From Prohibition to Eradication

Introductory statement to the OSCE Human Dimension Meeting
September 2014

A. Need for a stocktaking of success and failures

1. Introduction:

Let me thank you for inviting me to introduce this session on the rule of law and to set out a few core questions for discussions in what appears to be three separate topics that are in fact closely connected:

- The prevention of torture,
- The death penalty, and
- Counter-terrorism.

It will not take you by surprise that speaking on behalf of the World Organisation Against Torture (OMCT), the leading civil society coalition against torture, that I will address these three issues from an anti-torture perspective.

I do so against the background of our work across the region with member organisations of the SOS torture network – be it in the West or East of the OSCE region.

And I will do so against the background of having worked on anti-torture reforms in the OSCE region personally for many years.

2. Breaking the routine and taking stock

This is not the first of our discussions on torture in this forum. I have been following - like many of you - the evolution of the debate on torture the last 10-15 years. Like many in the human rights community I increasingly got the impression in the last years that our debate on torture reforms is becoming a sort of routine discussion. We tend to repeat the same issues again, indicate laws that have been adopted and progress we have made. Yet many of us have the impression that the OSCE and ODIHR have somehow lost somehow momentum on the fight against torture and that we should recreate some of the approaches pursued in the late 90ies.

So I suggest to you:

Let us use today to get out of the routine, not the least to do justice to the Swiss Chairmanship, who thankfully has put the issue of torture back on the OSCE agenda.

25 years ago the first partially free election paved the way for a new era in which we also embarked on rule of law and anti-torture reforms. For once we believed at the time the way would be open to address human rights issues without ideological divides and to move from standards to implementation.

This year we are also celebrating the 30th anniversary of the main universal anti-torture document, the UN Convention Against Torture. So reason enough to take stock of what has been achieved and how far we have gone in moving to implementation.

B. Need for a fresh and bold agenda for eradication

(1) Setting the right target: From prohibition to eradication!

We have consensus on the law that could not be stronger internationally.

'Absolute', 'non-derogable', '*ius cogens*', '*erga omnes', 'in peace and war'*. You name it. We know it. More than this torture is not a just an issue of abuse of power– no, it is outright criminal – so criminal that it is one of the few crimes under international law. The legal framework could hardly be any stronger on any of those points.

Yet, what is striking to me is that torture unlike slavery – let aside slavery-like practices such as trafficking – is far from being eradicated. States who regularly resort to torture can remain normal members of the international community. We somehow often contend ourselves with a legal prohibition instead of eradicating the practice.

This is true also in the OSCE region. While legally prohibited it is still practiced and there is very little if any accountability over torture treating it with the seriousness that a crime under international law would deserve. For those delegates here in the room that may disagree I would ask if they could name to me at least two to three cases of criminal convictions for the crime of torture over the last year.

I believe if we all agree on the principles and standards as you have all done as participating states of the OSCE we have to change this.

Let us be clear: Torture and cruel and inhuman or degrading treatment is very rarely coincidental or the result of the one 'bad apple'. It is largely institutional, the product of policies or the lack of laws and policies to prevent it, and a lack of capacity or willingness to give victims remedy and reparation, especially as we may not deem than particularly sympathetic victims. The good news is that this means we can eradicate torture.

Contrary to what I often here in the Caucasus or Central Asia a 'step by step' approach will not eradicate torture. We need in my understanding a bold and determined will to stop torture and to ensure full accountability.

I propose that we set a clear target. Let us also rename the session next year into 'the eradication of torture'. Let us be bold and ambitious in the OSCE region.

(2) Setting a clear approach: victims matter

A key lesson of the OSCE approach on torture is that we often tend to speak of the prevention of torture in somehow abstract terms. This does not do justice to the reality.

We speak about one of the most egregious violations of human rights, about often un-imaginable cruelty and suffering. Torture destroys and leaves human beings traumatises

and scattered for life. Torture and CIDT severely affects the fabric of society and where it is systematic it terrorizes societies and communities. It also distorts the rule of law and our institutions. Where there is torture there is no rule of law, where the rule of law reins torture has no place.

But let us not forget torture and cruel and inhuman or degrading treatment is about individuals and often about those that are rarely spoken about. They have rights and they have needs.

Torture, cruel and inhuman or degrading treatment often – including in a good number of OSCE participating states – affects members of marginalized and vulnerable communities, including minorities and migrants. And it often concerns persons that may not be popular with the state, the population.

A core principle of the fight against torture, however, is that we do not distinguish between innocent or guilty victims. Looking around in the OSCE region I often feel that we can 'deal' with sympathetic victims preferably ill-treated abroad. In contrast we are much less faithful to our own standards when confronted with 'not so sympathetic victims'. The inability to accept that terrorist suspects who have been tortured are nonetheless entitled to remedies and reparation is a case in point.

Overall I believe that the OSCE approach should integrate to a far greater extent a victim perspective, including the right to remedy and reparation, including rehabilitation, and justice and truth.

(3) Bringing the Convention and the CAT home

We are celebrating the 30th anniversary of the UN Convention Against Torture which sets out today as thirty years ago a real blueprint for implementation. No other document sets out as comprehensively the standards and steps to be taken.

We have to make it centrepiece of the OSCE reform agenda.

No other region has so strong experiences and know-how on the internalisation of international human rights treaties, such as the European Convention on Human Rights. Let us use this potential and know-how in relation to the Convention Against Torture and the authoritative recommendations of the UN Committee Against Torture (CAT). Let us screen legal frameworks, policies and our institutional framework to enable it to fully reflect and implement the Convention.

The OSCE region could set an example also in bringing the deliberations of the UN Committee Against Torture back to where it belongs. A few suggestions in this regard:

- CAT sessions have to be brought back to the countries concerned. While the debate is conducted in Geneva it is often seen by states as an administrative exercise and burden.

  ODIHR has many years ago systematically helped states to review their compliance and to facilitate the follow-up to the recommendations of CAT,

through government-civil society dialogues. The result in a number of cases was a new momentum to certain reforms, such as on prison reforms that had been recommended by CAT. In line with a Russian proverb that 'all new is a long forgotten old' it is worth to resurrect this work.

- We have to carry the discussion back into the country and we have to go beyond the usual suspects and selected few who know about these proceedings. OMCT has started to train journalist, helps in web-screening sessions in small events in the countries reporting to CAT. We would be happy to provide expertise and develop partnership on this with ODIHR and its field missions to ensure that a broader audience is aware of the significant hearings taking place before the Committee. The history of the OSCE shows very powerfully the importance of making standards domestically known and disseminated within civil society.

(4) Strong legal and institutional frameworks are essential (but not enough)!

The eradication of torture should be understood in line with the OSCE commitments in the Copenhagen document within the broader context of the rule of law. I recall in this regard the remarkably progressive definition of the 'rule of law' in the OSCE commitments not as a formal legality but as 'rule of rights'.

Torture traditionally places a burden on the rule of law. The lack of transparency, its cloud of secrecy, the false perception of corps spirit make the fight against torture sometimes the real litmus test for the rule of law.

In response we have adopted new laws, established procedures and institutions over the last twenty years across large parts of the OSCE region. Much of this has been a success story, notably in the accession process to the European Convention in the 90ies in Central and Eastern Europe. Such progressive internalization of international treaties may also still today be a model for some of the OSCE participating states in Western Europe.

It is to be welcomed that states are increasingly criminalizing torture in line with the definition of CAT (though a good number have not yet done including the country of the chairmanship Switzerland), it is to be welcomed that control over detention has been moved in most Participating States to the judiciary. And it remains important that we create real safeguards through effective access to lawyers and doctors with the moment of arrest and we also have to do more to enforce the vital separation between those who hold prisoners and those who have an interest in interrogations.

But the legal changes can only be a starting point.

The real question is not whether there is a crime of torture but whether states investigate and prosecute persons for torture (instead of at best use as is the case some minor public order offenses).

The real question is whether the transfer of authority over arrest or habeas corpus to the judiciary does in reality protect. In many instances it does not.

The real question is not whether states have an NPM or a NHRI or HR Ombudsman but what they are contributing in protection from torture.

If we do not want to stay in our comfort zone of institutional reforms and fall victim to a false perception of progress we need to move to a qualitative approach on laws and institutions. We have to look at the real impact and the quality of those changes.

When I look at parts of the OSCE region I recognize progress on a form of see a formal legality. But this is not the rule of law.

In some jurisdictions, such as in Central Asia for instances, it is true to say that the fact that a judge confirms detention has not produced results and has in reality mainly meant that the bribery to be paid migrates to the judiciary. Moreover, there is typically a concept of at best of 'controlled independence'.

But even where judges are independent they can fail to uphold anti-torture standards if they do not have a human rights culture. Independence alone is not sufficient. The limited reach of the judiciary as key safeguard is also dramatic in relation to the use of special security or intelligence services in most OSCE participating states rendering many safeguards on paper weak in practice.

Hence, we need to support further legal and institutional reforms. But they alone do not produce the necessary result. The real question is that of a culture change which requires legal reforms but is more complicated than just reforming the law.

(5) Make preventative mechanism prevent!

The Optional Protocol to CAT and the emerging role of national preventive mechanism is a fundamental new feature of the international human rights infrastructure. It is important that the OSCE supports this process.

Here, too, however, what matters is quality:

- First, do the NPMs whether West (such as in the country of the Chairmanship or in Germany) or East satisfy standards of institutional independence, financial autonomy and are they equipped to work effectively?

  In fact, we have seen with many NHRI and Ombudsman institutions in the OSCE – some are excellent, effective, well resourced but others are paralysed, lack independence, credibility and resources. There is today in parts of the civil society a real disillusionment about some of the institutions. We should learn the lesson and insist on independence, resources and a real human rights culture.

  We should also monitor and assess performance. The ODIHR, too, should take a critical look at some of the institutions when there are indications that they are not performing. Regaining confidence for institutions once discredited will be doubly difficult.

- Second, NPM visiting should not replace scrutiny by civil society access to detention – supported by the OSCE in the late 90ies. It is especially in this region that progressive models have been developed of civil society monitoring.

- Third, NPMs and other bodies in the OSCE region can easily have the tendency of neglect on certain categories of detainees, notably children and other vulnerable groups – in particular where NHRI are made also NPMs. It needs to be ensured that in mandate and work these groups are not escaping scrutiny. The OMCT would be happy to provide its expertise in this area to the OSCE institutions.

- Finally, in relation to the OPCAT we should formulate a clear target. The Sub-Committee for the Prevention of Torture (SPT) conducts country visits such as does the CPT. These reports are fundamental.

  It is with great astonishment that the SPT had to suspend just last week its recent visit to Azerbaijan for a lack of cooperation and risks of reprisals and issued. This is unacceptable.

  More than that we believe that if the SPT is supposed to play a role in the OSCE region reports need to be published if they are to have impact.

  I remember vividly working with the then Latvian Prison Director General in the late 90ies describing to me that it was only after the publication of the first CPT report that political reform on the penitentiary system started. Many of the persons working in the system very well knew the need for reform and were waiting for the government to act. Publication was key.

  Today it is largely accepted that CPT reports are public but we also have to make the SPT reports public. The UN has provided a fund for countries and NGOs working on the implementation of SPT recommendations conditioned on the publication of the reports. This could be a good model also for the OSCE and ODIHR engaging in technical assistance projects.

(6) Making accountability a key principle!

I am now turning to what I consider the key missing links in our anti-torture agenda.

While the legal and reform agenda of the OSCE has seen major steps of progress it is difficult to trace any tangible traces of legal accountability for torture. It often appears, as if we are able to deal with friendly, innocent victims, preferably from another country. But overall, there is rarely effective legal responsibility over torture in the OSCE region.

If those responsible for torture are never held to account prevention – no matter how nice the laws - is remaining an illusion. This is probably the most difficult issue to change but it would be important for the OSCE and ODIHR to play a stronger role.

What would accountability require?

- First institutionally independent prosecutors offices responsible for fighting torture that can overcome the corporate veil.

  We have seen progress in some countries, such as Russia, with the appointment of an investigative mechanism on crimes such as torture. This could become a model for the region if it was made to work.

  Unfortunately, it was rather cynical and not an encouraging sign that one of the first procedures initiated targeted the head of the countries most professional anti-torture organisation and member of the OMCT network, Igor Kalyapin from the Committee Against Torture in Nizhny Nowgorod.

- Second, primarily important is that states have an obligation ex officio to investigate torture allegations. Yet the classical response when speaking to officials in prisons and prosecutors offices about this the answer is a simple reference to the right to complain.

  Changing this is part of a see change within state authorities and prosecutors offices. I remember vividly the conversation with a chief police inspector in Kashmir frustrated with the lack of accountability over abuses in his force. He noted that '*we tend to say that we have to protect the morale of our troops. I never understood why protecting a rapist or torturer should be good for the morale of the troops*'.

  I believe that ODIHR should invest more effort in this regard including by setting up a network of anti-torture prosecutors in the region. It does not take a human rights activist to investigate crime but prosecutors who understand that torture is a serious crime and who consider the fact that it is committed by the state to make it even more serious.

- Third, we need the combination of domestic and international remedies.

  In most OSCE countries victims of torture face an uphill battle to pursue anti-torture remedies as the secrecy surrounding torture, interferences and intimidation of victims and witnesses are difficult challenges to overcome.

  In this environment international remedies are often the only realistic option to obtain redress. This applies in regards to the European Court of Human Rights but equally in relation to the UN treaty bodies, including the Committee Against Torture.

  In the year of 30 years of the Convention Against torture it is time to accept also its jurisdiction across the board in the OSCE region.

(6) A constituency for reform: support - not harass civil society!

A much-neglected element in the fight against torture in the OSCE region and in the

work of ODIHR and field missions is the role of the public support to reforms and the fundamental role of civil society.

The fight against torture requires states to respect, protect and fulfil the obligations under the Convention Against Torture. But the fight against torture concerns all of us and it is not only an issue for technicians.

In my view one of the key lessons learned of the failures of anti-torture reforms for the last two decades in the OSCE is that we have not sufficiently mobilized the public to support anti-torture reforms. More often than not we have treated the issue as a technical issue. We at the OMCT have learnt that we are far more successful where we build broader public support against torture, including by using arts, music and other more creative ways. We would be happy to share some of those experiences, including in the countries of the Mediterranean partnership of the OSCE.

More than that we need an active and vibrant civil society working on torture. There are many specialized organisation working on torture, including members of the OMCT network, who are able to make a major contribution to the fight against torture by their expertise, their ability to work with victims and to hold governments to account. Especially experiences with global human rights treaties show that it is when civil society can come together that real reforms can happen (examples CRC, CRPD, CEDAW).

In this regard, I note that states have an obligation to provide an enabling environment for torture defenders.

As we speak one member of the OMCT General Assembly, Leyla Yunus, is detained in Azerbaijan and we are concerned over her health and allegations of ill-treatment. Leyla is a well known long term advocate for political prisoners in the country and her detention is not only an attack against her but the whole human rights community in Azerbaijan. Another example is the detention and torture in detention of Mr Askarov in Kyrgyzstan who has been documenting torture and enforced disappearances. How credible we may ask are states in building new anti-torture institutions, such as NMPs as in Kyrgyzstan or Azerbaijan, when anti-torture lawyers are detained.

Organisations across the region are targeted, harassed when they do critical work on torture. I submit to you that the fight against torture can only be taken seriously if and when human rights organisations are enabled to work without hindrance and fear – even if for states their truth may hurt, shock or unquiet to use the language of the European Court of Human Rights. It is absolutely fundamental that whatever political divides may exist within the OSCE participation states that the protection of human rights defenders has to be a baseline consensus.

(7) The fights against torture matters – also in counter-terrorism!

Let me turn to the issue of counter-terrorism. OMCT has appreciated the ability to contribute and participate during the Swiss Chairmanship not only in the human dimension but also the counter-terrorism meeting in Interlaken as one of the few NGOs and I believe as the only global anti-torture organisation.

This is an expression also of the progress made over the years, from an attempt to exclude human rights after 9/11, to lip-service in the years that followed, to a recognition that terrorist threats have to be addressed as a continuation of the rule of law and not as its abrogation.

I will limit myself to a few principled remarks from an anti-torture perspective.

The history of torture is replete with examples of abuse in counter-terrorism across regions. It is typically here that the argument that the rule of the game has changed is particularly likely to occur. We have seen the devastating effects of policies ignoring core values to eradicate terrorism again and again. To be clear: it is not a question of whether or not terrorist threats are addressed but of the how this is done.

Studies on the effect of counter-terrorism have shown very clearly that beyond a human rights argument, that abusive policies, arbitrariness or even the perception of arbitrariness and lack of accountability turn to be counter-productive over time as they create further support for violent extremist ideology. In that sense I submit to you also that no counter-terrorism law has ever defeated terrorism. We need a long-term approach with human rights not being a handicap but a strength, that avoid the many fall outs that abusive counter-terrorism policies carry.

In relation to torture let me submit what matters most to me:

- Review counter-terrorism legislation to prevent torture:

Accountability requires a legal and policy framework that withstands the temptation of building short-cuts, reduce key safeguards against abuse, such as reduced access to lawyers and judicial oversight. What we need instead are solid criminal justice approaches in response to terrorist acts. It is doing grave injustice to the complexity of countering transnational terrorism that interrogations should be the main source of investigations. Rather we should look at the organized crime context to find inspirations. ODIHRs manual on counter-terrorism investigations is particularly welcome.

- Review legal controls over counter-terrorism actors

Accountability requires accountable actors. We have seen over the years the shift from a law enforcement and criminal justice model towards an intelligence and military intelligence paradigm in counter-terrorism.

Intelligence based approaches are no doubt needed and intelligent – if and when they are embedded in ensuring democratic and legal accountability over its actors.

This has not been done sufficiently and urgent steps are needed to reign into intelligence oversight and international intelligence cooperation. The OSCE and ODIHR with its comprehensive security mandate remains well placed to take on this complicated but fundamentally important issue.

Intelligence cooperation and exchange cannot become areas in which torture information can be freely shared and become the basis of action. We cannot accept that

torture evidence is excluded from legal processes but can be exchanged, shared and acted upon for so called operational intelligence purposes without constraints. Such understanding creates the incentives for torture, contradicts the exclusionary rule and creates complicity in torture.

- Accountability requires legal remedies and justice.

This is probably the most problematic feature. International law is clear that those responsible for torture have to be held to account even in countering terrorism. What we are facing in the OSCE region, including through the inaction of the United States, is that there is a lack of effective investigations in the face of an acknowledged policy of torture.

Accounting without accountability is violating core principles. This is also damaging the very foundations of the rule of law and the prohibition of torture.

Particularly disturbing is that torture victims in counter-terrorism have not seen yet effective remedies as national security and state security invocations have effectively extinguished their remedies in substance. A particular serious concern is that of prohibiting certain detainees who were subject to the CIA rendition program such as in the case of Mr Hawsawi to pursue effective remedies. This in itself can constitute cruel, inhuman or degrading treatment, and violates the right to a remedy.

We recognize the change of policies on interrogations and treatment but we have to come clean with the past if we want to avoid lasting damage to the absolute prohibition of torture. The present situation also leads to continuous double standard arguments. It remains therefore regrettable if a leading OSCE participating state is unable or unwilling to rectify torture.

(8) Death penalty – don't be agnostic about torture and CIDT

Allow me a brief final point on the death penalty.

I welcome the excellent report that ODIHR is putting out every year in line with its mandate. You will not be surprised that we at the global anti-torture movement firmly believe that the death penalty itself is a violation of the principle of human dignity.

Yet, even within the framework of the OSCE and its known transatlantic limitations there are few points from an anti-torture perspective to consider:

We know that many ways in which the death penalty is executed can in of itself constitute a violation of the absolute prohibition of torture. But the point that bothers me the most is the practice for example in Belarus of executions despite interim measures issued by the Human Rights Committee of the UN, and the absence of knowledge of the time, date and mode of execution for the families, and an unknown burial. This is unnecessarily cruel, inhuman or degrading treatment for the families concerned. The underlying philosophy of eradicating any trace of a persons life is not acceptable.

Another point we would like to raise is the question of moratoria, as they exist also in a few OSCE Participating States. Moratoria and the abolition of the death penalty have to go hand in hand with a reform of the detention regime on death row or those of life imprisonment. This system is typically cutting the person from the outside world and already process of dehumanization. If countries adopt moratoria or abolish the death penalty attention ought to be given to the integration of those prisoners in an appropriate and ordinary prison regime. If not we are producing severe suffering that qualifies as cruel and inhuman or degrading treatment if not torture.

C. <u>Conclusion:</u>

Let me return to the start.

We have been discussing an anti-torture framework within the OSCE for over twenty years. We have seen successes in terms of institutions, better prison conditions and laws. But major progress remains to be done.

We have to depart from business as usual.

I think ODIHR should be enabled to take torture issue centre piece with a designated special anti-torture point as we have seen on Roma and Sinti or trafficking, and/or recreate the advisory panel torture as it existed in the 90ies and inspired the various expert panels now existing within ODIHR.

Such decision would fit well to the commemoration of 30 years of the Convention Against Torture. And as we celebrate the 30th anniversary of the CAT why not issuing statements by each Participating States on 10 December on what they are doing to implement the Convention.

Finally, let me add a personal note of concern and pledge to you all. The OSCE is a unique creature with its distinct ability to bridge east and west. 25 year ago we saw change generating from the first (partially) free elections in Poland. It gave us for the last two decades the enthusiasm that human rights violations are addressed without a veil of ideology and that we move forward on real implementation.

This path and philosophy has to continue. If there ought to be one baseline consensus across the board in the OSCE it should be the absolute prohibition of torture, cruel and inhuman or degrading treatment – a baseline agreement we were able to foster even at the heights of the cold war when the Convention Against Torture was adopted.

Then let us use the Ministerial Council this year to task the ODIHR to set-up a comprehensive and holistic response to torture.

I thank you for your attention.

Gerald Staberock
Warsaw September 24, 2014