

Comment II: Documentation of Torture and Justice 'Bon pour L'Orient'?

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The study by Kelly et al. on the Istanbul Protocol (IP) was made in three low income countries. It is based on eighty interviews of human rights practitioners who in “many cases... were lawyers, but clinicians and other human rights professionals were also included.” (p63) The study does not provide a breakdown of the individuals interviewed, their professions, or their experience in documentation and specifically medico-legal or IP documentation. The study does not assume interviewees had any prior knowledge of the IP. In addition, health professionals – a key group that implements the IP – do not appear to be well represented among the interview group.ⁱⁱ

The study argues that one of the IP's weaknesses is that it does not lead to precise conclusions, but it does not suggest that more precise methods of documentation are available. The study is also unclear regarding whether any interviewees had knowledge of clinical forensic science and how its conclusions are made.ⁱⁱⁱ Through and even within

the field of forensic science, the IP has increased the ability of practitioners to make stronger and more complete conclusions on torture. This has been achieved by promoting joint medico-legal reports by mental health and medical professionals following a comprehensive evaluation of the history of torture allegations, all physical and psychological symptoms preceding, during, and following alleged torture events, and laboratory test results.

The article argues that IP implementation may be impracticable due to security concerns and limited resources. These are serious challenges, but to justice generally. These challenges, particularly where the rule of law is weak/impunity is high, affect not only human rights practitioners and health professionals, but judges and prosecutors too. The IP was created as one response to torture denial and impunity – by providing a tool to gather strong and clear evidence and by creating an obligation upon states to do so. The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment were adopted by the United Nations (UN) General Assembly.¹ The Principles provide a legal basis for human rights organisations to challenge the unwillingness of states to investigate torture allegations effectively, impartially, and promptly.

The study argues that “comprehensive documentation might not always be the most effective way of achieving the broader goals

ⁱ 'Bon Pour L'Orient' was a stamp affixed by French universities to diplomas earned by its Arab colonial subjects. It indicated that the students were not qualified for and did not receive the same level of excellent education as Western students, but an education that was 'good enough for the Orient'.

ⁱⁱ Of the forty-three citations to interviewees, only eight are to health professionals, including six to a medical professional¹ in Nepal (possibly the same individual), one to a medical doctor in Nepal, and one to a psychologist in Kenya.

ⁱⁱⁱ To put precision in perspective, not even DNA paternity tests offer 100% conclusive results.

of human rights organizations” although, it does not identify what those broader goals are. Human rights organisations have numerous strategies available to tackle the problems they face; the IP is just one tool. However, if the broader goal of human rights organisations is to force states to admit torture, confront it, improve the justice system, enhance the rule of law, and to provide redress to victims, the IP is designed for that purpose, namely, for producing compelling and undeniable evidence of torture. The IP has proven to be effective in achieving that goal in challenging contexts.

Effective investigation and documentation is central to the three pillars of state obligation under the UN Convention against Torture to ensure justice and to prevent and to redress all acts of torture. One perpetrator held accountable under rule of law has the potential to prevent a thousand new instances of torture. The process of documentation is also part of the rehabilitation process and often has an rehabilitative effect on victims.

Where torture is prevalent, providing training and implementing activities on IP has significant value for improving justice. From our global experience, applying the IP can enhance state investigatory practices, the quality of forensic services, and other justice mechanisms. In states without functional justice systems, IP documentation done today can be important to the future. For this reason, prominent organisations have provided training on IP documentation of torture in conflict and post-conflict states, including the International Rehabilitation Council for Torture Victims (IRCT) in Libya, Burundi, and the Democratic Republic of the Congo² and Physicians for Human Rights in Afghanistan and Syria.³

In its discussion section, the study provides interesting suggestions to achieve

accountability for human rights violations, such as reporting perpetrators in Nepal and Bangladesh to the UN Department of Peacekeeping Operations (DPKO) to foil the ability of alleged perpetrators to obtain lucrative jobs serving in UN peace keeping missions abroad. The study notes that, in these instances, only limited ‘proof’ is needed. Human rights practitioners should be congratulated for using all means available to build pressure on perpetrators. Practitioners should utilise any number of tactics, such as naming and shaming, a strategy that has also been applied in Nepal.⁴

The study however concludes that lobbying donors and local politicians is more effective than utilising IP medico-legal reports in the judicial system. While these methods for accountability may supplement efforts to achieve justice through rule of law, they should not supplant them; it is unthinkable that human rights organisations only have the broader goal of preventing perpetrators from obtaining lucrative or political jobs and that victims are satisfied with only that. Whether we succeed or not in our efforts to advance justice and the rule of law, we should not ignore the societal need to strive toward broader goals. The IP is an important tool for doing so.

We should not speak of methods that are ‘bon pour l’Orient’, or accountability that is ‘bon pour l’Africa’, or human rights, or women’s rights, or redress that is merely ‘good enough’ despite all the serious obstacles and challenges before us. Recourse to donor organisations and political leaders can never be a suitable alternative to achieving justice through the rule of law.

Finally, while I have reservations and disagreements with the conclusions of this study, I wish to thank the authors and supporting institutions for undertaking research on the IP. All discussion and

research on the IP is positive; raising awareness of it and the value of high quality medico-legal documentation of torture. Let us continue these explorations into the challenges of documenting torture as the more we continue to discuss how to do it better, the greater chance we have for achieving a better world.

References

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