delalic et al., *ibid.* note 45, para. 442.
- 50 Background Paper 2, "Aspects of the Definition of Torture in the Regional Human Rights Jurisdictions and the International Criminal Tribunals of the Former Yugoslavia and Rwanda", APT Seminar on the Definition of Torture, Association for the Prevention of Torture, November 2001.
- 51 See Articles 5 and 7 of the Convention.
- 52 Prosecutor v. Delalic et al., *ibid.* note 45, para. 470.
- 53 This assumed great importance in the House of Lords case consideration of the request for extradition from the UK to Spain of former Chilean head of State, Pinochet Ugarte. In its first decision, two of the judges stressed the idea that acts of torture could not be "official acts", while in the second substantive decision it seemed vital to the reasoning that they were; see Evans, *ibid.* note 25, p. 11.
- 54 J. Herman Burgers & Hans Danelius, "The United Nations Convention against Torture—A Handbook on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", Martinus Nijhoff Publishers, 1988, p. 120.
- 55 Cf. the definition of torture in Article 2 of the 1985 Inter-American Convention to Prevent and Punish Torture, which includes acts of torture committed by any person within the jurisdiction. Article 3 of the same Convention, however, states that only public servants or employees or persons acting at their instigation shall be held guilty of the crime of torture.
- 56 Nigel S. Rodley, "The Treatment of Prisoners Under International Law", 2nd ed., Oxford, 1999, p. 100.
- 57 Rodley, *ibid.*
- 58 Boulesbaa, *ibid.* note 28, p. 27.
- 59 See Summary prepared by the Secretary-General in accordance with Commission Resolution 18 (XXXIV) containing the comments received from Governments on the draft Articles of the Convention on Torture, Commission on Human Rights, 35th Session, UN Doc. E/CN.4/1314/Add. 2 (1979), p. 2.
- 60 Elmi v. Australia, Communication no. 120/1998, CAT/C/22/D/120/1998, para. 65.

- 61 The Human Rights Committee has interpreted the scope of Article 7 of the ICCPR to extend to acts committed by private persons. See Human Rights Committee general comment 20 of 10 April 1992 (replaces General Comment 7 of 30 July 1982), para. 2.
- 62 Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by Resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. There was an explicit reference to the Standard Minimum Rules for the Treatment of Prisoners in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. When the Convention was being drafted, the authors did not consider it appropriate to include a non-binding document in a legally binding one. For a critique of the decision not to retain a reference to the Standard Minimum Rules, see Boulesbaa, *ibid.* note 28, pp. 28-31.
- 63 See UN document "Question of the Human Rights of all Persons subjected to any form of Detention or Imprisonment, in particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", E/CN.4/1997/7, Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37 B.
- 64 E/CN.4/1997/7.
- 65 Boulesbaa, *ibid.* note 28, p. 47.
- 66 *Ibid.*
- 67 See the Legal Opinion of the Legal Department of the UN, Doc. E/CN.4/116 (1948), p. 4.
- 68 See in the context of the ICCPR: UN Doc. CCPR/C/Add.18; Report of the Human Rights Committee 33 UN GAOR, Supp. (no. 40) at 20, UN Doc. A/33/40 (1978): "The domestic system or practice could not be invoked as a reason for failing to implement the Covenant."
- 69 Boulesbaa, *ibid.* note 28, p. 50.
- 70 Burgers & Danelius, *ibid.* note 54, p. 123.
- 71 Boulesbaa, *ibid.* note 28, p. 58.
- 72 Boulesbaa, *ibid.* note 28, p. 67.
- 73 Boulesbaa, *ibid.* note 28, p. 87.
- 74 See for example, the Universal Declaration of Human Rights, Art. 29(2); the ICCPR, Arts. 12, 14, 18, 19, 21, and 22.
- 75 The provisions of the paragraph, save for minor differences in their scope, are similar to those of Article 4(2) of the ICCPR, of Article 15(2) of the ECHR, and of Article 27(2) of the Inter-American Convention on Human Rights.
- 76 Boulesbaa, *ibid.* note 28, p. 79.
- 77 The Charter of the International Military Tribunal of Nuremberg prescribed in Article 8: "The fact that the Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility."
- 78 The Charter was approved by the Supreme Commander of the Allied Powers on 19 January 1946. It was amended by order of the Supreme Commander, General Headquarters, APO 500, April 1946, General Orders no. 20. Trials of Japanese War Criminals, Dept. Of State, US Government Printing Office, Washington, DC (1946), pp. 39-44.
- 79 Formulation of the Principles Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 2nd Session, UN Doc. A/519 pp. 111-112; Boulesbaa, *ibid.* note 28, p. 86.
- 80 Article 6 § 4 of the Statute reads: "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires."
- 81 Article 7 § 4 of the Statute is essentially identical to the text of Article 6 § 4 of the Statute of the International Tribunal for Rwanda.
- 82 Article 33 § 1 of the Rome Statute of the International Criminal Court.
- 83 Burgers & Danelius, *ibid.* note 54, p. 125.
- 84 See G.E.T. Paez v. Sweden, Communication no. 39/1996, CAT/C/18/D/39/1996.
- 85 This is a different position from that adopted under the Convention relating to the Status of Refugees (1950), where a refugee can be expelled on the grounds of national security and public order. Moreover, the provision prohibiting refoulement of a refugee is not absolute; a refugee who is regarded as a danger to the security of the place in which he or she is located, or who has been convicted of a particularly serious crime in the country of refuge and is therefore considered as constituting a danger to the community, cannot claim the benefit of non-refoulement (Article 33 of the Convention Relating to the Status of Refugees (1951).
- 86 See General Comment no. 1, "Implementation of Article 3 of the Convention in the context of Article 22", CAT, adopted 21 November 1997, A/53/44, para. 258 and annex IX.

- 87 See E.A. v. Switzerland, Communication no. 28/1995, CAT/C/19/D/28/1995.
- 88 See E.A. v. Switzerland, Communication no. 28/1995, CAT/C/19/D/28/1995.
- 89 There is some current discussion as to the changing burden of proof. Some commentators have observed that where there is generally a consistent pattern of gross human rights violations in a country, the burden of proof upon the alleged victim is diminished, whereas if the human rights situation of a country is generally good, the burden of proof upon the alleged victim is increased. See annotated commentary to the Committee against Torture, 8 May 1996 (Alan v. Switzerland, Communication no. 21/1995), NJCM-Bulletin 22 (1997), pp. 1102-1106 .
- 90 However, in view of the difficulty of establishing a case, especially with the risk of further victimisation for the individual because of taking the case to the authorities, the State should provide some assistance to the individual in preparing his or her case. This provision should be read in conjunction with Article 9, which deals with mutual assistance.
- 91 Mutombo v. Switzerland, Communication no. 13/1999.
- 92 P.M. Kisoki v. Sweden ,Communication no. 41/1996, CAT/C/16/D/41/1996, and K.Y. Tala v. Sweden, Communication no. 43/1996, CAT/C/17/D/43/1996.
- 93 General comment no. 1, *ibid.* note 86.
- 94 Mutombo v. Switzerland, *ibid.* note 90.
- 95 P.M. Kisoki v. Sweden, *ibid.* note 91.
- 96 H. Haydin v. Sweden, Communication no. 101/1997, CAT/C/21/D/101/1997.
- 97 X.Y.Z. v. Sweden, Communication no. 61/1996, CAT/C/20/D/61/1996.
- 98 S.M. Aemeini v. Switzerland, Communication no. 34/1995, CAT/C/18/D/34/1995.
- 99 UN Report of the Committee against Torture, General Assembly Official Records, Fifty-third session (1998), Supplement no. 44 (A/53/44), Communication no. 83/1997 (Ms G.R.B. v. Sweden) p. 98, § 6.5: "The Committee considers that the issue whether the State Party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention."
- 100 See Elmi v. Australia, Communication no. 120/1998, CAT/C/22/D/120/1998, para. 6.5. See also the position under the European Convention of Human Rights in H.L.R. v. France, where the Court stated that "Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials." Reports 1997, iii, p. 758.
- 101 S.M. Aemeini v. Switzerland, *ibid.* note 97.
- 102 General comment no. 1, *ibid.* note 86.
- 103 Ingelse, *ibid.* note 20, p. 319.
- 104 Burgers & Danelius, *ibid.* note 54, p. 130.
- 105 Burgers & Danelius *ibid.* note 54, pp. 129-130.
- 106 See, for example, Initial Report of Armenia (1995), Official Records of the General Assembly, Fifty-first Session, Supplement no. 44 (A/51/44).
- 107 CAT/C/SR.268, § 2, under D, 12 (a) (Committee as a whole). See also the conclusions and recommendations to the report of Poland (CAT/C/25/Add.9): CAT/C/SR.279, §2, under D,5 (Committee as a whole) and E,9 (Committee as a whole).
- 108 Ingelse, *ibid.* note 20, p. 340.
- 109 Burgers & Danelius, *ibid.* note 54, p. 129.
- 110 Burgers & Danelius, *ibid.*
- 111 CAT/C/SR.34, § 25 and 63; CAT/C/SR.145, § 3 and 13; CAT/C/SR.158, § 14.
- 112 Burgers & Danelius, *ibid.* note 54, p. 129.
- 113 A minimum of sixty-one days for ill-treatment of an ear or finger was deemed insufficient: CAT/C/SR.40, § 25; Ingelse, *ibid.* note 20, p. 341.
- 114 CAT/C/SR.93, § 75.
- 115 Ingelse, *ibid.* note 20, p. 342.
- 116 Burgers & Danelius, *ibid.* note 54, p. 1. See also footnote 1 *supra* for a list of instruments containing provisions prohibiting the practice of torture.
- 117 Burgers & Danelius, *ibid.* note 54, p. 131.
- 118 Burgers & Danelius, *ibid.* note 54, p. 1 and p. 131. Also, for a critical discussion of the use of the term "universal jurisdiction" in the context of jurisdiction over an international crime where the alleged offender is present in the territory of the State, see Democratic Republic of the Congo v. Belgium, Judgment of the International Court of Justice, 14 February 2002, joint separate opinion of Judges Higgins, Kooijmans & Burgenthal. The three judges propose that jurisdiction as provided for, *inter alia*, in the respective article of

the Convention against Torture is really an “obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.” (para. 41 of the joint separate opinion)

- 119 See Article 5, Geneva Convention on the High Seas (1958).
- 120 See Geneva Convention on the Territorial Sea and Contiguous Zone (1958).
- 121 Burgers & Danelius, *ibid.* note 54, p. 131.
- 122 Burgers & Danelius, *ibid.*
- 123 A subsequent grant of nationality to the accused is prohibited, if it is an attempt to avoid prosecution of the accused. Burgers & Danelius, *ibid.* note 54, p. 132.
- 124 Ingelse, *ibid.* note 20, p. 320.
- 125 Burgers & Danelius, *ibid.* note 54, p. 133. Moreover, whether universal jurisdiction in absentia is accepted in international law outside a few specific areas was disputed in the separate opinion of President Guillaume in the ICJ in the *Congo v. Belgium* case, *ibid.* note 117 (para. 16 of the separate opinion). Cf. Judge Van den Wyngaert who, in her dissenting opinion, found: “There is no rule of conventional international law to the effect that universal jurisdiction in absentia is prohibited” (para. 54 of the dissenting opinion), and that “there is no customary international law to this effect either.” (para. 55 of the dissenting opinion)
- 126 Burgers & Danelius, *ibid.* note 54, p. 132: “[T]he general purpose of the Convention [is] to make it possible in all situations to prosecute torturers.”
- 127 Burgers & Danelius, *ibid.* note 54, p. 132.
- 128 Burgers & Danelius, *ibid.* note 54, p. 131.
- 129 Amnesty International, “Universal jurisdiction: The duty of states to enact and enforce legislation”, AI Index: IOR 53/012/2001, chapter 9.
- 130 Victims of torture submitted a communication to the Committee against Torture urging that it require Senegal to take measures to ensure Hissène Habré’s presence in the country pending a determination whether the decision by the Cour de Cassation that Senegal did not have jurisdiction over charges against him of torture in Chad was lawful. The Committee on 23 April 2001 requested Senegal “not to expel Mr Hissène Habré and to take all necessary measures to prevent Mr Hissène Habré from leaving Senegalese territory except pursuant to an extradition procedure”; see Human Rights Watch, “United Nations asks Senegal to Hold Ex-Chad Dictator: Victory for Hissène Habré’s victims”, 23 April 2001 (obtainable from <http://www.hrw.org/press/2001/04/habre-cat0423.html>).
- 131 Ingelse, *ibid.* note 20, pp. 321-323. Cf. Amnesty International: “There is also some authority, as reflected in the interpretation of international treaty monitoring bodies and international experts for the view that all states—whether parties to the Convention against Torture or not— may not harbour persons suspected of torture, but must either exercise universal jurisdiction over suspects found in their territory or extradite them to a state able and willing to do so.” Amnesty International, *ibid.* note 128, chapter 9, p. 11.
- 132 Rodley, *ibid.* note 56, p. 130. This position appears to be supported cautiously in the joint separate opinion of Judges Higgins, Kooijmans & Burgenthal in the *Congo v. Belgium* case from the ICJ, *ibid.* note 117 (see paras. 52 and 57). See also dissenting opinion of Judge Van den Wyngaert which states that “international law clearly permits universal jurisdiction for war crimes and crimes against humanity.” (para. 59)
- 133 Ingelse, *ibid.* note 20, p. 318.
- 134 CAT/C/SR.354, § 39.
- 135 In Article 27: “This Statute shall apply equally to all persons without 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.”
- 136 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.”
- 137 Article 6 § 2 has an identical wording to that of Article 7 § 1 of the Statute for the Yugoslav Tribunal.
- 138 Report of the International Law Commission, forty-eighth session, July 1996, A/51/10.
- 139 *Congo v. Belgium*, *ibid.* note 117, para. 51 of the judgment. Cf. dissenting opinion by Judge Van den Wyngaert, who argues that there is no basis in either positive international law or customary law to conclude that an incumbent minister of foreign affairs enjoys full immunity from foreign criminal jurisdiction. (para. 23 of dissenting opinion)
- 140 *Congo v. Belgium*, *ibid.* note 117, para. 59 of judgment.
- 141 *Ibid.*, para. 61 of judgment.
- 142 See the Preamble of the Vienna Convention on Diplomatic Relations (1961). See also *Congo v. Belgium*, *ibid.* note 117, para. 53 of judgment.

- 143 Cf. Lord Browne-Wilkinson, *R. v. Bow Street Metropolitan Stipendiary Magistrates and Others, Ex Parte Pinochet Ugarte* (1999) (no. 3) 2.W.L.R., para. 52: "How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?" Lord Browne-Wilkinson went on to find that as torture is contrary to international law, Mr Pinochet could not enjoy functional immunity from jurisdiction.
- 144 *Congo v. Belgium*, *ibid.* note 117, para. 60 of the judgment.
- 145 Ingelse, *ibid.* note 20, pp. 326-327, with a reference to the ICTY case of *Prosecutor v. Tadic* (Case no. IT-94-1-T of 10 August 1995). See also for a discussion of the principles of legality and related concepts: S.R. Ratner & J.S. Abrams, "Accountability for Human Rights Atrocities in International Law —Beyond the Nuremberg Legacy", 2nd ed., Oxford University Press, 2001, pp. 21-24.
- 146 Boulesbaa, *ibid.* note 28, p. 233.
- 147 Burgers & Danelius, *ibid.* note 54, p. 133.
- 148 See, for example, a Belgian law, adopted in 1993 and expanded in 1999, which establishes universal jurisdiction, including universal jurisdiction in absentia, for serious international crimes.
- 149 In the case of *The Democratic Republic of the Congo v. Belgium*, *ibid.* note 117, the majority of the International Court of Justice does not directly address the issue of whether Belgium had jurisdiction to seek the arrest or extradition of the (then) Congolese minister of foreign affairs. In the joint separate opinion of Judges Higgins, Kooijmans & Burgenthal, the three judges express the opinion that no rule of international law prohibits the exercise of universal criminal jurisdiction in absentia (para. 54 of the joint separate opinion). This view is shared by ad hoc Judge Van den Wyngaert in her dissenting opinion (paras. 54-55 of the dissenting opinion). However, in the separate opinion of Court President Guillaume, it is stated that, outside a few specific areas, "international law does not accept universal jurisdiction; still less does it accept universal jurisdiction in absentia." (para. 16 of the separate opinion)
- 150 Burgers & Danelius, *ibid.* note 54, p. 134.
- 151 Convention relating to the Status of Stateless Persons (1954): "1. For the purpose of this Convention, the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law."
- 152 See Lord Browne-Wilkinson, *Pinochet* (3), *ibid.* note 142: "...it is clear that in all circumstances, if the Article 5 §1 states do not choose to seek extradition or to prosecute the offender, other states must do so. The purpose of the Convention was to introduce the principle *aut dedere aut punire* —either you extradite or you punish." (para. 39)
- 153 Amnesty International, *ibid.* note 128, chapter 9, p. 6.
- 154 Amnesty International, *ibid.* note 128, chapter 9, p. 7.
- 155 Burgers & Danelius, *ibid.* note 54, p. 137.
- 156 Burgers & Danelius, *ibid.* note 54, p. 137.
- 157 Burgers & Danelius, *ibid.* note 54, p. 133 and p. 137.
- 158 Ingelse, *ibid.* note 20, p. 328.
- 159 Amnesty International, *ibid.* note 128, chapter 9, p. 9.
- 160 Burgers & Danelius, *ibid.* note 54, p. 137.
- 161 The CAT has criticised amnesties in several countries, and recommended that they not apply to torture; see Amnesty International, *ibid.* note 128, chapter 14, p. 134, with references in footnote 89.
- 162 Ingelse, *ibid.* note 20, p. 330. This issue is unrelated to the question of whether former or incumbent State representatives enjoy immunity *rationae materiae* or *rationae personae* under the Vienna Convention of the Law of Treaties or under international customary law.
- 163 Ingelse, *ibid.* note 20, p. 329.
- 164 Burgers & Danelius, *ibid.* note 54, p. 138.
- 165 Article 10 § 2 of the Statute of the ICTY.
- 166 Ingelse, *ibid.* note 20, p. 332.
- 167 Burgers & Danelius, *ibid.* note 54, p. 133.
- 168 Ingelse, *ibid.* note 20, p. 334.
- 169 See, for example, Article 15 of the Convention on the Safety of UN and Associated Personnel (1994) and Article 10 of the International Convention against the Taking of Hostages (1979).
- 170 See, for example, CAT/C/SR.17, § 98; Ingelse, *ibid.* note 20, p. 352.
- 171 CAT/C/SR.232, § 40 and 65.
- 172 Burgers & Danelius, *ibid.* note 54, p. 140.
- 173 Burgers & Danelius, *ibid.* note 54, p. 141.
- 174 Ingelse, *ibid.* note 20 p. 353.
- 175 CAT/C/SR.34, § 39 and 72; CAT/C/SR.35, § 38; CAT/C/SR.123, § 15.
- 176 Burgers & Danelius, *ibid.* note 54, p. 335.

- 177 Burgers & Danelius, *ibid.* note 54, pp. 141-142.
- 178 Burgers & Danelius, *ibid.* note 54, pp. 143-144.
- 179 Relevant standards: The Standard Minimum Rules for the Treatment of Prisoners (1957, 1977), Basic Principles for the Treatment of Prisoners (1990), the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988), United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (1990), Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982), Code of Conduct for Law Enforcement Officials (1979), Use of Force and Firearms by Law Enforcement Officials (1990), Basic Principles on the Role of Lawyers (1990), United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules 1990), United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).
- 180 See *inter alia*, CAT/C/SR.30, § 57; Ingelse, *ibid.* note 20, p. 273.
- 181 *Mukong v. Cameroon*, Complaint 458/1991, A/49/40, vol. II (1994), annex IX, sect. A, p. 171, § 9.3. In General Comment 21, the Human Rights Committee expressed its view that States should apply the Standard Minimum Rules and that a minimum of humanity and dignity must always be guaranteed: "Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State Party." General comment 21, HRI/GEN/1/Rev.1 (1994), p. 33, § 4.
- 182 CAT/C/SR.30, § 22 and 23; Ingelse, *ibid.* note 20, p. 272.
- 183 CAT/C/SR.95, § 7; CAT/C/SR.96, § 18; Ingelse, *ibid.*
- 184 CAT/C/SR.267, § 23, under E,4 (Committee as a whole); Ingelse, *ibid.*
- 185 CAT/C/SR.40, § 9 and 42; CAT/C/SR.120, § 24; Ingelse, *ibid.*
- 186 CAT/C/SR.195, § 39; CAT/C/SR.232, § 21; Ingelse, *ibid.*
- 187 See the conclusions of the Committee of a confidential investigation into the occurrence of systematic torture in Turkey, A/48/44/Add.1, § 47; Ingelse, *ibid.*
- 188 CAT/C/SR.145, § 10 and CAT/C/SR.168, § 40.
- 189 Ingelse, *ibid.* note 20, p. 336.
- 190 Bent Sorensen, CAT/C/SR.102, § 47 and 54.
- 191 E.B. Abad v. Spain, Communication no. 59/1996, CAT/C/20/D/59/1996. The author complained of having been subjected to ill-treatment consisting of insults, threats, and blows, of having been kept hooded for many hours and of having been forced to remain naked, although she displayed no signs of violence. The Committee found that these elements should have sufficed for the initiation of an investigation, which did not however take place. "The lack of investigation of the author's allegations, which were made first to the forensic physician after the first examination and during the subsequent examinations she underwent, and then repeated before the judge of the National High Court, and the amount of time which passed between the reporting of the facts and the initiation of proceedings by Court No. 44 are incompatible with the obligation to proceed to a prompt investigation, as provided for in article 12 of the Convention."
- 192 Burgers & Danelius, *ibid.* note 54, p. 145.
- 193 Ingelse, *ibid.* note 20, p. 335.
- 194 CAT/C/SR.245., § 37.
- 195 Halimi-Nedzibi v. Austria, complaint 8/1991, A749/44, Annex V, p. 40; Blanco Abad v. Spain, complaint 59/1996, A/53/44 (1998), Annex X, p. 66; Barakat v. Tunisia, complaint 60/1996, CAT/C/23/D/60/1996; Ingelse, *ibid.* note 20, p. 356.
- 196 Halimi-Nedzibi v. Austria, *ibid.*, § 15.
- 197 E.A. v. Switzerland, Communication no. 28/1995, CAT/C/19/D/28/1995.
- 198 Ingelse, *ibid.* note 20, p. 335.
- 199 E.A. v. Switzerland, *ibid.* note 198.
- 200 Barakat v. Tunisia, Communication no. 14/1994, CAT/C/14/D/14/1994, § 11,10 and 12; Ingelse, *ibid.* note 20, p. 356.
- 201 In 1989, Professor Theo van Boven was entrusted by the United Nations with a study on the right to restitution, compensation, and rehabilitation for victims of gross human rights violations. This ultimately resulted in Draft Basic Principles and Guidelines (1997), in which he concluded that the only appropriate response to such victims is one of reparation. Professor van Boven's study outlined four main forms of reparation: (1) restitution, (2) compensation, (3) rehabilitation, (4) satisfaction and guarantees of non-repetition. Professor M. Cherif Bassiouni, the United Nations Commission on Human Rights Independent Expert on the right to restitution, compensation, and rehabilitation for victims of grave violations of human rights and fundamental freedoms, continued the work of Professor van Boven and submitted to the UN Commission on Human Rights (2000) a set of Draft Basic Principles and Guidelines on the Right to a

- Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law, which aims to provide guidelines for the concept of redress and reparations for victims of, inter alia, torture. In 2001, the Commission requested that the Office of the High Commissioner for Human Rights convene a meeting with a view to finalising the Draft Basic Principles before the meeting of the Commission in 2002. The Office of the High Commissioner plans to convene the meeting in mid-2002.
- 202 Sir Nigel Rodley, the former Special Rapporteur on Torture, has pointed out that “[f]inancial compensation will not always be the appropriate remedy [for human rights violations], and where it is, its measure will be uncertain.”; Nigel Rodley, “The International Legal Consequences of Torture, Extra-Legal Execution, and Disappearance”, in Lutz, Hannum and Burke (eds.), “New Directions in Human Rights”, University of Pennsylvania Press, May 1989, p. 172.
- 203 See for example CAT/C/SR.10, § 25; Ingelse, *ibid.* note. 20, p. 370.
- 204 CAT/C/SR.36, § 21.
- 205 Ingelse, *ibid.* note 20, p. 370.
- 206 Burgers & Danelius, *ibid.* note 54, pp. 146-147. See also CAT/C/SR.96, § 20.
- 207 CAT/C/SR.18 § 29; see Ingelse, *ibid.* note 20, p. 373.
- 208 CAT/C/SR.10, § 15; CAT/C/SR.32, § 58. However, cf. the case of *Al-Adsani v. United Kingdom* under the European Convention on Human Rights, in which the Court upheld the procedural bar of immunity in British courts for the government of Kuwait in a civil claim concerning compensation for torture against a British national in Kuwait.
- 209 Ingelse, *ibid.* note 20, p. 362.
- 210 “Promoting the right to reparation for survivors of torture: What role for a permanent international criminal court?”, REDRESS, London, 1997.
- 211 CAT/C/SR.294/Add.1, § 23, under E,7 (Committee as a whole).
- 212 Burgers & Danelius, *ibid.* note 54, pp. 147-148.
- 213 A/47/44, § 100.
- 214 CAT/C/SR.245, § 44 and 47; Ingelse, *ibid.* note 20, p. 380.
- 215 CAT/C/SR.145, § 19; Ingelse, *ibid.* note 20, pp. 380-381.
- 216 Ingelse, *ibid.* note 20, p. 381.
- 217 Ingelse, *ibid.* note 20, p. 382.
- 218 HRC general comment 20 (Article 7), *ibid.* note 61, § 12.
- 219 Burgers & Danelius, *ibid.* note 54, pp. 120-121 and 149-150.
- 220 Amnesty International, *ibid.* note 128. For a critical discussion of the use of the term “universal jurisdiction” in the context of jurisdiction over an international crime where the alleged offender is present in the territory of the State see: *Congo v. Belgium*, *ibid.* note 117, joint separate opinion of Judges Higgins, Kooijmans & Burgenthal. The three judges propose that jurisdiction as provided for inter alia in the respective article of the Convention against Torture is really an “obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.” (para. 41 of the joint separate opinion)
- 221 Ingelse, *ibid.* note 20, p. 318.
- 222 Amnesty International, *ibid.* note 128, chapter V: “Introduction”.
- 223 Burgers & Danelius, *ibid.* note 54, p. 131.
- 224 See for example the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1971) and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973).
- 225 Whether universal jurisdiction in absentia is accepted in international law outside a few specific areas was disputed in the separate opinion of President Guillaume of the ICJ in the *Congo v. Belgium* case, *ibid.* note 117 (para. 16 of the separate opinion). Cf. Judge Van den Wyngaert who, in her dissenting opinion, found: “There is no rule of conventional international law to the effect that universal jurisdiction in absentia is prohibited” (para. 54 of the dissenting opinion), and that “there is no customary international law to this effect either.” (para. 55 of the dissenting opinion)
- 226 Amnesty International, *ibid.* note 128, Introduction, p. 43; reference to Michael P. Scharf, “Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States”, p. 35, *New Eng. L. Rev.* pp. 363, 379-382 (2001). See also Michael P. Scharf, “The ICC’s Jurisdiction over Nationals of Non-Party States”, in Sarah Sewall & Carl Kaysen (eds.), “The United States and the International Criminal Court: National Security and International Law”, p. 213 (Lanham/Boulder/New York/Oxford: Rowman & Littlefield, and Washington, DC: American Academy of Arts and Sciences, 2000).
- 227 Ingelse, *ibid.* note 20, p. 318.
- 228 CAT/C/SR.354, § 39.
- 229 In Article 27: “This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or par-

- liament, 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.”
- 230 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.”
- 231 Article 6 §2 has an identical wording to that of Article 7 §1 of the Statute for the Yugoslav Tribunal.
- 232 Report of the International Law Commission, forty-eighth session, July 1996, A/51/10.
- 233 Congo v. Belgium, *ibid.* note 117, para. 51 of the judgment. Cf. dissenting opinion by Judge Van den Wyngaert, who argues that there is no basis in either positive international law or customary law to conclude that an incumbent minister of foreign affairs enjoys full immunity from foreign criminal jurisdiction. (para. 23 of dissenting opinion)
- 234 Congo v. Belgium, *ibid.* note 117, para. 59 of judgment.
- 235 *Ibid.*, para. 61 of judgment.
- 236 See the Preamble of the Vienna Convention on Diplomatic Relations (1961). See also Congo v. Belgium, *ibid.* note 117, para. 53 of judgment.
- 237 Cf. Lord Browne-Wilkinson, Pinochet (3), *ibid.* note 142, para. 52: “How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?” Lord Browne-Wilkinson went on to find that as torture is contrary to international law Mr Pinochet could not enjoy functional immunity from jurisdiction.
- 238 Congo v. Belgium, *ibid.* note 117, para. 60 of the judgment.
- 239 See Amnesty International, *ibid.* note 128, chapter 9, note 26 for a list of scholarly authority for the recognition of the prohibition of torture as part of *jus cogens*.
- 240 Ian Brownlie, “Principles of Public International Law”, 4th ed., Clarendon Press, Oxford, 1990, pp. 513-514 (footnotes omitted).
- 241 Lord Browne-Wilkinson, Pinochet (no. 3), *ibid.* note 141, para. 109.
- 242 Prosecutor v. Furundjija, *ibid.* note 24, para. 156.
- 243 Al-Adsani v. the United Kingdom, application no. 35763/97, judgment of 21 November 2001.
- 244 Ratner & Abrams, *ibid.* note 132, p. 212.
- 245 ICC Statute, Article 7.
- 246 ICC Statute, Article 7 § 2(e).
- 247 ICC Statute, Article 8 § 2 (ii).
- 248 ICC Statute, Preamble, Article 1, Article 17(1)(a).
- 249 ICC Statute, Articles 26-29, 31-33.
- 250 As of May 2002, 66 countries have already ratified the Rome Statute and many countries have initiated ratification procedures ;see <http://www.iccnw.org/html/country.html> for further information.
- 251 ICTY Statute, Articles 1 and 8.
- 252 ICTY Statute, Articles 6 and 7.
- 253 ICTY Statute, Article 15.
- 254 ICTY Statute, Article 2 (b).
- 255 ICTY Statute, Article 5 (f).
- 256 ICTR Statute, Article 1.
- 257 ICTR Statute, Articles 5, 6, 8, 9.
- 258 Article 7 of the ICCPR reads: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”
- 259 Concluding observations CCPR/C/79/Add. 28.
- 260 Case CCPR/C/65/775/1997.
- 261 General comment on Art.7, nos. 7 and 20.
- 262 CO CCPR/C/79/Add. 75.
- 263 GC on art.7 nos. 7 and 20.
- 264 Cases Com no. R 2/11 Uruguay, Com no. 74/1980 Uruguay Com no. 124/1982 Zaire, CCPR/C/49/D/366/1989 Zaire, CCPR/C/51/D322/1988 Uruguay, CCPR/C/60/702/1996 Jamaica.
- 265 Com no. 139/1983 Uruguay, Com no. 176/1984 Bolivia.
- 266 Com no. R 14/63 Uruguay.
- 267 Com no. 161/1983 Colombia.
- 268 Case CCPR/C/51/D/407/1990 Jamaica.
- 269 CO CCPR/C/79/Add. 20 and Add. 46.
- 270 CO CCPR/C/79/Add. 44.
- 271 CO CCPR/C/79/Add. 51.

- 272 CO CCPR/C/79/Add. 118 Congo.
- 273 CO CCPR/C/79/Add. 82 Senegal.
- 274 CO CCPR/C/79/Add. 33.
- 275 Com no. 110/1981 Uruguay, Com no. 147/198 Uruguay, no. 161/1983 Colombia, CCPR/C/51/D/328/1988 Nicaragua.
- 276 CCPR/C/49/366/1989 Zaire, CCPR/C/51/D/414/1990 Equatorial Guinea.
- 277 CO CCPR/C/79/Add. 75 Georgia.
- 278 Com no. 4/1977 Uruguay, Com no. R 14/63 Uruguay, Com no. 124/1982 Zaire, Com no. 161/1983.
- 279 CO CCPR/C/79/Add. 63 Guatemala.
- 280 CO CCPR/C/79/Add. 20.
- 281 CO CCPR/C/79/Add. 23.
- 282 CO:CCPR/C/79/Add. 36.
- 283 CO CCPR/C/79/Add. 63.
- 284 CO: CCPR/C/79/Add. 118 and CCPR/C/79/Add. 78.
- 285 Com no. 110/1981 Uruguay.
- 286 CCPR/C/59/D/481/1991 Ecuador.
- 287 Communication no. R 9/37.
- 288 CCPR/C/51/D/449/1991 Dominican Republic, CCPR/C/50/D/330/1988 Jamaica, Com no. 107/1981 Uruguay, Com no. R1/4 Uruguay.
- 289 CCPR/C/49/D/366/1989 Zaire, Com no. 162/1983 Uruguay.