

**RWANDA**

**Initial Report on the Implementation of the Convention  
against Torture and other Cruel, Inhuman or Degrading  
Treatment or Punishment**

**Submission from TRIAL (Swiss Association against Impunity)  
to the Committee against Torture**

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## About TRIAL

TRIAL (*Swiss Association against Impunity*) is an association under Swiss law founded in 2002. It is apolitical and non-confessional. One of its principal goals is the fight against impunity of the perpetrators, accomplices and instigators of genocide, war crimes, crimes against humanity and acts of torture.

In this sense, TRIAL:

- ▶ fights against the impunity of the perpetrators and instigators of the most serious international crimes and their accomplices
- ▶ defends the interests of the victims of international crimes and gross human rights violations before Swiss tribunals and international human rights bodies;
- ▶ raises awareness among authorities and the general public regarding the necessity of an efficient

national and international justice system for the prosecution of international crimes.

In particular, TRIAL litigates cases before international human rights bodies (UN Treaty bodies and regional courts). TRIAL is active on cases concerning Algeria, Bosnia and Herzegovina, Burundi, Kenya, Libya, Mexico and Nepal.

Moreover TRIAL files criminal complaints on behalf of victims before national courts on the basis of universal jurisdiction.

Since 2011, TRIAL decided to submit alternative reports on different countries to the Committee against Torture and the Committee on the Rights of the Child, with the aim of encouraging these Committees to issue recommendations with respect to the scope of the principle of universal jurisdiction in a more systematic manner.

The organisation enjoys consultative status with the UN Economic and Social Council (ECOSOC).

More information can be found on [www.trial-ch.org](http://www.trial-ch.org).

## **Executive Summary**

The present written submission to the Committee against Torture is for the purpose of the examination of the initial report (CAT/C/RWA/1 of 16 June 2011) of Rwanda regarding the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “Convention against Torture” or “the Convention”), ratified by Rwanda on 15 December 2008.

TRIAL is focusing on the system of criminal punishment centred on the use of universal jurisdiction set up by the Convention against Torture in its Articles 4 (in conjunction with Article 1), 5 and 7 of the Convention, with a view to the effective repression of the crime of torture.

A detailed analysis of Rwandan criminal legislation leads TRIAL to highlight that the legal framework of the State is not fully in compliance with the commitments undertaken pursuant to Articles 4 (in conjunction with Article 1), 5 and 7 of the Convention against Torture on the question of criminalisation and effective punishment of the crime of torture.

Concerns arise with respect to a number of issues, namely:

- ▶ the lack of an adequate criminalization of torture, that is not considered as an autonomous offence but only as an aggravating circumstance or an ancillary crime;
- ▶ a deficient definition of torture with regard to Articles 4 and 1 of the Convention; and
- ▶ the impossibility for Rwandan courts to properly exercise their jurisdiction over conducts defined in the Convention against Torture.

## Section 1 - Introduction

TRIAL appreciates the opportunity to bring to the attention of the Committee against Torture information regarding the implementation of the Convention against Torture in Rwanda.

The following section of this report (Section 2) analyses the provisions of the cooperation system set up by the States Parties to the Convention against Torture in order to ensure an effective prosecution and punishment of torturers. Cornerstones of this system are on the one hand the principle of universal jurisdiction and on the other hand the obligation known as *aut dedere aut judicare*.

Section 3 of the report contains an assessment of the implementation of Rwanda of some provisions of the Convention against Torture through an analysis of national legislation concerning the criminalisation and punishment of the crime of torture.

Section 4 of the report outlines the conclusions of the analysis carried out in the previous section and sets forth a series of recommendations that TRIAL addresses to the Committee in view of the upcoming consideration of the State report.

In line with the mandate of TRIAL, the scope of the present submission is limited to the analysis of the provisions of the Convention against Torture that concern the prohibition of torture and the prosecution and punishment of alleged torturers, in particular pursuant to the principles of universal jurisdiction and *aut dedere aut judicare*. The omission of other subjects from the present document does not imply by any means that TRIAL believes that Rwanda fully complies with all its other international obligations under the Convention against Torture.

## Section 2 - The system for an effective prosecution and punishment of the crime of torture in the Convention against Torture

The drafters of the Convention against Torture elaborated a criminal cooperation system whose final purpose is to combat impunity for torture and, in particular, to deny safe-haven to persons suspected of having committed acts of torture.

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has recently expressed concerns regarding the prevalence of impunity as one of the root causes for the widespread practice of torture and voiced disappointment with respect to the low number of prosecutions for torture.<sup>1</sup>

He highlighted the challenge of effective application of the international legal framework, noting that

“torture occurs because national legal frameworks are deficient [...] Torture persists because national criminal systems lack the essential procedural safeguards to prevent its occurrence, to effectively investigate allegations and to bring perpetrators to justice.”<sup>2</sup>

<sup>1</sup> Special Rapporteur on Torture, “Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment”, doc. A/65/273 of 10 August 2010, para. 35.

<sup>2</sup> Ibidem, para. 35.

The Convention against Torture lays out a set of obligations and principles embodied in Articles 4 to 7, whose goal is to facilitate the punishment of torturers by enhancing the prosecution of the offenders through the adoption and exercise of extra-territorial heads of jurisdiction. The basic pillars are:

- ▶ the obligation on State Parties to codify torture as a separate criminal offence in domestic legislation in accordance with the definition of the crime contained in the Convention against Torture itself (Article 4, in conjunction with Article 1),
- ▶ the duty to extradite or prosecute, that is the obligation for the State in the territory of which an alleged torturer is found to prosecute him or to extradite him pursuant to a request made by a State wishing to prosecute him (Article 7); and,
- ▶ the obligation to entrust national courts with the power to establish and exercise a wide scope of jurisdiction over acts of torture, including, under certain circumstances, universal jurisdiction in order to maximize the opportunities to prosecute and punish alleged offenders (Article 5 and 7).

## 2.1 Article 4

The point of departure of the Convention's repression system is Article 4 which provides for an obligation on States Parties to codify torture as an autonomous offence under domestic legislation - as defined in Article 1 of the Convention<sup>3</sup> - and to attach an appropriately grave penalty to these conducts.

"Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

Therefore the first step to promote a smooth and effective criminal cooperation among States Parties is to oblige them to make sure that the scope of domestic criminal law covers at least all cases falling within the Convention definition<sup>4</sup> and provide for a punishment in line with the grave nature of the offence.<sup>5</sup>

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<sup>3</sup> Article 1(1) of the Convention against Torture: "For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

<sup>4</sup> J. Herman Burgers and H. Danelius, *The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, Martinus Nijhoff Publishers, 1988), p. 129.

<sup>5</sup> Conclusions and Recommendations of the Committee against Torture, Kuwait, CAT/C/KWT/CO/2, 28 June 2011, para. 7. See also Conclusions and Recommendations of the Committee against Torture, Ghana, CAT/C/GHA/CO/1, 15 June 2011, para. 9; Conclusions and Recommendations of the Committee against Torture, Turkmenistan, CAT/C/TKM/CO/1, 15 June 2011, para. 8; Conclusions and Recommendations of the Committee against Torture, Jordan, CAT/C/JOR/CO/2, 25 May 2010, para. 9; Conclusions and Recommendations of the Committee against Torture, Moldova, CAT/C/MDA/CO/2, 29 March 2010, para. 14; Conclusions and Recommendations of the Committee against Torture, Chile, CAT/C/CHL/CO/5, 23 June 2009, para. 10.

In its jurisprudence, the Committee against Torture has repeatedly urged States Parties to

“adopt a definition of torture that covers all the elements contained in article 1 of the Convention. [...] The State party should also ensure that acts of torture are not defined in terms of a less serious offence, such as the causing of physical and moral suffering, and that these offences are punishable by appropriate penalties which take into account their grave nature, as set out in article 4, paragraph 2, of the Convention.”<sup>6</sup>

Furthermore in this context the Committee clarified that States should ensure that acts amounting to torture are not subjected to any statute of limitations:

“The State Party should review its rules and provisions on the statute of limitations and bring them fully in line with its obligations under the Convention so that acts of torture, attempts to commit torture, and acts by any person which constitute complicity or participation in torture, can be investigated, prosecuted and punished without time limitations.”<sup>7</sup>

## 2.2 Article 5

Then Article 5 sets out the obligation for national authorities to establish jurisdiction to adjudicate over torture cases. This article obliges States Parties to assert a wide scope of jurisdiction over acts of torture, including instances involving non-nationals committing the crime in third States in case the alleged offender is present in their territory.

The first paragraph of Article 5 requires each State Party to provide for territorial and active nationality jurisdiction over torture and permits the establishment of passive personality jurisdiction, if the State deems it appropriate:

“Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

1. When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
2. When the alleged offender is a national of that State;
3. When the victim was a national of that State if that State considers it appropriate.”

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<sup>6</sup> Conclusions and Recommendations of the Committee against Torture, Kuwait, CAT/C/KWT/CO/2, 28 June 2011, para. 7. See also Conclusions and Recommendations of the Committee against Torture, Turkmenistan, CAT/C/TKM/CO/1, 15 June 2011, para. 8; Conclusions and Recommendations of the Committee against Torture, Bosnia and Herzegovina, CAT/C/BIH/CO/2-5, 20 January 2011, para. 8; Conclusions and Recommendations of the Committee against Torture, Ethiopia, CAT/C/ETH/CO/1, 20 January 2011, para. 9.

<sup>7</sup> Conclusions and Recommendations of the Committee against Torture, Jordan, CAT/C/JOR/CO/2, 25 May 2010, para. 9. See also Conclusions and Recommendations of the Committee against Torture, Sweden, CAT/C/SWE/CO/5, 4 June 2008, para. 10; Conclusions and Recommendations of the Committee against Torture, Denmark, CAT/C/DNK/CO/5, 16 July 2007, para. 11.

Article 5, paragraph 2 establishes a further title of mandatory jurisdiction:

“Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences 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.”

Article 5 therefore contains the obligation to establish universal jurisdiction<sup>8</sup>, in particular under the form of *forum deprehensionis* (also called conditional universal jurisdiction), meaning that States have the obligation to establish their jurisdiction when the alleged torturers are present in a territory under their jurisdiction, regardless of their nationality, the nationality of the victim and the place where the crime was committed.<sup>9</sup>

Among others, in its Concluding Observations on Nepal in 2007 the Committee against Torture stated that it “regrets the absence of universal jurisdiction in domestic legislation for acts of torture” and recommended that the State

“take the necessary measures to ensure that acts of torture are made subject to universal jurisdiction under the draft Criminal Code, in accordance with article 5 of the Convention”.<sup>10</sup>

The Committee has also expressed concerns regarding limitations on the scope of universal jurisdiction provisions, such as the French legislative requirement that the suspect be normally resident in France<sup>11</sup>, the double criminality requirement present in the former Yugoslav Republic of Macedonia (FYROM) and Kazakhstan domestic law<sup>12</sup> or also the lack of independence of the national authorities in charge of triggering universal jurisdiction criminal proceedings.<sup>13</sup>

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<sup>8</sup> In general terms universal jurisdiction is the capacity or competence of a State to exercise jurisdiction over a specific crime where none of the traditional jurisdictional nexus exists. (i.e. territorial, nationality, passive personality, or protective jurisdiction).

<sup>9</sup> Conclusions and Recommendations of the Committee against Torture, Sri Lanka, CAT/C/LKA/CO/2, 15 December 2005, para. 10.

<sup>10</sup> Conclusions and Recommendations of the Committee against Torture, Nepal, CAT/C/NPL/CO/2, 13 April 2007, para 18. See also Concluding Observations of the Committee against Torture, Ukraine, A/57/44, 21 November 2001, para 5(d); Conclusions and Recommendations of the Committee against Torture, Uganda, CAT/C/CR/34/UGA, 21 June 2005, para 5 (c); Conclusions and Recommendations of the Committee against Torture, Democratic Republic of Congo, CAT/C/DRC/CO/1, 1 April 2006, para 5(b); Conclusions and Recommendations of the Committee against Torture, South Africa, CAT/C/ZAF/CO/1, 7 December 2006, para 17; Conclusions and Recommendations of the Committee against Torture, Benin, CAT/C/BEN/CO/2, 19 February 2008, para 15; Concluding Observations of the Committee against Torture, Indonesia, CAT/C/IDN/CO/, 2 July 2008, para 29.

<sup>11</sup> Conclusions and Recommendations of the Committee against Torture: France, CAT/C/FRA/CO/4-6, 20 May 2010, para 19.

<sup>12</sup> Conclusions and Recommendations of the Committee against Torture: FYROM, CAT/C/MKD/CO/2, 21 May 2008, para 11. See also Conclusions and Recommendations of the Committee against Torture: Kazakhstan, CAT/C/KAZ/CO/2, 12 December 2008, para 19.

<sup>13</sup> Conclusions and Recommendations of the Committee against Torture: Portugal, CAT/C/PRT/CO/4, 19 February 2008, para 10.

### 2.3 Article 7

Article 7 is intrinsically linked with and logically complements Article 5 by laying out the obligation to exercise jurisdiction and actually prosecute torture offences. Notably, the provision establishes the exercise of jurisdiction in any case where an alleged torturer is present in a territory under the jurisdiction of a State Party and is not extradited.

The first paragraph of Article 7 provides that any State Party which does not extradite a person found in a territory under its jurisdiction alleged to have committed torture must submit the case to the competent authorities for the purpose of prosecution<sup>14</sup>.

This principle is known as the duty to extradite or prosecute (also called the *aut dedere aut judicare* rule).

Since torturers may well escape prosecution by the authorities of the State in whose territory they committed their crimes<sup>15</sup>, the obligation to extradite or prosecute alleged criminals who are found in the territory under another State's jurisdiction represents an extraordinarily effective criminal cooperation tool in order to combat impunity.

The purpose of Article 7 is thus to create a web of jurisdiction without loopholes using universal jurisdiction in a remedial manner where other heads of jurisdiction may not be available. The Committee against Torture repeatedly highlighted the importance of the duty to extradite or prosecute coupled with the principle of universal jurisdiction:

“The State Party should establish its jurisdiction over acts of torture in cases where the alleged offender is present in any territory under its jurisdiction, either to extradite or prosecute him or her, in accordance with the provisions of the Convention.”<sup>16</sup>

Notably, the obligation for the *forum* State to prosecute the alleged offender applies even in the absence of any extradition request.<sup>17</sup> Extradition is an option only if a request has been made and such extradition is not contrary to international law.<sup>18</sup> Otherwise, the State must start with the prosecution of the alleged offender.

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<sup>14</sup> Article 7(1) of the Convention against Torture: “The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution”.

<sup>15</sup> It is certainly true that in an ideal world it would be almost always better for the trial to take place in the territorial State, but the very reason States exercise or seek to exercise universal jurisdiction is because the territorial State has failed to fulfill its obligations under international law to investigate and, if there is sufficient admissible evidence, to prosecute the suspect of torture.

<sup>16</sup> Conclusions and Recommendations of the Committee against Torture, Bulgaria, CAT/C/BGR/CO/4-5, November 2011, para. 17. See also Conclusions and Recommendations of the Committee against Torture, Indonesia, CAT/C/IDN/CO/2, 2 July 2008, para. 29; Conclusions and Recommendations of the Committee against Torture, Italy, CAT/C/ITA/CO/4, 16 July 2007, para. 14.

<sup>17</sup> J. Herman Burgers and H. Danelius, *The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, Martinus Nijhoff Publishers, 1988), p. 137.

<sup>18</sup> M. Nowak, E. McArthur, *The United Nations Convention Against Torture: A Commentary*, Oxford University Press, 2008.



In the case of *Suleymane Guengueng et al. v. Senegal*,<sup>19</sup> the Committee found Senegal to be in violation of Article 7 of the Convention, in relation to the failure by Senegalese courts to prosecute or extradite Mr. Hissène Habré, the former President of Chad accused of acts of torture in Chad. In the absence of a request for extradition being made at the time when the complainants submitted their claim in January 2000, Senegal did not prosecute Mr Habré and that contravened Senegal obligation pursuant to Article 7. The Committee was clear in setting out that

“the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition. The alternative available to the State party under article 7 of the Convention exists only when a request for extradition has been made and puts the State party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial authorities for the institution of criminal proceedings, the objective of the provision being to prevent any act of torture from going unpunished”.<sup>20</sup>

Assessing Sri Lankan legislation compatibility with the standards set by the Convention against Torture, the Committee recently considered that domestic law

“appears to require the rejection of an extradition request before the requirement that the case be submitted to the relevant authorities. The Committee recalls its jurisprudence on the content of the obligation to extradite or prosecute (*aut dedere, aut judicare*), that the State party’s obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for extradition”.<sup>21</sup>

In the following sections, this report will assess the compatibility of Rwandan legislation with the mentioned provisions of the Convention against Torture.

## **Section 3 - Implementation of the Convention against Torture’s repression system in Rwandan Law**

### **3.1 Criminalization of Torture under Rwandan Law**

The Constitution of the Republic of Rwanda of 2004 guarantees the right to integrity and prohibits the use of torture without defining what torture is. Article 15 of the Constitution provides that:

“Every person has the right to physical and mental integrity. No person shall be subjected to torture, physical abuse or cruel, inhuman or degrading treatment”.<sup>22</sup>

A definition of the conduct is not provided within domestic criminal legislation either.

<sup>19</sup> CAT, *Suleymane Guengueng et al v Senegal*, CAT/C/36/D/181/2001, 19 May 2006.

<sup>20</sup> *Ibidem*, para. 9.7. The Committee found also a separate contravention of Article 7 from the time that Belgium issued its extradition request, on 19 September 2005, for the refusal of Senegal to comply with the extradition request.

<sup>21</sup> Conclusions and Recommendations of the Committee against Torture, Sri Lanka, CAT/C/LKA/CO/3-4, 23 November 2011, para. 26.

<sup>22</sup> Constitution of the Republic of Rwanda, 4 June 2003, Article 15, paras. 1 and 2.

Article 316 of the Rwandan Criminal Code 1977 (hereinafter “C.C.”) refers to torture as an aggravating circumstance to the perpetration of any other crime. It establishes that those who resort to torture in the execution of a crime will be punished as if they had committed murder.<sup>23</sup>

Article 388 of the C.C. subordinates the punishment of torture acts to those cases where the victims have been previously subjected to unlawful arrest or detention, especially where the acts lead to the victim’s death.

“Sera puni d'un emprisonnement de cinq ans à dix ans celui qui, par violences, ruses ou menaces, aura arbitrairement enlevé ou fait enlever, arrêté ou fait arrêter, détenu ou fait détenir une personne quelconque. Si la personne enlevée, arrêtée ou détenue est âgée de moins de 18 ans, le maximum de la peine sera prononcé. Si la détention ou la séquestration a duré plus d'un mois, la peine de l'emprisonnement pourra être portée à vingt ans. Lorsque la personne enlevée, arrêtée ou détenue aura été soumise à des tortures corporelles, le coupable sera puni de l'emprisonnement à perpétuité. Si les tortures ont causé la mort, le coupable sera condamné à mort. Quiconque aura prêté un lieu pour exécuter la détention ou séquestration subira les mêmes peines”.<sup>24</sup>

In two special bills referring to specific fields (rights of children and interrogation techniques) torture is generically prohibited but no definition of the crime is provided nor is a specific penalty established in case the relevant provisions are infringed.<sup>25</sup>

In Rwandan law, torture related-conducts are criminalised only in two circumstances.

First, Article 27 of the Law on Prevention and Punishment of Gender-Based Violence of 2008 states:

“Any person guilty of violence by exercising sexual torture or intending to commit sexual torture shall be liable to the life imprisonment with special provisions”.<sup>26</sup>

Second, with specific reference to crimes perpetrated between 1 January 1990 and 31 December 1994<sup>27</sup>, and solely in the framework of war crimes, crimes against humanity and genocide, the Law Establishing Gacaca Courts of 2004 provides for punishment of

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<sup>23</sup> Rwandan Criminal Code, 18 August 1977, Article 316: “Sera puni comme coupable d'assassinat celui qui, pour l'exécution de son crime, quelle qu'en soit la dénomination, emploie des tortures ou commet des actes de barbarie”. According to Article 312 of the C.C., murder was punished with the death penalty but, after the enactment of Law n° 31/2007 of 25 July 2007 concerning the abolition of the death penalty, it is punished with life imprisonment.

<sup>24</sup> Ibidem., Article 388.

<sup>25</sup> See Law n. 27/2001 relating to Rights and Protection of the Child Against Violence, 28 April 2004, Article 20, establishing that “no child should be subjected to torture or other inhuman and degrading treatments”. Similarly, Law n. 15/2004 relating to Evidence and its Production, 12 June 2004, Article 6 states that “practices amounting to torture or brainwashing are forbidden as techniques for the extortion of evidence”.

<sup>26</sup> Law No. 59/2008 on Prevention and Punishment of Gender – Based Violence, 10 September 2008, Article 27.

<sup>27</sup> Law No. 16/2004 establishing the Organization, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed between October 1, 1990 and December 31, 1994, 19 June 2004.

“the person who committed acts of torture against others, even though they did not result into death, together with his or her accomplices”<sup>28</sup> and “the person who committed acts of rape or acts of torture against sexual organs, together with his or her accomplices”.<sup>29</sup>

Pursuant to Article 72 of the above-mentioned bill, those responsible for acts of torture may be sentenced to penalties ranging from twenty five years to thirty years of imprisonment, if they confessed and pleaded guilty before the Gacaca court<sup>30</sup>, or to life imprisonment, if they did not.<sup>31</sup>

None of the above-mentioned provisions establishes an autonomous offence of torture nor they provide for a definition of the conduct in line with that of Article 1 of the Convention against Torture.

In its report presented to the Committee against Torture, Rwanda indeed explicitly declared that torture is not considered as an autonomous crime in its domestic legislation:

“The current Penal Code includes the punishment of physical torture in its Articles 316 and 388 but does not establish acts of torture as an autonomous offense”.<sup>32</sup>

Current Rwandan legislation concerning torture is therefore clearly in violation of the obligation set out in Article 4 of the Convention against Torture.

First of all, considering torture merely as an aggravating circumstance (Article 316 of the C.C.) *de facto* means that torture is not codified as a criminal offence *per se*.

The Committee against Torture already noticed that the conditions established in Articles 1 and 4 of the Convention are not matched by the designation of torture merely as an aggravating circumstance. In its Concluding Observations on Colombia of 2010 for example, the Committee considered domestic legislation inadequate as

“in practice, a charge relating to crimes of torture does not clearly identify torture as a specific and separate offence, given that it is subsumed under aggravating circumstances relating to other offences regarded as more serious by judicial officials”.<sup>33</sup>

Secondly, it is to be recalled that torture is a crime and a gross violation of human rights regardless of whether it is perpetrated in the context of a conflict or in peacetime, and whether it is committed as an isolated instance or as part of a widespread or systematic attack against civilian population. Therefore it is not

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<sup>28</sup> Ibidem, Article 51, 1<sup>st</sup> Category, para. 4.

<sup>29</sup> Ibidem, Article 51, 1<sup>st</sup> Category, para. 5.

<sup>30</sup> The Gacaca courts are part of a system of community transitional justice inspired by tradition and established in 2001 in Rwanda in the wake of the 1994 genocide to try the thousands of people accused of genocide, war crimes and crimes against humanity.

<sup>31</sup> Ibidem, Article 72.

<sup>32</sup> Committee Against Torture, Initial reports of States Parties due in 2010, Rwanda, 16 June 2011, CAT/C/RWA/1, para. 12.

<sup>33</sup> Concluding Observations of the Committee Against Torture, Colombia, 4 May 2010, CAT/C/COL/CO/4, para. 10. See also Conclusions and Recommendations of the Committee against Torture, Russian Federation, CAT/C/CR/28/4, 6 June 2002, para. 6(a).

sufficient for a State to criminalise the conduct only in connection with war crimes or crimes against humanity (Law Establishing Gacaca Courts), as a number of instances would therefore not be covered by the provision and this would foster impunity.

In its Concluding Observations of 2011 on Bulgaria, after pointing out “the absence of a specific and autonomous offence of torture which corresponds to the definition outlined in the Convention”<sup>34</sup> in Bulgarian legislation, the Committee recommended to

“ensure that all acts of torture, and not only those amounting to war crimes, can be prosecuted under jurisdiction over offences referred to in article 4 of the Convention”.<sup>35</sup>

In light of the lack of a specific provision defining torture as an autonomous criminal offence, conducts falling within the notion of torture as defined by the Convention are currently dealt with by Rwandan Courts through reference to minor or related crimes.

In the report to the Committee against torture, Rwandan authorities themselves acknowledged that:

“It is impossible to determine exactly how many cases apply anti-torture provisions. This is due to the fact that the Penal Code does not set up torture as an autonomous offence, so courts and tribunals cannot describe an act of torture as an offence of torture. Thus, any judgments rendered fall within the category of offence relating to violations of physical integrity”.<sup>36</sup>

The Committee consistently held that torture should not be downgraded and condemned under the discipline of less serious criminal offences. In its already quoted Concluding Observations on Colombia, the Committee declared its concern

“about the possibility of erroneous definitions that assimilate the crime of torture to other less serious criminal offences such as that of personal injury, which does not require proof of the offender’s intention. The Committee is concerned that these practices result in a serious under-recording of cases of torture and entail impunity for the said crimes”.<sup>37</sup>

The Committee also underlined that by naming and defining the offence of torture as required by the Convention and making that offence clearly different from other crimes the State parties will

“directly advance the Convention’s overarching aim of preventing torture by, inter alia, alerting everyone, including perpetrators, victims and the public, to the special gravity of the conduct”.<sup>38</sup>

Rwanda seems to acknowledge the necessity of amending its domestic legislation in order to comply with the

<sup>34</sup> Concluding Observations of the Committee Against Torture, Bulgaria, 14 December 2011, CAT/C/BGR/CO/4-5, para. 17.

<sup>35</sup> Ibidem.

<sup>36</sup> Committee Against Torture, Initial reports of States Parties due in 2010, Rwanda, 16 June 2011, CAT/C/RWA/1, para. 59.

<sup>37</sup> Conclusions and Recommendations of the Committee against Torture, Turkmenistan, CAT/C/TKM/CO/1, 15 June 2011, para. 8. See also Concluding Observations of the Committee Against Torture, Colombia, 4 May 2010, CAT/C/COL/CO/4, para. 10.

<sup>38</sup> Concluding Observations of the Committee Against Torture, Syrian Arab Republic, 20 May 2010, CAT/C/SYR/CO/1, para. 5. See also Concluding Observations of the Committee Against Torture, France, 20 May 2010, CAT/C/FRA/CO/4-6, para. 13.

provisions of the Convention against Torture. In the report to the Committee against Torture, Rwandan authorities mentioned that, at the apex of a period of “reconstruction” characterised by several legal reforms, “the Chamber of Deputies of Parliament recently adopted a draft organic law on a new Penal Code”<sup>39</sup>, whose article 204 “fully adopts the content of Article 1 of the Convention” and provides penalties commensurate to the gravity of the crime.<sup>40</sup>

While the efforts currently carried out by the State shall be definitely welcomed, it is worth noticing that the process of drafting the new criminal code has been on-going for some 8 years now<sup>41</sup>, and the Parliament has not been able to adopt a final text yet.

This is why, in the following sections of this report, TRIAL will limit its analysis to existing criminal provisions, assessing to what extent they are in line with the notion of torture as entrenched in the Convention against Torture.

Leaving aside on the one hand the overly narrow provisions on sexual torture and acts of torture in the framework of war crimes, and, on the other hand, the manifestly inadequate scope of Article 316 C.C. considering torture merely as an aggravating circumstance of some other principal offence, the focus of the present analysis will be on Article 388 of the C.C.

### **3.2 Shortcomings in the definition of torture under Rwandan law**

Article 388 of the C.C. does not incorporate some of the basic requirements expressly mentioned in the definition embodied in Article 1 of the Convention against Torture whose importance has been repeatedly underlined by the Committee<sup>42</sup> in order to establish a clear-cut distinction between torture and other criminal offences.

First of all Article 388 does not clearly define who is to be considered as the perpetrator of torture acts.

Despite admitting that its wording (speaking about arrest, detention or abduction) points to public officers as the main perpetrators of the offences embodied therein, the norm is vague and it does not necessarily imply the involvement of a public official in the prohibited conduct.

Yet it is exactly the official capacity of the perpetrator that characterises torture as a human rights violation, differentiating it from other kind of criminal offences that could be committed by any individual.

According to Article 1 of the Convention against Torture:

*“torture means any act by which severe pain or suffering [...] is intentionally inflicted [...] by or at the instigation of or with the consent or acquiescence of a public official or other person acting in*

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<sup>39</sup> Committee Against Torture, Initial reports of States Parties due in 2010, Rwanda, 16 June 2011, CAT/C/RWA/1, para. 13.

<sup>40</sup> Ibidem, para. 14.

<sup>41</sup> In this respect see the “Letter dated 24 January 2005 from the Permanent Representative of Rwanda to the United Nations addressed to the Chairman of the Counter-Terrorism Committee”, 31 January 2005, S/2005/63.

<sup>42</sup> Conclusions and Recommendations of the Committee against Torture, Turkmenistan, CAT/C/TKM/CO/1, 15 June 2011, para. 8. See also Concluding Observations of the Committee Against Torture, Colombia, 4 May 2010, CAT/C/COL/CO/4, para. 10.

*an official capacity*". [emphasis added]

The Committee against Torture repeatedly recalled the importance of defining torture in line with the definition of Article 1, namely including the public official requirement.<sup>43</sup>

Secondly, Article 388 does not require the presence of an element of intentionality to characterize the relevant conduct as torture. The Convention against Torture is clear in requiring the simultaneous presence of a *dolus generalis* and a *dolus specialis*: on the one hand, the perpetrator must intentionally inflict pain or suffering in order for the conduct to amount to torture, whereas on the other hand there must be a specific intended purpose that is usually one of those listed in Article 1 of the Convention.

"[...] the term "torture" means any act [...] inflicted on a person *for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind*". [emphasis added]

Whereas it is important to stress that the list contained in Article 1 doesn't have an exhaustive nature<sup>44</sup>, it is nonetheless clear that in the system drawn by the Convention the absence of a specific purpose pursued by the perpetrator excludes the possibility of defining a conduct as torture.

In conclusion the existence of a specific purpose is a necessary element under the Convention, distinguishing torture from other related offences.<sup>45</sup> As already pointed out, Article 388 of the Rwandan C.C. does not mention the intentionality of the conduct or the existence of a specific purpose, thus failing to meet existing international standards.

Thirdly, Article 388 C.C. applies only when torture is perpetrated upon a detainee or upon a person who is anyway under arrest or abducted.

This limitation does not find any correspondence in Article 1 of the Convention against Torture. In other words, Article 1 of the Convention does not pose any limitation on the "nature" of victims of torture, who shall not be – even if they can be – necessarily persons deprived of their liberty.

Moreover, it must be underlined that a systemic interpretation of the different paragraphs of Article 388 leads to a further limitation of the range of application of the provision: it indeed refers exclusively to torture perpetrated

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<sup>43</sup> Conclusions and Recommendations of the Committee against Torture, Bosnia and Herzegovina, CAT/C/BIH/CO/2-5, 20 January 2011, para. 8.

<sup>44</sup> See Manfred Novak, UN Convention Against Torture, A Commentary, Oxford Commentaries on International Law, 2008, p. 75 and United Nations Voluntary Fund for Victims of Torture, Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies, p. 4. The same conclusion can be achieved through an analysis of the drafting history of the Convention, as pointed out in A. Boulesbaa, The UN Convention on Torture and the Prospects of Enforcement, Martinus Nijhoff Publishers, 1999, p. 21.

<sup>45</sup> Conclusions and Recommendations of the Committee against Torture, Turkmenistan, CAT/C/TKM/CO/1, 15 June 2011, para. 8. See also Conclusions and Recommendations of the Committee against Torture, Ethiopia, CAT/C/ETH/CO/1, 20 January 2011, para. 9.

against people deprived of their liberty "*arbitrairement*", that is in an arbitrary way.

Therefore all the clauses of Article 388 evidently refer only to cases of arbitrary abduction, arrest or detention. Any act of torture perpetrated on regular detainees and persons lawfully arrested thus falls outside the scope of the mentioned provision.

Finally, Article 1 of the Convention expressly states that torture can arise from "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted". In its Conclusions and Recommendations on Sri Lanka in 2005, the Committee against Torture expressed concern over the absence of the word "suffering" in the domestic definition of the conduct.<sup>46</sup>

In the present case, not only any reference to "suffering" is missing, but also to "pain". Further, referring specifically to "*torture corporelles*", Article 388 sets a limitation excluding all those acts or omissions committed by public officials that amount to psychological torture.

It is evident that serious flaws are present in Rwandan domestic legislation related to torture.

Theoretically, pursuant to the Rwandan Constitution, international treaties "conclusively adopted" by the State are directly applicable in the domestic legislation and even prevail over national laws, being endowed with a higher binding power by Article 190.<sup>47</sup>

Yet in practice Rwanda failed to point out in its State report any case of direct application of the Convention against Torture pursuant to Article 190 of the Constitution.<sup>48</sup>

In this sense, the Committee against Torture constantly underlined that the Convention is not self-executing and that, as a consequence, States Parties are bound to establish the relevant procedures and substantive rules needed in order to give it the proper implementation in the domestic legal systems.<sup>49</sup>

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<sup>46</sup> Conclusions and Recommendations of the Committee against Torture, Sri Lanka, 15 December 2005, CAT/C/LKA/CO/2, para. 5.

<sup>47</sup> Constitution of the Republic of Rwanda, Article 190: "Upon their publication in the official gazette, international treaties and agreements which have been conclusively adopted in accordance with the provisions of law shall be more binding than organic laws and ordinary laws except in the case of non compliance by one of parties".

<sup>48</sup> Indeed, para. 29 of the State Report only refers to one case where the International Covenant on Civil and Political Rights is involved. The State, in the case at stake, even failed in reporting the results of the proceedings, simply referring to the fact that a lawyer invoked the Covenant's provisions in court. It is not clear if the Rwandan tribunal admitted or rejected the mentioned argumentation.

<sup>49</sup> Committee Against Torture, case Suleymane Guengueng and others v. Senegal, Communication No. 181/2001, 19 May 2006, CAT/C/36/D/181/2001 (also known as "the Habré case"), paras. 7.11 and 7.13. In its Concluding Observations on Liechtenstein, 25 May 2010, CAT/C/LIE/CO/3, para. 7, the Committee stated: "The Committee also recognizes that, according to the monist legal system of the State party, the provisions of the Convention have become part of the domestic law as from the date of ratification. Notwithstanding these provisions, the Committee firmly believes that the incorporation into the domestic law of the State party of a distinct crime of torture based on the definition of article 1 of the Convention would directly advance the Convention's overarching aim of preventing torture or ill treatment". See also Concluding Observations of the Committee Against Torture, Cambodia, 20 January 2011, CAT/C/KHM/CO/2, para. 10.



The general framework for the definition of torture and its criminalisation within Rwandan legislation shall thus be deemed deficient and unsatisfactory for a proper and effective implementation of the Convention.

### 3.3 Jurisdiction over torture under Rwandan law

Rwandan legislation entrusts Rwandan courts with territorial and active personality titles of jurisdiction in Articles 6, 8, 9 and 11 C.C.

According to Article 6 C.C., any breach of the law committed within Rwandan territory shall be punished according to Rwandan law.<sup>50</sup> It is considered as committed within Rwandan territory any criminal offence perpetrated on board of an aircraft registered in Rwanda or on board of a boat seafaring Rwandan flag when that aircraft or boat are out of other States' airspace or territorial waters.<sup>51</sup>

Article 9 C.C. establishes that all Rwandan citizens who commit, outside Rwandan territory, any conduct qualified as a felony under Rwandan legislation can be prosecuted and judged under its jurisdiction.<sup>52</sup>

Article 10 C.C. establishes that all Rwandan citizens who commit, outside Rwandan territory, any conduct qualified as a misdemeanour under Rwandan legislation can be prosecuted and judged under its jurisdiction, provided that "the offence is punishable with the law of the country in which it was committed".<sup>53</sup>

This provision is also applicable, pursuant to Article 11 C.C., to those who have acquired Rwandan nationality after putting in place a conduct amounting to a crime under Rwandan law.<sup>54</sup>

A further title of extraterritorial jurisdiction is set forth under Article 13 C.C., which provides Rwandan courts with jurisdiction over crimes committed abroad by foreigners when the criminal offence represents a threat to national security and when it amounts to forgery of Rwandan stamps or currency.<sup>55</sup>

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<sup>50</sup> Article 6 C.C.: "Toute infraction commise sur le territoire rwandais par des Rwandais ou des étrangers est punie conformément à la loi rwandaise, sous réserve de l'immunité diplomatique consacrée par les conventions ou les usages internationaux."

<sup>51</sup> Article 8 C.C.: "Par territoire rwandais, il faut entendre l'espace terrestre, fluvial, lacustre, aérien, compris dans les limites des frontières de la République. Est réputée commise sur le territoire rwandais toute infraction perpétrée par ou contre un citoyen rwandais dans un lieu non soumis à la souveraineté d'un Etat, ou par toute personne soit à bord d'un bateau battant pavillon rwandais et se trouvant en dehors des eaux soumises à la souveraineté d'un Etat, soit à bord d'un aéronef immatriculé au Rwanda, s'il se trouve en vol ou en dehors des territoires soumis à la souveraineté d'un Etat."

<sup>52</sup> Article 9 C.C.: "Tout citoyen rwandais qui, en dehors du territoire de la République s'est rendu coupable d'un fait qualifié crime puni par la loi rwandaise, peut être poursuivi et jugé par les juridictions rwandaises." This principle is confirmed by Article 193 of the Law No. 13/2004, Relating to the Code of Criminal Procedure. According to Article 20 of C.C., a felony ("un crime") is any offence sanctioned with a punishment of at least 5-year imprisonment.

<sup>53</sup> Article 10 C.C.: "Tout citoyen rwandais qui, en dehors du territoire de la République s'est rendu coupable d'un fait qualifié délit par la loi rwandaise, peut être poursuivi et jugé par les juridictions Rwandaises si le fait est puni par la législation du pays où il a été commis." This principle is confirmed by Article 194 of the Law No. 13/2004, Relating to the Code of Criminal Procedure.

<sup>54</sup> Article 11 C.C.: "Les dispositions des articles 6 à 10 sont applicables à ceux qui n'ont acquis la nationalité rwandaise que postérieurement au fait qui leur est imputé."

<sup>55</sup> Article 13 C.C.: "Tout citoyen rwandais ou étranger qui, hors du territoire de la République, s'est rendu coupable d'un crime ou d'un délit attentatoire à la sûreté de l'Etat ou de contrefaçon du sceau de l'Etat ou de monnaies nationales, peut être poursuivi et jugé d'après les dispositions de la loi rwandaise comme si le crime ou le délit avait été commis sur le territoire."



Moreover, regulating "special proceedings", chapter 5 of the 2004 Rwandan Code of Criminal Procedure includes Article 195, which entrusts Rwandan courts with jurisdiction over a certain set of crimes committed abroad by foreigners, namely genocide, crimes against humanity, war crimes, terrorism, taking people as hostages, sale of drugs, money laundering, stealing of motor vehicles for sale abroad and human being trafficking and slavery.<sup>56</sup>

In 2008 the State adopted the Law Determining the Organisation, Functioning and Jurisdiction of Courts (hereinafter "COCJ"),<sup>57</sup> whose Article 90 provides the High Court of Rwanda<sup>58</sup> with jurisdiction over

"non-nationals, non-governmental organizations or associations whether national or foreign, alleged to have committed within or outside the territory of Rwanda any crimes falling within the category of international or cross – border crimes".

Paragraph two of the same provision includes a list of conducts which shall be deemed as "international or cross-border crimes" referring to, inter alia, "torture, inhuman or degrading treatment of persons, the crime of genocide, crimes against humanity, war crimes, genocide denial or revisionism, inciting, mobilizing, aiding and abetting, or otherwise influencing, whether directly or indirectly, the commission of any of the offensive specified in this paragraph".

All in all, until the enactment of the COCJ in 2008, Rwandan courts were entitled to prosecute and punish acts of torture *per se* only on the basis of territoriality and active nationality. Under Article 195 of the Code of Criminal Procedure universal jurisdiction could be established only over acts of torture committed in the framework of war crimes, crimes against humanity and genocide.

This situation was clearly insufficient in light of the far-reaching jurisdictional obligation enshrined in Article 5 of the Convention.

The 2008 reform commendably brings Rwandan legislation formally in line with the prescriptions of the Convention by adding the universality principle of jurisdiction with respect to torture *per se*.

In practice, however, problems remain due to the lack of an adequate definition and autonomous criminalisation of torture within domestic legislation, as previously analysed.

Indeed, those flaws concern not only the substantive law applicable to the relevant offences but they also gravely undermine the possibility of establishing jurisdiction over offences of torture. For instance, invoking existing provisions under Rwandan law would not permit to exercise jurisdiction for instances of psychological

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<sup>56</sup> Article 195 of the Law No. 13/2004, Relating to the Code of Criminal Procedure, 17 May 2004: "Any person, including a foreigner, within the territory of the Republic of Rwanda after having, while abroad, committed international crimes including genocide, crimes against humanity, war crimes, terrorism, taking people as hostages, sale of drugs, money laundering, stealing motor vehicles for sale abroad, human being trafficking and slavery, can be prosecuted and tried by Rwandan courts."

<sup>57</sup> Law No. 51/2008, Determining the Organization, Functioning and Jurisdiction of Courts, 9 September 2008.

<sup>58</sup> According to Law No. 51/2008, the High Court has jurisdiction to try in the first instance certain serious offences committed in Rwanda as well as some offences committed outside Rwanda as specified by the law.

torture or torture committed against people who are not deprived of their liberty.

As torture is not properly defined within the domestic system, the only way the High Court could properly ascertain its jurisdiction over an act of torture would be to define that conduct with direct reference to the parameters stated in Article 1 of the Convention. Yet, as seen above, Rwandan courts systematically fail to do so.

Therefore it is apparent that the establishment of jurisdiction over torture in Rwanda results in practice unsatisfactory and not fully in line with the obligation provided for in the Convention against Torture.

## **Section 4 - Conclusions and Recommendations**

TRIAL respectfully submits to the Committee against Torture that the current state of Rwandan legislation does not respect the obligations embodied in Articles 4 (in conjunction with 1), 5 and 7 of the Convention against Torture.

The general framework for the definition, criminalisation and punishment of torture within Rwandan domestic law shall be deemed deficient and unsatisfactory for a proper and effective implementation of the Convention.

First of all, the failure to codify torture as an autonomous criminal offence in the Rwandan legislative system represents a grave violation of Article 4 of the Convention.

The current state of affairs of Rwandan criminal law considering acts of torture as merely aggravating circumstances or less serious crimes is not sufficient to fill the loopholes affecting its domestic legislation.

Article 388 of the C.C., in particular, does not meet international standards for at least a couple of reasons. On the one hand, Article 388 lacks several fundamental requirements, such as the “public official requirement” and the intentionality of the conduct. On the other hand, it foresees an extremely narrow scope of application, restricted to corporal punishment inflicted in the framework of arbitrary arrests, detentions or abductions.

Given this lack of proper definition and criminalisation, Rwandan courts are currently prosecuting offences amounting to torture under the discipline drawn for less serious criminal offences, or committed as war crimes.

Even though, according to Article 190 of the Constitution, international conventions ratified by Rwanda are directly applicable by Rwandan courts, Rwandan authorities have so far failed to directly apply the provisions of the Convention against Torture pursuant to this provision.

Finally, even though torture might be formally prosecuted and sanctioned according to the principles of territorial, active personality and, from 2008, universal jurisdiction, the *lacunae* affecting the criminalisation of torture negatively rebound on the possibility for Rwandan courts to exercise their jurisdiction on offences that could amount to torture but which are defined as less serious crimes under domestic legislation.

For the above reasons, TRIAL respectfully requests that the Committee against Torture recommends to Rwanda to:

- a. ensure that the crime of torture is codified as an autonomous offence in its Criminal Code in line with Article 1 of the Convention against Torture, encouraging the new draft Criminal Code to be adopted as soon as possible inasmuch as torture is codified as an autonomous offence, clearly distinguishing between torture and less serious conducts in order to ensure that torture is dealt with according to its particularly grave nature in terms of investigation and punishment;
- b. ensure that the definition of conducts related to torture present in Rwandan domestic legislation (namely Article 388 C.C.) is brought in line with Article 1 of the Convention against Torture in all of its requirements;
- c. ensure that local courts, while awaiting for the entry into force of the new Criminal Code, interpret domestic legislation according to the standards and principles enshrined in the Convention against Torture. In particular, with reference to universal jurisdiction, the High Court shall establish its jurisdiction over any offence amounting to torture pursuant to Article 1 of the Convention against Torture.

TRIAL remains at the full disposal of the Committee against Torture should it require additional information and takes this opportunity to renew to the Committee the assurance of its highest consideration.



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