



The Absolute and Comprehensive Prohibition of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

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In recent years, there has been a renewed interest in the international law concerning torture and other forms of cruel, inhuman or degrading treatment or punishment (“other ill-treatment”), as States formerly at the forefront of global efforts to combat torture have themselves become publicly implicated in acts of torture or ill-treatment in a variety of ways in connection with the “war on terrorism”.

It is important to address these headline-grabbing incidents and issues head-on. Torture and terrorism (deliberate targeting of civilians, whether with small-scale or mass-destructive violence) have been with us for hundreds or thousands of years. Allowing a weakening of the norms against torture now, on the basis of terrorism as a “new” threat, would be historically incorrect (as the existing norms already take that threat fully into account) and disastrously damaging both to specific individuals and to the broader aims of democratic and humane societies:

- There is no doubt that individuals with no connection of any kind to terrorism have been and will be subjected to torture and other ill-treatment as a direct or indirect result of the “new” approaches being adopted in connection with anti-terrorism measures.
- Applying torture or ill-treatment to anyone, including individuals who have been proven to be involved in acts of violence against the general population, dehumanizes and desensitizes the individuals and population that apply, condone or tolerate the torture. Every act of torture is a grave offence against the human dignity,¹ which is not only the right of every human being but also the foundation of just and humane society.
- Any weakening of international resolve to eradicate torture will send a signal to other States that torture will be tolerated, resulting in further entrenchment and proliferation of torture and ill-treatment affecting the general population in many parts of the world.

¹ 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Resolution 3452, by consensus, article 2.

However, the majority of torture and ill-treatment is still perpetrated outside of the “anti-terrorism” context, far from the scrutiny of the international mass media. Torture remains a systematically-applied, if secret, part of the regular criminal investigation and prosecution practices of police forces around the world. It continues to be used as a tactic for political intimidation of local populations. Despite all laws to the contrary, it is still deployed in international or internal armed conflict. Consequently, sustained, practical, in-the-field work to prevent and punish acts of torture and ill-treatment throughout the world, remains, and will remain, the only means for fundamentally addressing the global problem.

This paper will identify the sources and strength of the absolute prohibition of torture and other ill-treatment, and describe some of the key aspects of the prohibition. The illegality of attempts to “outsource” torture to other States, or to “contract out” torture to “private” actors will be given particular attention.

Sources of the Prohibition in International Law

The prohibition of torture and all other forms of cruel, inhuman or degrading treatment or punishment is specifically codified in all relevant international human rights and humanitarian treaties, including:

- the 1949 Geneva Conventions,²
- the International Covenant on Civil and Political Rights,³
- the European, American, and African regional human rights treaties,⁴ and
- the treaties establishing the various international criminal tribunals.⁵

The prohibition also forms a part of customary international law, the general rules of international law binding on all States whether or not the State is party to any particular treaty. The existence of a rule of customary international law is established through evidence of the actual practices of States (either doing or refraining from doing something) and evidence that the practice is pursuant to a shared opinion that the action or abstention is required by international law (*opinio juris*). There is ample evidence to support the many court judgments and scholarly analyses that have found the prohibition to be a part of customary international law.⁶

² E.g., *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, articles 3(1)(a) and (c), 27, 29, 31, 32, 147.

³ Article 7. See also the 1989 *Convention on the Rights of the Child*, GA 44/25, article 37(a).

⁴ 1953 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, article 3; 1978 *American Convention on Human Rights* article 5(2); 1981 *African Charter on Human and Peoples' Rights*, article 5.

⁵ *Rome Statute of the International Criminal Court*, articles 7(1)(f) and (k), and 8(2)(a)(ii), (b)(xxi) and (c); *Statute of the International Criminal Tribunal for the Former Yugoslavia*, articles 2(b) and (c), and 5(f) and (i); *Statute of the International Tribunal for Rwanda*, articles 3(f) and (i), 4(a) and (e),

⁶ In addition to the widely-ratified nature of the treaties that expressly include the prohibition, evidence of its customary nature is provided through a range of other international instruments, resolutions of UN bodies, and reactions by states to accusations that they or others engaged in torture: see, e.g., the evidence cited in Henckaerts, J-M. and Doswald-Beck, L., *Customary International Humanitarian Law, Volume I: Rules*, International Committee of the Red Cross and Cambridge University Press, Cambridge, 2005, at pp. 315-317; 1975 *UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, General Assembly Resolution 3452, by consensus, article 3; UN Human Rights Committee, General Comment

Strength of the Prohibition

The prohibition of torture and other forms of ill-treatment is absolute, non-derogable, and one of the strongest and most entrenched rules in all of international law. In other words, the prohibition applies with full force in all circumstances, including peacetime, wartime, during and in relation to public emergencies of any kind including terrorist attacks, and in respect of all anti-terrorism measures:

- The prohibition is absolute in that no act of torture or other ill-treatment can ever be justified on any basis in any circumstances.⁷ Judicial decisions, treaty texts and other international instruments, and international experts have confirmed that the right to freedom from torture and other ill-treatment cannot be “balanced” against other rights, including rights related to the security and safety of other individuals from acts of terrorism.⁸
- The prohibition is non-derogable in that treaties that codify the prohibition specifically exclude it from general “derogations” clauses that otherwise allow temporary limitation of some rights in extreme circumstances.⁹ In other words, a State is not permitted by any treaty to temporarily limit the application of the prohibition under its own domestic law for any public emergency, including for anti-terrorism measures or in the context of an armed conflict.

24, *General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 8; and *Restatement (3d) of the Foreign Relations Law of the U.S.*, § 702. Examples of international cases confirming the customary prohibition include: International Criminal Tribunal for the former Yugoslavia (“ICTY”), *Prosecutor v. Furundzija* (10 December 1998), para. 137; ICTY, *Prosecutor v. Delalić and others* (16 November 1998), paras. 454, 517; European Court of Human Rights, *Al-Adsani v. UK*, [2001] ECHR 35763/97, at para. 61; and Inter-American Court of Human Rights, *Caesar v. Trinidad and Tobago* (11 March 2005), paragraph 70. Examples of national cases include United Kingdom, *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)*, [2000] AC 147 (H.L.); USA, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir.1980) at 881-884; *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347-49 (N.D. Ga. 2002); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp 2d. 1345, 1361 (S.D. Fla. 2001), affirmed (11th Cir. 14 March 2005); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002).

⁷ Human Rights Committee, General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), paragraph 3. *Convention against Torture*, articles 2(2) and (3). General Assembly Declaration, articles 2, 3 and 7.

⁸ See, *inter alia*, European Court of Human Rights, *Chahal v. United Kingdom*, Judgment, 15 November 1996, paragraphs 76-80; UN Human Rights Committee, Concluding Observations on the 5th Periodic Report of Canada (2 November 2005), UN Doc. CCPR/C/CAN/CO/5, para. 15; UN Committee against Torture, *Paez v. Sweden* (1997), Communication No. 63/1997, para. 14.5; Supreme Court of Israel, *Judgment concerning the legality of the General Security Service’s interrogation methods*, (6 September 1999), para. 23; 1975 UN Declaration on Torture, article 3; 1984 *Convention against Torture*, article 2(2); European Court of Human Rights, *Aksoy v. Turkey* (1996), paragraph 62; 1993 Vienna Declaration and Programme of Action, A/CONF.157/23, paragraph 60. See also N. Rodley, *The Treatment of Prisoners Under International Law*, 2nd edn., Oxford University Press, Oxford, 1999, pp. 54-55, 64-65, 73-74, 78-84.

⁹ E.g., ICCPR, article 4(2); American Convention on Human Rights article 27(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, article 15(2). The African Charter has no derogation provision at all. See Human Rights Committee, General Comment 20, paragraph 3.

- The prohibition of torture, and possibly also the prohibition of all other forms of cruel, inhuman or degrading treatment or punishment, is also one of a subset of customary rules of international law that have sacrosanct status, so-called “peremptory norms of international law” or “jus cogens” rules.¹⁰ Any objection, reservation, treaty provision, declaration of interpretation, or any other customary rule that is inconsistent with the prohibition is utterly invalid to the extent of the inconsistency.¹¹ The jus cogens nature of the prohibition may also have implications for inconsistent domestic legislation, or the domestic legality of particular actions taken by a government.¹²

It is clear that the prohibition of torture and other ill-treatment is already, and has been for a long time, absolute as a matter of international law. Decades of armed conflict, and of serious threats and acts of terrorism, have not affected this absolute legal position. Thus, to those who question the absolute nature of the prohibition in a political context, the first response should be that the absolute prohibition forms a part of international law that no single state or group of states can alter or change for any reason. However, as a second answer, it is worth recalling some of the reasons why the prohibition is absolute:¹³

- Once torture is permitted on the purported ground of necessity, no matter how narrow, there is an inherent slippery slope that leads to its application of torture on grounds of expediency, inevitably leading to proliferation.¹⁴
- The application of torture, even to those who have themselves committed inhumane acts, is unacceptably dehumanising to the torturer and to the society that endorses or tolerates the torture, in terms of: individual and group morality, psychological effects on the torturer and others, and social effects on the society as a whole. Scientific studies have shown that many, perhaps a majority, of otherwise normal individuals will directly apply torture to other innocent individuals, so long as they believe they are authorized to do so or will suffer no consequences as a result.¹⁵

¹⁰ E.g., ICTY, *Prosecutor v. Furundzija* (10 December 1998), paras. 144-154; European Court of Human Rights, *Al-Adsani v. UK*, [2001] ECHR 35763/97, at para. 61; Inter-American Court of Human Rights, *Caesar v. Trinidad and Tobago* (11 March 2005), paragraph 70,

¹¹ See Human Rights Committee, General Comment 24, paragraph 8.

¹² See Erika de Wet, “The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary Law” (2004), *European Journal of International Law*, Vol. 15, No. 1, 97-121.

¹³ See also Amnesty International, *Torture in the Eighties* (London, 1984), and Redress Trust, *Terrorism, Counter-Terrorism and Torture: International Law in the Fight Against Terrorism* (July 2004).

¹⁴ See N. Rodley, *supra* at p. 80, citing Twining and Twining, “Bentham on Torture”, 24 *Northern Ireland Legal Quarterly* 305, 345-56 (1973). See also Human Rights Watch, “Q&A: The Legal Prohibition of Torture” (1 June 2004), <http://www.hrw.org/press/2001/11/TortureQandA.htm>.

¹⁵ E.g. the Milgram (Yale) experiments in the 1960s and the Stanford Prison Experiment in the 1970s: See Stanley Milgram (2004), *Obedience to Authority: An Experimental View*, New York: HarperCollins; Stanley Milgram (1963), “Behavioral study of obedience” *Journal of Abnormal and Social Psychology*, Vol. 67, pp. 371-378; Haney, C., Banks, W. C., & Zimbardo, P. G. (1973), “Study of prisoners and guards in a simulated prison” *Naval Research Reviews*, 9, 1-17. Washington, DC: Office of Naval Research; Haney, C., Banks, W. C., & Zimbardo, P. G. (1973), “Interpersonal dynamics in a simulated prison”, *International Journal of Criminology and Penology*, 1, 69-97.

- There is a long and well-documented history of the use of torture and other-ill treatment against innocent individuals, particularly in the context of secrecy on “national security” grounds, by both democratic and non-democratic States.¹⁶ This history demonstrates that no State can in fact limit torture or ill-treatment to only those individuals who intend to or have carried out violent acts and actually have information critical to prevent imminent threats to life that could not be obtained in any other way. “Ticking bomb” scenarios constructed for philosophical or political debates do not exist in real life due to inherent limitations on knowledge and certainty, both moral and factual, as to the threat, the existence of information, impossibility of obtaining by other means, the identity of the individual, accountability, etc.¹⁷
- Information obtained by torture is inherently unreliable and therefore of little or no value to any valid government objective.

Key Aspects of the Prohibition

The prohibition of torture and other ill-treatment is comprehensive, including the following aspects:

Prohibition:

- State officials, and other persons acting in an official capacity, must not themselves inflict, instigate, consent to or acquiesce in authorize, any act of torture or other ill-treatment.¹⁸
- The international law prohibition is equally absolute in respect of torture and in respect of all other forms of cruel, inhuman and degrading treatment or punishment. While techniques for prevention of different forms of prohibited conduct may vary, there is no question that both are absolutely and comprehensively forbidden in international law.
- States must criminalize all acts of torture under their domestic law, including attempts to commit torture, complicity in an act of torture, incitement of torture, and participation in an act of torture.¹⁹
- States may not transfer a person to the territory or physical or legal custody of another State, directly or through an intermediary third State, if the person

¹⁶ See, e.g., Malcolm Evans & Rod Morgan, *Preventing Torture*, Clarendon Press, Oxford, 1998, Chapters 1 & 2.

¹⁷ See John Kleinig, “Ticking Bombs and Torture Warrants”, 7 September 2005, Colloquium City University of New York, http://web.gc.cuny.edu/Philosophy/kleinig_ticking_bombs.pdf .

¹⁸ See *Convention against Torture*, Preamble, articles 1 and 16. General Assembly Declaration, articles 2, 3 and 5.

¹⁹ See *Convention against Torture*, article 4. General Assembly Declaration, article 7.

would face a real risk of torture or other ill-treatment in the receiving or intermediary State.²⁰

- States may not solicit, accept or use information in respect of which there is knowledge (or a real risk) that the information was obtained through torture.²¹ The only exception to the rule is in respect of proceedings against a person accused of torture in order to establish the torture.²²

Prevention:

- States must enact laws and undertake practical and effective measures to prevent both public officials and others within their territory or under their jurisdiction from engaging in prohibited treatment.²³
- A State may be responsible for ill-treatment perpetrated by private persons in its territory or jurisdiction, if the State was aware of the risk, or ought to have been aware of the risk, and did not take reasonable steps to prevent the ill-treatment.²⁴
- One of the key methods for preventing torture is the establishment of independent expert mechanisms, empowered to carry out visits to all places where persons are deprived of liberty, without prior notice and with a range of legally-entrenched rights to information and to interview detainees in private. This model, originating with the practice of the International Committee of the Red Cross in situations of conflict, is increasingly being implemented as a regular part of the domestic administrative and legal order of States. The 1987 *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* established such a mechanism for

²⁰ Human Rights Committee, General Comment 20, para. 9; Human Rights Committee, General Comment 31, para. 12. *Convention against Torture*, article 3. This obligation is sometimes referred to as *non-refoulement*, a term that has its origins in refugee law. However, the concept of *non-refoulement* may not capture the full strength and scope of obligations in the context of torture or other ill-treatment. For instance, in some instances refugee status may be denied to persons who engaged in terrorism or war crimes; the rule against exposure to risk of torture, on the other hand, applies to everyone in all circumstances: see, e.g., European Court of Human Rights, *Chahal v. United Kingdom*, Judgment, 15 November 1996.

²¹ UN Convention against Torture, article 15. General Assembly Declaration, article 12. For further discussion, see Matt Pollard, "Rotten Fruit: State Solicitation, Acceptance, and Use of Information Obtained through Torture by Another State" (September 2005), 23 *Netherlands Quarterly of Human Rights* 349.

²² Convention against Torture, article 15.

²³ Human Rights Committee, General Comment 31 "The Nature of the General Legal Obligation Imposed on States Parties", 26 May 2004, CCPR/C/21/Rev.1/Add.13, paragraph 8. European Court of Human Rights, *A. v. U.K.* (23 September 1998), paras. 19-24. ICTY, *Prosecutor v. Furundzija*, (10 December 1998), Case No. IT-95-17/I-T, at paragraph 148. Convention against Torture, article 2. General Assembly Declaration, article 4.

²⁴ Human Rights Committee, General Comment 31, *ibid.* European Court on Human Rights, *Mahmut Kaya v. Turkey*, para. 115. European Court of Human Rights, *Z. and others v. U.K.* (10 May 2001), paras. 70, 74-75. Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras*, paras. 166, 172.

Europe. The 2002 Optional Protocol to the UN Convention against Torture will establish a similar mechanism at the global level.²⁵

- States must also specifically include the prohibition of torture and ill-treatment in its training of law enforcement personnel, and include the prohibition in the instruments or rules applicable to anyone involved in the interrogation or treatment of individuals who are deprived of their liberty.²⁶

Investigation:

- Anyone who claims to have been subjected to torture or other ill-treatment has the right to have his or her claim impartially investigated.²⁷ Even if there is no official complaint, if public officials receive information suggesting that such treatment may have taken place, they must investigate.²⁸

Punishment and Remedy:

- Where investigations establish that torture occurred, the perpetrators must be criminally prosecuted; other acts of cruel, inhuman or degrading treatment must similarly be prosecuted or punished through other administrative or disciplinary proceedings.²⁹ The punishment must be sufficiently serious to match the grave nature of such crimes.³⁰
- States may (and in some cases must) exercise “universal jurisdiction” over acts of torture. In other words, under international law, domestic courts can exercise jurisdiction over acts of torture even if they did not occur in the territory or jurisdiction of that State.³¹ Indeed, a State must detain and extradite or prosecute any alleged torturer that enters the State’s territory or jurisdiction.³²
- Any individual who has been subject to torture or other ill-treatment must be given public redress and compensation.³³

Because these specific obligations derive from the general prohibition,³⁴ they are part of customary international law binding all States and are absolute and non-derogable in their application.

²⁵ The Protocol will enter into force on the 20th ratification. To date, 13 States have ratified, and 49 States has signed, the Protocol. For more details, visit www.apt.ch.

²⁶ *Convention against Torture*, articles 10 and 11. General Assembly Declaration, articles 5 and 6.

²⁷ *Convention against Torture*, article 13. General Assembly Declaration, article 8.

²⁸ *Convention against Torture*, article 12. General Assembly Declaration, article 9.

²⁹ *Convention against Torture*, article 7. General Assembly Declaration, article 10.

³⁰ *Convention against Torture*, article 4(2).

³¹ See *Convention against Torture*, articles 5, 7 and 9. See also *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)*, supra.

³² See *Convention against Torture*, articles 6, 7 and 8.

³³ *Convention against Torture*, article 14. General Assembly Declaration, article 11.

Outsourcing and Contracting Out of Torture

Two of the problems identified for discussion in this seminar are “outsourcing” of torture (relying on other States to conduct interrogations of individuals of interest, knowing or not questioning whether torture was or will be used in the interrogation), and “contracting out” of torture (where the State employs private individuals or corporations to carry out detention, interrogation on its behalf, and torture or other ill-treatment is involved in the detention and/or interrogation). Other participants will address aspects of these issues in more detail, here I will only give a broad overview.

Outsourcing

Outsourcing of torture to other States can directly engage several aspects of the prohibition described above:

- If the outsourcing begins with the transfer of an individual to the territory or custody of another State, and the transferring States knows or should know that there is a real risk of the individual being tortured or otherwise ill-treated in the receiving State, the transfer itself will in all cases violate the rule codified in article 3 of the Convention against Torture.
 - This is equally true whether the transfer is effected through formal extradition or expulsion proceedings, or through unofficial “extraordinary rendition”.³⁵
 - Diplomatic assurances, both by their very nature and by their real-world limitations, cannot render legal a transfer that would otherwise be illegal due to risk of torture or other ill-treatment.³⁶

³⁴ See, e.g., UN Human Rights Committee, *General Comment No. 20 concerning prohibition of torture and cruel treatment or punishment (Art. 7)*, 10 March 1992, UN Doc. HRI/GEN/1/Rev.7, at paragraphs 9, 12; Communication No.469/1991, *Chitat Ng v. Canada*, Views of the Human Rights Committee of 5 November 1993; European Court of Human Rights: *Loizidou v. Turkey*, Series A No. 310; *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A, Vol.161; *Chahal v. The United Kingdom*, Judgment of 15 November 1996, 1996-V, no. 22; African Commission, Communication 97/93 *Modisse v. Botswana* (AHG/229XXXVII), paragraph 91; Committee against Torture, *P.E. v. France*, CAT/C/29/D/193/2001 at paragraph 6.3; Committee against Torture, *G.K. v. Switzerland*, CAT/C/30/D/219/2002 at paragraph 6.10.

³⁵ Burgers and Danelius, *The United Nations Convention against Torture* (Dordrecht: Martinus Nijhoff, 1988), p. 126: “As it now reads, the article is intended to cover all measures by which a person is physically transferred to another State.” See also Committee against Torture, Concluding Observations and Recommendations on the Fourth Periodic Report of the United Kingdom, UN Doc. CAT/C/CR/33/3, 25 November 2004, paragraphs 4(b) and 5(e),

³⁶ For further discussion, see UN Special Rapporteur, Report to the General Assembly 30 August 2005, UN Doc. A/60/316, paras. 29-52, especially conclusion at para. 51; Human Rights Watch, *Empty Promises: Diplomatic Assurances No Safeguard against Torture* (April 2004), <http://hrw.org/reports/2004/un0404/>; Human Rights Watch, *Still at Risk: Diplomatic assurances No Safeguard against Torture* (April 2005), <http://www.hrw.org/reports/2005/eca0405/>; Report by Mr. Alvaro Gil-Robes, Council of Europe Commissioner for Human Rights, on his visit to Sweden (21-23 April 2004), Comm DH (2004) 13, para. 19.

- In terms of the information extracted as a result of “outsourcing”, a State will violate international law if it solicits, accepts or uses information in respect of which it knows (or should reasonably know) there is a real risk that the information will be or was obtained through torture.³⁷ The State will be implicated in the violation regardless of whether the torture was perpetrated on its own territory or whether agents of the State had any prior role in the torture.³⁸ The rule against use of such information applies both to formal criminal proceedings and other formal decision-making processes.³⁹

Contracting Out

States cannot avoid responsibility for torture or other ill-treatment by actively deploying or passively relying upon private contractors to provide local security or to manage places of detention or imprisonment.

The general rules of State responsibility under international law, which apply independent of any specific treaty provision, may make a State directly responsible for the actions of a private contractor. The International Law Commission (“ILC”) has summarized the general rules in a series of draft articles, which provide in part as follows:⁴⁰

5. The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

In its official commentaries,⁴¹ the ILC says that article 5 is intended to take account of “private companies”, where the company is “empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.”⁴² The commentaries expressly provide the example of “private security firms” that are “contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations.”⁴³ In such circumstances, the ILC articles further

³⁷ See Matt Pollard, “Rotten Fruit: State Solicitation, Acceptance, and Use of Information Obtained through Torture by Another State” (September 2005), 23 *Netherlands Quarterly of Human Rights* 349.

³⁸ Committee against Torture, Concluding Observations on the Fourth Periodic Report of the United Kingdom, 25 November 2004, UN Doc. CAT/C/CR/33/3, at paragraph 4(a)(i).

³⁹ See, e.g.: Committee against Torture, *P.E. v. France* CAT/C/29/D/193/2001 at paragraph 6.3; Committee against Torture, *G.K. v. Switzerland*, CAT/C/30/D/219/2002 at paragraph 6.10.

⁴⁰ See *Draft articles on Responsibility of States for internationally wrongful acts*, adopted by the International Law Commission at its fifty-third session (2001), (extract from the Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1).

⁴¹ [http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles\(e\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf)

⁴² [http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries\(e\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries(e).pdf)

⁴³ *Ibid.*, p. 92.

⁴⁴ *Ibid.*

specify that State responsibility applies even if the private contractor “exceeds its authority or contravenes instructions.”⁴⁴

In situations where the actions of private contractors, mercenaries or security firms do not fall within the principles discussed above, the State may still be responsible. The ILC articles also include the following provisions:

8. The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

9. The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

With respect to article 8, the ILC comments that there are two routes to State responsibility for private actors in this case: the first route, “acting on the instructions” will most commonly arise

...where State organs supplement their own action by recruiting or instigating private persons or groups who act as ‘auxiliaries’ while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as ‘volunteers’ to neighbouring countries, or who are instructed to carry out particular missions abroad.⁴⁵

As to the second route, “direction or control”, here the inquiry is very fact-dependent, and the threshold is somewhat higher than merely financing or equipping the private entities: involvement in planning and supervision of operations may be required.⁴⁶

With respect to article 9, the ILC indicates that in some situations of armed conflict or following occupation, where private actors supplement regular State forces, the conduct of the private actors may be attributed to the State. The ILC comments that “the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority.”⁴⁷

Apart from these general rules of international law, the specific context of torture and the specific requirements of treaties concerning torture may also cause the State to be responsible for the actions of private contractors. For instance, the UN Committee against Torture has, in reviewing the reports of States under the *Convention against Torture*, implied that the obligations of the Convention apply in respect of private

⁴⁴ ILC draft articles, article 6.

⁴⁵ ILC Commentaries, p. 104.

⁴⁶ See ILC Commentaries, p. 106, referring to ICTY, *Prosecutor v. Tadić*.

⁴⁷ ILC Commentaries at pp. 109-111.

security firms exercising public functions.⁴⁸ As was noted earlier, the UN Human Rights Committee has specifically indicated that States are under an obligation to protect individuals from torture or other ill-treatment at the hands of private actors, and this applies to anyone within the power or effective control of the State, even if the individual is not situated within the territory of the State.⁴⁹ As regards the prohibition of torture and ill-treatment under the European Convention on Human Rights, the European Court of Human Rights has said, in assessing State liability for corporal punishment applied to a pupil of a private school: “the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals”.⁵⁰

Various commentators have asserted that a gap or uncertainty exists in international law in respect of mercenaries and private (military) security firms.⁵¹ It is true that attempts to craft specific instruments to deal with these entities – the 1977 African Union *Convention for the Elimination of Mercenarism in Africa*⁵² and the 1989 UN *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*⁵³ for example – have not been effective (in the case of the UN Convention it has not even been widely ratified). However, based on the specific obligations of prevention incumbent on all States, the applicability of relevant provisions of international humanitarian law to non-state actors, and the general rules of State responsibility relating to private companies, it is clear that States *do* already bear legal responsibility in relation to any act of torture or other ill-treatment perpetrated by private contractors operating from or in the State’s territory or operating in the name of the State abroad.⁵⁴

Conclusion

This paper has given a broad overview of some of the sources and the strength of the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment. I have also made some very general introductory remarks on the subjects of “outsourcing” of torture and ill-treatment to other States, and “contracting out” of torture and ill-treatment to private actors.

I have described why, whether or not one accepts the premise that the threat posed by terrorism has fundamentally transformed in recent years, it is both important and possible to meet and reject the argument that some revision or weakening of the prohibition of torture and other ill-treatment is necessary to protect societies and

⁴⁸ See, e.g., Committee against Torture, *Conclusions and Recommendations: Germany* (11 June 2004), CAT/C/CR/32/7, paragraphs 4(e) and 4(f).

⁴⁹ See Human Rights Committee, General Comment 31, paragraphs 8 and 10.

⁵⁰ *Costello-Roberts v. the UK*, (1995) 19 EHRR 112, para. 27.

⁵¹ See, e.g., P.W. Singer, “War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law” *Columbia Journal of Transnational Law*, (Volume 42 Number 2, Spring 2004), Report of the UN Special Rapporteur on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (8 December 2004), E/CN.4/2005/14.

⁵² 3 July 1977, OAU Doc. CM/422/Rev. L. Annex 1 (1972).

⁵³ 4 December 1989, A/Res/44/34 (1989), in force 2001.

⁵⁴ For further discussion on the issue of “contracting out” of security responsibility, see also Alexis P. Kontos “Private’ security guards: Privatized force and State responsibility under international human rights law”, *Non-State Actors and International Law*, Volume 4, Number 3, 2004, pp. 199-238(40).

populations from terrorist threats. At the outset I also argued that it is equally important to keep in mind that the problem of torture and ill-treatment throughout the world is by no means limited to anti-terrorism measures. Parallel strategies are therefore called for, *both* to turn back new threats to the international prohibition, *and* to protect victims, to expand and reinforce training, and to establish local political and legal preventive mechanisms, in the field.

Freedom from torture was one of the first human rights to be fully recognized in international law, an important step forward in the historical struggle for human dignity. Any retreat, however small, from the absolute and comprehensive prohibition of torture and ill-treatment would not only destroy the dignity of its individual victims, it would destroy the dignity and ultimately the security of us all.