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THE CRIMINALISATION OF TORTURE AS A PART OF THE HUMAN RIGHT FRAMEWORK[**]

(A) INTRODUCTION

We are so very used to calling for those who are responsible for acts of torture to be held to account that we run the risk of losing sight of just how strange this is, in some ways, from a human rights perspective. Whilst we are increasingly used to the idea that there is – or ought to be – a more general right to a remedy available to those who are victims of violations of human rights obligations, such remedies are usually remedies against the *State*, not the perpetrator. This flows from the basic starting point that human rights obligations are owed by states to those who are subject to its jurisdiction and that it is the responsibility of the state which is engaged when those rights are breached. It is, then, the role of the state to provide redress and reparation – now increasingly refined and expanded to embrace restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Whilst this is, of course, hugely important it falls far short of holding *those responsible* for the act which has given rise to the breach personally liable in some way. For example, if there has been undue delay in the administration of justice, or if a protest march is wrongfully banned, those responsible are not necessarily to be the subject to personal sanction. Still less are those who were responsible for drafting and adopting legislation which is subsequently determined to be in breach of human rights obligations to be considered candidates for criminal sanction *just because* that law was enacted. In other words, it is important to remind ourselves that breaches of human rights – even fundamental human rights –rarely mandate the punishment of those responsible for the violation. Indeed, few other elements of the human rights framework expressly call for those responsible to be subject to the criminal law in this way – although this is now frequently understood as being implied. The only real equivalent of the approach taken to torture within the UN human rights framework is found in the relatively recent UN Convention on Enforced Disappearances, and which is very much modelled on the Torture Convention itself.

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Thus if we look at the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005)* we see they provide that States have a general 'obligation to respect, ensure respect for and implement international human rights law' which includes the obligation to 'investigate violations effectively, promptly, thoroughly and impartially and, *where appropriate,* take action against those allegedly responsible in accordance with domestic and international law' (para 3(b)). This contrasts with 'cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law' where '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' (ibid, para 4).

The Basic Principles are, perhaps, a little misleading at first sight in drawing a distinction between 'violations' and 'gross violations' of human rights law, since it is not really the magnitude of the violation but the nature of the right which is violated which really matters. And there is no doubting that Torture is a gross violation for these purposes. But the *Basic Principles* are still very much rooted in a 'human rights framework' approach and gloss over – or set to the side – the very real issues which tackling human rights violations from a criminal law perspective poses. The UN Convention against Torture is an exemplar of both this approach and of the problems, and it is to this that I now turn.

It is possibly misleading to describe the UNCAT an exemplar of a criminalising approach to human rights – it might better be seen as the fount and origin of criminalisation as a tool of human rights protection. It is often forgotten just how unusual a convention it is. What makes it look like a human rights treaty is that it is labelled as one – and of course that it establishes oversight mechanisms akin to those found in other human rights treaties. In all other regards it is a classic 'transnational crime suppression convention', of which there are many and from which much of its contents are directly borrowed. In UN terms, it is in many ways a 'Vienna' (UNODC) treaty which has become transported to 'Geneva'. This may account for why many of its provisions – particularly concerning extradition and mutual assistance in criminal justice – arguably remain under-explored: they are just not part of the 'Geneva heartbeat'.

It is also worth noting that some states which claim to find the jurisdictional and extradition provisions of the UNCAT difficult to accept seem to have no difficulty in accepting the equivalent obligations in the context of other 'suppression' conventions dealing with different subject matters which they do not perceive to be 'human rights' questions.

My point in stressing this is that it is very important indeed to understand the rationale for the criminalisation of torture if one is to 'do it right'. And there *are* competing visions in issue here. If one adopts what might be called the 'human rights' approach, the underlying rationale for criminalisation lies in the heinous nature of the act. The purpose is to ensure that those responsible are held

to account, that there is no impunity and that they are properly punished for the egregious wrongs which they have committed. Nevertheless, being rooted in the 'human rights' approach means that the focus is primarily upon the state itself: *it* is to criminalise, hold to account and ensure there is no impunity in order to fulfil *its* obligations in relation to those subject to *its* jurisdiction. The focus is on whether the state is responding with sufficient vigour to torture that has taken place within its jurisdiction.

The focus of the 'crime suppression' is very different. Whilst the underlying rationale may be the same, the basic assumption is that the state in which torture occurs either cannot or will not hold those responsible to account and so, if the form of conduct in question is to be punished, it falls to other states to do so, through the exercise of extraterritorial criminal jurisdiction. The implications of this difference in basic approach are profound and, in the case of torture, potentially problematic. It is one thing to argue that a state should respond to the serious nature of torture by criminally punishing those which breach its own domestic prohibitions. It is quite another to require a state to extradite or submit to its prosecuting authorities those whose own State has, for whatever reason, declined to prosecute. I am NOT staying that this ought not happen – I believe it should. What I am saying is that doing so raises very many issues which need to be considered and which may produce very different answers depending on the starting point that one takes. Prosecuting domestic crimes and prosecuting domestically crimes committed by foreign nationals abroad are very different enterprises, conceptually and practically. So also are international human rights obligations.

Let's take some examples, to be practical.

(A) DEFINITION

The definition of torture is set out in Article 1 of the UNCAT. Or rather, a definition of torture is set out there. There could easily be others. Interestingly and importantly, the 'human rights' prohibition does not define torture at all – it merely prohibits 'torture, cruel, inhuman or degrading' treatment or punishment. If one looks at the jurisprudence of the ECHR over the years, one can see that it has adopted a fluid, evolutionary approach to what amounts to torture and is not driven by definition. Whilst this may have a degree of indeterminacy about it, it does have the merit of ensuring that it accords with evolving understandings of what might amount to torture. There is, from a human rights perspective, something of a problem with this – since one of the hallmarks of a provision being 'prescribed by law' is that something is set out with sufficient certainty to be able to guide behaviour – and this is particularly important for provisions which carry criminal sanction. Fairly flexible interpretations of human rights standards are one thing when they mean that a state discovers for the first time that its approach – say – to criminalisation of forms of sexual conduct is in breach of its human rights commitments. The consequence of this finding is that it must change its law. It is rather different if it is determined that to treat a detainee in a way previously considered quite acceptable

is in fact impermissible and amounts to torture and as a result the policeman is to be subjected to severe criminal sanctions. Definitions are – by definition – designed to limit the possibility of the unexpected and may be a fetter upon evolutive development of standards. The answer is, of course, to have an open textured definition – and, to an extent, that is what we have: torture is 'severe' pain or suffering. What is 'severe' is very much a matter for debate – just look at the US Torture memos! And is it an objective or subjective standard, for example, and so on.

The requirements of intent and purpose found in the UNCAT definition also give rise to very real issues and which might not be necessary if torture is viewed as a human rights prohibition – though would certainly be necessary when viewed from a criminalisation perspective. The 'international crime suppression' approach has, however, limited the definition – arguably – more than might otherwise have been necessary by insisting on the involvement of a public official (or the consent or acquiescence of a public official). This makes perfect sense in the context of the exercise of extraterritorial jurisdiction: it means that it is those who are least likely to be the subject of domestic prosecution (because they are state actors) who are targeted, and this both limits and justifies what would otherwise be a potentially overbroad approach. It focuses on those 'most likely to get away with it'. What this does not justify, however, is automatically excluding from the scope of the human rights prohibition state responsibility for acts committed by private individuals in circumstances where the act might otherwise have been attributable to the State. 'Torturing' the meaning of consent or acquiescence hardly addresses this problem in a satisfactory way. In other words, the criminalisation of torture does have an impact on our understanding of the reach of the 'human rights understanding'. Personally, I would be quite comfortable with detaching the criminalisation of torture as a matter of domestic law, as a matter of transnational criminal law and as a matter of human rights law, since these are all rather different things and may legitimately require different definitional or descriptive approaches. However, we do seem to have 'bought into' a generic approach – at least for now. The main point I want to stress is that each of these is an important part of the framework of tackling torture, the structural limitations (and opportunities) of each need to be recognised and each approached in a way which maximises their potential to address torture – and it is not obvious that this is currently the case.

(C) EVIDENCE

A second area concerns the admissibility of evidence. On the one side, there is the exclusionary rule found in Article 15 of UNCAT. This has a clear 'human rights' focus and is clearly designed to buttress the prohibition on torture by making the admissibility of statements made as a result of torture inadmissible in any proceedings – except as evidence against a person accused of torture. It is fairly well known that the drafting of this provision is at best infelicitous and – at worst – downright unhelpful. It really seems to be primarily concerned with 'confession evidence' (hence 'statements') rather than with evidence more generally. It does not address the 'fruits of the poisoned tree' problem: what do you do with

evidence acquired as a result of statements made as a result of torture? And what is meant by 'proceedings'? It certainly includes criminal and civil and administrative proceedings. But what about the use by the executive or security forces of information so acquired? These are not 'proceedings' and certainly in the UK it has been decided that the use of information acquired as a result of torture is not to be ignored – just not used in court proceedings. Questions also arise about the burden of proof when determining whether information has been gained through torture. Again, in the UK it has been decided that it is, ultimately, for the personal alleging that evidence has been the product of torture to demonstrate that this is so, rather than for it to be proven that it has not been. There is also the question of the standard of proof.

Two things need to be said about this range of issues. First, although a 'human rights' paradigm seems to give fairly clear answers to many of these questions – encouraging a broad approach to inadmissibility in order to 'drive out' the use of torture by undermining its usefulness – this is increasingly being called into question. The uncomfortable truth is that the 'paradigmatic' model of torture which motivated the approach of the torture convention – and the criminalisation of torture – was political torture. There was only one victim – the person being tortured – and the only use of evidence was to justify the unjustifiable by extracting a confession of guilt to some 'crime' or 'offence' against the state. Much torture remains of this nature. But much does not. Particularly as our understanding of torture has developed, the effect of 'routine' ill-treatment which – regrettably and wrongly – forms part of the day to pay reality of much law enforcement in all parts of the world – is called into question. This concerns, then, the treatment of those whose alleged crimes have 'real victims'. When evidence is excluded as a result of the ill-treatment which a detainee has received has the effect of causing a trial to collapse and (frankly) the guilty walk free – this can be difficult to explain to the victim (and society in general) who sees the rights of the detainee being prioritised over the wrongs they have committed. As sophisticated human rights lawyers, it is relatively easy to explain this to our own satisfaction. I think we all know it is not so easy to explain it to other peoples' satisfaction.

The second thing that needs to be said is in some ways a development of this. If one approaches the criminalization of torture from the 'international crime suppression' perspective, then the arguments in favour of a broad approach to the exclusion of evidence immediately seem weaker. The entire point is to suppress crime – and this only favours those who argue in favour of the use of torture or ill-treatment in order to seek to forestall acts of terror or extreme violence against others. Whilst expansive approaches to the exclusionary rule appear cogent within the 'sealed world' of suppressing the crime of torture, there are other suppression conventions seeking to suppress other globally acknowledged criminal wrongs and within that broader frame of reference it becomes less obvious why the tackling the crime of torture is more significant than tackling other evils. We will answer that it has that priority – but others will continue to ask why.

I am acutely conscious that I run the risk of being thought an apologist for torture! Believe me – I am not. My concern is exactly the opposite. My concern is that

the confusion between the vital – but not necessarily co-terminus – roles of the criminalisation of torture and the absolute prohibition on torture has in fact opened up a dangerous space within which the legitimacy of torture has become open to debate in a way that ought never to have been the case.

Criminalising torture – and using the mechanisms of the criminal law to tackle torture is absolutely vital if it is to be effectively addressed. But we have managed to turn the absolute prohibition of torture as a matter of human rights law into an absolutist approaches to the application of the criminal justice system in relation to allegations of torture. As a result, we see any erosion of the strictest approaches to the prosecution of alleged tortures as evidence of a weakening of the absolute prohibition. We have equated state responsibility with individual criminal liability. As a result, where there is perceived injustice in holding an individual to account there seems to be a need to find a justification for torture – rather than a justification for not holding the individual to account for the act of torture. And when such a justification is offered, to accept it is seen as being to condone. What we are missing here is the 'human rights' dimension – that the state can be responsible even if the individual is held not to be. It is not necessary to distort the usual – and human rights compliant – operation of a criminal justice system in order to ensure that the absolute prohibition on torture is upheld as a matter of human rights law.

(D) IMMUNITIES

This, perhaps, may help to understand – and explain the reaction to – the way in which the relationship between torture and immunity has developed. A relatively simple issue has become excruciatingly complicated – and rendered more so by the implications which are read into it which, frankly, are not there. The issues are clear enough. Under international law the domestic courts of one state are not able to pass judgment on the conduct of another when acting in a sovereign capacity. Thus if it is alleged before domestic courts that a state has been responsible for torture (or, for that matter, any other human rights violation) then that state is entitled to claim immunity from process. This approach has been recently endorsed by the ICJ and for now seems incontrovertible. It is equally well attested that serving heads of state, heads of government and foreign ministers are entitled to personal immunity whilst in office – an approached recently endorsed by the ILC – and so cannot be impleaded before foreign domestic courts at all. Other individuals, however, may be prosecuted before foreign courts for torture unless they are entitled to immunity on some other basis. The controversy revolves around whether officials of states are entitled to immunity on the basis that the acts in question are 'official acts'. If acts of torture are official acts, then the state may claim on their behalf that such acts are attributable to the state. Under such circumstances, is it argued, the state is entitled to assert its immunity to prevent the prosecution from proceeding. In the context of civil actions the thrust of this reasoning has been accepted by the European Court of Human Rights recently – and it is proving difficult to justify an alternative approach in the context of criminal prosecutions. One argument is that torture can never be a lawful act and so can never be 'official'. Frankly, this is fairly

absurd – not least because the jurisdiction of foreign courts only lies in relation to acts of public servants – jurisdiction presupposes that the acts are official in nature. It has therefore been argued that the provisions of the UNCAT which call for the exercise of jurisdiction over exactly such acts impliedly waives immunity as between parties to the UNCAT. This seems the best reading of the Pinochet Judgment of some years back, but is not entirely satisfactory. A 'transnational crime suppression' reading of the UNCAT would tend to support this approach, however, since the entire point of the UNCAT on this basis is to facilitate the prosecution abroad of those who a state would otherwise be shielding from prosecution but it remains difficult to justify taking a different approach in criminal proceedings than in civil proceedings; and in civil proceedings the position currently seems clear – there is immunity from process.

The international court of justice – and the ECHR – resolve this problem by pointing to the central role of immunity for the effective functioning of international law and, in the words of the ICJ – stress that 'immunity does not mean impunity'. In other words, they recognise that differing legal orders may come to bear on issues in different ways. The ICJ has not seen this as being in anyway contrary to the ius cogens nature of the prohibition of torture and, in the Belgium v Senegal case, done what no other court has ever done, which is find a country to be in breach of its obligations under the Torture Convention. There is no doubting the ICJ's understanding of the absolute prohibition on torture and the significance of the torture convention and the criminalisation of torture for which it provides. It is upheld it like no other. And yet it also accepts that this does not mean that every individual arraigned for the crime of torture has to be brought to trial when other elements of the international system and rule of law stand in its way. For some, this is a deeply disturbing approach which calls into question the absolute prohibition on torture, because it frustrates the process of holding torturers to account. For others, it reinforces the integrity of the international legal system by recognising its role and realm and relationship to other legal frameworks and thus preserves the integrity of the absolute prohibition as a matter of international human rights law.

The point I wish to make from all this is that the ICJ does not measure the efficacy of the prohibition by the extent to which it overrides all other precepts of law.

The absolute prohibition as a matter of international law must be able to withstand the frictions of jurisdictional and even definitional issues before domestic courts and not consider itself diminished by them. It is not. Criminalisation is an absolutely vital element in the architecture of the fight against torture – but it is misguided to make this *the* touchstone by which the success of that struggle is measured. This would be to diminish the equally vital role that other approaches have to play alongside it.

And of course, I would not be doing my job as the Chair of the Subcommittee on Prevention of Torture if I did not end by suggesting that Prevention is one of those approaches. And I would not be being completely honest if I did not say that some elements of a preventive approach do not sit entirely comfortably with an absolutist approach to all aspects of the criminalising approach. But that is no worse than

acknowledging that there are dissonances even within that approach, and – as I have argued – there is no need at all to interpret this as if in some ways this casts doubt upon the integrity of the international prohibition, which stands strong and firm – even if sometimes the means by which we seek to bring it to fulfilment are lapping at its shores rather than forming an impregnable mote. Criminalisation is part of the human rights framework – a vital part, but a part nevertheless. We must do our best with what it can do, not angst about what it cannot do, and seek to complement it by the continual development of other parts of that framework too. There is no other way. In fact, I do not think that there is a better way. We must make it work as best we can – and it can work very well indeed. But there will always be more work to do, and ways in which to do it.

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KRIMINALIZACIJA TORTURE KAO DEO OKVIRA O LJUDSKIM PRAVIMA

REZIME

Autor u radu polazi od činjenice da odgovornost za učinjenu torturu leži pre svega na državi koja je dužna da žrtvama ovog ponašanja obezbedi restituciju i rehabilitaciju. No, kada se radi o licima koja su izvršila torturu i na taj način povredila ljudska prava često se dešava da njihova odgovornost izostaje. Problem je u okviru o ljudskim pravima koji retko izričito predviđa krivičnu odgovornost pojedinaca za učinjenu torturu. Autor navodi „Osnovne principe i uputstva UN o pravu na pravni lek i obeštećenje žrtava u slučaju teških povreda međunarodnih ljudskih prava i u slučaju povreda međunarodnog humanitarnog prava" koji po autoru stavljaju na stranu krivičnopravni aspekt torture. S druge strane, Konvencija UN protiv torture, iako ima elemente ugovora o ljudskim pravima, suštinski predstavlja konvenciju za suzbijanje transnacionalnog organizovanog kriminaliteta. Autor smatra da je važno uočiti postojanje dve perspektive kada se radi o kriminalizaciji torture. Prva se zasniva na pristupu „ljudskih prava" i podrazumeva da se pojedinci odgovorni za torturu gone i adekvatno kazne. U ovom slučaju akcenat je na postupanju države koja je dužna da preduzme mere potrebne za otkrivanje i kažnjavanje torture. Druga perspektiva zasniva se na „suzbijanju kriminaliteta", a suštinsku razliku u odnosu na prvi pristup čini obaveza države, koja iz bilo kog razloga nije gonila i kaznila učinioce torture, da ta lica isporuči drugoj državi radi postizanja pomenutog cilja.

U radu se potom analizira definicija torture. Autor ukazuje da pristup „ljudskih prava" ne sadrži jasnu i preciznu definiciju torture, dok se s druge strane pristup „suzbijanja kriminaliteta" zasniva na uskoj definiciji uz insistiranje da učinilac može biti samo službeno lice. Pored navedenog, autor pominje i definiciju torture sadržanu u Konvenciji UN protiv torture koja između ostalog zahteva i postojanje određene namere, što nije slučaj sa pristupom o „ljudskim pravima". No, svaki od navedenih pristupa – nacionalni, međunarodni i pristup ljudskih prava – ima svojih prednosti i treba biti uzet u obzir kod razmatranja torture.

Autor takođe analizira pitanje dokaza u svetlu dve navedene perspektive. Po prvom pristupu o „ljudskim pravima“ korišćenje dokaza koji su pribavljeni vršenjem torture je u svakom slučaju zabranjeno, što, kako autor ističe, ne doprinosi otkrivanju i gonjenju učinilaca. Suprotno, pristup o „suzbijanju kriminaliteta“ dozvoljava korišćenje ovih dokaza, jer je primarni cilj otkrivanje krivičnih dela. U radu se posvećuje pažnja i pitanju imuniteta uzimanjem u obzir oba pristupa kao i prakse Evropskog suda za ljudska prava. Autor zaključuje da krivičnopravni aspekt jeste važan za suzbijanje torture i da svakako kao deo okvira o ljudskim pravima treba da ima značajnu ulogu. Ipak, u obzir treba uzeti svaki od navedenih pristupa, a ne treba zanemariti ni preventivne mehanizme.

Ključne reči: tortura, ljudska prava, krivično pravo, definicija, dokazi, imunitet.