TORTURE, INTERNATIONAL LAW AND THE ENIGMA OF PREVENTION*

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The purpose of this short paper is to offer an overview of the requirements of international law on the prevention of torture and some comments about the national mechanisms established to meet these obligations, by way of introducing the broader question – sadly unanswered – of what effect interventions aimed at torture prevention actually have.

While discussion about torture prevention now tends to focus on the Optional Protocol to the UN Convention Against Torture (OPCAT) and the role of visiting mechanisms, both national and international, the prohibition of torture in international law has given rise to a far more extensive prevention regime. The Convention against Torture (UNCAT) itself is a blueprint for prevention, not only with measures such as procedural reform and training of personnel, but also with criminalization of torture, universal jurisdiction over the crime, the obligation to prosecute or extradite alleged torturers, and the provision of redress to victims. In the context of the UNCAT, all these are understood to have a primarily preventive function.

The singularity of the OPCAT lies in the creation of an international mechanism with the power to visit closed institutions in States Parties, as well as in the obligation on states to create a national mechanism charged with implementing its treaty obligations. The latter aspect, which emerged almost serendipitously from the drafting process, marks the latest high point in the evolution of national human rights institutions as agents of international law.

However, if the obligations of states with regard to torture prevention are clear, the actual impact of this portfolio of prevention techniques is much more opaque. Indeed, it is not entirely apparent how far a reduction in the risk of torture may be determined by far broader political and social factors, rather than deliberate preventative interventions. There is an urgent need for a more systematic understanding of the determinants of risk and the impact of specific preventive measures.

Torture prevention – the international legal regime

Discussion of the role of torture prevention, especially since the adoption of the OPCAT has tended to focus on one particular aspect that is highlighted by that radical and innovative treaty: the visiting mechanism. I do not want to deny the centrality of this aspect, which will no doubt dominate discussions in this particular forum. However, it is important to stress that it is not only the OPCAT, but the UNCAT that has the preventive purpose at its very core. Indeed, it has been remarked of the UNCAT that nowhere does it actually require states to refrain from acts of torture or other ill-treatment.[1] Of course, the prohibition of torture is well-established in international law,

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not only as a treaty obligation (the International Covenant on Civil and Political Rights), but as customary international law and, arguably, a *jus cogens* or peremptory norm.[2] The UNCAT elaborates that prohibition, for example in its very precise, if sometimes controversial, definition of torture, and in its clear requirement that the prohibition remain absolute even in the most extreme and exceptional circumstances. Primarily, however, the UNCAT is aimed at prevention – a purpose that is clearly stated in Article 2(1). The point is worth making because, alongside various measures commonly considered to have a direct preventive function – such as reform of procedures and training of personnel – the UNCAT also includes a series of other obligations usually only considered indirect in their preventive effect. These include the criminalization of torture in municipal law, the exclusion of evidence obtained through torture, the exercise of universal jurisdiction over the crime of torture, and the obligation to prosecute or extradite alleged torturers. It is also worth remarking, although it will not be explored further here, on the strong restatement of the principle of *non-refoulement* in Article 3. Prompt investigation of allegations of torture and the right to redress are also presented in such a framework that it is apparent that they are intended to be understood as a part of the panoply of preventive techniques.

It should not be any surprise to see criminal punishment and civil redress for torture understood in such a way. The argument for breaking the "cycle of impunity" in transition from regimes with poor human rights records has never been primarily punitive. The persuasive argument for transitional justice has always been the deterrent effect of prosecution in preventing future recurrence of torture and other serious human rights violations.[3]

The OPCAT and national human rights institutions

From the foregoing it is clear that the claim that the OPCAT is the first purely preventive human rights treaty is somewhat wide of the mark. It exists as an adjunct to the UNCAT and is properly understood in that context. However, this is not to detract from the truly radical character of the institutional preventive regime that the OPCAT creates.

The idea for the OPCAT dates from the 1970s, as part of the same process that gave birth to the UNCAT. The Optional Protocol proposal was temporarily shelved in order to gain consensus behind the main treaty. The inspiration for the role of a visiting mechanism in torture prevention came from the work of the International Committee of the Red Cross (ICRC), which had by this stage of its existence secured the agreement of many governments to allow preventive monitoring visits to security detainees. This work was judged highly effective, but had two main limitations or drawbacks. First, ICRC access was entirely dependent upon the goodwill of governments. Unlike the role of the Red Cross in armed conflict, guaranteed in terms of the Geneva Conventions, the ICRC

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[1] Ahcene Boulesbaa, 'The Nature of the Obligations Incurred by States under Article 2 of the UN Convention against Torture', *Human Rights Quarterly,* 12/1 (1990), 53-93.

[2] Nigel Rodley, *The Treatment of Prisoners under International Law* (3rd edn.; Oxford: Oxford University Press, 2009). 65

[3] Richard Carver, 'Zimbabwe: Drawing a Line through the Past', *Journal of African Law,* 37/1 (1993), 69-81. That is my own take on the preventive function of breaking the cycle of impunity. There is, of course, a very extensive literature on the issue.

had no leverage other than any humanitarian supplies it might offer. Second, the ICRC's findings on the treatment of prisoners were strictly confidential.[4]

Given the connection to the ICRC experience, it is not surprising that the impetus for what became the OPCAT emanated from the Swiss Committee Against Torture (the forebear of the Association for the Prevention of Torture). With the OPCAT project stalled, attention was turned to Europe, where a new regional anti-torture instrument supplemented the prohibition of torture in Article 3 of the European Convention on Human Rights. In the Committee for the Prevention of Torture (CPT), with powers to visit closed institutions in States Parties, there was created the precursor of the UN Subcommittee for the Prevention of Torture (SPT).[5] (There was much intellectual anguish at the time – somewhat curious in retrospect – concerning whether the CPT would trespass on the prerogatives of the European Court of Human Rights in relation to Article 3.)[6]

When negotiations for the OPCAT resumed, a new element was introduced into the mix in an unforeseen fashion. Among some of the parties to the drafting process, there was disquiet at the implications of the powers proposed for an international visiting institution. In an attempt to break the deadlock, Mexico proposed the creation of a national-level visiting mechanism. This encountered initial resistance from some of the European and North American proponents of the treaty, on the assumption that a national mechanism was in some sense a weaker solution more susceptible to governmental pressure and manipulation.[7] In the end, of course, the rather extraordinary compromise was the inclusion of both national and international visiting mechanisms – and it is this combination that gives the OPCAT its unique character.

Since its expansion in 2010, the SPT is now the largest of all UN treaty bodies. Nevertheless, the quotidian work of torture prevention, including but not limited to the visiting mandate, rests overwhelmingly with the National Preventive Mechanisms. The adoption of the NPM concept represents the completion of a remarkable full circle. As far back as 1946 the UN Economic and Social Council proposed the formation of national human rights committees to monitor member states' adherence to the new universal human rights standards – an idea that met with little enthusiasm from the UN Commission on Human Rights and was repeatedly shelved.[8] National human rights institutions themselves emerged at the state level, driven by domestic priorities and conforming to local institutional models. Although the UN began to promote NHRIs in the 1970s, it was only after the formulation of the Paris Principles in 1991 and their subsequent endorsement by the Commission on Human Rights and the General Assembly that there were some general norms governing the structure, mandate and functions of NHRIs.[9] It was also at this point, with the creation of the post of UN High

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[4] Rodley, *The Treatment of Prisoners under International Law*. 231-2

[5] Malcolm Evans and Rod Morgan, 'The European Convention for the Prevention of Torture: Operational Practice', *International and Comparative Law Quarterly,* 41/3 (1992), 590-614.

[6] Antonio Cassese, 'A New Approach to Human Rights: The European Convention for the Prevention of Torture', *American Journal of International Law,* 83/1 (1989), 128-53.

[7] Malcolm Evans and Claudine Haenni-Dale, 'Preventing Torture? The Development of the Optional Protocol to the UN Convention against Torture', *Human Rights Law Review,* 4/1 (2004), 19-55.

[8] A-E Pohjolainen, *The Evolution of National Human Rights Institutions: The Role of the United Nations* (Copenhagen: The Danish Institute for Human Rights, 2006).

[9] Principles relating to the status and functioning of national institutions for protection and promotion of human rights (endorsed by UN Commission for Human Rights Res 1992/54 and UNGA Res A/RES/48/134 20 December 1993).

Commissioner for Human Rights, that a global impetus developed for the promotion of NHRIs and their role bridging the implementation gap between the international and domestic spheres. NHRIs have undertaking this "bridging" role in a number of ways, most of them foreseen with a greater or lesser degree of precision in the Paris Principles:

- Promoting ratification of international human rights instruments;
- Reviewing municipal legislation for conformity with international human rights law;
- Reporting to human rights treaty bodies;
- Working in conjunction with other NHRIs on the international stage;
- Using international law standards in monitoring, reporting and complaints-handling to elucidate or expand the scope or content of human rights.[10]

Comparing the rough and inexact formulations of the Paris Principles with the best contemporary practice offers a good picture of the enormous progress that NHRIs have made as agents of international law. It is these developments that laid the basis for the NPM function in OPCAT and made its success a feasible prospect.

When the OPCAT came into force and the first tentative steps were taken towards creating NPMs, it was immediately apparent that, however influential the development of NHRIs had been on the emergence of the NPM model, the relationship between the old and new NHRI functions would be at best complex and at worst conflictive. At this point discussion focused on the fact that when existing NHRIs were designated as NPMs they would acquire a set of new legal powers (in many instances) that would enable them to do their existing work better. What has become increasingly apparent is that in times of straitened budgets the NPM functions, as treaty obligations, would almost invariably take precedence over "normal" NHRI work in closed institutions.

It is also apparent from the preceding discussion of the obligations of torture prevention in international law, that many of these fall within the "old" NHRI roles rather than the new NPM one: in particular, monitoring of incidence of torture, legal reform, training, redress mechanisms, and monitoring practice on refoulement all fall clearly within the competence of a Paris Principles-compliant NHRI (and largely outside the function of an NPM). How to reconcile these various preventive functions is one of the great unresolved challenges ahead.

The enigma: what prevents torture?

The UNCAT and the OPCAT between them present a considerable range of measures and interventions that States Parties are obliged to implement. These have been included, for the most part on the basis of common-sense assumptions about their effectiveness in preventing – or more precisely, reducing the risk of – torture. Most practitioners in the field could say with some confidence that ending incommunicado detention, for example, or excluding evidence obtained through torture would have an impact on its incidence. Of course, as legal norms many of these have a wider ethical basis, including the two just cited. Incommunicado detention has negative consequences even when it does not lead to torture. Using evidence from torture in legal proceedings risks

[10] Richard Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law', *Human Rights Law Review,* 10/1 (2010).

miscarriages of justice. However, in most instances these various norms for torture prevention exist more because they feel *right* than because there is an evidentiary basis for their role in reducing the risk of torture. Yet any effective torture prevention strategy must surely be evidence-based, in both a broad and narrow sense. The broad sense means to understand what are the factors that lead to a reduction in the incidence of torture. The narrow sense is to understand the impact of particular interventions.

Yet the literature is extremely sparse, especially when it is set alongside the numerous exegeses of the legal norms. More attention has been paid to psychological and sociological explanations of *why* people torture than the factors that lead to a decrease (or increase) in the phenomenon.[11] We do not even know with any certainty the relative importance of specific preventive interventions of any type and more general political and social preconditions. What research there is reinforces the common-sense assumption that democracies are less likely to torture than autocracies and that the risk of torture increases when there is a threat of violent insurrection or terrorism.[12] (There has been neglect of other relevant factors, such as the existence of serious crime involving drugs or armed robbery.) Likewise the assumption that social outsiders – "the other" – are at particular risk of torture tends to be confirmed.[13]

There are (at least) four methodological obstacles that make this an extremely difficult line of inquiry, but its importance means that approaches need to be adopted that address these concerns.

Evaluating the impact of human rights interventions

There are two underlying problems connected with human rights impact assessment (referring here to what Landman calls direct impact assessment – that is the effect of deliberate interventions intended to improve human rights[14]). First, there is little doubt that large scale changes in human rights result from a variety and combination of factors, making it impossible to attribute change with any certainty and difficult to assess different contributions. There is a second obstacle, which is how it is possible to measure the degree of respect for human rights, whether at any given moment or over time. This is perhaps more difficult in relation to torture than any other human rights issue, because of the absence or unreliability of data (see below).

Evaluating prevention

Strictly speaking, determining the effectiveness of preventive activities is establishing whether events that would otherwise have happened have not happened, as a result of the activities. While any impact assessment has a counterfactual element to it – addressing the question of whether events would (or would not) have occurred given different conditions – the attempt to establish a negative in this instance poses almost insoluble problems.[15] It is certainly possible to envisage a hypothetical situation in which

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[11] Most famously Philip G. Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (New York: Random House, 2007).

[12] Courtenay Ryals Conrad and Will H Moore, 'What Stops the Torture?', *American Journal of Political Science,* 54/2 (2010), 459-76.

[13] Christopher J Einolf, 'The Fall and Rise of Torture: A Comparative and Historical Analysis', *Sociological Theory,* 25/2 (2007), 101-21.

[14] Todd Landman, *Studying Human Rights* (London: Routledge, 2006).

[15] However, for the counterfactual element in comparative case studies, see Charles C. Ragin and John Sonnett, 'Between Complexity and Parsimony: Limited Diversity, Counterfactual Cases and Comparative

preventive activities were deemed effective in mitigating torture, even when the actual incidence of torture had increased.

Quantifying torture

Underlying all these methodological challenges is, of course, the immense difficulty in determining whether torture has taken place and quantifying its incidence. The very nature of torture means that it is usually an event that takes place secretly without any formal record.

Many global comparative indices use general measures of the presence or absence of torture, usually derived from international NGO reporting or sources such as the US State Department Human Rights reports. These are usually unconvincing as a precise index of the occurrence of torture and next to useless when the intention is to measure change over time.

Another approach is to use reports of torture, usually through official mechanisms, as an indicator of the incidence of torture. The problem with this is that the increase in reports may be primarily an indication of the existence of an effective reporting mechanism – a development that may actually be associated with a decline in the incidence of torture at the very moment when its reporting increases.

None of this is to say that torture can never be quantified. It may, for example, be possible to use a technique such as multiple systems estimation to infer the incidence of torture, although this is dependent on the presence of multiple agencies reporting cases of torture.[16]

Measuring risk

Finally, the real measure of the effectiveness of torture prevention is how far the *risk* of torture has been reduced. Yet the indicators that are usually selected for reduction of risk – for example by the Office of the UN High Commissioner for Human Rights[17] – are to a large extent the very same preventive measures whose effectiveness we wish to evaluate. Hence the process is completely circular. Further indicators of risk are needed that are independent of the preventive interventions being evaluated.

Conclusion: a proposed research agenda

Anecdotal evidence (perhaps more properly described as "thick" qualitative data) will tell us something of what worked to reduce the risk of torture in particular instances. We know, for example, that in Georgia it was a multi-faceted approach by the NHRI, involving treaty ratification, legal reform, training and public exposure of torture. In the Maldives it has been a highly effective and innovative NPM within an existing NHRI. In

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Analysis', in Sabine Kropp and Michael Minkenberg (eds.), *Vergleichen in Der Politikwissenschaft* (Wiesbaden, 2004).

[16] Multiple systems estimation is a statistical technique used with success by several truth commissions, particularly in Latin America, to estimate unknown populations of victims of gross human rights violations: Landman, *Studying Human Rights*. 117ff.

[17] *Report on indicators for promoting and monitoring the implementation of human rights*, HRI/MC/2008/3, 6 June 2008.

Turkey it has been a variety of institutional and legal reforms introduced by a government in a state with no NHRI. In each of these instances – which could be multiplied – the improvement took place within a favourable political context. What these examples fail to tell us with any certainty is what combination of factors would work in any other given circumstance. So, interesting as they are – perhaps even inspiring in some cases – they do not work as a guide to action.

Global surveys are of limited use too, primarily because they rest upon indices that are unreliable for the reasons indicated above. We must be prepared to consider the counter-intuitive, and perhaps unwanted, conclusions that they sometimes throw up: that countries with multiple accountability mechanisms are more likely to torture;[18] that ratification of human rights treaties correlates positively with increased human rights violations.[19] But we must remain deeply sceptical and certainly not act precipitously on these findings (such as abolishing the independence of the judiciary or arguing against treaty ratification!)

The research agenda that is called for is one that takes the "thickness" of qualitative case studies and refines it with sufficient parsimony that it becomes directly comparable with other instances.[20] It is of the utmost importance, not only for scholars but also for policy makers and activists, to understand which are the necessary factors to reduce the risk of torture, and also which are the sufficient ones. If this is a question that cannot be answered – and no one has offered a completely compelling solution yet – then at least let us make a spirited effort.

In the shorter term, valuable work is possible assessing the impact of particular interventions. When regular visits to closed institutions are conducted, it will be possible to track the incidence of relevant indicators over time. Other types of common intervention, such as training, could easily be evaluated more effectively than they usually are.[21]

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[18] Conrad and Moore, 'What Stops the Torture?'
[19] Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?', *Yale Law Journal,* 111 (1935-2042.
[20] Charles C. Ragin, *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies* (Berkeley: University of California Press, 1987).
[21] Richard Carver, 'Assessing the Effectiveness of National Human Rights Institutions', (Versoix: International Council on Human Rights Policy, 2005).