SHORTER ARTICLES AND NOTES

Torture and International Law: A Note on Recent Developments

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In this survey we will concentrate on two matters. First the definition of torture in International Law and secondly the attempts so far made, and the effectiveness thereof, in International Humanitarian Law to suppress the commission of torture by State agencies against the victims of armed conflict, political opponents and others. Such a survey is timely in the light of the 1985 United Nations Torture Convention, one of the latest, and potentially most significant, of a series of international conventions intended to deal with a problem which, as the investigative efforts of organisations such as Amnesty International remind us, continues to be one of pressing concern to the international community. It is timely also because this year (1988) marks the fortieth anniversary of the United Nationals Universal Declaration of Human Rights 1948, the inspiration for that Convention and for other treaties adopted by states concerned to demonstrate more than mere lip service tothe protection of human rights.

[1] Torture defined

The starting point must now be Article 1(1) of the 1985 *United Nations Torture Convention* (the Convention). The Convention came into force on 26 June 1987 when ratified by Denmark as the twentieth ratifying State.[1] Its definition of torture reflecting as it does previous international instruments, including General Assembly Resolution 3452(xxx) of 1975 (the *Declaration on torture and other cruel, inhuman or degrading treatment or punishment*), is in any event most probably part of general international customary law. It provides: "For the purposes of this Convention,

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1. As on 26 June 1987 the State Parties to the Convention were: Afghanistan, Argentina, Belize, Bulgaria, Byelorussian SSR, Cameroon, Egypt, France, Hungary, Mexico, Norway, Philippines, Senegal, Sweden, Switzerland, Uganda, Ukrainian SSR, Uruguay and the USSR. Australia signed the Convention on 10 December 1985. On 28 October 1987 the Minister for Foreign Affairs and Trade (Mr. Hayden) announced that legislation to enable Australia's ratification was well under way and that it was hoped that ratification would soon follow (H.R. Deb. 1987, 1593).

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."

This definition is for the most part self explanatory. As a theoretical definition of torture it could perhaps not be bettered. At a practical level, however, a court or other tribunal determining a case of alleged torture is faced with an inevitable area of possible uncertainty in its application — the penumbra of uncertainty that surrounds even the best legal drafting. How severe, for example, must the intentionally inflicted physical or mental suffering be for it to amount to torture? This was one of the questions considered by the European Court of Human Rights (The Strasbourg Court) in *Ireland* v. *United Kingdom* (1978)[2] an inter State application brought under the most effective of all human rights conventions, the *European Convention on Human Rights 1950.*[3]

The case arose out of the well known emergency in Northern Ireland. In 1971 as a result of an increase in I.R.A. terrorism the British Government had introduced a policy of detention without trial of suspected terrorists. Some of the detainees had been subjected to a form of "interrogation in depth" involving five particular techniques, the object of which (which proved successful)[4] was to obtain intelligence information concerning a large number of criminal incidents. Among other allegations, Ireland claimed that the use of the interrogation techniques, authorised at "high level", violated Article 3 of the Convention which provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The five techniques consisted of (a) *wall standing*: forcing detainees to remain spreadeagled against a wall for periods of some hours in a "stress position"; (b) *hooding*: placing a dark coloured hood for long periods over the detainees' heads; (c) *subjection to noise*: pending interrogations, keeping detainees in a room where there was a continuous loud and hissing noise; (d) *deprivation of sleep* pending interrogations; and (e)

2. (1978) 2 E.H.R.R. 25.
3. The European Convention on Human Rights (and the now 8 Protocols thereto) was drawn up pursuant to Article 1 of the Statute of the Council of Europe, 1949. It entered into force in 1953. All 21 member States of the Council of Europe are now Contracting Parties. They are: Austria, Belgium, Cyprus, Denmark, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom.
4. The interrogations resulted in the identification of 700 members of the two I.R.A. factions and the discovery of individual responsibility for about 85 previously unexplained criminal incidents: See (1978) 2 E.H.R.R. 25 at 60 (Judgment, paragraph 98).

deprivation of food and drink: reducing the diet of detainees pending interrogation. It was found that, although the application of these techniques had not caused any lasting physical injury, their use had occasioned "intense physical and mental suffering" and had also "led to acute psychiatric disturbances during interrogation".[5]

At this stage we should note that applications under the European Convention on Human Rights are considered first by the European Commission of Human Rights, a quasi judicial body which has the functions of reporting whether the allegations made disclose a prima facie violation of the Convention and of attempting to effect a settlement of the case.[6] In its report, the Commission unanimously expressed the opinion that the combined use of the five techniques constituted a practice of torture and inhuman treatment in violation of Article 3 for which the British Government, through its officials (the Royal Ulster Constabulary), was responsible.

The Court, as the final arbiter of such applications,[7] reached a different conclusion on the torture allegation. By a majority of thirteen judges to four it was held that the use of the five techniques did not constitute torture within Article 3. Their use did, however, amount to inhuman and degrading treatment, only one judge (the British judge Sir Gerald Fitzmaurice) dissenting from this latter finding.

How did the Court distinguish torture from inhuman or degrading treatment? Essentially the distinction is one of degree. For ill treatment to violate Article 3 at all it must attain a minimum level of severity. That minimum level, being relative, "depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc . . . ".[8] The circumstances of the case, including the premeditated use of the techniques applied in combination for hours at a stretch and the level of suffering caused, satisfied that minimum level. However, the intensity of the suffering caused, although sufficient to be "inhuman", fell short of that needed for "torture". In the words of the Judgment, the techniques "did not occasion suffering of the particular intensity and cruelty implied by the word torture". It was the intention of the European Convention, "with its distinction between 'torture' and 'inhuman or degrading treatment'," to attach "a special stigma" to torture which is "deliberate inhuman treatment causing

5. (1978) 2 E.H.R.R. 25 at 79–80 (Judgment, paragraph 167).
6. For the composition and role of the Commission see Articles 20–37 of the E.C.H.R.
7. The Court's judgment is final (Article 52) and binding on State parties (Article 53). See generally on the composition and role of the Court, Articles 38–56 of the E.C.H.R.
8. (1978) 2 E.H.R.R. 25 at 79 (Judgment, paragraph 162).

very serious and cruel suffering".[9] In so categorising torture the Court referred to the 1975 U.N. Declaration on Torture (see above) in which torture is said to be "an aggravated and deliberate form of cruel inhuman or degrading treatment or punishment" (Article 1(2)).

We have considered the *Ireland case* in some detail for a number of reasons. It marks the most important occasion upon which an international court (albeit a regional court) has interpreted the legal meaning of torture (although, in a wider context, the *Nuremburg Judgment* 1946 in so far as it concerns War Crimes and Crimes against Humanity which can include acts of torture should be remembered). The difference in opinion between the majority of the Court and the Commission reminds us of the lack of predictability inherent in applying abstract definitions to borderline cases. One has the feeling that if the use of the interrogation techniques had caused lasting physical or mental injury the Court would have found Britain guilty of torture as well as the "lesser offence" of inhuman treatment. As it was, the case also reminds us that, faced with a state of emergency, even an advanced civilised democracy such as Britain can, by its choice of means to resolve the crisis, stand accused, and, in the event, almost convicted, of torture.

The last point indicates another very important lesson demonstrated by the case. That is that the end does not necessarily justify the means. The European Convention on Human Rights, like other such treaties, permits derogation from many of its provisions "in time of war or other public emergency threatening the life of the nation" (Article 15). For instance, provided strict criteria are met, a state can detain suspected terrorists without trial by so derogating from another provision (Article 5) which normally prohibits such measures.[10] However, and again in common with other treaties, no derogation is permitted from Article 3. Also Article 3 is not qualified by exceptions which a State may make to several of

9. (1978) 2 E.H.R.R. 25 at 80 (Judgment, paragraph 167). See also the Report of the European Commission of Human Rights in *The Greek Case* (1969) *Yearbook* 12. This was an inter State application brought under Article 24 by Denmark, Norway and Sweden against Greece alleging violations of Article 3 by the Greek military Government after the revolution of 21 April 1967. After extensive investigations, including examination of witnesses in Greece, the Commission reported that the treatment of some of the political detainees concerned at the hands of Greek officials did constitute torture which was defined as being "generally an aggravated form of inhuman treatment" committed with a purpose "such as the obtaining of information or confessions, or the infliction of punishment . . .". The forms of mistreatment concerned included *falanga* (beating of the feet) and other severe beatings, application of electric shocks and the squeezing of the head in a vice. (See (1969) *Yearbook* 12 at pp. 499–500; the whole of this volume of the *Yearbook* (pp. 1–697) includes a detailed account of the *Greek Case* and the thorough investigations of the Commission. The proceedings led to the withdrawal of Greece from the Convention during the remaining period of the revolutionary Government.).
10. Britain had in fact made such a derogation from Article 5 (and 2 other Articles) in relation to the terrorist emergency in Northern Ireland and which the Court held to have been properly made under Article 15; see (1978) 2 E.H.R.R. 25 at 90–97 (Judgment, paras. 202–224).

the other Convention rights in the wider public interest in such matters as national security or public order or safety (see e.g. Articles 8–11).[11] In other words the ends, however understandable or laudable, *never* justify the means if those means involve the infliction of torture or other cruel or inhuman measures. The fact that Britain used the interrogation techniques in issue in order to more effectively deal with the great public danger and evil of terrorism, and that those methods proved relatively successful, was of no avail to her. Any breach of Article 3 is breach of an entrenched provision of the Convention.

The dilemma caused by this principle to those, soldiers, police and others, faced with the task of taking urgent action to confront urgent danger can be readily understood. Somewhat analogous is the dilemma facing subordinates ordered to commit acts of cruelty who, as stressed in the Nuremberg Judgment, and by national military tribunals, can take no legal refuge in a plea of superior orders.[12] However, the integrity of International Law (or of any legal system) permits of no other approach. It would be an unusual and terrifying State which pursued or permitted torture for purely sadistic or revengeful reasons; as an end in itself. Almost invariably its use is justified as a necessary means of achieving an important end. Nevertheless to allow such subjective criteria to dilute the International Law of torture would deprive it of almost any effectiveness in dealing with one of its most serious offences.

The same principle is found in the United Nations Torture Convention. Article 2(2) provides, "No exceptional circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture". And Article 2(3) provides that superior orders cannot be invoked as a justification of torture although, by analogy with the principle enshrined, for example, in Article 8 of the Nuremberg Charter, superior orders might be pleaded in mitigation of punishment of any subordinate state official found to have committed torture.

[II] The Suppression of Torture

The efforts of International Law to suppress the use of torture fall

11. See Ronald St. John Macdonald O.C., Q.C., "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights" in *International Law at the time of its Codification: Essays in honour of Roberto Ago* at pp. 187–208.
12. See the Judgment of the International Military Tribunal at Nuremberg delivered on 30 September, 1946, in which it was said, "The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the [superior] order, but whether moral choice was in fact possible". In rejecting the defence of superior orders raised by the indicted Nazi leaders the Tribunal applied Article 8 of its Charter of 1945 under which the only relevance of superior orders was in possible mitigation of punishment and which the Tribunal categorised as being part of general International Law. The Judgment is reported in (1947) 41 A.J.I.L. 172.

into two principal categories. First, there are the provisions of human rights treaties, both those sponsored by the United Nations Organisation and intended to be of world wide application — the most important of these now being the 1985 Torture Convention — and those having a regional application, the most effective of which, by far, is the European Convention on Human Rights 1950 noted earlier. These human rights treaties operate in times of peace as well as during periods of armed conflict. Secondly, there are provisions of international humanitarian law, the most important of which are those found in the Red Cross *1949 Geneva Conventions* and the *1977 Protocols* thereto, applicable to States involved in armed conflict. Each category will now be briefly outlined.

(a) The human rights treaties

(i) The United Nations Conventions

The *1985 Torture Convention* gives legal effect to the principles espoused in the 1975 Declaration which, as a General Assembly resolution, has itself no binding force. It is also intended to give added force to Article 5 of the *1948 Universal Declaration on Human Rights* and Article 7 of the *1966 International Covenant on Civil and Political Rights* (I.C.C.P.R.) which, as with Article 3 of the European Convention, outlaw torture or cruel, inhuman or degrading treatment or punishment.

The principal obligation of a State under the Convention is "to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" (Article 2(1)). As seen no exceptional circumstances or superior orders can ever justify torture (Article 2(2) and (3)). Further, a State has a duty not to expel, return or extradite a person to another State "where there are substantial grounds for believing that he would be in danger of being subjected to torture" (Article 3(1)). The circumstances which might generate such grounds include "the existence in the State concerned of a consistent pattern of gross, flagrant or mass violation of human rights" (Article 3(2)). One could anticipate that this obligation to grant sanctuary or refugee status might cause compliance difficulties. There are obvious potential problems of defining what are "substantial grounds" and of determining when they exist. Such a determination would involve passing judgment, in an extremely delicate area, upon the domestic affairs of another State with readily foreseeable risks to international relations. However, as it stands, even an undesirable alien, for example one who has committed serious criminal offences, could not under Article 3(1) be expelled if that would involve repatriation to a State where he would be in danger of torture.

Other obligations are to be found in Articles 4 to 16 of the Convention. They include for example an obligation to ensure that acts of torture, attempts to commit torture, acts of complicity or participation in torture are offences under a State's criminal law

punishable by appropriately severe penalties (Article 4); an obligation to either extradite or try alien alleged torturers (Articles 5 to 9); an obligation to inform relevant public officials (e.g. police and prison officers) of the Convention obligations and to systematically review interrogation and detention rules and procedures with a view to preventing any cases of torture (Articles 10 and 11); and to provide civil redress to torture victims (Article 14).

Enforcement of the Convention obligations is dealt with in Part II (Articles 17 to 24). From a legal viewpoint the enforcement provisions are less than perfect. Indeed their efficacy depends upon moral rather than legal pressure. In this respect they are similar to those found in other United Nations human rights conventions, in particular the I.C.C.P.R. Thus, as with the I.C.C.P.R., so with the Torture Convention, overall supervision of its provisions lies with a Committe, in this case the Committee against Torture (Article 17), which has merely reportive rather than legal powers. The Committee will consist of ten "experts of high moral standing and recognised competence in the field of human rights" (a body of Eminent Persons as it were). When electing them the State Parties should consider, inter alia, the "usefulness of the participation of some persons having legal experience" (Article 17(1)). State Parties will be obliged to furnish the Committee with regular reports on the measures they have taken to give effect to their Convention obligations (Article 19). If the Committee receives reliable information suggesting that torture is being systematically practised in any of the Convention States it has powers to confidentially investigate and report on the matter (Article 20).

More specific powers will be granted the Committee under Articles 21 and 22. It will be able to investigate and report on inter State claims of violations of the Convention (Article 21) and on claims brought by individuals claiming to be victims of a Convention violation (Article 22). However, the potential effectiveness of these provisions is weakened by the fact that they are optional in nature applying only to States which make declarations accepting them and then only when at least five such declarations to each Article have been made.[13] Also reports made by the Committee lack any legally binding force.

The weak enforcement provisions of the Convention are no doubt a disappointment but are hardly surprising. Their weakness is a reflection of jealously guarded national sovereignty and a consequent reluctance, at a general international level, to permit international legal intervention in matters considered to be within a State's domestic jurisdiction.

(ii) The Regional Conventions

The reluctance to expose domestic matters to outside legal scrutiny

13. Compare with similar provisions in the I.C.C.P.R. (Article 41 for optional inter State applications) and its *1966 Optional Protocol* allowing for a system of optional individual "communications" to its Human Rights Committee by victims of alleged Convention violations.

is less marked at a regional level between States sharing a broadly similar political, economic and social heritage. Thus, the Council of Europe member States are parties to the most effective human rights treaty of all, the *European Convention on Human Rights 1950*, and a number of South and Central American States (but not the U.S.A.) are parties to the *American Convention on Human Rights 1970*. Both contain provisions [14] outlawing torture and other forms of inhuman or degrading treatment. What distinguishes them from the U.N. Conventions is that both provide for legal as well as moral enforcement of their respective obligations. The E.C.H.R. is the most effective of all the treaties because by now almost all its 21 State parties have accepted the compulsory jurisdiction of the European Court of Human Rights (under Article 46) and the right of individual petition (under Article 25).[15] As a result, a valuable and growing body of interpretative case law [16] has developed of which the *Ireland case* already analysed is a good example.

Indeed, the Council of Europe, with the intention of strengthening the protection of victims of Article 3, has recently adopted another Convention — the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987*. This Convention establishes a non-judicial body, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which will have the right to visit "any place within its jurisdiction where persons are deprived of their liberty by a public authority" (Article 2) in order to examine the treatment of such detainees and to elicit the cooperation of the relevant State Party in effecting any improvement in such treatment which the Committee considers necessary. In this way it is hoped that the Committee will be able to "nip in the bud" any situation liable to cause torture or other breach of Article 3 of the E.C.H.R. committed against detainees. Obviously the success of such potentially important on site preventative measures will crucially depend on a constructive spirit of cooperation on the part of State Parties. The optimist would claim that this would merely be a small extension of that same spirit which has already been responsible for the relative success of the 1950 Convention in Western Europe.

14. Article 3, E.C.H.R. and Article 5 of the American Convention.
15. By 1987 18 of the 21 State Parties had made declarations accepting the right of individual petition (all except Cyprus, Malta and Turkey). As a result c. 350 million people could utilise the right and over 12,000 individual petitions had thus far been made to the Commission. All State Parties except Malta and Turkey have accepted the compulsory jurisdiction of the Court.
16. By 1988 the Court had given judgments in well over 100 cases and there have been many more published reports of the Commission giving its views on whether an application disclosed any breach of the Convention. It should be noted that over 10,000 of the c. 12,000 individual petitions registered with the Commission by 1987 were declared inadmissible under Articles 26 or 27 of the Convention.

(b) International humanitarian law: the Red Cross Conventions

The provisions of international humanitarian law applicable in wars and other armed conflicts are found principally in the four Geneva Conventions of August 1949 and the two 1977 Protocols thereto. The four Conventions are:

1. *The Convention for the Amelioration of the Condition of wounded and sick in Armed Forces in the Field* (The First Geneva Convention),
2. *The Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (The Second Geneva Convention),
3. *The Convention relative to the Treatment of Prisoners of War* (The Third Geneva Convention), and
4. *The Convention relative to the Protection of Civilian Persons in Time of War* (The Fourth Geneva Convention).

All of them contain firm prohibitions on the use of torture (See e.g. Article 50, First Geneva Convention; Article 51, Second Geneva Convention; Article 130, Third Geneva Convention; Article 147, Fourth Geneva Convention), all of which categorise such treatment as "grave breaches" of the respective Conventions. In respect of a "grave breach" a State undertakes to enact any legislation necessary to provide effective penal sanctions against its perpetrator or any person ordering its commission, and is obliged to search for and try suspects, regardless of nationality, before its own courts.

The four Conventions have their primary field of application in wars and other armed conflicts of an international character. As is well known, however, the majority of recent instances of armed conflict have not fallen within that traditional category. They have tended to be civil wars and other cases of armed conflict within the territory of one State. Indeed a formally declared war between States is very much a rarity these days. In one of the leading books on the topic[17] it has been estimated that about 80 per cent of the victims of armed conflicts since 1945 have been victims of non-international conflicts.

An attempt was made in the Geneva Conventions to give some protection to the victims of such non-international conflicts. That was in Article 3 common to all four Conventions (Common Article 3) under which a minimum standard of humane treatment is owed to "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause". This minimum standard includes an express prohibition upon "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture".

Further, Common Article 3 has now been reinforced by the two

17. D. Schindler and J. Toman *The Laws of Armed Conflicts*" (Second Ed. 1981) at 619.

1977 Protocols,[18] particularly Protocol II, which specifically relates to the protection of victims of non-international armed conflicts. Protocol I in Article 1(4) somewhat controversially extends the full protection of the four Conventions to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination". Protocol II spells out in greater detail the content of the duty of humane treatment owed to victims of non international conflicts. Again, it specifically prohibits torture as well as other forms of violence (Article 2(a)). Otherwise it has little relevance to this survey of the international law of torture. It should be noted, however, that, although the Protocol does not apply to situations of internal disturbances and tensions, e.g. riots and isolated acts of violence (Article 1(2)), the use of torture by or on behalf of State officials in such situations would still be prohibited by the customary and conventional human rights law discussed earlier in this survey.

Enforcement of the Geneva Conventions and Protocols is once again the weak link. In times of international war the system of Protecting Powers augmented by the supervisory role of the International Committee of the Red Cross (See e.g. the Third Geneva Convention on P.O.W.'s, Article 126) is intended to guard against violations. Otherwise, as with the U.N. human rights treaties, effective legal enforcement at an international level fails because of jealously guarded national sovereignty.

Sovereignty poses a particularly acute obstacle to the effectiveness of international humanitarian law in the case of non international conflicts. This is an issue highlighted in a recent article, "New Developments in Humanitarian Law: A challenge to the Concept of Sovereignty", by two authors experienced in the work of the Red Cross in the area, Thomas Fleiner-Gerster and Michael A. Meyer (the first a former member of the I.C.R.C. and the second Legal and Committee Services Officer to the British Red Cross Society).[19] In pessimistic vein they write,[20] "The most striking problem of humanitarian law today is its general lack of applicability. In the past 15 years several internal and international armed conflicts have occurred. However, in almost every case at least one of the parties to the conflict did not consider international humanitarian law to be applicable". Why is this so? Principally because of a reluctance by States to diminish national sovereignty — that to recognise the applicability of the Geneva Conventions to

18. At the time of writing (1988) 73 States were parties to Protocol I and 66 States were parties to Protocol II. The Australian Government has indicated an intention to soon ratify the Protocols (see e.g. statement of the then Acting Minister for Foreign Affairs, Senator Gareth Evans and Deputy Prime Minister and Attorney-General, Mr. Bowen on 11 March 1986 Comm. Rec. 1986, 333). The practical compliance problems inherent in parts of the Protocol have been highlighted by a distinguished retired Australian army officer, Brigadier P.J. Greville. (See, "Protocol's that spell disaster" *The Australian* newspaper, 11 July 1988.)
19. See (1985) 34 I.C.L.Q. 267.
20. (1985) 34 I.C.L.Q. 267 at 267.

an internal conflict would confer an international status on rebel forces that would in turn impair that sovereignty exercised by the government on behalf of the State. The authors suggest means by which that reluctance might be overcome and humanitarian law consequently strengthened.

In the meantime much depends upon the more general Human Rights and Torture Conventions. This brief survey has hopefully highlighted the relative effectiveness of the attempts to outlaw torture at a regional International Law level in the Council of Europe States. At a non regional level the 1985 U.N. Torture Convention, despite its weak enforcement machinery, might at least provide additional support to the efforts of such organisations as Amnesty International to focus a hostile world opinion on those nations which foster or tolerate one of the most serious crimes in International Law.