1. Addressing torture: an introduction

Malcolm D Evans and Jens Modvig

Torture is a difficult word. Whilst casually used by some to describe things they do not like or do not enjoy, for others it recalls the extremes of human suffering and of indescribable pain, both mental and physical.¹ For some, that pain has been their own, whilst for others that pain has been the focus of their attention in many different ways, for example, as medical practitioners seeking to address the needs of victims through various means or as lawyers seeking to secure redress and hold those responsible to account. Civil society has been heavily engaged in shedding light upon the continued practice of torture, and the international community has been mobilised, through regional and international organisations – as well as through bilateral and other multilateral channels – to address the continuing evil of torture in the contemporary world.

There remains, however, a deep-seated ambiguity concerning responses to torture. The moral opprobrium which attaches to torture – sometimes described as the ‘special stigma’² – is such as to seemingly mark it out as amongst the most forbidden of practices. The 1984 United Nations Convention against Torture makes it clear that ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture’.³ Indeed, in the language of the international lawyer, the prohibition of torture is recognised as being a norm of ‘ius cogens’⁴ – a prohibition which overrides any other legal obligations which a state might have. Yet the reality is that torture remains widely practised, and, even if not always condoned, is all too often the subject of justification by those who have resort to it. The second chapter in this collection, by Michelle Farrell, explores the arguments of those who suggest that terrible times can justify the commission of terrible crimes, and in particular the torture of those who might be in possession of information which, if discovered, might save the lives of others. The enduring appeal of this argument, despite the evidence that it is fundamentally misconceived, requires that it be addressed at the outset.

If the appeal to necessity is shown to be false, it becomes necessary to consider whether it is possible to take steps to combat the continued prevalence of torture. In many ways, this is the leitmotif of this Handbook, as it seeks to explore various dimensions of contemporary responses to torture. Can this ever be successful? Clearly, attending to the medical, psychological and social needs of victims can yield its own successes (though the impacts of torture on its victims are often enduring – indeed, lifelong); likewise, the prosecution and punishment

¹ See generally Scarry, E (1985) *The Body in Pain* (Oxford University Press).

² See, for example, *Ireland v the United Kingdom*, 18 January 1978, Series A no 25, para 167; *Selmouni v France* [GC], no 25803/94, ECHR 1999-V, para 96 and many others.

³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, Article 2(2).

⁴ *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, p 99, para 99.

of perpetrators. But is it possible to stop torture from happening in the first place? The third chapter of this book, by Richard Carver and Lisa Handley, drawing on the fruits of the most extensive research yet conducted into the efficacy of preventive methodologies, seeks to show that it is. The challenge, then, is to bring this about. Before doing so, however, the third chapter offers a timely reminder that there is a great deal more to the practice of torture than its use in extreme situations, or, indeed, in routine detention. Tobias Kelly, Steffen Jensen and Morten Koch Andersen cause us to reflect on other factors which feed the prevalence of torture, and which concern the vulnerability of marginal communities and the inequalities and corruptions which characterise so many countries and so many systems and places of detention.

As these chapters demonstrate, there are many dimensions to, and perspectives on, the question of addressing torture, both substantively and methodologically. No one approach, or combination of approaches, can make any valid claim for priority, let alone exclusivity. This permits a Handbook of this nature to surmount what might otherwise have been a near-insuperable problem: how to tackle the subject, and with what focuses? The only 'right' answer to this conundrum is to accept that no single work can satisfactorily engage with the issues which torture presents. Rather than seek to justify its approach in the face of competing alternatives, this Handbook simply embraces its potential to contribute towards an understanding of the responses to torture in the 21st century. It claims to be neither comprehensive nor definitive.

It does, however, claim to draw on the experiences of the editors and authors of this introduction, who at the time of writing occupy the positions of Chair of the UN Committee against Torture (Jens Modvig), established by the UN Convention against Torture,⁵ and Chair of the UN Subcommittee on Prevention of Torture (Malcolm Evans), established by the Optional Protocol to the UN Convention against Torture.⁶ This unique collaboration between the Chairs of the two bodies established by the global community by means of internationally legally binding treaties immediately defines its approach and frame of reference, and does so unashamedly. It is an approach founded on the prohibition of torture and cruel, inhuman and degrading treatment and punishment as a matter of international human rights law, and reflects the authors' personal expertise, which they bring to its realisation, in the fields of medicine and of international law.

Against this background, the logic of this Handbook becomes self-evident. A first set of chapters explore aspects of the protections from torture established through international law, followed by a second set of chapters which explore both the phenomenon of torture and responses to it from a medical perspective. Chapter 5, by Moritz Birk and Manfred Nowak (a former UN Special Rapporteur on Torture) present a 'tour de horizon' of the prohibition of torture in its many dimensions, both procedural and substantive. This is followed by a series of chapters which look in further detail at the work of bodies established within the UN system which have a particular focus on torture. Chapter 6, by Christof Heyns, Carmen Rueda and Daniel du Plessis, looks at the work of the UN Human Rights Committee (of which Christof Heyns is a member) concerning Articles 7 and 10 of the International Covenant on Civil and

⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 3 above).

⁶ Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237.

Political Rights⁷ which set out the prohibition of torture and ill-treatment within the framework of the 'UN Bill of Rights'. This is followed in Chapter 7 by a detailed examination of the work of the UN Committee against Torture by Felice Gear, who was a member of this body for 20 years. This is a particularly interesting as well as important Committee, combining as it does the tools of both international human rights protection, through the use of reporting, communication and inquiry procedures, with the oversight of Convention obligations concerning the establishment of torture as a transnational crime open to domestic prosecution by any state party.

Of course, treaties only bind states parties – and although today there are approaching 170 states parties to the Convention against Torture, it was not always thus, and there are a considerable number of states who are still outside of its system. However, they are not beyond the reach of UN mechanisms, and Chapter 8 looks in detail at the mandate of the UN Special Rapporteur on Torture, one of the oldest of the Special Procedures of the UN Human Rights Council (and of the Commission on Human Rights before it). This is written by Juan Mendez – a former Special Rapporteur himself – and Andra Nicolescu, who amply demonstrate both the power and the reach, but also the limitations, of that mandate and how it sits alongside those other bodies within the UN system which have previously been considered.

Of course, international legal prohibitions on torture do not exist only at the level of the UN: each of the principal regional systems for human rights protection also have mechanisms whose work needs to be explored. To this end, Chapter 9, by Christine Bicknell, gives an overview of various mechanisms operating within the European space which address questions of torture, and of torture prevention. Whilst this naturally includes the various bodies and mechanisms established under the auspices of the Council of Europe, and in particular the European Convention on Human Rights⁸ and the European Convention for the Prevention of Torture,⁹ it also looks at the work of the European Union and touches on that of the Organisation on Security and Cooperation in Europe too. Chapter 10 pursues the regional approach, with Diego Rodríguez-Pinzón, currently a member of the UN Committee against Torture, introducing the architecture and jurisprudence of the system of protection established by the Organization of American States, through both its Charter¹⁰ and the Inter-American Convention on Human Rights.¹¹ Particular attention is paid to the innovative jurisprudence developed within the system concerning awards of interim measures, which can play a vital role in both protecting potential victims, staying abusive practices and bringing those responsible to justice. This set of chapters focusing on regional approaches is completed by a chapter looking at the African Charter on Human and Peoples' Rights,¹² and other bodies working within the framework of

⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) ETS no 5.

⁹ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 26 November 1987, entered into force 1 February 1989) ETS no 126.

¹⁰ Charter of the Organization of American States (1948), Treaty no A-41, OAS Treaty Series nos 1C and 61, Article 53.

¹¹ American Convention on Human Rights (adopted 22 November 1969, entered into force 16 July 1978), Treaty no B-32, OAS Treaty Series no 36.

¹² African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), OAU Doc CAB/LEG/67/3 rev. 5.

the African Union, by Lawrence Mute, himself a former member of the African Commission on Human and Peoples' Rights and Chair of the Committee for the Prevention of Torture in Africa. Once again, this chapter highlights distinctive aspects of the regional protective system, including its focus on promotional work, and the distinctive manner in which its jurisprudence is developing.

The primary focus of all of these chapters has been on the work of these various bodies established by international and regional treaties and organisations to help ensure that states comply with their obligation under international human rights law that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.¹³ Commonly referred to as reflecting the 'prohibition' of torture, this wording in fact goes further: it requires that not only should such actions be 'prohibited', in the sense that they are to be forbidden, but that 'no one shall be subjected' to such actions. This underlines the often-overlooked point that it is not enough that those responsible for torture be held to account, and victims supported: the obligation is that such actions should not occur at all.

From the point of view of the individual perpetrator, the prohibition means that their actions are wrongful and must be the subject of punishment. For the 'perpetrator state' (which cannot be held criminally responsible or 'punished' in the same manner as an individual), it means that they can be held to have been in breach of their obligations and must provide redress (in its several dimensions). From the point of view of the victim, however, the 'prohibition' of torture takes on a very different hue: the obligation of states is that 'no one shall be subjected' to such ill-treatment – and this requires that protections be in place which seek to ensure that this is so. Whilst there is truth in the old adage that 'prevention is better than cure', from a victim perspective it should not be a question of 'choice': if the obligation is properly realised then there should be nothing to 'cure', since the ill-treatment will not have happened. This leads us to the 'preventive' dimension of the international response to torture. Article 2 of the UN Convention against Torture expressly requires states to take steps to prevent torture and ill-treatment from occurring,¹⁴ and the Committee against Torture has spelt out the implications of this at some length in its General Comment on the subject.¹⁵

In their own ways, all the work surveyed in the chapters of this book contribute to the prevention of torture and the realisation of its prohibition. However, just as distinct methodologies have emerged for scrutinising the compliance of states with their international obligations (for example, through reporting processes), of challenging the conduct of states, their agents and those for whom they are responsible through international processes for their actions in specific cases, and of holding individuals personally to account at a national level through the application of criminal civil law processes, so also have specific methodologies of prevention emerged. In Chapter 12 Malcolm Evans explores the emergence of preventive visiting as a discrete preventive methodology and looks at the work of the European Committee for the Prevention of Torture,¹⁶ of the UN Subcommittee for Prevention of Torture¹⁷ (of which he is

¹³ Universal Declaration of Human Rights, UNGA Res 217A (III) (adopted 10 December 1948), Article 5.

¹⁴ Article 2(1) provides that 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.

¹⁵ UN Committee Against Torture, General Comment no 2, Implementation of Article 2 by States parties, UN Doc CAT/C/GC/2 (24 January 2008).

¹⁶ Established by the European Convention for the Prevention of Torture (n 9 above).

¹⁷ Established by the Optional Protocol to the UN Convention against Torture (n 6 above).

currently Chair) and of the domestic-level ‘National Preventive Mechanisms’¹⁸ which have been established to undertake preventive work based on visits to closed institutions.

Having looked at the ‘preventive’ response to torture, the next set of chapters move to aspects of the criminal law responses – which, as has been seen, are expressly called for by the UN Convention against Torture. Chapter 13, by Robert Cryer, sets out the parameters of the criminal law response by the international community. Whilst the UN Convention calls on states to make torture a criminal offence in domestic legal systems, he points to the fact that it has not yet been rendered an international crime as such. Rather, torture is recognised as an element of other international crimes, such as war crimes, crimes against humanity and genocide. Because of the way in which it ‘sits’ within these more generally framed international crimes, what ‘amounts’ to torture may vary from case to case – and it is certainly true that much of what is torture for the purposes of international human rights law falls beyond the scope of international criminal law itself. As a result, one must look to domestic jurisdictions to take up the burden of holding many perpetrators to account.

Domestic systems have other responsibilities which flow from the UN Convention in addition to that of prosecuting those suspected of torture. A first concerns the use of evidence. Article 15 of the UN Convention prohibits the use of statements made as a result of torture being used in criminal proceedings.¹⁹ By removing what is often thought to be a key ‘incentive’ to torture (particularly in legal systems which place a strong emphasis on confession-based evidence), this forms a vital element of the architecture of both prevention and of ensuring the integrity of the criminal justice system. The contours of the Article 15 prohibition are, however, opaque – and in Chapter 14, Matt Pollard explores its parameters in order to better understand its meaning and practical application. Another key element of the preventive architecture of the Convention is Article 3(1), which prohibits the return of a person to a state where they might face the risk of torture²⁰ and this is explored by Carla Ferstman in Chapter 15. This has proven to be one of the most fertile areas of activity for the Committee against Torture, which receives many claims concerning individuals who are challenging their removal,²¹ and domestic courts are playing an increasingly important role in ensuring that individuals are not placed in situations of risk.

But despite such safeguards, torture still takes place and perpetrators must be held to account. Since torture is so often undertaken by state officials, or is tolerated by them, there is often a reluctance to bring criminal charges against those responsible, despite the clear obligations in the UN Convention to do so. However, and as was emphasised in Chapter 13,

¹⁸ Designated as such in accordance with the Optional Protocol to the UN Convention against Torture (n 6 above), Articles 17–23.

¹⁹ Article 15 provides that ‘Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made’.

²⁰ Article 3(1) provides that ‘No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’.

²¹ The Committee Against Torture has also issued two General Comments concerning Article 3. See UN Committee Against Torture, General Comment no 1: Implementation of article 3 of the Convention in the context of article 22, UN Doc A/53/44 Annex IX, 16 September 1998; UN Committee Against Torture, General Comment no 4 (2017) on the Implementation of article 3 of the Convention in the context of article 22, UN Doc CAT/C/GC/4, 4 September 2018.

doing so has been greatly assisted by the recognition that torture, even if it is not an ‘international’ crime, is a ‘transnational crime’ over which a multiplicity of domestic jurisdictions might exercise jurisdiction. Indeed, through the UN Convention against Torture, it has become generally accepted that states may extend their domestic jurisdiction so that anyone who commits an act of torture – anywhere, and against anyone – can be prosecuted before their courts, thus rendering torture one of the most ‘transnational’ of crimes and attracting universal jurisdiction,²² the most expansive form of jurisdiction which domestic courts can exercise, and reserved for the most heinous of crimes. This is explored by Lutz Oette in Chapter 16, who also highlights the many practical hurdles which still stand in the way of effectively using extraterritorial jurisdiction more generally, as well as universal jurisdiction in particular. Such practical barriers further support the need for complementary means of redress. Indeed, there may be many reasons why a criminal prosecution may fail, but that does not mean there is not sufficient evidence to ground a civil prosecution. This chapter therefore also examines the rise – and some might argue, fall – of transnational civil claims, in particular under the US Alien Tort Claims Act,²³ which, for a period, appeared to offer a powerful route through which to provide recognition and redress for victims.

A final topic in this area, which is considered by Lorna McGregor in Chapter 17, again concerns barriers to redress, in this case, that of the immunity that attracts to states and state agents from proceedings before domestic courts. Given that under Article 1 of the UN Convention, torture is by definition an act of, or an act committed with the toleration or acquiescence of, a public official,²⁴ immunity presents a powerful hurdle to the exercise of both criminal and civil jurisdiction, should it be asserted. This is a complex area of law – not made any easier by the assertion by the International Court of Justice that ‘immunity’ does not imply ‘impunity’.²⁵ Whilst doubtless true in theory, in practice immunity often does indeed result in impunity – and the promise held out by the prohibition of torture is, as a result, stunted or thwarted.

In combination, these chapters demonstrate both the power of the international condemnation of torture and of its reflection in law. They also show the strengths – and weaknesses – of the multifarious and multi-faceted legal and political instruments, bodies and processes which have been established at international, regional and domestic levels to address it. They also highlight the opportunities for further positive development, as well as charting some regrettable weakening of protections. Taken as a whole, they aim to give a realistic ‘feel’ for how the international community has sought to tackle torture through the mechanisms of international law. They do not, however, claim to be comprehensive, nor do they seek to support a claim

²² As recognised by the International Court of Justice in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment of 3 February 2012 (n 4 above), para 74.

²³ Alien Tort Statute, 28 USC § 1350 of 1789 and see also the Torture Victim Protection Act of 1991, 28 USC § 1350.

²⁴ Article 1(1) provides that ‘For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’

²⁵ See *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Preliminary Objections and Merits, Judgment, ICJ Reports 2002, p 3, para 60.

that the law – and the lawyers – hold the keys to an understanding of torture, and how it is to be addressed. That becomes even clearer as the collection turns to a second tranche of contributions, which explore medical perspectives and approaches to torture.

Chapter 18, by Vivienne Nathanson (and currently Chair of the UN Voluntary Fund for Victims of Torture) explores the ethical implications of the prohibition of torture, charting the increasing number of declarations by the World Medical Association and others developed in the light of the evolving understandings of the role of the medical profession. This is followed by José Quiroga and Jens Modvig (currently Chair of the UN Committee against Torture) considering in Chapter 19 the various ways in which torture can be categorised, and, using a typology based upon the mechanisms for the infliction of pain or suffering, they set out various methods of torture which remain prevalent today. In addition to describing such methods, this chapter carefully considers their various health impacts, emphasising not only the extent of the harm which torture can cause, but also the range of harms which need to be identified and addressed. Indeed, the inter-relatedness of the various forms of harm which might result from different kinds of torture lies at the heart of Chapter 20, in which Pau Pérez-Sales examines in detail the concept of psychological torture. The chapter highlights how physical pain can be harnessed as an element of mental trauma, thus breaking down what for some is a ‘hard’ distinction between torture as the imposition of bodily pain and torture understood in terms of mental suffering.

The theme of interconnectedness also lies at the heart of Chapter 21, by Vincent Iacopino, though in a rather different way. It reaches across the primary disciplinary focuses of this Handbook by considering the seminal document, the Istanbul Protocol.²⁶ First adopted in 1999 and recently updated and in part revised, the Istanbul Protocol addresses the documentation of torture. This is a very important topic, not only because it is vital to ensure the proper identification of the forms of torture from which a person has suffered in order to ensure they are most effectively treated and helped, but also to provide the evidence necessary to support the prosecution of those responsible for that torture. The timely and effective documentation of torture is vital if investigative and criminal law processes are to be effective means of holding perpetrators to account and, through this, to contribute to the realisation of the legal prohibition.

If Chapter 21 shows how the work of medical practitioners can contribute to the effectiveness of legal responses to torture, then Chapter 22 shows how the outputs of the legal mechanisms can assist the medical professionals in their work by looking at how Article 14 of the UN Convention against Torture has been understood and interpreted to further the rehabilitation of torture victims. Appropriately enough, it is written by three former members of the Committee against Torture who were instrumental in the drafting of its General Comment no 3,²⁷ Nora Sveaass (who is currently a member of the UN Subcommittee for Prevention of Torture), Felice Gaer and Claudio Grossman, whose areas of expertise – again, appropriately enough – span both the legal and medical spheres. This exemplifies the constructive manner in which insights gained from one disciplinary perspective can be harnessed in order to enhance

²⁶ *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc HR/P/PT/8/Rev.1, (2004).

²⁷ UN Committee Against Torture, General Comment no 3: Implementation of article 14 by States parties, UN Doc CAT/C/GC/3 (19 November 2012).

the contribution that can be made to the fight against torture by others: true complementarity, rather than competition.

Implicit in this is the need for different disciplinary perspectives to be challenged by the insights and understandings of others, in order to allow them to consider whether, and how, they might best respond. In that spirit, Chapter 23, by Nimisha Patel, broadens the horizon concerning the impact of torture and its ‘ripples of harm’, considering not only ‘traditional’ therapeutic interventions by clinicians focused on the medical needs of the victim or survivor, but also the broader social dimensions of the impact of torture. These include impacts not only on the victims or survivors themselves but also on their families and broader communities. The chapter highlights the roles which can be played by those broader networks in the structuring and delivery of psychological care – which in turn sheds light on the significance of the innovative approach to remedies developed particularly within the Inter-American human rights system and which focus on community recognition and reconciliation. Again, there is much here which explains the practical potency of what to a more traditionally oriented legal mind might appear somewhat unorthodox. Above all, however, the chapter highlights the need to pay more attention to what victims and survivors want, rather than what others (both the medically and legally trained) might believe that they need.

The necessity for further understanding is also a feature of Chapter 24, by Kirstine Amris, Lester E Jones and Amanda Williams, which considers what for many remains a central question in the treatment of torture survivors – the alleviation of pain in the aftermath of torture. Enough has been said already to make it clear that this is a multi-dimensional topic, one that is not limited to ‘healing’ in a purely physical sense, but which encompasses the restoration of the person as a whole. As a result, the complexities regarding how pain is experienced need to be understood if it is to be properly alleviated over time – which again challenges some traditional ideas concerning legal ‘remedies’ and what counts as ‘reparation’. Above all, the subjective nature of the experience of pain is highlighted – which once again serves to put the individual at the heart of the response.

Of course, for the victim, torture is a personal, subjective experience. But it is also a matter of societal concern, at all levels of society. Once again, it is not a question of ‘either’/‘or’; of a victim-centred approach or a societal response to wrongs to the person. It is about drawing these, and other, perspectives together in order to address torture in all its dimensions and complexities. Torture is not only a ‘lived’ reality for its victims: its very presence becomes a reality for the systems, structures and societies in which it exists, and which must also find their own responses to that reality. You do not need to be a torture victim to live under the threat, or the shadow, of torture – although, perhaps, in some ways that very threat, or shadow, may make one a form of victim in itself. It is, then, appropriate for the book to conclude with a series of short chapters comprising reflections by authors drawing on their experiences when working for NGOs concerning the reality of torture in the world today, in all its complexities. In Chapter 25, Yuval Ginbar sets out the experiences of three torture victims, in very different contexts but united by the enduring truths that underpin their suffering. In Chapter 26 Tom Porteus reflects on the propensity of so many states to continue to resort to torture, despite its absolute prohibition. This is a disquieting reality which is met by the final reflections of Barbara Bernath in Chapter 27 on the need for vigilance in pursuit of prevention, and highlighting the continuing need to challenge the positive portrayals of torture which are all too often to be found in populist culture, literature and media.

Taken together, these reflections serve to remind us why – after so many years of official opprobrium – there is a need to intensify efforts to make the prohibition of torture what it should be – absolute.²⁸

²⁸ Mirroring the words of Sir Nigel Rodley, former UN Special Rapporteur on Torture and member of the UN Human Rights Committee in the title of his article ‘The Prohibition of Torture: Absolute Means Absolute’ (2006) 34 *Denver Journal of International Law and Policy* 145–160.