



ICRC

ADVISORY SERVICE
ON INTERNATIONAL HUMANITARIAN LAW

Prohibition and punishment of torture and other forms of ill-treatment

There is an absolute ban on torture and other cruel, inhuman or degrading treatment and outrages upon personal dignity under international humanitarian law (IHL) and international human rights law (IHRL). The prohibition of torture and other forms of ill-treatment derives from the Geneva Conventions of 1949, their Additional Protocols of 1977, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, and other international instruments. Both IHL and IHRL converge and complement each other in establishing a comprehensive legal framework for the prevention and punishment of acts of torture and other forms of ill-treatment.

1. Definition of torture and other forms of ill-treatment

Under international humanitarian law (IHL) and international human rights law (IHRL), the definition of torture comprises three main aspects:

1. Any act by which severe pain or suffering, whether physical or mental, is inflicted on a person;
2. The act must be intentionally inflicted;
3. The act must be instrumental for such purposes as:
 - (a) obtaining from the individual or a third person information or a confession, or
 - (b) punishing him/her for an act he/she or a third person has committed or is suspected of having committed, or
 - (c) intimidating him/her or a third person, or
 - (d) coercing him/her or a third person, or
 - (e) for any reason based on discrimination of any kind.

What distinguishes torture from other forms of ill-treatment, which include other cruel, inhuman or degrading treatment and outrages upon personal dignity, is the third – purposive – aspect.

Inhuman and cruel treatment is defined as the infliction of severe physical or mental pain or suffering, which goes beyond mere degradation or humiliation. Outrages upon personal dignity are acts that humiliate, degrade or otherwise violate the dignity of the

person to such a degree as to be generally recognized as an outrage upon personal dignity. Unlike torture, there is no requirement that these acts be inflicted for a specific purpose.

IHL applies to all parties to an armed conflict. In contrast IHRL treaties, including the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), apply exclusively to States. As such, Article 1 of the CAT contains the additional requirement that the prohibited acts be “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.”

2. Key international instruments

a) IHL

The main IHL instruments that prohibit torture and other forms of ill-treatment include: the 1907 Hague Regulations respecting the Laws and Customs of War on Land (Art. 4); the four Geneva Conventions of 1949 (GC I, Art. 12; GC II, Art. 12; GC III, Arts 13, 17 and 87; GC IV, Arts 27 and 32; GC I-IV common article 3 and arts 50, 51, 130 and 147 respectively; Additional Protocol I of 1977 (Art. 75(2)(a)(ii)); and Additional Protocol II of 1977 (Art. 4(2)(a)).

The 1998 Rome Statute of the International Criminal Court (ICC) deems torture and other inhuman

treatment to be war crimes in both international and non-international armed conflicts (Art. 8(2)(a)(ii) and 8(2)(c)(i) and (ii)) as well as crimes against humanity (Art. 7(1)(f) and (k)).

Rule 90 of the ICRC study on customary IHL (2005) establishes that the prohibition on torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, in both international and non-international armed conflicts is a norm of customary international law. Further, Rule 156 provides that serious violations of IHL, including torture and other inhuman treatment, constitute war crimes in both international and non-international armed conflicts.¹

b) IHRL

The prohibition on torture is enshrined in international human rights instruments, such as the 1948 Universal Declaration of Human Rights (Art. 5), the 1966 International Covenant on Civil and Political Rights (Art. 7), the 1984 Convention against Torture, and the 1989 Convention on the Rights of the Child (Art. 37(a)).

The prohibition on torture is also contained in regional human rights

¹ See ICRC Customary Law database at <http://www.icrc.org/customary-ihl/eng/docs/home>

instruments, such as the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 3); the 1969 American Convention on Human Rights (Art. 5.2); the 1981 African Charter on Human and Peoples' Rights (Art. 5); the 1985 Inter-American Convention to Prevent and Punish Torture; the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; the 2004 Arab Charter on Human Rights (Art. 8); and the 2012 Human Rights Declaration by the Association of Southeast Asian Nations (Art. 14).

3. Key legal obligations deriving from the prohibition of torture and other forms of ill-treatment under international law

a) Enacting criminal sanctions

(i) IHL

Torture and other forms of ill-treatment are grave breaches of the Geneva Conventions (GC) and their additional Protocols (AP), as well as being serious violations of international humanitarian law and war crimes in both international and non-international armed conflicts. The relevant provisions include: Articles 50/51/130/147 of GC I-IV, respectively, and their common Article 3(1)(a); Article 85 of AP I; Article 4(2)(a) of AP II; Article 8(2)(ii) of the ICC Statute; and Rule 90 of the ICRC study on customary IHL.

States have a duty to enact legislation prohibiting acts of torture and other forms of ill-treatment and punishing those who commit them or order them to be committed. Individuals can be held criminally responsible for committing these war crimes. Further, military commanders are required to prevent, repress and take action against those under their control who commit acts of torture and other forms of ill-treatment. These protections are listed under Articles 49/50/129/146 of GC I-IV, respectively, and their common Article 3(1)(a); AP I, Articles 86 and 87; AP II, Article 4(2)(a); and Rules 151-153 and 156 of the ICRC study on customary IHL.²

² See Advisory Service Factsheet "Penal Repression: Punishing War Crimes," at www.icrc.org/eng/resources/documents/legal-fact-sheet/national-implementation-legal-fact-sheets.htm

To give effect to the principle of complementarity, States party to the ICC Statute must adopt domestic legislation to incorporate all crimes under the Statute, including the crime of torture.

(ii) IHRL

Article 4(1) of the CAT obliges all States Parties to ensure that all acts of torture are offences under their criminal law, including attempts to commit torture, as well as acts by any person that constitute complicity or participation in torture. States Parties are also required to make these offences punishable by appropriate penalties that take into account their grave nature.

b) Jurisdiction over acts of torture

(i) IHL

States are required under the Geneva Conventions and Additional Protocol I to exercise universal jurisdiction over grave breaches, including acts of torture and other forms of ill-treatment committed during international armed conflicts. Thus, States have an obligation to search for and prosecute alleged perpetrators, regardless of their nationality and of where the act was committed. Under Rule 157 of the ICRC study on customary IHL, States also have the right to vest universal jurisdiction in their national courts for war crimes, including torture and other forms of ill-treatment committed in non-international armed conflicts.

(ii) IHRL

Under the CAT, States Parties must establish jurisdiction over acts of torture where the offences are committed in any territory under their respective jurisdiction, or where the alleged offender or the victim is a national of the State.

In addition, the CAT specifies in Article 5(2) that a State can also establish universal jurisdiction over the crime of torture where the offender is present in any territory under its jurisdiction. These provisions are in keeping with the underlying object and purpose of the Convention, namely, as stated in its preamble, "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world."

c) Prosecuting or extraditing alleged offenders

(i) IHL

States also have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and to bring such persons, regardless of nationality, before the State's own courts, if such persons are not extradited to another State. This is reflected in Articles 49/50/129/146 of GC I-IV, respectively, and in AP I, Articles 85(1) and 86(1).

(ii) IHRL

According to Article 7(1) of the CAT, States are required to prosecute the alleged perpetrators of the offence of torture in any territory within their jurisdiction, if such persons are not extradited to another State.

Under Article 8 of the CAT, States must make torture, including complicity or participation therein, an extraditable offence in any extradition treaty between States Parties. Under Article 8(2), where States make extradition conditional upon the existence of an extradition treaty, the CAT may serve as a legal basis for extradition if a State does not have an extradition treaty with the requesting State.

d) Non-refoulement

The CAT (Art. 3) provides that no State Party shall expel, return ("refoulir") 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. The CAT further states that, for the purposes 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.

e) Non-use of information obtained from torture

Article 15 of CAT provides that any statement 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. In addition, all essential judicial guarantees

must be provided to ensure that accused persons receive a fair trial, as stipulated in Articles 49/50/102-108/66-75 of GC I-IV, respectively, and in Article 75(4) of AP I and Article 6(2) of AP II.

f) Remedies and reparations

(i) IHL

Article 91 of AP I, as reflected in Rules 149 and 150 of the ICRC study on customary IHL, requires that a party to the conflict that violates the provisions of the Conventions or of the Protocol – which by inference includes torture and other forms of ill-treatment – shall be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

(ii) IHRL

Similarly, under Article 14 of the CAT, each State Party is to ensure in its legal system that the victim of an act of torture can obtain redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. Defendants of deceased victims of torture are likewise entitled to compensation.

4. Monitoring and reporting mechanisms

a) ICRC detention visits

Through the 1949 Geneva Conventions, in particular Article 126 of GC III and Article 143 of GC IV (and the Statutes of the International Red Cross and Red Crescent Movement), the international community has mandated the ICRC to visit both prisoners of war and civilians interned during international armed conflicts. The ICRC also visits people detained in connection with non-international armed conflicts and situations of violence not reaching the threshold of an armed conflict.

The ICRC assesses the physical and mental well-being of detainees through visits to places of detention, dialogue with the detaining authorities and private interviews with the detainees themselves. All this helps to ensure that detainees' treatment and conditions of detention meet IHL and/or internationally recognized human rights standards.

The ICRC uses the information collected from detention visits to engage in confidential dialogue with the authorities. Among other things, it strives to prevent torture and other forms of ill-treatment.

b) IHRL

To ensure the effective implementation of the prohibition on committing torture and other forms of ill-treatment, a number of independent mechanisms are provided for under IHRL. These include national preventive mechanisms (Art. 3 of the 2002 Optional Protocol to the CAT), the Committee against Torture (CAT, Art. 17), and the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 2 of the Optional Protocol to the CAT). Members of these bodies should be of high moral character with proven professional experience in the administration of justice, in particular criminal law, prison or police administration, or in other fields related to the treatment of persons deprived of their liberty. The members shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the mechanism efficiently.

Article 19 of the CAT also requires States to submit reports on the measures they have taken to give effect to their obligations under the Convention.

According to Article 13 of the CAT, any individual who alleges that he has been subjected to torture in any territory under a State's jurisdiction has the right to have his case promptly and impartially examined by that State's competent authorities.

5. Prevention of torture and other forms of ill-treatment

a) IHL

The Geneva Conventions require that States Parties, in times of peace as in times of war, disseminate as widely as possible in their respective countries the text of the Geneva Conventions, which refer to the prohibition of torture and other forms of ill-treatment. Under Articles 47/48/ 127/144 of GC I-IV, respectively, as well as Article 83 of AP I and Article 19 of AP II, States Parties are also obliged to include the Geneva Conventions in military instruction.

b) IHRL

Article 10 of the CAT requires States Parties to ensure that education and information regarding the prohibition against torture and other forms of ill-treatment 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.

Moreover, Article 11 of the CAT requires States Parties to 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, detention or imprisonment in any territory under their jurisdiction, with a view to preventing any cases of torture.