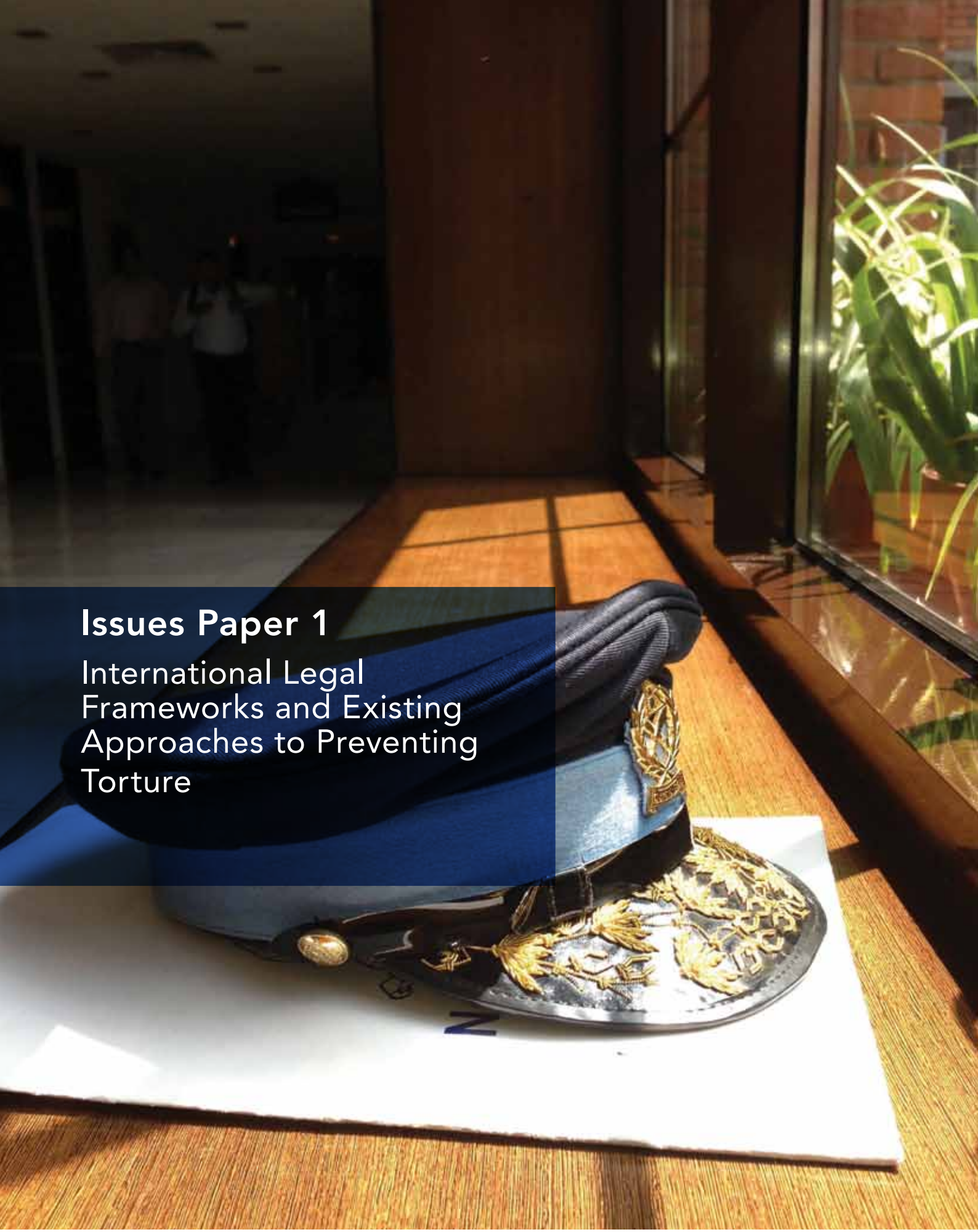

Issues Paper 1

International Legal Frameworks and Existing Approaches to Preventing Torture

ENHANCING HUMAN RIGHTS PROTECTIONS
IN THE SECURITY SECTOR IN THE ASIA PACIFIC

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ISSUES PAPER 1: INTERNATIONAL LEGAL FRAMEWORKS AND TRADITIONAL APPROACHES TO PREVENTING THE USE OF TORTURE

INTRODUCTION

This is the first of the *Issues Papers* in a series to support the *Enhancing Human Rights Protections in the Security Sector in the Asia Pacific* project. It comprised of background material that explains the significant history of action to identify strategies for addressing the use of torture.

Issues Paper 1 has two chapters. Chapter One focuses on the international human rights framework and the sanctions it has established, then moves to look at the scope of the problem at an international level and in the Asia Pacific in particular. Chapter Two considers the principal pillars of torture prevention over the last forty years, investigating, in particular, the theory of change that underpins them and what we know about how well they work.

CHAPTER ONE: TORTURE, CRUEL, INHUMAN AND DEGRADING TREATMENT AND PUNISHMENT AND SECURITY AND LAW ENFORCEMENT AGENCIES

As noted in the *Introduction to the Issues Papers*, in international law and international human rights instruments, the class of acts that we are here call 'torture' comes under the category of acts of cruel, inhuman or degrading treatment or punishment. Here we look at how these different terms have been understood in the international legal and human rights system.

General definitions

The most frequently cited definition of torture is the one set out in the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT):*

> 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 (Article 1).[1]

Although this definition is broadly accepted, there is less than universal acceptance when it comes to deciding if particular acts constitute torture. Thus, when it comes to prevention, part of what will be at issue will be reaching agreement about the types of acts that ought to fall within the ambit of anti-torture campaigns. For example, while there may be broad condemnation of the general category of torture, there may be significant differences between different groups of people over whether acts like slapping or verbal abuse should also be included.

There is no internationally agreed upon legal definition of a 'cruel, inhuman or degrading treatment'. The general consensus is that the different forms of treatment can be placed on a continuous scale of increasing severity. However the UN Human Rights Committee has held that it is not necessary to establish sharp distinctions between the different kinds of punishment or treatment and also that such distinctions depend on the nature, purpose and severity of the treatment applied.[2]

Torture by security personnel is dealt with most explicitly in the United Nations Code of Conduct for Law Enforcement Officials.[3]

Article 3 of this code specifies that:

> "Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty."

Commentary

(a) This provision emphasises that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorised to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.
(b) National law ordinarily restricts the use of force by law enforcement officials in accordance with a principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorise the use of force which is disproportionate to the legitimate objective to be achieved.
(c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardises the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities."

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[1] This is also the definition accepted as customary international law. See ICTY, 10 December 1998, *Prosecutor v. Anto Furundzija* [1998] ICTY 3, § 160.
[2] U.N. Doc. HRI\GEN\1\Rev.1 at 30 (1994), Human Rights Committee, General Comment 20, Article 7, § 4.
[3] Adopted by General Assembly resolution 34/169 of 17 December 1979.

Note once again that the definition does not include the specification of particular acts of torture, but rather provides principles for making a judgment about what forms of force will be acceptable. The key principles here are necessity and proportionality, and the importance of force being used towards the attainment of a legitimate objective. This same code of conduct refers, in Article 5, to the prohibition of torture or other cruel, inhuman or degrading treatment or punishment.

What are the prohibitions against torture?

The principal international instrument setting out the prohibitions against torture is the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*. The right to protection from torture is also set out in the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, various regional human right instruments[4] and the *Geneva Conventions*.[5] As noted above, the UN Code of Conduct for law Enforcement Officials bans torture.

Torture constitutes a war crime in non-international armed conflicts under the *Statutes of the International Criminal Court,* of the International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone.[6] The right to be free from torture is also protected by national legislation across the world, in domestic and international case law and official statements and practice. This fact has given it the status of customary international law, meaning that it applies everywhere, even in the absence of positive legal protection.[7]

Further, while all human rights are considered absolute and universal, torture is what is called a 'non-derogable right'; that is, one that cannot, under any circumstances be suspended. This means circumstances, such as states of emergency, terrorism or the pressing need to obtain critical information do not justify torture or make it permissible.

Beyond this legal framework, the use of torture have been the subject of extensive popular campaigns, provoking passionate responses from civil society, as we saw in the responses to incidents from Abu Ghraib to Syria. Nevertheless, torture remains a contentious issue, with people from various nations continuing to argue that it is, under certain circumstances, justifiable.[8] A recent example is the endorsement of certain methods of 'harsh interrogation techniques' by the US administration after 9/11. Indeed, the fact that significant proportions of people continue to accept torture partially explains why the extensive system of legal protections has failed to stem its occurrence. As long as there is a widespread consensus that torture, violence or force are permissible under certain circumstances, or against certain types of people, there will be resistance to fully implementing laws sanctioning them. There will also be a passive, if not active encouragement for their retention. This resistance will be rooted amongst those who practice torture, those with the power to punish it and the civil society that provides the permissive or condemnatory context.

Where does the use of torture occur?

The use of torture most often occurs in the context of security and law enforcement organisations. This is by virtue of its character as an act committed by or with the consent of a public authority or by persons acting in an official capacity, and its purpose of obtaining information or punishing, intimidating or coercing.[9] This is despite the fact that torture or other cruel, inhuman or degrading treatment or punishment and the improper use of force are explicitly prohibited and condemned in the manuals of police and militaries across the world.[10]

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[4] The Asia Pacific region does not however have a regional treaty dealing with torture. Article 14 of the ASAEN Human Rights Declaration provides that "No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

[5] Common article 3 prohibits "cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment" of civilians and persons *hors de combat*. Torture is also prohibited under First Geneva Convention, Article 12; Second Geneva Convention, Article 12; Third Geneva Convention, Article 17, Article 87, and Article 89; and, Fourth Geneva Convention, Article 32.

[6] ICC Statute, Article 8(2)(c)(i) and (ii); ICTR Statute, Article 4(a) and (e); Statute of the Special Court for Sierra Leone, Article 3(a) and (e).

[7] See judgments of the International Criminal Tribunal for the former Yugoslavia in the *Prosecutor v. Furundžija*. Case No. IT-95-17/1. Trial Chamber Judgement (December 10, 1998). *Prosecutor v. Kunarac et. al*. Case Nos. ICTY-96-23-T, IT-96-23/1-T. ICTY Trial Chamber Judgement (22 February 2001).

[8] Paul Gronke and Darius Rejali, "U.S. Public opinion on torture, 2001-2009," *PS* (2010): 437-444.

[9] There is an increasing awareness of the risks that people in 'disability institutions' face of torture. For further information see reports on the websites of Disability Rights International and the Mental Disability Advocacy Centre.

[10] For a list of manuals in which it is banned, see ICRC, "Rule 90. Torture and Cruel, Inhuman or Degrading Treatment", (2014): Footnote 8 at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule90#Fn_56_8, viewed May 29, 2014.

Geographically, torture remains a global phenomenon, meaning it occurs in security and law enforcement agencies on every continent.[11] In the Asia Pacific region, the practice of torture is well documented in virtually every country.[12] It would be inaccurate to claim that the use of torture is worse in this region than anywhere else, but a range of structural issues in many Asia Pacific countries have established fertile grounds for it to continue, even in the face of international and domestic efforts to eradicate it. These will be discussed in more detail in this report. Briefly, they include: defective criminal justice systems, poverty, poorly resourced policing institutions, political instability, armed conflict, corruption, authoritarian governance and/or weak democratic structures and inadequate systems of accountability.

Recognising such institutional, economic, political, social and cultural factors means that it is important for those seeking to prevent the use of torture to focus on the conditions that underlie it in particular contexts, rather than thinking about torture as a universal practice that is the same everywhere. Certainly, there will be commonalities both in the reasons that torture occurs and the ways in which it is sustained, but too often, generalised assumptions about the purpose of torture (e.g. that it is used to gain confessions) or about the reasons that it continues (e.g. the absence of criminal sanctions) impede the development of appropriately crafted prevention strategies. The starting point for this project was therefore this recognition that we need to go beyond knowing *that* torture occurs and that it is wrong, to understanding *how* it is caused, perpetuated and sustained.

What do we mean by 'prevention' of torture?

While the meaning of 'prevention' may seem obvious, there are in fact a number of ways in which it is understood in the literature and in the human rights sector. Prevention may mean abolishing torture, reducing it, fighting against it, inhibiting it, hearing no reports of it, or saving those in great need. Each usage has its own history, but also its own implications for action. 'Stopping' or 'ending' torture comes from the old abolitionist movements – as Amnesty said in 1972, to make torture as 'unthinkable as slavery'. It invokes a juridical-legal framework: we eradicate by banning. It is notable though that even in this prototype case of abolition, social scientists have challenged the popular belief that what brought about the end of slavery was a combination of moral and humanitarian factors and correlate laws, pointing to the economic factors such as the rise of capitalism.[13]

'Reducing' or 'minimising' the use of torture seems more realistic, but also may wrongly assume that we could actually measure the amount of the improper use of force accurately enough to describe these trends. Moreover, the pragmatism of this approach may seem to concede that a certain level of the improper use of force is acceptable. A further danger with this type of statistical model is that it may sway us towards aiming for maximum overall global reduction, thereby obscuring the important possibility that our successes may be limited to particular regions or conditions. As discussed below, the scope conditions for many prevention strategies are such that prevention strategies are often the least successful in the places where the most torture occurs.[14]

Lastly, 'inhibiting' the use of torture implies setting up barriers, or establishing new situational conditions that will prevent it from coming into play or, if it has already come into play, direct it towards ceasing. This is a social scientific understanding. As will become evident, it is the understanding favoured in this project because we see it as the most fundamental. By identifying and creating the conditions that inhibit torture, we are most likely to reduce, minimise, and perhaps even eradicate its incidence.

[11] For an excellent and accessible overview of the global situation, including country snap shots and links to reports on all countries, see the *Atlas of Torture Project*, in particular, http://www.univie.ac.at/bimtor/countrymap. Accessed June 14, 2014,
[12] The exception seems to be Hong Kong. Fernando, Jessica, and Shiv K. Singh, *The Practice of Torture; A Threat to the Rule of Law and Democratisation* (Hong Kong and Copenhagen: Asian Human rights Commission and Dignity, 2012).
[13] See for example Eric William, *Capitalism and Slavery* (Chapel Hill and London: University of North Carolina Press, 1944).
[14] The term 'scope conditions' refers to the fact that a theory may only apply under particular circumstances. In this case, scope conditions are often not made explicit, so that we end up with apparently universal statements about how to prevent torture, which ought to be qualified by statements about the conditions that would have to apply for them to work.

CHAPTER TWO: THE DOMINANT APPROACHES TO THE PREVENTION OF TORTURE[15]

Analysing existing approaches to prevention

The ultimate aim of this project has been to develop an effective strategy for preventing the use of torture in security organisations. As such we were interested in understanding existing approaches to prevention and the logic that explains how they are supposed to work. We also wanted to find out if they have been working. Chapter Two provides a very brief overview of the main approaches to prevention and investigates them via two key questions:

1. First, 'What theory of change underlies this approach?'[16] In other words, 'how do the people using this approach understand the problem and how do they see themselves as solving that problem?'[17]
2. Second, 'Does this approach work in preventing torture?' As we shall demonstrate, evaluating the effectiveness of prevention strategies is exceedingly difficult and, to date, the evaluation literature has not produced conclusive findings about what works. Where evaluative data on an approach is not available, what we have done is identify some of the hypotheses that underlie the approach and then look at social scientific evidence that would confirm or disconfirm those hypotheses. For example, if an approach is based on the hypothesis that says that punishing or criminalising certain acts prevents their future commission, we look at the evidence to see whether it supports this hypothesis.

This part of the research on prevention approaches goes beyond the scope of the project's aim, which is to design our own intervention. However it contributes to a broader understanding across the prevention field of how different actors have approached prevention of torture, and so lays the foundation for future research directions and more informed program development.

The dominant approaches to the prevention of torture

In the early 1970s, a number of events on the global stage galvanised actors to change and consolidate their strategies for preventing torture. Events included the Pinochet coup in Chile (1973), Amnesty's first Torture Report (1973) and shifts in the post-Cold War landscape. As such two principal schools in the international field of torture prevention were crystalised: the first based on establishing international legal norms (and then seeking compliance with those human rights treaties); the second based on establishing processes for monitoring sites at which there are risks of torture.[18]

The former United Nations (UN) Special Rapporteur, Manfred Nowak, observes that the first school was based on a diagnosis that impunity is 'the major root cause of torture'. Accordingly, its approach prescribes combating torture 'by means of domestic and international criminal law' and its theory of change holds that laws 'break the cycle of impunity and, thereby, have a significant preventive effect'.[19] This approach underpins campaigns and projects encouraging states to ratify and implement international instruments such as the Convention Against Torture (CAT), by passing domestic laws sanctioning torture, as well as the work that NGOs and treaty committees have been doing in monitoring and pressing for compliance through periodic reports and complaints processes.

Turning to the second school, one can determine two distinct form of external monitoring, each with a somewhat different set of practices and theories of change. The first, practiced in its purest variety by the International Committee of the Red Cross (ICRC), comprises "the purely non-judicial and *non-accusatory* system of preventive visits to places of detention, that is, those places in which most acts of torture and enforced disappearance occur in practice."[20]

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[15] This chapter is drawn from Professor Darius Rejali's expert report prepared for the project, Darius Rejali, *Torture Prevention: A Literature Review*, Expert Report Prepared for the Enhancing Human Rights Project (2014).

[16] For a good discussion see Danielle Stein and Craig Valters, "Understanding 'Theory of Change' in International Development; A Review of Existing Knowledge," *JSRP,* Paper 1 (London: The Justice and Security Research Programme and The Asia Foundation, 2012).

[17] As we will discuss below, the literature in the field of public health indicates that having a coherent and well-grounded theory of change is one of the most important factors in ensuring successful prevention, but that very rarely are theories of change made explicit or analysed.

[18] The line between the two is sometimes blurred, especially since 2002, with the implementation of the *Optional Protocol to Convention Against Torture* (OPCAT), whereby monitoring has been incorporated within treaty compliance.

[19] Manfred Nowak, "On the Prevention of Torture," in *An End to Torture: Strategies for its Eradication*, ed. Bertil Dunér (London: Zed Books, 1998), 248.

[20] Ibid., 249. For a detailed account of the ICRC see James Dawes, *That The World May Know: Bearing Witness to Atrocity* (Cambridge: Harvard University Press, 2007).

In this form of monitoring an external monitoring body enters the site in question (with the permission of the authorities concerned), conducts meticulous research and produces politically neutral documentations of its findings, which it then forwards to the relevant authorities.[21] In the case of the ICRC, the reports are completely confidential, whereas the other best known monitoring body, the European Committee for the Prevention of Torture (CPT) publishes its reports.[22] In both cases, the underlying philosophy is that the monitoring bodies can, by virtue of their privileged access, authority, neutrality, confidentiality and accuracy, build relationships and establish a constructive dialogue with state actors that will encourage appropriate reform.

More than one theory of change can be discerned in this form of monitoring. At one level, the working assumption seems to be that the presence of outsiders in closed environments is likely to reduce the likelihood of certain abuses occurring, even if those select outsiders do not broadly expose any illegal practices they might observe. At another level, it suggests that by giving unbiased reports about what is really happening in places of detention to the officials with ultimate responsibility (from the governors of prisons to top state officials), puts these officials into a position of *knowing* and so will be able to *act* consistent with their responsibilities to do so. Three underlying assumptions support this theory of change. The first is that the complexity of state organisations impedes the quick or comprehensive flow of information between center and periphery and so inaction is (at least in part) an artifact of ignorance rather than active support. The second is that once these higher officials know that someone else knows they will be more likely to intervene. The third is that following the recommendations of the monitoring bodies assists authorities in avoiding the costs associated with exposure or non-compliance, and so they have an incentive to do so. Finally, they assume that the members of monitoring bodies have the expertise to make recommendations about changes that will in fact reduce the risk factors for torture.

The second form of external monitoring, which grew largely out of criticism of the first, is the more familiar 'accusatory monitoring', as practiced by, for example, Amnesty International and Human Rights Watch.[23] The goal of this approach is to *expose* and *oppose*, most frequently through 'naming and shaming'.[24] Thus, it combines two types of actions: collecting accurate data and skillfully mobilising public opinion. Two critical dimensions of this approach are raising awareness and care amongst the relevant publics through education campaigns, and translating civil society and NGO information and outrage into concrete and effective changes to law, policy and practice. The broad theory of change at work here is that exposure places states at risk of incurring certain costs - at the domestic level the loss of popular support, and at the international level the withdrawal of aid, trade or military support – and that they will stop torture to avoid incurring those costs.[25]

Before assessing the effectiveness of these approaches, it should be noted that these two broad categories do not adequately capture the range of more targeted or practical strategies that fall under them, or that have been developing in recent years. For example, as well as calling for criminal sanctions, human rights treaties contain a range of articles relevant to prevention, including provisions concerning the treatment of prisoners and conditions of detention, access to legal counsel, medical and judicial oversight, incommunicado detention and the training and education of security personnel.[26] Similarly, the recommendations made by monitoring bodies will frequently focus on these concrete processes or safeguards, recognising that, for example, the requirement that all detainees must be brought before a judicial authority in a timely manner, or that they must be examined by an independent medical officer will reduce the risk of torture.

[21] Although its final report is confidential, the ICRC reserves the right to publish a report in its entirety if a government quoted it out of context. It also reserves the right to make public protests if violations go unattended. However aside from the rare leaks of ICRC reports, what it has to say about preventing torture is not public knowledge.

[22] The Optional Protocol to CAT has established a new monitoring regime combining an international monitoring body (the Subcommittee on Prevention of Torture) and national level monitoring authorities (National Preventative Mechanisms). This is not dealt with in the present report.

[23] Importantly, such international NGOs are highly reliant on the information that NGOs on the ground feed up to them.

[24] Katerina Tomasevski, "On the Prevention of Torture," in *An End to Torture: Strategies for its Eradication*, ed. Bertil Dunér (London: Zed Books, 1998), 197.

[25] For example Amnesty's first campaign against torture collected accurate accounts of torture, published annual audits of torture worldwide and combined this with media work, government lobbying and international activism. On Amnesty's work on torture see Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton: Princeton University Press, 2001). On the work of the India's ACHR using similar campaigns pioneered on the Amnesty model see Suhas Chakma, "Lessons Learned from the ACHR's National Campaign for the Prevention of torture in India," (2014), accessed July 15, 2014, *http://projects.essex.ac.uk/ehrr/V6N2/Chakma.pdf*

[26] As we have produced a separate report on education and training, this is not dealt with in the present report. See *Torture Prevention Training in the Security Sector: A Critical Overview and Analysis of the Field*, (Sydney: Enhancing Human rights Project, 2014).

Accordingly, two recent reports on torture prevention strategies, Delaplace and Pollard's *Torture Prevention in Practice* and Amnesty's *Combatting Torture*, include sections setting out these practical measures.[27] As discussed below, these approaches are based on an understanding that the best way to prevent torture may be to address the conditions that facilitate or permit it.

Finally, there is a school of approaches that seek to prevent torture not by championing the abolition of torture or telling people to be good, but by providing security personnel with practical skills that constitute alternative ways of doing their jobs. For example, teaching the 'PEACE method' of interrogation provides personnel with skills to gain information without resorting to coercion (see Case Study 1 below).[28] Insofar as torture is about far more than extracting information, this particular approach is viewed to have limited potential for impact. Nevertheless, it points to a larger insight that understanding the work that security personnel are required to do, and offering real, reliable practical alternatives to their using torture to carry out those functions (that is, showing them how to do their job better) may be an effective way of preventing torture.

Case Study

Avoiding the Wrong by Teaching the Right: Non-coercive Interrogation Techniques

From the early 20th Century, people started to think about more effective methods of obtaining information that did not involve coercion. In 1942, two professors of psychology, Fred Inbau and John Reid, published the book 'Criminal Interrogation and Confessions'. Over the last 60 years, this book has become the definitive police-training manual in the United States of America, if not the Western world, and focuses on non-coercive techniques. This consensus was held broadly until 2011 when the CIA and others argued that the new situation caused by 9/11 required a different approach. Nevertheless, many interrogators remained deeply committed to non-coercive interrogation. In other words, they did not participate merely because they endorsed the CAT or the Geneva Conventions but they believed that only non-coercive interrogation achieved reliable results.

One striking feature of what we have called the more 'practical' approaches is that they represent a move away from direct intervention (either punishment or monitoring) to prevent torture towards ameliorating *the conditions that are believed to produce it*. Strategies aimed at safeguarding detention and interrogation, for example, target physical and organisational facilitating conditions in the criminal justice system.[29] Correlatively, a broad range of strategies that can be placed under the rubric of the modernisation and professionalisation of law enforcement are thought to do the work of preventing torture. A number of important players in the field, including the Special Rapporteur on Torture, the World Organisation Against Torture and, in this region, the Asian Human Rights Commission, have recognised that one cannot explain or prevent torture without also having an eye to a broader set of systemic failures, and even beyond this, of socio-economic and political pathologies.[30] In this context, one of the reasons that we would want to raise awareness and concern would be that we understand the public's ignorance and apathy as facilitating conditions for torture.

This move towards taking into account and targeting facilitating conditions points to the approach taken in this project. For, as Evans and Morgan observe in relation to the CPT, "many factors causally associated with torture" cannot be dealt with, including the pay, social status, and working conditions of officers, as well as their training and technical support. Other factors they cite include the shallow roots of democracy, weak professional integrity, the absence of fearless judgment, as well as the presence of corruption and intimidation.[31]

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[27] Edouard Delaplace and Matt Pollard, "Torture Prevention In Practice," *Torture* 16, no. 3 (2006): 220-246. Amnesty International, *Combatting Torture – A Manual for Action* (London: Amnesty International, 2006).

[28] The PEACE (Preparation and planning Engage and explain, Account, Closure, Evaluate) method of interviewing favours information gathering over seeking a confession and is thought to significantly contribute to the reduction of torture during interrogations.

[29] The term 'facilitating conditions' will be used throughout this report and is central to our approach. It refers to the situational or contextual factors that make it more likely (literally easier) for torture to occur. For example, the presence of an opportunity and the absence of any monitoring or punishment are facilitating conditions.

[30] As Special Rapporteur, Nigel Rodley stated that: 'The overwhelming majority of those subjected to torture and ill-treatment are …from the lowest strata of society.' U.N. Doc. A/55/290, para. 35 (August 2000). See also Thomas E. McCarthy, OMCT *Attacking the Root Causes of Torture: Poverty, Inequality and Violence* (Geneva: World Organisation Against Torture, 2006); Basil Fernando, "Why the Asian Alliance Against Torture and Ill-Treatment," *Article 2*. 10, no. 3 (2011): 6-21.

[31] Malcom D. Evans and Rod Morgan, *Preventing Torture* (Oxford: Clarendon Press, 1998), 25-6.

An important practical question that arises here is, how broadly should preventative approaches conceive of facilitating conditions, or 'root causes', and to what extent should we embrace these broader contextual factors? We return to this question in *Issues Paper 2*.

How well do the dominant approaches to torture prevention work?

(i) Treaties

Assessing the impact of criminalising torture through the international legal regime, the former UN Special Rapporteur on Torture, Manfred Nowak, commented that he knew of 'almost no cases in which perpetrators of such crimes have been brought to justice'.[32] On face value, this would seem to imply that energies directed at establishing international and domestic criminal legal regimes have been ineffective because few people have been punished for committing torture. But this is too simple a conclusion, as we shall discuss below.

At the most general level, statistical studies have concluded that ratification of a treaty does not, in itself, influence the use of torture by states. In certain cases this worsened its use, and in some cases, where certain domestic conditions applied, it helped. Analysing the data more carefully, various theorists have suggested that the impact of treaty ratification on reducing torture depends on a number of factors, including regime type,[33] the level of power sharing in the country[34] or the effectiveness of the state's judiciary.[35] Committing to anti-torture treaties plays an important role in 'polities where complementary channels of influence – public demands, foreign pressures, powerful and well-respected courts – come together to demand an end to torture'.[36]

Recall though that theory of change that Nowak articulated was that breaking the cycle of impunity will reduce torture. Does the evidence support this theory? We examined the social scientific literature in relation to impunity in closed environments like prisons, in field units and for larger groups of soldiers. Our overall finding was that there is provisional evidence to confirm the claim that breaking the cycle of impunity will reduce violent abuses, including torture, but subject to two critically important provisos. First and most simply, one must break the cycle of impunity in a timely way. Punishing perpetrators years after committing the violations seems to have little preventative impact. Second, (and perhaps fairly obviously) the existence of criminal laws is by no means sufficient to counter impunity. Instead this is achieved by effectively and systematically operationalising five basic principles: clear authority, clear rules, clear punishments, immediate medical inspection and prompt remand before a judge. In other words, effective prevention requires a combination of both of the main approaches, but one that attends to the *practical* dimensions at the level of the institutions in which torture is likely to occur. These principles are most effective when they are not simply imposed by external agencies, but when they are embraced and taken up by the security organisations themselves. Case Study 2 about the Wickersham Report and police interrogation, illustrates this type of approach, demonstrating that mechanisms that operate at a distance or that do not alter the actual practices in spaces where there are risks of torture will not work. Ending impunity requires approaches that drill down into the systems that maintain it and identify concrete practices that will curtail it.

[32] Nowak, "Prevention of Torture," 249.
[33] Oona A. Hathaway, "The Promise and Limits of the International Law of Torture," in *Foundations of International Law and Politics*, eds. Oona A. Hathaway and Harold H. Koh (New York: Foundation Press, 2005); Beth A. Simmons, *Mobilizing for Human Rights; International Law in Domestic Politics* (New York: Cambridge University Press, 2009).
[34] James Vreeland, "CAT Selection: Why Governments Enter Into the UN Convention Against Torture," *Unpublished manuscript* (2003).
[35] Emilia J. Powell and Jeffrey K. Staton, "Domestic Judicial Institutions and Human Rights Treaty Violation" (paper presented at the annual meeting of the Southern Political Science Association, 2007).
[36] Simmons, *Mobilizing for Human Rights,* 306. Simmons' work is the most robust here. She concludes that CAT commitments are most effective in countries 'with volatile and transitional experiences with public accountability. CAT ratification resonates in those polities; individuals and groups who may have good reason to fear mistreatment of themselves, their families or their countrymen at the hands of the government have strong incentives to mobilize to implement the international ban in domestic law'. Simmons *Mobilizing for Human Rights,* 305.

Case Study

Change From the Inside: The Wickersham Report and Police Interrogation

In 1931 George Wickersham and his colleagues at the American Bar Association (ABA) issued a comprehensive account of police brutality in American cities large and small. Their report instigated steady transformation of American police practice over the next three decades. What is so interesting about the Wickersham's work is that much like ours, he went through a reflective process about the reasons torture occurred. In particular, Wickersham focused on the Boston area in the United States of America, where torture was at a minimum compared to other jurisdictions. His investigation asked why this was so. It found that the most important factor in the lesser amount of torture was the presence of internal monitoring by doctors, judges and police chiefs. This was deemed better than external monitoring by the press and public. He also found that the police there had a strong tradition of keeping to the law themselves, and were individually required to pay their own fines if convicted for lawlessness. Wickersham distilled five critical rules from his research: the need for clear authority, clear rules, clear punishments, immediate medical inspection and prompt remand before a judge.

(ii) Monitoring

What about monitoring? Looking first at the non-accusatory forms of monitoring, it is important to distinguish between *directly preventing acts of torture*, which non-accusatory monitoring does not seem to do, and *ameliorating the conditions that create risks of torture*, which it does seem to do. Monitoring does seem to be effective - in some cases at least - in addressing conditions that would be considered inhuman or degrading treatment such as poor prison conditions.[37] At the same time, as noted above, comprehensive non-accusatory forms of monitoring, when combined with other preventative mechanisms, can be effective.

Turning to accusatory monitoring, the idea that exposing torture will provoke public outrage and that these publics will then act to bring about changes in policy and practice rests on two hypotheses that require scrutiny: (i) that publics are generally anti-torture and so can be mobilised and (ii) that public pressure changes government policy or the action of institutions in which torture occurs. With regards to the first hypothesis, there is limited comprehensive global data on public opinion and torture, but the data that exists indicates that levels of support vary considerably.[38] In the context of the Asia Pacific region, specifically, two findings are particularly important. First, in this region, there are not strong anti-torture majorities. In fact, comparing regions, West Europeans, Canada and Australia most oppose torture, followed by Latin Americans, East Europe and the Middle East and then Asia and Southeast Asia, where publics are divided on the question of torture. African countries exhibit relative majorities in favour of torture (that is more people are for than against torture, but those in favour of torture are less than 50%).[39] And second, people are most opposed to torture where it is least likely to occur, and more supportive where it is more likely to occur. This is bad news when trying to get civil society to be a force for change in countries where there are high levels of torture. Or perhaps more constructively, this tells us that before we can mobilise public opinion, we must first focus on finding ways to change it.

[37] Caroline Moorehead, "Crisis of Confidence," *Financial Times,* June 18, 2005, 18.
[38] Peter Miller, "Torture Approval in Comparative Perspective," *Human Rights Review (December)* 12, no. 4 (2011): 441-463.
[39] Amnesty International recently conducted a new survey of attitudes to torture in 21 countries across every region. The figures are somewhat different to Miller's, most likely because of the phrasing of the question rather than shifts in attitudes. Amnesty International, "Attitudes to Torture," (2014), accessed May 23, 2014, http://www.amnesty.org/en/library/asset/ACT40/005/2014/en/571ddea2-66dd-4f77-81e3-053339d3a096/act400052014en.pdf.

In this regard, we can take some lessons from those who have thought about how to best mobilise public opinion in contexts where it is not already on one's side. Discussing the problem of USA opinion and torture in the post 9/11 context, Dinah PoKempner, General Counsel for Human Rights Watch, suggests several principles for effective campaigning to change public opinion around torture:

(a) Fight euphemisms and trivialisation wherever they occur in public discourse;
(b) Identify and redirect the emotional associations that images and words around torture evoke;
(c) Deploy the apprehension of danger (which is often used to justify torture) as a means of inhibiting the resort to torture;
(d) Both establish that torture does not work and develop a powerful alternative narrative about what does; and
(e) Identify the frameworks that have allowed for responsibility to be deflected and problematise the issue of social and political collaboration.[40]

In order to further test the theory of change underlying naming and shaming or accusatory monitoring, we then need to ask a further question: Do Governments take actions to bring about the elimination of torture as a result of NGO and civil society pressure? In general, it seems that NGOs have been tremendously successful in changing the global landscape in relation to human rights, establishing a vast machinery of instruments, institutions and funded programs as well as state support, as evidenced by ratifications, domestic laws and support for human rights programs.[41] The creation of *processes*, however, is not the same as achieving *outcomes*. Korey's study of Amnesty International's campaign in relation to torture usefully illustrates this problem. It concludes that 'The Campaign for the Abolition of Torture was one of the most successful initiatives ever taken by an NGO'[42] and then defines this success as the creation of legal standard settings and accusatory monitoring to name and shame governments into *more* legal standard-setting. What is missing here is data or information indicating that the legal standards that Governments enacted as a result of civil society advocacy resulted in less torture.

This focus on a juridical process, in the absence of a deeper engagement with the dynamics of the various organisations and individuals who actually perpetuate or sustain practices of torture, may miss the point. Part of what is at issue here, particularly in contexts like the Asia Pacific region, is that the drivers of torture are not necessarily neatly organised under a single authority – that is, torture may be beyond the control of the political actors who NGO campaigns target. So, while NGOs and civil society may be able to influence Governments to change formal laws, we do not know if Governments' influence extends to the levels of informal law and practice (that is, the factors that largely determine whether or not torture takes place). However, the research on the factors that allow NGOs to successfully influence politicians and policy makers is useful insofar that guides us to where efforts should be best focused. This research tells us, for example, that NGOs can gain political attention because they can fill a critical information gap that political figures experience: the a gap created by the plague too little or too much information. However to use this opportunity to its fullest potential, NGOs must provide information that is accurate, digestible and targeted to fit policy contexts.[43] NGOs may also be successful in gaining political attention by evoking norms and manipulating them rhetorically to force politicians to behave.[44] They do this both by exposing the ways in which political figures are violating standards that are generally thought to be appropriate, or that they have themselves publically endorsed.

Finally, and in summary, the evidence on the impacts of accusatory monitoring, or 'naming and shaming' in relation to torture reduction or prevention is inconclusive.[45] Cumulatively, the research suggests that accusatory monitoring does not, in itself, reduce violations; it does so indirectly and only in conjunction with many other conditions. Further, different states respond to different pressures in different ways so public naming and shaming of abusive governments is often followed by contradictory policy results despite the success of media, and NGOs in publicising abuses.[46]

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[40] Dinah PoKempner, "The Quality of Outrage," *Unpublished Manuscript* (2008)
[41] William Korey, *NGO's and the Universal Declaration of Human Rights* (New York: Palgrave, 1998); Hafner-Burton and Ron. "Seeing Double," 360-401.
[42] Korey, *NGOs,* 171.
[43] Elizabeth Bloodgood, "Influential Information," (Ph.D. diss., University of Pennsylvania, 2008)
[44] Thomas Risse-Kappen, Stephen C. Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999)
[45] Hafner-Burton and Ron, "Seeing double"
[46] James C. Franklin, "Shame on You: The Impact of Human Rights Criticism on Political Repression in Latin America," *International Studies Quarterly* 52 (2008): 187-21; Emilie Hafner-Burton, "Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem," *International Organization* 62 (Fall) (2008): 689-716.

In general, if accusatory monitoring is to work, international pressure must be applied to states where there is no national security threat, where economic interests of domestic elites are threatened by norm violations, and where pro-human rights constituencies have broad social support domestically.[47] None of this should lead us to conclude that we should do away with accusatory monitoring. Irrespective of how well it achieves the final end of reducing torture, it has a number of important proximal outcomes. Sound research provides us with accurate evidence of where, how and to what extent torture is occurring. Well-crafted public campaigns have shown they can shift public opinion, build domestic constituencies and change the norm landscape in which politicians (and others who are ultimately responsible for bring about policy changes) operate. And exposing where governments are failing to live up to the standards by which they will be judged electorally, or in terms of international relations, may convince them of the need to take action. Nevertheless, the fact that this strategy seems likely to succeed only under particular conditions, combined with very mixed evidence about the success of the human rights movement in reducing torture raises two critical questions. Firstly, if the more pessimistic analysts turn out to be correct, and accusatory monitoring has not brought about significant reductions in torture, how do we explain the hegemony of accusatory monitoring? Why are there so much energy, resources and personnel given over to naming, shaming, informing, educating, and training worldwide? Why are human beings investing so much in something that does not work, to prevent violations of personal integrity rights? This is an analytic puzzle to which there might be several possible answers: bureaucratic inertia and reproduction, the emergence of a new civil religion, or a new hegemonic language of the Global North to reconcile those in countries with high levels of oppression to their neo-globalised oppression. All of these might be plausible candidates that would explain this outcome.

Secondly, and more importantly, how would we work out what does work and go about translating this into programs of action for people committed to reducing torture? This question established the agenda for our project.

[47] 'International human rights influence cannot succeed in creating rights-protective regimes until all three conditions are satisfied. Indeed, this explains why human rights reform can take so long to achieve.' Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (Philadelphia: University of Pennsylvania Press, 2007), 115.