UCL
Université
catholique
de Louvain

INTERNATIONAL HUMAN RIGHTS
LouvainX online course [Louv2.01x] - prof. Olivier De Schutter

READING MATERIAL

Related to: section 1, sub-section 3, unit 2: *Jus cogens* status of human rights norms (ex. 2)

Example 2. The international crime of torture before domestic courts

House of Lords (United Kingdom), *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 3)*, judgment of 24 March 1999 [2000] A.C. 147:

[In this case, the House of Lords held that the former President of Chile, Senator Pinochet, could be extradited to Spain in respect of charges which concerned conduct that was criminal in the United Kingdom at the time when it was allegedly committed. The majority of the Law Lords considered that extraterritorial torture did not become a crime in the United Kingdom until section 134 of the Criminal Justice Act 1988 came into effect. As regards the crimes of torture committed outside the United Kingdom after that date, the argument was submitted by the defence of Pinochet that, since under Part II of the State Immunity Act 1978 a former head of State enjoyed immunity from the criminal jurisdiction of the United Kingdom for acts done in his official capacity, Mr Pinochet should benefit such immunity. The Law Lords rejected this argument. Instead, they took the view that torture was an international crime and prohibited by *jus cogens*, and therefore such immunity could not be invoked.]

Lord Browne-Wilkinson (leading judgment) (excerpts):

In general, a state only exercises criminal jurisdiction over offences which occur within its geographical boundaries. If a person who is alleged to have committed a crime in Spain is found in the United Kingdom, Spain can apply to the United Kingdom to extradite him to Spain. The power to extradite from the United Kingdom for an 'extradition crime' is now contained in the Extradition Act 1989. That Act defines what constitutes an 'extradition crime'. For the purposes of the present case, the most important requirement is that the conduct complained of must constitute a crime under the law both of Spain and of the United Kingdom. This is known as the double criminality rule.

Since the Nazi atrocities and the Nuremberg trials, international law has recognised a number of offences as being international crimes. Individual states have taken jurisdiction to try some international crimes even in cases where such crimes were not committed within the geographical boundaries of such states. The most important of such international crimes for present purposes is torture which is regulated by the International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. The obligations placed on the United Kingdom by that Convention ... were incorporated into the law of the United Kingdom by section 134 of the Criminal Justice Act 1988. That Act came into force on 29 September 1988. Section 134 created a new crime under United Kingdom law, the crime of torture. As required by the Torture Convention 'all' torture wherever committed world-wide was made criminal under United Kingdom law and triable in the United Kingdom. No one has suggested that before section 134 came into effect torture committed outside the United Kingdom was a crime under United Kingdom law. Nor is it suggested that section 134 was retrospective so as to make torture committed outside the United Kingdom before 29

September 1988 a United Kingdom crime. Since torture outside the United Kingdom was not a crime under UK law until 29 September 1988, the principle of double criminality which requires an Act to be a crime under both the law of Spain and of the United Kingdom cannot be satisfied in relation to conduct before that date if the principle of double criminality requires the conduct to be criminal under United Kingdom law at the date it was committed ...

[In] my view only a limited number of the charges relied upon to extradite Senator Pinochet constitute extradition crimes since most of the conduct relied upon occurred long before 1988. In particular, I do not consider that torture committed outside the United Kingdom before 29 September 1988 was a crime under UK law. It follows that the main question discussed at the earlier stages of this case – is a former head of state entitled to sovereign immunity from arrest or prosecution in the UK for acts of torture – applies to far fewer charges. But the question of state immunity remains a point of crucial importance since, in my view, there is certain conduct of Senator Pinochet (albeit a small amount) which does constitute an extradition crime and would enable the Home Secretary (if he thought fit) to extradite Senator Pinochet to Spain unless he is entitled to state immunity. Accordingly, having identified which of the crimes alleged is an extradition crime, I will then go on to consider whether Senator Pinochet is entitled to immunity in respect of those crimes ...

I must ... consider whether, in relation to these two surviving categories of charge [torture and conspiracy to torture after 29 September 1988], Senator Pinochet enjoys sovereign immunity. But first it is necessary to consider the modern law of torture.

Torture

Apart from the law of piracy, the concept of personal liability under international law for international crimes is of comparatively modern growth. The traditional subjects of international law are states not human beings. But consequent upon the war crime trials after the 1939–45 World War, the international community came to recognise that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity. Although there may be legitimate doubts as to the legality of the Charter of the Nuremberg Tribunal, in my judgment those doubts were stilled by the Affirmation of the Principles of International Law recognised by the Charter of Nuremberg Tribunal adopted by the United Nations General Assembly on 11 December 1946. That Affirmation affirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal and directed the Committee on the codification of international law to treat as a matter of primary importance plans for the formulation of the principles recognised in the Charter of the Nuremberg Tribunal. At least from that date onwards the concept of personal liability for a crime in international law must have been part of international law. In the early years state torture was one of the elements of a war crime. In consequence torture, and various other crimes against humanity, were linked to war or at least to hostilities of some kind. But in the course of time this linkage with war fell away and torture, divorced from war or hostilities, became an international crime on its own: see Oppenheim's *International Law* (Jennings and Watts edition) vol. 1, 996; note 6 to Article 18 of the I.L.C. Draft Code of Crimes Against Peace; *Prosecutor* v. *Furundzija Tribunal for Former Yugoslavia,* Case No. 17-95-17/1-T. Ever since 1945, torture on a large scale has featured as one of the crimes against humanity: see, for example, UN General Assembly Resolutions 3059, 3452 and 3453 passed in 1973 and 1975; Statutes of the International Criminal Tribunals for former Yugoslavia (Article 5) and Rwanda (Article 3).

Moreover, the Republic of Chile accepted before your Lordships that the international law prohibiting torture has the character of *jus cogens* or a peremptory norm, i.e. one of those rules of international law which have a particular status [quoting from Furundzija].

The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any state because the offenders are 'common enemies of all mankind and all nations

have an equal interest in their apprehension and prosecution': *Demjanjuk* v. *Petrovsky* (1985) 603 F. Supp. 1468; 776 F. 2d. 571.

... [L]ong before the Torture Convention of 1984 state torture was an international crime in the highest sense. But there was no tribunal or court to punish international crimes of torture. Local courts could take jurisdiction: see *Demjanjuk* (supra); *Attorney General of Israel* v. *Eichmann* (1962) 36 I.L.R.S. But the objective was to ensure a general jurisdiction so that the torturer was not safe wherever he went. For example, in this case it is alleged that during the Pinochet regime torture was an official, although unacknowledged, weapon of government and that, when the regime was about to end, it passed legislation designed to afford an amnesty to those who had engaged in institutionalised torture. If these allegations are true, the fact that the local court had jurisdiction to deal with the international crime of torture was nothing to the point so long as the totalitarian regime remained in power: a totalitarian regime will not permit adjudication by its own courts on its own shortcomings. Hence the demand for some international machinery to repress state torture which is not dependent upon the local courts where the torture was committed. In the event, over 110 states (including Chile, Spain and the United Kingdom) became state parties to the Torture Convention. But it is far from clear that none of them practised state torture. What was needed therefore was an international system which could punish those who were guilty of torture and which did not permit the evasion of punishment by the torturer moving from one state to another. The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal – the torturer – could find no safe haven. Burgers and Danelius (respectively the chairman of the United Nations Working Group on the 1984 Torture Convention and the draftsmen of its first draft) say, at p. 131, that it was 'an essential purpose [of the Convention] to ensure that a torturer does not escape the consequences of his act by going to another country' [J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Leiden: Martinus Nijhoff, 1988)].

The Torture Convention

Article 1 of the Convention defines torture as the intentional infliction of severe pain and of suffering with a view to achieving a wide range of purposes 'when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiesence of a public official or other person acting in an official capacity.' Article 2(1) requires each state party to prohibit torture on territory within its own jurisdiction and Article 4 requires each state party to ensure that 'all' acts of torture are offences under its criminal law. Article 2(3) outlaws any defence of superior orders. Under Article 5(1) each state party has to establish its jurisdiction over torture (a) when committed within territory under its jurisdiction (b) when the alleged offender is a national of that state, and (c) in certain circumstances, when the victim is a national of that state. Under Article 5(2) a state party has to take jurisdiction over any alleged offender who is found within its territory. Article 6 contains provisions for a state in whose territory an alleged torturer is found to detain him, inquire into the position and notify the states referred to in Article 5(1) and to indicate whether it intends to exercise jurisdiction. Under Article 7 the state in whose territory the alleged torturer is found shall, if he is not extradited to any of the states mentioned in Article 5(1), submit him to its authorities for the purpose of prosecution. Under Article 8(1) torture is to be treated as an extraditable offence and under Article 8(4) torture shall, for the purposes of extradition, be treated as having been committed not only in the place where it occurred but also in the state mentioned in Article 5(1) ...

Universal jurisdiction

There was considerable argument before your Lordships concerning the extent of the jurisdiction to prosecute torturers conferred on states other than those mentioned in Article 5(1). I do not find it necessary to seek an answer to all the points raised. It is enough that 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*

autpunire – either you extradite or you punish: Burgers and Danelius p. 131. Throughout the negotiation of the Convention certain countries wished to make the exercise of jurisdiction under Article 5(2) dependent upon the state assuming jurisdiction having refused extradition to an Article 5(1) state. However, at a session in 1984 all objections to the principle of *aut dedere aut punire* were withdrawn. 'The inclusion of universal jurisdiction in the draft Convention was no longer opposed by any delegation': Working Group on the Draft Convention U.N. Doc. E/CN. 4/1984/72, para. 26. If there is no prosecution by, or extradition to, an Article 5(1) state, the state where the alleged offender is found (which will have already taken him into custody under Article 6) must exercise the jurisdiction under Article 5(2) by prosecuting him under Article 7(1).

I gather the following important points from the Torture Convention:

(1) Torture within the meaning of the Convention can only be committed by 'a public official or other person acting in an official capacity', but these words include a head of state. A single act of official torture is 'torture' within the Convention;
(2) Superior orders provide no defence;
(3) If the states with the most obvious jurisdiction (the Article 5(1) states) do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i.e. there is universal jurisdiction.
(4) There is no express provision dealing with state immunity of heads of state, ambassadors or other officials
(5) Since Chile, Spain and the United Kingdom are all parties to the Convention, they are bound under treaty by its provisions whether or not such provisions would apply in the absence of treaty obligation. Chile ratified the Convention with effect from 30 October 1988 and the United Kingdom with effect from 8 December 1988.

State immunity

This is the point around which most of the argument turned. It is of considerable general importance internationally since, if Senator Pinochet is not entitled to immunity in relation to the acts of torture alleged to have occurred after 29 September 1988, it will be the first time so far as counsel have discovered when a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes.

Given the importance of the point, it is surprising how narrow is the area of dispute. There is general agreement between the parties as to the rules of statutory immunity and the rationale which underlies them. The issue is whether international law grants state immunity in relation to the international crime of torture and, if so, whether the Republic of Chile is entitled to claim such immunity even though Chile, Spain and the United Kingdom are all parties to the Torture Convention and therefore 'contractually' bound to give effect to its provisions from 8 December 1988 at the latest.

It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability. State immunity probably grew from the historical immunity of the person of the monarch. In any event, such personal immunity of the head of state persists to the present day: the head of state is entitled to the same immunity as the state itself. The diplomatic representative of the foreign state in the forum state is also afforded the same immunity in recognition of the dignity of the state which he represents. This immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attaching to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state. Such immunity is said to be granted *ratione personae.*

What then when ... the head of state is deposed? ... In my judgment at common law a former head of state ... loses immunity *ratione personae* on ceasing to be head of state: see Watts, 'The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers' [*Recueil des cours*, 247 (1994-III), 40, at 88] p. 88 and the cases there cited. He can be sued on his private obligations: *Ex-King Farouk of Egypt* v. *Christian Dior* (1957) 24 I.L.R. 228; *Jimenez* v. *Aristeguieta* (1962) 311 F. 2d 547. As ex head of state he cannot be sued in respect of acts performed whilst head of state in his public capacity: *Hatch* v. *Baez* [1876] 7 Hun. 596. Thus, at common law, ... the former head of state ... enjoy[s] immunity for acts done in performance of [his] functions whilst in office.

... Accordingly, in my judgment, Senator Pinochet as former head of state enjoys immunity *ratione materiae* in relation to acts done by him as head of state as part of his official functions as head of state.

The question then which has to be answered is whether the alleged organisation of state torture by Senator Pinochet (if proved) would constitute an act committed by Senator Pinochet as part of his official functions as head of state. It is not enough to say that it cannot be part of the functions of the head of state to commit a crime. Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity ratione materiae. The case needs to be analysed more closely.

Can it be said that the commission of a crime which is an international crime against humanity and *jus cogens* is an act done in an official capacity on behalf of the state? I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function ... I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as jus cogens was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a worldwide universal jurisdiction. Further, it required all member states to ban and outlaw torture: Article 2. How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises? Thirdly, an essential feature of the international crime of torture is that it must be committed 'by or with the acquiesence of a public official or other person acting in an official capacity'. As a result all defendants in torture cases will be state officials. Yet, if the former head of state has immunity, the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention.

Finally, and to my mind decisively, if the implementation of a torture regime is a public function giving rise to immunity ratione materiae, this produces bizarre results. Immunity *ratione materiae* applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state. Such immunity is necessary in order to prevent state immunity being circumvented by prosecuting or suing the official who, for example, actually carried out the torture when a claim against the head of state would be precluded by the doctrine of immunity. If that applied to the present case, and if the implementation of the torture regime is to be treated as official business sufficient to found an immunity for the former head of state, it must also be official business sufficient to justify immunity for his inferiors who actually did the torturing. Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the State of Chile is prepared to waive its right to its officials immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention – to provide a system under which there is no safe haven for torturers – will have been frustrated. In my judgment all these factors together demonstrate that the

notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.

For these reasons in my judgment if, as alleged, Senator Pinochet organised and authorised torture after 8 December 1988, he was not acting in any capacity which gives rise to immunity *ratione materiae* because such actions were contrary to international law, Chile had agreed to outlaw such conduct and Chile had agreed with the other parties to the Torture Convention that all signatory states should have jurisdiction to try official torture (as defined in the Convention) even if such torture were committed in Chile ...

For these reasons, I would allow the appeal so as to permit the extradition proceedings to proceed on the allegation that torture in pursuance of a conspiracy to commit torture, including the single act of torture which is alleged in charge 30, was being committed by Senator Pinochet after 8 December 1988 when he lost his immunity.