Volume 11 | Issue 2

Summer 2008

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Recommended Citation

Walter Kalin, *Extraterritorial Applicability to the Convention Against Torture Remarks*, 11 N.Y. City L. Rev. 293 (2008).
Available at: 10.31641/clr110209

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EXTRATERRITORIAL APPLICABILITY OF THE CONVENTION AGAINST TORTURE

Walter Kälin*

Are human rights in general, and the prohibition of torture in particular, universal, i.e. applicable to all human beings regardless of nationality, race, gender, or origin? Since the 1776 Virginia Bill of Rights proclaimed, “[T]hat all men are by nature equally free and independent, and have certain inherent rights . . .”¹ the answer is yes, a yes confirmed by the 1948 Universal Declaration of Human Rights.² While it is recognized that individuals cannot be excluded from the protection of their human rights for reasons of who they are, some States, among them the United States, assert that exceptions from the universal applicability of human rights exist in certain situations and locations. For example, the United States maintains that the International Covenant on Civil and Political Rights “does not apply extraterritorially.”³ In regards to the Convention Against Torture (“the Convention”), the United States on the one hand stresses that “U.S. officials from all government agencies are prohibited from engaging in torture, at all times, and in all places.”⁴

On the other hand, it underlines that the Convention Against Torture does not apply in the context of U.S. military actions on foreign soil because “U.S. detention operations in Guantanamo, Afghanistan, and Iraq are part of ongoing armed conflicts and, accordingly, are governed by the law of armed conflict, which is the *lex specialis* applicable to those particular operations.”⁵ In other words, the United States accepts that it is bound by the torture prohibitions provided for by international humanitarian law, but

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¹ Virginia Declaration of Rights (1776), art. 1, <http://www.gunstonhall.org/documents/vdr.html> (last visited 10/25/08).

² Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

³ United States Responses to Selected Recommendations of the Human Rights Committee (October 10, 2007), *available at* <http://www.state.gov/documents/organization/100845.pdf>.

⁴ The United States’ Response to the Questions Asked by the Committee Against Torture, May 8, 2006, *available at* <http://www.state.gov/g/drl/rls/68562.htm>.

⁵ *Id.*

rejects any obligation to respect the Convention Against Torture in the context of overseas military operations.

It is true that international humanitarian law contains unambiguous prohibitions of torturing and ill-treating the civilian population and everyone who has laid down his or her arms (*persons hors de combat*),⁶ and international criminal law makes such acts punishable as a war crime.⁷ However, the distinction made by the United States is not of an academic nature but has the practical consequence of not being subjected to the reporting duties under Article 19 of the Convention or under any other international monitoring mechanism. Therefore, it is relevant whether or not the Convention Against Torture binds a State party when acting outside its own territory.

THE POSITION OF THE COMMITTEE AGAINST TORTURE

The Committee against Torture ("CAT") does not agree with the positions espoused by the United States. In the 2006 Conclusions and Recommendations issued at the end of its consideration of the second report of the U.S. under Article 19 of the Convention, the Committee called on the U.S. to "recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction."⁸ It furthermore reiterated its "view that this includes all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised" and considered "the State party's view that those provisions are geographically limited to its own de jure territory to be regrettable."⁹ It therefore recommended that the United States recognize that the provisions of the Convention expressed are applicable to any "territory under the

⁶ Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, (Protocol I) art. 75(2)(a), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(2)(a), June 8, 1977, 1125 U.N.T.S. 609.

⁷ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9, arts. 8(2)(a)(ii), 8(2)(c)(i) (declaring torture a crime against humanity when it is committed as part of a widespread or systematic attack against any civilian population); *see also id.*, art. 7(1)(f).

⁸ Committee Against Torture, *Considerations of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, United States of America*, ¶ 14, CAT/C/USA/CO/2, (July 25, 2006), available at <http://www2.ohchr.org/english/bodies/cat/cats36.htm>.

⁹ *Id.* ¶ 15.

State party's jurisdiction" and can be "fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world."¹⁰ These statements reflect the obligation of States parties enshrined in Article 2 of the Convention to "take effective legislative, administrative, judicial or other measures to prevent acts of torture *in any territory under its jurisdiction*."¹¹

In General Comment No. 2, the Committee against Torture now reiterates "that the concept of 'any territory under its jurisdiction,' linked as it is with the concept of non-derogability, includes any territory or facilities and must be applied to protect any person, citizen or non-citizen, without discrimination subject to the *de jure* or *de facto* control of a State party."¹²

This is a bold and welcome reaffirmation of the universality of the prohibition of torture, which would be seriously undermined if relevant legal instruments could be circumvented by simply "exporting" such ill-treatment to a territory outside one's own boundaries. The notion of "any territory under its jurisdiction" as well as the statement in General Comment No. 2 raise, however, certain questions, among them the following: 1) Is this notion to a large degree irrelevant in the present context, as the Convention Against Torture does not find any application in situations of armed conflict anyway? 2) If no, what is the meaning of 'jurisdiction'? and 3) What kind of relationship must exist between the exercise of jurisdiction and a given territory to make the Convention applicable?

APPLICABILITY IN SITUATIONS OF ARMED CONFLICT

Extraterritorial applicability of the Convention Against Torture is particularly relevant in times of armed conflict. However, the issue becomes relevant only if, in fact, the Convention applies in such situations, too.

The U.S. argument that international humanitarian law as *lex specialis* makes the Convention Against Torture inapplicable at times and locations of armed conflict is clearly refuted by Article 2(2) of the Convention. By stating that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, . . .

¹⁰ *Id.*

¹¹ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 2, ¶ 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984) [hereinafter Convention].

¹² U.N. Office of the High Comm'n on Human Rights [OHCHR], Comm. Against Torture, *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 7, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter *General Comment No. 2*].

may be invoked as a justification of torture,”¹³ this provision presupposes that the obligation to refrain from and prevent torture as embodied in paragraph 1 of the same article has to be respected in situations of armed conflict, too. This is in line with, for example, Article 4 of the International Covenant on Civil and Political Rights explicitly declaring that the prohibition of torture also applies “[i]n time of public emergency which threatens the life of the nation,”¹⁴ a condition that is clearly fulfilled in a situation of armed conflict, and similar language in regional conventions.¹⁵ General Comment No. 2 of the Committee Against Torture, therefore, correctly stresses that the prohibition of torture must also be fully respected during “a state of war or threat thereof, internal political instability or any other public emergency. This includes any threat of terrorist acts or violent crime as well as armed conflict, international or non-international.”¹⁶

More generally, the International Court of Justice, in its 2004 advisory opinion entitled “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,” considered “that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation[,]”¹⁷ meaning that some guarantees may simultaneously be a matter of human rights and international humanitarian law. This is certainly the case for torture, which is prohibited simultaneously by international human rights, humanitarian, and criminal law, as indicated above. Thus, General Comment No. 2 is sound in insisting on the applicability of the Convention also in times of armed conflict.

EXERCISING JURISDICTION

The second issue to consider is the notion of jurisdiction. The U.N. Human Rights Committee (“HRC”) has defined this notion

¹³ Convention, *supra* note 11, art. 2 ¶ 2.

¹⁴ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 4 ¶ 1, U.N. Doc. A/6316, (Dec. 16, 1966), *available at* <http://www2.ohchr.org/english/law/ccpr.htm> [hereinafter ICCPR].

¹⁵ *See, e.g.*, European Convention on Human Rights, art. 15, Sept. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights]. The convention provides for the possibility of derogation “[i]n time of war or other public emergency threatening the life of the nation,” *id.* ¶ 1, but excludes torture from the list of derogable guarantees, *id.* ¶ 2.

¹⁶ General Comment No. 2, *supra* note 12, ¶ 5.

¹⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9), *available at* <http://www.icj-cij.org/docket/files/131/1671.pdf>.

as being “the power or effective control” over an individual exercised by a State within or outside its own territory, regardless of whether it is carried out *de jure* or just *de facto*, i.e. “regardless of the circumstances in which such power or effective control was obtained.”¹⁸ Such power or effective control must, however, be direct and immediate. The European Court on Human Rights held in the *Bankovic* case, concerning an air to ground missile attack on a television studio in Belgrade during the 1999 Kosovo crisis, that jurisdiction understood in this way does not exist in the case of military air strikes on a hostile country in which the State concerned exercises neither control over the population nor any public powers.¹⁹

Whether a specific action by a State having an impact on an individual may be qualified as jurisdiction is, as the *Bankovic* case indicates, often difficult to determine. Such difficulties do not arise in the context of torture. Torture can only be carried out if the victim is in the hands and under the direct and effective control of the torturer; furthermore, Article 1 of the Convention requires that it be inflicted on a person “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”²⁰ These two elements of control over the victim and attributability to the State make torture as defined by the Convention Against Torture necessarily and automatically an exercise of jurisdiction. Taking into account the severity of this human rights violation and the extremely high degree of control over the victim, one could even describe torture as the ultimate, albeit deeply illegitimate and abusive, exercise of State power.

THE LINKAGE BETWEEN TERRITORY AND JURISDICTION

The third and most complex issue in the context of the Convention Against Torture is the linkage between territory and jurisdiction required in order for the Convention to become applicable outside a State party’s territory. The relationship between the concepts of jurisdiction and territory is complex. The notion of nation state and the related concept of territorial sovereignty imply, on

¹⁸ U.N. Human Rights Comm., *General Comment No. 31, [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, CCPR/C/21/Rev.1/Add.13 (May 26, 2004), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument) [hereinafter Human Rights Comm., *General Comment No. 31*].

¹⁹ *Bankovic v. U.K.*, 44 Eur. Ct. H.R. 75 (2001).

²⁰ Convention, *supra* note 11, art. 1.

the one hand, the presumption that States exercise their jurisdiction over their own territory. As Max Huber in his 1928 award in the *Island of Palmas* case highlighted, “[s]overeignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”²¹ On the other hand however, experience shows that that, for example, in the context of a belligerent occupation, States may disregard this right and exercise some of their functions on the territory of another State. This is why human rights conventions often contain provisions explicitly addressing this issue. This is done in a variety of ways.

Some human rights treaties such as the Convention on the Rights of the Child (Article 2) or the European Convention on Human Rights (Article 1) simply require States parties to secure guarantees to individuals “within their jurisdiction” with no mention of their territory.²² This provides for their extraterritorial application, as a State can also clearly exercise *de facto* jurisdiction outside its own national territory.

This has been explicitly recognized by the European Court of Human Rights, which recognized that “the concept of ‘jurisdiction’ under Article 1 of the [European Convention on Human Rights] is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own [territory].”²³ The Court further recalled, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.²⁴

The Covenant on Civil and Political Rights seems to use a much narrower approach by imposing the obligation on States to ensure Covenant rights “to all individuals within its territory and

²¹ *Island of Palmas* (Neth. V. U.S.), 2 R.I.A.A. 829 (Perm. Ct. Arb 1928).

²² See CONVENTION ON THE RIGHTS OF THE CHILD, G.A. RES. 44/25, ART. 2 ¶ 1, U.N. DOC. A/44/49 (Nov. 20, 1989), available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>; European Convention on Human Rights, *supra* note 15, art 1.

²³ *Loizidou v. Turkey*, 23 Eur. Ct. H.R. 513, 530 (1996).

²⁴ *Id.*

subject to its jurisdiction.”²⁵ The wording is ambiguous inasmuch as the “and” linking the elements of the State’s own territory and that of jurisdiction over the person concerned can be construed as a cumulative requirement, meaning those parts of the national territory that are subject to the jurisdiction of the State concerned; or as an “and/or” alternative referring to individuals within a State’s territory and subject to its jurisdiction, as well as individuals who are not within the territory, but are nonetheless subject to the jurisdiction of the State concerned because they are under its power and effective control.

The HRC has since long espoused the second interpretation. Two communications submitted to the HRC in 1977 addressed Uruguay’s responsibility for the abduction and torture of opponents of the regime who had been tracked down and arrested in neighbouring countries by its intelligence services. The HRC held that the Covenant had extraterritorial scope of application, arguing that a literal interpretation of Article 2 would lead to the absurd conclusion that States parties could perpetrate with impunity abroad human rights violations that were prohibited within their own frontiers.²⁶

As one of the members of the HRC highlighted, the wording of Article 2 was not intended to apply to such cases but to special circumstances in which the State was faced with objective obstacles such as foreign occupation in exercising its jurisdiction in part of the national territory.²⁷ In its Advisory Opinion on the so-called wall in the Occupied Palestinian Territory, the International Court of Justice endorsed that interpretation. It noted that Article 2 “can be interpreted as covering only individuals who are both present within a State’s territory and subject to that State’s jurisdiction. It can also be construed as covering both individuals present within a State’s territory and those outside that territory, but subject to that State’s jurisdiction.”²⁸

The Court, after having analyzed the drafting history and the practice of the HRC, concluded that the Covenant is applicable to

²⁵ ICCPR, *supra* note 14, art. 2 ¶ 1.

²⁶ See Delia Saldías de López (on behalf of her husband Sergio Rubén López Burgos) v. Uruguay, Communication No. 52/1979 (adopted on July 29, 1981) (Report of the Human Rights Committee U.N. GAOR Doc. A/36/40) (68 I.L.R. 29); Lilian Celiberti de Casariego v. Uruguay, Communication No. 56/1979 (adopted on July 29, 1981) (Report of the Human Rights Committee U.N. GAOR Doc.A/36/40) (68 I.L.R. 29).

²⁷ *Id.*

²⁸ See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 109 (July 9).

all acts undertaken by a State when exercising jurisdiction outside its territory, because the drafters of the treaty had certainly not intended the wording of Article 2 to allow States to escape from their obligations when they exercised jurisdiction abroad.²⁹

Similarly, General Comment No. 31 of the HRC emphasizes that the Covenant protects anyone within the power or effective control of a State party; this principle also applies where military forces exercise such control abroad, for example, in the context of international peacekeeping or peace-enforcement operations.³⁰ As the HRC has made clear, the general rules of State responsibility determine in such circumstances the acts for which a State whose forces are operating in foreign territory is to be held accountable.³¹

Regarding the Convention Against Torture, it is noteworthy that Article 2(1) uses neither the language of the Convention on the Rights of the Child, nor that of the Covenant on Civil and Political Rights. Rather, it provides that it links a State party's obligation to "acts of torture in any territory under its jurisdiction."³² While this formula puts the emphasis on jurisdiction over a territory, not a person, it is clear that State control over the victim of torture is the first condition that must be met to make the Convention binding upon a State in a particular case. However, it seems to add, as a second condition, the requirement that jurisdiction over a person is combined with jurisdiction over a territory. In other words: The Convention Against Torture is binding upon a State party if it exercises jurisdiction over a person in a territory under its jurisdiction.

In doing so, the Convention Against Torture, arguably, uses a narrower approach than the Covenant on Civil and Political Rights as interpreted by the HRC and the International Court of Justice, raising the question as to what is necessary to have *de jure* or *de facto* jurisdiction over a territory. The following situation can be

²⁹ *Id.* ¶¶ 110, 111. The Court confirmed at the same time that the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Right of the Child (CRC) also have extraterritorial scope, stressing, however, that the rights guaranteed by the (ICESCR), by their nature, are essentially territorial, so that a State is bound by obligations outside its territory only if it exercises effective jurisdiction as in the case of occupation. *Id.* ¶ 112 (discussing the ICESCR, which has no general scope of application clause); *id.* ¶ 113 (discussing CRC art. 2, which mentions only the jurisdiction aspect).

³⁰ See Human Rights Comm., *General Comment No. 31*, *supra* note 18, ¶ 10.

³¹ See generally Human Rights Comm., *Concluding Observations of the Human Rights Committee of Israel*, ¶ 11, CCPR/CO/78/ISR (Aug. 21, 2003), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.78.ISR.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?OpenDocument).

³² Convention, *supra* note 11, art. 2 ¶ 1.

distinguished: As jurisdiction is defined as power and effective control, it exists on a State's own territory unless part of it is held by insurgents or a foreign occupying force. If a foreign State occupies another State's territory during an international armed conflict, or if it has exclusive control over part of another State by virtue of a lease of a similar arrangement, then that territory is certainly under the jurisdiction of the foreign State.

Arguably, a territory under the jurisdiction of a foreign country can also comprise of a piece of land that is used as a military base or detention facility if such installation is not only of a very passing nature and the State running it has exclusive control over it. On the other hand, a short commando operation in another country leading to the apprehension and subsequent torturing of an individual certainly does not lead to jurisdiction over that territory. Unlike in the case of other human rights conventions, the Convention Against Torture does not apply here and victims have to seek redress under the Covenant on Civil and Political Rights or an applicable regional convention.

CONCLUSION

The statement contained in paragraph 7 of General Comment No. 2 to the effect "that the concept of 'any territory under its jurisdiction' . . . includes any territory or facilities and must be applied to protect any person, citizen or non-citizen, without discrimination subject to the de jure or de facto control of a State party,"³³ while not explicitly highlighting all complexities of the issue, is correct provided that the State concerned has a solid and not just passing control over the location where the torture takes place. This condition is fulfilled not only when a State is torturing, instigating torture, or acquiescing to it on its own territory, but also on foreign territories it occupies. The condition is also fulfilled outside situations of occupation, in detention facilities or military bases that are not just of a passing nature and are run under the exclusive control of the State concerned.

³³ *General Comment No. 2*, *supra* note 12, ¶ 7.