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Panel 1: Are Adequate Legal Frameworks in Place at the Domestic Level? Torture as a Specific Criminal Offense in Domestic Laws

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Panel 1: Are Adequate Legal Frameworks in Place at the Domestic Level?

Torture as a Specific Criminal Offense in Domestic Laws

*Remarks of Matt Pollard**

THE MAIN “EVIDENTIARY BASIS” FOR MY REMARKS, WHICH HAS BEEN MADE AVAILABLE TO CONFERENCE PARTICIPANTS, INCLUDES AN ACADEMIC STUDY OF DECISIONS OF THE COMMITTEE AGAINST TORTURE under relevant provisions of the UN Convention,¹ as well as excerpts from the other relevant jurisprudence and treaties to which I will be referring.

The topics I will address are: first, where does the obligation to make torture a specific offense in domestic law come from? Second, what is the scope of jurisdiction that has to be established for that offense in domestic law? Third, a description of ancillary obligations designed to ensure that torture is criminalized in practice, including mandatory investigation and arrest, as well as prosecution and extradition.

In terms of the obligation itself, and the sources of the obligation, the first and perhaps oldest source is the 1949 Geneva Conventions. As you probably know, each of the Geneva Conventions includes provisions on “grave breaches.”² Among other things, “torture” and “inhuman treatment” of prisoners, and “unlawful confinement” of civilians, are covered by those grave breaches provisions. The Conventions require that alleged perpetrators of “grave breaches” be searched for by the state, and then (in a manner that, as we will see, is similar to that eventually enacted for “torture” under the UN Convention against Torture) requires that they are either prosecuted or extradited.

On the plus side, the Geneva Conventions have essentially been ratified by every country in the world. So in that sense, they are a good source. On the other hand, on their face, the grave breaches provisions only apply to international armed conflicts. Now, as regards non-international armed conflicts – whether as interpreted under U.S. Supreme Court decisions in this country or otherwise – there are other arguments for criminalization of torture under international humanitarian law in those contexts.³ But the other major limitation is that on its face, again, those grave breaches provisions apply only to the “protected persons” under each Convention, and you have to look under the Convention for the definition.⁴ So, as a source of obligation, the Geneva Conventions do not apply all the time, everywhere, and they do not necessarily apply to everyone.

The relevant part of Article 7 of the International Covenant on Civil and Political Rights simply states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The Human Rights Committee established under the treaty has, however, interpreted that provision as incorporating a requirement to bring perpetrators to justice.⁵ In fact, in

a particular case, *Rajapaksa v. Sri Lanka*, in 2006 it actually found Sri Lanka to be in violation, apparently for having failed its duty to prosecute and punish the perpetrator of torture under the Covenant on Civil and Political Rights.⁶ But again, there’s nothing actually written into the text of the Covenant itself about criminalization or prosecution, so some states might say “thank you esteemed experts but we respectfully disagree with you,” leaving matters at a sort of impasse.

Customary international law is another possible source, although most people think that in terms of the obligation to criminalize and punish and so on, customary international law is permissive rather than mandatory. But the case of Hissène Habré, the former President of Chad, who is accused of crimes against humanity – including torture – in Chad, is of interest. He is currently under house arrest in Senegal, and Belgium has been seeking to have him extradited or prosecuted for some time. Belgium has now filed an application to the International Court of Justice, against Senegal, relying in part on customary international law, arguing that it actually poses mandatory obligations to either prosecute or extradite;⁷ however, they also rely on the explicit provisions of the Convention against Torture, which will in fact form the basis for the rest of my remarks.

The UN Convention against Torture is the most explicit and detailed international code or source for the obligation to criminalize torture.⁸ It expressly addresses both war and peace time.⁹ It has some 146 state parties. The Convention itself does not specifically say that there must be a distinct offense or definition named “torture” in domestic law, but certainly the Committee has consistently, in dozens and dozens of instances, stated that it interprets the Convention as requiring that there must indeed be a separate definition, a separate offense, of torture in national law.¹⁰ So it is not sufficient that any act of torture might be covered by a general offense of “assault” under national law, as many countries argue. There is very good reason to accept the Committee’s interpretation of the Convention. First of all, as I will discuss in a moment, the Convention specifically requires each state to eliminate certain defenses in respect of any act of torture, defenses that might otherwise ordinarily apply to all offenses in the state’s criminal code; how could a state make such defenses inapplicable to every act of torture if “torture” is not defined in national law? Second, the Convention requires that an appropriate sentencing range be available in respect of acts of torture;¹¹ again, how is a state to ensure an appropriate sentencing range for all acts of torture if “torture” is not mentioned in its criminal code? Third, as we will see, the Convention requires states to establish international, potentially global, jurisdiction over acts of torture, and very few if any countries have interna-

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tional, global jurisdiction over simple assault offenses, so again how is a state going clearly to establish that jurisdiction without a definition of “torture” under its laws.

The Committee does not necessarily expect states to enact exactly the definition that appears in Article 1 of the Convention verbatim into domestic laws, but any national law definition must cover at minimum all acts covered by the Convention definition.¹² The elements of any such definition were mentioned by Professor Nowak; key among them are severe pain and suffering whether physical or mental, inflicted for certain purposes set out in the Convention. The definition in the Convention excludes “pain or suffering arising only from, inherent in or incidental to lawful sanctions,” but “lawful” in this context is generally interpreted to mean lawful under *international law*.¹³ So a state cannot say “well, that particular type of treatment or punishment is actually provided for in our national laws, and therefore excluded from the definition of the Convention, and therefore not a problem.” To allow otherwise would obviously completely undermine the purpose and objective of the treaty, for one thing. Further, if one refers to the UN General Assembly’s 1975 Declaration on Torture, it contained a similar exclusion, but one which more precisely referred to “lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.”¹⁴ This is probably the best way to understand, what the Convention meant to exclude by referring to “lawful sanctions,” that there may be, for instance, severe mental pain and suffering inherent in the simple fact of being incarcerated, but if the incarceration is fully in compliance with human rights standards then such punishment is excluded from the definition.¹⁵

Article 4(1) of the Convention specifically requires not only that each state criminalize every “act of torture” in the sense of the person who actually inflicts the pain and suffering, but also that any “attempt to commit torture” and any act “by any person which constitutes complicity or participation in torture” be included. The concepts of “complicity” and “participation” often already exist in national laws, though they may be called “aiding or abetting” or “accessory” or other terms. Once again, however, whatever its name, the concept of “attempt,” “complicity” and “participation” applied at the national level must cover at least everything that is meant by the treaty itself when it uses those words. By way of illustration, several cases from the International Criminal Tribunal for the Former Yugoslavia help to give a sense of the breadth of such concepts (therein discussed in terms of “co-perpetration” and “aiding and abetting”) under international law.¹⁶

In terms of the absoluteness of the prohibition of torture, including at the national level, Article 2(2) of the Convention provides that “[n]o exceptional circumstances whatsoever . . . may be invoked as a justification of torture” and expressly including “a state of war or a threat of war, internal political instability or any other public emergency.” Many national criminal codes will have general defenses of necessity, or defense of self, defense of others, and so on, which might ordinarily apply in respect of other crimes in situations of duress. Clearly any such defenses must somehow be made inapplicable in national law to the offense of torture in order to comply with the

Convention, and indeed to comply with the absoluteness of the prohibition that applies more generally under customary international law. Article 2(3) of the Convention also specifically says that “[a]n order from a superior officer or a public authority may not be invoked as a justification of torture.” Such defenses are often set out more generally under national laws, for instance to allow legitimate (proportionate and necessary) use of force by law enforcement officials which otherwise might constitute an assault. Any such defenses must again somehow be made inapplicable to torture in national law.

Article 5 of the Convention requires that states establish in national law several bases of jurisdiction over acts of torture [as well as attempt, complicity and participation]. First, territorial jurisdiction: all acts of torture carried out on the State’s territory must be covered by national criminal law. The article also requires that extraterritorial jurisdiction be established on several possible grounds. Thus, all acts of torture, carried out anywhere, must be covered by a state’s criminal law if the perpetrator is a national of the state; so, in the case of an American offender accused in respect of acts committed in another country, indeed even an American astronaut on the moon who tortures another astronaut, U.S. criminal law must be made to apply to that act. Finally, if an alleged offender of whatever nationality comes into a state’s territory, and is not extradited to another state, the state must be able to exercise criminal jurisdiction over acts of torture of which he or she is accused, regardless of where the alleged acts took place or against whom they were perpetrated.¹⁷

It is not enough that states enable such jurisdiction in national law; the Convention requires specific actions that must take place when particular instances arise. For instance, if someone is on the state’s territory who is accused of an act of torture, under Article 6 the state is required to take the individual into custody or otherwise to ensure his or her presence pending investigation. (Interestingly, in the International Court of Justice application mentioned earlier, Belgium is asking the Court to order provisional measures, similar to an interim injunction, that Senegal is bound to ensure that Habré is kept under house arrest or otherwise unable to escape from the country.) Having taken the person into custody, the state is then required to begin inquiring into the facts, and to notify and report promptly the results to the state or states whose territories or nationals may be involved. Again, these obligations apply not only *vis-à-vis* a person accused of actually inflicting the pain and suffering, but also to anyone who was involved through complicity or participation. At the heart of this scheme, which is aimed at ensuring that there is “no safe haven” anywhere in the world for torturers, is an express obligation in Article 7 to prosecute or extradite the alleged offender. It is a strictly either/or proposition with only two possibilities: either the case is submitted for prosecution by the state’s own authorities, or (assuming another state is seeking extradition) the person is extradited for prosecution elsewhere. (In its application to the International Court of Justice, Belgium is relying expressly on Articles 5 and 7 in its case against Senegal, arguing Senegal is obliged under the Convention against Torture to either prosecute this person or send him to Belgium for prosecution and, as Senegal has done neither, Belgium argues it has violated its obligations under the Convention.)

Note that the Convention does not on its face state that every case must ultimately be brought to trial and the person convicted; Article 7 requires that the state “submit the case to its competent authorities for the purpose of prosecution,” and that those authorities “shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.” In other words, in deciding whether to take forward the case for prosecution, the authorities cannot apply a lower standard, or a higher standard, of evidence, and they should not allow political or other improper criteria to influence their decision. The Convention does not dispense with the need for a proper criminal case;¹⁸ admissible evidence is required, one shouldn’t expect that simply providing newspaper reports, or say a book, to the authorities will trigger an obligation to prosecute.¹⁹

All of this applies to every one of the 146 countries who is a party to the Convention. As the conference is taking place in the United States, however, I will make a few specific observations. Obviously the Executive Orders issued by President Obama are very positive and encouraging on a going-forward basis, but problems remain that have to be addressed, some of which are probably obvious to you at this point in my presentation.

First, at the time that the United States ratified the Convention, the Senate stated certain “understandings” about how it interprets the definition in Article 1 of the Convention, including the words “severe mental pain and suffering.”²⁰ And those understandings have found their way into the definition of torture under U.S. criminal law.²¹ It would seem that has not changed with the Executive Order, as we are talking about Congressional legislation.

Second, a statutory defense was slipped into the 2005 Detainee Treatment Act, on “Protection of United States Government Personnel Engaged in Authorized Interrogations” [section 1004]. It applies to U.S. personnel who face civil or criminal proceedings arising out of their involvement in “spe-

cific operational practices” that involved “detention and interrogation of aliens” who the executive believed were “engaged in or associated with international terrorist activity.” It seems to be a type of “ignorance of the law” or “due diligence” defense, making it a defense for any accused who establishes that he or she “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful,” and that “[g]ood faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.” Under the Convention, there is little if any room for any defense of due diligence or ignorance of the law when it comes to torture. This may be especially so given that, so far as I understand, the reason that Congress felt it needed to enact the specific provision is because similar defenses do not exist under U.S. law in respect of other similarly serious criminal offenses.

Finally we had the admissions before Congress by state officials during the previous administration that indeed some individuals were subjected to water-boarding (at the same time denying that it constituted torture under U.S. law).²² We also have the admission of the Convening Authority at Guantánamo Detention Center that one of the Military Commission cases was stopped because she concluded that the person had been tortured.²³ As I have explained, under the Convention once you have – as in these cases – public acknowledgements of acts of torture, certain machinery of criminal investigation and prosecution is certainly supposed to start operating. Now, perhaps it is operating behind closed doors and we are not aware of it, but weeks have gone by without further comment. We must add this, then, to the list of questions that must continue to be asked about the consistency of U.S. law and practice with its international obligations regarding “torture as a specific criminal offence in domestic laws.” Thank you. HRB

ENDNOTES: Torture as a Specific Criminal Offense in Domestic Laws

¹ Nigel Rodley and Matt Pollard, “Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” [2006] 2 European Human Rights Law Review 115-141.

² Third Geneva Convention, 1949 (Prisoners of War), articles 129, 130, 131, and Fourth Geneva Convention, 1949 (Civilians), articles 146, 147, 148; UN Convention against Torture (1984), articles 1, 2 and 4 to 7.

³ See, e.g., Rome Statute of the International Criminal Court, article 8(2)(c); Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (ICRC/Cambridge University Press: Cambridge, 2005); Eve La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge University Press: Cambridge, 2008).

⁴ E.g. Third Geneva Convention, article 4; Fourth Geneva Convention, article 4. However, note the ICRC Commentary to the Fourth Convention (ICRC: Geneva, 1958), pp 50-51, especially: “Every person in enemy hands must have some status under international law; he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no intermediate status; nobody in enemy hands can be outside the law.*”

⁵ See Human Rights Committee, “General Comment no. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant,” UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), para 18.

⁶ Human Rights Committee, *Lalith Rajapakse v. Sri Lanka*, decision of 14 July 2006, UN Doc CCPR/C/87/D/1250/2004 (26 July 2006), para. 9.3 [referring to “a duty” to “investigate thoroughly” and to “prosecute and punish those held responsible for such violations”], as well as paras 9.4 and 9.5 [finding a violation of article 7 in combination with article 2(3) on the obligation to provide an effective remedy].

⁷ Application Instituting Proceedings, *Belgium v. Senegal* (16 February 2009), <<http://www.icj-cij.org/docket/files/144/15054.pdf>>, accessed 12 March 2009.

⁸ Article 4(1) requires in part: “Each State Party shall ensure that all acts of torture are offences under its criminal law.” “Torture” is defined in article 1 of the Convention (see further discussion below).

⁹ See articles 2(2) and 4(1).

¹⁰ See Rodley and Pollard, *supra* n. 1, at 118-120.

¹¹ Article 4(2) provides: “Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”

¹² Article 1 defines torture to mean “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.” However, this definition is specified to be without prejudice to “any international instrument or national legislation which does or may contain provisions of wider application”: article 1(2).

¹³ See Rodley and Pollard, *supra* n. 1, at 120-122.

¹⁴ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by UN General Assembly resolution 3452 (XXX) of 9 December 1975, article 1(1).

¹⁵ See Rodley and Pollard, *supra* n. 1, at 121.

¹⁶ *Prosecutor v. Furundžija* (“Lašva Valley”), Case no. IT-95-17/1, Appeal Judgment 21 July 2001, paras 115-121; *Prosecutor v. Blaškić*, Case no. IT-95-14, Appeal Judgment 29 July 2004, paras. 43-50.

¹⁷ Article 5 also expressly recognised that States whose nationals are victims of acts of torture can also establish extraterritorial jurisdiction on this ground, regardless of the nationality of the perpetrator, though this jurisdiction is not obligatory under the Convention.

¹⁸ Article 7 also provides “the standards of evidence required for prosecution and conviction” in extraterritorial cases against non-nationals “shall in no way be less stringent than those which apply” in territorial cases or those against nationals”; and that the accused “shall be guaranteed fair treatment at all stages of the proceedings.”

¹⁹ Note, though, that evidence that might not suffice to support prosecution will very often if not always trigger an obligation to *investigate* the allegations. Article 12 of the Convention states: “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”

²⁰ “. . . with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality”: U.S. reservations, declarations, and understandings, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990), reproduced at <<http://www1.umn.edu/humanrts/usdocs/tortres.html>> accessed 12 March 2009.

²¹ See the extraterritorial torture offence established by 18 U.S.C. §§ 2340 and 2340A. The UN Committee Against Torture, established under the Convention, has apparently concluded that U.S. law is not consistent with the Convention for this, among other, reasons [including the absence of a torture offence generally applicable *within* the United States]. See the Concluding Observations of the Committee in 2006 [UN Doc CAT/C/USA/CO/2 (25 July 2006)]: “The State party should ensure that acts of psychological torture, prohibited by the Convention, are not limited to ‘prolonged mental harm’ as set out in the State party’s understandings lodged at the time of ratification of the Convention, but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or its duration.” See also its Concluding Observations in 2000 [UN Doc A/55/44 (15 May 2000)], paras. 179(a) and 180(a).

²² To this we might add the clear statement of the current Attorney General, Eric Holder, during his January 2009 Senate confirmation hearings, that “water boarding is torture”: transcript at <<http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html>> accessed 12 March 2009.

²³ “Detainee Tortured, Says U.S. Official,” WASHINGTON POST, Wednesday, January 14, 2009; Page A01.