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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. 1)

International Criminal Tribunal for former Yugoslavia (ICTY), Trial Chamber, *Prosecutor* v. *Anto Furundzija*, judgment of 10 December 1998, paras. 147–57:

'147. There exists today universal revulsion against torture: as a USA Court put it in *Filartiga* v. *Peña-Irala*, 'the torturer has become, like the pirate and the slave trader before him, hostis humani generis, an enemy of all mankind' (*Filartiga* v. *Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980)). This revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination. The prohibition against torture exhibits three important features, which are probably held in common with the other general principles protecting fundamental human rights.

(a) The prohibition even covers potential breaches

148. Firstly, given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the European Court of Human Rights in *Soering* [where the Court stated, in its *Soering* v. *United Kingdom* judgment of 7 July 1989: 'It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him, if implemented, be contrary to Article 3 [prohibiting torture and inhuman or degrading treatment] by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article' (para. 90)], international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment). It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition.

149. Let us consider these two aspects separately. Normally States, when they undertake international obligations through treaties or customary rules, adopt all the legislative and administrative measures necessary for implementing such obligations. However, subject to obvious exceptions, failure to pass the required implementing legislation has only a potential effect: the wrongful fact occurs only when

administrative or judicial measures are taken which, being contrary to international rules due to the lack of implementing legislation, generate State responsibility. By contrast, in the case of torture, the requirement that States expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice. Consequently, States must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring.

150. Another facet of the same legal effect must be emphasised. Normally, the maintenance or passage of national legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (lato sensu) only when such legislation is concretely applied [see Mariposa Development Company and others, Decision, US-Panama General Claims Commission, 27 June 1933, UN Reports of International Arbitral Awards, Vol. VI, pp. 340–1; *German Settlers in Upper Silesia*, Advisory Opinion of 10 September 1923, PCIJ, Series B, No. 6, pp. 19–20, 35–8; the arbitral award of 1922 in the *Affaire de l'impôt sur les benefices de guerre*, in UN Reports of International Arbitral Awards, vol. I, pp. 302–5]. By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or condoning torture or at any rate capable of bringing about this effect.

(b) The prohibition imposes obligations *erga omnes*

151. Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.

152. Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfil its international obligations. The existence of such international mechanisms makes it possible for compliance with international law to be ensured in a neutral and impartial manner.

(c) The prohibition has acquired the status of *jus cogens*

153. While the *erga omnes* nature just mentioned appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules [see also the *General Comment No. 24: Issues relating to Reservations made upon Ratification or Accession to the Covenant [on Civil and Political Rights] or the Optional Protocol thereto, or in relation to Declarations under Article 41 of the Covenant*, issued on 4 November 1994 by the United Nations Human Rights Committee, para. 10 ('the prohibition of torture has the status of a peremptory norm'). In 1986, the United Nations Special Rapporteur, P. Kooijmans, in his report to the Commission on Human Rights, took a similar view (E/CN. 4/1986/15, p. 1, para 3). That the international proscription of torture has turned into *jus cogens* has been among others held by US courts in *Siderman de Blake* v. *Republic of Argentina*, 965 F. 2d 699 (9th Cir. 1992), cert. denied, *Republic of Argentina* v. *de Blake*, 507 U.S. 1017, 123L. Ed. 2d 444, 113 S. Ct. 1812 (1993); *Committee of US Citizens Living in Nicaragua* v. *Reagan*, 859 F. 2d 929, 949 (D.C. Cir. 1988); *Xuncax et al.* v. *Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Cabiri* v. *Assasie-Gyimah*, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996); and *In re Estate of Ferdinand E. Marcos*, 978 F. 2d 493 (9th Cir. 1992), cert. denied, *Marcos Manto* v. *Thajane*,

508 U.S. 972, 125L. Ed. 2d 661, 113 S. Ct. 2960 (1993)]. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.

154. Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.

155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio* [Art. 53 Vienna Convention on the Law of Treaties, 23 May 1969], and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. [As for amnesty laws, it bears mentioning that in 1994 the United Nations Human Rights Committee, in its General Comment No. 20 on Art. 7 of the ICCPR stated the following: 'The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.'] If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: 'individuals have international duties which transcend the national obligations of obedience imposed by the individual State' [I.M.T., 1 (1946), p. 223].

156. Furthermore, 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. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*, and echoed by a USA court in *Demjanjuk*, 'it is the universal character of the crimes in question i.e. international crimes which vests in every State the authority to try and punish those who participated in their commission' [*Attorney General of the Government of Israel* v. *Adolf Eichmann*, 36 I.L.R. 298; *In the Matter of the Extradition of John Demjanjuk*, 612].

157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.'