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International Human Rights, Legal Diversity, and the Recognition of Cruelty[1]

Human rights practices are ripe for analysis in terms of the approaches and questions that Franz von Benda-Beckman has developed over his long and fruitful career as a legal anthropologist. For one, it has often been claimed that international human rights law is not law at all, but a vague set of normative aspirations, with only an indirect relationship to the coercive power of the state. However, as Franz's work has shown, if we want to understand the ways in which order is made and unmade, or social relationships produced and reproduced, we need a more expansive conception of legality than allowed by a rather narrow legal positivism. Secondly, human rights law exists in an international field marked by immense legal diversity. Not only is human rights law made up of multiple normative reference points, but also international humanitarian law, the law of war, international 'soft' commercial law, not to mention domestic national laws, all compete with human rights law for applicability to any given context. Franz's work has been central in allowing us to understand how such plural legal orders relate to one another, and the consequences for the production of political, social and economic inequality. Finally, and most importantly for the focus

of this paper, human rights shape people's way of making sense of the world. As Franz has pointed out many times, legal categories are not merely instrumental objects to be cynically manipulated, but shape the ways in which we see the world and act upon it. In particular, he has made a key distinction between law as a set of cognitive categories, that which describes the ways in which they world is and why it is so, and normative categories, that describes the ways the world should be.[2] Legal practices produce both the 'is' and the 'ought' of social life, as the divide between 'fact' and 'law' is constantly crossed.

This paper will use the insights of Franz von Benda-Beckman on plurality and inequality on the one hand, and the role of law as both a cognitive and normative set of practices on the other, as its starting point in order to explore the ways in which the UN human rights system seeks to get to grips with the meanings and implications of deliberately inflicted cruelty, otherwise known as torture. Torture is perhaps the most widely prohibited of all human rights violations and has a significant place in virtually every major international human rights instrument. At the heart of the international prohibition of torture lies the UN Committee Against Torture, charged with monitoring compliance with the Convention Against Torture. The work of the Committee plays an important role in defining torture and the compliance of states with the Convention. However, as with the other UN human rights committees, it lacks the means of enforcement. Instead, the Committee generates reports from states, alongside information from NGOs and other international bodies, and then issues non-binding recommendations. As such, the Committee Against Torture is best understood as being a form of knowledge production. The recognition of torture represents arguably unique challenges. Torture's particular stigma, as one of the most

universally recognised human rights prohibitions, raises the stakes for those states potentially accused of torture. Very few, if any, states will willingly admit that they participate in torture. Furthermore, despite its apparent moral absolutism, torture remains a notoriously slippery subject, its precise meanings constantly moving under pressure. Finally, the overwhelming pain of torture, and the often subtle ways it is administered, arguably blocks forms of communication, creating doubt about its very existence in any given case.[3] Any attempt to recognise torture must therefore deal with serious political, legal and epistemological hurdles.

This paper turns the ethnographic gaze on the human rights monitoring process, in order to ask what forms of knowledge does human rights monitoring produce about cruelty and suffering? Human rights monitoring is not merely a technical process of information gathering, but is shot through with normative assumptions about forms of accountability and responsibility. To begin with, practices and procedures have to be made 'monitorable' and amenable to particular forms of assessment. As such, the monitoring process does not simply reveal, but abstracts and codifies.[4] Evidence is not just 'out there', but is filtered through judgments about expertise, trust and risk. This is not a neutral process but depends on institutional environments that are 'fit for monitoring'.[5] In this context, the Committee Against Torture produces a form of knowledge about suffering that is always one step removed from the direct infliction of cruelty. A concern for the 'is' and 'ought' of torture is shifted away from particular incidents of violence to the level of broad polices, frameworks, and statistics, where wrongdoing and its eradication is linked to the relative absence or presence of set of technical arrangements. The normative and the empirical are merged through a focus on an idealized vision of the liberal state. These processes serves to reproduce a

generalized distinction, never quite held down to specifics, between the developed and the underdeveloped and the 'civilized' and the 'uncivilized'. The result is that the Committee largely ignores the political nature of violence in favour of technical policies procedures, simultaneously reproducing international political inequalities and depoliticising the causes and consequences of cruelty and suffering.

The paper presented below is based on fieldwork at the 2006 and 2007 sessions of the Committee Against Torture. This period saw reports presented by the US, Qatar, the Republic of Georgia, Togo, Ukraine, Denmark, Guatemala, Italy, Japan, Lichtenstein, the Netherlands, Peru, and Poland. During this time I attended the sessions of the Committee as well as interviewed Committee members, staff of the OHCHR secretariat, and numerous NGO and state representatives. This has been supplemented by an analysis of the numerous reports produced by the state parties to the Convention, NGOs and the Committee itself.

Torture, Recognition and Human Rights

Despite its moral absolutism, the concept of torture remains notoriously vague, and it is legal practices that have historically given torture its greatest definitional coherence. Medically speaking there is no specific syndrome associated with torture victims, whose symptoms can range from severe psychosis to mild nightmares.[6] The most widely accepted medical condition associated with torture victims, Post-Traumatic Stress Disorder (PTSD), includes a group of people much wider than those who have been subjected to torture.[7] Furthermore, a diagnosis of PTSD fails to capture the whole experience of torture survivors, who are often as concerned with access to housing, welfare and employment as they are about medical treatment.[8] At

the level of direct experience it has famously been claimed the distinctive nature of torture lies in its ability to destroy the capacity to communicate.[9] However, the idea that the pain of torture is a fundamentally private experience denies the ways in which pain is itself a social relationship. As Veena Das argues, the statement 'I am in pain' is a declarative statement that does not seek to describe a state- but to voice a complaint.[10] The task is therefore to create the conditions that allow the 'private experience of pain to move out into the realm of publicly articulated pain- to create a moral community through the sharing of pain'.[11] As such, the problem of torture is not one of the failure of language, but the failure of recognition. The issue is not so much that victims can not communicate their suffering but that lawyers, doctors and other practitioners find it difficult to recognize when and where cruelty has taken place. The ways in which legal processes produce or deny claims about torture is therefore a question of great importance.

Any understanding of the concept of torture cannot be separated from the legal practices that have shaped its meanings and implications. More specifically, the category of torture has its roots in the reform of European law in the seventeenth and eighteenth centuries.[12] The growth of judicial torture in medieval Europe was not simply the product of an arbitrary and capricious politics, but rather a desire to create legally reliable evidence. Similarly, the abolition of torture took place following the creation of forms of punishment, such as the prisons, that unlike the death penalty did not seem to demand absolute levels of proof. The concept of torture has therefore developed not as a direct expression of human experience, but against the background of judicial reforms. This is not to say that the legal concept of torture is itself unified or coherent. There are important and ongoing conflicts over the threshold of the

severity of pain and cruelty, the role of intention, the identity of perpetrators and the positive obligations of states to prevent torture. This also does not mean of course that wider moral and sentimental definitions of torture are widely used. However, the concept of torture has been developed within the context of juridical institutions and legal forums remain the central place where the precise meanings of torture are debated and recognized. Torture is therefore, to use Franz von Benda Beckman's terminology, a legal category in both the cognitive and normative sense. It sets out to describe and distinguish specific for s of cruelty, and to prohibit its occurrence.

The production of legal knowledge about torture therefore needs to be examined in order to explore how it prioritises particular forms of knowledge about cruelty and suffering over others. As such we need to pay attention to the ways in which legal practices shape and produce, rather than simply distort understandings of suffering.[13] Rather than being clean and precise, the legal recognition of torture is itself shot through with disjunctures and fissures. It is marked as much by gaps that have to be continually jumped over, as it is by internal coherence. In this context, the task is not to examine how the legal processes of recognizing torture bleach out and thin down subjective experiences, but rather to explore how the legal recognition of torture produces multi-layered and often contradictory forms of knowledge about suffering.

UN human rights committees hold a particularly ambiguous position in international law. Although they are at the centre of the system of international human rights, they lack the ability either to determine issues of fact, or to issue legally binding decisions. As such they have an uncertain status, often fudged as 'quasi-legal' or 'quasi-judicial'. This ambiguity should not be treated as an anomaly to be skipped over, but

rather should be examined head on as it is central to the forms of knowledge produced by the Committee Against Torture. Never entirely certain of the empirical ground upon which they stand, nor able or willing to make clear determinations on matters of legal doctrine, the Committee members constantly move in a grey zone between 'fact' and 'law'. Although the Committee members are seen as the guardians of one of the key UN human rights conventions, at the same time they lack the mandate to issue legal determinations. Furthermore, although the Committee members are supposed to monitor compliance, they do not have the resources to launch effective investigations.

However, in the face of this normative and empirical uncertainty, a measure of stability is regained by the Committee members through a general distinction between what are seen as culturally and institutionally 'developed' and 'underdeveloped' states. States that are seen as failing to live up to this idealized model, that in reality exists nowhere, are treated as a pathological failure.[14] From the penal reformers of the 18th century, to the debates over the 'war on terror', the fight against torture has been associated with the values of a seemingly enlightened modernity.[15] The eradication of torture was a central part of the 'civilising mission' of the nineteenth and twentieth century.[16] More recently, the seeming tension between the use of torture and the purported 'values of the civilised world' has been at the heart of debates over the meanings and implications of the 'war on terror'.[17] In practice of course, as the last decade has shown, the historical opposition between torture and states claiming to uphold the values of 'civilisation' is far from self-evident.[18] However, at the levels of professed values and legal discourse at least, torture is widely seen as abhorrent and in direct contradiction to liberal modernity.

Recent work has highlighted the ways in which international human rights law can serve to reproduce global inequalities.[19] Such arguments have shown the ways in which colonial categories have been reinscribed into the practise of international law. However, whilst important, such critiques are often based on the analysis of text or broad histories of international relations and diplomacy, and as such ignore the often contradictory intentions and desires of the individuals and organisations through which human rights law is reproduced. At the UN Committee Against Torture, the reproduction of the distinction between the 'developed' and 'underdeveloped' is not the result of a deliberate policy, but rather is a product of the political constraints faced by the Committee and its institutional weaknesses. The rest of this paper will therefore explore the ways in which international human rights law is produced in the context of the cross cutting intentions and institutional configurations as people grapple with the task of monitoring human rights compliance.

The United Nations Convention Against Torture

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted in 1984, and entered into force on 26 June 1987. Created after intense lobbying by NGOs, most notably Amnesty International, CAT is currently ratified by 144 states. In its preamble the treaty declares its aim is 'to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world'. Article 1 defines torture as any act that causes mental or physical pain that is inflicted in order to obtain information, a confession or to coerce and intimidate. Importantly, for the Convention, torture does not include 'pain or suffering arising only from, inherent in or incidental to lawful sanctions'. The prohibition of torture is seen as absolute, with

no exceptions for reasons of security or otherwise and 'no exceptional circumstances whatsoever…may be invoked as a justification of torture (Article 2). The central principle behind the Convention is the prevention of impunity through ensuring that torture is effectively criminalized by member states.

The Committee Against Torture (hence forth the 'Committee') was established by CAT in order to monitor compliance with the Convention. In doing so, CAT mirrors the other core UN Human Rights treaties. As Normand and Zaidi argue, from the outset signatory states were unable to agree on the precise powers of the UN human rights system, with the US and USSR being particularly keen to avoid any restrictions on sovereignty.[20] The result was a monitoring process with a deliberately restricted mandate. As with the other Committees, the terms of reference for Committee Against Torture are left vague by the Convention, opening up considerable room for interpretation and contestation between states and the Committee members. As such, it is crucial to recognize that the roles and process of the Committee are not given once and for all, but are constantly changing. Rather than being a functional product of international governance, or a direct and self-evident response to international human rights violations, the practices of the Committee are a fragmented and conflicted process, produced through the interaction of the various interests of international diplomats, UN civil servants and NGOs.[21] The Committee is made up of ten members, elected every 4 years by the states that have ratified the Convention. Members are nominated by their states, but once they sit on the Committee they are supposed to act independently. The practice has been to have two South American, two African, three European, one North American, Eastern European and one Chinese member. Of the ten members in 2007, two worked in NGOs, three were diplomats, three worked in law schools, and two as judges.

In order to monitor compliance with their obligations under the Convention, state parties are required to submit an initial report one year after initially ratifying the Convention, and thereafter a periodic report every four years. The Convention merely sets out that states must 'submit to the Committee… reports on the measures they have taken to give effect to their undertakings under this Convention.'[22] It does not detail the format of the reports, their length, or the forms of information required. Historically, there as been a wide variation in the reports sent to the Committee. The Committee does issue guidelines for how it would like the reports to be presented, but these are by no means always followed. Since the late 1990s, the Committee has also adopted the practice of sending a list of issues, essentially a request for further information, six months prior to examining a state's report. In 2007 the Committee also adopted, a new procedure whereby it would send out, on a case by case basis, its own list of issues, which will then form the basis of a state's periodic report. The specific process through which reports are examined is also not set out anywhere in the Convention. As of 2008 the Committee meets twice a year in May and November, for three and two weeks respectively. Reporting states are given the opportunity to present their report, before receiving questions from the members. The state is then given 36 hours to come back and give replies. Finally, the Convention states that the Committee 'may, at its discretion, decide to include any comments or suggestions', but does not make these comments obligatory, nor does it set out their form.[23] Over the years there has been a great deal of variation in what have come to be called 'conclusions and recommendations'. The very term 'recommendation' is a discretionary insertion from the Committee and is not included in the text of the Convention. Originally, the conclusions were not issued in the name of the Committee as a whole, but individual members. More recently there has been a move towards

more systematized conclusions, that include 'positive aspects' and then 'subjects of concern' with distinct 'recommendations' attached to each issue.

Alongside the formal sessions of the Committee there are three parallel mechanisms directly or indirectly established by CAT. The first is a system of complaints by private individuals about specific incidences of torture, known as 'communications'. States have to opt into this aspect of CAT and decisions are communicated to the state and petitioner involved. The second is a 'confidential inquiry' by one of the Committee members. This process has only been set into motion in three cases (Brazil, Egypt and Turkey). Finally, and perhaps most importantly, an Optional Protocol to the Convention (OPCAT) entered into force on 22 June 2006. OPCAT established a sub-committee in order to ensure a 'system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.'[24] The OPCAT process is in its initial stages at the time of writing, and its direct relationship to the Committee is still largely undefined. The focus of this paper is the state reporting process, as that remains the most comprehensive part of the monitoring process.

The general consensus amongst commentators, NGOs and even many diplomats and UN employees is that the Committee is 'weak'. There is a wide complaint that members of the Committee do not have the necessary levels of expertise to grasp complicated legal issues, or else have not understood the implications of their formal independence. Academic writings also routinely describe the monitoring process as being in 'crisis'.[25] However, although states often reportedly complain about the Committee's ineffectiveness, it is worth remembering that design of the Committee

and its membership is decided by the states themselves. The limitations of the Committee should not so much be seen simply as a failure, but rather as the product of a deliberately restricted mandate. Realist critiques of the UN human rights system are liable to dismiss human rights monitoring as an unenforceable irrelevance. However, recent work however has suggested that the impacts of the various UN Human Rights Committees are diffuse and indirect, as their conclusions, recommendations and communications take on a life of their own.[26] Despite the many weaknesses and criticisms of its work, it is therefore of crucial importance to understand the logic and structure of the specific forms of knowledge produced by the UN human Committee Against Torture.

State Reports

The principle source of information for the Committee is the reports produced by the signatory state. Reports are supposed to describe new measures and developments relating to the implementation of the Convention since the last report. Although states are supposed to report every four years, many of them do not do so, and several have never reported since ratifying the convention. The Committee has no powers to force states to submit and according to one estimate over 70% of states have overdue reports.[27] For those states that do provide reports, they can simply refuse to answer the questions of the Committee, or do so in a way that obscures the situation on the ground.[28] States often fill their written reports with long lists of legislation and formal polices, rather than concrete practices. Faced with the vast amounts of information given to the Committee by reporting states, the Committee has to decide how much of it is reliable and how much of it was window-dressing. However, the Committee has limited investigatory powers of its own. It is worth remembering that members are

unpaid, and only work in Geneva for five weeks a year, and spend the rest of the time doing other jobs. The financial and time resources of the Committee are therefore severely limited. They are supported by a secretariat drawn from the civil servants of the Office of the High Commissioner for Human Rights (OHCHR), but none of these work for the Committee full time. Some members, especially those with backgrounds in the NGO movement, do carry out their own private visits, but do so out of their own funds and in their own time. The resources available to the Committee are obviously far smaller than those available to any state. The Committee therefore operates with an information deficit in relation to the states whose reports it examines.

NGOs and the Committee

To a great extent the Committee relies on information supplied by NGOs. As such NGOs can play a central role in setting the Committee's agenda, the questions they ask, and eventually the recommendations that they make. The involvement of NGOs can begin up to a year prior to the session, when they may meet the Committee's designated country rapporteurs and the UNHCHR secretariat in order to explain the key questions that they think the Committee should ask. Prior to the session NGOs also normally submitted written 'shadow reports'. The Committee Against Torture has formalised the participation of NGOs to a greater extent than probably any other part of the UN human rights system. Formal closed briefing sessions, complete with translators, are timetabled into the Committee's programme. Officially NGOs are only supposed to contact the Committee members through the secretariat, but in practice they often do so independently, especially if they have an ongoing relationship with an individual member. In this context, the Committee often appears to be directly or indirectly influenced by the information provided by NGOs. During sessions

members sometimes refer directly to information from human rights organisation, especially if it has a high international profile. More often than not though, members simply quote from the NGO's reports, without indicating that they are doing so. It is possible to follow the issues raised in shadow reports and in NGO briefings, through to those arising in the formal sessions. The World Organisation Against Torture (OMCT) carried out a survey which found that, in the reports in which it had engaged, between 18% and 53% of the recommendations produced by the Committee could be traced back to recommendations originally made by them.[29]

There is however often a disparity in the amount of information provided by NGOs on different states. Over 15 NGOs turned up for the US report, where as none came for Qatar, and there was only one international NGO present for the report from Togo during the same session. Smaller NGOs are also often confused by the rules of the Committee, which are not only slightly different from the other branches of the UN human rights treaty monitoring system, but are also constantly changing as the Committee tinkers with its procedures. The Committee faces a particular problem in assessing the relative credibility of information produced by NGOs. The policy of accepting any information submitted to it creates a problem of whether to trust all of this information, and how much relative weight to give it. There is some attempt made to double-check claims against press reports, national human rights ombudsmen and information supplied by other UN organisations. However, to a large extent the Committee members can only rely on the relative reputation of the organisation that submitted the information. As a result there is a tendency to rely on the information supplied by the larger international NGOs.

Nearly all of the Committee members recognise that they could not do their work without the input of NGOs, and they depend on human rights organisations for their basic information.[30] However, the extent to which they are open to NGO involvement varies from member to member, and is often linked to whether the respective member has an NGO background. Where one Committee member, for example, who works for a psychosocial organisation, said that she found the involvement of NGOs in the process one of its most refreshing features, another who worked as a diplomat, openly said that he thinks NGOs take up too much time. States also sometimes complain that NGOs are too influential in the process, and that they have not come to Geneva to have a discussion with a domestic NGO, and if they had wanted to do that they could have stayed at home. NGOs therefore play a central in the Committees information gathering process, but their position is also contested by both states and Committee members.

Gaps in Knowledge and the Monitoring Process

The Committee's information gathering about torture and compliance with the Convention is therefore marked by holes, inconsistencies and question marks. Problems in the institutional capacity of the Committee, the knowledge of its members and its technical procedures all mean that to a large extent the Committee has great difficulty in assessing the situation on the ground and the information provided by any particular state. There is a routine delay of two years between the report being submitted and being heard. However, if all the states that are supposed to send reports did so, the delay would be much longer. The format of meetings twice a year for a total of five weeks is simply not long enough to process all the reports. The large amounts of paper work can also overwhelm the Committee. For the US report,

NGOs and the US delegation together submitted over 3200 pages of documentation. Although this was abnormally high, Committee members often complain that they do not have time to read all the documents given to them for a particular session. There is also a particular problem with the translation of the documents produced for the session. For the US report, for example, one of the two rapporteurs only worked in French. Although the initial US report, written in English, was translated into French, the written replies were not. The result is that large parts of the replies are not available to the Committee members who do not share the language of the written report.

The gaps in the knowledge produced by the Committee means that it has to rely on information that is one step removed from the direct infliction of torture. As such, monitoring produces evidence that is not taken from the 'scene of crime', but rather is read off secondary claims about policies, institutional design, legislation and statistics. Information is taken from surfaces that are 'monitorable'. This is not simply a technical or neutral process but depends on institutional environments that are 'fit for monitoring'. It requires the production of evidence that can be presented and then assessed by the Committee. The monitoring process therefore involves judgements about the risk, expertise and trustworthiness of NGOs, and above all reporting states. At the level of information gathering, it sees a movement towards a focus on procedures and principles, and at the level of assessment there is an implicit assumption that the institutions associated with liberal democracies are less likely to produce torture.

As to the facts…

The result of the Committee's restricted mandate and limited investigatory powers is that the Committee cannot and does not make determinations on issues of fact, or even firm allegations. The questions posed by the Committee members to reporting states are therefore often highly qualified. Rather than making direct allegations, members ask states to comment on allegations. They use phrasing such as: 'I have a feeling that…', 'there are strong allegations that…' or 'could you comment on…'. Often members go so far as to admit they know relatively little about the situation in the state before them. During the session on Georgia, for example, the rapporteur said that he did 'not know very much' about the country. In private most Committee members admit that they have to make a certain level of deferral to the state's claims. When there are disagreements over basic factual issues, which happens often, the Committee is in no position to determine who or what is correct. The Peruvian delegation, for example, told the Chair that he was simply wrong to suggest that political prisoners might have been convicted by evidence obtained through torture, and that he should provide any names and dates to back up these allegations. In situations of such conflicting claims the Committee does not determine who is correct, but either asks for more information or, more often than not, leaves the question up in the air.

The result of the lack of ability to make determinations on facts means that in general there is a tendency to focus on procedures and principles rather than specific cases. In this context, the precise questions often vary according to the background of the members. The two members who are both judges often ask questions about the 'rule of law', where-as the two members with backgrounds in NGOs often ask about gender issues and children. In general the questions asked are either about broad

policies, institutional set-ups or for statistical clarifications. One of the Committee members, for example, complained to the Georgian delegation that there were no statistics on the number of calls to a hotline set up to hear complaints of torture. The polite tone and general nature of many of the questions also means that it is relatively easy for states to avoid answering questions if they want to. It is often almost impossible for the Committee and watching NGOs to track which questions have been asked and then answered. When Committee members ask their questions, they often do so in such a way that it is not clear when one question starts and another ends, or even if a question has been asked at all. When the states come back to answer the oral questions they often choose to cluster them according to themes. States often also say they will provide written answers to follow-up questions.[31] General questions often also invite general answers, where-as specific questions are met with a mass of further information that is not fully digested by the Committee. In this context, specific substantive issues almost always give way to general issues of principle and procedure which are easier to assess.

On matters of law…

Alongside the uncertainty over facts, the jurisprudence of the Committee is notoriously underdeveloped. Although CAT seeks to define the general scope of torture to a greater degree than any other international human rights instrument, there are few explicit statements by the Committee on the nature of treaty obligations. In part this is due to a deliberate case of 'constructive ambiguity'. Members argue that they do not want, for example, to create a clear distinction between torture and cruel, inhuman or degrading treatment or punishment (CIDTP), as this will create a line to which states will automatically move towards. By leaving the border fuzzy it creates

more room for the Committee to move in. However, NGOs also criticise the Committee for constantly shifting in its jurisprudence, making claims at some point that are dropped at others. In general, the Committee members move between a narrow and broad interpretation of the Convention. There is a tension between the use of a specific legal definition of torture that refers directly to the Convention, and a more expansive definition based on what might be called ethical sensibilities. In particular, in recent years several members have started asking questions about domestic violence. Some members welcome this broadening of the Committee's remit, saying that although domestic violence may not be strictly within the Convention, it is important not to be 'too narrowly legal'. However, for some of the Committee members domestic violence is outside the scope the Committee's remit, as it is not carried out by people 'acting in an official capacity'. Many of the questions of the members are often guided by a general sense of what they call 'the pressing issues' in a specific country, rather than a narrow interpretation of the Convention. The US, for example, was asked about the response to Hurricane Katrina, whilst Qatar was asked about the treatment of child camel jockeys. States often reject this widening of the remit of the Committee, either pointedly refusing to answer the question, by answering the question but pointing out it is outside the scope of the Convention, or quietly leaving the question unanswered.

The lack of a precise jurisprudence is in part due to the absence of 'General Comments'. The UN treaty monitoring bodies have adopted the practice of publishing their interpretation of the content of human rights provisions in the form of comments on thematic issues. However, where-as the Human Rights Committee had by 2007 published 31 General Comments (including 2 on torture), the Committee Against Torture has only two General Comments. There are several reasons why the

Committee has relatively few General Comments. Other human rights committees, which are generally much larger, have created sub-committees in order to draft their comments. The small size of the Committee against Torture makes this more difficult. However, perhaps the most important reason is the inability of the members to agree amongst themselves. The General Comment on Article 2, concerning the responsibilities of states under the Convention, was in preparation for six years. Some members of the Committee complain that their fellow members are far too conservative, where-as others argue that their colleagues want to 'play fast and loose' with the Convention.

There is a key dispute as to the status of the final recommendations produced by the Committee. This dispute exits both within the Committee, and between the Committee and several states. The Committee, as with all human rights treaty monitoring bodies, is not granted the explicit power to issue legally binding interpretations of CAT or even to determine whether states are in compliance with the Convention. In this context, most members are hesitant in their jurisprudential claims, framing their arguments in terms of phrasings such as 'I wonder if…', 'in my opinion…', or 'it could be said that…'. Most Committee members recognize that their recommendations are precisely that: recommendations, with no binding force. However, many also argue there is a duty for the states to comply. During the US session some of the members were even more forceful, claiming that 'it is our interpretation that will decide whether you are in conformity, not yours…one of the parties has to give way, but it will be you, the Committee will have to prevail'. The US however explicitly rejected this view, arguing that 'the Convention does not grant the Committee the power to grant legally binding views'. Such rejections of the Committee's power to determine the interpretation of the Convention are common

and states routinely conclude their presentations with the claim that 'we are confident that this fulfils our obligations', implicitly challenging the Committee to disagree.

The Conclusions and Recommendations of the Committee

Two weeks after a session closes, the Committee releases its 'conclusions and recommendations'. The recommendations are in practice drafted by the secretariat, and signed off by the Committee members, with the rapporteurs taking the lead. Although the recommendations have to be based on the questions and answers given in the session, the practice of having them drafted by the secretariat means that they are often more precise than the questions asked during the sessions. The secretariat members often work on several human rights treaty bodies at the same time, and therefore have considerable experience. Although they have changed several times over the years, conclusions and recommendations take a specific format. They currently begin with a set of 'positive aspects' before moving on to 'subjects of concern and recommendations'. Each subject of concern is usually, but not always, matched with a recommendation on paths of action. Often in practise, such recommendations are as vague as saying that the state 'should take all necessary steps to combat torture'.

The language in which recommendations are written makes it clear that they are not obligatory. Most of the recommendations issued by the Committee focus on issues of legislative development or policy, often framed in the broadest possible terms. Togo, for example, was recommended to 'take the necessary legislative, administrative and judicial steps to prevent all acts of torture and ill-treatment'. [32] When recommendations are more specific they tend to focus on institutional structures. Several states were recommended to incorporate torture as a particular crime within

their criminal law.[33] It was also suggested, for example, that Peru set up a registry of complaints against law enforcement officials.[34] Very few recommendations refer to specific incidents and at most they refer to broad allegations. In its recommendations to Togo the Committee wrote that the 'committee is concerned by allegations received…of the widespread practice of torture, enforced disappearances, arbitrary arrests and secret detentions…'.[35] It is also very rare for states to be told that they are in direct contravention to the Convention. Although the Committee recommended that the US 'should rescind any interrogation technique, including methods involving sexual humiliation, "waterboarding"and "short shackling"', the language is ambiguous as to whether the US has used these techniques, and was in direct breach of the convention.[36] The only state out of the 7 that were examined during the May 2006 session that was explicitly told it was in breach of the convention was Qatar.[37] The Committee wrote that 'certain provisions of the Criminal Code allow punishments such as flogging and stoning to be imposed as criminal sanctions... These practices constitute a breach of the obligations imposed by the Convention'.[38]

Universality in a World of Unequal States

The Committee members are very aware of their political and institutional weaknesses. As a result there is a predominant language of 'dialogue' during the sessions and the tone of the Committee is overwhelmingly one of diplomatic politeness. Time after time members will thank the reporting state for their 'interesting and thorough report' and the presence of the 'high level delegation'. As the Chair explains it: 'we need to go softly. We can not throw everything at them. The purpose is not to point fingers but to save lives… We can not demand too much as otherwise they will close the door on us…. It is constantly stressed that states have to

have the 'political will and capacity to reform' and that the Committee can not enforce this, but can only encourage it through a careful dialogue.

The focus on dialogue rather than the strict application of the Convention inevitably raises the issue of whether all states can and should be treated equally. The Committee constantly stresses that 'no exceptional circumstances whatsoever may be invoked as a justification of torture'.[39] However, at the same time, the Committee is also forced to recognise that the states that appear before it have vastly different political and institutional capacities. As one member put it 'we can not expect Uganda to implement things in the same way as Norway… we must recognize that there are political realities on the ground'. Other Committee members were directly critical of this approach, arguing that it is crucial that the Committee treats all states as equals, as they 'can not tell a state they are poor and therefore we will be nice to you'. From this perspective, as the 'custodian' of a UN human rights convention the Committee has the responsibly to treat all states equally according to universal principles. During the US session in particular, there were accusations, from both some of the Committee members and NGOs, that the US was being given favorable treatment, as well as accusations that it was being held up to a higher standard than others. Equally, others argued that the US was getting more scrutiny than it deserved. One leading torture NGO was privately critical of all the time spent on the US report, arguing that it was coming at the expense of equally grave issues elsewhere in the world. Several members of the Committee recognised that the US was being held to a higher standard, but did not see this as a problem, arguing that as 'the most powerful country in the world the US had no excuses' for not implementing the Convention fully. Others saw the issue as one of precedent, arguing that where the US lead, others

would follow. The issue of differential levels of engagement cuts both way. For some people, weaker and more unstable states should be the subject of a greater level of inspection precisely because they are weaker, for other people the very same states can not be expected to meet the same level of commitment precisely because they are weak and unstable.

In this context, the Committee constantly moves between a sense of universal principle and recognition that not all states before it can be treated in the same manner.[40] On the one hand the Committee wants to uphold the universal prohibition of torture as an absolute right, at another level it also recognises that too narrow an application of the Convention is counter productive in a world where not only do states have different capacities, but the Committee can only persuade rather than force states to comply. In this context, states that are widely perceived as 'developed' are often subjected to higher standards. The US for example was told by the chair that **'**we should start by recognising the unique contribution to human rights of the US… but like Caesar's wife this also creates obligations'. However, at the same time there is also a broad assumption among the Committee that 'liberal democracies' are less likely to be in violation of the Convention, and this is reflected in the amount of the scrutiny that they give these states. Before the May 2007 session, which was predominately made up of EU states, many of the members were openly saying that it was going to be a 'boring meeting', as there would not be much to discuss. The secretariat was openly trying to shorten the time dedicated to some states, saying that it was pointless to spend all morning on them. There are discussions within the Committee whether to make all states report after the same amount of time. Although the Convention stipulates that states must send a report every four years, there is some

flexibility in that the extensive delays between a report being submitted and heard, means there is space to shift the order around. At the same time, states perceived as being less 'developed' are given relatively less serious attention from the Committee. One member of the Committee offered to arrange an interview with me during the Togo session, saying 'it is only Togo'. It is states in the middle ground, those that profess to be liberal democracies, but do not seem to live up to their promises, that attract the most attention. This situation is best understood in terms of a broad distinction between principle and evidence. States that are seen to be relatively developed are held up to higher standards, but are also seen to be less likely to commit torture. In contrast, states that are taken to be relatively underdeveloped are not expected to reach the same standards, but are assumed to be susceptible to violence against their citizens and subjects. There are comparatively different levels of evidential trust and perceptions of risk invoked for what are seen as developed or underdeveloped states

Liberal Institutions, Development and 'Civilisation'

In the absence of rigorous jurisprudence and the ability to make determinations on issues of fact, the Committee falls back onto assumed universal values and institutional formations that are seen as being linked to liberal democracies. The grey zone between fact and law is filled with a set of distinctions and judgments, used in both the collection evidence and its evaluation, that reproduce an idealized model of the liberal nation state. In this process, the Committee keeps returning to a distinction between developed and underdeveloped states. This distinction is based on assumptions about the universal direction of development and the desirability of particular legal and institutional frameworks as a path to eradicate violence. States

that are seen as lacking these frameworks, such as Qatar, Togo, Peru, Guatemala, and Georgia are singled out as being in need of 'reform' in order to eradicate torture. Qatar, for example, was told that some of its forms of punishment were 'anachronistic' and had to be abandoned. Other states are constantly encouraged to strengthen the 'reform process'. In contrast, despite the widespread accusations of torture, the US was never recommended to 'reform', and any incidents of torture were implicitly treated as an historical aberration. In large measure the precise notion of development remains vague, but it serves as a pole around which reporting states are conceptually organized and judgments made about the risks of torture. The relative absence or presence of torture is linked to the relative absence or presence of a set of broadly liberal institutions and procedures to which all states should be working towards.

Development is conceptualized by the Committee primarily in institutional terms. Crucially, the processes of the Committee are designed to examine compliance with the Convention, rather than to eradicate torture. The object of monitoring is one step removed from the infliction of cruelty. In this process there is a prejudice towards specific forms of broadly liberal institutional arrangements. At one level the questions and recommendations of the Committee assume a certain level of institutional capacity, in that they often focus on available statistics as a stable surface against which the possibility of torture can be read off. Delegations are routinely asked for statistical break-downs by age and gender of prisoner numbers, police killings, torture victims, access to medical care in detention and sexual crimes, amongst other things. Whilst statistical information is relatively straightforward for many European or North American states, such information gathering assumes a level

of institutional capacity and is beyond many of the states before the Committee. At another level there is an implicit assumption that specific liberal institutions are more likely to eradicate torture. Judicial independence, for example, is seen as an area of particular concern, with both Japan and Qatar criticized for not following 'universal standards for an independent judiciary'.[41] The Committee also has great difficulty grasping the implications of the institutional arrangements that differ from the broadly and formally liberal frameworks with which they are most familiar. They had problems, for example, in understanding Japanese and Qatari legal systems as they did not fit into the models of common or civil law that most of the members worked within. The status of *shari'a* law in Qatar caused several members of the Committee some confusion, and a great deal of time was taken during the sessions on clarifying technical aspects of the legal system.[42] One of the Committee members said that he had not had a chance to read the report, but he wanted to know to what extent 'Islamic law' was in force in Qatar. In this process, Islamic law was in itself implicitly being treated as a problem.

Levels of development are also often linked to notions of culture. Members talk about the fight against torture as being fundamentally about 'changing mentalities'. The Qatari delegation, for example, was told that 'the eradication of torture begins in the minds of…officials'.[43] The Republic of Georgia was asked to 'give a higher priority to efforts to promote a culture of human rights'.[44] Other states were told to 'promote the values and practices of democracy'.[45] Peru was praised for the 'change in values' that had taken place since the previous regime, but there was a further need to 'change the culture of the prosecutors'. According to one member, many developing countries 'may not know what to do' and it is therefore helpful to be told so by the Committee.

As such, a particular emphasis is often placed on training of police officers, prison guards and soldiers, as well as lawyers, judges and the general public. Training, it is claimed, can help prevent torture by 'raising awareness' of the Convention. The Peruvian delegation was told that 'cultural factors are of vital importance, and therefore we need education'. In some cases the continued presence of torture is directly linked by the Committee to inadequate training. Togo, for example, was told that the 'numerous reports containing allegations of acts of torture and crueler, inhuman or degrading treatment submitted to the Committee further demonstrate the limited scope of …training'.[46] The eradication of torture is therefore seen as an issue of cultural change.

Against this background of talk about implicitly liberal values and institutions, the distinction between developed and underdeveloped states easy slips into talk about civilized and uncivilized, where the presence of torture is linked to absence of 'civilisation'. One Committee member describes the Committee process as being 'designed to promote the highest values of civilization and the rule of law'.[47] It is not just Committee members that seek to link torture to a notion of civilisation. Many states, most notably those implicitly being accused of lacking 'modern values' are often keen to associate themselves with the values of 'civilisation'. One of the leading anti-torture NGOs also argues that 'the practice of torture is fundamentally at odds with the notion of civilised life'.[48] Such linkages between human rights violations and the absence of something called civilisation are common in the UN human rights system. As Foot has argued, the new international 'standard of civilization' is partly based around human rights principles.[49] Similarly, Merry has claimed that the UN human rights system operates according to a particular model of a fair society based

on what she calls 'transnational modernity' that resonates with a colonial era conception of what it means to be 'civilized'.[50] In doing so local differences are seen as a challenge to a 'universal vision of just society'.[51] The relative absence or presence of human rights as both a value and a practice is linked to the relative absence or presence of 'civilization.'

An approach that seeks to link torture to the absence of broadly liberal institutions and cultures contains particular sociological assumptions about the relationship between institutional forms, values and the incidence of violence. The Committee, working with their own version of a 'liberal peace theory', implicitly assumes that states that have liberal institutional structures will be more likely to comply with the Convention, and that liberal institutions produce liberal practices all the way down.[52] The relative absence of torture is linked to the presence of self-described liberal institutions and values. There is not the space here to develop a lengthy alternative theory of violence, but merely to point out that the implied link between the absence of torture and liberalism not only ignores the ways in which liberal politics can produce its own forms of violence, but also it serves to reduce violence to an issue of institutional design and cultural values, rather than political and economic inequality.[53] It assumes that violence can be eradicated so long that we have the correct technical policies which are then followed to the letter. The violence that remains, such as the death penalty, or mass imprisonment, is left unquestioned or is normalized. What counts as violence is taken for granted. For example, the Qatari delegation was told that the practice of flogging was on contravention to the convention, but the US was merely told that they should 'carefully review its execution methods, in particular lethal injection, in order to prevent severe pain and

suffering'.[54] However, cruelty, rather than being a residue of some pre-modern and uncivilised past, or an accidental aberration to be explained away by a few 'rotten apples', can be an inherent part of modern bureaucratic life.[55] As Darius Rejali has shown liberal democracies have been at the forefront of the development of techniques of torture. Far from the institutions of inspection and accountability associated with liberal democracy eradicating torture they have lead to the development of methods that leave no marks and are therefore hard to monitor.[56] The point here is not the moral relativist claim that all cultural or political formations are equally valid. Rather the point is that there is a danger of treating cruelty as a product of a failed 'modernity', as the result of 'lack' that can only be remedied through the creation of particular institutional frameworks. The eradication of violence is seen as being linked to technical policy formulations.[57] Through a focus on institutions and values there is a displacement of a discussion of the causes and consequences of violence in favour of the systems that are supposed to monitor violence.

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[1] The research for this paper was made possible by the generous support of the Nuffield Foundation and the Carnegie Trust for the Universities of Scotland.

[2] FRANZ VON BENDA-BECKMAN, PROPERTY IN SOCIAL CONTINUITY (1979), Franz von Benda-Beckman, *Anthropology and Comparative Law*, in ANTHROPOLOGY OF LAW IN THE NETHERLANDS (Keebet von Benda-Beckman and Fons Strijbosch eds., 1986), Franz von Benda-Beckman, Citizens, Strangers and Indigenous Peoples: Conceptual Politics and Legal Pluralism, in NATURAL RESOURCES, ENVIRONMENT AND LEGAL PLURALISM, YEARBOOK OF LAW AND ANTHRPOLOGY (Franz von Benda-Beckman , Keebet von Benda-Beckman and Andre Hoekema eds., 1997), Franz von Benda-Beckman, *Who's Afraid of Legal Pluralism?,* 47 JOURNAL OF LEGAL PLURALISM 37-82 (2002).

[3] *See* ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD (1986).

[4] *See* MICHAEL POWER, THE AUDIT SOCIETY: RITUALS OF VERIFICATION (1997).

[5] *See* Id.

[6] *See* James Jaranson, *The Science and Politics of Rehabilitating Torture Survivors: An Overview, in* CARING FOR VICTIMS OF TORTURE (James Jaranson and Michael Popkin eds., 1998).

[7] *See* Derek Summerfield, A Critique of Seven Assumptions Behind Psychological Trauma Programmes in War Affected Areas, 48 SOCIAL SCIENCE AND MEDICINE 1449-1462 (1999).

[8] *See* MEDICAL FOUNDATION FOR THE CARE OF VICTIMS OF TORTURE, GUIDLINES FOR THE EXAMINATION OF SURIVORS OF TORTURE (2000).

[9] SCARRY, *supra* note 2.

[10] VEENA DAS, CRITICAL EVENTS: AN ANTHROPOLOGICAL PERSPECTIVE ON CONTEMPRORARY INDIA (1995).

[11] *Id*. at 193.
[12] *See* JOHN LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME (2006); EDWARD PETERS, TORTURE (1996).
[13] Compare Kirsten Hastrup, *Violence, Suffering and Human Rights: Anthropological Reflection,* 3 ANTHROPOLIGICAL THEORY 309-323 (2003).
[14] See Duffield, Mark, *Social Reconstruction and the Radicalization of Development: Aid as a Relation of Global Liberal Governance*, 33 DEVELOPMENT AND CHANGE 1047-1071 (2002).
[15] *See* Stanford Levinson, Contemplating Torture, in TORTURE: A COLLECTION (Stanford Levinson ed., 2004).
[16] *See* ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004).
[17] *See* LEVINSON, *supra* note 14.
[18] *See* DARIUS REJALI, TORTURE AND DEMOCRACY (2007).
[19] *See* ANGHIE, *supra* note 14.
[20] ROGER NORMAND & SARAH ZAIDI, HUMAN RIGHTS AT THE UN: THE POLITICAL HISOTRY OF UNIVERSAL JUSTICE (2008).
[21] *See* Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social* Movements and the Expansion of International Institutions, 41 HARVARD INTERNATIONAL LAW JOURNAL 539-587 (2000).
[22] CAT art. 19.
[23] *Id*. art. 19.
[24] OPCAT art. 1.
[25] *See* Roland Bank, *Country Orientated Procedures Under the Convention Against Torture: Towards a New Dynamism*, *in* THE FUTURE OF THE UN HUMAN RIGHTS MONITROING SYSTEM (Philip Alston and James Crawford eds., 2001); James Crawford, *The Human Rights Treaty System: A System in Crisis?*, in THE FUTURE OF THE UN HUMAN RIGHTS MONITROING SYSTEM (Philip Alston and James Crawford eds., 2001).
[26] *See* MERRY, *supra* note 24.
[27] ANNE BAYEFSKY, THE U.N. HUMAN RIGHTS TREATY SYSTEM: UNVERSALITY AT THE CROSSROADS 7 (2001).
[28] *See* also SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE (2006).
[29] OMCT. RAPPROT NARRATIF (2006).
[30] *See* also MERRY, *supra* note 24 at 69.
[31] There is a formal follow up process through which states are supposed to supply further information within a year on specific points asked for by the Committee its concluding recommendations. One year after the 2006 US session, the US was yet to supply this information.
[32] CAT/C/USA/CO/2 para. 26. and CAT/C/TGO/CO/1 para. 12.
[33] *See*, for example: CAT/C/GTM/CO/4 para. 10, CAT/C/KOR/CO/2 para. 4.
[34] CAT/C/PER/CO/4 para. 14.
[35] CAT/C/TGO/CO/1 para. 12.
[36] CAT/C/USA/CO/2 para. 24.
[37] Despite the criticisms of the US contained in the Committee's Recommendations, at no point did it explicitly state that the US was in breech of the Convention.
[38] CAT/C/QAT/CO/1 para. 12.
[39] *See*, for example: CAT/C/NPL/CO/2 para. 10.
[40] *Compare* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRICTURE OF INTERNATIONAL LEGAL ARGUMENT (2005).
[41] *See*, for example: CAT/C/JPN/CO/1 para. 15.
[42] *See* for example: CAT/C/SR/707 para. 14 and 21. Several years previously, the Saudi delegation criticized the Committee for 'being unfamiliar with Islamic law' CAT/C/SR.519, para. 7.
[43] CAT/C/SR/707 para. 30.
[44] CAT/C/GEO/CO/3 para. 9.
[45] CAT/C/SR.709 para. 4.
[46] CAT/C/TGO/CO/1 para. 18.
[47] CAT/C/SR.662 para. 11.
[48] REHABILITATION AND RESEARCH CENTRE FOR TORTURE VICTIMS, INDEPENDENT MONITROING OF HUMAN RIGHTS PRACTICES IN PLACES OF DETENTION (2007).
[49] ROSEMARY FOOT, RIGHTS BEYOND BORDERS: THE GLOBAL COMMUNITY AND THE STRUGGLE OVER HUMAN RIGHTS IN CHINA 11 (2000).

[50] Sally Engle Merry, *Constructing a Global Law - Violence Against Women and the Human Rights System,* 28 LAW AND SOCIAL INQUIRY 943 (2003),
[51] *Id.* at 946.
[52] On 'liberal peace theory' *see* Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUROPEAN JOURNAL OF INTERNATIONAL LAW 503- 538 (1995).
[53] On the violence of Liberal Democracies *see* Walter Benjamin, *Critique of Violence*, *in* REFLCTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS (Walter Benjamin, 1978).
[54] CAT/C/QAT/CO/1 para.12 and CAT/C/USA/CO/2 para. 31.
[55] *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1973).
[56] DARIUS REJALI, TORTURE AND DEMOCRACY (2007).
[57] *See* also ANGHIE, *supra* note 14 at 165.