



RESPONDING TO TORTURE

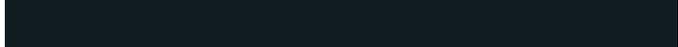
Latin American Perspectives
on a Global Challenge

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FOREWORD

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Torture infringes upon the physical and mental integrity of human beings and has an irreparable effect on victims because they can never return to their pre-torture state. Torture undermines trust in the state as the guarantor of freedoms and rights of the population and the bearer of the legitimate monopoly of violence. Society suffers from impotency and terror when torture goes unpunished, which poses a threat to the rule of law.

The use of violence by the state poses great challenges to the timely, impartial and effective investigation and documentation of actions committed by public officials, more so when forensic services are not independent. However, the challenges do not reduce the state's responsibility to investigate and punish torture, and to compensate victims. This responsibility has been repeatedly reaffirmed in the jurisprudence of regional and international courts, as well as by specialised UN bodies.

One of the objectives of the International Bar Association's Human Rights Institute (IBAHRI) is to contribute to the effective prevention, documentation and investigation of torture and other cruel, inhuman or degrading treatment or punishment in Latin America. Through investigative activities, training programmes and expert assistance, the IBAHRI seeks to narrow the gap between relevant international standards and debates and the particular norms and contexts in the countries in which it works. Moreover, it fosters an understanding of the challenges and opportunities that are specific to the region, via international forums dedicated to analysing and generating standards on torture prevention.

In the context of its work with legal professionals, the IBAHRI understands that to attain sustainable results, it is imperative to adopt a comprehensive approach

and recognise that the prevention and punishment of torture involves more than a legal dimension. Accordingly, the IBAHRI has adopted a multidisciplinary perspective in its work, which requires constant dialogue and interaction between relevant actors from medicine, psychology, public policy and international relations, among other areas.

Knowing that it is important to facilitate broader access to these dialogues, and recognising that the production and dissemination of legal, academic and scientific resources on the issue have taken place primarily in English, the IBAHRI and the Faculty of Finance, Government and International Relations at the University of Externado, Colombia, have worked together to produce a publication in Spanish.

The original book brings together articles by an extraordinary group of professionals whom the IBAHRI has had the opportunity to work with in recent years. In demonstration of their commitment to the prevention and punishment of torture and their solidarity with victims, these professionals have agreed to share their lessons learned and concerns on these issues, as well as to identify contemporary challenges that stem from or have an impact on the effective prevention, identification, documentation and treatment of torture in Latin America.

FOOTNOTES

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INTRODUCTION



RENEWING THE FIGHT AGAINST TORTURE: CHALLENGES AND LESSONS LEARNED FROM LATIN AMERICA

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The book is divided into two parts. Part 1, which has five chapters, examines the significant gaps that exist between the formal commitments of Latin American states to the eradication of torture and the practice of torture in the region. In Part 2, comprising four chapters, the potential for political and institutional innovation in the fight against torture in the region is highlighted.

In Chapter 1 Gaia Pergolo, a lawyer, examines the implementation of the United Nations Convention against Torture and the Inter-American Convention to Prevent and Punish Torture in Peru and Mexico. She concludes that these countries have failed to fully align their national laws and practices with the stipulations of international law. This inconsistency, in her opinion, can be observed across the region and negatively affects the investigation and prosecution of perpetrators of torture.

Fabio de Sa e Silva, one of the book's editors, focuses on the Brazilian scenario in Chapter 2. Although Brazil has committed at international and domestic levels to criminalise, investigate and punish those who are responsible for torture, he argues that local activists are sceptical about the effectiveness of this approach to bring justice

and reparation to torture victims. He examines structural factors that explain this distrust and corroborate the fragility of the rule of law in Brazil and Latin America.

In Chapter 3 lawyer Andra Nicolescu states that the predominant responses to juvenile delinquency and antisocial behaviour in Latin America continue to emphasise deprivation of freedom. To deprive children and adolescents of freedom is costly, ineffective and leads to severe human rights violations, including torture. She argues that in light of international standards, countries in the region must continue to seek alternative solutions to the problem of juvenile delinquency in spite of the social pressure to maintain the status quo.

The lawyer Paulina Zamorano Valenzuela penned Chapter 4, in which she analyses the viability of the principle of independence that, as per the Optional Protocol to the UN Convention against Torture, should apply to National Preventive Mechanisms (NPMs) against torture. Her conclusion is that restrictive legal frameworks and budgetary constraints often compromise the independence of NPMs in Latin America and that consequently NPMs do not meet the preventive obligations under the Optional Protocol.

In Chapter 5 Edgar Hassan, a psychologist, proposes ten standards to guide the work of forensic services in their independent documentation and evaluation of alleged torture cases. The proposal is based on the identification of institutional requirements in the investigation of such cases according to legal and technical parameters shared by the international community.

Together, the chapters in Part I demonstrate that the practice of torture persists in Latin America despite many countries signing and ratifying international instruments against torture. This gap accentuates an inevitable and growing institutional distrust, especially among the most vulnerable citizens, who are the most common victims of torture.

The second part of the book begins with Chapter 6, which is written by Juan E. Méndez, the lawyer, professor and former UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Based on scientific studies, the chapter argues that torture, as well as being immoral and illegal, does not lead to reliable information for criminal investigations. The author examines the development of an international initiative that seeks to produce a Universal Protocol for non-coercive interviews. He believes a Universal Protocol

will contribute greatly to torture prevention in Latin America given the history of authoritarianism and discrimination that marks its criminal justice systems.

Chapter 7 was written by the lawyers Miguel Sarre and Juan Morey. They maintain that penitentiary policies based on treatment and rehabilitation can create a context favourable to torture practices. Based on recent changes in Mexican law, the authors propose a model in which inmates are considered to be ‘subjects of rights and obligations’ and in which the execution of sentence is designed as a judicial process.

In Chapter 8 Rafael Barreto Souza, the lawyer and former member of the Brazilian NPM, analyses the preventive dimension of the legal mandate of Latin American NPMs. He demonstrates the innovative ways in which countries in the region have delineated the mandate of their NPMs in light of the Optional Protocol and literature on torture prevention.

Finally, in chapter 9 the psychologists Miryam Rivera-Holguín, Tesania Velázquez and Diego Otero-Oyague examine psychological treatment policies for victims of torture and political violence in Latin America. After reviewing the three predominant models, the authors advocate for a ‘community-based’ solution, the purpose of which is to create collective and transformative processes to address the consequences of torture among victims. The authors also examine torture cases decided by the Inter-American Court of Human Rights against Guatemala, Mexico and Peru, where the sentences point to an incorporation of the premise of the community-based model.

Together, the chapters in Part 2 highlight innovative practices in response to torture. These practices have the potential to inform an agenda that is broad, multidisciplinary and transforms the institutional framework for the prevention, adjudication and reparation of torture. Change in the overall landscape of torture practices in the region will not be automatic; it will require involvement and actions along many fronts and by many groups.

- **Political actors**

National executives and legislatures, which are responsible for the adoption and implementation of norms and policies against torture, continue to be important

domains of action. Their decisions can have consequences (even if unintended) for the effectiveness of norms and policies, creating regulatory gaps or organisational disfunction that allows for the continuation or even the expansion of torture. At the same time, executives and legislatures can serve as agents of innovation, establishing standards for courts⁴ or NPMs⁵, or promoting creative approaches to policies or programmes.⁶

- **Legal professionals, institutions and culture**

Legal professionals and institutions are also important, especially when it comes to implementing norms on the investigation and punishment of torture perpetrators. The book does not cover the challenges faced by many Latin American countries in the attempt to reconstruct their ‘legal complexes’⁷ (bar associations, public prosecutor’s offices and benches), which endured decades of authoritarian regimes and, in some cases, were involved in the repression of dissidents.⁸ Nevertheless, chapters 2 and 3 make clear that this is an unfinished process and that the legal profession in many Latin American countries is neither properly equipped for, nor absolutely committed to, the fight against torture. One of the most pronounced deficits is in legal culture, which has not been able to absorb new concepts and instruments that derive from integration into an international human rights-normative order.⁹ The problem goes beyond a lack of knowledge of the norms; there is also a need structurally to rethink dimensions of the legal complexes, with new criteria for recruitment, training and promotion.¹⁰

- **Institutional actors**

The medical profession and forensic services are in a similar situation. These professionals are indispensable for the adequate documentation of torture cases. They can provide a solid basis of evidence to hold perpetrators accountable, as well as information relevant to preventive actions. However, in the Latin American context these professionals and services lack the appropriate knowledge and tools, including the institutional power, to carry out their work with due independence and technical quality.¹¹

- **Civil society**

The book demonstrates the importance of good professional foundations for the implementation of international human rights standards, even when these have been formally adopted. It also addresses civil society and its role in the prevention and adjudication of torture. Civil society plays an accountability role when it puts pressure on governments to adopt and give effectiveness to norms against torture. Historically, civil society has been one of the main sources of innovation in human rights, both in national and regional contexts.¹²

However, civil society groups can be resistant to embracing certain human rights norms, especially in the context of inequality and institutional fragility,¹³ or they can even speak against these norms,¹⁴ as is evident not only in Latin America but in developed countries caught up in political polarisation and right-wing populism.

Policy challenges and ways forward

The fight against torture in Latin America reflects challenges that are inherent to any attempt to eradicate the problem. Such challenges require multidimensional responses, but also sociopolitical will and feasibility. Unfortunately, the regional context does not look favourable for an effective fight against torture.

First, Latin America, as elsewhere, faces rising authoritarianism. This trend is reflected not only in the electoral turn to the right in recent years but also, more worryingly, in persistently high levels of support for authoritarian leadership and decline in support for democracy in the region, though these trends disguise important differences between countries. Beyond the region, there seems to be a backsliding in the fight against torture and ill-treatment. In fact, democratic governments have taken the lead recently in the legitimisation of torture.¹⁵ Second, and relatedly, the socio-economic context in Latin America is characterised by rising inequality, weak economic growth and dramatic levels of violence. Perceptions of insecurity are high and there is often a lack of trust in the ability of authorities to provide efficient responses to citizen concerns. The ‘war on drugs’ is still raging with its predictable

negative consequences on human rights, including the extensive use of torture, often with significant public support, against individuals who are generally marginalised and involved in micro-drug trafficking.

Third, state capacity to carry out far-reaching reform is often limited, particularly given the scale of the policy challenges. The region's criminal justice systems are highly problematic. The prison systems are in deep crisis, serving primarily to perpetuate violence and crime. Law enforcement suffers from a lack of credibility and legitimacy.

Nevertheless, given the ubiquity of torture practices in Latin America, we cannot remain passive. What can be done? What pathways of change can be distilled from the authors' contributions? First, it is important to take the political fight. As UN Special Rapporteur on extreme poverty and human rights Philip Alston reminds us, human rights are not a consensus project¹⁶ and there are no quick fixes. In the best-case scenario progressive change will be incremental. Therefore, continuing advocacy, identifying and cultivating institutional allies, engaging with the public, shifting attitudes and countering stereotypes should all be part of an ongoing political campaign against torture and ill-treatment.

Second, it should be recognised that over the decades of effort in the fight against torture important insights have been gained as to what makes torture possible, when it occurs, and why. Torture is a specific form of abuse of power targeting those in positions of vulnerability. This relationship of unequal power is particularly acute in detention, which has been a long-standing area of work for torture-prevention advocates. As the late Sir Nigel Rodley argued, torture is a crime of opportunity.¹⁷ To avoid torture, therefore, it is necessary to diminish the opportunities for state agents to use it, for example, through the implementation of legal and procedural safeguards. As he notes: 'The longer [detainees] [are] denied access to and from the outside world (i.e. to family, lawyers, doctors, courts), the more they [are] vulnerable to abuse by those wishing to obtain information or confessions from them.'¹⁸ Moreover, where torture is consistently investigated, prosecuted and punished, the risk of torture falls. Monitoring of places of detention through regular visits is also proven to be important. Independent complaint mechanisms also have significant impact where they feed directly into prosecution processes.¹⁹

However, and as the third key point, there is a need to go beyond a dominant focus on formal law and legal procedures and pay closer attention to the informal practices as well as structural conditions that enable torture and ill-treatment. Although advocating for the adoption of robust legal protections is important, such safeguards are not sufficient to reduce the incidence of torture. A concern with practice and informality does not mean, however, that institutions are irrelevant. On the contrary: advancing effective implementation of the torture prohibition in the formal democracies of Latin America highlights the importance of taking state capacity,²⁰ as well as state willingness,²¹ seriously.

The strengthening of formal institutions and policy implementation matters. This includes engaging with politically difficult areas of reform such as criminal justice and prison systems, as highlighted in various chapters in the book. Recent developments in the implementation of the Optional Protocol and the creation of NPMs in several Latin American countries indicate that new institutions can make a difference. There is still a need, however, to calibrate expectations in light of the structural and political realities in Latin American societies. Also, and though this does not appear in the book, more attention needs to be paid to the relationship between torture and corruption, not only because a lack of resources and capacity explains the persistence of torture in some settings, but also because of the connection that may exist between the corrupt exercise of power and violent abuses, including torture.²² This again highlights the importance of capacity-strengthening and training for all relevant actors, including frontline officials with crucial roles to play in torture prevention, such as police officers, prison staff and the judiciary.

How, then, to convert these insights into actionable measures? There are no ready-made templates, but the authors' contributions at least point to several key elements of this endeavour. First, human rights advocates need to engage with the general public. Doing this requires a broader political vision that goes beyond abstract justifications ('torture is wrong') and engages with interest-based politics. Considering the prohibition of torture invites us to reflect on the moral foundations of human rights. For some, torture is inherently wrong, no matter the consequences. For others, the legitimacy, or not, of the torture prohibition

depends on what types of consequences it may have on victims, perpetrators and society as a whole. Engaging politically with the public on the prohibition of torture should not compromise fundamental principles, but the case needs to be made persuasively that torture is harmful for society and does not provide solutions to legitimate concerns regarding, for example, crime or terrorism.

Building on this point, a political perspective on the fight against torture also requires taking the concerns of the public more seriously. In particular, there is a pressing need to take socio-economic contexts and insecurity fears seriously. Inequality matters for the politics of human rights. Human rights advocates need to recognise frustration and anger among the general population over eroding living standards, rising inequalities and the manifest indifference of elites to the precarious lives that the majority of people lead in many societies. Various forms of inequality are evident in torture, as people whose bodies are considered violable are far more at risk of being subjected to ill-treatment.

The fight against torture will also need to engage more seriously with distributive and economic matters. After all, all human rights, including protections against torture, cost money. Effective, humane and rights-respecting criminal justice systems are expensive and require political prioritisation. This means that anti-torture advocates need to take the socio-economic dimensions of torture and state violence seriously and engage with taxation matters and fiscal policies more generally.

Finally, the contemporary struggle against torture needs to tap into the historical reservoir of solidarity with those subjected to torture and ill-treatment and build additional coalitions of allies. International non-governmental organisations and advocacy will continue to be a crucial element of this effort. However, they will be far from sufficient, not least since there are diminishing returns to strategies that rely on lobbying powerful governments to put pressure on rights-violating regimes. Building and strengthening local capacity and support for the struggle against torture will therefore be crucial. Indeed, the future of anti-torture efforts – and human rights – is local. As important, if not more so, localised human rights politics also requires finding ways to strengthen the political agency of those directly affected and most at risk of torture.

Box 1: The political agenda in the fight against torture

- **Improve public outreach:** The fight against torture must involve persuasion, not just condemnation.
- **Avoid reinvention of the wheel:** Extensive practical knowledge already exists about what prevents torture.
- **Seek improvement both in formal law and in informal practices:** Investments must be made in training, capacity-building and commitment to frontline personnel.
- **Commit to fair and adequate resource allocation:** A criminal justice system with enough resources should be treated as a public concern affecting all citizens, in the same way as healthcare and education.
- **Strengthen the relationship between international policy expertise (eg, the IBAHRI) and local organisations:** A relationship of support and complementarity must be pursued, and a bottom-up agenda must be established.
- **Develop coherent responses to new areas of concern:** Including the nexus between corruption, organised crime and torture.

Clearly, this political agenda (Box 1) will take time and effort, but there is no time to lose. We are facing a political crisis of global dimensions that has direct implications for human rights everywhere. Global inequalities are rising, fuelling what some call our ‘age of anger’,²³ which in turn drives political violence. Support for representative democracy as a political system is in decline, according to some measures. Civil society spaces are increasingly restricted in many countries. There is a resurgence of nationalism and intolerance in many regions of the world, including in Latin America. The trend towards the undermining of the international rule of law continues to gain strength.

In short, these are interlocking and mutually reinforcing crises that have dramatic consequences for human rights advocacy. Human rights institutions and advocates clearly need to respond to these challenges. The response requires an explicitly political agenda of reaffirming and creatively promoting human rights. This volume does precisely this and deserves to be widely read and taken seriously in the ongoing struggle against torture and ill-treatment.

FOOTNOTES

4. See chapter 7.
5. See chapter 8.
6. See chapter 9.
7. Lucien Karpik and Terence C Halliday, 'The Legal Complex', *Annual Review of Law and Social Science* (2011) Vol 7(1), pp 217–236.
8. Anthony W Pereira, *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (University of Pittsburgh Press 2005).
9. See chapters 1, 2 and 3.
10. See chapter 2.
11. See chapter 5.
12. See chapter 2; Nigel S. Rodley, 'Reflections on Working for the Prevention of Torture', *Essex Human Rights Review* (2009) Vol 6(1), pp 15–21.
13. See chapter 2.
14. See chapter 3.
15. Richard L. Abel, *Law's Trials: The Performance of Legal Institutions in the US 'War on Terror'* (Cambridge University Press 2018); Richard L. Abel, *Law's Wars: The Fate of the Rule of Law in the US 'War on Terror'* (Cambridge University Press 2018).
16. Philip Alston, 'The Populist Challenge to Human Rights', *Journal of Human Rights Practice* (2017) Vol 9(1), pp 1–15.
17. See n 12 above, Rodley.
18. *Ibid*, p 15.
19. Richard Carver and Lisa Handley (eds), *Does Torture Prevention Work?* (Liverpool University Press 2016).
20. Thomas Risse-Kappen, Stephen C. Ropp, and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013).
21. Alejandro Anaya-Muñoz, 'Bringing Willingness Back In: State Capacities and the Human Rights Compliance Deficit in Mexico', *Human Rights Quarterly* (30 May 2019) Vol 41(2), pp 441–64.
22. Jimena Reyes, 'State Capture Through Corruption: How Can Human Rights Help?' *AJIL Unbound* (2019) 113, pp 331–35.
23. Pankaj Mishra, *Age of Anger: A History of the Present* (Allen Lane 2017).



In the aftermath of World War Two, the international community reached a consensus that there had to be an absolute prohibition on torture. The deliberate infliction of physical or psychological pain upon a human being to extract information or to punish, for whatever reason, was deemed morally repugnant and to be universally reviled. Not only did it involve inhumanity against another human being, evidence showed that information or confessions secured through the use of torture were rarely reliable.

Sadly, despite the legal protections created by the Universal Declaration of Human Rights, the United Nations Convention against Torture and even domestic law, there is widespread condoning of such conduct in many nations around the world. Too many police forces and security forces resort to coercive ill-treatment of detainees and are able to do so without facing any consequences in the courts. The training of prosecutors, lawyers, judges and forensic experts to recognise the signs of torture and to invoke international law and other legal mechanisms to end such a gross violation of human rights is vital work.

This book brings together many of the experts who have worked within Latin America to share their thoughts, hopes and concerns about the extent to which abusive power blights our societies.

These experts proudly reaffirm the need for the universal ban on torture. I know you will too.

Baroness Helena Kennedy QC



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