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The Principal Approaches to Preventing Torture

1 THE DILEMMA OF THE PERSISTENCE OF TORTURE

Secrecy or concealment is one of the distinguishing features of modern torture; its commission is almost always shielded from public view.¹ And yet, largely due to the work of individuals, communities, and organizations dedicated to exposing the incidence of torture and its devastating effects, since the early 1970s, we have witnessed the emergence of extensive engagement across the globe with the reality of torture and the challenge of how to eradicate it. Torture has been subject to extensive activism and advocacy, principally through transnational and local human rights nongovernmental organizations (NGOs) seeking to prevent its use and to bring perpetrators to justice and justice to victims,² as well as through the work of health professionals developing treatment for torture survivors at both an individual and a community level.³ At the same time, scholars have studied torture through various disciplinary lenses (moral philosophy, political science, law, history, trauma studies, literature, and public health) with a range of goals. These include formulating and articulating the reasons why we ought to recognize torture as an absolute wrong (or, in fewer cases, articulating moral justifications for the

¹ Darius Rejali, *Torture and Democracy* (Princeton, NJ: Princeton University Press, 2009). The most famous rendering of the shift from the public exhibition of torture to its movement into spaces of detention is provided in Michel Foucault's *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (New York: Vintage, 1977).

² The key international human rights NGOs such as Amnesty International and Human Rights Watch have worked extensively on torture, but there are also specialist international anti-torture NGOs such as the APT, the World Organisation Against Torture, DIGNITY, and Redress, as well as a plethora of domestic-level NGOs that work on torture prevention at the more local level.

³ The International Rehabilitation Council for Torture Victims is the international umbrella organization comprising approximately 140 torture rehabilitation and treatment organizations in about seventy countries.

use of torture), tracing how torture has been used and how techniques of torture have been transmitted across history and context, documenting its effects, uncovering its causes, identifying ways of healing its victims or discouraging its perpetrators, and working out how we might create a world without it.⁴

Already in the wake of revelations of the Nazis' use of torture, its absolute condemnation was codified in the earliest global human rights treaty, the Universal Declaration of Human Rights (Article 5), adopted in 1948, and subsequently enshrined in the International Covenant on Civil and Political Rights (Article 7), adopted in 1966. Heightened publicity of the use of torture even after countries had ratified this convention, principally in the authoritarian regimes of Latin America, but also by the British in the context of Northern Ireland and somewhat earlier by the French in Algeria and Indo-China, catalyzed vigorous anti-torture activism. Then, in 1984, as a result of this early advocacy, torture became the subject of a new distinct international treaty – the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), more commonly known as the Convention Against Torture.⁵ Indeed, within the human rights canon, torture is held to be such a grave violation that in customary international law the right to be free from torture is considered one of the few non-derogable rights, meaning that it cannot be suspended or compromised under any circumstances – not war, not a state of emergency, and not even a hypothetical ticking time bomb scenario.⁶ Of course, this formal legal insistence on non-derogability has not been transposed into more popular

⁴ The literature is too vast to reference but key texts across these different disciplines include Manfred Nowak, Elizabeth McArthur, and Kerstin Buchinger, *The United Nations Convention against Torture: A Commentary* (Oxford: Oxford University Press, 2008); Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010); Rejali, *Torture and Democracy*; Sanford Levinson, *Torture: A Collection* (Oxford: Oxford University Press, 2004); Metin Başoğlu, *Torture and Its Consequences: Current Treatment Approaches* (Cambridge: Cambridge University Press, 1992); Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985); Talal Asad, "On Torture, or Cruel, Inhuman, and Degrading Treatment," *Social Research* 63, no. 4 (1996).

⁵ Matthew Lippman, "The Development and Drafting of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," *Boston College International and Comparative Law Review* 17 (1994).

⁶ On non-derogability, see Article 4 of the ICCPR and the Committee Against Torture, General Comment 2, Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007). The ticking time bomb scenario asks that we imagine that a detainee knows where a ticking time bomb is and asks whether one would be justified in using torture to obtain this information. It has been subject to extensive philosophical debate, but see in particular Henry Shue, "Torture in Dreamland: Disposing of the Ticking Bomb," *Case Western Reserve*

views about torture, where it is precisely these types of circumstances that are almost always invoked by those who wish to defend the use of torture.⁷

Nevertheless, within the human rights world, and building on the foundations of this international legal condemnation, since the 1980s we have witnessed the development of a considerable suite of organizations, programs, projects, strategies, and tools aiming to prevent torture. Such strategies include advocating for states to ratify the UNCAT and complementary regional human rights treaties condemning torture; pushing for the enactment of domestic laws implementing international legal standards, specifically by criminalizing torture and compensating victims; developing mechanisms for monitoring places of detention; researching when, where, and how torture is occurring and then exposing the practices and shaming perpetrators of torture; seeking to bring about reforms in the criminal justice system, including the development of laws concerning admissibility of evidence obtained under torture; developing codes of conduct for professionals who may be directly or indirectly involved in torture (prosecutors, judges, police, doctors, and so on); tracing and seeking to prevent the distribution of instruments of torture; and training security sector and law enforcement personnel in the norms and laws regarding torture. Such initiatives have been driven and implemented by international institutions such as the UN Special Rapporteur on Torture and the Organization for Security and Co-operation in Europe (OSCE), transnational NGOs like Amnesty International and the APT, and a myriad of domestic NGOs and civil society organizations, and they have been funded by a range of international organizations like the European Union and human rights-oriented foundations.

And yet, torture persists, and in many parts of the world, it remains endemic.⁸ Indeed, since the world learned that the United States and its allies

Journal of International Law 37 (2005); Robert Brecher, *Torture and the Ticking Bomb* (Malden, MA: John Wiley & Sons, 2007).

⁷ For examples of such popular debates, see PBS: Public Broadcasting Service, “The Torture Question,” *Frontline*, PBS, October 18, 2005, www.pbs.org/wgbh/pages/frontline/torture; “Is Torture Ever Justified?,” *The Economist*, September 20, 2007, www.economist.com/node/9832909. For a more recent discussion of contemporary debates concerning the ethics of torture and “ticking time bomb” justifications, see Rebecca Gordon, *Mainstreaming Torture: Ethical Approaches in the Post-9/11 United States* (Oxford: Oxford University Press, 2014). My reference to popular debates should not imply that the use of torture is not also defended in the academy. See, for example, Alan M Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, CT: Yale University Press, 2002).

⁸ Arguments concerning the persistence of torture can be found in Jeremy Wisniewski, *Understanding Torture* (Edinburgh: Edinburgh University Press, 2010), 1–3; Rejali, *Torture*

systematically used torture in the War Against Terror,⁹ and even more so since US officials at the highest levels endorsed the use of torture against those labelled terror suspects,¹⁰ we have reason to conclude that the headwind that had gathered behind an at least nominal global endorsement of the absolute norm against torture has lost some of its force. This lapse is by no means because the opponents of torture have quelled their efforts. Rather, the voices of those who endorse, or probably more often of those who accept the instrumental justifications for, torture have been bolstered by a shifting global discourse in which security now poses serious competition to human rights as an organizing norm guiding law and policy.¹¹ Even aside from the attacks on the United States on September 11, 2001 and the subsequent War Against Terror, and their effects on global politics and discourses, evidence indicates that in many parts of the world, significant proportions of populations have never ceased seeing torture as justified, necessary, or appropriate under certain circumstances.¹² For some, torture is justified by extreme threats posed to civilian populations, or more accurately by extreme threats that they fantasize might be minimized by torturing suspects or their associates. For others, torture is seen as appropriate when you are dealing with certain types of people. As we repeatedly heard in our research in Nepal and Sri Lanka, when confronted with hardened criminals, those thought to be uneducated or uncivilized, and even young people who use drugs, “there is nothing much wrong with police giving them a beating.”

This situation presents us with a dilemma. How is it that even as we have seen a substantial expansion in the intellectual, organizational, and financial

and Democracy. The detailed country reports of the UN Special Rapporteur on Torture provide perhaps the most accurate and up-to-date information at a global level. Links to a broad range of country-specific studies can be found on the Atlas of Torture, www.univie.ac.at/bimtor/countrymap.

⁹ See Greenberg and Dratel, *The Torture Papers*.

¹⁰ Mark Danner, “Torture and Truth,” *New York Review of Books* 35 (2004).

¹¹ Often adopting the idea of “human security,” there are those who still argue that security and human rights are complementary, not antagonistic, as against those who insist that security may require the compromise of human rights. See Benjamin J Goold and Liora Lazarus, eds. *Security and Human Rights* (Oxford: Hart Publishing, 2007).

¹² For findings on public opinion, see Steven Kull et al., *World Public Opinion on Torture*, Program on International Policy Attitudes, University of Maryland (2008), http://worldpublicopinion.net/wp-content/uploads/2016/06/WPO_Torture_Jun08_packet.pdf; Peter Miller, “Torture Approval in Comparative Perspective,” *Human Rights Review* 12, no. 4 (2011). More recently, questions on attitudes to torture were also included in International Commission of the Red Cross, “People on War: Perspectives from 16 Countries” (Geneva: ICRC, 2016). On the significant methodological problems with drawing conclusions based on public opinion surveys, see Paul Gronke et al., “US Public Opinion on Torture, 2001–2009,” *PS: Political Science and Politics* 43, no. 3 (2010).

energies invested in preventing torture, the problem persists with such tenacity? There are a few ways one might answer this question, but even before one considers those answers, it's worth pausing and reflecting on the robustness of the question itself. For, although we know that torture persists, the data that we have and evaluation studies available to us do not put us in a sound position to come to clear or robust conclusions about how much impact existing efforts have had. In the absence of reliable, longitudinal data and rigorous social scientific evaluation, we can draw no definitive conclusions about how effective torture prevention strategies have been. And we never have access to the counterfactual: what torture rates would look like had these interventions not been made. In the absence of a counterfactual that might offer a comparison – a world without anti-torture campaigns or the suite of other strategies – we cannot know how much worse matters might have been. Indeed, as I will discuss in Chapter 2, studies that have been conducted on the effectiveness of torture prevention strategies come to inconsistent conclusions.¹³ Nevertheless, as a prerequisite to thinking through, developing, and implementing prevention strategies for the future, it is important to take stock of the approaches that have been adopted in the past to get as accurate a read as possible of whether they have been effective, what about them has or has not been effective, and why. After all, the modern human rights movement is now less than seventy years old, and the dedicated fight against torture really less than forty years old.

To do this, we would do well to try to work out how existing strategies conceived of the causes of torture, how they imagined that what they were doing would affect those causes, whether their practice in fact matched their plans, and what their actual effects were. To this end, this chapter sets out the principal prevention approaches that have been developed and pursued since the mid-1980s and tries to make explicit the intervention logic or ToC that underpins them. As discussed in the Introduction, all human rights interventions are based on a ToC, or a theory about what causes the violation and how what one is doing will shift those causal dynamics, even if this theory is (as is often the case) only implicit. Making explicit the implicit Theories of Change of existing prevention strategies places us in a better position to engage critically with their understanding of causality and the efficacy of the strategies they suggest for addressing the identified causes. Having laid out these approaches, and the Theories of Change that underpin them, in Chapter 2 I will turn to what we know about their effectiveness. First

¹³ Emilie M Hafner-Burton and James Ronn, "Seeing Double: Human Rights Impact through Qualitative Eyes," *World Politics* 61, no. 2 (2009).

though, some greater specificity of the object of our analysis, torture, is in order.

2 WHAT DO WE MEAN WHEN WE TALK ABOUT TORTURE?

From the bird's eye view of international law, definitions of torture are relatively straightforward. The definition set out as Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and accepted in international customary law specifies that:¹⁴

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.

This definition seems to afford a fair amount of specificity, at least insofar as it sets out explicit criteria for the types of acts that count as torture. These include criteria concerning the effects that an act has to have if it is to be torture (severe pain and suffering), the required state of mind of the perpetrator (intentionality and having specific purposes in mind), the types of actors whose actions can count as torture (public officials or those acting in this capacity), and the purposes toward which they must be acting (to obtain information or a confession, to punish, to intimidate, to coerce, or for other reasons based on discrimination).

What, though, about the other acts specified in the name of the convention, that is, cruel, inhuman, or degrading treatment or punishment? These are defined with far less clarity, and in fact one can find no internationally agreed-upon legal definition for them. The general consensus is that these different forms of treatment can be placed on a continuous scale of increasing severity leading up to torture. At the same time the UN Human Rights Committee has held that it is not necessary to establish sharp distinctions between the different

¹⁴ On the acceptance of this definition as customary international law, see International Criminal Tribunal for the former Yugoslavia (ICTY), December 10, 1998, *Prosecutor v. Anto Furundzija* [1998] ICTY 3, § 160.

kinds of treatment or punishment and that such distinctions depend on the nature, purpose, and severity of the treatment applied.¹⁵ Similarly, the European Court of Human Rights has noted that as societal expectations of standards of treatment increase, acts can move from the lower to higher categories, thus acknowledging the historical nature of the definition.¹⁶

One way of handling this apparent definitional slide (between what we ought to call torture and what we ought to call degrading treatment) is to deem that all of the acts named here need to be the targets of preventative work. This decision would be formally justified insofar as they are all prohibited, and substantively justified because all are deeply harmful in the obvious sense of causing direct damage to the dignity, health, and integrity of the victims as well as to their families and communities.¹⁷ In this regard, one enters dangerous territory when one presumes that the severity of the act, measured according to some putatively objective metric, is correlated with the gravity of the harm. Indeed, when researchers have looked at how victims experience the damage caused by torture and other forms of inhuman and degrading treatment, focusing on effects such as depression, post-traumatic stress, and long-term psychological damage, they have come to the conclusion that the perceived distress and uncontrollability of the treatment matters more than the “class” of violence.¹⁸ At the same time, all of these acts engender a far broader type of damage – to the trust that citizens have in the state and security forces, to the integrity of the rule of law, and to the social and political fabric of a political community in which power is exercised through inflicting such arbitrary, unpredictable, and severe violence. In this respect, the political, social, and institutional damage caused by the more extreme acts that we

¹⁵ UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), Human Rights Committee, General Comment 20, Article 7, § 4.

¹⁶ *Selmouni v. France* (1999) 29 EHRR 403, at para.101.

¹⁷ On the physical effects of torture, see Anne E. Goldfeld et al., “The Physical and Psychological Sequelae of Torture: Symptomatology and Diagnosis,” *Journal of the American Medical Association* 259, no. 18 (1988). On psychological effects on victims, see Zachary Steel et al., “Association of Torture and Other Potentially Traumatic Events with Mental Health Outcomes among Populations Exposed to Mass Conflict and Displacement: A Systematic Review and Meta-Analysis,” *Journal of the American Medical Association* 302, no. 5 (2009); Ellen Gerrity, Terence M. Keane, and Farris Tuma, *The Mental Health Consequences of Torture* (New York: Springer Science & Business Media, 2001).

¹⁸ Metin Başoğlu, Maria Livanou, and Cvetana Crnobarić, “Torture vs Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?,” *Archives of General Psychiatry* 64, no. 3 (2007). On broader family impacts, see Jeremy Woodcock, “Healing Rituals with Families in Exile,” *Journal of Family Therapy* 17, no. 4 (1995). On the collective trauma associated with torture, see Jack Saul, *Collective Trauma, Collective Healing: Promoting Community Resilience in the Aftermath of Disaster* (New York: Routledge, 2013).

might call torture, and that tend to occur under particular political conditions, and the damage caused by those forms of violence that are more pervasive and normalized in the day-to-day operation of certain security agencies, may have a somewhat different accent, but are both highly corrosive. For the purposes of this analysis, then, I will not distinguish between those acts that might formally be considered torture and those that might attract one of the “lesser” designations. Rather, I refer to the entire scale as “torture.”

Insisting that for definitional purposes the full scale of acts be designated torture should not be taken as implying that from a substantive point of view, they all fall into a single category. Nor does it imply that once we understand the torture that takes place under conditions of heightened conflict or in the context of extreme political repression, we also understand the torture that occurs as a matter of routine in police stations throughout the world. On the contrary, as I suggested in the Introduction, the causal dynamics associated with the types of torture that attract the most public attention, torture ordered by political elites against high-value detainees, are importantly different to the dynamics associated with routinized and everyday beatings, often of members of marginalized groups. The failure to distinguish between these quite disparate scenarios will impede our ability to develop strategies appropriate to each. As will become apparent in this study, my principal interest lies not with what I refer to as the sharp and spectacular end of torture, but rather with the broad base, the more commonplace and everyday forms of torture that pervade security institutions in their routine activity, rather than their exceptional activities.

Indeed, a further reason for placing all these forms of ill-treatment under the same designation of absolutely prohibited acts is precisely to erect a barricade against the contestation that we so often hear concerning what ought to count as “real” torture.¹⁹ As the definition cited at the start of this section indicates, the UNCAT does not provide a list of prohibited acts, nor do any of the authoritative interpretations (such as General Comments of the Committee Against Torture). This is intentional.²⁰ To do so would risk acts that had not been anticipated escaping the definitional net. The downside of guarding against preemptive exclusions is that the lack of act-specificity opens the space for arguments to be made that certain forms

¹⁹ Doris Graber and Gregory Holyk, “What Explains Torture Coverage during War-Time? A Search for Realistic Answers,” in *Terrorism and Torture*, edited by Werner GK Stritzke et al. (New York: Cambridge University Press, 2009).

²⁰ As the Human Rights Committee states, it does not “consider it necessary to draw up a list of prohibited acts”: UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), Human Rights Committee, General Comment 20, Article 7, § 4.

of violence committed against people in detention are not actually torture, and such arguments are perennial. The most well known were those set out in the infamous US torture memos, where advisors in the administration of President George W Bush argued that even extreme acts of violence such as prolonged standing, sleep deprivation, and exposure to excessive light and noise did not constitute torture because they did not cause pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”²¹ The extremity and blatant manipulation of the official definition evident in this argument made it an obvious and highly remarked upon affront to legitimate definitional interpretation, but it is only an example of a far more widespread practice.

The Bush-era torture memos provide the most vivid example of the attempt to try to pull the definition so far back as to exclude from its ambit some of the most extreme forms of torture, but in fact, it is generally at the “lower end” of the scale that this type of contestation occurs. Security personnel and others within the criminal justice system who swear their allegiance to the norm against torture may well, at the very same time, reject the idea that “a few slaps” or a beating for someone from a marginalized group really constitutes torture. By so doing, they manage to continue to assert that they condemn torture as an absolute wrong; but the wrong to which they are referring is one that occurs somewhere else, and is far graver than anything they are doing or authorizing. The result of this definitional slippage is that there may appear to be normative agreement between human rights defenders and security personnel, and often there is at a nominal level. It is when we dig a bit that we discover that our agreement was only possible because we were assuming different referents. We cannot take for granted that the word carries a universal designation in *use*; and this is even before we get to the more difficult and obviously politicized contestation about when circumstances require that our moral judgments be modified. In this latter case, people might even agree that an act constitutes torture, but the moral inflection of this designation may vary among them, depending on the circumstances of its use. In such cases, even denotative agreement belies a vast gap in what different people believe follows from this designation. Torture, in other words, never simply names a positive act, it also always includes a moral judgment.

²¹ This specific definition was set out in the memo sent from Assistant Attorney General Jay S Bybee to Alberto R Gonzales, Counsel to the President, on August 1, 2002. See Greenberg and Dratel, *The Torture Papers*, 172ff.

What this opens up is a problematic set of questions about meaning – problematic for both conceptual and moral reasons. This is not the place to enter into complex discussions of theories of meaning and the philosophy of language, but as soon as we start thinking hard about torture and the business of preventing torture, we find ourselves mired in precisely the questions that these branches of philosophy seek to understand.²² Does the word “torture” designate an objectively verifiable set of actions in the world in a way that would (or should) attract universal assent (as my initial discussion suggested)? Or is it more context dependent, with different people having different understandings in accordance with its localized use? This latter understanding would be consistent with the empirical evidence, which shows us that differently placed people do understand torture as referring to different types of acts and different types of situations. It would also be consistent with the argument of hermeneutic philosophers such as Gadamer, who insists that it is impossible to escape prejudicial interpretations of the world, because these are the windows to our experience.²³ If this is the case though, how do we justify the distinction between understandings and uses that are better or worse in some absolute sense?

From the point of view of those defending human rights and seeking to prevent torture, and even more so from the point of view of those who experience torture, even to ask these questions may seem like a dangerous, if not unethical enterprise, ushering in the very moral relativity that the human rights idea was established to expunge and that human rights defenders have been working to combat. And they would be right. Torture has a particular set of referents and a particular moral inflection: it is an absolute wrong. Insisting on this understanding has been one of the most important achievements of the international human rights movement.

And yet, effectively working with people who do not accept this definition and normative stance may sometimes require more than the unbending assertion of this position and insisting that it is the only possible stance a reasonable and ethical person could take. A more active interest in how those who disagree are making sense of the world and how their understanding of torture is embedded in their broader worldview and environment, how it is, in short, contextually and historically produced, may, under certain

²² I have in mind here principally Wittgenstein’s challenges to traditional theories of meaning and his contention that meaning is use, and the vast literature surrounding these debates. Ludwig Wittgenstein, *Philosophical Investigations (PI)*, 4th edn., edited and translated by PMS Hacker and Joachim Schulte (Oxford: Wiley-Blackwell, 2009).

²³ As Gadamer puts it, “Prejudices are biases of our openness to the world.” Hans-Georg Gadamer, *Philosophical Hermeneutics* (Berkeley, CA: University of California Press, 1976), 9.