

Duty to Prevent and Punish Torture

Canada has legal obligations to exercise powers to prevent and punish torture arising from:

- o laws passed by Parliament including the *Crimes against Humanity and War Crimes Act*, *The Criminal Code of Canada*, *The Canadian Charter of Rights and Freedoms*, *The Immigration and Refugee Protection Act*, and *The Geneva Conventions Act*; and,
- o international instruments to which Canada is a signatory including the: *Rome Statute of the International Criminal Court*, *Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, *Geneva Convention Relative to the Treatment of Prisoners of War*, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, *The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International and Non-International Armed Conflicts* and *Charter of the United Nations*.

The United Nations Charter itself sought to make rights universal and to “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,” Preamble, paragraph 3. The Charter is founded on the premise that peace can only be obtained and maintained when all states operated “in conformity with the principles of justice and international law” (Article 1), enshrined the rule of law and fundamental freedoms in national systems and worked cooperatively to ensure the universality of fundamental freedoms. (Articles 2, 3, 55(c), 56.

The Purpose of the UN Charter is to prevent war and the achieve and maintain international peace and security by establishing universal human rights and the rule of law. The Charter also embodies the principle of the sovereignty of states and prohibits military intervention except where sanctioned by the Security Council. Sovereignty of secondary to the human rights. While sovereignty can be overridden by the Security Council or by the General Assembly, in order to re-establish peace and human rights, there is no similar provisions whereby human rights can be displaced to re-establish sovereignty. Indeed, in the case of torture, the *Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment* (CAT), specifically provides that freedom from torture overrides threats to sovereignty. (Article 2)

The UN General Assembly has re-stated the necessity of member states taking *effective* action to prevent and punish war crimes and crimes against humanity. (torture is a war crime and a crime against humanity)

1969: 15 December 1969 by resolution, the UN General Assembly called on member states to ‘take necessary measures to investigate war crimes and crimes against humanity including torture, and to ‘detect, arrest, extradite and punish’ perpetrators. This resolution was based on the collective awareness that punishment of persons responsible was an “important element” in the prevention of such crimes. (U.N. G.A. Res. 2583 (XXIV) 15 December 1969, Preamble para. 3 and Article 1)

1975: Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975 articulated the duty of each state to “ensure that all acts of torture are offences under its criminal law”, to investigate allegations of torture and, when torture appears to have been committed, to institute criminal proceedings against the alleged offender(s) “in accordance with national law.” (Article 9)

Article 5 of CAT to create an expanded jurisdiction to prosecute torture.

Article 5. 2. “Each State Party shall likewise take measures as may be necessary to establish its jurisdiction over such offences [acts of torture, including attempts, complicity or participation] in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this Article.”

Geneva Convention relative to the Treatment of Prisoners of War (GC III), Article 130 III and Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV), Article 146 impose a duty on Canada to:

“...enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.”

“...search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.” Or “...hand such persons over for trial to another High Contracting Party concerned, provided that such High Contracting Party has made out a prima facie case.”

“...take measures necessary for the suppression of all [other] acts contrary to the provisions of the present [Geneva] Convention...”

The Rome Statute of the International Criminal Court

The purpose of the *Rome Statute of the International Criminal Court* is to put “...an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes” Canada and other states parties affirm “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation” and recall, “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” Preamble para. 4 -6.

Ratifying states such as Canada have a duty to vigorously pursue investigation of allegations of torture and prosecutions of alleged perpetrators.

Crimes against Humanity and War Crimes Act

1987: *Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*

As a signatory to *The Convention against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment* [24 July 1987] Canada is required to arrest persons alleged to have committed, or been complicit in torture, and to detain them until criminal or extradition proceedings are implemented.

Article 6.1. “Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 [torture] is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.”

The torture, and other cruel, inhuman and degrading treatment to which detainees at Abu Ghraib and Guantanamo Bay prisoners are being subjected is also prohibited by a number of other international conventions and

April 2005: *Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Violations of International Human Rights and Serious Violations of International Humanitarian Law*, adopted in April 2005 by the 61st session of the Human Rights Commission. This is a groundbreaking document that takes as its starting point the needs and wishes of the victims themselves, and constitutes the first compilation of the already existing obligation of States regarding victims' right to reparation.

Preamble, paragraph 8, “Recalling that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity,” (paragraph 8 of the Preamble)

The Guidelines go on to state, in clear language the duty of states to “investigate [violations of international human rights and humanitarian law] and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.”(Article 4)¹

¹ Article 4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

Article 5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should

The *Immigration and Refugee Protection Act* 2001 c. 27 (IRPA), section 35 bars entry to foreign nationals when there are reasonable grounds to suspect involvement in a variety of acts including committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act* or being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*.

December 2000: *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, recommended by General Assembly Resolution 55/89 of 4 December 2000. The stated purpose of these principles is to--through investigation and prosecution--establish individual and State responsibility for torture and to demonstrate the need for full reparation and redress from the responsible state.

<http://www.ohchr.org/english/law/investigation.htm>

February 2007: *Torture and other cruel, inhuman or degrading treatment or punishment*. This resolution adopted by the UN General Assembly 14 Feb. 2007, A/RES/61/153, specifically condemns all attempts to legalize torture or other cruel, inhuman or degrading treatment and emphasizes that torture is a violation of international humanitarian law, can be a war crime or a crime against humanity and emphasizes the primary duty of states to take effective action to investigate, prosecute and severely punish all acts of torture (paras. 2. 5. 6). The resolution also notes in paragraph 12 that “prolonged incommunicado detention or detention in secret places... can in itself constitute a form of [torture].”

http://www.ohchr.org/english/issues/torture/rapporteur/docs/a_res_61_153.pdf

facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.