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Torture: State practice at the national level

UNIVERSAL JURISDICTION:
The duty of states to enact and implement legislation -
Chapter Ten
(Torture: State practice at the national level)

As discussed below in Section II of this chapter, at least 80 of the 126 states which are parties to the Convention against Torture as of 1 September 2001 may exercise universal jurisdiction over individual cases of torture not amounting to war crimes or crimes against humanity, although not necessarily all conduct amounting to torture as defined under international law. Indeed, one of the most important obstacles to using universal jurisdiction legislation to end impunity for torture is the inadequacy of definitions. Other serious problems are the same as with other crimes under international law at the national level - weak principles of individual criminal responsibility, improper defences, recognition of amnesties and so forth. A frequent problem with legislation is that it applies prospectively only, which will seriously limit its effectiveness for decades, unless it is amended.

Constitutional provisions or legislation which permit courts to exercise universal jurisdiction over torture generally fall into one of five models, although there is some overlap between these models and some states follow more than one model. As discussed below, these models involve either: (1) express recognition of universal jurisdiction over torture; (2) universal jurisdiction over analogous ordinary crimes, such as assault; (3) universal jurisdiction over crimes defined in treaties; (4) universal jurisdiction over customary law; and (5) direct incorporation of international customary and conventional law, including jurisdictional aspects.

As discussed below, courts in several of the states mentioned in Section II have exercised universal jurisdiction or their executive officials have supported the exercise of universal jurisdiction by their own or other courts. There have been no known formal protests by states about the adoption of legislation by other states providing for universal jurisdiction over torture and only a few protests by states over the exercise of jurisdiction under such legislation by courts on the ground that such jurisdiction was prohibited under international law. In such cases, the protests must be discounted because the officials were from states that were parties to the Convention against Torture with legislation providing for universal jurisdiction. The summary below cites the relevant provisions of legislation (for the text of many of these and related provisions, as well as a discussion of their scope, see Chapter Four, Section II above), government explanations to the Committee against Torture (where available) and comments by the Committee against Torture (where available).

I. TYPES OF LEGISLATION

A. Express provisions

A number of states have ***expressly provided for universal jurisdiction over torture***, either as part of their obligations under the Convention against Torture or to punish torture as a matter of international customary law. These include ***Australia, Brazil, Cameroon, Canada, China, Colombia, Finland, France, Iceland, Malta, Netherlands, Portugal, United Kingdom, United States and Uruguay .***

B. Analogous crimes

Other states may exercise universal jurisdiction over certain types of torture because their legislation permits the exercise of ***universal jurisdiction over analogous crimes under national law***, such as assault and rape or murder or manslaughter, when the torture causes the death of the victim. However, such ordinary crimes may not cover all types of torture in the definition of torture in Article 1 of the Convention against Torture and Article 2 of the Inter-American Convention on Torture. They may also not incorporate all relevant principles of criminal responsibility, such as command or superior responsibility, or exclude impermissible defences, such as superior orders. These states include: ***Austria, Azerbaijan, Colombia, Croatia, Czech Republic, Democratic Republic of the Congo, El Salvador, Italy, Jordan, Kyrgyzstan, Liechtenstein, Macedonia (Former Yugoslav Republic of), Norway, Paraguay, Peru, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Turkey, Ukraine, Uzbekistan.***

C. Crimes defined in treaties

Some states have legislation permitting their courts to exercise ***universal jurisdiction over crimes defined in treaties - usually to which the state is a party***, but not all of them have defined torture as crime or provided for penalties specifically applicable to torture. For the reasons discussed above, such legislation may not always be effective. States which have enacted such legislation and also signed or ratified treaties defining torture include: ***Argentina, Armenia, Austria, Azerbaijan, Belarus, Bulgaria, Bolivia, Brazil, Bulgaria, Chile, Costa Rica, Cyprus, Czech Republic, Demark, Ecuador, Ethiopia, Germany, Greece, Guatemala, Honduras, Hungary, Iran, Italy, Mexico, Panama, Paraguay, Peru, Spain, Switzerland***.

D. Customary international law

Other states have enacted laws permitting their courts to exercise ***universal jurisdiction over crimes under customary international law***, although the failure to define torture as a crime under national law or to provide for penalties specifically applicable to torture may cause problems. These states include: ***Belgium, Ecuador, El Salvador, Ethiopia, Georgia***.

E. Direct incorporation

Another group of states provide in their national constitutions or legislation that ***international law, either conventional or customary, is part of national law***, either automatically through direct incorporation or after acceptance by the state, generally having precedence over national legislation. In some states, it is fairly clear that these provisions permit national courts to exercise universal jurisdiction to try persons suspected of torture. It is not always clear, however, whether

such provisions incorporate only the substantive criminal law provisions of treaties or also the procedural ones, such as those concerning universal jurisdiction. For a discussion of states that have such constitutional or legislative provisions, but where there are authoritative interpretations of executive officials, courts scholars or intergovernmental organization bodies indicating that they are insufficient to permit a court to exercise universal jurisdiction, see Chapter Fourteen, Section I.A and the discussion of the Hissène Habré case in Senegal Section II of this chapter.

Direct incorporation. In some states, such provisions permit courts ***to apply international criminal law directly, including rules of universal jurisdiction*** and the trial of persons accused of crimes under international law. Such states probably include: ***Egypt*** (although there is some controversy concerning its jurisdiction), ***Hungary***. However, the courts of such states are often reluctant today to apply international criminal law directly under such principles and prefer express authorization in the form of legislation defining their extraterritorial jurisdiction, the crime and the penalty.

Direct incorporation with specified conditions of acceptance or approval. In other states, such provisions permit courts ***to apply international criminal law, including rules of universal jurisdiction, under specified conditions of acceptance or approval***. ***Argentina*** is such a state.

II. COUNTRY BY COUNTRY REVIEW

This section discusses provisions in states that have constitutional or legislative provisions permitting their courts to exercise universal jurisdiction over certain conduct amounting to torture. Although some of the legislation falls short in some respects of the requirements of international law by failing to criminalize all aspects of torture, most provisions permit national courts to exercise universal jurisdiction over conduct, such as assault or rape, when it amounts to torture within the meaning of Article 1 of the Convention against Torture or Article 2 of the Inter-American Convention on Torture. Some of the legislation contains defences or principles of criminal responsibility that are inconsistent with international law, but the discussion below should not be seen as a comprehensive survey of all such deficiencies, which would require an in-depth study of national law and jurisprudence. Although many states parties to the Convention against Torture and the Inter-American Convention on Torture have provided for universal jurisdiction in national law over conduct amounting to torture, some of these states, although accepting the obligation to provide for such jurisdiction, appear to have not yet done so.[1]

[1] It is not always possible to determine whether national law prevents a court from exercising universal jurisdiction. In some states, the government has made statements or published reports, usually in the context of examinations of state reports by the Committee against Torture, courts have issued judgments or intergovernmental organization bodies have issued findings that make it clear that the states have not yet fulfilled their obligations to provide for universal jurisdiction. Such states include: ***Kuwait, Mauritius*** (Conclusions and recommendations of the Committee against Torture concerning the second periodic report of Mauritius, U.N. Doc. A/54/44, 5 May 1999, para. 122 (expressing concern "that six years after its accession to the Convention and four years after the consideration of its initial report, the State party has failed to incorporate into its internal legislation important provisions of the Convention namely: . . . (c) The provisions of article 5, subparagraphs 1 (b) and (c) and 2 in conjunction with those of articles 8 and 9")); ***Morocco, Senegal*** (see discussion in this section); ***Tunisia***.

In other cases, it has not been possible to locate relevant legislation or jurisprudence on this issue, so it remains an open question whether the state party to the Convention against Torture or the Inter-American Convention on Torture provides for universal jurisdiction over torture. Such states include: ***Bahrain, Guinea, St Vincent and Grenadines*.**

No attempt has been made to review the constitutional provisions and legislation in states that are not parties to these treaties, but where it is clear that their courts could exercise universal jurisdiction over torture, this fact is noted.

· ***Algeria:*** There are two bases for Algerian courts exercising universal jurisdiction over certain conduct amounting to torture (for the text and scope of the relevant provisions, see Chapter Four, Section II above).

First, under Article 123 of the Algerian Constitution, treaties, including jurisdictional provisions, duly ratified take precedence over national legislation and can be directly enforced by national courts. In the context of the obligation in Article 7 of the Convention against Torture to extradite or prosecute persons suspected of torture, the government has stated that "in the absence of specific provisions on the subject in Algerian legislation, the provisions of the Convention apply".[2] Second, Article 584 of the Criminal Procedure Code permits Algerian courts to exercise universal jurisdiction over persons who commit a crime under Algerian law abroad and subsequently acquire Algerian nationality.

[2] Initial report of Algeria to the Committee against Torture, U.N. Doc. CAT/C/9/Add.5 (1991), para. 82. *See also* Second periodic report of Algeria to the Committee against Torture, U.N. Doc. CAT/C/25/Add.8, 30 May 1996, paras 54-55. In that report, Algeria stated:

> "54. Under the Constitution, international conventions ratified by Algeria have a higher legal status than domestic law. This naturally means that all provisions of international conventions are taken into account by national legislation in force.
>
> 55. By its Decision No. 1 of 20 August 1989, the Constitutional Council considered in that regard that 'after it is ratified and once it is published, any international convention becomes a part of national law and, pursuant to article 123 of the Constitution, acquires higher authority than that of the laws, authorizing any Algerian citizen to invoke it before the courts'."

In response to a question by Mr Burns, the Chair of the Committee against Torture, who asked the Algerian delegation on 18 November 1996 during its examination of the second periodic report for clarifications about the status of the incorporation of the Convention in Algerian legislation in the light of the 1989 decision by the Constitutional Council, and in the light of the failure to publish the Convention against Torture in the *Journal Officiel*, Mr. Dembri of the Algerian delegation is reported to have explained that

> "it went without saying that ratification by Algeria of any convention was followed by changes in the Constitution, as necessary. It was therefore not possible for there to be any conflict between international treaties and the Constitution. Publication of a convention meant publication of the presidential decree ratifying the Convention. International treaties were publicized through the Journal Officiel, as well as in the records of debates in the National People's Assembly. Generally speaking, the practice of incorporating international instruments in domestic law was constantly being refined and improved."

Summary records of the meeting on 18 November 1996, U.N. Doc. CAT/C/SR.273, 11 April 1997, paras 21, 24. Mr. Soulem, another member of the Algerian delegation, is reported to have said that

> "the public was informed of the adoption of international instruments not only by the means described by Mr. Dembri, but also through the procedure whereby the Minister for Foreign Affairs presented the instrument to be ratified to the Foreign Affairs Committee of the Parliament. Information about international instruments was also disseminated through the holding of seminars for judges and court officers. During the previous year, for example, a human rights seminar had been held in Algiers with the participation of 20 or so NGOs, and the following year, the African Commission on Human and Peoples' Rights would be holding its session in Algeria."

Ibid., para. 25. The Committee recommended that "[t]o avoid any ambiguity, the State party should arrange for the full text of the Convention to be published in the Official Gazette". Conclusions concerning the second periodic report of Algeria, Report of the Committee against Torture, U.N. Doc. A/52/44 (1997), para. 80 (a). To the extent that there may be any doubt about whether Algerian courts can exercise universal jurisdiction over torture committed abroad, it will have to await a definitive judicial decision.

Algeria is a party to the Convention against Torture. In its initial report to the Committee against Torture, the government stated that it was a capital offence if any person used torture in committing a crime, but it did not identify torture as an independent crime.[3] The Committee against Torture has recommended that acts of torture be defined consistently with the Convention.[4]

· ***Argentina:*** Article 75 (22) of the 1994 Argentine Constitution provides that

> "treaties and agreements take precedence over laws. Insofar as they are valid, . . . the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, . . . have constitutional status, do not abrogate any article of the first part of this Constitution, and shall be interpreted as complementary to the rights and guarantees recognized thereby." [5]

[3] Initial report of Algeria to the Committee against Torture, U.N. Doc. CAT/C/9/Add.5 (1991).

[4] Conclusions concerning the second periodic report of Algeria, Report of the Committee against Torture, U.N. Doc. A/52/44 (1997), paras 78 (a) and 80. The Committee stated that it was concerned that "78 (a) Torture is not more fully defined, in conformity with article 1 of the Convention" and recommended that "80 (b) The definition of torture should be revised to bring it into closer conformity with article 1 of the Convention".

[5] *Constitucion de la Nacion Argentina, Art. 75 (22)* (*"en las condiciones de su vigencia, tienen jeraquía constitutional, no derogan artículo alguno de la primera parte de esta Constitución y deben entenderse complementarios de los derechos y garantías por ella reconocidos."*) (English translation based on a translation in Gisbert H. Flanz, ed. *Constitutions of the Countries of the World*, Release 95-3 (Dobbs Ferry, New York: Oceana Publications, Inc. May1995). Article 75 (24) authorizes Congress "[t]o approve integrated treaties which delegate competences and jurisdiction to interstate organizations concerned with reciprocal and equal conditions and which respect the democratic order and human rights. Any standards dictated pursuant thereto are to supersede laws.") (*"Aprobar tatados de integración que deleguen competencias y jurisdicción a organizaciones supraestatales en condiciones de reciprocidad e igualdad, y que respeten elorden democrático y los derechos humanos. Las normas dictatadas en su consecuencia tienen jerarquía superior a las leyes."*) *Ibid.* Mr. Paz of the Argentine delegation informed the Committee against Torture at its 11 November 1992 afternoon meeting that, "once ratified, international instruments were directly applicable by the courts in the same way as domestic legislation. In that connection, he referred to article 27 of the Vienna Convention on the Law of Treaties, which provided that 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty', and confirmed that the international instruments ratified by Argentina took precedence over domestic legislation." U.N. Doc. CAT/C/SR.123, 8 Feb. 1993, para. 39.

According to the government, "[i]t is clear from the foregoing that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has constitutional rank in Argentina. This means that its contents are on a par with the constitutional provisions even if the source is different." [6]

Article 144 (3) of the Argentine Penal Code (*Código Penal*)provides that torture is a crime, but it is silent on the question of extraterritorial jurisdiction and extradition. Nevertheless, with respect to Argentina's obligations under Article 7 to extradite suspects or to submit the cases to its prosecuting authorities, the government has stated that "Argentina applies the principle *aut dedere aut punire*, as laid down in the international agreements that are binding on it. In cases where no agreement exists, the principle applies to nationals, and also in respect of acts having consequences within its territory."[7] In response to a question by the Committee against Torture's country rapporteur on Argentina, who said that this comment "seemed to indicate that the duty to try the accused where extradition was refused and no bilateral extradition treaty existed would apply only with respect to nationals" and "wondered what would happen if a foreigner's extradition was refused and no extradition treaty existed with the requesting state", the delegation responded that the Convention was self executing.[8] Presumably, the government also had in mind the extradition law (for the text and scope, see Chapter Four, Section II). However, reportedly several courts have refused extradition of Argentine nationals on the basis of universal or passive jurisdiction and then declined to try them. Moreover, as discussed elsewhere, high-level government officials have sometimes taken different positions with regard to Argentine military officers arrested abroad who have been alleged to have committed acts of torture. Nevertheless, although there remains some doubt whether a court would authorize a prosecution of a non-national for torture committed outside Argentina, it is clear that in principle Argentina has accepted that it is under a duty pursuant to the Convention to do so in cases where it does not extradite the suspect.

[6] Third periodic report of Argentina to the Committee against Torture, U.N. Doc. CAT/C/34/Add.5, 18 June 1997, para. 2.

[7] Third periodic report of Argentina to the Committee against Torture, U.N. Doc. CAT/C/34/Add.5 (1997), para. 21.

[8] Country Rapporteur, Gonzalez Poblete, summary records of the 303rd meeting, U.N. Doc. CAT/C/SR.303 (1997), para. 24. The Argentine delegation subsequently stated:

> "[B]y virtue of the fact that the Convention had been ratified, no additional provision was necessary to secure its automatic execution . . . [T]he Constitution was the supreme law of the nation and . . . [r]atified international human rights treaties had a higher authority than decisions of Congress. The authorities of each province were obliged to comply with them, regardless of the provisions of their internal laws and provincial constitutions . . . At the national level, the Supreme Court had jurisdiction over all matters governed by the Constitution and domestic law, other than those coming under the jurisdiction of the provincial courts."

Argentine delegation, summary records of the 304th meeting, U.N. Doc. CAT/C/SR.304 (1998), paras 18-19.

Article 118 of the Constitution of Argentina provides Argentine courts with jurisdiction over violations of international norms outside the national borders (for the text and scope, see Chapter Four, Section II).

Argentina has ratified the Convention against Torture, the Inter-American Convention on Torture and the Rome Statute. A working group drafting a proposal for implementing legislation for the Rome Statute expected to publish its report in September or October 2001.

· ***Armenia:*** Article 14 of the 1999 Penal Code provides universal jurisdiction over foreign citizens or stateless persons who have committed offences outside Armenia when the offences are referred to in a treaty ratified by Armenia (for a summary of this article, see Chapter Four - Part A, Section II).[9]

Armenia is a party to the Convention against Torture and it has signed, but not yet ratified as of 1 September 2001 the Rome Statute.

· ***Australia:*** Section 6 of the Australian Crimes (Torture) Act 1988 provides jurisdiction over any public official or person acting at the instigation of or with the consent or acquiescence of a public official who "does outside Australia an act that is an act of torture . . . [that] would constitute an offence" if it had been committed in Australia.[10]

[9] Second periodic report to the Committee against Torture, U.N. Doc. CAT/C/43/Add.3 (1999), para. 10.

[10] Article 6 of the Australian Crimes (Torture) Act 1988, 26 December 1988, No. 148 of 1988, *obtainable from:* http://scaletext.law.gov.au, provides:

"(1) Where:

(a) at any time after the commencement of this Act, a person who:

(i) is a public official or is acting in an official capacity; or

(ii) is acting at the instigation, or with the consent or acquiescence, of a public official or person acting in an official capacity;

does outside Australia an act that is an act of torture; and

(b) that act, if done by the person at that time in a part of Australia, would constitute an offence against the law then in force in that part of Australia;

the person is guilty of an offence against this Act, punishable, upon conviction, by the same penalty as would be applicable if the person were found guilty of the offence referred to in paragraph (b).

(2) In determining for the purposes of subsection (1) whether or not an act is or was, under the law in force at a particular time in a part of Australia, an offence of a particular kind, regard shall be had to any defence under that law that can be or could have been established in a proceeding for the offence."

According to the initial report of Australia to the Committee against Torture, its obligations under Article 5 (1) (b) and (2) of the Convention against Torture

"have been met by the creation of offenses under the Crimes (Torture) Act 1988, which incorporates the Convention as a schedule to the Act and defines torture as it is defined in the Convention . . . . The effect of the Crimes (Torture) Act is to apply to a person who had committed acts of torture outside Australia the criminal law which applies in that part of Australia where the person is present. The penalty to be imposed upon conviction is the same as would have been applicable had the person

Australia is a party to the Convention against Torture and it has signed the Rome Statute, although it had not yet ratified it as of 1 September 2001.

· ***Austria:*** Austrian courts can exercise universal jurisdiction under two provisions of the Penal Code (for the text and scope, see Chapter Four, Section II) over certain conduct amounting to torture.

committed the offense in the relevant state or territory."

U.N.Doc. CAT/C/9/Add.8, para. 88, September 1991. It added that, with respect to Article 7 of that Convention, "Alleged perpetrators of torture who are present in Australia are subject to the criminal law, whether the acts of torture were committed within or outside Australia. The normal process of prosecuting offenders against the criminal law would apply . . .". *Ibid.*

Article 64.1.6 of the Penal Code provides custodial universal jurisdiction over crimes which Austria is under an obligation to punish independently of the law of the place where they occurred. Austria has informed the Committee against Torture that its legislation provides for universal jurisdiction over torture. It said that Article 5 of the Convention against Torture was such an obligation, but that it would only exercise jurisdiction pursuant to Article 5 (1) (c) (providing for passive personality jurisdiction) "when it cannot be expected that criminal proceedings will be instituted by a State that would have jurisdiction under paragraph 1 (a) and (b)". [11] Article 65.1.2 of the Penal Code provides universal custodial jurisdiction over non-political crimes which are also crimes in the place where they were committed, if the suspect cannot be extradited.

Austria is a party to the Convention against Torture and the Rome Statute. As of November 1999, it had not yet defined torture as a crime under national law, so a prosecution for torture would have to be based on ordinary crimes, such as assault or rape.[12]

[11] Initial report of Austria to the Committee against Torture, U.N. Doc. CAT/C/5/Add.10 (1988), paras 24-25; see also the statement of delegation during the 19th meeting, U.N. Doc. CAT/C/SR.19 (1988).

[12] Initial report of Austria to the Committee against Torture, U.N. Doc. CAT/C/5/Add.10 (1988), para.16 (stating that, "[s]ince the Convention is directly enforceable and since article 1 thus forms part of Austrian law, it has not been necessary to take any measures with a view to its implementation"). The Committee against Torture expressed its concern about the failure to do so, stating that,

> "[i]n spite of the fact that the Convention has the status of law in the Austrian legal system and is directly enforceable, a definition of torture as provided in article 1 of the Convention is not included in the penal legislation of the State party and, therefore the offence of torture does not appear as punishable by appropriate penalties as required by article 4, paragraph 2 of the Convention[.]"

Conclusions and recommendations of the Committee against Torture - Austria, U.N. Doc. A/55/44, 12 November 1999, para. 49 (a). It recommended that Austria "establish adequate penal provisions to make torture as defined in article 1 of the Convention a punishable offence in accordance with article 4, paragraph 2 of the Convention". *Ibid.*, para. 50 (a).

On 13 August 1999, Peter Pilz, a Vienna city councillor, filed a complaint with the Public Prosecutor of Vienna alleging that Izzat Ibrahim Khalil Al Duri (also known as Al Doori), the Deputy Chair of the Revolutionary Council of Iraq, was responsible for the torture of two Iraqi citizens, Faeq Rasul and Salam Abdullah Ibrahim, as well as other victims.[13] The complaint referred to evidence given by the victims in an Austrian and a Swedish court. The Public Prosecutor was requested to "arrange the arrest of the Accused Izzat Ibrahim Khalil Al Doori and to commence with the investigation of the facts of the case."[14] The suspect was then a patient at the Doebling private clinic in Austria.

The public prosecutor reportedly instituted investigations against the suspect. However, the Austrian Minister of Interior stated that since no international arrest warrant had been issued concerning the suspect there had been no reason to deny him a visa. The Foreign Minister furthermore emphasised that Austria could not refuse a visa given that Al Duri was the vice head of government of a friendly nation with which Austria maintained diplomatic relations. Eventually, despite pressure from the United States, Al Duri, who had not been arrested during the prosecutor's investigations, was permitted to leave the country on 18 August 1999.[15]

· ***Azerbaijan:*** Article 12 of the Azerbaijan Criminal Code, entered into force 1 September 2000, contains three bases for courts to exercise universal jurisdiction over certain conduct amounting to torture (for the history, text and scope of these provisions, see Chapter Four, Section II above).

Paragraph 1 of Article 12 provides that stateless persons who are permanent residents can be held criminally responsible under the present Code for the act (action or inaction) committed abroad if the act is considered as a crime under Azerbaijan legislation and by the legislation of the territorial state if they have not been tried in a foreign state for the crime. Paragraph 2 of this article provides that foreigners and stateless persons may be held criminally responsible under the Code for a crime committed abroad in cases covered by international treaties to which the Azerbaijan Republic is a party and if they have not been tried in a foreign state for the crime. Paragraph 3 states that foreigners and stateless persons who committed torture and other crimes where treaties to which Azerbaijan is a party provide for punishment independent of the place where the crime was committed shall be held criminally responsible and punished under the Code.[16]

[13] Case Report to the Public Prosecutor Vienna concerning Izzat Ibrahim Khalil Al Doori, submitted by Peter Pilz, 13 August 1999 (English translation by Amnesty International).

[14] *Ibid.*, 2.

[15] For press reports of this case, see AP Worldstream, *Green Party official files criminal complaint against ailing Iraqi official*, 16 August 1999; *Schlögel verteidigt Visum aus 'humanitären Gründen - Grüne zeigen Saddam Husseins Stellvertreter an*, *Der Standard*, 17 August 1999; John Lancaster, *U.S. Steps Up Efforts to Prosecute Top Iraqis*, Washington *Post*, 28 October 1999.

[16] Azerbaijan Criminal Code of 1999, effective 2000 (English text in ICRC International Humanitarian Law Database, *obtainable from* http://www.icrc.org/ihl-nat).

Azerbaijan is a party to the Convention against Torture. It has not signed the Rome Statute and had not ratified it as of 1 September 2001. It has provided that torture is a crime under national law when committed on a widespread or systematic basis.[17] After criticism by the Committee against Torture in November 1999, a new Article 133 defining the crime of torture was adopted in December 1999 as an article in the Criminal Code; it is a significant improvement, although the UN Special Rapporteur on torture has stated that it is not fully consistent with the definition in Article 1 of the Convention against Torture.[18]

· ***Belarus:*** There are two bases in Belarus for exercising universal jurisdiction over certain conduct amounting to torture (for the text and scope of these provisions, see Chapter Four, Section II).

Article 6 (1) of the Criminal Code gives courts custodial universal jurisdiction over stateless persons who are permanent residents in Belarus who have committed a crime abroad if these acts are punishable in the state where they were committed and they were not prosecuted in that state. Article 6 (4) states that the Criminal Code imposes criminal responsibility on a person for certain crimes listed in Article 6 (3), which include crimes committed outside Belarus which can be prosecuted by virtue of a treaty binding on Belarus.

Belarus is a party to the Convention against Torture. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. Belarus has not defined torture as a crime under international law, so any prosecutions for individual acts of torture not amounting to war crimes or crimes against humanity would have to be based on ordinary crimes, such as assault or rape.[19]

[17] Azerbaijan Criminal Code, Art. 113 (Torture). See remark following Article 103 stating: "Crimes against humanity means intentional actions, set out in Articles 103-113 of the present section when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." It is not clear whether this phrase limits torture to cases meeting this high threshold or simply means that when torture meets the threshold in those cases it also constitutes a crime against humanity. The Committee against Torture criticized the absence of a definition of torture in the Criminal Code that was consistent with the definition in Article 1 of the Convention against Torture. Conclusions and recommendations of the Committee against Torture concerning the initial report of Azerbaijan, U.N. Doc. A/55/44, 17 November 1999, para. 68 (a) ("The absence of a definition of torture as provided in article 1 of the Convention in the penal legislation currently in force in the State party, with the result that the specific offence of torture is not punishable by appropriate penalties as required by article 4, paragraph 2 of the Convention[.]") and para. 69 (a) (the Committee recommended that "[t]he State party fulfil its intention to establish adequate penal provisions to make torture as defined in article 1 of the Convention a punishable offence in accordance with article 4, paragraph 2, of the Convention.").

[18] Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43, U.N. Doc. E/CN.4/2001/66/Add.1, 14 November 2000, para. 73 (the text is in para. 72).

[19] Conclusions and recommendations of the Committee against Torture on the third periodic report of Belarus, U.N. Doc. CAT/C/XXV/Concl.2/Rev.1, 20 November 2000, para.6 (b) (expressing its concern about "[t]he absence of a definition of torture, as provided in article 1 of the Convention, in the Criminal Code of the State party and the lack of a specific offence of torture with the result that the offence of torture is not punishable by appropriate penalties, as required in article 4(2) of the Convention.") and para. 7 (recommending that Belarus "amend its domestic penal law to include the crime of torture, consistent with the definition contained in article 1 of the Convention, and

· ***Belgium:*** It is possible that Belgium may be able to exercise universal jurisdiction over acts of torture that do not amount to war crimes or crimes against humanity as a crime under customary international law.

Belgium is a party to the Convention against Torture and to the Rome Statute, but as of 1 September 2001 it had not yet enacted implementing legislation for the Rome Statute.

supported by an adequate penalty").

The Minister of Foreign Affairs of ***Belgium***, Erik Derycke, stated in a television interview that "the British and Spanish authorities have the right to arrest the former Chilean dictator Pinochet."[20] Subsequently, Belgium requested the extradition of the former President of Chile from the United Kingdom and challenged the Home Secretary's decision to release him on medical grounds.

· ***Bolivia:*** Bolivian courts can exercise universal jurisdiction over torture. Article 1 (7) of the Penal Code gives courts universal jurisdiction over offences which Bolivia is obliged by treaty to punish, even when they have been committed abroad (see Chapter Four, Section II)

Bolivia has ratified the Convention against Torture. It has signed the Inter-American Convention on Torture in 1985 but as of 1 September 2001 it had not yet ratified it. It has signed the Rome Statute and is expected to ratify it in 2001. Bolivia is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

Bolivia has though not defined torture in national law as required by Article 1 of the Convention against Torture.[21]

· ***Bosnia and Herzegovina:*** Separate criminal codes apply in the two parts of the country, but both provide for universal jurisdiction over conduct, such as assault, which would include some aspects of the definition of torture in the Convention against Torture. It has not signed the Rome Statute and as of September 2001 it had not yet ratified it.

In the ***Federation of Bosnia and Herzegovina***, Article 133 (2) of the Criminal Code of the Federation of Bosnia and Herzegovina provides that courts may exercise custodial universal jurisdiction over crimes under the law of the Federation which are punishable in the territorial state by five years' imprisonment or more (for the text and scope of this provision, see Chapter Four, Section II above).

In the ***Republika Srpska***, Article 107 (2) of the Criminal Code of the Socialist Federal Republic of Yugoslavia, which has been adopted as its criminal code, provides for custodial universal jurisdiction over any crime punishable by at least five years' imprisonment (for the text and scope of this provision, see Chapter Four, Section II above).

· ***Brazil:*** National courts can exercise universal jurisdiction over torture under two legislative provisions.

[20] *Interview met Minister van Buitenlandse Zaken Erik Derycke over de arrestatie van Pinochet*, VRT-TV1, 1900, 22 October 1998.

[21] The Committee against Torture recommended that "the State party incorporate in its criminal legislation the definition of torture as set forth in the Convention". Committee against Torture concludes its Twenty-Sixth Session, Round-up, Press release, 18 May 2001. See Chapter Six for provisions on torture.

First, Article 7 (Part II) (a) of the Brazilian Criminal Code (for the text, see Chapter Four, Section II above) provides that national courts have custodial universal jurisdiction to try crimes committed abroad which Brazil is obliged to repress under a treaty.[22] The suspect must be in Brazil, the act must also be also punishable in the territorial state (double criminality) and that extradition for the crime be authorized under national law. Both restrictions are inconsistent with Brazil's obligations under the Convention against Torture. In addition, the suspect must not have been acquitted, have completed a sentence or been pardoned. In some cases, this restriction could also be inconsistent with the Convention against Torture, for example, when the trial was a sham or the pardon prevented a judicial determination of guilt or innocence, the emergence of the truth and reparations to victims and their families.

Second, Article 2 of Law No. 9,455 of 7 April 1997 makes the law criminalizing torture applicable to the crime of torture not committed on Brazilian territory if the person responsible is in an area under Brazilian jurisdiction.[23] Although this provision is of limited scope, it would appear to include areas under the control of Brazilian forces in a United Nations peace-keeping operation.

[22] Brazil has not expressly provided for universal jurisdiction over torture, but Article 7 (Part II) (a) would include the crime of torture. The government has informed the Committee against Torture that

> "[c]rimes committed in foreign countries, which Brazil committed itself to suppress by means of Treaty or Convention, such as torture, are also subject to Brazilian law. The extraterritoriality of Brazilian criminal law responds to the interest of the States when it suppresses such practices and acts considered as international crimes."

Initial report of Brazil to the Committee against Torture, U. N. Doc. CAT/C/9/Add.16, 18 August 2000, para. 101. However, when it adopted legislation criminalizing torture, the only express provisions on extraterritorial jurisdiction were with respect to Brazilian victims and crimes committed in places under Brazilian jurisdiction. The government has stated that, in the light of the above, "the recommendation of article 5 of the Convention, regarding the jurisdiction over the offence was met by article 2 of Law 9455/97 (*Lei N.º 9.455, de 7 abril de 1997, publicada no Diário Oficial da União, de 8 abril 1997*), which states that 'the provision of this law is applicable to crimes even if they have not been committed in the National Territory, in the case where the victim is Brazilian or if the offender is in a place under Brazilian jurisdiction". *Ibid.*, para. 102. Nevertheless, the government appeared to confirm that Brazil can exercise universal jurisdiction over torture committed abroad when it stated with regard to its obligations under Article 7 of the Convention against Torture:

> "Regarding crimes of torture, the Convention allows the resort to the universal criminal competence for all States parties. As a result of the universal system for suppression, the State party which does not take legal actions against those held accountable for torture are obligated to extradite them."

Ibid., para. 105.

[23] The UN Special Rapporteur on torture has noted that this law provides for universal jurisdiction. Report of the Special Rapporteur on torture, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43, U.N. Doc. E/CN.4/2001/66/Add.2, para. 152.

Brazil is a party to the Convention against Torture and to the Inter-American Convention on Torture. It has signed the Rome Statute and is expected to ratify it in 2001. Brazil has defined torture as a crime under national law.[24] As the Law 9,455/97 criminalizing torture provides for a punishment of a maximum of four years in prison, torture under Article 109 of the Penal Code is subject to a statute of limitations of eight years.

· ***Bulgaria:*** It is possible that Bulgarian courts may exercise universal jurisdiction over certain conduct amounting to torture under a provision of the Bulgarian Penal Code.

Article 6 (2) states that "[t]he Penal Code shall also apply to other crimes committed by foreign citizens abroad, where this is stipulated in an international agreement, to which the Republic of Bulgaria is a party". Bulgaria has informed the Committee against Torture that its courts could exercise universal jurisdiction over aliens in the territory suspected of torture, but only if a bilateral agreement so required.[25] The basis for this interpretation limiting Article 6 (2) to bilateral, rather than multilateral, treaties is not known, and it is possible that this statement contained a translation error.

Bulgaria is a party to the Convention against Torture. It has signed the Rome Statute, but had not yet ratified it as of 1 September 2001. Certain conduct amounting to torture is a crime under Bulgarian law, but torture itself is not defined as a crime under national law as required by Article 1 of the Convention against Torture.[26]

· ***Burundi:*** National courts may exercise universal jurisdiction over conduct which takes place abroad amounting to torture.

Article 4 of the Decree-Law No. 1/6 of 4 April 1981 provides for universal jurisdiction over any conduct abroad which would be a crime under Burundi law with a penalty of two or

[24] Law No. 9,455/97. For a short discussion of this law, see Rodrigo Terra, *Breves Apontamentos sobre a Lei da Tortura (Lei N.º 9.455/97)* (*obtainable from* <http://www.jus.com.br/doutrina/tortura4.html>). Torture is an aggravating factor in homicide, *Lei 2.848 de 7/12/1940, art. 121* it is classified as a heinous crime, *Lei N.º 8.072 de julho de 1990, publicada no Diáro Oficial da Uniã, de 26 de julho 1990.*

[25] Report of meeting of Committee against Torture on 3 May 1999, U.N. Doc. CAT/C/SR.375, para. 15. The Committee, however, expressed its concern at "[t]he lack of measures to ensure universal jurisdiction with regard to acts of torture in all circumstances." Conclusions and recommendations of the Committee, Bulgaria, U.N. Doc. A/54/44, 7 May 1999, paras 159, 162 (a). Similarly, the UN Special Rapporteur has expressed his concern that the definition was not consistent with the definition in Article 1 of the Convention against Torture. Report of the Special Rapporteur on torture, *supra*,n.23, para. 151.

[26] Criminal Code, Art. 128 (defining as a crime the infliction of severe bodily injury on another). The Committee against Torture has expressed its concern about "[t]he lack in domestic law of a definition of torture in accordance with article 1 of the Convention and the failure to ensure that all acts of torture are offences under criminal law. Conclusions and recommendations of the Committee against Torture on the second periodic report of Bulgaria, U.N. Doc. A/54/44, para. 157, and has recommended that it adopt "the necessary legislative measures in that regard". *Ibid.*

months' imprisonment, unless the suspect is extradited and provided that the Prosecutor's Office (*Ministère Public*) requests a prosecution (for the text and scope, see Chapter Four, Section II).

Burundi is a party to the Convention against Torture. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. It has not been possible to obtain a copy of the Penal Code to determine whether it defines torture as a crime under national law, but the wording of Article 4 of the 1981 decree-law makes it clear that it includes any conduct that is a crime under national law, so it would cover conduct such as assault or rape when it amounts to torture. The 1998 Constitutional Act of Transition prohibits torture, but it does not specify a penalty or appear to be a provision of the Penal Code that could be directly enforced.[27]

· ***Cameroon:*** Courts in Cameroon can exercise universal jurisdiction over torture.

Article 28 (bis) of the Cameroon extradition law of 1964, as amended in 1997, provides for the arrest of persons found in the territory who are suspected of torture and provides for measures to secure their appearance during the period required for criminal proceedings or the completion of

[27] *Acte constitutional de transition, Bujumbura, juin 1998, art. 22.*

extradition proceedings.[28] Nevertheless, the Committee against Torture has criticized Cameroon for not fully implementing Articles 5, 6 7 and 8 of the Convention against Torture.[29]

Cameroon has ratified the Convention against Torture. It has signed the Rome Statute and is expected to ratify it in 2001. It appears that Cameroon has defined torture as a crime under national law, but it has not been possible to locate a copy of the relevant provision.

· ***Canada:*** Canadian courts may exercise universal jurisdiction over torture.

Section 7 (3.7) of the Canadian Criminal Code provides for custodial universal jurisdiction over torture:

"Notwithstanding anything in this Act or any other Act, everyone who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence

[28] Law No. 64/LF/13 of 26 June 1964, establishing the procedure for extradition, as amended by law No. 97/010 of 10 January 1997, Article 28 (bis) . That article of the extradition law now provides:

"1) When circumstances justify such action, any foreign national for the time being in Cameroon who is suspected of having committed an act of torture in another country may, upon receipt of useful information, be obliged to undergo a preliminary enquiry with a view to establishing the facts.

2) The measures necessary to secure his presence may be taken in accordance with current national legislation. Such measures may be maintained only during the period required for criminal proceedings, or the culmination of extradition proceedings.

3) Anyone held pursuant to the previous sub-paragraph of this article may immediately contact the closest qualified representative of the State whose nationality he bears or, in the case of a stateless person, the representative of the State where he habitually resides.

4) The State in which the torture has been committee shall be informed:

- of the measures taken pursuant to sub-paragraph 2 above, as well as the circumstances in justification thereof;
- of the results of the enquiry and, where appropriate, the statement relating to the choice of jurisdiction". (English translation by Amnesty International)

The French text reads:

"1) - lorsque les circonstances le justifient, toute personne étrangère retrouvée au Cameroun et soupçonnée d'avoir commis un acte de torture dans un autre pays peut, après des renseignements utiles, faire l'enquête préliminaire en vue d'établir les faits.

2) - Les mesures nécessaires destinées à assurer sa présence peuvent être prises conformément à la législation nationale en vigeur. Ces mesures ne peuvent être maintenues que pendant le délai nécessaire aux poursuites pénales ou à l'aboutissement d'une proédure d'extradition.

3) - Toute personne détenue en application de l'alinéa précédant du présent article peut communiquer immédiatement avec le plus proche représentant qualifié de l'Etat don't elle a la nationalité ou, s'il s'agit d'une personne apatride, avec le représentant de l'Etat où elle réside habituellement.

4) - L'Etat dans lequel la torture a été commise est informé :

- des mesures prises en application de l'alinéa 2 ci-dessus ainsi que des circonstances qui les justifient;

- des résultats de l'enquête et, le cas échéant, de l'incation relative à l'option de compétence."

Loi nº 97/101 du 10 Janvier 1997 modifiant certaines dispositions de la loi nº 64/LF/13 du 26 Juin 1964 fixant le régime de l'extradition, Article 1er.

[29] Conclusions and recommendations of the Committee against Torture on the second periodic report of Cameroon, U.N. Doc. CAT/C/XXV/Concl.5, 6 December 2000, para. 7 (c) (recommending that Cameroon "[t]ake advantage of the process of codification already under way to bring Cameroonian legislation into line with the provisions of articles 5, 6, 7 and 8 of the Convention[.]").

against, a conspiracy or an attempt to commit an offence against, being an accessory after the fact in relation to an offence against, or any counselling in relation to an offence against section 269.1 shall be deemed to commit that act or omission in Canada if . . . (e) the person who commits the act or omission is, after the commission thereof, present in Canada."

Canada has ratified the Convention against Torture and the Rome Statute. Section 269.1 of the Criminal Code defines the crime of torture in a manner which is similar to that in Article 1 of the Convention against Torture. Nevertheless, the Committee against Torture indirectly expressed concern about the apparent Canadian preference to deport persons suspected of crimes under international law rather than to prosecute them.[30] The Committee has also expressed concerns about defences to torture and principles of criminal responsibility that are contrary to international law.[31]

On 27 November 1998, the Foreign Minister of Canada, Lloyd Axworthy, welcomed the first judgment of the House of Lords in the *Pinochet* case two days before, noting that it "makes clear the global dimension of this challenge and our collective responsibility to address this issue".[32]

· ***Chile:*** Chilean courts may exercise universal jurisdiction over torture.

Chile has informed the Committee against Torture that its legislation provides for universal jurisdiction over torture. It stated:

"In the event of a conflict between internal law and the provisions of the Convention, it is the Convention that prevails. This is by virtue of the constitutional reform approved on 30 July 1989, which modified the hierarchy of human rights treaty norms, elevating them to constitutional status. . . . [P]ersons allegedly responsible for acts of torture committed abroad could be tried in Chile without any need for an express provision of national legislation on the matter."[33]

[30] Conclusions and recommendations of the Committee against Torture concerning the third periodic report of Canada, U.N. Doc. CAT/C/XXV/Concl.4, 22 November 2000, para. 6 (c) (recommending that Canada "[p]rosecute every case of an alleged torturer in a territory under its jurisdiction where it does not extradite that person and the evidence warrants it, prior to any deportation.").

[31] *Ibid.*, para. 5 (h) (expressing concern that, "[n]otwithstanding the new War Crimes and Crimes against Humanity Bill and the assurances of the State party, the possibility that an accused torturer could still plead a number of defenses that would grant him/her immunity, including that foreign proceedings had been conducted for the purpose of shielding the accused from criminal responsibility; that the offense was committed in obedience of the law in force at the time; or that the accused had a motivation other than an intention to be inhumane.").

[32] Address by the Honourable Lloyd Axworthy to the International Conference on Universal Rights and Human Values - A Blueprint for Peace, Justice and Freedom", Edmonton, 27 November 1998.

[33] Initial report, U.N. Doc. CAT/C/7/Add.2 (1989), para. 118 (quoting Article 6 (8) of the Code of

Organization of the Courts); *See also* Second report, U.N. Doc. CAT/C/20/Add.3 (1994), paras 9-10.

Chile has ratified the Convention against Torture and the Inter-American Convention on Torture. It has signed the Rome Statute and it is expected to ratify it in 2001 or 2002. Article 150, 150A and 150B of the Penal Code prohibit torture (See Chapter Six).

· ***China:*** It appears that Chinese courts may exercise universal jurisdiction over certain conduct amounting to torture.

Article 9 of the Criminal Code provides that it applies to crimes specified in international treaties which China has signed or ratified and China exercises criminal jurisdiction within its treaty obligations (for the text and scope, see Chapter Four, Section II). Since the Convention against Torture imposes *aut dedere aut judicare* obligations under Articles 5 and 7, it appears that Chinese courts may exercise universal jurisdiction over persons suspected of torture.

China is a party to the Convention against Torture. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. China has not defined torture as a crime under international law as required by Article 1 of the Convention against Torture, so a prosecution for torture may have to be based upon an ordinary crime, such as assault or rape.[34]

Portugal has informed the Committee against Torture that China had agreed to the extension of the Convention against Torture to Macau.[35] In that autonomous region, courts may exercise universal jurisdiction over persons suspected of torture. Article 5 of the Penal Code of Macau (*Código Penal de Macau*) states that courts of the territory have universal jurisdiction over torture, which is made a crime under internal law by Article 236 of the Penal Code, provided that the suspect is in Macau and the suspect's extradition is not sought. The definition in Article 236 is not as broad as that in Article 1 of the Convention against Torture, however.

· ***Colombia:*** In certain circumstances, Colombian courts may exercise custodial universal jurisdiction over conduct, such as torture, which is a crime under national law.

Paragraph 6 of Article 16 (Extraterritoriality) of the Colombian Penal Code (*Código Penal*), Law 599 of 2000, in force since July 2001, provides that Colombian courts have jurisdiction over certain crimes committed abroad by foreigners against other foreigners, when the suspect is within Colombian territory, under certain circumstances (for the text, see Chapter Four).

[34] The Committee against Torture has recommended that China "incorporate in its domestic law a definition of torture that fully complies with the definition contained in the Convention". Conclusions and recommendations of the Committee against Torture concerning the third periodic report of China, U.N. Doc. A/5/4, 9 May 2000, para. 123.

[35] Concluding observations of the Committee against Torture: Portugal, U.N. Doc. A/55/44, 8 May 2000, para. 98 ("The Committee heard with interest the oral statement of the Portuguese delegation, in which details were provided of events that had occurred since the submission of the report. The Committee noted, in particular, the extension of the Convention to the territory of Macau, which had been confirmed by the Peoples' Republic of China.") (commenting on the third periodic report of Portugal).

Colombia is a party to the Convention against Torture and to the Inter-American Convention on Torture. It has signed the Rome Statute and it announced that it intends to ratify it in the near future. Torture is a crime under national law.[36]

· ***Costa Rica:*** Costa Rican courts may exercise custodial universal jurisdiction over torture.

Article 7 of the Costa Rican Penal Code (*Código Penal*) (for the full text, see Chapter Four, Section II above) provides for custodial universal jurisdiction over "anyone who commits . . . punishable acts against human rights covered by the treaties signed by Costa Rica or by this Code". This provision would include torture. Article 8 requires that the suspect be present in the territory and provides that a criminal prosecution may only be brought by "the relevant bodies". Article 372 of the Penal Code provides for a sentence of ten to 15 years' imprisonment for "anyone who directs or belongs to organizations of an international nature which . . . breach the provisions of treaties on human rights protection to which Costa Rica is a signatory".[37]

[36] Ley 599 of 2000 (Penal Code) Art. 178 (Torture): "Whoever inflicts on a person severe pain or suffering, whether physical or mental, for the purpose of obtaining from them or a third person information or a confession, punishing them for an act they have committed or are suspected of having committed, or intimidating or coercing them for any reason based on discrimination of any kind shall incur eight to fifteen years' imprisonment, a fine of between eight hundred (800) and two thousand (2,000) current legal minimum salaries and disqualification from the exercise of public duties and civil rights for the duration of the period of deprivation of liberty.

The same penalty shall be incurred by whoever commits such acts for purposes other than those described in the above paragraph.

Torture shall not be understood as including pain or suffering arising only from, inherent in or incidental to lawful sanctions." (English translation by Amnesty International).

Spanish original reads: *"Artículo 178. Tortura:*

El que inflija a una persona dolores o sufrimientos graves, físicos o psíquicos, con el fin de obtener de ella o de un tercero información o confesión, de castigarla por un acto por ella cometido o que se sospeche que ha cometido o de intimidarla o coaccionarla por cualquier razón que comporte algún tipo de discriminación incurrirá en prisión de ocho a quince años, multa de ochocientos (800) a dos mil (2.000) salarios mínimos legales vigentes, e inhabilitación para el ejercicio de derechos y funciones públicas por el mismo término de la pena privativa de la libertad.

En la misma pena incurrirá el que cometa la conducta con fines distintos a los descritos en el inciso anterior.

No se entenderá por tortura el dolor o los sufrimientos que se deriven únicamente de sanciones lícitas o que sean consecuencia normal o inherente a ellas."

Obtainable from http://www.cajpe.org.pe/rij/bases/legisla/colombia/col-1.HTM

Between the 6 of July of 2000 and 24 of July 2001 a special Law on genocide, enforced disapearance, forced displacement and torture has been in force (Ley 589 of 6 July 2000). Law 589 in its Article 14 stated that the crimes included in the law were not subject to amnesty or pardon. Spanish text reads: "*Los delitos que tipifica la presente ley no son amnistiables ni indultables.*"

[37] ARTÍCULO 374.- "*Se impondrá prisión de diez a quince años a quienes dirigieren o formaren parte de organizaciones de carácter internacional dedicadas a traficar con esclavos, mujeres o niños, drogas estupefacientes*

o realicen actos de terrorismo o infrinjan disposiciones previstas en los tratados suscritos por Costa Rica para proteger los derechos humanos."
(Así modificada la numeración de este artículo por el numeral 185, inciso a), de la ley No.7732 de 17 de diciembre de 1997, que lo traspasó del 372 al 374) Obtainable from http://www.poder-judicial.go.cr/salatercera/leyes/cpenal.htm
(English translation by Amnesty International)

Costa Rica is a party to the Convention against Torture and the Inter-American Convention on Torture. It has signed the Rome Statute and is expected to ratify it in 2001. It has not defined torture as required by Article 1 of the Convention against Torture, so a prosecution for torture may have to be brought for an ordinary crime, such as assault or rape.[38]

· ***Croatia:*** Croatian courts may exercise universal jurisdiction over torture.

Croatian courts may exercise universal jurisdiction over torture under two legislative provisions (for the text and scope of these provisions, see Chapter Four, Section II).

First, under paragraph 1 of Article 14 (Applicability of Criminal Legislation to Criminal Offenses Committed Outside the Territory of the Republic of Croatia) of the Criminal Code, Croatian courts may exercise universal jurisdiction over anyone who commits a crime which Croatia is required to punish under international law and treaties. This provision would certainly authorize universal jurisdiction under the Convention against Torture.

Second, paragraphs 4 and 5 of Article 14 impose an *aut dedere aut judicare* obligation on Croatian courts to exercise custodial universal jurisdiction over persons found in Croatia who are suspected of committing crimes under national law abroad which are punishable by at least five years' imprisonment in the territorial state in cases where the foreigner is not extradited.

Croatia is a party to the Convention against Torture. It has ratified the Rome Statute, but as of 1 September 2001, it had not yet ratified it. Torture is a crime under Croatian law.[39]

· ***Cuba:*** There are two bases for Cuban courts to exercise universal jurisdiction over conduct abroad which would amount to torture and would also violate Cuban law (for the text and scope of these provisions, see Chapter Four, Section II).

First, Article 5.1 of the Cuban Penal Code of 1987 states that Cuban criminal law applies to non-citizens (probably means stateless persons) resident in Cuba who commit a crime abroad if they are found in Cuba and are not extradited.

[38] The Committee against Torture has recommended that " the offence of torture should be included in the criminal code of Costa Rica in terms consistent with article 1 of the Convention, with penalty commensurate with its seriousness". Committee against Torture concludes Twenty-Sixth Session, Round-up, Press release, 18 May 2001.

[39] Criminal Code, Art. 176 (Torture and other cruel, inhuman or degrading treatment). *See also* Follow-up report of the Government of Croatia in response to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Croatia from 20 to 30 September 1998, CPT/Inf (2001) 5, p. 3; Conclusions and recommendations of the Committee against Torture, U.N. Doc. A/54/44, 17 November 1998, para. 64 (stating that "Croatia has incorporated the crime of torture and acts constituting other inhuman, cruel or degrading treatment or punishment into its internal legislation in terms which are in keeping with the provisions of articles 4 and 16 of the Convention, since it makes these offences punishable by appropriate penalties which take into account their grave nature."). The original text of Article 176 is in *Narodne Novine, Sadrzaj*, 110/1997, 21 October 1997. The law was promulgated on 29 September 1997 and entered into force on 1 January 1998.

Second, Article 5.3 of the Penal Code provides that Cuban criminal law, under certain conditions, applies to foreigners and to stateless persons not resident in Cuba who commit a crime abroad if they are found in Cuba and not extradited. The requirement that the conduct be a crime in the state where it was committed does not apply if the crimes are against humanity, human dignity or collective safety or can be prosecuted pursuant to international treaties.

Cuba is a party to the Convention against Torture. It has not signed the Rome Statute and had not yet ratified it as of 1 September 2001. Cuba had not defined torture as a crime under national law as of November 1997, so prosecutions for torture would have to be brought for ordinary crimes, such as assault or rape.[40]

· ***Cyprus:*** Cypriot courts may exercise universal jurisdiction over torture.

Section 5 (1) (e) (v) of the 1972 Criminal Code (cap. 154) gives courts universal jurisdiction over offences which any treaty binding on Cyprus provides that its law applies (for the text of legislative provisions cited, see Chapter Four, Section II).[41] This section is supplemented by Section 20 (1) (e) of Law 14 of 1960, which gives jurisdiction to an assize court to try any offence outside Cyprus as provided by law.

Cyprus is a party to the Convention against Torture. It has defined torture as a crime under national law.[42]

· ***Czech Republic:*** Czech courts can exercise universal jurisdiction pursuant to several provisions over certain conduct amounting to torture.

First, Section 20 (1) of the Criminal Code requires courts to exercise custodial universal jurisdiction over crimes committed abroad by aliens or stateless persons not resident in the Czech

[40] Concluding observations of the Committee against Torture concerning the initial report of Cuba, U.N. Doc. A/53/44, 21 November 1997, para. 110 (expressing concern that "[t]he failure to establish a specific crime of torture as required by the Convention leaves a gap in the application of its provisions that is not filled by any of the existing offences directed against violations of the bodily integrity or the dignity of the individual. Moreover, the absence of the specific offence of torture renders difficult the monitoring of the application of the Convention.") and para. 118 (a) (recommending "[t]he criminalization of torture, as defined in the Convention, by the creation of a specific crime or crimes giving effect to every aspect of it").

[41] The government has stated that Section 5 (1) of the Criminal Code is, "obviously, in line with article 5 of the Convention". Second periodic report of Cyprus to the Committee against Torture, U.N. Doc.CAT/C33/Add.1, 13 June 1997, para. 26.

[42] Law No. 235 of 1990 defines torture as a crime with the same definition as in Article 1 of the Convention against Torture. Initial report of Cyprus to the Committee against Torture, U.N. Doc. CAT/C/16/Add.2, 5 July 1993, para. 41. *See also* Concluding observations of the Committee against Torture concerning the second periodic report of Cyprus, U.N. Doc. A/53/44, 21 November 1997, para. 47 ("The Committee especially welcomes the way in which the Convention has been incorporated into the domestic law of Cyprus, in particular the Convention definition of "torture" itself.").

Republic, provided that the act is criminal in the place where it occurred and the suspects are not extradited:

> "Czech law shall also be applied to determine the punishability of an act committed abroad by an alien or a stateless person who is not a resident of the Republic, if:
>
> (a) the act is also punishable under the law in force in the territory where it was committed; and
>
> (b) the offender is apprehended on the territory of the Republic and is not extradited to a foreign State for criminal prosecution."[43]

Paragraph 2 of Section 20 provides that a person convicted pursuant to this provision may not be sentenced to a more severe punishment than that provided under the law of the place where the crime occurred.[44] In addition, Section 18 (1) (b) provides: "Czech law shall be applied to determine the punishability of an act committed abroad by a Czech citizen or stateless resident of the Republic."[45]

Second, in addition to other provisions giving courts custodial universal jurisdiction over crimes under Czech law that are crimes in the territorial state, Section 20a (1) of the Criminal Code provides:

> "Czech law shall also be applied to determine the punishability of an act when this is provided by a promulgated international treaty by which the Czech Republic is bound."[46]

The Czech Republic is a party to the Convention against Torture. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Torture is a crime under national law.[47] Statutes of limitation do not apply to torture (see Chapter Four, Section II).

· ***Democratic Republic of the Congo:*** The courts of the Democratic Republic of the Congo may exercise universal jurisdiction over conduct amounting to torture.

[43] Criminal Code, No. 140/1961, § 20 (1) (English translation in the initial report of the Czech Republic to the Committee against Torture, U.N. Doc. CAT/C/21/Add.2 (1994), para. 55). A similar translation appears, with a brief commentary, in *Criminal Code "Trestní zákon"* (Prague: Trade Links June 1999).

[44] Criminal Code, No. 140/1961, § 20 (2) (English translation in *Criminal Code "Trestní zákon"* (Prague: Trade Links June 1999).

[45] Criminal Code, Section 18 (1) (b) (English translation in the initial report of the Czech Republic to the Committee against Torture, U.N. Doc. CAT/C/21/Add.2 (1994), para. 53).

[46] Criminal Code, Section 20a (1) (English translation in the initial report of the Czech Republic to the Committee against Torture, U.N. Doc. CAT/C/21/Add.2 (1994), para. 54).

[47] Criminal Code, Sec. 259a. *See* Second periodic report of the Czech Republic to the Committee against Torture, U.N. Doc. CAT/C/38/Add.1, 22 June 2000, para. 12.

Article 3 of Book 1, Section 1 of the Penal Code of Zaire, which is still in effect, provides for universal jurisdiction over crimes punishable by more than two months' imprisonment (for the text and scope, see Chapter Four, Section II).

The Democratic Republic of the Congo is a party to the Convention against Torture. It has signed the Rome Statute, but as of 1September June 2001it had not yet ratified it. It does not appear to have defined torture as a crime under national law, so a prosecution for torture would have to be based on an ordinary crime, such as assault or rape.

· ***Denmark:*** There are several provisions of the Danish Penal Code of 1930 that give courts universal jurisdiction over certain conduct amounting to torture committed abroad (for the text and scope of these provisions, see Chapter Four, Section II), but the Director for Public Prosecutions (*rigsadvokaten*) and the Minstry of Justice have declined to open criminal investigations based on universal jurisdiction for persons outside Denmark suspected of torture abroad.

(1) Legislative provisions. First, Article 8 (5) of the Danish Penal Code provides for universal jurisdiction over violations of international treaties requiring Denmark to institute criminal proceedings.

Second, Article 8 (6) of the Penal Code provides for universal jurisdiction where transfer of the accused for legal proceedings in another country is rejected, and the act is committed within the territory recognized by international law as belonging to a foreign state is punishable with a sentence more severe than one year of imprisonment.

Third, Danish courts may exercise universal jurisdiction under Article 7 over alien residents for serious crimes committed outside the territory of any state and over nationals and residents of Nordic countries present in Denmark for crimes committed in a foreign state where the act also violated the law of the territorial state.

Denmark is a party to the Convention against Torture. It has ratified the Rome Statute, but it had not yet enacted implementing legislation as of 1 September 2001. As of May 1997, Denmark had not yet defined torture as a crime under national law, so prosecutions for torture abroad would have to be based on an ordinary crime, such as assault or rape.[48]

[48] Conclusions and recommendations of the Committee against Torture concerning the third periodic report of Denmark, U.N.Doc. A/52/44, 1 May 1997, para. 180 (expressing concern "that Denmark has still not introduced the offence of torture into its penal system, including a definition of torture in conformity with article 1 of the Convention") and para. 185 (reiterating "the recommendations it made during consideration of the first and second periodic reports of Denmark that it should incorporate into its domestic law provisions on the crime of torture, in conformity with article 1 of the Convention"). The Committee also expressed its concern that "there may still be some doubts as to the legal status of the Convention in domestic law, particularly with regard to the possibility of invoking the Convention before the Danish courts and the competence of the courts to apply its provisions ex officio." *Ibid.*, para. 179.

The government has stated that "[t]his provision [Article 8] establishes, *inter alia*, Danish jurisdiction in torture cases regardless of where the act was committed and irrespective of the offender's nationality."[49] In its second periodic report to the Committee against Torture in 1995, the government stated that Denmark had "established jurisdiction based on the principle of *aut dedere aut judicare* with a view to fulfilling the requirements as to jurisdiction under article 5".[50]

(2) Investigations. Following its second periodic report to the Committee against Torture, government officials held that there was no universal jurisdiction over the crime of torture which would permit opening a criminal investigation in a case involving a person outside Denmark suspected of torture abroad.

On 7 November 1998, 15 Danish residents, apparently with Chilean nationality, filed an information with the Director of Public Prosecutions alleging that the former President of Chile, Augusto Pinochet, was responsible for torture and other inhuman and degrading treatment in Chile during the period 1973 to 1988. They requested that Denmark institute a criminal investigation and seek his extradition from the United Kingdom. The Prime Minister of Denmark, Poul Nyrup Rasmussen, also requested the Minister of Justice, Frank Jensen, to study the possibility of asking for the extradition of the former head of state of Chile.[51]

However, according to the government, on 3 December 1998, the Director of Public Prosecutions stated that "he found no basis for requesting the extradition of Augusto Pinochet for prosecution in Denmark, as there is no Danish jurisdiction for the offences involved in the information."[52] The complainants appealed this decision to the Ministry of Justice, "which stated on 29 January 1999 that the Ministry found no basis for altering the decision of the Director of Public Prosecutions".[53] At the same time as this decision, the Ministry requested the Director of Public Prosecutions to seek further information about the matters contained in the information and, on the basis of this material, to consider whether to include the matters reported to a prosecution in another country. A report of an interrogation of one of the complainants was subsequently forwarded to the Spanish authorities and the Ministry stated that it is considering contacting the Chilean authorities concerning the prosecution of the former President.[54]

[49] Initial report of Denmark to the Committee against Torture, U.N. Doc. CAT/C/5/Add.4 (1988), para. 19.

[50] Second periodic report of Denmark to the Committee against Torture, U.N. Doc. CAT/C/17/Add.13 (1995), para. 10.

[51] *Primer Ministro Danés analiza posible demanda extradition*, 11 December 1998 (EFE).

[52] Fourth periodic report of Denmark to the Committee against Torture, U.N. Doc. CAT/C/55/Add.2, 21 September 2000, para. 33.

[53] *Ibid.*, para. 34. The decision "contains a detailed discussion of articles, 5, 6 and 7 of the Convention, including particularly article 5 (1) (c)". *Ibid.*

[54] *Ibid.*, paras 34-35. *See also* Peter Otken, *Correspondents' Reports - Denmark*, 3 Y.B. Int'l L. (2000) (forthcoming).

· ***East Timor:*** Special panels of the District Court in Dili, East Timor, which is expected to become independent in 2002 (see Chapter Four, Section II) have universal jurisdiction over torture.

Section 2.1 in Section 2 (Jurisdiction) of United Nations Transitional Administration in East Timor (UNTAET) Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences provides for universal jurisdiction over torture (for the text and scope, see Chapter Four, Section II). Section 7 of the Regulation, which defines torture, follows closely the definition in Article 1 of the Convention Against Torture. The Special Panel for Serious Crimes of the Dili District Court has stated that "torture . . . deserve[s] universal jurisdiction due [to] international customary laws and (more recently) international laws".[55]

· ***Ecuador:*** The courts of Ecuador may exercise universal jurisdiction over torture.

The Committee against Torture in its concluding observations in1992 on Ecuador's initial report noted that in "[r]eferring to Article 5 of the Convention, the [Ecuadorian] representative stated that Ecuadorian law could also apply to Ecuadorian nationals or aliens who committed acts of torture abroad but who had been arrested in Ecuador."[56]

Ecuador is a party to the Convention against Torture and the Inter-American Convention on Torture. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it (see Chapter Six).

· ***Egypt:*** It is possible that Egyptian courts may be able to exercise universal jurisdiction over torture, but the matter is not entirely free from doubt. According to the government of Egypt, the provisions of international treaties, including their jurisdictional provisions, are directly enforceable by Egyptian courts, although there appears to be no jurisprudence on this point (for a discussion of whether Egyptian courts may prosecute persons for crimes under international law committed abroad pursuant to treaties it has ratified in the absence of national legislation expressly providing for universal jurisdiction, see Chapter Four, Section II).[57]

[55] *Prosecutor v. Kasa*, Judgement, Case No. 11/CG/2000, Special Panel for Serious Crimes, Dili District Court, 9 May 2001.

[56] U.N. Doc. A/47/44 (1992), para. 88.

[57] During the Committee against Torture's examination of Egypt's second periodic report, in response to the Committee against Torture's request for clarification on certain parts of the initial report and expanding upon replies given in 1990, Mr Zahran of the Egyptian delegation explained that "[o]nce Egypt had acceded to the Convention against Torture, the text of the instrument had been published in the Official Gazette and its provisions had become applicable on the same footing as domestic law." Summary records of the 162nd meeting of the Committee against Torture on 12 November 1993, U.N. Doc. CAT/C/SR.162, 17 November 1993, para. 13. That afternoon, Mr Khalil of the Egyptian delegation further explained that, "Since Egypt had acceded to the Convention, the definition of torture contained in article 1 could be invoked in the Egyptian courts, so that, if there were any gaps in the legislation, the provisions of the Convention were there to fill them, and vice versa. The Convention was henceforth part of Egyptian legislation and was self-executing in Egypt, as the Court of Cassation had recently confirmed in several

judgements." Summary records of the 163rd meeting, 12 November 1993, U.N. Doc. CAT/C/SR.163/Add.1, 1 December 1993, para. 7.

In Egypt's third periodic report to the Committee against Torture, it states: The provisions of articles 6 to 9 [of the Convention against Torture] are deemed to be directly enforceable . . . . Hence, following Egypt's accession to the Convention, they constitute legislative principles which are directly enforceable in Egypt and binding on all the authorities to which they apply." Third periodic report of Egypt to the Committee against Torture, U.N. Doc. CAT/C/34/Add.11 (1999), para. 82. The government has stated that universal jurisdiction provision of treaties were incorporated into national law. Mr Zahran of the Egyptian delegation explained that "[u]nder article 151 of the Egyptian Constitution, international conventions, once they had been ratified and published in the Official Journal, became an integral part of Egyptian law." Summary records of the 382nd meeting on 7 May 1999, U.N. Doc. CAT/C/SR.382, 15 November 1999, para. 3. In response to a question by the Chair of the Committee against Torture during an examination of this report whether universal jurisdiction over torture was part of Egyptian law, including the principle of *aut dedere aut judicare, ibid.,* para. 12, Mr Khalil of the Egyptian delegation stated: "Egypt fully respected the provisions on universal jurisdiction of all international instruments to which it was a party, since those instruments were incorporated directly into national law." *Ibid.,* para. 15. For a dissenting view, see Chapter Four, Section II.

Egypt is a party to the Convention against Torture. Egypt has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Torture is a crime under national law.[58] However, the definition is more restrictive than the definition in Article 1 of the Convention against Torture. Prosecutions for torture are not subject to any statute of limitations.[59] Superior orders are not a defence to torture.[60]

· ***El Salvador:*** Article 10 of the 1998 Penal Code (*Código Penal*) of El Salvador provides courts with universal jurisdiction over crimes in national criminal law that affect "property internationally protected by specific agreements or rules of international law or seriously undermine universally recognized human rights". The Committee against Torture has welcomed this provision as a positive aspect of fulfilling El Salvador's obligations under the Convention against Torture.[61]

[58] Penal Code No. 57 of 1937, Arts 126, 282 (2) (cited in the supplementary report of Egypt to the Committee against Torture, U.N. Doc. CAT/C/34/Add.11, 28 January 1999, para. 44)

[59] Code of Criminal Procedure, No. 150 of 1950, Art. 15 (cited in *ibid.*, para. 56).

[60] Supplementary report of Egypt to the Committee against Torture, U.N. Doc. CAT/C/34/Add.11, 28 January 1999, paras 70-73.

[61] Conclusions and recommendations of the Committee against Torture concerning the initial report of El Salvador, U.N. Doc. A/55/44, 12 May 2000, para.158 (b) (citing as positive "[t]he attribution of jurisdiction to national courts for the judgement of offences affecting internationally protected property or universally recognized human rights, regardless of by whom and where such offences are committed").

El Salvador has ratified the Convention against Torture and the Inter-American Convention on Torture. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. As of May 2000, El Salvador had not yet defined torture adequately as a crime under national law, so prosecutions for certain aspects of torture may have to be brought for ordinary crimes, such as assault or rape, or may not be criminal at all.[62]

According to Article 99 of the Penal Code statutes of limitation do not apply to the crime of torture:

> "Offences shall not be time-barred in the following cases: torture, acts of terrorism, kidnapping, genocide, violations of the laws and customs of war, enforced disappearance of persons, political, ideological, racial, sexual or religious persecution, provided that the acts in question were committed after the entry into force of this Code."[63]

·***Estonia:*** Estonian courts may exercise universal jurisdiction over torture under several provisions of the 1992 Criminal Code and the new Penal Code, which enters into effect in 2002. Both legislative provisions are reinforced by the Constitution.

(1) Current Criminal Code. Section 5 (Validity of the present code in respect of acts committed outside the territory of the Republic of Estonia) of the current 1992 Criminal Code provides:

> "(1) A citizen of the Republic of Estonia, a citizen of a foreign country or a stateless person can be prosecuted under the present code for the act committed outside of Estonia:
>
> 1) if under an international treaty there has been presented a request to prosecute the offender and the act is punishable as a criminal offence in the place where it was committed or no criminal law of any country is in force in that place;
>
> . . . .
>
> (2) This code is in force in respect of acts committed outside the reach of the present code that are offences under the present code and the act is punishable as a criminal offence according to criminal law of the place it was committed or no criminal law of any country is in force in that place:
>
> 1) if the offender was a citizen of the Republic of Estonia or became a citizen of the Republic of Estonia after committing that act, or

[62] *Ibid.*, para.160 (expressing concern that "[t]he country's penal legislation does not adequately define the offence of torture in terms consistent with article 1 of the Convention. The type of offence referred to in the Penal Code does not cover all the possible objectives of the offence according to the Convention.") and para. 166 (recommending that "[t]he offence of torture should be defined in terms complying with article 1 of the Convention").

[63] Spanish text reads: "*No prescribe la pena en los casos siguientes: tortura, actos de terrorismo, secuestro, genocidio, violación de las leyes o costumbres de guerra, desaparición forzada de personas, persecución política, ideológica, racial, por sexo o religión, siempre que se tratare de hechos cuyo inicio de ejecución fuese con posterioridad a la vigencia del presente Código.*" (English translation in CAT/C/37/Add.4 p.29)

> 2) if the offender was a citizen of a foreign country or a stateless person and detained in Estonia and shall not be extradited to any other country.
>
> 3) Regardless of the law of the place where the act was committed, this code is in force in respect of acts which are punishable as criminal offences under an international treaty concluded by the Republic of Estonia even if the act is committed outside the borders of the Republic of Estonia."

(2) New Penal Code. A recently adopted new Penal Code, which will replace the current Penal Code when it enters into effect on 1 March 2002 provides under Section 8 (Validity of the penal law in respect of acts directed against internationally protected legal benefit):

> "Irrespective of the law of the place an act was committed Estonian penal law is in force in respect of the act committed outside Estonian territory if the punishability of the act derives from the international treaty binding for Estonia."

Estonia is a party to the Convention against Torture. It has signed the Rome Statute but it had not yet ratified it as of 1 September 2001.

· ***Ethiopia:*** Ethiopian courts can exercise universal jurisdiction over torture.

Article 17 (1) (a) of the Penal Code of 1957 provides courts with universal jurisdiction over offences against international law, international offences specified in Ethiopian legislation or an itnernational treaty ratified by Ethiopia, and Article 18 (2) gives the courts universal jurisdiction over other serious crimes in the Penal Code (for the text and scope of these provisions, see Chapter Four, Section II).

Ethiopia is a party to the Convention against Torture. It has not signed the Rome Statute and, as of 1 September 2001 it had not yet ratified it. It does not appear to have defined torture as a crime under national law, but Article 17 (1) (a) would permit a prosecution based on universal jurisdiction directly under international law. This provision is supplemented by the Federal Courts Proclamation No. 25 of 1996 giving Ethiopian courts jurisdiction over offences against the law of nations, which would, of course, include torture (for the text, see Chapter Four, Section II). The Constitution provides that statutes of limitation do not apply to torture.[64]

· ***Federal Republic of Yugoslavia:*** National courts may exercise universal jurisdiction over conduct amounting to torture when it also violates national law, such as assault or rape. Article 107 (2) of the Criminal Code of Yugoslavia of 1976 provides for custodial universal jurisdiction over any crime punishable by at least five years' imprisonment.

[64] Constitution, Art. 28 (1). That article states:

"Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ."

The Federal Republic of Yugoslavia is a party to the Convention against Torture. However, it does not appear to have made torture a crime under national law, therefore, prosecutions for conduct amounting to torture would have to be based on ordinary crimes, such as assault or rape.[65]

· ***Finland:*** Finnish courts may, under three separate provisions (for the text and scope, see Chapter Four, Section II), exercise universal jurisdiction over certain conduct amounting to torture.

According to the government, Article 7 (1) of the Finnish Penal Code, as amended in 1996, "provides that Finnish law always applies to international offences regardless of where they have been committed" and "[t]he Decree relating to the section further provides that the offences referred to in the Convention against Torture are international offences."[66] A decree has provided that certain forms of torture are international offences.[67]

Second, paragraphs 1 and 3 of Section 6 (Offence committed by a Finn) of Chapter 1 provide that Finnish law applies to persons resident in Finland at the time of the offence or at the beginning of the trial and to persons found in Finland who are citizens or permanent residents of Nordic countries at the start of the trial.

Third, Section 8 (Other offence committed outside of Finland) of this chapter states that Finnish law applies to offences carrying a penalty of more than six months if the territorial state has requested prosecution or requested extradition and it was refused.

Finland has ratified the Convention against Torture and the Rome Statute. As of November 1999, it had not yet not expressly defined torture as a crime under national law, so prosecutions for torture would have to be brought for ordinary crimes, such as assault or rape.[68]

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[65] Conclusions and recommendations of the Committee against Torture, U.N. Doc. A/54/44, 16 November 1998, para. 44 (expressing concern about "the absence in the criminal law of Yugoslavia of a provision defining torture as a specific crime in accordance with article 1 of the Convention"), 51 (recommending "the verbatim incorporation of the crime of torture into the Yugoslav criminal codes").

[66] Third periodic report of Finland to the Committee against Torture, U.N. Doc. CAT/C/44/Add.6, 12 February 1999, para. 30 (noting that the Act incorporating the amended Article 7 (1) and the Decree entered into force on 1 September 1996).

[67] Decree on the application of Chapter 1, section 7 of the Penal Code (627/1996). Section 1 provides: "For the purposes of Chapter 1, section 7 of the Penal Code, the following offences shall be considered international crimes: . . . 9) Such torture for the purpose of obtaining a confession, and assault or aggravated assault, which must be considered torture within the meaning of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (FTS 60/1989)[.]" (English translation *obtainable from* <http://www.icrc.org/ihl-nat>).

[68] Conclusions and recommendations of the Committee against Torture considering the third periodic report of Finland, U.N. Doc. A/55/44, Paras. 51-55, 12 November 1999, para. 54 (a) (expressing concern about "[t]he lack of a definition of torture, as provided in article 1 of the Convention, in the penal legislation of the State party and the lack of a specific offence of torture punishable by appropriate penalties, as required by article 4, paragraph 2, of the Convention") and para. 55 (a) (recommending that "Finland establish adequate penal provisions to make torture as

defined in article 1 of the Convention a punishable offence in accordance with article 4, paragraph 2, of the Convention").

· ***France:*** There are two legislative provisions that permit French courts to exercise custodial universal jurisdiction over certain conduct amounting to torture. They should be read against the backdrop of the French Constitution. Article 55 of the Constitution provides that "[t]reaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party."[69]

(1) Constitution and legislation. There are two bases for universal jurisdiction over torture. Both are reinforced by Article 55 of the Constitution, which states that "[t]reaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party."[70] However, as explained below, French courts have not treated these constitutional provisions as authorizing them, in the absence of legislation, to implement the jurisdictional provisions of international humanitarian law or other international treaties or customary international law.

Article 689 of the Criminal Procedure Code. Article 689 of the Criminal Procedure Code (*Code de procédure pénal*), provides:

> "The authors of and accomplices in offences committed outside the territory of the Republic may be prosecuted and tried in French courts when, pursuant to the provisions of the Criminal Code, Book 1, or of another legislative instrument, French law is applicable or when an international convention gives French courts jurisdiction to deal with the matter."[71]

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[69] The original French text of Article 55 reads:
"Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois sous réserve, pour chaque accord ou traité, de son application par l'autre partie."
(English translation in Vlad G. Spitzer, *France,* in Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. June 1998).

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[71] Code of Criminal Procedure, as amended by the Act of 16 December 1992, Art. 689 (English translation in the second periodic report of France to the Committee against Torture, U.N. Doc. CAT/C/17/Add.18, 8 October 1997, para. 54. The original French text of Article 689 provides:
"Les auteurs ou complices d'infractions commises hors du territoire de la République peuvent être poursuivis et jugé par les juridictions françaises soit lorsque, conformément aux dispositions du livre 1er du Code pénal ou d'un autre texte législatif, la loi française est applicable, soit lorsqu'une convention internationale donne compétence aux juridictions françaises pour connaître de l'infraction."
Code de procédure pénale (Paris: Litec 9e ed. 1996/1997), art. 689-1 (L. n. 92-1336, 16 déc. 1992, art. 61 ;L. n. 93-913, 19 juill. 1993), art. 689.

However, this provision alone is insufficient to give French courts jurisdiction over torture within the definition of Article 1 of the Convention against Torture. There are specific articles providing for universal jurisdiction over torture. Articles 689-1 and 689-2 of the *Code de procédure pénale* (Code of Criminal Procedure) provide for universal jurisdiction over persons responsible for torture who are found in France. Article 689-1 states:

> "Pursuant to the international conventions referred to below [in Articles 689-2 to 689-7], any person who renders himself guilty outside the territory of the Republic of any of the offences enumerated in those articles may, if in France, be prosecuted and tried by French courts. This article shall apply to attempts to commit any of those offences whenever such attempts are punishable[.]"[72]

Article 689-2 provides:

> "For the purposes of the application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted at New York on 10 December 1984, any person may be prosecuted and tried under the conditions stated in article 689-1."[73]

[72] Code of Criminal Procedure, as amended by the Act of 16 December 1992, entered into force on 1 March 1994, Art. 689-1 (English translation in the second periodic report of France, *supra,n.71* para. 56. The original French text of Article 689-1 provides:

> *"En application des conventions internationales visées aux articles suivants, peut être poursuivie et jugée par les juridicitions françaises, si elle se trouve en France, toute personne qui s'est rendue coupable hors du territoire de la République de l'une des infractions énumerées par ces articles. Les dispositions du présent article sont applicables à la tentative de ces infractions, chaque fois que celle-ci est punissable."*

Code de procédure pénale (Paris: Litec 9e ed. 1996/1997), art. 689-1 (L. n. 92-1336, 16 déc. 1992, art. 61 ;L. n. 93-913, 19 juill. 1993), art. 689-1.

[73] The original French text of Article 689-2 reads:

> *"Pour l'application de la convention contre la torture et autre peines ou traitements cruels, inhumains ou dégradants, adoptée à New York le 10 décembre 1984, peut être poursuivie et jugée dans le conditions prévues à l'article 689-1 toute personne coupable de tortures au sens de l'article 1er de la convention."*

Code de procédure pénal (Paris: Litec 9me ed.1996/1997), art. 689-2 (L. n. 92-1336, 16 déc. 1992, art. 61 ; L. n. 93-913, 19 juill. 1993).

However, Article 222-1 of the *Code pénal* (Penal Code), prohibiting torture, does not contain a definition, however the official circular published when it was enacted into law indicates that it was intended to cover all acts within the definition of Article 1 of the Convention against Torture and acts of torture by persons not linked to public officials.[74] Article 222-1 has been criticized by the Committee against Torture for the absence of a definition consistent with that in Article 1 of the Convention against Torture.[75] Another serious problem with French legislation concerning torture is that statutes of limitations apply to torture.[76]

Article 113-6. A second basis in French law for universal jurisdiction over conduct amounting to torture is Article 113-6 of the Penal Code (*Code pénal*), which permits French courts to try persons for crimes under French law committed abroad in the rare case when the person subsequently becomes a French national (for the text of this provision, see Chapter Four, Section II).

(2) Court decisions and criminal investigations - French courts have limited the effectiveness of universal jurisdiction over torture and other crimes under international law by requiring that the suspect be found in France before an investigating judge can take any action at all to investigate allegations of torture abroad.

Javor. In 1994, a French investigating judge (*juge d'instruction*) in the *Javor* case held that the requirement in Article 689-1 that persons suspected of crimes, such as torture, listed in Articles 689-2 to 689-7 be found in France permitted the court to undertake a preliminary inquiry before the suspect entered the country. After stating that the suspect must be identified and the charges determined before the suspect was arrested in France or extradition requested, Judge Getti concluded that all acts of the preliminary inquiry (*actes d'instruction*) could be undertaken without the presence of the suspect in France.[77] The *Cour d'appel de Paris* (Court of Appeal of

[74] Article 222-1 provides:

"The act of subjecting a person to torture or barbarous acts is punishable by 15 years in prison." (English translation by Amnesty International).

The original French text reads:

"Le fait de soumettre une personne à des tortures ou à des actes de barbarie est puni de qunze ans de réclusion criminelle."

Code pénal, art. 222-1. For the circular, see *Circ. 14 mai 1993, nº [153]ss.727-3.* Some further insight into the scope of conduct falling within the definition of torture and barbarous acts under French law can be found in the *Ely Ould Dah* case (see below in this entry). Although the term *barbarie* was used by Rafaël Lemkin in his two-part definition of the crime which later was defined as genocide, it is not clear that there is any link between the two concepts.

[75] Conclusions and recommendations of the Committee against Torture - France, May 1998, U.N. Doc. A/53/44, 27 May 1999, para. 143 (a) (expressing concern about "[t]he absence, in French positive law, of a definition of torture which conforms fully with article 1 of the Convention") and 144 (recommending adoption of a definition of torture consistent with Article 1).

[76] *Code de procédure pénal (Paris: Litec 1996/1997), art. 7, L. n. 1336, 16 déc. 1993, art. 7, L. n. 93-913, 19 juill. 1993.* See also the discussion of prescription in the *Ely Ould Dah* case below in this entry.

[77] In re *Javor, Tribunal de grande instance de Paris, Ordonnance,* 6 May 1994 (Getti, J.), 4.

Paris) reversed and concluded that French courts could not exercise universal jurisdiction as long as the suspect was not in France, not even the jurisdiction to determine where the suspect was located.[78] The *Cour de cassation* (Court of Cassation) affirmed this restrictive interpretation.[79]

The very restrictive interpretation by the *Cour d'appel* and the *Cour de cassation* in the *Javor* case of the requirement in Article 689-1 of the Criminal Procedure Code that the suspect be "found in France" before the court can even open an investigation causes serious problems for victims seeking to constitute themselves as *parties civiles*, since they do not have the same resources as a prosecutor or investigating judge (*juge d'instruction*) to locate and verify the presence of a suspect, who often may be in hiding. Indeed, locating suspects is a burden for the prosecutor or investigating judge, even with the resources of the *police judiciaire* (police operating under their instruction). This restrictive interpretation also prevents French courts from requesting extradition of a person suspected of torture or other crimes under international law who is abroad.

[78] *Javor, Dossier N° A 94/02071, Arrêt, Cour d'appel de Paris,* 24 November 1994.

[79] *Javor, Arrêt, no. 132, Cour de cassation, chambre criminelle, 26 mars 1996, 1996 Bulletin des Arrrêts de la Cour de Cassation, Chambre Criminelle, nos. 1-6, 379.*

Jean-Claude (Baby Doc) Duvalier, Kalinda and Zigiranyirazo. A number of other efforts to have criminal investigations opened concerning Jean-Claude (Baby Doc) Duvalier, former President of Haiti, widely believed to be in France, and persons suspected of torture in Rwanda failed because of the restrictive interpretation in the *Javor* case.[80]

Munyeshyaka. Nevertheless, despite the restrictive interpretation in the *Javor* case, French courts have exercised universal jurisdiction over persons accused of torture in other countries who have been found in France. On 26 July 1995 an investigating judge of the *Tribunal de Grande Instance de Privas* issued an arrest warrant against Wenceslas Munyeshyaka on charges of torture and other crimes. On 20 March 1996, the *Cour d'appel de Nîmes* in 1996 reversed this decision on the ground that jurisdiction had to be predicated on the most serious charges, genocide and complicity in genocide, and since it found that there was no universal juridiction under French law over these crimes, there could be no jurisdiction over the lesser crime of torture.[81] On 22 May 1996, the legislation providing for cooperation with the Rwanda Tribunal and for universal jurisdiction over crimes listed in its Statute was enacted.[82] On 6 January 1998, the *Cour de cassation* reversed. As described above in Chapter Four, Section II, it stated that 22 May 1995 law gave French courts jurisdiction over crimes listed in the Rwanda Statute if committed in Rwanda and that Article 689-2 gave French courts jurisdiction over torture.[83] It reassigned the case to the *Cour d'accusation de la Cour d'appel de Paris* for trial.

Ely Ould Dah. On 4 June 1999, the *Ligue des droits de l'homme* (LDH) and the *Féderation internationale des Ligues des droits de l'homme* (FIDH) initiated a procedure to open an inquiry (*information judiciare*) with the prosecutor (*procureur de la République*) of the *Tribunal de Montpellier* (court of Montpellier) against a Mauritanian army lieutenant, Ely Ould Dah, then participating in a training course with the French army. He was placed under investigation (*mis en examen*) by the *Chambre d'accusation de la Cour d'appel de Montpellier* (Indicting chamber of the Court of Appeal of Montpellier) based on allegations by two former prisoners that he had been responsible for torturing them at the Jreïda prison near Noukchott in 1990 and 1991. He was remanded in custody on 2 July 1999.

[80] *See Kalinda, Plainte* (complaint) (*Tribunale de grande instance de Paris*) (filed 4 July 1994); *Depaquier contre Zigiranyirazo, Plainte* (*Tribunale de grande instance de Paris*) (filed 19 July 1994) and *Ordonnance* (order), 23 February 1995.

[81] *Wenceslas Munyeshyaka, La Chambre d'Accusation de la Cour d'appel de Nîmes, Arrrêt,* 20 March 1996.

[82] *Loi n. 96-432 du 22 mai 1996.* For the text of the relevant part of this legislation, see Chapter Four, Section. II.

[83] *Wenceslas Munyeshyaka, La Chambre criminelle, Cour de cassation, Arrêt*, 6 January 1998, reprinted in 102 *Revue générale de Droit international public* 825 (1998/3). An English translation by Louise Wesseling Plug of part of the decision by the *Cour de cassation* appears in 1Y.B. Int'l Hum. L. 598 (1998).

After the French Foreign Minister intervened in the case by sending a letter to the *Parquet Général de Montpellier* (Prosecutor of Montpellier), the suspect was released under judicial supervision (*contrôle judiciaire*) on 28 September 1999. In January 2000, the suspect's lawyers filed a request to dismiss the case, which was argued on 17 February 2000 and rejected by the court on 14 March 2000. Three weeks later, on 5 April 2000, the suspect fled back to Mauritania. An investigation was opened into the circumstances of his flight and the file (*dossier*) was returned to the prosecutor on 30 June 2000.[84]

On 25 May 2001, the court, in a decision by the investigating judge, Jean-Louis Lesaint, determined that the French court could exercise universal jurisdiction over the suspect. The court held that the Convention against Torture has been integrated into French law (*intégrée au droit positif français*) since 9 November 1987, the date that the Convention had been published in the Official Journal (*Journal Officiel*):

> "Article 5, paragraph 2 of the Convention establishes a law for states to exercise jurisdiction over acts of torture, as this term is defined in Article 1, over the suspect found in its territory.
>
> Article 7 provides that a person thus found in the territory of a state, if he is not extradited, is to be prosecuted according to the rules of procedure and applicable principles under the internal law of that state.
>
> Article 689-2 introduced in the Code of Criminal Procedure by the law of 30 December 1985, incorporated in French law that principle of universal jurisdiction by authorizing prosecutions and trial in France of anyone found here and who was responsible, abroad, for acts qualified as felonies (*crimes*) or misdemeanours (*délits*) which constitute torture within the meaning of the Convention.
>
> Articles 689-1 and 689-2 of the Code of Criminal Procedure repeats this principle.

[84] This account is based upon a number of sources, including the following publications of FIDH, all obtainable from <http://www.fidh.org>: *Affaire Ely Ould Dah (n.d.); Communiqué: Mauritanie : Un Lieutenant mauritanien arrêté en France pour crime de tortures, 5 juillet 1999 ; Communiqué: Mauritanie : La Chambre d'accusation de la Cour de Montpellier a décidé de remettre en liberté, sous contrôle judiciaire, le Capitaine Ely Ould Dah, mis en examen du chef de torture, 28 septembre 1999*.

Article 693 gives the investigating judge of Montpellier jurisdiction in that Ely Ould Dah has regularly resided here, since August 1998, undergoing advanced military training in the School of the Army Commissariat."[85]

The court clarified the scope of conduct covered by the terms, torture and barbarous acts, in Article 222-1 of the Penal Code. This conduct included both torture and barbarous acts alone and, when they were aggravating circumstances in other crimes, such as murder (*assassinat*), listed in Article 303 of the Penal Code, and cases of physical torture (*tortures corporelles*) inflicted on a person unlawfully arrested, detained or confined (*illegalement arrêtée, détenue ou séquestrée*), as covered by Articles 344 and 341 of the Penal Code.[86] They also included:

"Exceptionally serious violent behaviour, resulting in acute suffering or pain, carried out with the intention of denying the victim their human dignity and accompanied by a threat to life, physical integrity or security of the person, was punishable by French criminal law prior to 1 March 1994."[87]

[85] *Ely Ould Dah, supra,n.84 § 1.* The original French text reads:

"L'article 5, paragraphe 2, de la convention institue un droit pour les Etats de connaître des infractions de torture, tel que ce terme est défini dans l'article 1er, contre l'auteur présumé trouvé sur son territoire.

L'article 7, dispose que la personne ainsi découverte sur le territoire d'un Etat, si elle n'est pas extradée, est poursuivie selon les règles de procédure et de fond applicables dans le droit interne de cet Etat.

L'article 689-2 a introduit dans le Code de Procédure Pénale par la loi du 30 décembre 1985 a transposé en droit français cette règle de compétence universelle en autorisant les poursuites et le jugement en France de quiconque y est trouvé et se serait rendu coupable, à l'étranger, de fait qualifiés crime ou délit qui constituent des tortures au sens de la convention.

Les articles 689-1 et 689-2 actuels du Code de Procédure Pénale reprennent ce principe.

L'article 693 donne compétence au juge d'instruction de MONTPELLIER en ce que Ely OULD DAH y résidait régulèrement, depuis août 1998, dans le cadre d'une formation militaire supérieure aux Ecoles du Commissariat de l'Armée de Terre (ECAT)."

Ely Ould Dah, Tribunal de grande instance de Montpellier, Ordonnance, Nº du parquet : .99/14445, Nº Instruction : .4/99/48, 25 mai 2001, § 1, Vice-président chargé d'instruction, M. Jean-Louis Lesaint. The full text of the decision is not publicly available; the citations are to an unpaginated version made available by FIDH, with portions deleted to protect the identity of victims and witnesses.

[86] *Ibid., § 2.*

[87] *Ibid., § 2.* (English translation by Amnesty International). The original French text reads:
"Les comportements de violences d'une gravité exceptionnelle, occasionnant une souffrance ou une douleur aiguë, don't les auteurs se rendaient coupables avec la volonté de nier la dignité humaine de leur victime, étaient en consequence avant le 1er mars 1994 incriminés par le droit pénal français, lorsqu'ils accompagnaient un atteinte à la vie, à l'integrité physique ou à la liberté de la personne."

The court held that the acts alleged in the complaint, which included intentional violence leading to total incapacity of the victims to work, injuries and the death of victims, constituted torture under French law and Article 1 of the Convention against Torture.[88] The court implicitly recognized that French law on prescription applied to acts of torture.[89] However, it held that a 1993 Mauritanian law granting an amnesty for crimes committed by members of the armed and security forces between 1 January 1989 and 18 April 1992 was not binding on French courts:

> "Whatever the legitimacy of such an amnesty, in the framework of a local politics of reconciliation, that law has no effect except on the territory of the state concerned and it is not binding on third countries, within the framework of the application of international law.
>
> It has, therefore, no effect on a prosecution in France."[90]

The court added that as party to the Convention against Torture, France could not be bound by statutes of limitation or amnesties of other countries applicable to torture:

> "Therefore, France, as a state party to the Convention [against Torture], has jurisdiction over acts within the scope of the Convention not prescribed or subject to an amnesty in France, whatever may be the effect in Mauritania of the current acusations of torture, their prescription or the amnesty."[91]

Khaled Nezzar. On the morning of 25 April 2001, the parents of a detainee who reportedly died under torture in Algeria and two former detainees who said that they had been tortured, one at a prison in Bida and the other in a police station at Alger-Caignac and later at a military

[88] *Ibid., § 3* (*"violences volontaires executées avec tortures ou actes de barbarie, ayant pu entrâiner des incapacités totales de travail personnel, des infirmités, voire la mort des victimes"*); *Ibid., § 4 ("En l'état des témoignages circonstanciés et concordants, corroboré par des expertises médico-légales et des photographies des séquelles de blessures, les faits de violences, graves en ce qu'elles ont été commises avec acharnement, cruauté, usage de supplices tels la suspension par les membres, la noyade ou l'ensevelissement, qui sont reprochés à Ely OULD DAH pour les avoir commandés ou y avoir personnellement participé, sont constitutifs de tortures ou actes de barbarie au sens de l'article 222-1 du Code Pénal."*

[89] *Ibid., § 4.* It stated that the ten-year period of limitations for crimes did not apply to the facts of the case since the investigation had been opened before it had expired.

[90] *Ibid.* The original French text reads:

"Quelle que soit le légitimité d'une telle amnistie, dans le cadre d'une politique locale de réconciliation, cette loi n'a d'effet que sur le territoire de l'Etat concerné et n'est pas opposable aux pays tiers, dans le cadre de l'application du droit international.

Elle n'a en conséquence aucune incidence sur l'action publique pour l'application de la loi en France."

[91] *Ibid.* The original French text reads:

"Il appartient donc à la FRANCE, comme Etat signataire de la convention de New York, de se saisir des faits non prescrits ni amnistiés en FRANCE susceptibles dans le champ d'application de cette convention, quels que puissent être, en M AURITANIE, les incriminations existantes en matière de torture, leur délai de prescription ou leur amnistie."

detention centre at Aïu Amguel, filed a complaint (*plainte*) at the office of François Cordier, Chief of the Fourth Section of the Office of the Paris Prosecutor (*la quatrième section du parquet de Paris*). The complaint accused a former Algerian defence minister and member of the High Committee of State (*Haut Comité d'Etat*), Khaled Nezzar, of torture in Algeria. The French Ministry of Foreign Affairs said, in response to a press inquiry, that General Nezzar was on an official mission in France, although he reportedly had no meetings planned with French officials, and the Algerian embassy said that he was carrying a diplomatic passport.

The prosecutor promptly opened a preliminary investigation (*enquête*) the same afternoon, but the suspect left a few hours later, after the meeting to promote his book, on a privately charted aircraft.[92] For further details about this case see Chapter Two, Section VI.D.

· ***Georgia:*** Georgian courts may exercise universal jurisdiction over torture pursuant to three provisions in the Criminal Code of 1999 (for the text and scope of these provisions, see Chapter Four, Section II).[93]

First, paragraph 1 of Article 5 (Criminal responsibility for a crime committed overseas) of the Criminal Code of Georgia provides universal jurisdiction over aliens permanently resident in Georgia who commits acts abroad which are crimes under the Code, as well as crimes under the law of the territorial state.[94]

Second, Article 5 (2) permits national courts to exercise universal jurisdiction over aliens permanently resident in Georgia who commit acts abroad which are crimes under the Code and under international undertakings, even if not crimes under the law of the territorial state.

Third, Article 5 (3) provides universal jurisdiction over foreigners and stateless persons not permanently resident in Georgia who have committed a serious crime within the meaning of Georgia's international undertakings.[95]

[92] This account of the case is based on information from a number of sources, including the following press accounts: *Florence Beaugé, Le départ, précipité du général Nezzar provoque les protestations des défenseurs des droits de l'homme, Le Monde, 28 avril 2001.*

[93]The government has explained with respect to the substantially similar predecessor of Article 5 of the current Penal Code, that "acts of torture are considered by Georgian legislation to be universal crimes, irrespective of the nationality of the guilty party and/or the victim, and that they inevitably entail criminal liability." *Ibid.*, para. 77.

[94]According to the government, under Article 6, Part I of the pre-1999 Criminal Code (the previous version of Article 5 (1) and (2)), "foreigners and stateless persons permanently resident in the Republic, who have committed crimes outside Georgia, shall be liable under this Code should a criminal prosecution be in course against them or should criminal proceedings be brought against them in Georgian territory and should they not have been punished by the verdict of a foreign state" Initial report of Georgia to the Committee against Torture, U.N. Doc. CAT/C/28/Add.1, 17 June 1996, para. 75.

[95]In addition, according to the government, under Article 6, Part II of the Criminal Code (the previous version of Article 5 (3)), "[f]oreign nationals, and also stateless persons, not permanently resident in Georgia, shall be liable under the Criminal Code for crimes committed outside Georgia only in those instances for which provision is made in international law and if proceedings have been initiated against them in Georgia . . .". *Ibid.*, para. 76.

Georgia is a party to the Convention against Torture. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Torture is a crime under national law.[96]

· ***Germany:*** German courts may exercise universal jurisdiction pursuant to two provisions in the Penal Code over certain conduct amounting to torture (for the text and scope, see Chapter Four, Section II).

Article 6 (9) of the Penal Code provides that German criminal law applies to acts which, on the basis of a treaty binding on Germany, are to be prosecuted even when they have been committed abroad. Germany has ratified the Convention against Torture. However, as of 11 May 1998, it had not defined torture as a crime under national law so prosecutions based on universal jurisdiction for torture would have to be based on ordinary crimes, such as assault or rape; in addition, defences and principles of criminal responsibility for torture appear to be inconsistent with international law.[97] The working group that has prepared draft legislation to implement the Rome Statute did not include individual cases of torture that do not amount to war crimes or crimes against humanity in the *Entwurf eines Völkerstrafgesetzbuch* (EGVStB), Draft of a law for the introduction of a Code of Crimes under International Law (see Chapter Four, Section II).

· ***Greece:*** Greek courts may exercise universal jurisdiction over torture.

[96] Criminal Code of 1999, Art. 126 (Torture). The Committee against Torture has recommended that "the State party amend its domestic penal law to include a definition of torture which was fully consistent with the definition contained in article 1 of the Convention, and provide for appropriate penalties". Committee against Torture concludes its Twenty-Sixth Session, Round-up, Press release, 18 May 2001.

[97] Concluding observations of the Committee against Torture on the second report of Germany, U.N. Doc. A/53/44, 111 May 1998, para. 185 (Although the Committee against Torture has stated that Section 340 of the German Criminal Code and the Act on the Suppression of Crime of 28 October 1994 "would seem to cover most incidents of torture, statistical coverage of the incidence of torture, aggravated forms of torture with specific intent (dolus eventualis) and incidents causing severe mental pain or suffering ("mental torture" insofar as not covered by article 343 of the German Penal Code) are not covered by current legislative provisions, as required by the Convention. Likewise, it is not absolutely clear that all exculpation by justification and superior order is categorically excluded as required by the Convention.") and 190 (recommending that Germany "adopt the precise definition of the crime of torture foreseen by the Convention and integrate it into the internal German legal order (art. 4, para. 2, of the Convention)").

Article 8 (k) of the Penal Code provides that Greek criminal legislation applies to non-nationals irrespective of the law of the place where crimes were committed where treaties ratified by Greece provide that Greek legislation should apply (for the text and scope, see Chapter Four, Section II). Torture is a crime under national law.[98] The Convention against Torture is part of national law and takes precedence over all domestic legislation.[99] Superior orders are not a defence to torture.[100]

· ***Guatemala:*** Guatemala courts may exercise universal jurisdiction over certain conduct amounting to torture.

Paragraph 5 of Article 5 (Extraterritoriality of criminal law) of the Penal Code provides that the Guatemalan Penal Code applies to any offence, which by virtue of a treaty, is punishable in Guatemala, even if committed outside the country (for the text and scope of this provision, see Chapter Four, Section II). The government cited this provision to the Committee against Torture in the section of its report concerning implementation of Article 5 of the Convention against Torture, so it appears to consider that this provision fully satisfies its obligations under that article.[101]

Guatemala is a party to the Convention against Torture and the Inter-American Convention on Torture. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. Torture is a crime under national law, but the definition is not fully consistent with Article 1 of the Convention against Torture.[102]

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[98] Act No. 1,500 of 1984, Art. 1 (2). *See* initial report of Greece to the Committee against Torture, U.N. Doc. CAT/C/7/Add.8, para. 12. This act included the crime of torture in Articles 137A to 137D of the Criminal Code.

[99] Initial report of Greece to the Committee against Torture, U.N. Doc. CAT/C/7/Add.8, para. 32 ("As of the date of publication in the Official Journal of Act No. 1782/88 on the ratification of the Convention against Torture, all persons subject to Greek law as well as law-enforcement agencies are under an obligation to comply with its provisions."), para. 33 ("The Convention cannot be repealed, amended, restricted or changed by any law because, once an international convention has been ratified, it takes precedence over any conflicting legal provision, in accordance with article 28 of the 1975 Greek Constitution.").

[100] Criminal Code, Art. 137D, paras 1 & 2. Paragraph 3 of Article of Law 1782/1988, the law on ratification of the Convention against Torture, contains a similar prohibition of the defence of superior orders to torture.

[101] Third periodic report of Guatemala to the Committee against Torture, U.N. Doc. CAT/C/49/Add.2 , 21 June 2000, para. 32.

[102] In May 1998, the Committee against Torture criticized "[t]he faulty definition of the crime of torture in article 201-A of the Penal Code, which is inconsistent with article 1 of the Convention". Concluding observations of the Committee against Torture on the second periodic report of Guatemala, U.N. Doc. A/49/44, 27 May 1998, para. 164 (e). It urged the "[h]armonization of article 201-A of the Penal Code with the definition of torture contained in article 1 of the Convention." *Ibid.*, para. 165 (f). On 8 June 1998, in response to this criticism, the Presidential Commission for Coordinating Executive Policy in the field of Human Rights sent the Private Secretary of the Office of the President a note containing a proposal for amending the definition of torture, to be numbered Article 201 *bis*. (Third periodic report of state parties due in 1999 to the Committee against Torture, Guatemala. U.N. Doc.

CAT/C/49/Add.2 (21 June 2000), para. 156-157). Nevertheless, the Committee criticized this article, after it became law pursuant to Decree No. 58-95 of 10 August 1995. Conclusions and recommendations of the Committee against Torture concerning the third periodic report of Guatemala, U.N. Doc. CAT/C/XXV/Concl/6, 6 December 2000, para.7 (d) (expressing concern about "[t]he inadequate definition of the offence of torture in article 201 *bis* of the Penal Code, as already pointed out by the Committee during its consideration of the second report") and para. 9 (a) (reiterating its previous recommendations to amend "the provisions of the Penal Code, especially articles 201 *bis* and 425, to bring the definition of the offence of torture and its punishment into line with articles 1 and 4 of the Convention).

The original text in Spanish of relevant articles on torture in Guatemala read as follows:
"Artículo 201 bis. Tortura. Comete el delito de tortura quien por orden, con la autorización el apoyo o aquiescencia de las autoridades del Estado, infrinja intencionalmente a una persona, dolores o sufrimientos, físicos o mentales, con el fin de obtener de ella o de un tercero información o confesión, por un acto que haya cometido, o que persiga intimidar a una persona o, por ese medio, a otras personas. Igualmente cometen el delito de tortura los miembros de grupos o bandas organizadas con fines terroristas insurgentes, subversivos o de cualquier otro fin delictivo. No se consideran torturas las consecuencias de los actos realizados por autoridad competente en el ejercicio legítimo de su deber y en el resguardo del orden público. El o los responsables del delito de tortura serán sancionados con prisión de veinticinco a treinta años."
"Artículo 425:
Abuso contra particulares. El funcionario o empleado público que ordenare apremios indebidos, torturas, castigos infamantes, vejaciones o medidas que la ley no autoriza, contra presos o detenidos, será sancionado con prisión de dos a cinco años e inhabilitación absoluta. Igual sanción se aplicará a quienes ejecutan tales órdenes."
"Artículo 85 Código Procesal Penal:
"Métodos prohibidos para la declaración. El sindicado no será protestado, sino
simplemente amonestado para decir la verdad. No será sometido a ninguna clase de coacción, amenaza o promesa, salvo en las prevenciones expresamente autorizadas por la ley penal o procesal. Tampoco se usará medio alguno para obligarlo, inducirlo o determinarlo a declarar contra su voluntad, ni se le harán cargos o reconvenciones tendientes a obtener su confesión."

· ***Honduras:*** Honduran courts may exercise universal jurisdiction over certain conduct amounting to torture.

Article 5 (5) of the *Código Penal* (Penal Code) states that national courts have universal jurisdiction to try persons who are present in the country for crimes committed outside the country when it is permitted by international treaties or when the crime is in grave violation of universally recognised human rights. A draft bill to modify this article was proposed in June 2000 (for the text and scope of Article 5 (5) and the proposed amendment, see Chapter Four, Section II).

Honduras is a party to the Convention against Torture and it has signed the Inter-American Convention on Torture, but as of 1 September 2001 it had not yet ratified it. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it.

Honduras has defined torture as crime under national law.[103] The June 2000 proposal would include it as a crime in the Penal Code.[104]

· ***Hungary:*** Two legislative provisions permit Hungarian courts to exercise universal jurisdiction over certain conduct amounting to torture committed abroad, and it is possible that the courts may also do so directly, based on the incorporation of international law under the Constitution (for the text and scope of these provisions, see Chapter Four, Section II).

Section 5 (a) of the 1961 Hungarian Penal Code permits national courts to exercise universal jurisdiction over conduct which is a crime both under Hungarian law and the law of the place where it was committed.

[103] The original Spanish text in Article 209A of the Penal Code of Honduras reads:

"Comete tortura el empleado o funcionario público, incluidos los de instituciones penitenciarias o de centros de protección de menores que, abusando de su cargo y con el fin de obtener una confesión o información de cualquier persona o de castigarla por cualquier hecho que haya cometido o se sospeche ha cometido, la somete a condiciones o procedimientos que por su naturaleza, duración u otras circunstancias le supongan sufrimientos físicos o mentales, la supresión o disminución de sus facultades de conocimiento, discernimiento o decisión, o que de cualquier otro modo atenten contra su integridad moral. El culpable de tortura será castigado con reclusión de diez (10) a quince (15) años si el daño fuere grave, y de cinco (5) a diez (10) años si no lo fuere, más inhabilitación absoluta por el doble de tiempo que dure la reclusión.

Las penas anteriores se entenderán sin perjuicio de las que sean aplicables a las lesiones o daños a la vida, integridad corporal, salud, libertad sexual o bienes de la víctima o un tercero.

Cuando el delito de tortura sea cometido por particulares, se disminuirán en un tercio las penas previstas en el párrafo primero de este artículo".

Version obtained from: *"Códigos Penales de Latinoamérica, Edición de la Suprema Corte de Justicia de México y el Instituto Latinoamericano de las Naciones Unidas para la Prevención del Delito y el Tratamiento del Delincuente: programa ILANUD / COMISIÓN EUROPEA, ,mayo de 2000, México D.F (versión CD ROM)"*

[104] Draft Penal Code of Honduras (First Draft), June 2000, Bk. One (General Part), Chap. IV (Injuries), Arts 167 (Threats by an Official) and 168 (Torture). *Proyecto Código Penal de Hondureño (Primer Borrador), Junio 2000, Libro Primero (Parte General), Capítulo IV (Lesiones), Art. 167 (Amenaza de funcionario) y 168 (Tortura).*

Law-Decree No. 3 of 1988 of the Presidential Council of the Hungarian People's Republic promulgated the Convention against Torture in Hungarian law.[105] According to the government, with respect to Hungary's obligations under Article 5 of the Convention,

[105] Law-Decree No. 3 of 1988 of the Presidential Council of the Hungarian People's Republic, Hungarian Gazette (*Magyar Közlöny*) No. 8 of 1988 (cited in initial report of Hungary to the Committee against Torture, U.N. Doc. CAT/C/5/Add.9, 7 November 1988, para. 7.

> "Hungarian law does not literally follow the requirements of the Convention, but in substance articles 3 and 4 of the Penal Code meet those requirements in full. It is to be stressed, however, that paragraph 1 (c) of article 4 makes Hungarian jurisdiction subject to an international treaty. Jurisdiction is provided for in article 5, paragraph 1 (c), and 2 of the Convention. Accordingly, if Hungarian jurisdiction in a concrete case cannot be established under national law, it is established by the Convention."[106]

In addition to these provisions, Article 7 (1) of the Hungarian Constitution states that "the legal system of the Republic of Hungary shall accept the generally recognized rules of international law".[107] In 1993, the Constitutional Court held that this provision means that these rules form part of Hungarian law without any further transformation . Therefore, the Constitution and national law must be interpreted consistently with international law.[108] In addition, it may also mean that the rules concerning crimes under international law can be enforced directly by national courts, although there seems to be no jurisprudence on this specific point.[109]

Hungary is a party to the Convention against Torture and it has signed the Rome Statute, but as of 1 September 2001, it had not yet ratified it. The government has informed the Committee against Torture that the Convention is part of national law:

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[106] Initial report of Hungary, *supra,n.105*, para. 17.

[107] Constitution of the Republic of Hungary of 1949, Art. 7 (1).

[108] According to a commentary on Hungarian criminal law, "the Constitution and domestic law should be interpreted in such a way as to ensure actual application of the generally accepted rules of international law". Imre Wiener,*Criminal Law, in* Attila Harathy, ed., *Introduction to Hungarian Law* 183, 187 (The Hague/London/Boston: Kluwer Law International 1998).

[109] A commentary on Hungarian criminal law seems to suggest that Hungarian courts may directly enforce prohibitions on war crimes and crimes against humanity, but does not expressly state that they can do so:

> "The provisions on war crimes and crimes against humanity, as well as the conditions for their punishability, are also determined by international law. These crimes are prosecuted and punished by the community of nations either directly or by requiring States to do so. The rules relative to the punishment of war crimes and crimes against humanity are *jus cogens* norms of international law, because these crimes threaten mankind and international coexistence in their foundations. A State refusing to undertake this obligation may not be a member of the international community. The rules on war crimes and crimes against humanity undoubtedly form part of customary international law, and of the general principles recognized by the community of nations, or, in the terminology of the Hungarian Constitution, of 'the generally recognized rules of international law'. These rules are 'accepted' by Hungarian law, as is stated in the first sentence of Para. (1) Art. 7, and are therefore part, without transformation or adaptation, of the 'obligations under international law', with which domestic law must be in harmony by virtue of the same article (second sentence)."

Ibid., 187-188. Subsequently, the commentary distinguishes crimes which treaties require states parties to punish, such as forgery and aircraft hijacking, where individuals "may only be held responsible for acts covered by the treaties if those acts are treated as crimes by domestic law", from war crimes and crimes against humanity, where individual responsibility "is based on international law regardless of its regulation by domestic law". *Ibid.*, 188.

> "As the Convention has been fully integrated into the Hungarian legal system, the provisions of the Convention have the legal status of a *sui generis* law and consequently are directly enforceable. Accordingly, any person may directly invoke the Convention before the Hungarian courts and administrative authorities."[110]

The government has stated that this means that Hungary has incorporated the definition of torture under Article 1 of the Convention into national law. [111] However, it appears that there may not be a specific crime of torture under Hungarian law, so that prosecutions for torture may have to be brought for ordinary crimes.[112]

· ***Iceland:*** Article 6 (9) of the General Penal Code provides that courts may exercise universal jurisdiction over persons suspected of having committed torture abroad, provided that the Minister of Justice, a political official, authorizes the prosecution.[113]

[110] Third periodic report of Hungary to the Committee against Torture, U.N. Doc. CAT/C/34/Add.10 (1997), para. 2; *see also ibid.*, para. 37. However, the scope of the definition of torture has been criticized. Conclusions and recommendations of the Committee against Torture, U.N. Doc. A/54/44, 19 November 1998, para. 81 (expressing concern that "the provisions of article 123 of the Criminal Code of Hungary that makes torture punishable only if the soldier or policeman committing the act was aware that by so doing he or she was committing a criminal offence.").

[111] Initial report of Hungary to the Committee against Torture, U.N. Doc. CAT/C/5/Add.9, 7 November 1988, para. 7 ("The definition of 'torture' in the Convention was incorporated in Hungarian law by Law-Decree No. 3 of 1988.").

[112] *Ibid.*, para. 8 (stating that "[t]he criminal acts covered by article 1 are summed up by the Criminal Code (Act IV of 1978) under the heading 'offences of officials'", which include "misuse of authority or power, breach of official duty or misuse of official position (to cause unlawful detriment or to acquire unlawful advantage), physical abuse by officials in the course of proceedings and unlawful detention").

[113] The government of Iceland has informed the Committee against Torture that Article 6 (9) of the General Penal Code, No. 19/1940, as amended by Act No. 142/1995, provides that

> "a person can be sentenced under Icelandic criminal law for an offence described in the Convention against Torture even if it has been committed outside Icelandic territory and irrespective of the perpetrator's nationality. However, criminal action can only be brought under this provision if so ordered by the Minister of Justice."

Iceland's initial report to the Committee against Torture, U.N. Doc. CAT/C/37/Add.2, 9 June 1998, para. 71. The government explained that

> "[t]he reason for this arrangement is that extended criminal jurisdiction of this kind is a clear exception from the principle that a suspected offender or offence must have ties to Iceland. A decision on such a measure, involving the application of a special exception from the general rules on prosecution, is deemed to require particular care, and the Ministry of Justice is deemed to be the proper authority to assess this need."

Ibid., 81. As of 10 February 1998, there had not been any occasion for a prosecution under this provision. *Ibid.*, para. 71.

Iceland is a party to the Convention against Torture. It is also a party to the Rome Statute, but as of 1 September 2001 it had not yet enacted implementing legislation. Although torture is not expressly defined as such in the General Penal Code, the government has stated that most aspects of the crime of torture are punishable under the Code.[114] Therefore, a prosecution for torture would have to be brought for an ordinary crime, such as assault or rape.

· ***Iraq:*** Iraqi courts may exercise universal jurisdiction over torture committed abroad, but only in the limited case of a foreigner who subsequently acquires Iraqi nationality. Such jurisdiction is subject to a number of conditions.

Iraq can exercise universal jurisdiction over crimes and offences committed abroad by foreigners which are criminal in the place where they occurred under Article 10 in Section 3 (Personal Competence) of the Penal Code, provided that the foreigner subsequently becomes an Iraqi national. That article provides:

> "Any Iraqi who commits, while abroad, a crime or offence, punishable by the law of that country, and is apprehended in Iraq, shall be punished according to the law.
> This law applies whether the perpetrator acquired the Iraqi nationality after committing the crime or was an Iraqi at the time of the crime and lost his nationality thereafter."[115]

Prosecutions may only be initiated with the permission of a political official, the Justice Minister, and *ne bis in idem* precludes a second trial if a sentence has been served or elapsed through prescription.[116] If the sentence has not been fully served or the acquittal abroad concerns certain crimes by Iraqi officials, then they may be retried in Iraq.[117]

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[114] *Ibid.*, paras 59-69. The Committee against Torture, however, has expressed its concern that "torture is not considered as a specific crime in the penal legislation of the State Party" and recommended that "[t]orture as a specific crime be included in the penal legislation of Iceland." Conclusions and recommendations of te Committee against Torture, Iceland, U.N. Doc. A/54/44, 17 November 1998, paras 59, 60 (a).

[115] Penal Code, Art. 10 (English translations of the Penal Code by Amnesty International).

[116] *Ibid.*, Art. 14 -1. That provision states:
"Tracking those who commit a crime outside the Republic can only be initiated by the permission of the Justice Minister. If a foreign court has passed its final sentence against such a person, where the sentence has been served, or if the claim or punishment has elapsed, it is not permissible to try such a person. To ensure that the final judgement has been passed and that the claim or punishment has elapsed, reference should be made to the law of the country concerned."

[117] *Ibid.*, Art. 14-2. That provision reads:
"Had the punishment imposed not been served in full, or the acquittal was concerning a crime cited in Articles 9 and 12, and was based on the fact that the law of such a country did not punish such an act, it is then permissible to track down and try the accused before Iraqi courts."
Any sentence served would be taken into account. *Ibid.*, Art. 15 ("The time spent by an accused in detention,

custody or prison abroad for a crime committed should be taken into account.”).

Iraq is not a party to the Convention against Torture. It has not signed the Rome Statute and as of 1 September 2001 it had not ratified it. It has, however, defined torture as a crime, although the definition does not appear to be consistent with the definition in the Convention against Torture.[118]

· ***Ireland:*** Irish courts can exercise universal jurisdiction over torture. Section 2 of the Criminal Justice (United Nations Convention against Torture) Act, 2000 provides for universal jurisdiction over torture.[119] Similarly, Section 3 of the Act provides for such jurisdiction over ancillary offences of torture.[120] Consent of the Director of Public Prosecutions is required for all proceedings (other than a remand in custody or on bail).[121] Ireland has signed the Convention against Torture, but as of 1 September 2001 it had not yet ratified it.

· ***Italy:*** Although Italian law would appear to provide courts with universal jurisdiction over torture, there is some controversy over the effectiveness of this legislation in practice which has led to calls for amendment to make it clear that courts may exercise such jurisdiction.

Italy has ratified the Convention against Torture and has enacted implementing legislation. Article 3.1 of Law No. 498 of 3 November 1988 provides:

> "The following shall be punished, according to Italian law, on the request of the Minister of Grace and Justice:
> a) the citizen that commits an offence abroad defined as torture by Art. 1 of the Convention;
> b) the foreigner that commits abroad one of the acts indicated in letter a) to the detriment of an Italian citizen;

[118] Article 333 of the Penal Code provides that "any employee or public servant who tortures, or orders the torture of an accused, witness, or expert in order to compel that person to confess to committing a crime, to give a statement or information, to hide certain matters, or to give a specific opinion will be punished by imprisonment or detention. The use of force or threats is considered to be torture."

[119] Criminal Justice (United Nations Convention against Torture) Act, 2000, Number 11 of 2000, Sec. 2. It reads:

> "(1) A public official, whatever his or her nationality, who carries out an act of torture on a person, whether within or outside the State, shall be guilty of the offence of torture.
> (2) A person, whatever his or her nationality, other than a public official, who carries out an act of torture on another person, whether within or outside the State, at the instigation of, or with the consent or acquiescence of, a public official shall be guilty of the offence of torture.
> (3) A person guilty of the offence of torture shall be liable on conviction on indictment to imprisonment for life."

[120] *Ibid.*, Sec. 3. That section reads:
"A person, whatever his or her nationality, whether within or outside the State, who -
(a) attempts to commit or conspires to commit the offence of torture, or
(b) does an act with the intent to obstruct or impede the arrest or prosecution of another person, including a person who is a public official, in relation to the offence of torture,
shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life."

[121] *Ibid.*, Section 5.

c) the foreigner that commits abroad one of the acts indicated in letter a), provided that he is on the territory of the State and his extradition has not been granted."[122]

Despite the apparently clear wording of this statute, one Italian international law expert, Antonio Marchesi, has stated that Article 3.1 does not provide a sufficient basis for a prosecution based on universal jurisdiction of a person found in Italy suspected of torture abroad since it does not itself define the crime of torture or the appropriate penalties.[123] The Italian government, however, has stated that it would be possible to prosecute a person on this basis for conduct amounting to crimes under Italian law other than torture.[124] It has also stated that the definition in Article 1 of the Convention against Torture is sufficient to permit a prosecution. However, it is not be clear what would be the appropriate penalty. Draft legislation has been introduced to address these matters.[125]

[122] The original text reads:

"È punito, secondo la legge italiana, a richiesta del Ministro di grazia e giustizia:

a) il cittadino che commette all'estero un fatto costituente reato che sia qualificato atto di tortura dall'articolo 1 della convenzione;

b) lo straniero che commette all'estero uno dei fatti inicati alla lettera a) in danno di un cittadino italiano;

c) lo straniero che commette all'estero uno dei fatti inicati alla lettera a), quando si trovi sul terrritorio dello Stato e non ne sia disposta l'estradizione."

3 novembre 1988, n. 498 (in Suppl. Ordinario alla Gazz. Uff. N. 271, del 18 novembre) - Ratifica ed esecuzione della convenzione contro la tortura ed altre pene o trattamenti crudeli, disumani o degradanti, firmata a New York il 10 dicembre1984, art. 3.1.

[123] *See also* Salvatore Zappatà, *Le Point sur la Législation Italienne en Matière de Crimes Internationaux*, unpublished draft manuscript submitted for discussion at the *Etude Comparée des Critères de Competence Juridictionnelle en Matière de Crimes Internationaux (Crimes Contre l'Humanité, Génocide, Torture, Crimes de Guerre, Terrorisme)*, Paris, 2 to 3 July 2001, 11 (reaching the same conclusion).

[124] Some crimes in the Penal Code that have been suggested could include some acts of torture are: beatings (Article 581), injuries (Article 582), illegal arrest (Article 606), unlawful restriction of personal freedom (Article 607), abuse of authority against people arrested or detained (Article 608) and arbitrary search and personal inspection (Article 609).

[125] Draft bill N. 7283, introduced by the Ministers of Justice and Foreign Affairs on 20 August 2000 or 28 August 2000 (*Disegno di Legge presentato dal ministro dell giustizia (Fassino) di concerto con il ministro degli affari esteri (Dini) - Norme in materia di tortura e di altri trattamenti crudeli, disumani o degradanti, Presentato il 28 agosto 2000, Camera dei Deputati, n. 7283*). This bill would not introduce a specific crime of torture, but would provide that the crimes mentioned above in footnote 124, as well as other crimes, such as murder, rape and kidnapping, would carry a more severe penalty if the aggravating factor of torture was present. Other draft legislation has been introduced that would introduce a separate crime of torture, including N. 2701 (*Introduzione del reato di tortura nel codice penale, Presentato in data 24 Luglio 1997; annunciato nella seduta n. 231 del 29 Luglio 1997, Atto Senato, S. 2701*), C. 4087(*Norme concernenti il reato di tortura, Presntato in data 31 Luglio 1997; annunciato nella seduta n. 240 del 31 Luglio 1997, Atto Camera, C. 4087*) and S. 3691 (*Introduzione del reato di tortura, Presentato in data 10 Dicembre 1998; annunciato nella seduta n.500 del 10 Dicembre 1998, Atto Senato 3691*). The Committee against Torture welcomed the introduction of such legislation, Conclusions and recommendations of the Committee against Torture on the third periodic report of Italy, U.N. Doc. A/54/44, 7 May 1999, para. 165 (a) and urged that "[t]he legislative authorities in the State party proceed to incorporate into domestic law the crime of torture as defined in article 1 of the Convention . . .". *Ibid.*, para. 169 (a).

In addition, a Senate commission established after reports that members of the Italian peace-keeping forces

in Somalia had committed crimes against civilians in 1993 and 1994 recommended that the offence of torture be included in the civilian Penal Code and in the Military Penal Code of Peace. Fabio Raspadori, *Correspondents' Reports: Italy - Peacekeeping - Conclusive Report on the Investigation of Behaviour of the Italian Military Contingent in Somalia in the Context of the UN Mission 'Restore Hope', Rome, 2 June 1999,* 2 Y. B. Int'l L. 385 (1999).

Independently of the 1988 law implementing the Convention against Torture, Article 7 (5) of the Penal Code provides for universal jurisdiction over any crimes for which international agreements specify that Italian criminal law applies. In addition, Article 10 of the Penal Code provides custodial universal jurisdiction over ordinary crimes committed abroad which are punishable by life imprisonment or imprisonment for not less than a minimum of 1 year and extradition has not been granted or accepted by the state of the suspect's nationality. The government has stated that "the Italian juridical system provides a sanction for all conduct that can be considered to come under the definition of torture as given in article 1 of the Convention".[126] Despite this explanation of the government, the Committee against Torture has recommended that "the legislative authorities in the State party proceed to incorporate into domestic law the crime of torture as defined in article 1 of the Convention".[127]

· ***Japan:*** It is possible that Japanese courts may be able to exercise universal jurisdiction over certain conduct amounting to torture.

Article 4-2 of the 1966 Penal Code provides universal jurisdiction over certain crimes under Japanese law committed by anyone outside Japan when a treaty requires that they be punished even if committed outside Japan (for scope of this provision, see Chapter Four, Section II). That article states:

> "In addition to those provided for in the preceding three Articles [dealing with protective and active personality jurisdiction], this Code shall also apply to every person who has committed outside Japanese territory those crimes mentioned in Book II [Articles 77 to 264] which are considered to be punishable by a treaty even if committed outside Japanese territory."[128]

This provision would appear to be self-executing, so that a court could exercise universal jurisdiction over any conduct that amounts to an ordinary crime and that is also conduct over which a treaty provides for universal jurisdiction.[129]

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[126] Third periodic report of Italy to the Committee against Torture. U.N. Doc. CAT/C/44/Add.2 (1998), para. 8.

[127] Concluding observations of the Committee against Torture on the third periodic report of Italy. U.N. Doc. CAT/C/ITA (1999), para. 7.

[128] Penal Code of Japan (1996), EHS Law Bulletin Series, II EHS, PA-PC, Nos. 2400, 2402, Art. 4-2.

[129] The scope of extraterritorial jurisdiction over torture will soon be determined in an active personality case when Japan decides whether to exercise such jurisdiction over one of its citizens accused of homicide, kidnapping and inflicting bodily injury amounting to torture whom it has stated cannot be extradited. On 6 September 2001, Nelly Calderon, a Peruvian prosecutor, announced that she had filed charges in the Supreme Court the previous day alleging that the former President was responsible for homicide, kidnapping and serious injury with respect to two incidents, one in 1991 and the other in 1992, carried out by a 35-person paramilitary unit, the Colina Group, and a "disappearance", torture and homicide of a person whose body was found in 1997 (for further information about this case, see Chapter Two, Section. It is reliably reported that Peru intends to seek Alberto Fujimori's extradition to face these charges. However, on 6 September 2001, Takeshi Seto, a lawyer in the international affairs division of the Ministry of Justice's Criminal Affairs Bureau, stated that "[u]nder Japanese law, Japanese citizens cannot be extradited", and Prime Minister Junichiro Koizumi stated that "[t]he Japanese government

will respond in accordance with Japanese law."

Japan is a party to the Convention against Torture. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. There are a number of crimes mentioned in Book II which might be used to punish certain conduct amounting to torture, including: rape and other crimes of sexual violence[130] and inflicting bodily injury.[131]

· ***Jordan:*** It appears that Jordanian courts can exercise universal jurisdiction over torture committed by foreigners who are resident in the state. Article 10 (4) of the Penal Code permits courts to exercise universal jurisdiction over crimes committed abroad by foreigners who are residing in Jordan, provided the suspect's extradition was not requested or accepted (for the text and scope of this provision, see Chapter Four, Section II above).

· ***Kazakhstan:*** National courts may exercise universal jurisdiction over certain conduct which is a crime under national law amounting to torture within the meaning of the Convention against Torture (for the text and scope of these provisions, see Chapter Four, Section II). First, Article 7 (1) of the Penal Code permits national courts to exercise universal jurisdiction over stateless persons suspected of crimes committed abroad which is also a crime under the law of the territorial state. Second, Article 7 (4) of gives courts universal jurisdiction over offences where this is provided in a treaty to which Kazakhstan is a party, provided that the suspect has not been tried in another state. Kazakhstan is a party to the Convention against Torture. It has defined some conduct amounting to torture as a crime under national law.[132] However, since the definition falls short of the requirements of Article 1 of the Convention against Torture, a prosecution for torture may have to be on the basis of an ordinary crime, such as assault or rape.

[130] Penal Code, Arts 176 to 182.

[131] *Ibid.,* Arts 204 to 208-2.

[132] The failure to adopt a definition consistent with Article 1 of the Convention against Torture has been criticized by the Committee against Torture, which recently expressed its "concern about the absence of a definition of torture, as provided in article 1 of the Convention" and it recommended that "the State party proceed promptly with its stated plans to amend its domestic penal law to include the crime of torture". Committee against Torture concludes its Twenty-First Session, Round-up, Press release, 18 May 2001. It has also been criticized by a body of experts appointed by the Organization for Security and Cooperation in Europe for not incorporating all aspects of the definition of torture in the Convention against Torture.

· ***Kyrgyzstan:*** National courts may exercise universal jurisdiction under two provisions over certain conduct which is a crime under national law amounting to torture within the meaning of the Convention against Torture. Article 6 (1) provides for jurisdiction over crimes committed abroad by stateless persons resident in Kyrgyzstan. Kyrgyzstan is a party to the Convention against Torture. It has defined some conduct amounting to torture as a crime under national law.[133]

· ***Latvia***: There are two legislative provisions, whose origins can be traced back to Russian universal jurisdiction of 1903 (see Chapter Two, Section II.), authorizing Latvian courts to exercise universal jurisdiction over torture.

First, Sub-section 1 of Section 4 (Applicability of the Criminal Law Outside the Territory of Latvia) of the Criminal Law of Latvia provides for universal jurisdiction over aliens and stateless persons resident in Latvia for any crimes committed abroad.

Second, Subsection 4 of Section 4 provides for universal jurisdiction over aliens and stateless persons not permanently resident in Latvia who are suspected of crimes abroad when it is so provided in treaties to which Latvia is a party, if they have not previously been tried for the same crime (for the text and scope, see Chapter Four, Section II).

Latvia is a party to the Convention against Torture. It has not been possible to determine whether torture is defined as a crime under national law.

· ***Lebanon:*** National courts can exercise universal jurisdiction over certain conduct abroad amounting to torture. Article 23 of the Penal Code (*Code pénal*) provides that Lebanese law applies to every foreigner found in Lebanese territory who has committed abroad a crime in the cases not covered by the articles granting protective or active personality jurisdiction (for the text and scope, see Chapter Four, Section II).

[133] Conclusions and recommendations of the Committee against Torture concerning the initial report of Kyrgyzstan, U.N. Doc. A/55/44, 18 November 1999, para. 74 (a) (expressing concern about "[t]he absence of a definition of torture as provided in article 1 of the Convention in the penal legislation currently in force in the State party, with the result that the specific offence of torture is not punishable by appropriate penalties as required by article 4, paragraph 2, of the Convention) and para. 75 (a) (recommending that Kyrgyzstan "amend its domestic penal law to include the crime of torture, consistent with the definition in article 1 of the Convention, and supported by an adequate penalty"). A body of experts appointed by the Organization for Security and Cooperation in Europe has also criticized Kyrgyzstan for not incorporating all aspects of the definition of torture in the Convention against Torture.

However, Lebanese law does not apply to conduct abroad that is not a crime under the law of the territorial state.[134] If there is difference between the foreign law and Lebanese law, the difference can be interpreted to the benefit of the accused.[135] Prosecutions are barred of foreigners who have been the subject of a final judgment and foreigners who have been sentenced abroad if a period of limitations for enforcement of the sentence has expired or the person has been pardoned.[136]

Lebanon is a party to the Convention against Torture. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. It is not known if it has defined torture as a crime, so prosecutions for torture may have to be brought for ordinary crimes, such as assault or rape. For example, Article 401 of the Penal Code prohibits the use of excessive force during interrogations, and states that those who inflict "injuries or illness" on suspects as a result of force used during interrogation will receive a minimum sentence of a year in prison. Even if no injuries or illness result, use of excessive force during interrogation may still result in prison terms of between three months and three years.

· ***Liechtenstein:*** Liechtenstein courts may exercise universal jurisdiction over torture. Paragraph 64.1.6 of the Penal Code provides for universal jurisdiction over ordinary crimes. The government has stated that this paragraph "and article 5 of the Convention together thus ensure the fulfilment of the provisions contained in article 5."[137] Liechtenstein is a party to the Convention against Torture. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it.

· ***Lithuania***: Lithuanian courts can exercise universal jurisdiction over torture (for the text of the relevant legislative and constitutional provisions see Chapter Four, Section II).

Current Criminal Code. There are two bases for the exercise of universal jurisdiction over certain conduct amounting to war crimes under the Current Criminal Code. The first paragraph of Article 6 (Criminal Responsibility for Crimes Committed Abroad) provides for universal jurisdiction over stateless persons permanently resident in Lithuania who have committed a crime under Lithuanian law abroad. The second paragraph of this article provides for universal jurisdiction over crimes committed abroad by other persons, but only if the conduct was a crime under the law of the place where it occurred and in Lithuania and the lesser of the two possible penalties is applied.

Paragraph 1 of Article 7 (Criminal Responsibility for Crimes Provided for in International Treaties) provides:

[134] *Ibid.*, Art. 24.

[135] *Ibid.*, Art. 25.

[136] *Ibid.*, Art. 27.

[137] Initial report of Liechtenstein to the Committee against Torture, U.N. Doc. CAT/C/12/Add.4 (1994), para. 23.

> "The persons shall be held responsible in accordance with this Code, regardless of their nationality and place of residence and regardless of whether their deed is punishable under the law of the territory where the crime has been committed, when they commit crimes responsibility for which is provided for by international treaties."

The new Criminal Code. . Article 5 of the New Criminal Code which is to enter into effect from 3 January 2003, (Criminal Responsibility of the Citizens of the Republic of Lithuania and Other Persons that Live Permanently in Lithuania for Crimes Committed Abroad) provides:

> "Citizens of the Republic of Lithuania and other persons permanently resident in Lithuania shall be held responsible for the crimes committed abroad in accordance with this Code."

Paragraph 1 of Article 7 (Criminal Responsibility for Crimes Provided for in International Treaties) provides:

> "The persons shall be held responsible in accordance with this Code, regardless of their nationality and place of residence and regardless of whether their deed is punishable under the law of the territory where the crime has been committed, when they commit crimes responsibility for which is provided for by international treaties.

Lithuania is a party to the Convention against Torture. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. It has not been possible to determine if torture has been defined as a crime under both the current and new criminal codes so presumably prosecution will have to be brought for ordinary crimes.

· ***Luxembourg:*** National courts may exercise universal jurisdiction over persons suspected of torture abroad.

> ***(1) Legislation.*** Article 7-4 of the Act of April 2000 provides:
>
> "Anyone in a foreign country who has committed one of the offences provided for in articles 260-1 to 260-4 of the Penal Code can be prosecuted and tried in the Grand Duchy when a application for extradition has been submitted, but the person concerned has not been extradited."[138]

[138] Code of Pre-Trial Proceedings, Art. 7-4 (added by the Act of 24 April 2000) (English translation in the third periodic report of Luxembourg to the Committee against Torture, U.N. Doc. CAT/C/34/Add.14, 19 February 2001, para. 21). The French original reads:

> *"Art. 7-4 - Toute personne qui se sera rendue coupable à l'étranger d'une des infractions prévues par les articles 260-1 à 260-4 du Code pénal, pourra être poursuivie et jugée au Grand-Duché, lorsqu'une demande d'extradition est introduite et que l'intéressé n'est pas extradé."*

Troisièmes rapports périodiques des États parties devant être soumis en 1996 - Additif - Luxembourg, O.N.U. Doc. CAT/C/34/Add.14, 19 fèvrier 2001, al. 21.

Luxembourg is a party to the Convention against Torture. It has ratified the Rome Statute, but it had not yet enacted implementing legislation as of 1 September 2001. Torture is a crime under national law.[139]

[139] Penal Code, Arts 260-1 to 260-4 (added by the Act of 24 April 2000). *See also* the third periodic report of Luxembourg to the Committee against Torture, U.N. Doc. CAT/C/34/Add.14, 19 February 2001, para. 5 (listing other provisions concerning conduct that might amount to torture).

(2) Criminal investigations. Chilean refugees resident in Luxembourg filed a complaint with the city prosecutor in Luxembourg after the former President of Chile was arrested in London on 16 October 1998 alleging that he was responsible for systematic torture and crimes against humanity. The prosecutor supported the claimants and sought to have an investigating judge (*juge d'instruction*) open a criminal investigation.[140] The investigating judge held that Article 4 of the Penal Code (*Code pénal*) restricted jurisdiction to territorial jurisdiction, except as otherwise provided by law, meaning national law, and that the only exceptions for crimes committed abroad under the Code of Criminal Investigation (*Code d'instruction criminelle*) were crimes committed by a national of Luxembourg.[141] The judge said that the complaint could not be assimilated to one by nationals of Luxembourg for purposes of jurisdiction. Second, he held that the provisions of Article 5 of the Convention against Torture were not self-executing under the law of Luxembourg (he did not discuss Article 7 of that treaty). Third, although the judge agreed with the prosecutor that the conduct alleged amounted to crimes against humanity under international law and that such conduct could be prosecuted as ordinary crimes under national law, he held that he had no jurisdiction under national law, as it then stood, he had no jurisdiction over a suspect who was then abroad.[142] The decision was affirmed on appeal.[143]

(3) Executive action. Jacques Poos, the Foreign Minister of Luxembourg, said on 31 October 1998 that Luxembourg might seek former President Augusto Pinochet's extradition. However, no such request was ever made, presumably because of the decision of the investigating judge that there was no specific provision in national law at the time permitting the exercise of universal jurisdiction over the former President.

· ***Macedonia (The former Yugoslav Republic of):*** Macedonian courts can exercise universal jurisdiction over certain conduct amounting to torture.

[140] *Réquisitoire du 19 novembre 1998 du parquet du tribunal d'arrondissement de Luxembourg dans l'affaire de la plainte contre Augusto Pinochet, nº 18077/98/CD, reprinted in* 9 *Annales du Droit Luxembourgeois* 393 (1999).

[141] *L'Affaire de la plainte contre Augusto Pinochet, nº 1630/98, Ordonnance du juge d'instruction auprès du Tribunal d'arrondissement de Luxembourg, 16 décembre 1998, reprinted in* 9 *Annales du Droit Luxembourgeois* 402, 404 (1999).

[142] The reasoning of the court is at , *ibid.*,403- 406.

[143] The appellate decision is reported at: 9 *Annales du Droit Luxembourgeois* 407 (1999).

Article 119 (2) of the Criminal Code provides for custodial universal jurisdiction over crimes which are punishable by five or more years' imprisonment, provided that conditions for extradition have not been fulfilled or the suspect is not extradited (for the text and scope, see Chapter Four, Section II). The government indicated to the Committee against Torture that this provision satisfied its obligations under Articles 5 and 7 of the Convention against Torture.[144] In response to a question by the Chair of the Committee against Torture, the government stated that the criminal law of Macedonia was applicable to torture committed by foreign nationals against other foreign nationals abroad when the crimes were punishable by five or more years' imprisonment.[145]

Macedonia is a party to the Convention against Torture. It has signed the Rome Statute, but it had not yet ratified it as of 1 September 2001. Since Macedonia has not defined torture as a crime under national law, prosecutions for torture must be based on ordinary crimes, such as assault or rape.[146]

· ***Malta:*** Section 5 of the Criminal Code of Malta permits courts to exercise universal jurisdiction over torture. Section 5 provides that

> "a criminal action may be prosecuted in Malta:
> . . . . (1) (e) against any person who, being in Malta, shall be a principal or an accomplice in any of the crimes referred to in sections 139A [torture act] and 298, although the crime shall have been committed outside Malta. . . ."[147]

According to the second report of Malta to the Committee against Torture, this section was amended to give courts custodial universal jurisdiction over persons who committed torture (section 139 A).[148] Malta is a party to the Convention against Torture. It has signed the Rome Statute, but it had not yet ratified it as of 1 September 2001.

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[144] Initial report of the Former Yugoslav Republic of Macedonia to the Committee against Torture, U.N. Doc. CAT/C/28/Add.4 (1998), para. 69.

[145] Summary records of the examination by the Committee against Torture of the initial report of Macedonia, U.N. Doc. CAT/C/SR.366 (1999).

[146] Conclusions and recommendations of the Committee against Torture concerning the initial report of the former Yugoslav Republic of Macedonia, U.N. Doc. A/54/44, 5 May 1999, para. 112 (expressing concern about "[t]he absence of a specific crime of torture as defined in the Convention") and para. 114 (recommending that "[t]he definition of torture as contained in the Convention and torture as a defined crime should be incorporated into the Criminal Code of the former Yugoslav Republic of Macedonia with appropriate penalties attached to it").

[147] Second report of Malta to the Committee against Torture, U.N. Doc. CAT/C/29/Add.6 (1998), para. 61.

[148] *Ibid.* Although Section 5 also states that " no criminal action shall be prosecuted against the President of Malta in respect of Acts done in the exercise of the functions of his office", torture is not a legitimate official function. *See Ex parte Pinochet Ugarte,* [1999] 2 All ER 97.

· ***Mexico:*** Article 6 of the Mexican Penal Code (*Código Penal Federal*) of 1931, as amended 2000 (for the text, see Chapter Four, Section II above) provides that courts have jurisdiction to try those crimes under international treaties imposing this obligation on Mexico. Article 6 would appear to permit courts to exercise universal jurisdiction over torture, since it is a party to the Convention against Torture.[149] For a discussion on the scope of this article see Chapter IV part B. There does not appear to be any jurisprudence on that question.

In addition, Article 3 of the *Ley federal para prevenir y sancionar la tortura* (Federal Law for the Prevention and Punishment of Torture) expressly prohibits torture:

"An official commits the offence of torture when he uses his position to inflict severe pain or suffering, whether physical or mental, on a person in order to obtain from him or from a third person information or a confession, or to punish him for an act he has committed or is suspected of having committed, or to coerce him into doing or not doing something. Pain or suffering which arise only from, or are inherent in or incidental to, forms of punishment permitted by law, or arise from a legitimate act of authority shall not be deemed to constitute torture." [150]

[149] However, the initial report of Mexico to the Committee against Torture did not cite Article 6 of the Penal Code with respect to its obligations under Article 5 of the Convention against Torture to provide for universal jurisdiction over torture, but only Article 4 of the Penal Code, which provides for active and passive personality jurisdiction. U.N. Doc. CAT/C/34/Add.2 (1996), para. 91. This may simply have been an oversight. However, based on the state report, the Committee against Torture concluded that Mexico had not fulfilled its obligation to provide for universal jurisdiction over torture.

[150] The Spanish text of Art.3 reads:
"Comete el delito de tortura el servidor publico que, con motivo de sus atribuciones, inflija a una persona dolores o sufrimientos graves, sean fisicos o psiquicos con el fin de obtener, del torturado o de un tercero, informacion o una confesion, o castigarla por un acto que haya cometido o se sospeche ha cometido, o coaccionarla para que realice o deje de realizar una conducta determinada.
No se consideraran como tortura las molestias o penalidades que sean consecuencia unicamente de sanciones legales, que sean inherentes o incidentales a estas, o derivadas de un acto legitimo de autoridad."
Available from http://www.juridicas.unam.mx

Mexico arrested on 24 August 2000 Ricardo Miguel Cavallo, also known as Miguel Angel Cavallo, a former Argentine military officer accused of torture and murder of persons at the Argentine Navy School of Mechanics during the 1976-1983 military government, as he was about to fly out of the country. The arrest was based initially on charges related to false documents in Mexico, not on torture charges under Mexican law based on universal jurisdiction. However, Spanish Judge Baltazar Garzón issued an international arrest warrant on 1 September 2000 based on a 196-page indictment alleging that the suspect was linked to 227 "disappearances", 110 cases of torture and the kidnapping at birth of 16 babies born to women detainees, based on universal jurisdiction under Spanish law. The Mexican authorities then indicated that the suspect would be detained pending a court decision on this request.[151] On 12 September 2000, issued a request for the suspect's extradition, including 32 additional charges of torture. In addition, it is reported that the French investigating judge (*juge d'instruction*) Roger Le Loire, has asked the Mexican authorities to question the suspect in connection with the death of 15 French citizens, including two nuns. Mexican Judge Jesus Guadalupe Luna on 12 January 2001 held that the suspect could not be extradited on the charges of torture because they were barred by the statute of limitations, but also held that he could be extradited on the charges of genocide and "terrorism".[152] He recommended to the Ministry of Foreign Affairs that the suspect be extradited to Spain.[153] On 2 February 2001, the Ministry of Foreign Affairs said in a press release that it would extradite the suspect to Spain on all charges including torture.[154] A Federal District Court has heard arguments on a writ of amparo and is expected to issue its judgment in 2001.

Mexico has ratified the Convention against Torture and the Inter-American Convention on Torture. It has signed the Rome Statute, but as of 1 September 2001it had not yet ratified it.

· ***Monaco:*** The courts of Monaco may exercise universal jurisdiction over torture committed abroad.

Article 8 (2) of the Code of Criminal Procedure provides:

"The following may be prosecuted and tried in the Principality:
. . . .
2) Anyone, outside the territory of the Principality, is responsible for acts constituting the felony (*crime*) or misdemeanour (*délit*) within the scope of Article 1 of the Convention

[151] For further information about this case, see Chapter Two, Section II.E above.

[152] See Chapter Eight for text of decision.

[153] *AFP, Le Mexique accepte d'extrader un ex-militaire argentin, Le Monde, 13 janvier 2001*.

[154] Available from http://www.sre.gob.mx/comunicados/prensa/dgcs/2001/feb/B-021.htm.
Tim Weiner, *Mexico to Extradite an Argentine Accused of Genocide to Spain*, New York *Times*, 3 February 2001; *Correspondents' Reports - Mexico*, 3 Y.B. Int'l L. (2000) (forthcoming).
See Chapter IV Part B for a quotation from the Foreign Ministry resolution on whether the suspect could be extradited for the charge of torture.

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted at New York on 10 December 1984, if he is found in the Principality."[155]

However, prosecutions under Article 8 (2) are subject to a number of conditions which are inconsistent with Monaco's obligations under Articles 5 and 7 of the Convention against Torture. Article 10 provides that Articles 6 and 9 do not apply when the person concerned has had a final judgment abroad and, if that was a conviction, served the sentence or the sentence has been prescribed or the person has been pardoned or received an amnesty.

Monaco is a party to the Convention against Torture. It is not known if Monaco has defined torture as a crime, so prosecutions for torture may have to be for ordinary crimes, such as assault or rape.

· ***Mongolia:*** There are two provisions which appear to provide Mongolian courts with universal jurisdiction over certain conduct amounting to torture within the meaning of Article 1 of the Convention against Torture (for the text and scope of these provisions, see Chapter Four, Section II). First, paragraph b of Article 3 of the Criminal Code provides that stateless persons in the territory who have committed crimes abroad, if found in Mongolia be subject to criminal responsibility and punishment under the Criminal Code. Second, paragraph c of Article 3 provides that foreign citizens who have committed crimes abroad shall be subject to criminal responsibility according to the Criminal Code when provided for by international agreements. It is not certain whether this provision means when the treaty provides for criminal responsibility for the conduct or when the treaty provides for such responsibility when the conduct occurs abroad. There appears to be no jurisprudence or commentary on this point. Paragraph c is strengthened by Article 10 (3) of the Constitution, which provides that treaties to which Mongolia is a party become effective as domestic legislation upon the entry into force of the laws on their ratification or accession.

Independently of these two legislative provisions, it may be possible that Article 10 (1) of the Constitution of Mongolia, which requires that Mongolia "adhere to the universally recognized norms and principles of international law . . .", permits the exercise of universal jurisdiction based on customary international law or general principles of law.

[155] Code of Criminal Procedure, Art. 8 (2). The original French text reads:

"*Quiconque, hors du territoire de la Principauté, se sera rendu coupable de faits qualifiés crime ou délit constituant des tortures au sens de l'article premier de la convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, adoptée a New York le 10 décembre 1984, s'il est trouvé dans la Principauté.*

Mongolia is not yet a party to the Convention against Torture. It has signed the Rome Statute, but it has not yet ratified the Rome Statute as of 1 September 2001. Torture is a crime under Mongolian law.[156]

· ***Netherlands:*** National courts may exercise universal jurisdiction over torture.

[156] Criminal Code, Art. 77 (Beatings and torture) (covering some, but not all, of the conduct in the definition in Article 1 of the Convention against Torture).

(1) Legislation. Section 5 of the Act of 29 September 1988 implementing the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Implementation) Act, No. 478 gives national courts universal jurisdiction over torture.[157] The Netherlands is a party to the Convention against Torture. It has signed the Rome Statute, but it had not yet ratified it as of 1 September 2001. Torture is defined as a crime under national law.[158]

(2) Jurisprudence and executive action. As interpreted by Dutch courts, this law was not effective in practice for the first 12 years of its existence, leading to calls for amendment. However, as explained below, there was a dramatic change in a November 2000 decision.

The problems with the Dutch courts' interpretation of this law are illustrated in the *Pinochet* case. The Amsterdam Public Prosecutor failed to act on complaints of torture filed on 29 May 1994 against former President Augusto Pinochet during his visit to Amsterdam and on 6 June 1994 the Public Prosecutor informed the two complainants that he saw no reason to comply with the request.[159] The Procurator General subsequently concluded that the Public Prosecutor correctly decided not to prosecute on a number of legal grounds, including: the objectives of the complaint were formulated "in very broad terms"; the intent of Parliament had been that when there were specific individuals who had been harmed, they, rather than other individuals or organizations, should file the complaint; no decision had been made by the government not to extradite the former President; it was not "certain that Pinochet was (still) in the Netherlands at the time the request was made to the Public Prosecutor in the District of Amsterdam", implying that it was up to the complainants to demonstrate that the former President was in the Netherlands at the time; and that he was immune because "[a] head of state may claim immunity" and since "Pinochet is still head of the Chilean armed forces, [that] would preclude prosecution in Chile".

The Procurator General also cited a number of practical problems. He said that in his view,

> "prosecution would be illusory, since all or most of the evidence will have to be gathered in Chile, given the nature of the alleged acts of torture. The Netherlands has no convention with Chile providing for the gathering of criminal evidence. Prosecution will also entail

[157] This provision states: "Dutch criminal law shall apply to any person who commits outside the Netherlands one of the criminal offences described in Sections 1 and 2 of this Act." Initial Report of the Netherlands under the UN Convention against Torture, U.N. Doc. CAT/C/9/Add.1, p. 20.

[158] The definition in Section 1 of the Act is similar to that in Article 1 of the Convention against Torture, but the Netherlands has been criticized about the differences. Conclusions and recommendations of the Committee against Torture concerning the third periodic report of the Netherlands, U.N. Doc. A/55/44, 16 May 2000, para.188 (a) (recommending that "[m]easures be taken in the Netherlands (European part) to fully incorporate the Convention in domestic law, including adopting the definition of torture contained in article 1 of the Convention").

[159] Letter from W. Bos, the Procurator General, to the Court of Appeal in Amsterdam, Ref. Staf-E/94/270 and 12SV-U3-3221/94/57, 3 November 1994 (English translation for Amnesty International by Johannes Gerrit de Waard). All references below to the position of the Procurator General are from this letter.

> many (other) practical problems regarding execution. I take the view that the Dutch Public Prosecution Service cannot be expected to tackle these problems in real earnest and solve them."

He also contended that since prosecution of Germans, Japanese and Yugoslavs suspected of war crimes had been and were continuing to be prosecuted by international tribunals and that since the courts in the Netherlands only prosecuted Dutch persons suspected of war crimes, "prosecution of Pinochet by the Dutch Public Prosecution Service would be out of proportion and presumptuous". He noted other practical problems, such as ensuring service of documents in a proper manner and claimed that "no imposed penalty could be executed, since Chile cannot be obligated to extradited any of its own nationals". The Amsterdam Court of Appeal concluded that

> "[t]he complaint is manifestly unfounded, even if it might be assumed that CKN, the complainant, as evidenced by its objectives and factual activities, promotes an interest that is harmed directly by the decision not to prosecute Pinochet. The reason is that criminal proceedings against Pinochet by the Dutch Public Prosection Service will evidently encounter so many legal and factual problems that the Public Prosecutor was completely right in waiving such proceedings."[160]

However, six years later, the same court took a much more liberal approach to interpreting this law in the *Bouterse* case. On 20 November 2000, the Court of Appeal of Amsterdam decided that a judicial investigation should be started with a view to prosecution into the allegations that Lt. Col. Desiré Delano Bouterse, the head of state of Surinam until 1989 was responsible for the torture and murder of 14 people on 8 or 9 December 1982.[161] Two relatives of the victims filed a complaint with the Court of Appeal of Amsterdam in June 1997. It complained that the Public Prosecutor of Amsterdam had refused to open an investigation into the allegations against Bouterse.

The court explained that "torture as a crime against humanity was already a crime in 1982 under customary international law, and that the offender can be held personally liable under criminal law"; that "in 1982, it was probably not the case (any more) that a crime against humanity could also be committed only in time of war or armed conflict, not in time of peace"; that "crimes against humanity are not subject to statutory limitation"; and that "customary international law, as it stood in 1982, gave a state competence to exercise extraterritorial (universal) jurisdiction over a person accused of a crime against humanity when that person was not a national of the state".[162]

[160] Decision of 4 January 1995 on the complaint under petition No. 578/94 by the Chili Komittee Nederland (CKN) foundation, Court of Appeal in Amsterdam (English translation for Amnesty International by Johannes Gerrit de Waard). The Committee against Torture stated that it regretted the failure to prosecute the former President. Conclusions and recommendations of the Committee against Torture concerning the third periodic report of the Netherlands, U.N. Doc. A/55/44, 16 May 2000, para.2 (d).

[161] Marlise Simmons, *Dutch Court Orders an Investigation of '82 Killings in Suriname,* New York *Times*, 26 November 2000.

[162] *Bouterse* Case, Decision (*beschikking*), Petition numbers R 97/163/12 Sv and R 97/176/12 Sv, Court of

Appeal (*Gerechtshof Amsterdam*), 5th chamber, 20 November 2000, para. 8.2 (unofficial English translation *obtainable from* <http://www.icj.org/objectives/decision.htm>).

It also concluded that Netherlands courts could exercise jurisdiction over the torture committed on 8 to 9 December 1982, even though the effective date of the Netherlands Act against Torture was 20 January 1989. It explained that the Convention against Torture was simply "of a declaratory nature", which "only confirms that which was already contained in customary international law in sofar as its prohibition, punishment and description of torture as a crime against humanity are concerned".[163] It agreed with the court-appointed expert, John R. Dugard of the University of Lieden, that the Act "could be applied retrospectively to cover conduct that was illegal under Dutch law before 1989 but was not criminalised under the name of torture, such as assault or murder", because it was a retrospective statute that did not create new offences, but provided jurisdiction over a crime that was "criminal according to the general principles of law recognized by the community of nations", within the meaning of Article 15 (2) of the International Covenant on Civil and Political Rights, rather than a retroactive statute, that made conduct criminal which was not punishable at the time it occurred, in violation of the prohibition in Article 15 (1) of the Covenant.[164]

The court then ordered the Public Prosecutor in the District of Amsterdam to prosecute Bouterse for the alleged torture on 8 to 9 December 1982 in Paraibo, Suriname and to file a demand with the examining magistrate in the District Court in Amsterdam to open a preliminary inquiry into the alleged torture.[165] The Public Prosecutor has appealed and the Amsterdam Court of Appeal ordered the Prosecutor to open an enquiry.

The Office of the Prosecution in Amsterdam has challenged the decision by the Court of Appeals on jurisdictional grounds before the Netherlands Supreme Court. As of 1 September 2001, it had not yet issued a decision on the challenge.

[163] *Ibid.*, para. 6.3.

[164] *Ibid.*(citing John R. Dugard, Opinion, *Bouterse* case, 7 July 2000, *obtainable from* <http://www.icj.org>). A senior Ministry of Justice official who teaches at the University of Groningen, Gerard A.M. Strijards, has argued in an article for the *Nederlands Juristenblad,* a Dutch legal journal, that Dutch courts cannot exercise universal jurisdiction over torture. He claims that, although Article 93 of the Dutch Constitution provides that self-executing provisions of treaties are, when promulgated, directly binding, this principle does not apply to crimes. In his view, Article 16 of the Constitution is a special rule (*lex specialis*) overriding the monist general rule (*lex generalis*) in Article 93. Both this article and Article 1 of the Dutch Criminal Code require that no conduct is criminal unless defined as a crime by a statute at the time of the conduct. He also contended that universal jurisdiction provisions in treaties are not self-executing and must be enacted into law before they can be enforced in Dutch courts. The foregoing account of the Strijards article, which is not available in English, is based on a summary in Elies van Sliegdregt and Nico Keijzer, *Correspondents' Reports - Bouterse,* 3 Y.B. Int'l Hum. L. (2000) (forthcoming).

[165] *Ibid.*, para. 11.

On 12 January 2001, Maarten Mourik, a former Dutch Ambassador to UNESCO, filed a complaint with a Dutch prosecutor alleging that Jorge Zorreguieta, the former Argentine Minister of Agriculture from 1976 to 1981 during the military government, and other government ministers were responsible for torture and crimes against humanity.[166] The Dutch College of Prosecutors-General referred the complaint to the Office of the Prosecutor in Amsterdam, which decided on 23 March 2001 that it had no jurisdiction over crimes committed before 1989, when the Convention against Torture became effective in the Netherlands. The decision has been appealed to the Court of Appeal in Amsterdam.

· ***New Zealand:*** New Zealand courts may exercise custodial universal jurisdiction over torture and ancillary crimes. Section 3 of the Crimes of Torture Act 1989 provides:

> "(1) Every person is liable upon conviction on indictment to imprisonment for a term not exceeding 14 years who, being a person to whom this section applies or acting at the instigation or with the consent of such a person, whether in or outside New Zealand, -
> (a) Commits an act of torture; or
> (b) Does or omits an act for the purpose of aiding any person to commit an act of torture; or
> (c) Abets any person in the commission of an act of torture; or
> (d) Incites, counsels, or procures any person to commit an act of torture.
> (2) Every person is liable upon conviction on indictment to imprisonment for a term not exceeding 10 years who, being a person to whom this section applies or acting at the instigation or with the consent or acquiescence of such a person, whether in or outside New Zealand, -
> (a) Attempts to commit an act of torture; or
> (b) Conspires with any other person to commit an act of torture; or
> (c) Is an accessory after the fact to an act of torture.
> (3) This section applies to any person who is a public official or who is acting in an official capacity."[167]

Section 4 provides that no proceedings under Section 3 may be brought unless the person to be charged is a New Zealand citizen, the person is present in New Zealand or the act or omission occurred in New Zealand or on board a New Zealand ship or aircraft.[168] Although Section 12 requires the consent of the Attorney-General for prosecutions of anyone charged under Section 3,

[166] Letter dated 12 January 2001 from Ddr. Britta Böhler and Dr. Liesbeth Zegveld of the law firm olf Van den Biesen, Prakken and Böhler to J.L. de Wijkerslooth de Weerdesteijn, President of the Procurators General, Ref. 20000779.BB/lz alleging "torture and crimes against humanity committed by the members of the government of Argentina between 1976 and 1983", and "in particular against Jorge Zorreguieta, a member of this government from 1976 to 1981"; *Alain Franco, Les amours embarrassantes de Maxima et d'"Alex", prince hériter des Pays-BAs, Le Monde, 13 février 2001.*

[167] The Crimes of Torture Act 1989 (1989, No. 106), Sec. 3 (Acts of torture).

[168] *Ibid.*, Sec. 4 (Jurisdiction in respect of acts of torture).

it does not require such consent to make an arrest, thus permitting the authorities to act quickly to avoid possible flight.[169]

· ***Norway:*** Norwegian courts may exercise universal jurisdiction over some conduct amounting to torture within the definition of the Convention against Torture.

Section 12 (4) of the General Civil Penal Code provides universal jurisdiction over assault and other crimes committed by any foreigner and over felonies committed by foreign residents or foreigners staying in Norway (for the text and scope, see Chapter Four, Section II). The government has stated that,

[169] *Ibid.*, Sec. 12 (Attorney-General's consent required to prosecutions).

> "In general, Norway implemented the principle of universal jurisdiction which was applicable to acts of torture committed abroad by Norwegian nationals, as well as to acts committed abroad by foreigners. That approach was a tradition which dated back to the trial of war criminals after the Second World War. If a person who had committed an act of torture was in danger of ill-treatment or the death penalty if he was extradited, he would be tried in Norway."[170]

The government has made similar statements on other occasions.[171] Norway is a party to the Convention against Torture and to the Rome Statute.

· ***Panama:*** Panamanian courts may exercise custodial universal jurisdiction over torture. Article 10 of the Penal Code (*Código Penal*) provides for custodial universal jurisdiction over persons who commit punishable acts covered by treaties ratified by Panama.

The government stated the following in 1997:

> "Further to the above text [about other types of jurisdiction], under articles 10 and 12 of the Panamanian Penal Code, Panamanian criminal law also applies to persons who commit punishable acts referred to in international treaties ratified by the Republic of Panama. When an accused person is on the territory of the Republic, and independently of the provisions that apply where the punishable act was committed and the nationality of the accused, judgements in criminal proceedings delivered in respect of the offences emphasized and described in the previous paragraph, including those referred to in the Convention, will not have the force of res judicata under national law."[172]

Panama has defined torture under national law. The Committee against Torture said that

[170] Summary record of the 123rd meeting of the Committee against Torture, U.N. Doc. CAT/C/SR.123 (1993), para. 1.

[171] Initial report of Norway to the Committee against Torture, U.N. Doc. CAT/C/5/Add.3, 19 October 1988, para. 22 ("The territorial application of the Penal Code is regulated in its section 12, which to a large extent applies the principle of universality. Violations of the provisions referred to above may be tried by Norwegian courts even when the offence is committed by a foreigner abroad."); first supplementary report to the Committee against Torture, U.N. Doc. CAT/C/17/Add.1, 23 July 1992, paras 17 18 ("17. . . .The principle of universality is herein [Section 12 of the Penal Code] applied to a large extent. Norwegian criminal law is applicable not only to acts of torture committed in the realm, but also to such acts committed abroad by any Norwegian national or any person domiciled in Norway. 18. Norwegian criminal law is also, on certain conditions set out in section 12, paragraph 4, also applicable to acts committed abroad by a foreigner."). The third period report to the Committee, U.N. Doc. CAT/C/34/Add.8, 29 July 1997, paras 19 and 26, and the fourth periodic report, U.N. Doc. CAT/C/55/Add.4, 10 October 2000, paras 18 and 20, indicated that these provisions were unchanged. In the third report, the government further explained:

> "A person who with just cause is suspected of torture will be extradited if there is a request for extradition and the requirements for extradition set out in the Extradition Act are fulfilled. If not, he or she will be prosecuted in Norway if the prosecution authority deems that the evidence will lead to a conviction. If not, the case will be dismissed."para. 27.

[172] Third periodic reports of States parties due in 1996 : Panama. 01/10/97. CAT/C/34/Add.9, para.46.

> "the definition of torture embodied in the Convention had been incorporated in the Panamanian legal system and included in articles 156 to 160 of the Penal Code. Panamanian law also followed the definition of torture contained in the Inter-American Convention to Prevent and Punish Torture of the Organization of American States. All legal decisions were required to take account of the definition of torture embodied in those instruments. Moreover, the Judicial Code prohibited the release on parole of any person convicted of an offence of torture or ill-treatment."[173]

Panama has ratified the Convention against Torture and the Inter-American Convention on Torture. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it.

· ***Paraguay:*** Paraguayan courts may exercise universal jurisdiction pursuant to two provisions over torture.

First, Article 9 (1) of the Penal Code (*Código Penal*) provides custodial universal jurisdiction over crimes which are also crimes in the place where they were committed and the author at the time of the commission of the crime was a Paraguayan national or had acquired such nationality after the crime. In case the author was a stateless person the Paraguayan law shall be applicable if the person is in Paraguayan territory and an extradition demand has been denied . The same rule applies when there is a lack of government (*poder punitivo*) in the place where the act was committed. [174]

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[173] Summary Records of the 332nd meeting of the Committee against Torture, U.N. Doc. CAT/C/SR. 332 (1998).
The original Spanish text of Article 160 of the Penal Code states that:

> "*El servidor público que someta a un detenido a severidades o apremios indebidos será sancionado con prisión de 6 a 20 meses. Si el hecho consiste en torturas , castigo infamante, vejaciones o medidas arbitrarias la sanción será de dos a cinco años de prisión.*"

The government has stated the following in relation to Article 160:

> "2. Specifically, article 160 of the Penal Code provides for two to five years' imprisonment for public servants who subject a detainee to torture, degrading punishment, harassment or arbitrary measures, so that this rule is a direct application of the above-mentioned Convention. In addition, this law also punishes a public servant who subjects a detainee to hardship or ill-treatment, stipulating for such cases prison terms of between 6 and 20 months."

Third periodic reports of States parties due in 1996 : Panama. 01/10/97. CAT/C/34/Add.9.

[174] *Artículo 9.- "Otros hechos realizados en el extranjero*
1º Se aplicará la ley penal paraguaya a los demás hechos realizados en el extranjero sólo cuando:
1.en el lugar de su realización, el hecho se halle penalmente sancionado; y
2. el autor, al tiempo de la realización del hecho,
a. haya tenido nacionalidad paraguaya o la hubiera adquirido después de la realización del mismo; o
b. careciendo de nacionalidad, se encontrara en el territorio nacional y su extradición hubiera sido rechazada, a pesar de que ella, en virtud de la naturaleza del hecho, hubiera sido legalmente admisible.
Lo dispuesto en este inciso se aplicará también cuando en el lugar de la realización del hecho no exista poder punitivo.(...)"
Obtainable from http://www.itacom.com.py/ministerio_publico/codigo_penal/

Second, Article 8 (7) of the Penal Code, Law No. 1. 160 provides custodial universal jurisdiction over acts which Paraguay is obliged under a treaty to pursue even when they have been committed abroad. While the draft of the current Code was being considered by Congress, the government explained that

> "under the draft Penal Code now before Parliament, punishable acts in respect of which Paraguay has ratified treaties are considered to be subject to universal legal protection. Accordingly, Paraguayan criminal law will apply to cases in which Paraguay is required by the terms of the Convention to prosecute a punishable act, even if it has been committed abroad."[175]

Paraguay has ratified the Convention against Torture and the Inter-American Convention on Torture. It has ratified the Rome Statute, but as of 1 September 2001 it had not yet enacted implementing legislation. Paraguay has defined torture as a crime under national law, but it does not include all the elements required by Article 1 of the Convention against Torture.[176]

· ***Peru:*** Peruvian courts may exercise universal jurisdiction over torture. Article 2 (5) of the Peruvian Penal Code (*Código Penal*)provides that courts may exercise universal jurisdiction over crimes committed abroad which Peru is required to punish pursuant to a treaty (for the text and discussion of its scope, see Chapter Four, Section II above).

Peru has ratified the Convention against Torture and the Inter-American Convention on Torture. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Torture was defined in 1998 as a crime under national law.[177]

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[175] Second periodic report of Paraguay to the Committee against Torture, U.N. Doc. CAT/C/29/Add.1 (1996), para. 32. The Committee against Torture has indicated that it believes that this provision fulfills Paraguay's obligations under Article 5 to provide for universal jurisdiction. Conclusions and recommendations of the Committee against Torture concerning the third periodic report of Paraguay, U.N. Doc. A/55/44, 10 May 2000, para. 149 (b) (citing as positive "[t]he innovations introduced by the new Penal Code, including the extension of its application to the punishment of acts committed abroad against rights which are universally protected under an international treaty, a provision which is in keeping with article 5 of the Convention").

[176] Conclusions and recommendations of the Committee against Torture concerning the third periodic report of Paraguay, U.N. Doc. A/55/44, 10 May 2000, para. 150 (b) (expressing concern that "in the legislation in force, torture is not defined as an offence in accordance with article 1 of the Convention; the offence provided for in the new Penal Code does not include basic elements of the offence described in the Convention") and para. 151 (b) (recommending "[t]he inclusion in the Penal Code of provisions defining torture as a crime in accordance with article 1 of the Convention").

[177] Art. 321 of the Penal Code -Title XV-A- (introduced by Art. 1º of Law Nº 26926, published 21-02-98) reads as follows:

> *"El funcionario o servidor público o cualquier persona, con el consentimiento o aquiescencia de aquél, que inflija a otro dolores o sufrimientos graves, sean físicos o mentales, o lo someta a condiciones o métodos que anulen su personalidad o disminuyan su capacidad física o mental, aunque no causen dolor físico o aflicción psíquica, con el fin de obtener de la víctima o de un tercero una confesión o información, o de castigarla por cualquier hecho que haya cometido o se sospeche que ha cometido, o de intimidarla o de coaccionarla, será reprimido con pena privativa de libertad no menor de cinco ni mayor de diez años.*
>
> *Si la tortura causa la muerte del agraviado o le produce lesión grave y el agente pudo prever este*

resultado, la pena privativa de libertad será respectivamente no menor de ocho ni mayor de veinte años, ni menor de seis ni mayor de doce años."

· ***Philippines:*** It appears that Philippine courts can exercise universal jurisdiction over conduct abroad amounting to torture when it also constitutes an ordinary crime under national law, such as assault or rape.

Generally accepted principles of international law are part of the law of the Philippines. Section 2 of Article II (Declaration of Principles and State Policies) of the current Constitution of 1987, which dates to the 1935 Constitution, states:

> "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."[178]

As explained above in Chapter Four, Section II, the Philippine Supreme Court gave this concept a broad reading in the *Kuroda* case more than half a century ago. A similarly broad reading today would include the jurisdictional rules of international law, including universal jurisdiction. The government has stated that

> "Article 2 of the Revised Penal Code extends application of this [territorial] jurisdiction outside Philippine territory for specific offences . . . and the law of nations, except as provided in the treaties and the laws of preferential application.
>
> . . .
>
> [A]ny individual, be he a citizen or a foreigner who claims to have been a victim of torture or other cruel, inhuman or degrading treatment or punishment, may obtain orders from Philippine courts, the Philippine Commission on Human Rights or other competent authorities."[179]

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[178] Constitution of the Philippines of 1987, Art. II, § 2 (*obtainable from* <http://memory.loc.gov/law/GLINv1/GLIN.htm>).

[179] Addendum to initial report, CAT/C/5/Add.18, 30 June 1989, paras 46, 48. Article 2 of the Revised Penal Code states in relevant part:

"Except as provided in the treaties and laws of preferential application, the provisions of this Code shall be enforced not only within the Philippine Archipelago, including its atmosphere, its interior waters and maritime zone, but also outside of its jurisdiction, against those who:

....

5. Should commit any of the crimes against national security and the law of nations, defined in Title One of Book Two of this Code.

The government explained that

> "the Philippines has a standing national legislation namely its Revised Penal Code which pertinently provides that, except as provided in the treat[ies] and laws of preferential application, the provisions of the Code shall be enforced not only within the Philippine Archipelago, including its atmosphere, its interior waters and maritime zones, but also outside its jurisdiction, against those who, among others, commit an offence while on a Philippine ship or aircraft, or, while being public officers or employees, commit any of the crimes against national security and the law of nations, these being treason, espionage, piracy, and mutiny on the high seas.

Initial report of the Philippines to the Committee against Torture, U.N. Doc. CAT/C/5/Add.18, 30 June 1989, para. 9. The government further explained that

> "[i]n the Philippines, the provisions of the Convention can be invoked before, and directly enforced by, the courts and administrative authorities by virtue of the constitutional provision which states that the Philippines adopts the generally accepted principles of international law as part of the law of the land and adheres to a policy of peace, equality, justice, freedom, co-operation and amity with all nations."

Ibid., para. 10. Foreigners may invoke these provisions:

"An individual, be he citizen or a foreigner who claims to have been a victim of torture or other cruel, inhuman or degrading treatment or punishment may obtain redress by bringing his case to the Commission on Human Rights or to the usual courts of justice."

Ibid., para. 11.

The Philippines has ratified the Convention against Torture. It has signed the Rome Statute but, as of 1 September 2001, it had not yet ratified it. According to the initial report of the Philippines to the Committee against Torture in 1989, torture is not defined as a crime under national law, so prosecutions for torture would have to be for one of the ordinary crimes under national law prohibiting such conduct.[180] As far as is known, torture has not yet been defined as a crime under national law.

· ***Poland:*** Polish courts may exercise universal jurisdiction over certain conduct amounting to torture. Chapter XIII (Liability for offences committed abroad) of the Penal Code of 1997, which regulates extraterritorial jurisdiction, provides two bases for universal jurisdiction over conduct amounting to torture, one over ordinary crimes and the other over crimes which Poland is required to prosecute under an international treaty (for the full text and scope of all the relevant provisions, see Chapter Four, Section II).

The first basis is set out in Article 110 (2), which provides for custodial universal jurisdiction over aliens who have committed crimes abroad which have no link with Poland when the crime would have been subject to a penalty of two years' imprisonment if committed in Poland, but Article 111 requires that the conduct have been punishable in the place where it occurred (double criminality).

The second basis for universal jurisdiction is found in Article 113, which provides:

> "Notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements."[181]

[180] Initial report of the Philippines to the Committee against Torture, U.N. Doc. CAT/C/5/Add.18, 30 June 1989, paras 41-44.

[181] *Ibid.*, Art. 113 (revising former Art. 115).

This legislative provision is reinforced by the Constitution. Article 91 (1) states that "[a]fter promulgation thereof in the Journal of Laws of the Republic (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute."[182] Article 91 (2) provides that "[a]n international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes."[183]

Poland has ratified the Convention against Torture. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. As of May 2000, Poland had not defined torture as a crime under national law, so prosecutions for torture would have to be brought for ordinary crimes, such as assault or rape.[184] Poland also permits the defence of superior orders in certain situations.[185]

· ***Portugal:*** There are several legislative provisions permitting Portuguese courts to exercise universal jurisdiction over certain conduct amounting to torture (for the text and scope of these provisions, see Chapter Four, Section II).

First, Article 5 (1) (e) of the 1999 Penal Code (*Código Penal Português*) provides Portuguese courts with jurisdiction over crimes for which extradition is permitted which have been committed by foreigners abroad when they are found in Portugal and cannot be extradited.

Second, Article 5 (2) of the Penal Code provides for universal jurisdiction over acts committed abroad which the state is obligated under any international treaty to try.

[182] Polish Constitution of 1997, Art. 91 (1).

[183] *Ibid.*, Art. 91 (2). Article 9 provides that "[t]he Republic of Poland shall respect international law binding upon it."

[184] Conclusions and recommendations of the Committee against Torture concerning the third periodic report of Poland, U.N. Doc. A/55/44, 5 May 2000, para. 87 (expressing concern that "the amendments to domestic legislation do not contain any provisions for the prosecution and punishment of those guilty of the crime of torture, as required by articles 1 and 4 of the Convention") and para. 92 (recommending that Poland "introduce such legislative changes as are necessary to identify torture as a specific crime and to enable prosecutions of torture, as defined in the Convention, and the application of appropriate penalties").

[185] Conclusions and recommendations of the Committee against Torture concerning the third periodic report of Poland, U.N. Doc. A/55/44, 5 May 2000, para. 88 (expressing concern that "the new Penal Code does not introduce any substantial change regarding orders of superiors when they are invoked as justification of torture. According to existing legislation, criminal responsibility of the recipient of an order is based on his awareness of the criminal nature of the command.") and para. 93 (recommending that "the Penal Code be amended to ensure that orders of superiors cannot be invoked, in any circumstances, as justification of torture").

Portugal is a party to the Convention against Torture. It has signed the Rome Statute, but as of 1 September 2001 had not yet ratified it. Torture is defined as a crime under national law in two provisions.[186]

· ***Romania:*** Article 6 of the Romanian Criminal Code of 1988 (for the text and scope of this and other relevant provisions, see Chapter Four, Section II above) gives national courts custodial universal jurisdiction over crimes specified in the Criminal Code committed abroad by foreigners and stateless persons, provided that the conduct was criminal in the place where it occurred and there are no bars to prosecution under the law of that place. Such restrictions are contrary to the requirements of Articles 5 and 7 of the Convention against Torture.

Article 7 of this Code states that "[t]he provisions included in Articles 5 and 6 shall only apply if international agreements do not otherwise provide." The meaning of this provision is not entirely clear, but it appears to mean that if a treaty provides for universal jurisdiction without the restrictions in Article 6, then the broader treaty provisions would control. There does not seem to be any jurisprudence or authoritative commentary on Articles 6 and 7.

Article 6 appears to be worded sufficiently broadly to include ordinary crimes that would amount to torture.

[186]Articles 243 (Torture and other cruel, degrading or inhuman treatment) (*Tortura e outros tratamentos cruéis, degradantes ou deshumanos*) and 244 (Severe torture and other cruel, degrading or inhuman treatment)(*Tortura e outros tratamentos cueis, degradantes ou deshumanos graves*)of the Penal Code define torture as a crime more restrictively than Article 1 of the Convention against Torture.

Romania is a party to the Convention against Torture. It has signed the Rome Statute, but as of 1 September 2001 had not yet ratified it. Statutes of limitation appear to apply to torture.[187]

· ***Russian Federation:*** Russian courts appear to have universal jurisdiction pursuant to two provisions over certain conduct amounting to torture within the definition of the Convention against Torture (for the text of that provision, see Chapter Four, Section II).

First, Article 12 (1) of the 1996 Russian Criminal Code, effective 1997, provides jurisdiction over stateless persons permanently resident in the Russian Federation who have committed crimes abroad, if that conduct was a crime under the law of the territorial state, provided that they had not been convicted in that state. The requirement that the conduct be a crime in the territorial state is contrary to the Russian Federation's obligations under Articles 5 and 7 of the Convention against Torture.

Second, Article 12 (3) gives Russian courts universal jurisdiction over foreign citizens and stateless persons not permanently resident in the Russian Federation for crimes under Russian law where a treaty provides for prosecution for such conduct, as long as the suspects have not been convicted of such conduct in another state.

[187] Article 121 of the Criminal Code excludes only crimes against peace and mankind (see Chapter Four, Section II).

Generally, under the Constitution, treaties have primacy over other law. However, the government in 1996 noted problems with respect to direct enforcement of international law by courts.[188] Although torture is prohibited, in 1996, the Committee against Torture criticized "[t]he failure to create a specific crime of torture in the domestic law, as required by article 4 of the Convention."[189] Therefore, any prosecution for torture would have to be for an ordinary crime, such as assault or rape.

· ***Senegal:*** Senegalese courts may not exercise universal jurisdiction over torture, according to a decision by the *Cour de cassation* (Court of Cassation) in 2001. The history of the litigation illustrates the problem, even in monist states like Senegal, of relying solely on constitutional provisions providing that conventional or customary international law has priority of over contradictory legislation when the state has not enacted legislation both expressly defining the crime and penalty and expressly giving the court universal jurisdiction. It also demonstrates the risks of reliance on government statements on the status of international law in national systems in the absence of an authoritative determination by the highest court in the state.

Article 79 of the Constitution of Senegal provides: "The treaties or agreements regularly ratified or approved have, on their publication, an authority superior to that of the laws, subject, for each treaty or agreement, to its application by the other party."[190] Senegal became a party to the Convention against Torture on 21 August 1986, almost a year before it entered into force on 26 June 1987. Ten years after ratification, Senegal provided in Article 40 of the Penal Code that torture and acts of barbarism (*actes de barbarie*) are crimes.[191] However, there is no provision in

[188] During the consideration of the second periodic report by the Committee against Torture, Mr Ivanov of the Russian Federation delegation stated:

> "17. . . . The Committee was perhaps not fully aware of the difficulties encountered, in particular by Parliament, in incorporating international norms into Russian legislation. The principle of the primacy of those norms over domestic law was not yet universally accepted in the Russian Federation and it would be helpful if it could be stated outright and the legislation amended accordingly. It should not be forgotten that the situation in the Russian Federation was very unstable in the current period of transition. In any event, the reform effort was continuing despite the difficulties, and the Committee's recommendations would be extremely useful.
>
> 18. As Mr. Kartashkin had said, the Constitution had already been invoked in court, and the plenary Supreme Council, as it was empowered to do, had issued a special decree to the effect that the courts must enforce the Constitution directly. Where the direct implementation of international norms was concerned, the situation was less clear and he was unable to cite a specific example of those norms actually being invoked in the courts."

Summary records of the 265th meeting, 12 November 1996, U.N. Doc. CAT/C/SR.265, 27 January 1997, paras 17-18.

[189] Concluding observations of the Committee against Torture on the report of the Russian Federation, U.N. Doc. A/52/44 (1996), para. 42 (a).

[190] *Constitution de la Republique du Sénégal, Art.79 ("Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.")* The English translation is in Gisbert H. Flanz, ed., *Constitutions of the Countries of the World*, Release 98-7 (Dobbs Ferry, New York: Oceana Publications, Inc. November 1998).

[191] Law 96-16, 28 August 1996. Previously, both torture and acts of barbarity were simply aggravating factors to be considered in determining the appropriate sentence. Law 76–02, 25 March 1976, Art. 288.

the Penal Code expressly giving courts universal jurisdiction over torture or over acts of barbarism.

Nevertheless, a court has exercised universal jurisdiction over the former President of Chad who has been charged with torture in that country, apparently based on the direct incorporation pursuant to Article 79 of the Constitution of the Convention against Torture's universal jurisdiction provisions. The initial court determination was not entirely surprising since the government had informed the Committee against Torture in its initial report in 1990 that Senegalese courts could exercise universal jurisdiction over torture:

> "The Senegalese courts are in principle not competent to try offences committed abroad by an alien who has been granted asylum in Senegal, particularly since, not being a Senegalese national, the offender can always be handed over to the foreign authority requesting his extradition. There are however, two exceptions to the Senegalese courts' lack of jurisdiction. One is that when the State's security or credit is under threat, the Senegalese judge will take action regardless of the nationality of the guilty party, the place where the act was committed and the legislation of the country in which it was committed. The other is when the crime or offence committed abroad by an alien is prejudicial to the interests of the international community. There arises the principle of universal jurisdiction provided for in some international conventions to which Senegal is a party and relating, in particular, to drug trafficking, counterfeiting and, finally, the Convention against Torture."[192]

On 26 January 2000, nine individual victims and the *Association des Victimes des Crimes et Répressions Politiques* (AVCP), Association of Victims of Crimes and Political Repression filed a complaint a private prosecution (*plainte avec constitution de partie civile*) on 26 January 2000 in the *Tribunal Régional Hors-classe de Dakar* (Dakar Regional Court) alleging that Hissène Habré was responsible for torture, acts of barbarism and crimes against humanity. The complaint was supported by several other non-governmental organizations.[193] The complaint

[192] Initial report of Senegal to the Committee against Torture, U.N. Doc. CAT/C/5/Add.19, 15 January 1990, para. 93. The original text in French reads:

> *"Le juge répressif sénégalais est en principe incompétent pour connâitre des infractions commises à l'étranger par un étranger qui vient se réfugier chez nous. D'autant que n'étant pas un national sénégalais, le délinquant peut toujours être livré à l'autorité étrangère qui demanderait son extradition. Cette incompétence du juge sénégalais souffre cependant de deux exceptions. D'une part, quand la sûreté de l'Etat ou son crédit sont en jeu, le juge sénégalais va intervenir sans consideérations de la nationalité du coupable, du lieuoù son infraction a été commise. D'autre par, lorsque l'infraction commise à l'étranger par un étranger lèse les intérêts de la communauté internationale. Ici se pose le principe de la compétence universelle prévue dans quelques conventions internationales auxquelles le Sénégal est partie, conventions relatives notamment au trafic des stupéfiants, au faux-monnayage et en dernier lieu la convention contre la torture."*

Rapport initial du Sénégal au Comité contre la torture, CAT/C/5/Add.8, 15 janvier 1990, al. 93.

[193] In addition to AVCRP, two national organizations joined the case: (RADDHO); the Chadian League for Human Rights (LTDH); Chadian Association for the Promotion and Defence of Human Rights; the National Organization for Human Rights. Three international non-governmental organizations also joined the case: FIDH,

detailed 97 political killings, 142 cases of torture, 100 "disappearances" and 736 arbitrary arrests and annexed extensive documentation supporting the allegations.[194]

Human Rights Watch and Interights and one French non-governmental organization, Agir Ensemble pour les Droits de l'Homme. In May 2000, 53 other Chadian victims and a French widow whose Chadian husband had been killed in 1984 joined the case.

[194] *Plainte avec Constitution de Partie Civile*, 26 January 2000 (*obtainable from* http://www.hrw.org/french/ghemes/habre-plainte.html).

As in other private prosecutions, the *juge d'instruction* (investigating judge) of the Dakar Regional Court, Judge Demba Kandji, consulted the prosecutor, Abdulaye Gaye, who gave a favourable opinion (*requisitoire pour information*) that the prosecution could go forward within the next two days. The investigating judge heard six of the victims testify *in camera* the following day and on 3 February 2001 required Hissène Habré to testify *in camera*. The same day, the investigating judge indicted Hissène Habré on charges of complicity in torture (*complicité d'actes de torture*) and opened a criminal investigation into the allegations of acts of barbarity and crimes against humanity, as well as into allegations of "disappearances".[195] He also restricted Hissène Habré's movements, ordered him not to make any public statements, required him to report weekly to the police and ordered him to surrender his passport and firearms. On 18 February 2000, the former President appealed. While this appeal was pending, the investigating judge heard extensive evidence concerning crimes committed in Chad.[196]

Hissène Habré was represented by a lawyer who was acting as a special adviser to the President of Senegal. On 30 June 2000, four days before the *Chambre d'accusation de la Cour d'appel de Dakar* (Accusation Chamber of the Dakar Court of Appeals) was to decide on Hissène Habré's challenge to jurisdiction, the *Conseil supérieur de la Magistrature* (Superior Council of the Magistracy), headed by President Wade, decided to remove Judge Kandji from his post as chief investigating judge of the *Tribunal Régional Hors-classe de Dakar* and appoint him as assistant prosecutor at the *Cour d'appel de Dakar*. At the same time, the Council removed Cheikh Tidiane Diakhaté, the President of the *Chambre d'accusation*, where the motion to dismiss for lack of jurisdiction was pending and appointed him to the *Conseil d'Etat* (Council of State). The removal of the chief investigating judge, the promotion of the President of the Indicting Chamber and the links between Hissène Habré's lawyer and the President of Senegal were criticized by the UN Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, and the UN Special Rapporteur on torture, Sir Nigel Rodley.[197]

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[195] He stated:

> *"Après avoir ainsi constaté l'identité du comparant, nous lui avons fait connaître les faits qui lui sont imputés et l'avons informés qu'il est en conséquence inculpé d'avoir à N'djaména (République du Tchad) entre juin 1982 et décembre 1990, période à laquelle vous exerciez les fonctions de Président de la République, Chef de l'Etat du Tchad, avec conaissance, aidé ou assisté X . . . dans la commission des faits de crimes contre l'humanité, d'actes de torture et de barbarie qui leur sont reporochés."*

Procès-verbal d'interrogatoire de première comparution, Tribunal Régional Hors Classe de Dakar, Cour d'appel de Dakar, Cabinet de M. Demba Kandji, Juge d'instruction, No. du Parquet: 482, No. de l'instruction: 13/2000 (*obtainable from* http://www.hrw.org/french/themes/habre-inculpation.html).

[196] For a summary of this evidence, see Human Rights Watch press releases: *Senegal Must Try Ex-Chad Dictator*, 10 May 2000; *Crimes of Ex-Chad Dictator Detailed*, 12 May 2000; *Case Against ex-Chad Dictator Debated*, 16 May 2000 (*obtainable from* http://www.hrw.org/press).

[197] They reminded Senegal of its obligations under the Convention against Torture, drew its attention to UN Commission on Human Rights Resolution 2000/43 stressing the general responsibility of all states to investigate allegations of torture and to ensure that those who encourage, order, tolerate or perpetrate such acts are held responsible for them and be severely punished and called upon Senegal to ensure that the judiciary was able to investigate the allegations against Hissein Habré independently and impartially. UN Press Release, 2 August 2000.

Immediately after these actions by the *Conseil Superieur de la Magistrature*, on 4 July 2000 the new President of the Indicting Chamber ordered Hissène Habré released. The Court held, first, that it did not have jurisdiction over the crime of torture because it had not been made a crime under Senegalese law until 1996, six years after the former President of Chad had fled the country. It did not address the victims' argument that Senegal had jurisdiction over the crime of torture under customary international law, independently of the Convention against Torture.[198] The court also stated that, under the principle of legality as recognized in Article 4 of the Penal Code, Senegal could not exercise jurisdiction over crimes against humanity because they were not defined as crimes under Senegalese law.[199] The court did not address the question whether it had jurisdiction over acts of barbarity, a crime under the Penal Code, or "disappearances", both of which had been under investigation by the investigating judge.

Second, the court held that "Senegalese courts do not have jurisdiction over acts of torture committed by a foreigner outside Senegalese territory whatever the nationality of the victims".[200] It stated that the list of crimes in Article 669 of the Code of Criminal Procedure over which Senegalese courts had universal jurisdiction (crimes against state security and counterfeiting) was an exclusive list.

Third, the court rejected the precedent of an administrative law case in the *Cour de cassation* holding that national law was subordinate to treaties under the Constitution, stating that criminal law standards were different. It held that criminal law was founded on two main rules, on the one hand, by fundamental rules defining the crime and its penalties, and on the other, by rules of form that determined competence, jurisdiction and functioning of courts, and that the rule of legality required precision in each.[201]

[198] This argument is detailed in Eric David's paper, *Observations de la Partie Civile sur la Requête en Anulation deposée par Hissein Habré* (2000), annexed to the complaint, and on file with Amnesty International. The former President's name is spelled in a variety of ways and the spelling in quoted documents is left unchanged.

[199] The statement by the court that Hissène Habrè had been indicted for complicity in crimes against humanity and acts of barbarity is in error; he had only been indicted for complicity in torture, although the investigating judge had opened an investigation into the first two crimes. As with the torture allegations, the court did not consider the victims' argument, as set out in the Eric David paper, that Senegalese courts could exercise jurisdiction over crimes against humanity under customary international law.

[200] The original text in French reads: *"[L]es juridictions sénégalaises ne peuvent connaître des faits de torture commis par un étranger en dehors du territoire sénégalaise quelque soit les nationalités des victimes . . ."*

[201] The original text in French reads:

"Considérant que la matière qui nous intéresse est relative à la justice pénale; qu'elle est bâtie sur deux grandes règles : d'une part les règles de fond qui définissent les infractions et fixent les peines et d'autres part, les règles de forme qui déterminent la compétence, la saisine et le fonctionnement des juridictions ;

Elle a toujours manifesté son autonomie par rapport aux autres normes juridiques ; que cette particularité est due au caractère sanctionnateur du droit pénal qui tend à la protection des intérêts de la société comme ceux des individus en cause et exige un certain formalisme de procédure ;

Considérant de ce fait que toute comparaison avec les autres branches du droit est vouée à l'échec, que l'arrêt cité pour soutenir la compétence universelle ne saurait prospérer en l'espèce, que l'incrimination universelle ne peut se confondre avec la compétence universelle . . ."

Habré, Arrêt nº 135 du 04-07-2000, la Chambre d'accusation (*obtainable from*

http://www.hrw.org/french/themes/habre-decision.html).

The court also stated that Article 5 of the Convention required states parties to enact implementing legislation providing for universal jurisdiction, noting that Belgium and France had enacted such legislation, although it did not demonstrate that these states were obliged to do so under their legal systems or simply did so because it was desirable to clarify the scope of the states' obligations. In addition, it also noted that, in contrast to the Charter of the International Military Tribunal at Nuremberg, Article 5 did not establish jurisdiction. In reaching this conclusion, the court did not recognize that Article 5, as explained in Chapter Nine, Section II.A, does not limit the required measures to legislative measures, but imposes an obligation on states parties to take any measures necessary, which may include executive and judicial measures. It did not indicate why the allocation of jurisdiction to a newly established international criminal court was relevant to jurisdiction of national courts. The court also did not even mention the *aut dedere aut judicare* obligations in Article 7 of the Convention against Torture.

The *parties civiles* sought review of this decision in the *Cour de cassation* (Court of Cassation). The office of the prosecutor issued an opinion on 3 January 2001 supporting the application.[202] The *Cour de cassation* rejected the application on 20 March 2001. After disposing of a number of challenges alleging procedural errors, the court stated that Article 5 (2) of the Convention against Torture required each state party to take measures necessary to establish its jurisdiction over persons suspected of torture found in their territory under their jurisdiction if they are not extradited and that Senegal had not taken the necessary legislative measures to do so.[203] Like the *Chambre d'accusation*, it did not discuss the *aut dedere aut judicare* obligation in Article 7 of the Convention.

On 7 April 2001, President Wade reportedly asked Hissène Habré to leave Senegal. The victims, who had constituted themselves as *parties civiles* in the criminal prosecution, then submitted a communication to the Committee against Torture, a body of experts established under the Convention against Torture to monitor its implementation, pursuant to Article 22 of the

[202] *Conclusion du Ministère Public, Instance Pénale, Affaire nº67/RG/2000, Dakar, 3 janvier 2001* (*obtainable from* http://www.hrw.org/french/themes/habre-ministere_public.html).

[203] *Arrêt, nº 14 du 20-3-2001 Pénal, La Cour de cassation, Première chambre statuant en matière pénale* (*obtainable from* http://www.hrw.org/french/themes/habre-cour_de_cass.html). The original text in French on this point reads:

> *"Attendu qu'en cet état, la Cour de cassation est en mesure de s'assurer que la décision n'encourt pas les griefs allégués ; que l'article 5-2 de la Convention de New-York du 10 décembre 1984 contre la torture et autres peines ou traitements cruels inhumains ou dégradants fait peser sur chaque Etat partie l'obligation de prendre des mesures nécessaires pour établir sa compétence aux fins de connaître des infractions visées à l'article 4 dans le cas où l'auteur présumé de celles-ci se trouve sur tout territoire sous sa juridiction et où ledit Etat ne l'extrade pas ;*
> *qu'il en résulte que l'article 79 de la Constitution ne saurait recevoir application dès lors que l'exécution de la Convention nécessite que soient prises par le Sénégal des mesures législatives préalables ;*
> *qu'aucun texte de procédure ne reconnaît une compétence universelle aux juridictions sénégalaises en vue de poursuivre et de juger, s'ils sont trouvés sur le territoire de la République, les présumés auteurs ou complices de faits qui entrent dans les prévisions de la loi du 28 août 1996 portant adaptation de la législation sénégalaise aux dispositions de l'article 4 de la Convention lorsque ces faits ont été commis hors du Sénégal par des étrangers ; que la présence au Sénégal d'Hissène Habré ne saurait à elle seule justifier les poursuites intentées contre lui . . ."*

Convention, on 18 April 2001, alleging that Senegal had violated its obligations under Articles 5 and 7 of the Convention.[204] The communication requested that the Committee recommend that Senegal remedy the violations by amending its legislation to provide for universal jurisdiction and either to extradite Hissène Habré or to submit the case to the competent Senegalese authorities for the purpose of prosecution. On 23 April 2001, the Committee against Torture 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."[205] Senegal filed a reply and the victims responded.[206] As of 1 September 2001, the former President of Chad was believed to still be in Senegal.

· ***Slovak Republic:*** There are two bases for courts in the Slovak Republic to exercise universal jurisdiction over torture (for the text and scope of the relevant jurisdictional provisions, see Chapter Four).

First, Section 20 of the Code of Criminal Procedure provides that foreign nationals or stateless persons who are permanent residents are criminally responsible for conduct abroad which is a crime under the law of the Slovak Republic and the law of the place where it occurred, if they are found in the Slovak Republic and if they are not extradited to another state.

Second, under Article 20a, the law of the Slovak Republic applies when it is prescribed by a treaty to which the Slovak Republic is a party. This provision permits courts to exercise universal jurisdiction when this is authorized by a treaty.

A proposed new Penal Code would include a new Section 6 that would expressly provide for universal jurisdiction over torture and other inhuman and cruel treatment, as defined in a new Section 154, when committed abroad by foreigners or stateless persons not resident in the Slovak Republic.

[204] *Suleymane Guengueng et autres c/ Sénégal, Communication presentée au Comité contre la torture (Article 22 de la Convention) pour violation des Articles 5 et 7 de la Convention, 18 avril 2001* (*obtainable from* http://www.hrw.org/french/themes/habre-cat.html; Cover letter by Reed Brody, Advocacy Director, Human Rights Watch, 18 April 2001 (*obtainable from* http://www.hrw.org/french/themes/habre-cat2.html).

[205] 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). *See also* letter by Hamid Gaham, Chief Support Services Branch, to Mr. Reed Brody, dated 27 April 2001 (*obtainable from* http://www.hrw.org/french/themes/images/guengueng_small.jpg).

[206] *Communication No. 181/2001, Suleymane Guengueng & autres c/ Sénégal, Réponse aux observations du Sénégal, 19 juillet 2001* (*obtainable from* http://www.hrw.org/french/themes/habre-senegalreponse.html). The Senegalese government reply is not available on the Internet.

The Slovak Republic is a party to the Convention against Torture. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Torture is a crime.[207]

· ***Slovenia:*** Slovenian courts can exercise universal jurisdiction over certain conduct amounting to torture.

Article 123 (2) of the Penal Code provides custodial universal jurisdiction over foreigners who have committed a crime abroad, provided that the crime is punishable by at least three years' imprisonment.

Slovenia is a party to the Convention against Torture. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Slovenia has not defined torture as a crime under national law, so prosecutions for torture would have to be for an ordinary crime, such as assault or rape.[208]

· ***Spain:*** Spanish courts may exercise universal jurisdiction over torture.[209]

[207] Criminal Law, Sec. 259a (Torture and other inhuman and cruel treatment) (defining the crime of torture in a manner similar to that in Article 1 of the Convention against Torture, but restricting the scope of persons who can be charge with the crime to public officials. The Committee against Torture has recommended that Slovakia "adopt a definition of torture which would cover the elements of the definition contained in article 1 of the Convention and to amend its domestic penal law accordingly". Committee against Torture concludes Twenty-First Session, Round-up, Press release, 18 May 2001.

[208] Conclusions and recommendations of the Committee against Torture concerning the initial report of Slovenia, U.N. Doc. A/55/44, 16 May 2000, para.203 (expressing concern that a definition of torture "has not been introduced into a criminal code and that substantive criminal law does not yet contain a specific corpus delicti torture and therefore is not an instrument for the direct incrimination and appropriate punishment of persons guilty of torture") and para. 208 (recommending that Slovenia incorporate the definition in substantive criminal law).

[209] In addition to the other sources on Spain cited in the bibliography (Annex I), the following unpublished papers were used in drafting the entries on Spain in this memorandum: Valentine Bück, *Rapport Espagnol*, unpublished manuscript submitted for discussion to the *Etude Comparée des Critères de Competence Juridictionnelle en Matière de Crimes Internationaux (Crimes Contre l'Humanité, Génocide, Torture, Crimes de Guerre, Terrorisme)*, Paris, 2 to 3 July 2001; Luc Reydams, *Spain*, a chapter in his book, *Universal Jurisdiction in International Law* (Oxford: Oxford University Press); Carmen Lamarca Pérez, *"El principio de la justicia universal y la competencia de la jurisdicción española en los casos de Argentia y Chile"* Revista de Derecho Penal y Criminología, 2a Epoca, No extraordinario 1 (2000) pags. 59-68.

(1) Legislation. Article 23.4 of the Organic Law of the Judicial Power provides that Spanish courts have jurisdiction over acts committed outside Spain where the conduct would violate Spanish law if committed in Spain or violates obligations under international treaties. Articles 173 to 177 of the Penal Code make torture a crime under Spanish law (Penal Code of 1995), *Ley Orgánica 10/1995, de 23 de noviembre*).[210] In addition, Article 23.4 of the 1985 Organic Law of the Judicial Branch permits courts to exercise jurisdiction over crimes "committed by Spanish or foreign persons outside of national territory and capable of being proven under Spanish law, such as the following crimes: . . . (g) and any other [crime] which, under international treaties or conventions, should be pursued in Spain"

Spain is a party to the Convention against Torture. Therefore, Spanish courts may exercise universal jurisdiction over the crime of torture, which is a crime under national law and which Spain is required under the Convention to investigate and prosecute. Spain is also a party to the Rome Statute, although it has not yet enacted implementing legislation as of 1 September 2001. Torture is subject under Article 131 (1) of the Penal Code to a statute of limitation of 20 years, but one Spanish investigating judge has declared that torture is not subject to a statute of limitations.[211]

[210] The original Spanish text of Ley Organica 10/1995 de 23 de noviembre reads:
"TÍTULO VII. DE LAS TORTURAS Y OTROS DELITOS CONTRA LA INTEGRIDAD MORAL.
"Artículo 173.
El que infligiere a otra persona un trato degradante, menoscabando gravemente su integridad moral, será castigado con la pena de prisión de seis meses a dos años.
Artículo 174.
1. Comete tortura la autoridad o funcionario público que, abusando de su cargo, y con el fin de obtener una confesión o información de cualquier persona o de castigarla por cualquier hecho que haya cometido o se sospeche que ha cometido, la sometiere a condiciones o procedimientos que por su naturaleza, duración u otras circunstancias, le supongan sufrimientos físicos o mentales, la supresión o disminución de sus facultades de conocimiento, discernimiento o decisión, o que de cualquier otro modo atenten contra su integridad moral. El culpable de tortura será castigado con la pena de prisión de dos a seis años si el atentado fuera grave, y de prisión de uno a tres años si no lo es. Además de las penas señaladas se impondrá, en todo caso, la pena de inhabilitación absoluta de ocho a doce años.
2. En las mismas penas incurrirán, respectivamente, la autoridad o funcionario de instituciones penitenciarias o de centros de protección o corrección de menores que cometiere, respecto de detenidos, internos o presos, los actos a que se refiere el apartado anterior.
Artículo 175.
La autoridad o funcionario público que, abusando de su cargo y fuera de los casos comprendidos en el artículo anterior, atentare contra la integridad moral de una persona será castigado con la pena de prisión de dos a cuatro años si el atentado fuera grave, y de prisión de seis meses a dos años si no lo es. Se impondrá, en todo caso, al autor, además de las penas señaladas, la de inhabilitación especial para empleo o cargo público de dos a cuatro años.
Artículo 176.
Se impondrán las penas respectivamente establecidas en los artículos precedentes a la autoridad o funcionario que, faltando a los deberes de su cargo, permitiere que otras personas ejecuten los hechos previstos en ellos.
Artículo 177.
Si en los delitos descritos en los artículos precedentes, además del atentado a la integridad moral, se produjere lesión o daño a la vida, integridad física, salud, libertad sexual o bienes de la víctima o de un tercero, se castigarán los hechos separadamente con la pena que les corresponda por los delitos o faltas cometidos, excepto cuando aquél ya se halle especialmente castigado por la Ley."

[211] *Auto por el que se informa a la Fiscalía de la Corona sobre la imprescriptibilidad de las conductas*

(2) Jurisprudence. As discussed in Chapter Two, Section V.A, the Spanish Court of Appeal (*Audiencia Nacional*) has upheld the jurisdiction of courts over torture committed by foreigners abroad.

imputadas a Augusto Pinochet, Madrid, 18 de diciembre de 1998 [Decision of 18 December 1998] (*obtainable from* <http://www.derchos.org/nizkor/chile/juicio/18dic98htm>).

The *Audiencia Nacional* unanimously held on 4 November 1998 that it could exercise jurisdiction over charges that Argentine military officers, including former Presidents of Argentina, were responsible for torture committed in Argentina and other countries pursuant to Article 23.4 of the Organic Law of the Judicial Branch.[212] An investigating judge has issued arrest warrants in this case for 97 Argentine military officers and one Argentine judge on the basis of charges of torture and other crimes.[213]

The following day on 5 November 1998, *Audiencia Nacional* also unanimously held that it could exercise jurisdiction over charges that Chilean military officers, including former President Pinochet, were responsible for torture committed in Chile and other countries, pursuant to Article 23.4 of the Organic Law of the Judicial Branch.[214]

On 27 March 2000, an investigating judge opened a criminal investigation of former Presidents Efrain Rios Montt of Guatemala, Fernando Romeo Lucas Garcia and Oscar Humberto Mejia Victores and five senior police officers based on allegations of torture and other crimes under international law. For a description of this case and the decision of the *Audiencia nacional*, see Chapter Eight, Section II.

On 1 September 2000, Judge Baltazar Garzón issued a 196-page indictment against Ricardo Miguel Cavallo, alleged to be Miguel Angel Cavallo, a former Argentine military officer, linking him to 227 "disappearances", 110 cases of torture and the kidnapping at birth of 16 babies. The suspect had been detained a week earlier in Mexico and Judge Garzón had issued a request for the suspect's extradition on 12 September 2000 (see discussion in this section under Mexico).

· ***Sri Lanka:*** The High Court of Sri Lanka can exercise universal jurisdiction over torture.

Article 4 (1) of the Torture Act No. 22 of 1994 provides:

[212] The text is available under the following title (not the title of the decision itself) at: *Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura argentina* (Ruling of the National Audience on Jurisdiction of Spanish Justice to Pursue Crimes of Genocide in Argentina), Madrid, 4 October 1998 <http://www.derechos.org/nizkor/arg/espana/audi.html>, Section Two.

[213] *Arg - On the arrest warrants against 97 high commanders and 1 judge*, Nizkor English Service <nzkspain@teleline.es>, 13 November 1999 (concerning decision based on a bill of indictment in Case No. 19/97, 2 November 1999, issued by the *Juzgado Central de Instruccion No. 5, Audiencia Nacional*, reported at: http://www.derechos.org/nizkor/arg/espana/gar.html).

[214] The decision is available under the following title (not the title of the decision itself) at *Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena* (Ruling of the National Audience on Jurisdiction of Spanish Justice to Pursue Crimes of Genocide in Chile), Madrid, 5 October 1998 <http://www.derechos.org/nizkor/chile/juicio/audi.html>, Section Two.

> "The High Court of Sri Lanka shall have jurisdiction to hear and try an offence under this Act committed in any place outside the territory of Sri Lanka by any person, in any case where -
> (a) the offender whether he is a citizen of Sri Lanka or not is in Sri Lanka . . .
> . . . .
> (2) The jurisdiction of the High Court of Sri Lanka in respect of an offence under this Act committed by a person who is not a citizen of Sri Lanka, outside the territory of Sri Lanka, shall be exercised by the High Court of Sri Lanka holden in the Judicial Zone nominated by the Chief Justice, by a direction in writing under his hand."[215]

Sri Lanka is a party to the Convention against Torture. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. Torture is a crime under national law.[216] Superior orders are not a defence to torture.[217]

· ***Sweden:*** Swedish courts may exercise universal jurisdiction under two legislative provisions (for the text and scope of both provisions, see Chapter Four, Section II) over certain conduct, such as assault and rape, which are crimes under national law, when they fall within the definition of torture in the Convention against Torture.

(1) Legislation. First, Section 2 of Chapter 2 of the Swedish Penal Code of 1965 provides for custodial universal jurisdiction over aliens found in the territory suspected of committing crimes abroad which are crimes under Swedish law punishable by more than six months, provided that they are crimes in the state where committed. Second, Section 3 of Chapter 2 of the Penal Code provides universal jurisdiction over crimes carrying a penalty of four years under Swedish law which are crimes under international law. Such broad provisions would permit Swedish courts to exercise universal jurisdiction over certain conduct amounting to torture. The government has stated:

[215] An act to give effect to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and for matters connected therein or incidental thereto (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act of 1994), Art.4.

[216] *Ibid.,* Art. 2. Torture is defined in Article 12 in a manner similar to the definition in Article 1 of the Convention against Torture, but in a somewhat more restrictive fashion. The Committee against Torture has expressed its concern that, " while the CAT Act 24/94 covers most of the provisions of the Convention, there were certain significant omissions" and it urged Sri Lanka "to review the CAT Act 22/94 and other relevant laws in order to ensure complete compliance with the Convention, in particular in respect of: (a) the definition of torture . . ." Conclusions and recommendations of the Committee against Torture on the initial report of Sri Lanka, U.N. Doc. CAT/C/SR.341, 26 May 1998, paras 17, 19.

[217] *Ibid.,* Art. 3 (b).

> "The Penal Code and the Code of Judicial Procedure contain provisions to the effect that the Swedish authorities shall take measures to prosecute in the case of criminal offences which fall within the jurisdiction of Swedish courts. Cases referred to in paragraph 1 of article 7 [of the Convention against Torture] will therefore be submitted to these authorities for the purpose of prosecution, if the person concerned is not extradited."[218]

Sweden is a party to the Convention against Torture. Sweden has not defined torture as a crime under national law, although some conduct amounting to torture carries penalties of four or more years' imprisonment.[219]

(2) Executive action. On 25 November 1998, the Minister for Foreign Affairs of ***Sweden***, Anna Lindh, welcomed the first judgment of the House of Lords in the *Pinochet* case, saying: "It is good that yet another step has been taken in a process that may lead to Pinochet being brought to justice in Spain".[220]

· ***Switzerland:*** Swiss courts may exercise universal jurisdiction over certain conduct amounting to torture.

[218] Initial report of Sweden to the Committee against Torture, U.N. Doc. CAT/C/5/Add.1, 14 October 1988, para. 55.

[219] For a list of such offences, see the initial report of Sweden to the Committee against Torture, U.N. Doc. CAT/C/5/Add.1, 14 October 1988, paras 31-45, and the first supplementary report due in 1992 of Sweden to the Committee against Torture, U.N. Doc. CAT/C/17/Add.9, 2 December 1992, para.7; third periodic report of Sweden to the Committee against Torture, U.N. Doc. CAT/C/34/Add.4, 28 November 1996, paras 7 to 17. *See also* Conclusions and recommendations of the Committee against Torture concerning the third periodic report of Sweden, U.N. Doc. A/52/44, 6 May 1997, para. 219 (expressing concern "about the continued failure of the Swedish government to incorporate into its domestic law the definition of torture, in accordance with article 1 of the Convention" and para. 224 (specifically renewing its recommendation, "made during its consideration of previous reports of the State party, that Sweden incorporate into its domestic legislation the definition of torture as contained in article 1 of the Convention").

[220] Ministry of Foreign Affairs Press Release, 25 November 1998.

(1) Legislation. Article 65.2 of the Swiss Constitution provides that torture and ill-treatment are prohibited, but the Penal Code does not have a specific crime of torture.[221] Nevertheless, Article 6*bis* of the Swiss Penal Code gives Swiss civilian courts universal jurisdiction over acts committed abroad which the state is obliged to prosecute by treaty, provided that the act is punishable in the territorial state, the suspect is found in Switzerland and the suspect is not extradited. The government has stated that this provision gives Swiss courts "world-wide jurisdiction", as required by Article 5 of the Convention against Torture.[222] It added that "[t]he principle of *aut dedere aut judicare* is known to Swiss legislation (see arts. 5 and 6 *bis* CP). Furthermore, Switzerland has confirmed it by ratifying various international conventions." *Ibid.*, para. 55 (footnote omitted). However, the requirement that the act be punishable in the territorial state is, in cases of torture, contrary to Switzerland's obligations under Articles 5 and 7 of the Convention against Torture.

Switzerland is a party to the Convention against Torture. It has signed the Rome Statute, but it had not yet ratified it as of 1 September 2001

Although the government has argued that Swiss criminal law adequately covers all acts of torture in Article 1 of the Convention against Torture, the Committee against Torture has urged Switzerland to include torture as a specific offence under national law.[223]

(2) Investigations. A Swiss prosecutor has exercised universal jurisdiction over a person suspected of torture abroad. After an employee of the Geneva canton hospital discovered on 13 February 2001 that the former Tunisian Minister of Interior, Abdallah Kallel, was a patient in the hospital, he informed Abdennacer Naït-Liman, the head of an association of victims of torture in Tunisia based in Geneva since 1995. The association's head reportedly had been tortured in the facilities of the Ministry of Interior between 22 April and 1 June 1992 when Abdallah Kallel had been the Ministry of Interior. That evening, he, Eric Sottas, the director of the *Organisation mondiale contre la torture* (OMCT), and a lawyer, Me François Membrez, drafted a complaint alleging that Abdallah Kallel was responsible for torture. The following morning, on 14 February 2001, the complaint was transmitted to Bernard Schmid, the prosecutor (*procureur*) of the Geneva canton. He later explained that the Convention against Torture had been ratified by both Tunisia and Switzerland and that

[221] Paragraphs 2 and 3 of Article 10 of the Swiss Constitution of 1999 state:
"2.Tout être humain a droit à la liberté personelle, notamment à l'integrité physique et psychique et à la liberté de movement.
3. La torture et tout autre traitement ou peine cruels, inhumains ou degradants sonts interdits."

[222] Initial report of Switzerland to the Committee against Torture, U.N. Doc. CAT/C/5/Add.17 (1989), para. 52.

[223] Concluding observations of the Committee against Torture on the third periodic report of Switzerland, U.N. Doc. A/53/44, 27 November 1997, para. 89 (observing that "the lack of an appropriate and specific definition of torture makes the full application of the Convention difficult") and para. 97 (recommending that an explicit definition of torture should be included in the Criminal Code").

> "it contained an obligation to prosecute every person, even a foreigner, suspected of the crime of torture. The facts alleged in the complaint appear well-founded. After consultation with the Chief Prosecutor [*Procureur général*], a preliminary inquiry [*pré-enquête*] was opened."

However, on 14 February 2001, the former minister had disappeared and is believed to have left Switzerland. The Geneva prosecutor did not request an international arrest warrant, but said that the complaint could be reactivated and the former minister could be questioned if he set foot again in Switzerland.[224]

· ***Syrian Arab Republic:*** It appears that two legislative provisions permit Syrian courts to exercise universal juridiction over certain conduct amounting to torture committed abroad (for the text and scope of these provisions, see Chapter Four, Section II).

First, Article 20 of Title I (Competence), Section 3 (Personal Competence) of the Syrian Penal Code of 1949, as amended 1953 provides for jurisdiction over crimes in the Code committed by foreigners abroad. Second, Article 23 of Title I, Section 4 (Comprehensive Competency) provides for jurisdiction over crimes committed by foreign residents, without any territorial restriction, when extradition has either not been requested or has not been accepted.

Syria is not a party to the Convention against Torture. It has signed the Rome Statute but as of 1 September 2001 it had not yet ratified it. The Penal Code does not provide that torture is a crime under national law, so prosecutions based on universal jurisdiction would have to be brought for ordinary crimes, such as assault or rape.

· ***Tajikistan:*** There are two bases for Tajik courts to exercise universal jurisdiction over torture under the 1998 Criminal Code of the Republic of Tajikistan (for the text and scope of these provisions, see Chapter Four, Section II).

First, Paragraph 1 of Article 15 of the Criminal Code provides for jurisdiction over stateless permanent residents who committed crimes under Tajikistan law outside the country (for the text and scope, see Part Two, Section III above). Second, Article 15 (2) of the Criminal Code provides for jurisdiction over foreigners and stateless persons not resident in Tajikistan who commit crimes under the Code when the crime is prohibited by norms of international law or treaties (for the text and scope, see Part Two, Section III above).

[224] The account of this incident is based largely on the article, *Pierre Hazan, Comment l'ex-ministre de l'intérieur tunisien a échappé à la justice genevoise, Le Temps, 21 février 2001.*

Tajikistan is a party to the Convention against Torture. It has signed the Rome Statute and has ratified it, but as of 1 September 2001 it had not yet enacted implementing legislation. However, it has defined torture as a crime under national law in terms which include some of the conduct in the definition in the Convention against Torture.[225]

· ***Turkey:*** Turkish courts may exercise universal jurisdiction over torture.

Article 6 (b) of the Penal Code provides for universal jurisdiction over crimes carrying a penalty of at least three years' imprisonment, provide that there is no extradition treaty with the territorial state or of the suspect's nationality or the extradition is refused (for the text and scope of this provision, see Chapter Four, Section II).

Turkey is a party to the Convention against Torture. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. Turkey has provided that torture as a crime under national law, but has not defined the crime in a manner consistent with Article 1 of the Convention against Torture.[226]

· ***Turkmenistan:*** There are two provisions permitting national courts to exercise universal jurisdiction over conduct amounting to torture committed abroad (for the text and scope, see Chapter Four, Section II).

First, Article 8 (1) of the Turkmenistan Criminal Code of 1997, entered into force 1 January 1998, provides for universal jurisdiction over stateless permanent residents of Turkmenistan who have committed a crime under Turkmenistan law outside Turkmenistan, if the conduct is a crime in the territorial state and the suspect has not been convicted in a foreign state. The condition that the conduct be a crime in the territorial state is contrary to Articles 5 and 7 of the Convention against Torture.

[225] Criminal Code, Art. 117 (Torture).

[226] Turkish Criminal Code, Art. 243 (English translation in *The Turkish Criminal Code* (South Hackensack, New Jersey: Fred B. Rothman & Co. and London: Sweet & Maxwell Limited 1965) (providing in part that "[w]hoever, being a chief or member of a court or council or a public officer, tortures an accused person in order to make him confess his offense, shall be punished by heavy imprisonment for not mre than five years and shall be disqualified from holding public office, temporarily or for life.").

Second, Article 8 (2) states that foreign nationals and stateless persons who do not reside permanently in Turkmenistan, are subject to responsibility under the criminal laws of Turkmenistan for a crime committed outside Turkmenistan, if the crime is directed against Turkmenistan or its citizens and also in the cases provided for by international treaties entered into by Turkmenistan, if they have not been convicted in a foreign state and criminal proceedings have been instituted against them on the territory of Turkmenistan."[227]

Turkmenistan is a party to the Convention against Torture. It has not signed the Rome Statute and, as of 1 September 2001, it had not yet ratified it. It is not known if torture is defined as a crime under national law, so prosecutions for torture may have to be made for ordinary crimes, such as assault or rape.

· ***Ukraine:*** Ukranian courts can exercise universal jurisdiction over conduct amounting to torture in two situations: stateless persons suspected of crimes abroad and foreigners suspected of crimes abraod in circumstances provided by treaties (for the text and scope of these provisions, see Chapter Four, Section II).

First, Article 5 of the Criminal Code of 1997 provides that stateless persons who have committed crimes abroad can be tried in the Ukraine. Second, foreign nationals can be held responsible for crimes abroad under Ukrainian criminal law in cases provided for in international treaties.

In addition, it may be possible to exercise universal jurisdiction pursuant to Article 9 of the Constitution, which provides that international law is part of national law. For a discussion of this possibility, see Chapter Four, Section II

[227] *Ibid.*, Art. 8 (1).

The Ukraine is a party to the Convention against Torture. It has signed the Rome Statute, but as of 1September 2001 it had not yet ratified it. As of 31July 2000, it had not expressly provided that torture is a crime under national law, but Article 5 would appear to give courts jurisdiction over conduct committed abroad, such as assault and rape, which are crimes under national law, when they amount to torture.[228]

· ***United Kingdom:*** United Kingdom courts can exercise universal jurisdiction over torture, but only as a state party to the Convention against Torture - or the Geneva Conventions and Protocol I - and only when that jurisdiction is provided for by statute.

[228] The Committee against Torture expressed its concern that, "[a]lthough article 28 of Ukraine's Constsitution prohibits the use of torture, its criminal legislation fails to define torture as a distinct and dangerous crime. In the circumstances, this provision of the Constitution is merely declaratory". Conclusions and recommendations of the Committee against Torture, U.N. Doc. A/52/44, 1 May 1997, para. 134. It recommended that "[p]riority should be given to the adoption of a new criminal code, defining torture as a punishable offence[.]" *Ibid.*, para. 143. The recommendation had not yet been implemented as of 31 July 2000. Fourth periodic report of Ukraine to the Committee against Torture, U.N. Doc. CAT/C/55/Add.1, 17 November 2000, para. 38 ("'Torture' is not currently defined in Ukranian criminal law as a specific criminal offence. A bill to make it so has been introduced in the *Verkhovna Rada* [Supreme Council]."). The date the report was completed is 31 July 2000.

(1) Legislation **-** Section 134 of the Criminal Justice Act 1988 provides for universal jurisdiction over anyone suspected of torture, including nationals of non-states parties to the Convention against Torture.[229] However, the definition of torture is not fully consistent with Article 1 of that treaty. Pargraphs 4 and 5 provide defences to a charge of torture which are expressly prohibited by Article 2 (2) and (3) of the Convention against Torture.[230] A further problem with this legislation is that it requires the approval of the Attorney General in England and Wales and the Attorney General for Northern Ireland in that part of the country, both political officials, in order to begin proceedings under Section 134.[231] In addition, the legislation has been interpreted in the *Pinochet* case to apply prospectively only (see below).

[229] Section 134 (1) and (2) provides:

"(1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or perported performance of his official duties.

(2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if: -

(a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence: -

(i) of a public official; or

(ii) of a person acting in an official capacity; and

(b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it."

[230] Section 134 (4) and (5) provide:

"(4) It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct.

(5) For the purposes of this section 'lawful authority, justification or excuse' means -

(a) in relation to pain or suffering inflicted in the United Kingdom, lawful authority, justification or excuse under the law of the part of the United Kingdom where it was inflicted;

(b) in relation to pain or suffering inflicted outside the United Kingdom -

(i) if it was inflicted by a United Kingdom official acting under the law of the United Kingdom or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law;

(ii) if it was inflicted by a United Kingdom official acting under the law of any part of the United Kingdom or by a person acting in an official capacity under such law, lawful authority, justification or excuse under the law of the part of the United Kingdom under whose law he was acting; and

(iii) in any other case, lawful authority, justification or excuse under the law of the place where it was inflicted."

The Committee against Torture has concluded that "Sections 134 (4) and (5) (b) (iii) of the Criminal Justice Act 1988, appear to be in direct conflict with article 2 of the Convention" and recommended that they be amended "to bring them into conformity with the obligations contained in article 2 of the Convention". Conclusions and recommendations of the Committee against Torture, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. A/54/44, paras 76 (e) and 77 (c), 17 November 1998. Article 2 (2) of the Convention against Torture states: "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." Article 2 (2) provides: "An order from a superior order or public authority may not be invoked as a justification of torture."

[231] Criminal Justice Act 1988, Section 135. Although the Attorney General is supposed to decide such questions on non-political grounds, these are not spelled out in legislation and have led to the appearance of political interference with the prosecution.

(2) Cases. Two important cases illustrate the problems and limitations of universal jurisdiction in the United Kingdom.

Dr. Mohammed Ahmed Mahgoub Ahmed Al Feel case. In 1997, a Sudanese doctor residing in the United Kingdom, Dr. Mohammed Ahmed Mahgoub Ahmed Al Feel, was charged in a Scottish court pursuant to Section 134 of the Criminal Justice Act with torture in the Sudan after the 1989 coup. Although charges were dropped in 1999 on the ground of insufficient evidence, the court exercised universal jurisdiction over the national of a non-state party to the Convention against Torture.[232]

Augusto Pinochet. The catalytic effect of the arrest of the former President of Chile on investigation, extradition and prosecution of crimes under international law, both on the basis of extraterritorial and territorial jurisdiction, has been described in Chapter Two. In the long run, this may be its most important legacy, rather than its jurisprudence either with respect to the main issue, official immunity, or on the question of universal jurisdiction. The first issue is largely outside the scope of this paper, but the response of the courts to the question of universal jurisdiction was largeley seen as disappointing.

[232] Redress - Universal Jurisdiction in Europe:Annex at http://www.redress.org/annex.html; James Rougvie, *Sudan Torture Charges Dropped*, *The Scotsman*, 28 May 1999. The Crown Office informed Redress that "following a very thorough review of the evidence in the case, which included complex questions of concert, it was concluded by Crown Counsel that the available evidence was not, in our law, sufficient to prove in criminal proceedings that Mohammed Ahmed Mahgoub Ahmed Al Feel was a party to conduct which amounted to an offence under Section 134 of the Criminal Justice Act 1988". Letter from J. E. Cameron, Head of the High Court Unit, to Fiona McKay, Legal Officer, Redress, 28 May 1999.

The Divisional Court focused on the question whether the former President had immunity, rather than whether English courts could exercise universal jurisdiction over him on allegations of genocide, torture and hostage-taking.[233]

In the first House of Lords hearing on the merits in November 1998, the Respondent (Augusto Pinochet) argued that there was "no rule of customary international law which would establish universal jurisdiction on the facts of this case", since "[t]he universality principle applies as a matter of customary law to piracy and war crimes only", and that there was no universal jurisdiction over torture or hostage-taking since the relevant treaties required states parties to enact legislation. Case for Respondent, paras 53-54. Neither of the two judges in the minority, Lord Slynn of Hadley and Lord Lloyd of Berwick, directly addressed the question of universality. Of the two judges in the majority that delivered written opinions, Lord Nicholls appeared to assume that English courts had such jurisdiction by virtue of ratification of the Convention plus enactment of Section 134 of the Criminal Justice Act of 1988. Lord Steyn made it a point to say, "Finally, I must make clear that my conclusion [on the absence of immunity] does not involve the expression of any view on the interesting arguments on universality of jurisdiction in respect of certain international crimes and related jruisdictional questions. Those matters do not arise for discussion." The third judge, Lord Hoffman, agreed with Lord Nicholls.

The summary of the judgment read by Lord Browne-Wilkinson in the 1999 *Pinochet* case declared that "[a]lthough the reasoning varies in detail, the basic proposition common to all, save Lord Goff of Chieveley, is that torture is an international crime over which international law and the parties to the Torture Convention have given universal jurisdiction to all courts wherever the torture occurs."[234] However, despite this broad statement in the summary, only Lord Millet stated that the United Kingdom could exercise universal jurisdiction over torture under customary international law independently of the Convention against Torture. However, he assumed that only a limited number of cases of torture, those that had to meet a higher threshold than to qualify as crimes against humanity:

> "In my opinion, the systematic use of torture on a large scale had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973. I would hold that the courts of this country already possessed extra-territorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it."[235]

[233] *In the matter of an application for a writ of habeas corpous ad subjicendum, re: Augusto Pinochete Ugarte and in the matter of an application for leave to move for judicial review, R. v. (1) Nicholas Evans (Metropolitan Stipendiary Magistrate); (2) Ronald Bartle (Metropolitan Stipendiary Magistrate); (3) The Secretary of State for the Home Department, Ex parte Augusto Pinochet Ugarte, High Court of Justice for England and Wales, 28 October 1998.*

[234] *Regina v. Bartle ex parte Pinochet*, Summary of judgment read by Lord Browne-Wilkinson, 24 March 1999, 2.

[235] *Regina v. Bartle ex parte Pinochet*, Judgment, 24 March 1999, 103 (Millet, J.).

His approach to the question seemed to require that torture must reach the scale and horror of the atrocities of the Second World War before they would be subject to universal jurisdiction under customary international law. Specifically, he read the *Eichmann* decision upholding universal jurisdiction as, in effect, saying that "the scale and international character of the atrocities of which the accused had been convicted fully justified the application of the doctrine of universal jurisdiction".[236] As explained elsewhere, in Chapter Nine, the rationale for the conditions for exercise of universal jurisdiction is unconvincing:

> "In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. Firrst they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale that they can justly be reagarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria."[237]

In contrast to the other judges, he believed that English courts could exercise universal jurisdiction over torture independently of the Convention against Torture and of statute - provided that these restrictive criteria were met:

> "Every state has jurisdiction under customary international law to exercise extra-territorial jurisdiction in respect of international crimes which satisfy the relevant criteria. Whether its courts have extra-territorial jurisdiction under its internal doemsetic law depends, of course, on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts. The jurisdiction of English courts is usually statutory, but it is supplemented by the commmon law. Customary law is part of the common law, and accordingly I consider that the English courts have and always have had extra-territorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law."[238]

He concluded that this jurisdiction under customary international law had existed for a considerable time, well before the adoption of the Convention against Torture, but, given the rejection of that approach by the other judges, he proceded to analze the case on the basis of statutory authority implementing the Convention.[239]

[236] *Ibid.,* 175.

[237] *Ibid.,* 177.

[238] *Ibid.*

[239] *Ibid., 178.*

Each of the other judges in the majority took an even more restrictive view of extraterritorial jurisdiction. Lord Phillips went so far as to say that "it is still an open question whether international law recognises universal jurisdiction in respect of international crimes - that is the right, under international law, of the courts of any state to prosecute for such crimes wherever they occur."[240] Lord Saville treated jursisdiction as rooted int eh Convention.[241] Lord Hutton sated that "since the endo fthe 1939-1945 war there has been a clear recognition by the internatinal communty that certain crimes are so grave and so inhuman that they constitue crimes against international law and that the international community is under a duty to bring to justice a person who commits such crimes".[242]
Lord Hope believed that the prohibition of torture had reached the status of a jus cogens norm by the time the Convention against Torture had entered into force. Lord Browne-Wilkinson stated that he had

> "doubts whether, before the coming into fofce 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 offiial 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 som 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 woldwide universal jurisdiction."

Such reasoning led the majority to determe that there was no universal jursdiction over torture before the Convention entered into force for the United Kingdom.

(3) Executive action **-** The Secretary of State, Jack Straw, on 9 December 1998, issued an order to a magistrate authorizing the magistrate to proceed with a hearing on a request for extradition of the former President of Chile to Spain for torture and conspiracy to torture committed in a third country and on 14 April 1999, after the second decision by the House of Lords, he issued a further order to the same effect.[243] In contrast, the Attorney General repeatedly refused to authorize a criminal investigation of the former President. Then, at the end of March 2001, one year after former President Pinochet was allowed to fly home, the Attorney General

[240] *Ibid.,* 188-189.

[241] *Ibid.*

[242] *Ibid.,* 163.

[243] Order to the Chief Metropolitan Stipendiary Magistrate or other designated Metropolitan Stipendiary Magistrate sitting at Bow Street, 9 December 1998; Order to the Chief Metropolitan Stipendiary Magistrate sitting at Bow Street, 14 April 1999. However, in March 2000, the Secretary of State permitted the former President to leave for Chile on the ground that he was not medically fit to stand trial. Statement of Secretary of State, Jack Straw, in the House of Commons, 2 March 2000.

authorized the Metropolitan Police to open an investigation of Saddam Hussein, President of Iraq, and Tariq Azziz, the Deputy President, for hostage-taking.

· ***United States:*** United States courts can exercise universal jurisdiction over torture.

(1) Legislation. Section 2340A of Title 18 of the United States Code provides universal jurisdiction over the crime of torture:

> "(a) Offence. - Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
> (b) Jurisdiction. - There is jurisdiction over the activity prohibited in subsection (a) if -
> (1) the alleged offender is a national of the United States; or
> (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender."[244]

However, the definition of torture in Section 2340A is not consistent with the definition of torture in Article 1 of the Convention against Torture.[245]

(2) Investigations. No prosecution was initiated by the United States between 21 October 1994 and 15 October 1999.[246] However, there has been at least one attempt since that period to exercise universal jurisdiction over torture in the United States. For example, the Federal Bureau of Investigation detained ***Major Tomás Ricardo Anderson Kohatsu***, at the airport in Houston, Texas on 9 March 2000 for possible arrest and prosecution for acts of torture. He is a Peruvian army officer who had been sentenced to eight years' imprisonment by a Peruvian military court in May 1997 for torturing Leonor La Rosa Bustamente and then had the judgment reversed on appeal by the Supreme Court of Military Justice. He was subsequently released, apparently on the ground that he had a diplomatic passport.[247]

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[244] 18 U.S.C. 2340A, Pub.L. 103-236, Title V, § 506 (a), 30 April 1994, 108 Stat. 463, *amended by* Pub.L. 103-322, Title VI, § 60020, 13 September 1994, 108 Stat. 1979.

[245] The legislation reflects the United States reservations to the Convention against Torture and to Article 7 of the ICCPR. The Committee against Torture has expressed its concern about "[t]he failure of the State party to enact a federal crime of torture in terms consistent with article 1 of the Convention." Conclusions and recommendations of the Committee against Torture on the initial report of the United States, U.N. Doc. CAT/C/24/6, 1-19 May 2000 (unedited version), para. 5 (a). It recommended that the United States "enact a federal crime of torture in terms consistent with article 1 of the Convention and should withdraw its reservations, interpretations and understandings relating to the Convention". *Ibid.*, para. 6 (a).

[246] Initial report of the United States to the Committee against Torture, U.N. Doc. CAT/C/28/Add.5, 15 October 1999, para. 189. *See also* Beth Van Schaack, *In Defence of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int'l L. J. 141, 149 (2001) (stating that despite receiving credible information about the presence of human rights abusers within the United States, this statute [18 U.S.C. § 2340A] has yet to be utilized.").

[247] According to one account, after Tomás Ricardo Anderson Kohatsu was detained, the Department of Justice consulted the Department of State and "Under Secretary of State Thomas R. Pickering decided that Major Anderson

was entitled to immunity from prosecution as a diplomatic representative of his government present in the United States for an official appearance before an international organization" and, therefore, the Federal Bureau of Investigation allowed him to depart the United States on 10 March 2000. Sean D. Murphy, ed., *Immunity Provided Peruvian Charged with Torture, Contemporary Practice of the United States Relating to International Law*, 94 Am. J. Int'l L. 535, 536 (2000). *See also* Karen DeYoung & Lorraine Adams, *U.S. Frees Accused Torturer,* Washington *Post*, 11 March 2000; *State Dept. Helped Peruvian Accused of Torture Avoid Arrest,* New York *Times*, 11 March 2000.

Howevever, the approach in other cases of alleged torturers appears to be to deport rather than prosecute. In November 2000, the United States Immigration and Naturalization Service arrested 14 persons alleged to have entered the United States in violation of immigration laws from Angola, Haiti, Honduras and Peru, who were suspected of war crimes and torture. However, the authorities reportedly plan to deport them, not prosecute them.[248] This approach appears to be contrary to the assurances that the United States gave to the Committee against Torture that "a universal jurisdiction was assumed by the State party whenever an alleged torturer is found in its territory".[249]

(3) Executive action. The United States is reported to have urged Austrian authorities to arrest Izzat Ibrahim Khalil Al Duri, the Deputy Chair of the Revolutionary Council of Iraq, when a complaint was filed against him on a trip to Vienna for medical treatment, alleging that he was responsible for torture (for further information about this case, see entry on Austria in this section).

· ***Uruguay:*** Uruguayan courts may exercise universal jurisdiction over conduct amounting to torture when it violates national law, such as assault and rape. Article 10 (7) of the current Uruguayan Penal Code (for the text, see Chapter Four, Section II above) provides that courts have universal jurisdiction to try crimes which were committed abroad, when this is provided for in national law or in treaties. The government has indicated that this includes universal jurisdiction over conduct amounting to torture.[250]

Uruguay has ratified the Convention against Torture and the Inter-American Convention on Torture. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Uruguayan law does not contain a separate crime of torture, although a bill to define torture as a crime was introduced in 1985.[251]

· ***Uzbekistan:*** Uzbek courts can exercise universal jurisdiction under two provisions of the Criminal Code over certain conduct amounting to torture.

[248] *Correspondents' Reports - United States*, 3 y.B. Int'l Hum. L. (2000) (forthcoming).

[249] Conclusions and recommendations of the Committee against Torture on the initial report of the United States, U.N. Doc. CAT/C/24/6, 1-19 May 2000 (unedited version), para. 4 (f). In its initial report, *supra*,n.239, para. 194, the government declared: "Indeed, the U.S. Department of Justice has undertaken measures to ensure that any person on United States territory believed to be responsible for acts of torture is identified and handled consistent with the requirements of this provision [Article 7 of the Convention]".

[250] Second periodic report of Uruguay to the Committee against Torture, U.N. Doc. CAT/C/17/Add.16, 30 May 1996, paras 66-67 (indicating that all crimes coming under Uruguayan jurisdiction by virtue of international conventions are subject to Uruguayan law and that with respect to Article 7 of the Convention against Torture, "our Penal Code follows the doctrine of 'universality' since it affirms that Uruguayan law applies to acts which by their seriousness offend and injure higher interests").

[251] Second periodic report of Uruguay to the Committee against Torture, U.N. Doc. CAT/C/17/Add.16, 30 May 1996, para. 42.

The first unnumbered paragraph of Article 12 of the Uzbekistan Criminal Code provides that national criminal law applies to stateless persons who have committed a crime outside the national territory, provided that they have not served a sentence for the crime in the place where it was committed (for the text and scope, see Chapter Four, Section II). The third unnumbered paragraph of Article 12 of the Criminal Code provides national courts with universal jurisdiction over foreign citizens and stateless persons not permanently resident in Uzbekistan for offences under the Criminal Code committed outside the country only when international treaties or agreements so provide.

Uzbekistan is a party to the Convention against Torture. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it.

· ***Venezuela:*** Venezuela has ratified the Convention against Torture, the Inter-American Convention on Torture and the Rome Statute. As of 5 May 1999, it had not yet provided that torture was a crime under national law.[252] In addition, superior orders are a defence to crimes in Venezuela.[253]

[252]Conclusions and recommendations of the Committee against Torture, U.N. Doc. A/54/44, 5 May 1999, para. 141 (recommending "[t]he prompt consideration, discussion and approval of the Bill relating to torture, whether it takes the form of a separate law or is incorporated in the provisions of the Penal Code.").

The New Constitution of the *Republica Bolivariana de Venezuela* (Gaceta oficial No.36860 de 30 de diciembre de 1999) includes the prohibition of torture in article 146. The original text in Spanish reads:

"Toda persona tiene derecho a que se respete su integridad física, psíquica y moral, en consecuencia:

1. Ninguna persona puede ser sometida a penas, torturas o tratos crueles, inhumanos o degradantes. Toda víctima de tortura o trato cruel, inhumano o degradante practicado o tolerado por parte de agentes del Estado, tiene derecho a la rehabilitación."

According to the Constitution within the year after thecreation of the Assembly legislation on torture will be passed either by reforming the Penal Code or by means of a special law. *("DISPOSICIONES TRANSITORIAS - Cuarta. Dentro del primer año, contado a partir de su instalación, la Asamblea Nacional aprobará:*
1. La legislación sobre la sanción a la tortura, ya sea mediante ley especial o reforma del Código Penal.")

[253] Conclusions and recommendations of the Committee against Torture, U.N. Doc. A/54/44, 5 May 1999, para. 138 (expressing concern about "[t]he continued existence in the Penal Code, the Armed Forces (Organization) Act and the Code of Military Justice of provisions exempting from criminal responsibility persons who act on the basis of due obedience to a superior" and stating that "these provisions are incompatible with both article 46 of the Constitution and article 2, paragraph 3, of the Convention [against Torture]"), 148 (recommending repeal of these provisions).