Analysis: Torture Committed by Private Individuals and State Responsibility

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The crime of torture and cruel, inhuman or degrading treatment or punishment was originally conceived as an offence committed by State officials. However, over time, this offence has evolved to encompass conduct inflicted by private individuals, a development particularly important for women and children who typically experience violence in private places. This article examines how States have been held responsible for tortious conduct committed by private persons, through the notion of due diligence. It also briefly looks at efforts to create a domestic torture offence that does not involve State officials.

The prohibition against torture and cruel, inhuman or degrading treatment or punishment is a basic and fundamental human rights norm. It is recognized as part of customary international law, accepted as a peremptory *jus cogens* norm, and reinforced in a number of international treaties and declarations.[1] This prohibition was originally conceived in response to widespread and egregious abuses committed by State officials during WW2, particularly those committed by the Nazi regime. More recently, however, and specifically in the context of gender and children's issues, the application of the prohibition against torture to actions committed by private individuals, rather than by public actors, has been given consideration.

The genesis of the public/private actor dichotomy arose in the early 1990s out of a concern that international law inadequately addressed gender-based violence, such as rape or genital mutilation, which typically occurs in private spaces.[2] Early international cases confirmed that rape constitutes severe pain and suffering amounting to torture, at least when committed by state officials. The statement of the International Criminal Tribunal for the former Yugoslavia Appeals Chamber in the case of Kunarac, Kova? and Vukovi?[3] is particularly pertinent in this regard. The Chamber noted that: "Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as torture".[4]

It was left to other international cases to address how obligations imposed on States might extend to the conduct of private actors. International law is commonly understood to impose obligations on states and not directly on individuals. However, jurisprudence has evolved to hold States responsible at international law where they know or have reasonable grounds to believe that torture or ill-treatment [5] is being committed by private actors and State officials do not prevent, investigate, prosecute, punish or otherwise properly respond to the actions. This is commonly referred to as the State's obligation to act with due diligence and applies to States parties' failure to prevent (e.g., by enactment of necessary laws) and protect (e.g., through investigation and prosecution) victims of rape, domestic violence, female genital mutilation and trafficking.[6]

In international jurisprudence, this notion was confirmed by the European Court of Human Rights in the case of *A v. UK*,[7] a complaint concerning a nine-year-old boy whose stepfather had repeatedly beaten him with a garden cane. A domestic court had acquitted the stepfather, relying on the defence of "moderate and reasonable chastisement" under English law. In contrast, the European Court found firstly, that the beatings constituted torture and ill treatment contrary to the *European Convention on Human Rights* and secondly, that the UK had failed to take appropriate measures to ensure individuals within its jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment administered by private individuals. Specifically, the availability of the defence of "moderate and reasonable chastisement" meant that British law failed to provide adequate protection against acts of torture and ill-treatment committed by private individuals.[8]

Similarly, the Committee against Torture confirmed that States are responsible where they "acquiesce" to acts of torture committed by persons who are not State officials. In *Dzemajl et al. v. Yugoslavia,* the Committee held the State responsible where police, though present at the scene, had failed to intervene to prevent groups of citizens from burning and destroying a Roma settlement.[9]

The Inter-American Court of Human Rights has also stated, in regard to the *American Convention on Human Rights*, that "[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention".[10]

As evidenced above, it is broadly acknowledged at the international level that injury inflicted by private individuals may amount to torture where a State fails to exercise due diligence. In contrast, governments have been reluctant to create a domestic torture offence that is purely private – that is, one that does not involve state action or acquiescence.[11] Such an offence is considered essential by many women's rights activists in order to underline the severity of domestic violence in its extreme forms.[12]

In Canada, section 269.1 of the *Criminal Code* largely adopts the definition of torture from article 1 of CAT, including culpability of a public official who participates or acquiesces in tortious conduct. A private member's Bill[13] was introduced in 2016 that would have labelled severe and prolonged pain inflicted by a private individual for the purposes of coercion or intimidation, as torture, regardless of whether there existed any State acquiescence or involvement. This mirrored efforts in other jurisdictions which have criminalised private torture, including France, Germany, Brazil, Rwanda, Slovenia, Queensland in Australia and several US states.[14] Ultimately, however, Canadian lawmakers rejected the private member's Bill on the basis that such private acts or torture were already encompassed by other *Criminal Code* offences (e.g., sexual assault and aggravated assault) and that the severity of the conduct in particular fact situations could be addressed through sentencing.

There are, of course, strategic considerations to be weighed when pursuing a torture prosecution, whether committed by a State official or private actor, whether occurring before a domestic court or international body. It is often difficult to obtain conviction for a severe offence and onerous evidentiary requirements may also present challenges. However, naming severe abuse as torture, including in a domestic context, underlines to society the gravity of such conduct and properly stigmatizes its perpetrators.

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Irit Weiser has spent most of her career with the federal Department of Justice. She was Senior General Counsel and Head of Legal Services for Health Canada and the Public Health Agency of Canada. She provided legal, policy and strategic advice to senior levels of government in regard to various health-related matters, including the Canada Health Act, food and drug regulation, quarantine, and tobacco. Prior to heading up Health Legal Services, Irit was General Counsel and Director of the Human Rights Law Section of the Department of Justice. She provided legal and policy advice, and litigation support on the Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act and international human rights law. Before joining the Department of Justice, Irit worked for the Lawyers Committee for Human Rights in New York. She has also taught International Human Rights at the Faculty of Law of the University of Ottawa. Finally, she has written articles and presented

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References

1. For example, the United Nations *Universal Declaration of Human Rights* (art. 5), the *International Covenant on Civil and Political Rights* (art. 7), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), the *European Convention on Human Rights* (art. 3), the *African Charter on Human and Peoples' Rights* (art. 5) and the *American Convention on Human Rights* (art. 5.2).

2. Fortin, K. (2008), An Evaluation of the Committee against Torture's Attitude to Sexual Violence, https://www.researchgate.net/publication/26569431_Rape_as_torture_-_An_evaluation_of_the_Committee_against_Torture's_attitude_to_sexual_violence; Edwards, A. (2006) 'The "feminizing" of torture under international human right law', *Leiden Journal of International Law*, 19(2): 349-391; Sifris, R. (2014) *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture*, New York: Routledge.

3. *Prosecutor v. Kunarac, Kova? and Vukovi?*, Case No. IT-96-23 and IT-96-23/1-A

4. At para. 150. This statement has been followed in the jurisprudence of other international institutions, such as the International Criminal Court (Decision of Confirmation of Charges, *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, paragraph 205) and the Extraordinary Chambers in the Courts of Cambodia, *Kaing Guek Eav alias Duch* (Case File 001/18-07-2007-ECCC/SC), Supreme Court Chamber, 3 February 2012, paragraphs 205-208).

5. There is jurisprudence and much worthy literature on the characterization of certain conduct as torture versus cruel, inhuman or degrading treatment, and the implications of the distinction. This article, however, does not explore this issue and treats the concepts as synonymous.

6. General Comment 2 of CAT, 24 January 2008, para. 18; Human Rights Committee General Comment 20, 10 March 1992, para. 2; see also with respect to rape the Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 5 February 2010, A/HRC/13/39/Add.5, para. 53; *Njamba v. Sweden*, 3 June 2010, CAT Communication No. 322/2007, para. 9.5; Concluding Observations on Canada, 25 June 2012, CAT/C/CAN/CO/6, para 20; Concluding Observations on the Philippines, 29 May 2009, CAT/C/PHL/CO/2, para. 18; Concluding Observations on Cambodia, 20 January 2011, CAT/C/KHM/CO/2, paras. 15 and 21; re female genital mutilation, see Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 5 February 2010, A/HRC/13/39/Add.5, paras. 201-202; Concluding Observations on Cameroon, 4 August 2010, CCPR/C/CMR/CO/4, para. 10; Concluding Observations on Sweden, 7 May 2009, CCPR/C/SWE/CO/6, para. 9

7. *A v UK*, no. 25599/94, Rep. 1996-VI, judgement of 23 September 1998. See also *Z and Others v UK,* 34 Eur. H.R. Rep. 3 (2001) where the State was held responsible for the inadequate action of health and social services officials in a case involving extreme neglect and ill-treatment of four children by their parents.

8. At para. 24.

9. CAT/C/29/D/161/2000, UN Committee Against Torture (CAT), 2 December 2002.

10. *Velásquez Rodríguez v. Honduras,* Judgment of 29 July 1988, Inter American Court of Human Rights (Ser.C) No. 4, 1988, Para. 172.

11. Sheehy, E. (2018) “Criminalizing private torture as feminist strategy” in *Intimate Partner Violence, Risk and Security: Securing Women’s Lives in a Global World*, New York: Routledge, 251-268.

12. Graycar, R. and Morgan, J. (1990) *The Hidden Gender of Law*, Sydney: Federation Press; Charlesworth, H. and Chinkin, C. (1993) ‘The gender of *jus cogens*’, *Human Rights Quarterly*, 15(1): 63-76.

13. Bill C-242 (2016) *An Act to Amend the Criminal Code (Inflicting Torture)*.

14. Sheehy, E. fn 11 at page 254.