The Prohibition of Torture in Canada and Vietnam Through the Lens of International, Constitutional and Criminal Law

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Introduction

This paper provides a critical overview of the issue of torture in Canada and Vietnam through the lens of international, constitutional and criminal with a particular focus on the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. The comparison between Canada and Vietnam is justified on the basis that "Canada as a nation [has] a well-deserved reputation as a leading nation in the field of human rights."[1] The author submits that the similarities and differences between the two countries may be beneficial to the debate surrounding the legal issues raised by the prohibition of torture.

1. International Law and the Prohibition of 'Torture'

Since torture mainly targets an attack on the life and physical integrity of a person, they are formally prohibited in international law by various conventions. When defining the concept of 'torture' in the international law, the literature, according to Rodley, focuses, among some legal instruments[2], on definitions contained in the 1975 United Nations Declaration against Torture[3] and the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[4] ('Convention against Torture') as well as "on the case law of bodies set up human rights treaties prohibiting torture ... even though the treaties may not themselves contain a definition of torture."[5]

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[1] See, e.g., Senate of Canada, *Report of the Standing Senate Committee on Human Rights*, December 2001. Retrieved online: https://sencanada.ca/Content/SEN/Committee/371/huma/rep/rep02dec01-e.htm
[2] For example, UN General Assembly (1966) International Covenant on Civil and Political Rights, Treaty Series, 999, 171.
[3] UN General Assembly, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 December 1975, A/RES/3452(XXX).
[4] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465.
[5] Nigel S. Rodley, 'The Definitions of Torture in International Law' (2002) 55 Current Legal Problems (Oxford University Press).

The Convention against Torture defines 'torture' as:

> 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 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.

In a nutshell, other international legal instruments provide about 'torture':

- *Universal Declaration of Human Rights 1948*

  Article 5: "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."

- *International Covenant on Civil and Political Rights 1966*

  Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

- *United Nations 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*

  Article 3: "No State may permit or tolerate torture and other cruel inhuman or degrading treatment or punishment."

The prohibition of torture became a norm of customary international law and was also crystalized in the *Rome Statute of the International Criminal Court*.[6] Its Article 7(2)(e) defines 'torture' in the context of 'crimes against humanity' as follows:

> 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The International Criminal Tribunal for the former Yugoslavia ('ICTY') has also explored the definition of torture. In the *Furundžija* case[7] decided in 1998, the ICTY set out standards in international law on the issue of torture and cruel, inhuman and degrading treatment. In its judgment, the Trial Chamber of the ICTY stated:[8]

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[6] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998.
[7] *Prosecutor v. Anto Furundžija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998 [*Furundžija*]; see also *Prosecutor v. Delacic and* Others, 16 November 1998, case no. IT-96-21-T, para 454); *Prosecutor v. Kunarac*, 22 February 2001, case nos. IT-96-23-T and IT-96-23/1, para 466.
[8] *Furundžija*, ibid, para 148.

> States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. ... It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition.

In addition, "the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right."[9] In a classic passage of the *Barcelona Traction* case, the International Court of Justice ('ICJ') explained in an *obiter dictum*[10] the obligations *erga omnes* as follows:[11] "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."

Also, the ICTY stated that the "prohibition of torture has the value of *jus cogens*, that is to say that it became a peremptory norm of international law, which means that "the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community."[12] Article 53 of the *Vienna Convention on the Law of Treaties* ('VCLT') succinctly defines *jus cogens* as "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted"[13]

Further, the position of ICTY regarding the prohibition of torture as a norm of *jus cogens* was also adopted by the House of Lords in the United Kingdom in its decision regarding the former Chilean dictator Augusto Pinochet.[14] Moreover, it was also adopted by the European Court of Human Rights in its judgment *Al-Adsani v. The United Kingdom*.[15]

Summarily, in international law, "the two concepts [of *jus cogens* and *erga omnes*] may be distinguished by their role: the norms of *jus cogens* are said to be peremptory, the equivalent of imperative law, and are essential in international law; international obligations can also be

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[9] ibid, para 151.

[10] Ian Brownlie, *Principles of Public International Law* (Oxford, 4th ed, 1990), p. xlvii: "lesser propositions of law stated by tribunals or by individual members of tribunals; propositions not directed to the principal matters in issue." Nevertheless, "Judge Fitzmaurice acknowledged that comments made by the International Court by way of *obiter dicta* cannot have the authority of a judgment. Yet, he remarked, in the absence of international legislation, judicial pronouncements 'of one kind or another' are the principal instrument for the clarification and development of international law": Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford University Press, 2000) 7.

[11] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase*, International Court of Justice (ICJ), 5 February 1970, para 33.

[12] *Furundžija* (n 7) paras 153-154.

[13] *Vienna Convention on the Law of Treaties*, 1969 1155 UNT.S. 331. Its Article 64 narrowly describes the effect of the emergence of a new perepmptory norm of general international law (*jus cogens*).

[14] *R v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1999] 2 All ER 97.

[15] *Al-Adsani v. The United Kingdom*, 35763/97, Council of Europe: European Court of Human Rights, 21 November 2001, para 26.

of interest to all States, be *erga omnes*, giving everyone an interest in taking action and seeing to their application."[16]

The concept of *erga omnes* is broader (since it can, for example, be based on an international treaty) than the concept of *jus cogens* (that has a customary basis).[17] Most importantly, the *jus cogens* norms are "very exceptional" and come into play when, for example, "there is or would be a clear consensus for the protection of human rights, such as the prohibition of torture".[18]

a. Canada's Reception of International Law and the Convention against Torture

Canada has ratified various international human rights instruments aimed at prohibiting torture and other cruel, inhuman and degrading treatment or punishment. Because "in certain circumstances, the adjudication of questions of international law by Canadian courts will be necessary to determine rights or obligations within [the Canadian] legal system"[19], because the Convention against Torture is binding on Canada[20], and also because the question of 'torture' has been addressed by Canadian courts[21], it is worth to examine the interaction of international and domestic law

Beaulac notes that "[t]he traditional position about unimplemented treaty norms is the direct result of the so-called dualist approach to international convention"[22], i.e. "the legislative transformation of treaty obligations is required to incorporate them within the internal legal order of Canada".[23] Maxwell Yalden, former member of the UN Human Rights Committee, stated that "Canada is a dualist country where, in theory, [the Parliament] must legislate in order to bring an international treaty into Canadian law in order for it to be justiciable in the courts."[24]

However, van Ert criticizes the application in Canada of the dualist approach. He rather argues that Canada is neither dualist nor monist, but a hybrid of the two models.[25] Crawford describes 'monism' as a theory that "postulates that national and international law form one single legal order, or at least a number of interlocking orders which should be presumed to be coherent and consistent. On that basis, international law can be applied directly within the national legal order"[26] whereas "[d]ualism emphasizes the distinct and independent character of the

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[16] Stéphane Beaulac, *Précis de droit international public* (LexisNexis, 2012) 270 [translated from French by Sébastien Lafrance].
[17] ibid, 288.
[18] ibid, 271.
[19] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, para 49.
[20] See, e.g., *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, para 39.
[21] See, e.g., *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176.
[22] Stéphane Beaulac, 'The Suresh Case and Unimplemented Treaty Norms' (2002) 15 Revue québécoise de droit international 221, 222.
[23] ibid, 223.
[24] Maxwell Yalden, former member, United Nations Human Rights Committee, testimony before the Committee, 21 March 2005, cited in *Final Report of the Standing Senate Committee on Human Rights*, 'Effective Implementation of Canada's International Obligations with respect to the Rights of Children, footnote 16. Retrieved from: https://sencanada.ca/content/sen/committee/391/huma/rep/rep10apr07-e.htm#_ftn16
[25] See, e.g., Gib van Ert, *Using International Law in Canadian courts*, (Irwin Law, 2nd ed., 2008), 3-5.
[26] James Crawford, *Brownlie's Principles of Public International Law* (9th edition, Oxford University Press, 2019), 45.

international and national legal systems."[27] Regarding the application of these models in Canada, van Ert contends:[28]

> Canada's reception scheme is not as dualist as the orthodox approach to treaties may suggest. But the more important qualification of Canada's dualist stance, in my view, arises from Canadian judicial interpretive practices. For every Canadian decision affirming that treaties are not a source of law, often in the same decision, there is another argument that supports the counter proposition that Canadian courts strive to interpret domestic laws in conformity with the state's international legal obligations.

We will see an example of this latter approach to Canada's reception of international law later when we will discuss the Suresh decision rendered by the Supreme Court of Canada ('SCC').

b. Vietnam's Reception of International Law and the Convention against Torture

Since 1998, Vietnam has concluded or acceded to more than one thousand international treaties.[29] Therefore, the issues related to the reception of international law in Vietnam matters.

Nguyen, Phan and Freeman state that Vietnam follows a monist approach to the reception of international law.[30] However, because "Viet Nam decides on the incorporation of treaties into Vietnamese law on a case-by-case *basis*. It does not strictly follow the monist theory", contrary to what the latter author stated, "[n]or does [Vietnam] agree to the dualistic doctrine that international law must be transformed into national law to become domestically binding on a state".[31] Yen rather argues that "[a]lthough the Constitution of the Socialist Republic of Vietnam 2013 ('the Constitution') does not address the relationship between national law and international law, an examination of various legal documents suggests that it adopts a *modified monist* approach"[32]

In fact, beyond the controversy that exists in the doctrine between the dualist and monist models[33], there are practical issues regarding the reception of international law in Vietnam. For example, "there remains a very low uptake of international law by the Vietnamese judicial bodies in practice. ... There is no guidance on the explicit criteria to determine whether a treaty

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[27] ibid.
[28] Gib van Ert, 'Dubious Dualism: The Reception of International Law in Canada' (2010) 44 Val. U. L. Rev. 3, 931.
[29] Dr. Nguyen Thi Hoang Anh, Deputy Director, Department of International Law and Treaties, Ministry of Foreign Affairs of Vietnam, 'Law of treaties' (2005) Vietnam Law & Legal Forum. Retrieved from: https://vietnamlawmagazine.vn/law-of-treaties-3631.html (consulted on April 21, 2021).
[30] Lan Ah Nguyen, Hao Duy Phan and Jessye Freeman 'International and ASEAN Law in the ASEAN 10 National Jurisdictions: The Reception of International Law in the Legal System of Vietnam' *ASEAN Integration Through Law: The ASEAN Way in a Comparative Context* (Plenary on Rule of Law in the ASEAN Community). Retrieved from: https://cil.nus.edu.sg/wp- content/uploads/2016/08/SD_ES-ASEAN-10-Vietnam-study.pdf.
[31] Trinh Hai Yen, 'Part III International Law in Asian and Pacific States, Southeast Asia, Vietnam' in Simon Chesterman, Hisashi Owada, Ben Saul (eds.), *The Oxford Handbook of International Law in Asia and the Pacific*, 2019, 479-480.
[32] ibid, 478-479 (italics added).
[33] A.F.M. Maniruzzaman, 'State Contracts in Contemporary International Law: Monist versus Dualist Controversies' (2001)12 *European Journal of International Law* 2; see also Sébastien Lafrance, 'India, International Energy Law and Transboundary Environmental Harms' (IJPIEL, 5 April 2021). Retrieved from: https://ijpiel.com/index.php/2021/04/05/india-international-energy-law-and-transboundary-environmental-harms/ (consulted on April 19, 2021).

or which parts or provisions therein are 'explicit and specific' enough for direct implementation. Nor is there established procedure on how courts and state agencies would directly apply treaties."[34] This issue is not new. Before the most recent Constitution of Vietnam adopted in 2013, "the revised 1992 Constitution, as well as the Law on promulgation of legal documents enacted in 1996 and revised in 2001 and the 1998 Ordinance on conclusion and implementation of treaties, contain[ed] no provision relating to the application of treaties and the incorporation of treaties into Vietnam's legislation in general."[35] Mendez explains that "[b]y incorporation what is meant here is that the treaty is considered to become a binding part of domestic law."[36] In short, there was no guidance provided to Vietnamese courts and litigants regarding the application of treaties ratified or acceded to by Vietnam.

Thus, it is fair to wonder, based on the above-mentioned information and from a procedural point of view, about how treaties ratified or acceded by Vietnam are applied and incorporated into Vietnam's domestic law, and then, in turn, to wonder about how these treaties could be practically used and relied upon by domestic courts. In other words, it is difficult in such a context not to think, without proposing here a final answer in that regard, that perhaps international law may have been, at least in appearance, an empty shell in Vietnam's domestic law while being officially abide by at the international level.

Korenica and Doli recall that "[i]n the monistic doctrine, international law and national law always come together to form a single legal system. In monist models, a ratified international treaty forms part of the domestic legal order and is directly incorporated and often directly applied at the national level."[37] Therefore, if Vietnam genuinely follows either a 'monist' or a 'modified monist' model, as we have seen above, the lack of guidance in Vietnam's domestic law about how and when to apply these treaties would practically keep them out of reach, and in a somewhat legal vacuum before they may be applied in domestic courts. These treaties would still have, in principle, the force of law in Vietnam, but they would hardly be enforced by domestic courts for lack of understanding about their relevancy or their scope, for instance.

Vietnam signed the 1984 Convention against Torture in 2013. Its National Assembly ratified it in 2014. The State party's ratification occurred in 2015.[38] Immediately after ratifying the Convention against Torture, the Decision No. 364/QĐ-TTg approving its implementation in Vietnam was issued.[39] It is noteworthy to mention, however, that Vietnam did not accede to the Optional Protocol to the Convention against Torture[40], which established "a Sub-Committee for the Prevention of Torture that has authority to visit places of detention and to assess the conditions of that detention as a way to reduce the incidence of torture or cruel,

[34] (n 30).
[35] (n 29).
[36] Mario Mendez, 'The Legal Effects of Treaties in Domestic Legal Orders and the Role of Domestic Courts' in *The Legal Effects of EU Agreements* (2013) Oxford University Press, 17.
[37] Fisnik Korenica and Dren Doli, 'The Relationship Between International Treaties and Domestic Law: A View from Albanian Constitutional Law and Practice' (2013) 24 Pace Int'l L. Rev. 92 (2012), 94.
[38] Human Rights Committee, United Nations, International Covenant on Civil and Political Rights, 'Concluding observations on the third period report of Viet Nam', CCPR/C/VNM/CO/3, 29 August 2019, para 30(g).
[39] Nguyen Tung Lam, 'Công ước của Liên Hiệp quốc về chống tra tấn và các hình thức đối xử hoặc trừng phạt tàn bạo, vô nhân đạo hoặc hạ nhục con người và pháp luật Việt Nam về phòng, chống tra tấn' [*United Nations Convention against torture and brutal, inhuman or degrading treatment or punishment and Vietnamese legislation on prevention and combat of torture*] (October 29, 2020) Học viện lục quân (The Army Academy). Retrieved online: http://hvlq.vn/tin-tuc/tin-quoc-te/cong-uoc-cua-lien-hiep-quoc-ve-chong-tra-tan-va-cac-hinh-thu.html (consulted on April 21, 2021).
[40] (n 38), para 4(b).

inhuman or degrading treatment or punishment."[41] In addition, Vietnam eluded the potential scrutiny of international justice tribunals by making it clear that it is not bound to submit disputes concerning the interpretation or application of the 1984 Convention against Torture either to arbitration or to the ICJ.[42]

Even though the official message conveyed by Vietnam in 2017 was that "[i]nternational treaties to which Viet Nam is a party, including the [Convention against Torture], have been incorporated into domestic laws"[43], Tung Lam Nguyen writes in late 2020 that "Vietnam *does not directly apply* the provisions of the Convention against Torture, but the implementation of the Convention will comply with provisions of the Constitution and the laws of Vietnam."[44] This raises an important question: why Vietnam does not directly apply, for instance, this convention when it is a 'monist' or 'modified monist' State (as identified as such by some authors) since it should apply international law "directly within the national legal order"[45] according to the monistic model of reception of international law? A possible explanation could perhaps be that Vietnam is, contrary to what has been stated by some authors, like Canada, i.e. neither dualist nor monist, but a hybrid of the two models.[46]

In light of the above, the implementation of the legal standards established by the Convention against Torture in Vietnam's domestic courts, for example, remains a concern. This should be understood in the context where one of the rules of particular importance for international law, *pacta sunt servanda* (treaties must be executed)[47], applies to the treaties ratified and acceded to by Vietnam since it became a party to the VCLT in 2001.[48] The VCLT provides, under its Article 26, "Every treaty in force is binding upon the parties to it and *must be performed* by them in good faith".[49] Thus, even though "States are free to determine how they meet their international obligations" and even though "international law leaves it to the domestic legal order to determine how it gives effect to its treaty obligations in the domestic legal arena"[50], States must still *entirely* meet their treaty obligations at the domestic level, not only at the international level, and then ensure their application.

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[41] Alice Edwards, 'The Optional Protocol to the Convention against Torture and the Detention of Refugees' (2008) 57 The International and Comparative Law Quarterly 4, 789.
[42] (n 31), 494 referring in the relevant footnote to Viet Nam's reservation to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed 10 December 1984, entered into force 26 June 1987).
[43] United Nations Committee against Torture, Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure, Initial report of States parties due in 2016, Viet Nam, CAT/C/VNM/1, 13 September 2017, para. 8 *in fine*.
[44] (n 39) (italics added). In the original: "Việt Nam không áp dụng trực tiếp các quy định của Công ước chống tra tấn, mà việc thực hiện Công ước sẽ theo quy định của Hiến pháp và pháp luật của Việt Nam" (italics added) [translated from Vietnamese by Sébastien Lafrance].
[45] (n 26).
[46] See, e.g., (n 25).
[47] See, e.g., А. А. Краевский, 'Исследования права с позиций социальных и гуманитарных (неюридических) наук' [*Legal Research from the standpoint of social and humanitarian (non-legal) sciences*] (2021) 12 Вестник Санкт-Петербургского университета – Право [*Bulletin of the University of Saint-Petersburg - Law*] 1, 193. Retrieved from: https://lawjournal.spbu.ru/ [translated from Russian by Sébastien Lafrance].
[48] (n 29).
[49] (n 13) (italics added).
[50] Mendez (n 30) 2.

2. Fundamental Rights

Because "the question of how norms of public international law are received into domestic legal systems is largely a matter of constitutional law"[51], but keeping in mind that it would go beyond the scope of this paper to examine closely the details of constitutional law in Canada and Vietnam, our analysis will still benefit from doing first a short review of the general principles that apply in the context of the prohibition of torture in both countries.

In Canada, the *Canadian Charter of Rights and Freedoms*[52] (hereinafter '*Charter*') enacted in 1982 guarantees the basic rights and freedoms of all Canadians that are considered essential in the Canadian society. In Vietnam, the fundamental rights of Vietnamese citizens are provided by the most recent constitution, the 2013 Constitution of Vietnam.

a. Fundamental Rights in Canada and Torture

With respect to the risk of torture, sections 7 and 12 of the *Charter* apply more particularly, even if torture is not expressly mentioned. These sections read as follows. Section 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 12: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." It is these articles that are primarily examined by Canadian courts in their analysis of the validity of a decision approving the extradition of a person, for example, to a country where he or she is at risk of being subjected to torture or cruel treatment.

These two sections should not leave unnoticed the clause "permitting reasonable limitations on the right if those limits are justified and proportional".[53] These limitations are established by section 1 of the *Charter*. The seminal decision of the SCC that interpreted this section is the oft-cited decision *R. v. Oakes* that was rendered in 1986. It is still applied nowadays. It "created what is called the 'Oakes test' in Canadian constitutional law. This legal test applies, explained summarily, in cases where there is a *Charter* breach of a right or a freedom in order to determine whether such a breach could be 'justified in a free and democratic society'".[54] In plain terms, this means that "all *Charter* rights and freedoms can be limited by the State."[55]

In that respect, Bird submits that "there are potential candidates for 'absolute' status", which means that their breach may not be justified via the application of the Oakes test. He suggests that "[t]he right 'not to be subjected to any cruel and unusual treatment or punishment' guaranteed by section 12 is one"[56], implying that this right is not currently absolute. This goes in line with what the Human Rights Committee recommended to Canada in its Consideration of Reports Submitted by States Parties under Article 40 of the *International Covenant on Civil and Political Rights*, i.e. Canada "should recognize the absolute nature of the prohibition of

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[51] (n 28), 927.
[52] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982 c. 1 ('*Charter*').
[53] Rosalie Silberman Abella, 'Freedom of Expression or Freedom from Hate: A Canadian Perspective' (2018) 40 Cardozo L Rev, para 518. The Honorable Justice Abella was the most senior puisne judge of the Supreme Court of Canada ('SCC') in 2021. She retired from the SCC in the summer of 2021.
[54] Herlambang P. Wiratraman and Sébastien Lafrance, 'Protecting Freedom of Expression in Multicultural Societies: Comparing Constitutionalism in Indonesia and Canada' (2021) 36 Yuridika 1, 84 footnote 64.
[55] Brian Bird, 'Are All *Charter* Rights and Freedoms Really Non-Absolute?' (2017) 40 Dalhousie Law Journal 1, 108.
[56] ibid, 116.

torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from."[57]

As the SCC recalled in the decision *Suresh v. Canada (Minister of Citizenship and Immigration)* ('*Suresh*'), "When Canada adopted the *Charter* in 1982, it affirmed the opposition of the Canadian people to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12."[58] Section 12 of the *Charter* protects against "cruel and unusual treatment or punishment", although the more common language in international and comparative human rights instruments is that of "cruel, inhuman, or degrading treatment or punishment". The *Charter* was enshrined in the Canadian constitution, and then the rights and freedoms it provides have a fundamental value in the Canadian society.

The prohibition of torture applies not only to acts committed directly by the Canadian State, but also to its decisions to extradite a person to a country where these practices are still present. One of the most important Canadian cases that addressed this issue is the *Suresh* decision. Manickavasagam Suresh was a Sri Lankan citizen of Tamil descent. In 1991, he was recognized as a refugee. However, in 1995, he was subject to deportation orders from Canada on security grounds. These reasons were based on an opinion of the Canadian Security Intelligence Service to the effect that Suresh belonged to the Liberation Tigers of Tamil Eelam ('LTTE') and would collect funds for them. The LTTE was engaged in acts of terrorism in Sri Lanka and its members are at risk of torture there. The SCC examined the Canadian context in the Suresh decision and found that "torture is seen in Canada as fundamentally unjust."[59] It also observed that there are "compelling indicia [at the international level] that the prohibition of torture is a peremptory norm."[60]

Nevertheless, the SCC circumscribed in *Suresh* the application of international law in Canada in the following terms:[61]

> International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations *qua* obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.

More recently, in the decision *India v. Badesha* rendered in 2017, the SCC noted that the inquiry of a court reviewing the decision of the Minister of Justice to extradite an individual to his or her country of origin "is not whether there is no possibility of torture or mistreatment, but whether it was reasonable for the Minister to conclude that there was no substantial risk of torture or mistreatment"[62], which would offend the principles of fundamental justice.[63]

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[57] UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations, Canada*, 20 April 2006, CCPR/C/CAN/CO/5, para 15.
[58] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at para. 51.
[59] ibid.
[60] ibid, para 62 and ss.
[61] ibid, para 60. This goes in line with what stated Ruth Sullivan, *Driedger on the Construction of Statutes* (Toronto: Butterworths, 3rd ed., 1994) 330, i.e. international law, both customary and conventional, is part of the legal context of statutory interpretation; see also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para 70.
[62] [2017] 2 S.C.R. 127, para 62.
[63] ibid, para 43; section 7 of the *Charter*.

Arguably, this legal standard alone could potentially leave room for quite unfortunate situations where torture or mistreatment may still occur. However, another layer of protection for such individuals exists. Indeed, the SCC recalls that "[w]here the Minister is satisfied that the person sought for extradition does not face a substantial risk of torture or mistreatment and that his or her surrender is compliant with the *Charter*, the Minister must nonetheless refuse the surrender [of an individual] if he or she is satisfied that it would be otherwise unjust or oppressive."[64]

Harrington criticizes Canada's extradition process in the following manner:[65]

> It is worrisome that a country committed to a principled foreign policy does not insist that its extradition partners be parties to the Convention Against Torture. This treaty provides more than support for the customary rule that prohibits the sending of an individual to face a substantial risk of serious ill-treatment. It also imposes a legal requirement for regular state reporting to an independent, international, treaty-monitoring body, with monitoring mechanisms, whether consular or otherwise, viewed as an important safeguard to enhance the reliability of a diplomatic assurance.

That being said, it must be noted that, in spite of these general reporting obligations, Vietnam's non-accession to the Optional Protocol to the Convention against Torture, as we have seen earlier, would not make possible for Canadian authorities, for instance, to require the supervision of Sub-Committee for the Prevention of Torture to monitor the situation of an individual surrendered from Canada to Vietnam.

b. Fundamental Rights in Vietnam and Torture

Summarily, the legal framework of Vietnam includes "36 articles in Chapter II of the 2013 Constitution of Viet Nam regulating on human rights, fundamental rights and obligations of citizens, including ... the right not to be subjected to torture."[66]

The right not to be subjected to torture, cruel, inhuman or degrading punishment or treatment is provided by Article 20 paragraph 1 of the 2013 Constitution as follows: "Everyone has the right to physical inviolability and to have their health, honor and dignity protected by law; the right not to be subjected to torture, violence, coercion, applying corporal punishment or any other form of treatment which involves in physical violation or violation of health, honor and dignity".[67]

However, acknowledging the various amendments brought to various legal instruments of Vietnam[68] in order to meet its international obligations, including the prohibition of torture, the question remains as to how compliance with the fundamental rights provided by the Constitution and the laws of Vietnam be eventually verified and reviewed by courts when courts in Vietnam has a "low or no independence[, which] directly influence[s] the

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[64] ibid, para 53. See also *Németh v. Canada (Justice)*, [2010] 3 S.C.R. 156, para. 56.
[65] Joanna Harrington, 'Extradition, Assurances and Human Rights: Guidance from the Supreme Court of Canada in India v. Badesha' (2019) 88 *Supreme Court Law Review* 273, 291-292.
[66] (n 43), para. 6. Retrieved from: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/VNM/1&Lang=en.
[67] ibid, para 7.
[68] For an entire list and discussion of the amendments, see (n 38).

implementation of basic human rights, especially rights of individuals"?[69] An independent court that does constitutional judicial review is a crucial legal body to exercise "a restriction on the abuse of state power, [it] indirectly protects basic rights by maintaining mechanisms for human rights protection stipulated in the constitution and restricting the abuse of state power."[70]

3. Criminal Law

Even though the jurisprudence plays a major role in its interpretation and the establishment of rules and legal tests, the main source of criminal law in Canada is the *Criminal Code*.[71] Vietnam has its *Penal Code*, which most recent version was adopted by the Vietnam's National Assembly in 2015[72] and took effect on the first day of 2018.

a. Criminal Law in Canada and Torture

Paragraph 4 of the Convention against Torture that clearly stipulates that "Each State Party shall ensure that all acts of torture are offences under its criminal law". Because Canada follows the dualist model when it comes to the incorporation of treaties into its domestic, one "way to implement a treaty in Canada is to amend domestic law to bring it into conformity with the treaty's requirements, without expressly mentioning the treaty in the amending legislation."[73] This is exactly what Canada did regarding this obligation provided by the Convention against Torture by enacting section 269.1 of the *Criminal Code*.[74]

This section defines torture at the hands of a public official as "any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for purposes including "intimidating or coercing the person". It practically means, as noted by the SCC in *Kazemi Estate v. Islamic Republic of Iran*, that "[i]f the Canadian government were to carry out acts of torture, such conduct would breach international law rules and principles that are binding on Canada, would be illegal under the *Criminal Code*, and would also undoubtedly be unconstitutional."[75]

b. Criminal Law in Vietnam and Torture

Quý Vương Lê, Deputy Minister of Public Security of Viet Nam, reported in 2018 to the Committee against Torture of the United Nations Human Rights Office of the High Commissioner that "[i]n 2015, the [Vietnam's] National Assembly had amended many

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[69] Do Minh Khoi, 'The Impact of the Rule of Law on Protection of Human Rights in Vietnam' (2016) Asia-Pacific Journal on Human Rights and the Law 17, 18
[70] ibid, 19.
[71] R.S.C., 1985, c. C-46.
[72] The Vietnam's National Assembly adopted Resolution No. 41/2017/QH14 dated 20 June 2017 on the implementation of Penal Code No. 100/2015/QH13 dated 27 November 2015, amended and supplemented by Law No. 12/2017/QH14.
[73] Gib van Ert, 'Canada' in David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement* (Cambridge University Press, 2010) 169-170.
[74] ibid, 170 footnote 12.
[75] (n 21) para. 52.

important laws and regulations pertaining to the prevention of torture, including the Criminal Code [and] the Criminal Procedure Code".[76]

He added that "[a]lthough the 2015 Criminal Code *did not define a separate offence of torture*, it did define crimes such as 'the use of corporal punishment' and 'obtaining testimonies under duress' as offences that in their nature constituted torture."[77] For example, Article 373 of the Vietnam's Criminal Code titled 'Use of Torture' covers possible cases where a person "who, in the course of proceedings, trial, or implementation of measures including mandatory attendance at a correctional institution or rehabilitation center, uses torture or brutally treats or insults another person in any shape or form".

This is a step in the right direction, but this may not comply directly with paragraph 4 of the Convention against Torture. In fact, the United Nations Human Rights Committee expressed concerns in 2019 regarding the absence of criminalization of torture in Vietnam.[78] The Committee then recommended that Vietnam amend its criminal law to *explicitly criminalize* acts of torture and include a definition of torture in conformity with international standards, and preferably by also codifying torture as an independent crime.[79]

Conclusion

The issue of torture is never to be taken lightly. The presentation and the discussion of Canada's and Vietnam's legal reality regarding the question of torture in light of international law but also through the lens of their respective domestic law allowed us to observe some similarities and differences between the two countries. There remains serious legal issues to be explored for both countries. The author hopes to have contributed with this paper, said with the utmost humility, to this important debate.

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