Introduction

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> The EHRR aims to provide an open-access international, multidisciplinary forum for the dissemination of original academic work relating to theoretical and practical research in the field of human rights.
> – EHRR Mission Statement

Given the rapid pace of recent developments in the field of prevention of torture, and the urgent need for work in this area (not least as a result of the impact of anti-terrorism initiatives and the worldwide growth in the prison population), in *Preventing Torture in the 21st Century* the EHRR aims to unite superb scholarship with excellent practice-focused work to create a global account of initiatives on preventing torture. As an open-access journal, our publications are freely available and accessible to all. This is what makes Preventing Torture in the 21st Century unique and what has allowed us to unite so many wonderful papers, including a selection of peer-reviewed articles to complement the papers commissioned from top scholars and practitioners in the field. While much has been written about preventing torture, this information is available only in fragmented form, much of it in costly books and journals. Given that the field is plagued by a lack of resources, it is vital that all interested actors can access scholarship about the many significant developments currently underway and so be in a position to engage with these exciting developments now, when there is momentum in addition to great need. We hope *Preventing Torture in the 21st Century* will help to fill this gap and make this much-needed knowledge available, in one place, to those who most need it and could otherwise least afford it.

In the first article of this issue, Silvia Casale (former President of both the CPT and SPT) explores two of the key treaty bodies working to prevent torture by monitoring places where persons are deprived of their liberty. The CPT has been operational in the field for two decades, while the SPT has been operational in the field for around two years. The approach to preventing torture represented in the treaties that establish these bodies centres on cooperation and positive dialogue with States in order to effect change: disclosure of violations without the prior consent of the State involved is seen as a 'last ditch' option, rather than a starting point for negotiation. The effectiveness of this approach is demonstrated by the fact that the CPT has had to make public statements in only a handful of instances in its twenty year history. The work of the CPT provides useful precedents for the SPT, which aims to engage cooperatively with States and national preventive mechanisms (NPMs), not least in terms of identifying key challenges, including how to combat reprisals against those who provide information to monitoring bodies. However, the SPT's lack of funding is, at present, seriously limiting the SPT's execution of its mandate, especially in relation to supporting NPMs in their work. The following two papers pick up on many of the same issues by examining the reasoning behind these preventive approaches.

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Nigel S. Rodley's reflection on his involvement in the field, including as a former UN Commission on Human Rights Special Rapporteur on the question of torture, offers a personal insight into how various bodies, conventions, initiatives and other preventive measures came to be. He offers a window onto the forces that led to treaties like the European Convention on the Prevention of Torture and inhuman or degrading treatment or punishment (ECPT) and the Optional Protocol to the Convention against Torture and other cruel, inhuman or degrading treatment or punishment (OPCAT), which, respectively, established the CPT and the SPT, being drafted and adopted in their current forms. Thus, he also explores reasons that the preventive approach common to the ECPT and OPCAT came to be seen as the way forwards, first in Europe and then worldwide. By examining what is meant by 'prevention' of human rights violations such as torture versus 'promotion' and 'protection' of human rights, Rodley asks what the practical consequences of the use of these terms is and considers the approaches they represent, questioning whether preventive measures can ever truly be preventive as opposed to remedial. If 'prevention means we save the state's face, in return for which we hope to get more effective action than would be achieved by exposure', as Rodley argues, what does this say about States' commitment to preventing torture versus being seen to prevent torture?

Wilder Tayler, Deputy Secretary-General of the International Commission of Jurists (ICJ) and a member of the SPT, focuses on situating the work of the SPT (and, to a lesser extent, the CPT) in relation to other bodies, measures and treaties that aim to prevent torture and promote the human rights of persons deprived of their liberty. Tayler considers the 'added value' of the SPT in relation to the UN Committee against Torture and how these bodies might work together to best effect. To this end, Tayler outlines a number of factors that often impact negatively on the work of the SPT and NPMs, indicating how other bodies, treaties and international legislation are important in providing a framework within which the SPT and NPMs have the powers and resources to execute their mandates effectively.

Mario Coriolano, vice-chairman of the SPT, outlines three key aspects of the SPT's approach to ensuring effective preventive monitoring: (i) independence, (ii) improvements in how information about torture is documented and exchanged, and (iii) inter-institutional cooperation. Through this examination, Coriolano discusses the implications of the OPCAT and the SPT's work in driving forwards the development of a 'Torture Prevention Network': a truly worldwide network of actors whose aims is to prevent torture and other forms of ill-treatment. The SPT and CPT will have an important place in this proposed network, but, in order to move beyond the prevention-via-monitoring approach discussed by Rodley and Tayler, a network or diverse treaties, bodies and organisations is required. New treaties, while not specifically focused on torture (such as the International Convention for the Protection of All Persons from Enforced Disappearance) offer opportunities to address the conditions, not only in places of detention but also in wider society, that give rise to torture. Ultimately, to prevent torture, the conditions – physical, social, and cultural – that encourage people to torture must be changed.

Audrey Olivier and Marina Narvaez's article picks up on the themes and challenges of inter-institutional cooperation, discussing the APT's extensive experience in helping States prepare to ratify the OPCAT via drafting new legislation to establish an NPM with the required powers, resources and capacities. As Olivier and Narvaez argue, States Parties would do well to involve a wide range of interested actors, including civil society, in the process of conceptualising and drafting this new legislation and also in considering the form that the NPM should take. Encouraging many different actors to become invested in ratification and the designation of the NPM will help to create an atmosphere in which the work of the NPM and the SPT is welcomed.

The OPCAT offers States Parties a wide range of options for designating a body (or bodies) as the NPM in order to allow States to choose the most appropriate option given the State's demographic, social, political, and cultural challenges.

As Elina Steinerte and Rachel Murray argue, the designation of an NPM is often affected by whether the State already has an independent, accountable human rights institution that interested actors view as legitimate: this often offers a simpler, less expensive option than forming a new body to take on the NPM mandate. Steinerte and Murray offer a detailed exploration of both the challenges that States face when designating a human rights commission (HRCs) versus an ombudsman as the NPM, and the obstacles that these different bodies face in effectively executing the NPM mandate. Ombudsperson institutions tend to be focused on overseeing legal and administrative aspects of the criminal justice system, whereas HRCs often deal with broader human rights issues. As such, HRCs are often more experienced in the proactive approach that the NPM mandate requires. However, the vastly different challenges that are represented in different states require different types of NPMs. Through this discussion, the authors also explore the impact of the Paris Principles and of accreditation by the ICC (International Coordinating Committee of National Human Rights Institutions), on the designation of NPMs.

Antenor Hallo de Wolf advances this exploration by considering the range of places of deprivation of liberty covered by the OPCAT that the SPT and NPMs are mandated to visit, focusing particularly on non-traditional places of deprivation of liberty (for instance, care homes for the elderly and for children, and psychiatric institutions). There is a long-standing tradition of visits to prisons and similar institutions; however, visits to psychiatric institutions and care home have become standard only relatively recently. In Europe, the CPT began visiting some non-traditional institutions from its inception and quickly broadened its understanding of the range of institutions that came under the ECPT, as seen in Marco Leidekker's paper. However, visits to such institutions involve complex and specific challenges (such as interviewing the mentally ill or young children about sensitive matters). For countries that have ratified the OPCAT but have little, if any prior experience of conducting visits even to traditional institutions, these challenges are considerable. Some States Parties have resolved these difficulties by designating a number of institutions as the NPM (for instance, the UK has designated 16 institutions as its NPM). Often these are institutions with prior experience of visiting different places of deprivation of liberty. Thus, different institutions visit different places of deprivation of liberty and significant expertise and existing experience is brought to bear on the execution of the NPM mandate. However, it is not only expertise that can be problematic in terms of visits to non-traditional institutions: legislation, policy and practice may need to change to allow the SPT and NPM of some States access to these places and to afford the visiting bodies sufficient powers to carry out their mandates.

Marco Leidekker, a member of the CPT Secretariat, also discusses this issue in his examination of the development of CPT standards since 2001. In relation to non-traditional places of deprivation of liberty, a key development is the re-examination of whether patients who have voluntarily committed themselves to psychiatric care can be considered to be deprived of their liberty and, thus, should receive attention from the ECPT and OPCAT visiting bodies. Similarly, the issue of guardianship in terms of giving permission for medical procedures (for instance, surgical castration of sexual offenders held in psychiatric institutions) has been identified as requiring re-consideration in order to clarify standards. A driving force in the evolution of CPT standards is the introduction of new technologies, including the use of tasers by law enforcement

personnel. Leidekker's discussion takes in not only the aims of setting and refining standards, but also the challenges involved in creating standards that are specific enough to help to prevent violations of human rights while being conceived in such a way that they are applicable at the universal level: in other words, standards must be applicable in States Parties with very different demographic, social, cultural and political conditions. While these standards and the work to create them will be of use to the SPT, the challenges the SPT faces in working to set standards that can be applied worldwide will be far more complex.

Carmelo Danisi explores another aspect preventing torture that generally receives little attention. His paper presents a discussion of the challenges involved in protecting asylum seekers, and illegal and irregular immigrants, against torture and other ill-treatment. Danisi's article examines the situation in Italy in relation to those who are expelled, those who are rejected and those who are detained in special centres, which the CPT has visited on a number of occasions. Jurisprudence of the ECtHR indicates that assurances that those expelled or rejected will not be tortured or otherwise ill-treated by their country of origin or a third state are not sufficient to fulfil States' obligations under the ECPT to respect the principle of *non-refoulement*. Italy's situation is complicated by its recent cooperation with Libya and Frontex, a European international agency, to stop migrants reaching its shores, including via rejection at sea. Danisi explores the responsibilities that European States currently have, not only within their own territory, but in relation to engaging in cooperative ventures with states that are not bound by human rights instruments that offer equal protection to illegal/irregular immigrants and/or asylum seekers, including via independent monitoring of detention centres where such persons are held. Under the first protocol to the ECPT, non-member states can now be invited to ratify the convention. This offers possibilities for European states to encourage non-European states that they regularly engage with in relation to migrants to ratify the convention in order to ensure that these persons are afforded protections. Moreover, ratification of the ECPT may provide a useful starting point for states with little or no previous engagement in independent external monitoring to work towards the more demanding requirements of the OPCAT, including the need for an NPM.

In her examination of extraordinary rendition, Elena Landriscina's article advances the consideration of states' obligations to prevent torture when acting outside their own territory and/or in cooperation with other states and non-state actors. Landriscina starts by examining different types of rendition, demonstrating the dangers inherent in compromising on human rights principles even in order to render persons for prosecution. She then moves on to a consideration of rendition to torture, focusing primarily on the United States' national and international obligations in relation to rendition and to how it has negotiated its violation of these obligations, including in three key cases. In these cases, the state secrets privilege has been used to actively prevent prosecution of individuals alleged to have been involved in rendition and torture, and to block applicants from obtaining redress through the courts. States that do not prosecute those who torture, and do not provide a system that allows victims to exercise their right to reparation (as Carla Ferstman argues in *Preventing Torture in the 21st Century* – Part II), encourage an environment of impunity for, rather than effective deterrence of, torture. However, third country prosecutions afford opportunities for holding perpetrators accountable and also for encouraging states to fulfil their obligations under national and international human rights instruments.

K. Alexa Koenig, Eric Stover and Laurel E. Fletcher pick up on many of these themes in their exploration of America's changing attitude towards not only rendition to torture, but torture

itself. Under the Bush administration, torture and rendition were legalised in the United States. This article charts the rationalisations that Bush administration officials and advisors offered to justify these changes. The authors explore how the Obama administration is attempting to address, while not necessarily providing redress for, these recent violations of both human rights principles and the United States' obligations under national and international human rights instruments. The authors then go on to discuss the safeguards that the new government can and should put into place to protect all those detained by, or with the cooperation of, American officials or those contracted by them. They offer a compelling discussion of the cumulative impact of different measures and detainment conditions that do not, singly, rise to the level of torture (or even cruelty), but may do so when used in combination, especially over time.

Focusing on the situation in Israel, Yuval Ginbar also examines the issue of legalisation of torture, though from an unusual, personal perspective. This mirrors that of his other, related work, in which he defends this stance on the grounds that the 'failure' on the part of government officials, scholars and the public to support an absolute ban on torture 'dictates a discussion which … is able, at least potentially, to reach as many as possible of those unconvinced (or not sufficiently convinced) by formal argument': [1] 'I have therefore opted … to use a dialogic, conversational style of writing … . Hence, for instance, … the use of "I".'[2]
Part II of *Preventing Torture in the 21st Century* examines (i) the steps countries (including Japan and Australia) around the world are taking to ratify the OPCAT, (ii) key regional human rights initiatives (including those of the APF) and instruments (including the Robben Island Principles and the Inter-American Convention on Human Rights) aimed at preventing torture, and (iii) the work of national (Uganda and Indian) and international NGOs (including Redress and the IRCT).

[1] Yuval Ginbar, *Why not Torture Terrorists? Moral, societal and legal aspects of the 'ticking bomb' justification for torture in the struggle against terrorism* (Oxford: Oxford University Press, 2008), p.8.

[2] Ginbar, *Why not Torture Terrorists?*, p.8.