

USE OF TORTURE IN CONFLICT SITUATIONS

- Torture is practiced on a varyingly wide scale by many States but most prevalently in conflict situations
- New rationales to justify the use of torture have been introduced by States as a strategy to circumvent their duties under international law which effectively cede the moral high ground in favour of a pragmatic approach
- Legal frameworks prohibiting torture in absolute terms are substantively strong but remarkably weak in procedural enforcement
- Mainstreaming principles on the prevention of torture into structures, practices and procedures domestically are key to preventing torture from occurring and holding perpetrators to account

BACKGROUND

What is torture? For what purposes and to what extent it is still used?

1. Torture is the action or practice of intentionally inflicting severe mental or physical pain or suffering on individuals.ⁱ It is used predominantly to induce a sense of terror, punish, obtain information or confessions, revenge, maintain social control, suppress, punish or intimidate political opponents, or even to assist ethnic cleansing.ⁱⁱ Torture often occurs in the context of armed conflict, where there is lack of rule of law, power imbalances and a need to obtain strategic or tactical advantage by parties to a conflict.ⁱⁱⁱ The most common forms of torture include beatings, rape and sexual assault, electric shocks, stretching, submersion in water, sleep deprivation, suffocation, burns, isolation, threats, humiliation, mock executions, and forced observation of the torture of others.^{iv}
2. Torture has been practiced throughout history yet the universal prohibition against torture was realised only in the aftermath of World War II.^v Despite decades of global efforts to eradicate torture, it continues to be used worldwide in 141 countries with a renewed rationale in justifying its use by States.^{vi} In the past decade, in particular, States have relied on "national security" interests and the "ticking time bomb" rationale to use torture in the fight against terrorism, to obtain intelligence and as a tool of repression/deterrence against dissent. While State officials, particularly prison, law enforcement and military officials are major perpetrators of torture, many non-State actors are also engaged in it, in particular, in conflict settings. These include members of paramilitary or guerrilla forces and criminal actors such as organised crime syndicates and traffickers.
3. Torture usually takes place in the shadows and perpetrators of torture often do not fear arrest, prosecution or punishment. Behind this lies a lack of State political will and not having human rights as a high priority on the political agenda. In fact, States often put more effort into consistently denying the use of torture or covering it up than carrying out full investigations. They, prevalently, use a variety of strategies to circumvent their legal duties, including plausible deniability, deployment of secret police, "need to know" policies, denial that certain practices constitute torture, appeal to various laws (national or international), use of jurisdictional arguments, claim of "overriding need", and the use of torture by proxy.^{vii} These strategies serve to protect perpetrators from prosecution, and effectively defeat the purpose of the international prohibition of torture by ceding the moral high ground in favour of a pragmatic approach.
4. International instruments prohibiting torture primarily obligate States to assert responsibility for the prohibition, prevention, investigation, and prosecution of torture.

INTERNATIONAL LAW

What is the basis for the prohibition of torture under international law and what obligations does it impose on States?

5. International law prohibits torture in absolute terms, by underlining its non-derogable status, for any purpose and under any circumstance.^{viii} In order to eradicate the practice of torture, States have an obligation to enact criminal sanctions,^{ix} establish jurisdiction over acts of torture,^x prosecute or extradite alleged offenders,^{xi} respect the principles of *non-refoulement*,^{xii} abstain from using information obtained through torture^{xiii} and provide remedies and reparations to the victims of torture.^{xiv}
6. The use of torture is prohibited under International Human Rights Law (IHRL), International Humanitarian Law (IHL) and International Criminal Law (ICL), which cover peacetime and conflict situations, as well as national emergency situations. The exact definition of torture depends on the particular legal context in which the term is used. The prohibition of torture under the relevant treaties and customary international law is a peremptory norm (*jus cogens*).^{xv} As a *jus cogens* principle, the prohibition of torture enjoys a higher rank in the international hierarchy of norms than treaty law and customary rules.^{xvi} In categorising torture, assessing which legal regime applies to an incident of torture is important since different standards and rules can apply.

LEGAL FACTSHEET

7. Torture, under the IHRL treaties, generally, means any act by which severe pain or suffering is intentionally inflicted on a person for such purposes as obtaining information or a confession, for punishment, intimidation or coercion, or for any reason based on discrimination of any kind.^{xvii} The definition of torture contained in human rights treaties prohibiting torture establishes State responsibility for acts perpetrated by its own officials, but also for failure to take effective preventive measures or to investigate and prosecute torture perpetrated by private actors.^{xviii}
8. IHL governs the conduct of parties during armed conflicts of an international or non-international nature.^{xix} The main IHL treaties and customary international law provide for the prohibition of torture, which requires that civilians and persons *hors de combat* be treated according to that fundamental guarantee.^{xx} Violations of IHL ordinarily give rise to State responsibility or the responsibility of the parties to the armed conflict but, where the relevant parts of treaties/instruments, forming the body of ICL, require criminalisation of conduct, perpetrators can be individually criminally responsible for crimes committed.^{xxi} The prohibition of torture is also subject to universal jurisdiction which means that theoretically, any State can exercise its jurisdiction over offences of torture, and properly ought to prosecute/extradite an alleged perpetrator, regardless of where the crime took place or the nationality of the perpetrator or victim.^{xxii} The prohibition of torture, the obligation on States to criminalise such conduct, and universal jurisdiction allow for the categorization of torture, under ICL, as a distinct international crime in and of itself as well as a war crime, a crime against humanity and/or a constitutive act of genocide.^{xxiii} The definition of torture and the requirements to make out the crime, therefore, under ICL, can differ according to the particular category of crime an incident of torture is charged under; such definitions/requirements are usually set out in the statutes of the particular international court or tribunal with jurisdiction.

IMPLEMENTING THE PROHIBITION OF TORTURE IN CONFLICT SITUATIONS

What are the challenges in implementing the prohibition of torture in conflict situations and what are the strengths and weaknesses of the existing mechanisms?

9. International treaties prohibiting torture have been accepted by nearly every State in the world but States, which have ratified international treaties, do not necessarily engage in less torture.^{xxiv} A certain level of international reputation ensues from ratifying international treaties, which is outweighed by actual implementation and enforcement required of States under those treaties.^{xxv}
10. International and regional treaty-based monitoring bodies assess States' compliance through periodic reporting and the examination of individual and inter-State complaints.^{xxvi} Except for publicising reports when States fail to comply with their obligations, there is not a formal enforcement procedure of punishment or power to make binding decisions except by international courts. International courts, although, having the power to make binding decisions and take interim measures, also generally lack formal enforcement procedures. Monitoring compliance through State visits by the Committee against Torture (CAT), is weakened not only by the requirement that the information obtained must be reliable, well-founded and indicate a systematic practice of torture, but also the requirement of an invitation by the State party concerned with the possibility for the State to place a special reservation on the use of this mechanism.^{xxvii} CAT has previously established systematic practices of torture through a number of country visits but the monitoring power of the CAT is, in practice, limited due to States' perception of external visits to be a threat to their sovereignty.
11. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECT) and the Optional Protocol to the CAT (OPCAT), in contrast to the CAT, allow monitoring bodies to undertake unannounced visits to countries, without prior permission. The OPCAT Subcommittee on Prevention of Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment (Subcommittee on Torture) has the mandate to carry out unannounced missions, have access to all relevant documents and conduct private interviews with detainees. The Subcommittee on Torture functions, however, under strict confidentiality; publication of fact-finding results depends on specific punitive terms. The effectiveness of unannounced country visits is limited by the regional limitation of the ECT and the slow ratification of the OPCAT. The OPCAT also obliges States to create National Preventive Mechanisms (NPMs) with reactive and preventive powers to monitor places where torture takes place most prevalently, such as detention centres and prisons. The obligation to establish an independent and effective national mechanism has become a challenge in respect of ratification and proper implementation of the OPCAT.^{xxviii}
12. Apart from treaty based mechanisms UN charter-based Special Procedures, such as the Special Rapporteur on Torture (SRT), were introduced in an effort to bolster State compliance with human rights. These mechanisms generally have the advantage of publicising violations but lack the ability to compel States to compliance or ensure enforcement of State obligations.
13. An International Humanitarian Fact-Finding Commission and a number of *ad hoc* international criminal tribunals have been established and, from 2002, the International Criminal Court has had a mandate, as a permanent

LEGAL FACTSHEET

international court, to deal with violations of humanitarian law and international criminal law. These complementary mechanisms to national courts face challenges because torture, in particular, in conflict situations, takes place in isolation; perpetrators are often confident that they are outside the reach of effective monitoring and act under the protective shield of States or parties to the conflict.^{xxix} There is also lack of reporting by victims out of fear, intimidation and reprisals which limits available evidence.

14. It has become increasingly accepted that human rights principles prohibiting torture apply during armed conflict situations, and thus, the European Court of Human Rights (ECtHR) and other regional human rights courts are in a position to use IHRL and IHL in an equally reinforcing way.^{xxx} Doing so prevents gaps in protection against torture and could facilitate: (a) dialogue with parties to a conflict concerning the extent of their legal obligations; (b) establishing the necessary elements for triggering national or international legal accountability for torture committed in the conflict situations; and (b) the creation of necessary mechanisms to ensure that victims can exercise their right to remedies and reparations.^{xxxi} To further strengthen implementation of human rights standards when dealing with conflict situations and ensure the protection of victims, human rights courts must have an awareness of the distinct features of IHL and IHRL and be able to interpret and apply relevant principles/rules.^{xxxii}
15. Preventing the use of torture during conflict situations requires measures to be taken in advance during peacetime as well in armed conflict. Those measures should require that both civilians and the military personnel are familiar with the rules of IHRL, ICL and IHL prohibiting torture and administrative/judicial structures be set up, in advance, at a domestic level to prevent torture and punish incidents of torture when they occur.

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LEGAL FACTSHEET

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LEGAL FACTSHEET

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