The struggle against torture

by Walter Kälin

Over the past fifty years, the struggle against torture has become a central concern of human rights law. The first international legal text specifically outlawing "torture" was the 1948 Universal Declaration of Human Rights (Article 5). The first treaty prohibiting torture — the European Convention on human rights (Article 3) — was adopted soon afterwards, in 1950. In 1984, the United Nations Convention against torture became the first binding international instrument exclusively dedicated to the struggle against one of the most serious and pervasive human rights violations of our time.

Today, most general human rights conventions, at both regional and global levels, address the issue of torture and ill-treatment of persons.[1] They declare that torture is prohibited absolutely — even during emergencies or armed conflicts, these conventions insist, torture is impermissible.[2] The dedication of international human rights law to outlawing such acts is also evidenced by the existence of instruments dedicated to the *prevention* of torture.[3]

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[1] Article 7 of the Covenant on civil and political rights (CCPR), 19 December 1966; Article 37(a) of the Convention on the rights of the child (CRC), 20 November 1989; Article 5(2) of the American Convention on human rights (ACHR), 22 November 1969; Article 3 of the (European) Convention for the protection of human rights and fundamental freedoms (ECHR), 4 November 1950; Article 5 of the African Charter on human and peoples' rights, 26 June 1981.

[2] Article 4(2) CCPR, Article 15(2) ECHR, Article 27(2) ACHR.

[3] European Convention for the prevention of torture and inhuman or degrading treatment or punishment, 26 November 1987; Inter-American Convention to prevent and punish torture, 9 December 1985.

The strong presence of prohibitions on torture in human rights law should not overshadow the important contributions to banning torture made by international humanitarian law over the last century. Without referring explicitly to "torture", Article 4 of the Hague Conventions on the laws and customs of war on land of 1899 and 1907 states that prisoners of war must be humanely treated, clearly excluding torture from acceptable treatment.[4] Article 3, common to the four Geneva Conventions of 1949, includes on the list of minimum standards to be observed by all parties even in non-international armed conflicts a prohibition on "[v]iolence to life and person, in particular . . . mutilation, cruel treatment and torture". Similarly, Protocol II prohibits "violence to the life, health and physical or mental well-being of persons, in particular . . . cruel treatment such as torture, mutilation or any form of corporal punishment".[5] The Third Geneva Convention obliges State Parties and their authorities to treat prisoners of war of international armed conflicts humanely at all times and to respect their persons in all circumstances.[6] The Fourth Convention prohibits acts of violence against and the torture of protected civilians in time of war.[7] Finally, Article 75 of Protocol I extends this prohibition to all persons in such situations and clarifies that "torture of all kinds, whether physical or mental" is absolutely prohibited.[8]

The subject of torture is an area where human rights law and humanitarian law clearly converge and where the two sets of norms reinforce each other. The different provisions on torture are a good example of how norms for the protection of human beings today are often based on unified

[4] A prohibition of torture can also be deduced from other Articles, including 44 and 46; see M. Cherif Bassiouni, "An appraisal of torture in international law and practice: The need for an International Convention for the prevention and suppression of torture", *Revue internationale de droit pénal*, Vol. 48, 1977, Nos. 3 and 4, p. 71.

[5] Article 4, para. 2(a) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II).

[6] Articles 13 and 14 of the Third Geneva Convention relative to the treatment of prisoners of war of 12 August 1949.

[7] Articles 27 and 32 of the Fourth Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949.

[8] Article 75, para. 2(a)(ii) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

concepts that underlie different institutional frameworks.[9] This paper explores the relationship of these norms on different levels. To this end, it is useful to distinguish between the three complementary aspects of effective human rights implementation: prevention; enforcement and repression; and reparation.

Prevention

Because of its far-reaching psychological effects, the harm inflicted by torture on the victim cannot be undone. Therefore, prevention is of primary importance. In the area of human rights law, Article 2, para. 1, of the Convention against torture obliges each State to "take effective legislative, administrative, judicial or other measures to prevent acts of torture". Such measures include not only clearly outlawing acts of torture,[10] but also training police and security personnel, implementing precise guidelines on the treatment of persons deprived of their liberty, implementing domestic inspection and supervision mechanisms and/or introducing machinery for the effective investigation of complaints regarding ill-treatment. As the former Special Rapporteur on Torture of the UN Human Rights Commission, Peter Kooijmans, has rightly stressed, torture is never an isolated phenomenon: "It does not start in the torture chambers of this world. It begins much earlier, whenever respect for the dignity of all fellow human beings and the right to have this inherent dignity recognized are absent".[11] Therefore, safeguards against torture must already be built up in the treatment of prisoners and other detained persons.[12]

Humanitarian law has long recognized the need for detailed provisions concerning the treatment of persons deprived of their liberty as a safeguard against ill-treatment. The many provisions of the Third Geneva

[9] See Theodor Meron, *Human rights in internal strife: Their international protection*, Cambridge, 1987, p. 28, and Walter Kälin/Larisa Gabriel, "Human rights in times of occupation: An introduction", in Walter Kälin (Ed.), *Human rights in times of occupation: The case of Kuwait*, Bern, 1994, pp. 26-29.

[10] On the obligation to declare torture as an offence under domestic criminal law, see Article 4 of the Convention against torture.

[11] Peter H. Kooijmans, "The role and action of the UN Special Rapporteur on torture", in Antonio Cassese (Ed.), *The international fight against torture — La lutte internationale contre la torture*, Baden-Baden, 1991, p. 65.

[12] *Ibid.*

Convention, especially those on the internment of prisoners of war (Article 21 ff.) and those on the relations between prisoners of war and the authorities (Article 78 ff.), can be read as a codification of norms to effectively prevent torture and cruel or inhuman treatment or punishment for this category of protected persons. The same is true for many of the provisions on the treatment of internees contained in the Fourth Geneva Convention.[13]

The duty to prevent torture is of paramount importance as violations are often hidden. Peter Kooijmans has accurately called torture the most intimate human rights violation, as it takes place in isolation and is very often inflicted by a torturer who remains anonymous to the victim and who regards the victim as a faceless object.[14] Visits to places of detention help to eliminate this anonymity and are therefore very effective in preventing torture. Such visits also make it possible to identify situations conducive to torture and initiate appropriate measures to reduce the risk of such acts. International humanitarian law recognizes the value of these visits. According to Article 143 of the Fourth Geneva Convention, delegates of the ICRC or the Protecting Powers "shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work".[15] The same right is granted in Article 126 of the Third Geneva Convention for visiting prisoners of war.[16] In situations of non-international armed conflicts, the ICRC may offer its services to the parties to the conflict[17] and thus receive permission to visit persons deprived of their liberty as a result of these conflicts too. The right of initiative is also recognized in situations of tension and internal disturbances where the ICRC might visit (with the consent of the state concerned) persons detained for reasons related to that particular situation, i.e. "political" or "security" prisoners.

[13] Art. 79 ff.

[14] "Torture and other Cruel, Inhuman and Degrading Treatment or Punishment", Report of the Special Rapporteur, Mr P. Kooijmans, 21 December 1991, UN Doc. E/CN.4/1992/17, para. 277.

[15] Article 143(1) of the Fourth Geneva Convention. According to para. 5 of the same Article, the occupying power has to approve the appointment of delegates of the ICRC but not the principle of visits as such.

[16] Article 81 of Protocol I reiterates these rights in general terms.

[17] Common Article 3(2).

In their visits, the ICRC and its delegates will make confidential approaches to the authorities to ameliorate the detainees' conditions.[18] Additionally, the mere physical presence of persons from outside the place of detention can often effectively prevent torture and ill-treatment and lead to improvements in the conditions of detention. The ICRC's experience has shown that "[a]ccording to the detainees and even the governments who have chosen to accept the services of the ICRC, the visits of the delegates of the ICRC are generally positive."[19]

Jean-Jacques Gautier, a Geneva-based private banker, shared this positive assessment. In 1977, Gautier founded the Geneva-based Swiss Committee Against Torture (now named the Association for the Prevention of Torture). His vision was to extend to all prisoners the system of preventive visits to places of detention by international experts and thus to apply an instrument developed in humanitarian law in the sphere of human rights protection.[20]

After it became clear that the time was not ripe for the adoption of a treaty-based obligation to accept such visits at the United Nations level, the Council of Europe took up the matter and, in 1987, adopted the European Convention for the prevention of torture and inhuman or degrading treatment or punishment. This Convention allows a body of independent experts (known as the European Committee for the Prevention of Torture) to carry out regular or *ad hoc* visits to all places of detention in the territory of States Parties and to make confidential recommendations to the country concerned in order to improve situations conducive to

[18] On the visits carried out by the ICRC see, in particular, Hans Haug, *Humanity for all – The International Red Cross and Red Crescent Movement*, Berne/Stuttgart/Vienna, 1993, pp. 97-162; Françoise Comtesse, "Activities of the ICRC in respect of visits to persons deprived of their liberty: conditions and methodology", in Association for the Prevention of Torture (Eds), *The implementation of the European Convention for the prevention of torture and inhuman or degrading treatment or punishment (ECPT) — Assessment and perspectives after five years of activities of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, Geneva, 1994, pp. 239-248; Philippe de Sinner/Hernan Reyes, "Activités du CICR en matière de visites aux personnes privées de liberté: Une contribution à la lutte contre la torture", in Cassese, *supra* (note 11), pp. 153-171.

[19] Comtesse, *supra* (note 18), p. 247.

[20] See the contributions by Renaud Gautier and François de Vargas in *20 ans consacrés à la réalisation d'une idée*, Recueil d'articles en honneur de Jean-Jacques Gautier, APT, Genève, 1997, pp. 21-26 and 27-46.

torture and ill-treatment. This has had considerable success in the fight against torture.[21]

At the same time, the idea of creating an effective instrument of prevention at the global level has not been dropped. In 1991, the UN Human Rights Commission received Costa Rica's submission of a draft Optional Protocol to the 1984 Convention against torture.[22] The draft aims to introduce a system of preventive visits to places of detention "with a view to strengthening, if necessary, the protection of . . . [detained persons] . . . from torture and from cruel, inhuman or degrading treatment or punishment". If this Protocol is ratified, such visits will be carried out by a sub-committee composed of independent experts.[23] Negotiations of this draft continue in the working group set up by the UN Human Rights Commission.

The human rights instruments for the prevention of torture would not exist without the model provided by international humanitarian law. Experience has shown, however, that the European Convention on the prevention of torture is not just a duplication of the ICRC's visits to detainees. The Convention has evolved its own identity.[24] For instance, the Convention covers all situations of detention, whereas ICRC visits are limited to particular situations in the context of armed conflict and violent disturbances.

More significantly, the ICRC is primarily concerned with *individuals* while the European Committee for the Prevention of Torture (CPT) focuses mainly on *situations*. The ICRC maintains a long-term presence in the places it visits : to visit prisoners repeatedly and to give them material aid if necessary is one of the basic principles of this work. The CPT's visits are generally one-off,[25] serving as a point of departure for an

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[21] On the European Convention for the prevention of torture (note 20) see Malcolm Evans and Rod Morgan, "The origins and drafting of the ECPT — a salutary lesson?", *supra*, pp. 85-97; Antonio Cassese, The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, in Cassese, *supra* (note 11), pp. 135-152.

[22] Draft Optional Protocol to the Convention against torture and other cruel, inhuman or degrading treatment or punishment, annexed to the letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations Office at Geneva addressed to the Under-Secretary-General for Human Rights, UN Doc E/CN.4/1991/66.

[23] The proposed full title is "Sub-Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture".

[24] See Hans-Peter Gasser, "Suivre les travaux du groupe Gautier . . .", *supra* (note 20), p. 67.

[25] Follow-up visits are possible but their primary purpose is not to revisit individual prisoners.

ongoing dialogue with the government regarding measures to reduce the risk of torture and ill-treatment. As a consequence, the CPT has become deeply involved in issues relating to the rights of persons in police custody (e.g. measures against being detained *incommunicado*) or improvements in sub-standard conditions of detention.[26]

Like the ICRC's visiting activities, the work undertaken by the CPT remains confidential. However, the emphasis on reform explains why States found it necessary to depart from the principle of full confidentiality and to include in the European Convention the possibility of making a public statement if the State Party concerned "fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations."[27] If the Draft Optional Protocol to the Torture Convention enters into force, the emphasis on situations and reform might be even stronger, particularly as the draft has been amended during negotiations to create a fund which would allow States with limited means to implement costly reforms.[28]

Regarding the methodology of visits to places of detention, humanitarian law has also created the model for human rights instruments. According to Article 143 of the Fourth Geneva Convention, delegates are permitted to go to all places of detention and internment selected by them and are to have "access to all premises" there.[29] Delegates must be able to interview in private any detainee they wish, without limits on the duration and frequency of such visits. These conditions must also be met before the ICRC carries out visits on the basis of its right of initiative.

These basic principles have been incorporated into the European Convention on the prevention of torture.[30] The Inter-American Commission on Human Rights also has the right of access to places of detention

[26] See Roland Bank, "Preventive measures against torture: An analysis of standards set by the CPT, CAT, HCR and Special Rapporteur", *supra* (note 20), p. 129; Ralf Alleweldt, "Präventiver Menschenrechtsschutz — Ein Blick auf die Tätigkeit des Europäischen Komitees zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Strafe (CPT)", *Europäische Grundrechte-Zeitschrift*, 1998, pp. 245-271.

[27] Article 10(2), European Convention for the prevention of torture and inhuman or degrading treatment or punishment.

[28] Article 16 of the Draft Optional Protocol, UN Doc. E/CN.4/1998/42, 2 December 1997, Annex I.

[29] See also Article 126 of the Third Geneva Convention.

[30] Article 8 of the European Convention on the prevention of torture.

and of talking to detainees without witnesses[31] and the UN Special Rapporteurs insist on the same possibilities when they carry out visits to places of detention.[32] The Draft Optional Protocol to the Torture Convention now before the UN Human Rights Commission follows the same pattern, but the relevant provision has not been adopted yet. It is to be hoped that what has been established as standard operating procedures for international mechanisms carrying out visits to places of detention will not be jeopardized when this Optional Protocol is adopted!

Enforcement and repression

Human rights law has developed a multitude of instruments for enforcing the prohibition on torture. The 1984 Convention against torture provides an example of the full range of possibilities: the obligation of States Parties to submit, on a regular basis, "reports on the measures they have taken to give effect to their undertakings under this Convention"[33] forces them to justify their behaviour and provides the Committee Against Torture with an opportunity to enter into a dialogue with the government concerned and to criticize it publicly if necessary to improve the situation. Such a reporting system is also part of the Covenant on Civil and Political Rights which allows, *inter alia*, questions to be raised regarding the infliction of torture.[34] The Convention against torture allows the Committee to investigate situations of systematic violations and, with the consent of the State Party concerned, to carry out on-site visits.[35] Investigations of systematic violations of the prohibition on torture (including visits to the countries concerned[36]) are also undertaken by the Special Rapporteur on Torture[37] and other Rapporteurs and Working Groups appointed by the

[31] Article 59 of the Regulations of the Inter-American Commission on Human Rights.

[32] See Association for the Prevention of Torture, "Standard operating procedures of international mechanisms carrying out visits to places of detention", Workshop, 24 May 1997, Geneva, 1997.

[33] Article 19(1).

[34] Articles 7 and 40.

[35] Article 20 of the Convention.

[36] Such visits need the consent of that country.

[37] See Kooijmans, *supra* (note 11), pp. 56-72.

UN Commission on Human Rights[38] who have to report on allegations of torture and their findings. Finally, the Convention against torture provides for the possibilities of interstate and individual complaints.[39] Such procedures also exist within the framework of the Covenant on civil and political rights and in regional human rights conventions. In the case of the European Convention on human rights, these mechanisms are mandatory and the decisions of the European Court of Human Rights binding and enforceable.

Enforcement mechanisms are relatively weak in international humanitarian law. In cases of torture, Protecting Powers and the ICRC may make representations to the responsible State Party to the Geneva Conventions and the Protocols, but there are no formal procedures that allow the enforcement of the prohibition on torture. Article 90 of Protocol I has instituted the International Fact-Finding Commission which, *inter alia*, could investigate serious cases of torture.

In contrast, humanitarian law has played a vital role in developing concepts for penal repression of grave breaches of basic obligations under the Geneva Conventions and their Additional Protocols. Torture is explicitly mentioned in the definition of grave breaches in all four Geneva Conventions.[40] States are obliged to "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed" such acts; they are also "under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts" if these persons are not extradited to another State Party.[41] In view of this clear recognition of torture as an act which entails individual penal responsibility of the perpetrators, it is not

[38] Besides the Special Rapporteur on Torture, many of the country-specific Rapporteurs, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions and the Working Groups on Arbitrary Detention and on Disappearances are concerned with cases of torture and ill-treatment.

[39] Articles 21 and 22. These procedures can take place only if the country concerned has made a declaration recognizing the competence of the Committee against Torture to receive such communications.

[40] Article 50 of the First, Article 51 of the Second, Article 130 of the Third and Article 147 of the Fourth Geneva Convention.

[41] Article 49 of the First, Article 50 of the Second, Article 129 of the Third and Article146 of the Fourth Geneva Convention.

surprising that torture is also among the acts punishable by the International Tribunals established to deal with crimes committed in the former Yugoslavia and in Rwanda.[42] Furthermore torture is also listed in the Draft Code of Crimes against the Peace and Security of Mankind.[43]

Human rights law is normally not concerned with individual responsibility. It is therefore crucial for the struggle against torture that, according to Articles 4 and 5 of the Convention against torture, States must enact legislation allowing for the punishment of perpetrators of torture who are their own nationals or, in the case of aliens, are not extradited. While, according to the *travaux préparatoires*, these provisions have been inspired by conventions dedicated to the struggle against terrorism,[44] the foundation on which they are based is the concept of individual responsibility for grave breaches of international humanitarian law.

Reparation

As mentioned above, acts of torture cannot be undone and psychological damage continues long after the physical wounds inflicted on the victim are healed. Yet human rights law recognizes that reparation and compensation for such victims may enhance the healing process by supporting the victim's sense of justice. The most explicit provision of human rights law on reparation is Article 14 of the Convention against torture. This provision obliges every State Party to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation". In principle, reparation and compensation can also be granted by the international bodies whose task it is to decide about individual applications. Article 41[45] of the European

[42] Articles 2(b) and 5(f) of the Statute of the International Tribunal for the persecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, 32 *I.L.M.* 1170 (1993), and Articles 3(f) and 4(a) of the Statute of the International Tribunal for Rwanda, 33 *I.L.M.* 1602 (1994).

[43] Articles 18(c) and 20(a)(ii) of the Draft Code of crimes against the peace and security of mankind, Human Rights Law Journal, Vol. 18, 1997, pp. 96-134. See also Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/2/Add. 1 (14 April 1998), draft article on crimes against humanity.

[44] See J. Herman Burgers/Hans Danelius, *The United Nations Convention against torture*, Dordrecht/Boston/London, 1988, pp. 56-57 and p. 130, who mention as sources of inspiration the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, the Convention against the taking of hostages or the Convention for the suppression of the unlawful seizure of aircraft.

[45] Formerly Article 50, ECHR.

Convention on human rights provides that the European Court of Human Rights shall, in a decision binding on States, "afford just satisfaction to the injured party".[46] The Inter-American Court of Human Rights has developed similar case law[47] and other treaty bodies have, on several occasions, recommended the payment of compensation to victims of human rights violations.[48]

International humanitarian law addresses the question of reparation for States,[49] but does not provide for compensation to be paid to victims on torture. In this regard, the Iraqi occupation of Kuwait presents an interesting case, as the Security Council, in Resolution 687 (1991), decided that Iraq was obliged to pay reparations through a Compensation Fund for the resulting injuries. The UN Compensation Commission has decided to grant payments of fixed amounts[50] to persons who "as a result of Iraq's unlawful invasion and occupation of Kuwait . . . suffered serious personal injury",[51] including torture.[52] It remains to be seen whether this will serve as a model for future cases of grave breaches of international humanitarian law.

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[46] For details see the study by Gerhard Dannemann, *Schadenersatz bei Verletzung der Europäischen Menschenrechtskonvention*, Köln/Berlin/Bonn/München, 1994. See also, e.g., ECHR, *Kurt v. Turkey* judgment of 24 May 1998, Reports 1998 (not yet printed), paras. 171-175.

[47] Velasquez Rodriguez Case, Judgment of July 29, 1988, Series C No. 4 (1988).

[48] See Theo van Boven, "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms", dated 2 July 1993 and submitted to the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Forty-fifth session, UN Doc. E/CN.4/Sub.2/1993/8, paras. 60-79. Especially rich is the case law of the Human Rights Committee established under the Covenant on Civil and Political Rights (van Boven, paras. 50-59).

[49] See Article 3 of the Hague Convention regarding the laws and customs of war on land, 18 October 1907. The Four Geneva Conventions all provide that parties cannot absolve themselves of liability in respect of grave breaches, and Protocol I, in Article 91, stipulates that parties to a conflict shall be "liable to pay compensation" for violating provisions of the Conventions or of the Protocol.

[50] According to Decision 1 of the Governing Council of the Compensation Commission, paras. 11-13 (30 *I.L.M.* 1713 [1991]) the amounts were set at between 2,500 and 10,000 US$. These amounts were later raised to 30,000 US$ per claimant and 60,000 US$ per family unit (Governing Council Decision 8, para. 3 and 4, 31 *I.L.M.* 1036 [1992]).

[51] UN Compensation Commission, Governing Council Decision 1, para. 10, 30 *I.L.M.* 1713 (1991).

[52] UN Compensation Commission, Governing Council Decision 3 defining the terms "personal injury and mental pain and anguish" as consequences *inter alia* arising from torture.

Conclusion

International humanitarian law and human rights law have both made specific contributions to the struggle against torture. The ICRC has developed a methodology for prison visits which has deeply influenced human rights law instruments for the prevention of torture. Basic concepts regarding penal responsibility for acts of torture also have been elaborated in the context of norms applicable in situations of armed conflict. Human rights law has significantly contributed to the development of mechanisms for the enforcement of the prohibition on torture, including individual complaint procedures and fact-finding methods. It is also in human rights law that the idea of reparation for victims of torture is explicitly recognized.

The present state of international law shows that together humanitarian law and human rights instruments offer a comprehensive set of norms and procedures for the prevention, implementation and repression of acts of torture, and for reparation for such acts. Historically, the two areas have influenced each other positively. Today, weaknesses in one area can most often be compensated by invoking instruments belonging to the other. The continuing existence of torture in many countries is not caused by legal gaps, but rather by a lack of political will to implement the obligations of States under international humanitarian and human rights law.