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1. Introduction

In 1945 the United Nations Organisation (U.N.) arose out of the ashes of the Second World War. It was and still is designed to prevent international armed conflict, and its structure reflects this objective. Pursuant to its Charter certain basic principles are set out. All states are sovereign and equal² and no state is entitled to interfere in the domestic affairs of another except in very specific circumstances.

When disputes between states arise there is an obligation to resolve them by peaceful methods³, again subject to certain specific exceptions. The debating and broad policy creating chamber is the General Assembly⁴, the Secretary General is the executing arm⁵ and the Security Council is responsible for all matters relating to international peace and security⁶.

In broad terms, the only way in which lawful force can be applied to international disputes is through the medium of the Security Council⁷. This is subject to the exceptions of self-defence⁸ and actions authorised by regional arrangements⁹.

From the beginning the U.N. recognised the relationship between cultural acceptance of basic human rights norms and the reduction of the risk of international armed conflict. As a consequence a number of measures were undertaken to encourage states to opt into these basic human rights norms.

The General Assembly adopted the Universal Declaration of Human Rights in 1948 and from the 1960's a series of Conventions were adopted to make those human rights norms effective at the national level. These are known as Universal Human Rights Conventions¹⁰, to distinguish them from regional treaties, and one of these is the

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment 1984 (Torture Convention). China signed the Torture Convention on December 12th, 1986 and ratified it (“adopted” it) on October 4th, 1988. The Torture Convention entered into force on June 26th, 1987, and presently has 140 member states.

All the Universal Human Rights Conventions have certain common features including the method of oversight and enforcement. This is done by each treaty creating a committee of experts whose task it is to ensure that state parties to each convention observes its terms.

Under the Torture Convention Article 17 sets out the details pertaining to the creation of the Committee Against Torture (C.A.T.) and Articles 19-22 set out its jurisdiction. It is essentially a monitoring body that receives, analyses, draws conclusions and renders recommendations relating to reports submitted to it by state parties. In certain instances it can engage in enquiries, receive individual complaints and make recommendations in respect to them, and arbitrate allegations between state parties of a breach of the Convention by any of them. China has reserved on Articles 20 (the investigative function of the CAT) and 30(1) (the individual complaints and arbitration power of the CAT).

So the CAT’s relationship with China is essentially through its Article 19 powers obliging a state party to report in full the state of torture in that country.

At the World Conference on Human Rights 1993, the Vienna Declaration and Programme of Action was adopted by the representatives of 171 states¹¹. One of the most significant of its declarations is found in para. 5 whereby: “[A]ll human rights are universal, indivisible and interdependent and interrelated.” This declaration conclusively

rejects the notion of derogability based upon cultural conditions. The world conference also concluded that “one of the most atrocious violations against human dignity is the act of torture, the result of which destroys the dignity and impairs the capability of victims to continue their lives and their activities”¹².

Historically torture has been engaged in by state authorities to extort confessions from suspected criminals, to cow political, social and religious dissidents, or to demonstrate absolute control over segments of their population. In the modern world some brutal regimes still resort to torture in order to maintain their fragile grasp upon power. Happily, the modern democratisation process has diminished the number of these brutal regimes.

For the purposes of the Torture Convention, torture is defined in Article 1 to mean:

1. For the purposes of this Convention, the term “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.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

From this definition a number of points can be made. The pain and suffering must be severe, it must be inflicted in order to achieve one of the specific purposes outlined (or

a similar purpose pursuant to the use of the words “such as”...), and that it must be inflicted by some form of “state” agency¹³.

2. China and the Torture Convention

The CAT is a U.N. human rights reporting body created pursuant to Article 17 of the Torture Convention, the monitoring body that attempts to ensure that states party to the Convention observe its obligations. Under Article 19 state parties must report to the CAT within a year of ratification and then once every four years. The initial report should extensively describe the way in which the state part meets the requirements of the Convention and subsequent reports should *inter alia* describe any changes that have occurred since the earlier report.

Generally, the Convention imposes the obligation upon a state party to take “effective, legislative, administrative, judicial and other measures to prevent torture, as defined in Art. 1(1) from occurring in its territory”¹⁴. China submitted its initial report on the Torture Convention in December 1989 and followed up with a supplementary report in 1992, its second period report in 1995 and its third periodic report in 1999.

The CAT has expressed the view that full implementation of the Convention requires a state party to enact a domestic crime of torture in terms consistent with the definition contained in Article 1. This is because there is a qualitative difference between torture and the usual classes of assault and homicide found in state criminal codes. But there is an even more compelling reason. A state must report to the CAT the steps taken to eradicate torture including sanctions imposed upon officials who may have participated in it. Unless there is a distinct crime of torture in a state’s criminal code, the

administrative capacity to report in this respect is lacking. Article 2 prohibits “necessity” (including war or internal political instability) and “superior orders” from being raised as justification for torture.

Article 3 is becoming increasingly important to the work of the CAT. Under it “no state party shall expel, return (“refouler”) 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”. This provision is probably of little concern to China so long as it fails to declare in favour of Article 22 since virtually all the cases drawn to the CAT’s attention have been brought before it by this procedure. But, the obligation in Article 3 is a general one and a state party should in its reports advise the CAT what procedure it has put in place to comply with it. It may become more significant to China as measures against terrorism are put in place.

The obligations of Article 5 go to the matter of criminal jurisdiction. It requires a state party to establish such a jurisdiction on a territorial basis (including ships and aircraft) and a nationality basis (both active and passive). It also obligates a state to assume universal jurisdiction over alleged torturers in their territory whom they do not extradite to stand trial elsewhere.

The whole premise of the Torture Convention is that torturers are not to enjoy impunity¹⁵, they must be investigated, arrested and tried for their crimes. Other than in the case of incumbent heads of state, foreign ministers and perhaps diplomats can immunity from prosecution be raised by a torturer and then only for the period of the incumbency¹⁶. The Torture Convention requires a universal jurisdiction to be established over alleged torturers who are present in a state party’s territory and, for whatever reason,

the state party declines to extradite him to a requesting state to stand fair trial for that crime. In such a case the state party would be obliged to initiate a regular criminal investigation with a view to prosecution before its own courts¹⁷.

It should be noted that a state, having established its jurisdiction, may choose not to assert it. This is implicit in Article 6(4) of the Torture Convention, but it is also clear that such jurisdiction must be exercised if a state party decides not to extradite an accused person. This obligation is set out in Article 7. This does not mean that such an accused must be prosecuted, but that the case must be investigated and dealt with in the ordinary way by the authorities of the state party.

The crimes of torture, aiding and abetting torture, and attempted torture (*Quaere*: conspiracy to torture?) are deemed by Article 8 to be extraditable offences in any extradition treaties between state parties, and Article 9 requires such states to co-operate duly with one another *vis-à-vis* any prosecutions related to such offences.

Article 10 of the Torture Convention is one that imposes enormous obligation upon a state party. Under it “education and information regarding the prohibition of torture must constitute an integral part of the training of civil and military personnel in charge of law enforcement, of medical personnel, of public officials and of other persons involved in the custody, interrogation or treatment of arrested, detained or imprisoned persons in the state [concerned]”.

China is a complex society with a variety of bureaucratic structures that will be affected by Article 10. It requires a large number of state departments to educate and re-educate personnel and then monitor the way in which personnel behave in that regard. This imposes a huge burden in terms of resources upon all state parties, but is a burden

that must be met if the Torture Convention is to be effected. The process itself may take many years to achieve its goals, it may cause adverse political and workplace responses along the way, but it must occur. It is the implementation of this provision together with Article 11 that truly measures a state party's will to comport to the values and duties contained in the Convention.

Article 11 obliges states parties to supervise and review its methods of interrogation as well as the way in which people are held in custody, detention or imprisonment. The state's competent authorities must ensure that a prompt and impartial investigation of complaints of torture is made (Article 12), and that individuals' complaints are dealt with seriously (Article 13). A state must also ensure that witnesses and the complainant of torture are neither intimidated nor ill-treated (Article 14).

In China it also means that the system of "fanren guanli fanren" whereby "cell bosses" participate in the administration of provisions by assisting cadres to [control] prisoners and [punish] the recalcitrant should be reviewed, with a view to its abolition.

The obligation, contained in Article 13, to provide adequate redress and compensation for persons tortured is a far-reaching one. It may involve medical and social rehabilitation of the victim as well as compensation for the injuries sustained. It is usually insufficient to make provision for the victim to merely have the right to sue the torturer, unless the state recognises that it is vicariously responsible for the acts of such a functionary.

One of the most important provisions of the Convention is Article 16 which prohibits cruel, inhuman or degrading treatment or punishment. This article's implementation by China has caused concern in the CAT, particularly in regard to prison

conditions and way in which capital punishment is carried out. The traditional methods of executing some criminals by shooting in public were thought by the CAT to be in breach of Article 16 and it is noteworthy that the Chinese government in its 3rd Periodic Report reported that it had altered its practices in this respect to allow the option of lethal injection and that executions would no longer be carried out in public. In China, this requirement will need resource allocation to the penal system and may even involve further changes to the circumstances in which capital punishment is carried out.

3. Some General Matters

To this point I have concentrated on issues that will be thrown up in China applying the Torture Convention. But all Human Rights Treaties raise general matters of implementation as well. These include:

(a) Structural Compliance

Human Rights Treaties very often require a State party to change its domestic law and practices to conform to the obligation contained in them. This may mean enacting or amending domestic legislation, altering administrative and executive practices, or changing the effect of judicial decisions.

(b) Education and Re-education

Very often Human Rights Treaties contain norms and standards that are absent or contrary to those observed by domestic functionaries. This imposes a primary obligation upon State Parties to ensure that officials involved in the field of implementation are

intellectually and professionally prepared for it. The most difficult task is to modify the behaviour of those already in the field. Hopefully, this can be achieved by persuading them by re-education of the moral desirability of observing the new standards of behaviour. But where this cannot be done effectively powerful sanctions may have to be resorted to. These may range from matters of loss of promotion opportunities (or actual demotion or transfer) to penal sanctions in extreme cases.

As well, a concentrated effort should be made to sensitise the *whole population* to the values in the Universal Human Rights Treaties. Schools, colleges and universities should reflect in the content of their curricula the values that underpin the treaties.

(c) Resources

It is a given that the internal structural shift and any sea-change in a society's basic value-system is going to be associated with considerable costs. This means that a state will have to prioritise its reform needs and act upon the most urgent as a matter of necessity. Since no state has unlimited resources, it probably means that no state has the capacity to meet all the obligations of these treaties at the outset.

But over time a focused and properly funded reform programme could substantially achieve the treaties objectives.

(d) Political Will

Human Rights Treaties are usually (and some like the Torture Convention are exclusively) concerned with the conduct of state agents *vis-à-vis* individuals and collectives. Bureaucrats, and particularly police, prison and armed forces personnel, are

by their own culture prone to follow not only the orders but also the perceived or intuited objectives of their supervisors and superiors.

It is crucial to the success of the Torture Convention's implementation anywhere that the line officers understand that the managers and executive of the state agency concerned are committed to the values contained in it and to ensuring their enforcement.

In a country like China, which is vast in size but has a centralised government system, it means the Beijing must by clear direction advise all national and provincial institutions of it's commitment to the Torture Convention. It also means that the PLA command, and the Executives of the police, prison and other relevant agencies must also issue clear directives to their personnel to like effect. Conduct in breach of the Torture Convention's obligations must be swiftly and effectively dealt with. Administrative detention is still reported to occur in China, and few detainees get access to counsel within 48 hours, notwithstanding the profound Criminal Procedure Reforms of 1997. Torture still occurs¹⁸, but the most heartening feature is that some prosecutions may take place as a result of more vigorous procuratorial policy in this respect¹⁹.

(e) The Role of Non-Governmental Organisations

One of the most problematic questions for China in the implementation of the Human Rights Treaties is the role of Non-Governmental Organisations (NGO's). Much of the impetus for human rights based reform in international relations has originated out of the agendas and work of these bodies, such as Amnesty International and Asia Watch.

NGO's act as a spur to government action, including compliance with treaty obligations, by attracting media attention and sometimes even participating in the formal

legal process. As well, they provide treaty monitoring bodies with relevant information when those bodies are considering state reports.

In short, they are an integral part of the process of oversight and enforcement of such treaty obligations and their political influence throughout the work cannot be ignored.

The NGO tradition in China is not so deeply imbedded in the traditions of politics and culture as they are in the West. But even in the West the modern expression of the NGOs is essentially a post-World War II phenomenon. China will probably have to come to terms with their activities at home as well as abroad. If it is able to do so it will learn that the resources and commitment of the NGO community can be greatly enabling and not only a political nuisance.

No government enjoys criticism from any source, but particularly not from those perceived to be professional critics. But NGOs tend to attract young, energetic, idealistic and creative members who, in all likelihood, would prefer to assist in implementing the terms of Human Rights Treaties rather than to be forced to provoke their own government into doing so. If China can harness the energy and co-operation of domestic NGO groups its own task in implementation will be that much easier to accomplish.

Conclusions

From this brief examination of China's application of the Torture Convention a few fairly impressionist conclusions may be drawn:

- (a) The Criminal Procedure reforms of 1997 have completely altered the legal framework in favour of basic human rights in the criminal justice system in a

formal sense. But, in implementation the reforms still have a long way to go.

Administrative detention still persists and this condition very often leads to torture by public officials upon detainees. Judicial oversight of police conduct is still slight and access to counsel in a timely manner is honoured very often in the breach. The questions remains: is there real political will to implement the 1997 reforms fully?

- (b) There has been progress over the past fifteen years, but it is slow and halting.

- (c) Radical Islamist terrorists will put pressure on all governments, including China, to resort to torturous methods to obtain confessions and information that may protect the state from terrorist acts. The Torture Convention is clear; its terms must be observed even in the face of the most vile and threatening conduct of others. States party to the Torture Convention must resist the “siren call” of torture as an easy method of obtaining such information. To do otherwise is to breach the convention²⁰.

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² U.N. Charter, Art. 2(1).

³ *Ibid*, Art. 2(3) and (4)

⁴ *Ibid*, Chapter IV

⁵ *Ibid*, Chapter XV

⁶ *Ibid*, Chapter V, particularly Art. 24

⁷ *Ibid*, Chapter VIII

⁸ *Ibid*, Art. 51

⁹ *Ibid*, Art. 52

¹⁰ These are: the International Covenant on Economic, Social and Cultural Rights 1966; the International Covenant on Civil and Political Rights, 1966 (and its Optional Protocol, in force 1976); the International Convention on the Elimination of All Forms of Racial Discrimination 1965; the Torture Convention 1984; the Convention on the Elimination of All Form of Discrimination Against Women 1979; the Convention on the Rights of the Child 1989; and the Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families 1990.

¹¹ U.N. DPI/1394-39399 – August 1993-20M

¹² *Ibid*, para 55

¹³ The CAT has given a broad construction to the concept of “acting in an official capacity”: see *Elmi v. Australia*, Communication No. 120/1998

¹⁴ Torture Convention, Art. 2(1)

¹⁵ See the views of Lord Browne-Wilkinson in *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet (No. 3)* [1999] 2 W.L.R. 827, at 842 (H.L.)

¹⁶ See the decision of the International Court of Justice, *Democratic Republic of the Congo v. Belgium*, Feb. 14th, 2002

¹⁷ Torture Convention, Art. 5(2)

¹⁸ But the Chinese authorities are this year dealing with it very seriously: see the report by Xinhua News Agency, May 18th, 2005

¹⁹ See the account in Xinhua News Agency, May 26th, 2005, whereby the Supreme People’s Procuratorate is reported that it will “focus on crimes like inquisition by torture, extorted confessions, [and] illegal detention...”

²⁰ As the English novelist and poet, John Milton, in his monumental work, Paradise Lost, Book iv, line 393, expressed it:

“So spake the Fiend, and with necessity,
The tyrant’s plea, excus’d his devilish deeds.”