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Human Rights Protection and Torture

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INTRODUCTION

Rethinking human rights protection: lessons from survivors of torture and beyond?

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Abstract: How can human rights mechanisms better protect victims of torture? The article serves as an introduction to a special issue on torture and human rights protection. It argues that human rights protection is often thought about in a way that is both too narrow and too broad to provide effective responses to the needs of survivors of torture, their families and communities. The article proposes an approach that looks at protection from the perspective of the security of survivors rather than formal norms and mechanisms. Such a perspective cannot act as a magic bullet for human rights work, but it does create space for reflection on the problems and challenges of protection from violence, and for identifying what does work, for whom, and in what ways.

Keywords: Torture, protection, human rights, violence, security.

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Introduction

How can human rights mechanisms better protect victims of torture? The connection between human rights and protection often seems self-evident. The 1948 *Universal Declaration of Human Rights* (UDHR), for example, declares in its preamble that: 'human rights should be *protected* by the rule of law' [emphasis added], and goes on to use the word 'protection' nine times. The *European Convention on Human Rights* (ECHR) took up the baton in 1950: its full name is the *Convention for the Protection of Human Rights and Fundamental Freedoms*. The word protection is then mentioned 19 times in the 1969 *American Convention on Human Rights* (ACHR) and 10 times in the 1986 *African Charter on Human and Peoples' Rights* (ACHPR). Human rights organisations have also embraced protection as central to their mission. *Amnesty International*, for example declares its aim as being to: 'Protect Human Rights' and *Human Rights Watch* describes itself as 'Protecting Rights, Saving Lives'.[1] The words 'human rights' and 'protection' seem to go hand in hand.

But what are we talking about when we talk about human rights protection? We argue below that human rights protection is often thought about in a way that is both too narrow and too broad to provide effective responses to the needs of survivors of torture, their families and communities. On the one hand, human rights protection is too narrow in that it refers to the protection of very particular rights enshrined in law, rather than the protection of the people who might hold those rights. When brought together, such specific rights—such as the right to bodily integrity, freedom from torture, or access to health—do not adequately add up in a way that captures the complexity of protection needs. On the other hand, human rights protection is too broad, in that it refers to the underlying principle human dignity that whilst still important, can be too abstract and not contextually specific enough to capture and respond to particular vulnerabilities. Lost in the middle of all this are the complex and overlapping ways in which people are rendered vulnerable to violence, as well as the diverse, creative and sometimes problematic practices through which survivors and their communities try to bring about a measure of safety and security for themselves.

In contrast to humanitarianism—where there have been widespread attempts to re-examine protection (Ferris 2011; Goodwin-Gill 2008; Walker & Purdin 2004)—the meanings of human rights protection have largely been taken for granted. This article, which serves as an introduction to the collection of articles that follow, constitutes an attempt to rethink human rights protection, by focusing on the specific issue of torture. Although the protection needs of survivors of torture have their own particularities—such as those linked with psychosocial concerns (Segal 2018)—many of the

[1] See, for example: https://www.amnesty.org/en/get-involved/join/ and https://www.hrw.org/about/about-us (accessed 24 September 2021).

issues are also shared with other human rights violations and speak to the more general inaccessibility and inadequacy of formal human rights protection mechanisms, such as national human rights commissions and the branches of the UN human rights systems, in relation to survivors of violence.

We understand protection here as the practices used to avoid and prevent insecurity, in its multiple forms. Importantly, experiences of insecurity are wider than questions of violence and order, and include issues of livelihood and wellbeing (Goldstein 2016; Loader & Walker 2007). Protection can therefore include interdependent aspects of physical safety, shelter, income, health and social relations, amongst others. As such, protection needs and concerns—and the responses they produce—are always context specific. There are some cross overs with approaches to human security here (Marhia 2013; Paris 2001; Thomas 2001). Unlike some of the dominant frames in human security, we do not seek to root security concerns in the individual, but in wider sets of social relationships. In doing so, we do not want to define threat and insecurity in universal terms, but rather to ask, from their own perspective what threats and insecurities do people face and how do they go about seeking protection from these?

We start with the assumption that protection is a foundational principle in and of itself. Our approach is to look at protection from the perspective of survivors of torture, rather than formal norms and mechanisms. This means, in the first instance, stepping outside human rights frames and norms, to think about protection more broadly. In order to do so, we examine the threats faced by survivors and those closest to them, before asking how they understand their own protection concerns, the steps they take to remain safe and secure, and the roles, if any, of human rights norms and mechanisms in these processes. We use the words 'survivors of torture' to refer to people who have directly experienced torture *and* those who are under threat of torture, as well as their families and communities. Such a wide definition is important in order to avoid an individualised understand of torture and violence that ignores the wider social and cultural contexts within which people are both rendered vulnerable and attempt to live with its implications.

We do not think that thinking about protection from the perspective of survivors can act as a magic bullet for human rights work, and we note that protection practices can themselves be hierarchical, exclusionary and violent. Protection is not a binary issue: it is not that people are protected or not protected, protection is not good nor bad in and of itself. Instead, it is always a matter of relative degree and relationships. We also need to be careful not to spread the concept of protection too thinly. Over the past 30 years, the meanings of humanitarian protection, for example, have shifted and expanded, to the extent that they often overlap with forms of protection associated with human rights, child protection and domestic violence work, amongst others (Ferris 2011; Goodwin-Gill 2008; Walker & Purdin 2004). The broadening of humanitarian protection has not gone without criticism, in part for widening the concept of

protection so far that it becomes allegedly meaningless (Ferris 2011; Walker & Purdin 2004). However, focusing on protection issues from the perspective of survivors creates space for reflection on the problems and challenges of protection activities, and also for identifying what does work, for whom, and in what ways, in places where we might not always think to look. In doing so, this introduction and the articles in the rest of the collection, show the ways in which protection is both immediate and long term, and a matter of intimate relationships of care as much as institutional structures. In this situation, there remain significant gaps within formal human rights protection regimes, and although there is potential for human rights mechanisms to fill some of those gaps, they do not necessarily have the solution to all problems and challenges. We should also look to a wider range of community-based organisations that have developed the enduring relations of trust that enable a measure of protection.

The arguments presented here build on British Academy funded research, originally in Kenya and Sri Lanka with Wangui Kimari, Ermiza Tegal and Thiagi Piyadasa. The research involved participatory workshops, interviews with human rights actors and survivors, and ethnographic diaries. The research was then expanded to include Brazil, Tunisia and the Philippines. The case studies in the articles were chosen because they represent situations with long histories of human rights abuses, with torture particularly to the fore, but they are all also contexts with vibrant and diverse grassroots responses to violence. The case studies were chosen because they each bring something to an inductive conceptual reformulation of protection. Comparing cases through an iterative process of analysis and research allows for an in-depth examination of the multi-layered processes through which protection practices take effect and the ways in which they interact with human rights norms and institutions. These case studies are all in the global South, but in no way should this be taken to imply that torture is somehow uniquely a problem of the South.[2] The last 20 years, as well as a much longer history of colonial and other forms of violence, has shown the ways in which European and North American states have been complicit in multiple forms of torture—often framed as police violence—against their own populations as well as in global wars (Ralph 2020; Rejali 2009). As such, it is important to recognise the ways in which experiences in Sri Lanka, Kenya and the Philippines, for example, might not only have important lessons for each other, but also for contexts in the global North.

The rest of this special issue consists of two interviews with grassroots human rights practitioners, a legal analysis of international human rights norms and five country case studies. We begin with the interviews with Sarah Wangari and Amitha Priyanthi (2022), from Kenya and Sri Lanka respectively. Both women are survivors, grassroots human rights defenders and community activists, working on the frontline

[2] In large measure, our geographical focus is a result of the structure and restrictions of Overseas Development Assistance linked research funding that (perhaps problematically) requires a focus in Low and Middle Income Countries.

of the fight against torture. They are interviewed here as experts on the question of protection and we start with them in order to foreground the challenges and issues at stake. Shifting to a legal analysis, Towers' article (2022) examines the potential for a more expansive normative approach to protection within the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Towers shows how there is an emerging shift within human rights norms involving more contextually specific approaches. Hapal *et al.*'s article (2022) explores state and elite violence in the Philippine countryside, focusing on the ways in which land activists and trade unionists have responded to a long history of human rights violation, including torture, and in doing so have developed a range of protection strategies. Kimari's article examines the ways in which grass roots activists in urban Kenya tactically respond to the threat of police violence, constantly maneuvering between retreat and confrontation. Jesus *et al.*'s article (2022) examines the role of mothers' groups in Brazil in protecting their children from police and gang violence. Piyadasa and Tegal's article (2022) shows how family members seek to protect survivors of torture whilst engaging in attempts at legal accountability. Finally, El Ghali's article (2022) examines how undocumented sub-Saharan African migrants negotiate with the police and protect themselves through communal organising, including forming their own gangs in a context of endemic violence.

We organise the argument in the rest of this introductory article in four sections. We begin by exploring the threats faced by survivors of torture and their communities. We then contrast these experiences with the normative frameworks associated with human rights protection. The next section looks at human rights approaches to protection in practice and the gaps they produce. Drawing on the insights from the rest of the volume, we then look at some of the ways in which survivors and their communities attempt—successfully or not—to protect themselves, before concluding with a discussion of the ways in which human rights mechanisms might be able to work alongside and support such protection practices.

What do survivors of torture need protecting from?

Mama Akinyi is a 38-year-old mother of three living in Mathare Valley, one of Nairobi's oldest informal settlements. The valley has been neglected by city planning authorities and there is no water or sanitation. Her husband died after the 2013 elections from a police gunshot when he was protesting the outcome of the election. Akinyi's 19-year-old son disappeared after a run in with the police. She fears he was beaten, shot and killed but she is yet to receive any reports from the police or see his body despite her weekly visits to the police station. At night she is a waiter at a local

bar and sometimes engages in sex work when she cannot raise enough money to pay for school fees for her daughters, although this is often dangerous work.

On the other side of the Indian Ocean, Hassan Farook's family fled from Sri Lanka's Jaffna Peninsula in 1990 in the face of Liberation Tigers of Tamil Eelam (LTTE) violence, before settling on the coast near Batticaloa. Farook supported his family working in a small shop, which was destroyed by the 2004 tsunami. Ten years later Farook was beaten by the police after getting into a dispute with one of his neighbours. In 2019, too afraid to seek help from the police, his family hid in their homes out of fear of anti-Muslim violence following the Easter bombings.

Before thinking about human rights protection, it is important to examine the types of threats survivors of torture face and the things they fear. These two particular examples were collected during a series of participatory workshops in Nairobi, Kenya and in Colombo, Sri Lanka and are part of a wider pattern shown through the ethnographic research, interviews and workshops. For Mama Akinyi and Farook the events described above were not just simply separate incidents, but experiences that ran through and compounded one another. In both cases violence was layered upon violence, building on vulnerabilities that led to new vulnerabilities. Mama Akinyi and Farook both sought ways to make themselves and their families safe, whilst encountering new threats. These were threats that came from the police as well as members of the public and were rooted in conditions of poverty as well as endemic forms of violence. Violence and torture emerged as part of a much wider (and sometimes almost invisible) environment of insecurity.

There are six linked wider points that are important to make here, drawing on the wider case studies and other research.

First, torture is embedded in larger and endemic patterns of violence. In international human rights terms, if torture is defined as the deliberate infliction of severe pain or suffering at the instigation or acquiesce of a public official, from the perspective of survivors it is also important to embed such action in wider forms of violence.[3] Torture is part of a continuum of violence. In Kenya, for example (Kimari 2022, this issue), many acts of violence can be described in terms of multiple human rights abuses. And whilst important from an international human rights perspective, when ill-treatment tips over into torture, it is not always the most immediately significant issue for survivors and their communities.

Second, violence might be considered 'everyday' rather than exceptional. In Brazil, for example, many of the urban poor routinely experience police supported home invasions, harassment, forced disappearances, extra judicial killings and torture (Jesus *et al.* 2022, this issue). These actions are part of a continuum of overlapping violence.

[3] Article 1 of the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment.

As Jesus *et al.* suggest 'groups of socially and economically vulnerable individuals tend to live with instability and the expectation that, at any moment, a shootout or a violent police intervention may disrupt their supposed tranquillity' (this volume). In previous research (Jensen *et al.* 2018) we found that more than one quarter of the households in a specific squatter camp in Nairobi had been subjected to police violence (Jensen *et al.* 2018). State violence, including torture, can therefore be understood as part of routine life for many people.

Third, the state, or more particularly the police, are not the only threat people face. Gangs, militias, as well as political factions, can all deploy violence. In research we carried out in Kenya in 2015, gangs were said to account for over 25 per cent of the specific incidents of violence encountered by the residents of an informal settlement (Jensen *et al.* 2018). El Ghali's account of migrant gangs and Tunisian neighbours illustrate this point well (El Ghali 2022, this issue). Importantly though, identifying exactly who is and who is not a gang member or public official is often far from self-evident when seen from the perspective of many people living in the most vulnerable of circumstances (Choudhury *et al.* 2018).

Fourth, the experience of violence cannot be separated from wider forms of economic precarity (Jefferson 2014, 2016; Oette 2021). Persons living in poverty are particularly vulnerable to torture and violence, as their livelihood strategies and places of residence are criminalised and subjected to violent forms of policing. Violence can be both a source of precarity, putting people's livelihoods at stake, and a response to the ways in which people are forced to earn a living. Street hawkers in Nairobi, for example, are both routinely subjected to police violence because of their marginal economic position and have their ability to earn a living put at stake by constant raids and harassment (Dragsted 2021). The poor are often particularly vulnerable to extortion by the police, which can turn violent, when bribes are not paid (Jensen & Andersen 2017). In this process, it may not be possible to neatly distinguish between motivations for state violence and for instance, corruption-based exchange relationships.

Fifth, while torture and other human rights violations are condemned in the abstract, they are often condoned and supported in practice by state officials and the broader public. The war on drugs in the Philippines, for example, has caused the death of thousands, but has been supported by 80 per cent of the population (Social Weather Station 2017). Even those likely to be targeted have expressed understanding for the use of such violence (Kusaka 2017; Caldeira 2001). The deployment of violence is often seen as the legitimate defence of threatened moral orders: drug and crime free societies; religiously-based societies; peaceful and prosperous, capitalist economies; socially and culturally coherent communities; families with intact moral values. The attempted preservation of each of these moral orders can victimise populations along intersecting lines of race, class, gender, sexually, generation or religion (Jensen *et al.* 2021).

Sixth, and finally, torture is not evenly distributed. Whilst torture is inflicted on individuals, not all people are equally vulnerable to torture. Some populations are far more likely to be tortured than others (compare Fassin 2017). There is an increasing realisation amongst researchers and practitioners that the vast majority of survivors of torture are members of already vulnerable groups and that vulnerability does not start or end with the act of torture (Choudhury *et al.* 2018; Perez-Sales & Zraly 2018). Torture is therefore not simply a matter of specific individual perpetrators and survivors, but is rooted in wider histories of domination, discrimination and inequality. This has important implications for how we might think about where protection needs to both start and end.

In sum, for survivors of torture, the fear and implications of torture cannot be reduced to singular violent events, but are folded into wider social relations of vulnerability, where forms of violence are overlapping and come from multiple sources. The protection needs of torture survivors therefore extend beyond specific incidents. As such, in the course of marginalised lives, the experience of violence does not fit into discrete, self-evident blocks, but rather is part of multi-layered processes (Jensen 2015; Krause 2009). Protection needs therefore do not easily break down in distinct human rights categories and normative frameworks, such as torture, extra-judicial killings etc., but cut across and transcend such categories. In the next two sections we therefore examine the relationship between the threats faced by survivors of torture and current formal human rights protection mechanisms, starting with normative approaches before moving on to examine human rights practices.

Human rights protection: normative approaches

If protection often appears synonymous with human rights, what and who exactly is being protected by international and national human rights mechanisms? One approach is to say that it is very specific legal rights that are being protected. The UDHR—widely understood as having the status of customary international law—for example, sets out protection from discrimination (Article 7), from interference in private life (Article 12), against unemployment (Article 23) and 'of the moral and material interests resulting from any scientific, literary or artistic production' (Article 27).[4]

[4] The ECHR, similarly states that 'everyone's right to life shall be protected by law' (Article 1), and mentions both the protection of 'private life' (Article 6), and 'the right to form and join a trade union' (Article 11), whilst the supplementary *Protocol* declares the 'protection of property' (Article 1). The ACHR talks of the protection of the right to private life (Article 11), the family (Article 17) and the rights of a child (Article 19). Interestingly, and importantly, the language of protection is also used as a reason to limit rights, for example for the 'protection of public order, health, or morals' (Articles 9 and 10 of the ECHR) and to 'prevent crime or to protect national security, public safety, public order' (Article 22 ACHR).

Importantly though, the language of protection is seldom explicitly used in direct relation to torture. Where it does appear is in relation to torture is in the form of protection from reprisals if a victim decides to report abuse to legal authorities (Towers 2022, this issue). The 1984 *UN Convention Against Torture* (UNCAT), for example, states that 'Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given' (Article 13). There is a wider sense here in which it is not people being protected but their specific rights, and that these are protected through the law. We might see this, in part as the difference between protecting survivors of torture and protecting their specific legal rights not to be tortured. Such, a focus on protecting rights rather than the holders of those rights, can result in a piecemeal approach to protection, which leaves significant gaps. Stacked up alongside one another, such rights supposedly simply add up to the 'whole' of protection issues. To separate off one form of abuse from the other might make sense in narrow legal terms, but it also prevents us from fully grappling with the diverse ways that such abuses play themselves out in people's lives and the ways in which they respond. Most importantly, it provides what might be called a surface level form of protection, focused on after the fact symptoms rather than causes, and fails to grapple with underlying drivers that make people vulnerable. As Towers (2022) shows in this issue, whilst there is considerable potential within international human rights norms to take a more contextual approach to protection, and some movement has been made, there is still a long way to go. In particular she notes there is very little specific guidance from international mechanisms about the scope and nature of protection.

A more holistic approach to human rights protection has been to focus on the concept of dignity, as a way to foreground the *human* in human rights, rather than the specific rights they might hold. In the words of the UDHR: 'All human beings are born free and equal in dignity and rights' (Article 1). This is a form of dignity that is seen to come from the inherent worth and value of every human being (Agamben 2002: 66; Sangiovanni 2017; Waldron 2012; Webster 2018). This formulation though still leaves the question of what are we talking about when we are talking about dignity? As Eleni Coundouriotis notes, 'Although dignity is a foundational concept of human rights, it rarely elicits a critical examination. As a result, dignity is pushed to the margins; it is seen either as synonymous with humanity and hence a starting point for elaborating a theory of rights, or as the ultimate expression of rights realized' (2006: 844). For its critics the concept of dignity is too amorphous and undefined to have much purchase in real world problems (McCrudeen 2008; Moyn 2014; Riley 2018). Dignity can matter deeply to people, but as a category it risks being too abstract to guide specific interventions. To talk about dignity does not immediately tell us about the particular indignities that people might face and how to remedy them. Coundouriotis suggests instead that it is more productive to focus on *indignity*. Rather than starting with

specific rights or the broader concept of dignity, the implication is that we should therefore start by asking what threats people face and what they think they need protecting from. We will return to this issue in the final section. Before that though we will examine how human rights mechanisms approach protection in practice.

Human rights protection: practices

In practice, international human rights mechanisms tend to leave the specific question of protection from torture in the background, and instead emphasise three related approaches: prevention, accountability and reparation; preventing torture from happening through legal change and training; holding perpetrators to account through civil, constitutional and criminal procedures or national human rights commissions, for example; and providing a measure of reparations through psychosocial interventions, compensation and guarantees of non-repetition.[5] Criminal prosecution, for example, can be seen as a protection strategy in so far as it acts as a possible deterrent for perpetrators and takes abusers off the street, but the implicit assumption is that protection is best dealt with indirectly; if we get the rest in line, protection will follow.

A focus on protection for survivors of torture from reprisals when making legal complaints raises several challenges. There is considerable evidence to show that in the first instance, survivors want to feel safe and secure and are extremely unlikely to report their experiences to human rights mechanisms until they do so. Protection mechanisms therefore fall at the first hurdle, before they are even accessed. In many, if not all places in the world, the chances of a successful prosecution against a perpetrator of torture are very small. In the Philippines, there has only been one conviction for torture, despite thousands of cases being reported by human rights organisations (Hapal *et al.* 2022). In Kenya, despite the Independent Police Complaints Authority receiving over 5,000 complaints against the police between 2012 and 2019, there were only six convictions of police officers.[6] In Sri Lanka, there have only ever been nine convictions for torture and cases can take up to 17 years in the courts (Tegal & Piyadasa 2022). Over 99 per cent of cases taken to the Sri Lanka Human Rights Commission are not prosecuted.[7] In Tunisia, for the few cases that are taken forward, conviction rates remain almost non-existent.[8] The situation is worse in the global

[5] UN Committee Against Torture, General Comment 3 on Article 14, available at: https://www2.ohchr.org/english/bodies/cat/docs/gc/cat-c-gc-3_en.pdf

[6] Independent Police Oversight Authority: Annual Report and Financial Statements for the year ended 30 June 2019, Annex B. Available at: http://www.ipoa.go.ke/wp-content/uploads/2021/02/IPOA-Annual-Report-2018-2019-Web.pdf

[7] Law and Society Trust, Policy Brief, January 2021.

[8] ASF, LTDH, OCTT, OMCT, Alternative Report to the UN Human Rights Committee for its 128th session (March 2020). Available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/TUN/INT_CCPR_CSS_TUN_41543_E.pdf

North. For instance in Britain, only one person has ever been convicted of torture and that was an Afghan warlord convicted of torture in Afghanistan (Kelly 2012). The combined effect of reprisals and an unresponsive legal system means that few survivors feel secure enough to report their experiences.

Rather than accountability creating protection, it can sometimes end up doing exactly the opposite: adding to the threats people face. In 2014–2017, for example, we carried out research into the experience of torture in Nairobi, Kathmandu and Dhaka (Jensen *et al.* 2018; Choudhury, Jensen & Kelly 2018).[9] Many survey participants reported that they would not choose or had already chosen not to report an incident of torture, due to fear of being subjected to further violence. More broadly, even when survivors—often assisted and prompted by human rights organisations—do agree to take part in legal procedures, they often abandon it because of the risks and the costs in money and time (Christensen *et al.* 2020). The reluctance to report experiences is particularly the case for survivors who are already socially, economically and politically marginalised. In Sri Lanka, for example, already vulnerable groups, whether for reasons of ethnicity, sexuality or means of employment, are particularly unlikely to report experiences of torture (Tegal & Piyadasa 2022). Across the board, people are only likely to come forward if they already feel acknowledged as full citizens by the state. For too many people this is not the case. As Tegal & Piyadasa show, torture is often so taken for granted that it seldom occurs to people to report it as taking place. It is also hard for survivors to sustain a complaint over time, given the long delays and the emotional, social and economic costs involved. Finally, there is also a level of social shame combined with disbelief associated with speaking about torture, which can make survivors particularly uncomfortable in coming forward.

The focus on protection mechanisms in relation to reprisals and the criminal justice process is repeated across the globe. However, as Towers (2022) shows in this issue, international human rights norms, as well as national practice in the area is often very restrictive, narrowing the scope of protection. These protection mechanisms are largely inaccessible to all but a small minority (DIGNITY 2016). Those that do exist often have very limited admissions criteria, requiring a high level of threat to a person's life and the critical value of the witness to a particular legal case. In Kenya, the 2017 *Prevention of Torture Act* obliges the state to protect complainants and witnesses from reprisals and intimidation, but only during the course of the investigation (Article 13(9), Kimari 2022). The Witness Protection Agency is underfunded, and civil society organisations report that by the time it makes contact with vulnerable witnesses, it is often too late.[10] In the Philippines, the 1991 *Witness Protection, Security and Benefit*

[9] For a full account of this research, see https://torturedocumentationproject.wordpress.com/

[10] Amnesty International, Kenya, 'Witnesses should be given state protection', 8 February 2021. Available at: https://www.amnestykenya.org/witnesses-should-be-given-state-protection/

Act formally supports people at risk when involved in criminal prosecutions through secure housing, livelihood assistance and escort protection.[11] However, the system is widely mistrusted and seldom used.[12] In Sri Lanka, the National Authority for the Protection of Victims and Crime and Witnesses was established in 2015, but again limits support to those involved in judicial proceedings (Tegal & Piyadasa 2022, this volume). Even if survivors are able to access formal protection mechanisms, their related social costs are high. In Brazil, access to the State Program for the Protection of Victims and Witnesses (PROVITA) can see survivors' lives seriously disrupted through relocation, and as a result, as Jesus *et al.* argue, there is widespread resistance to enter into these programs (this volume). These social costs for victims of police harassment in Sri Lanka similarly render relocation almost impossible because people rely on their social networks for survival (Piyadasa & Tegal, this volume).

There has also been considerable attention on protection issues from the international human rights field in relation to the specific protection of human rights defenders. The establishment of the *UN Special Rapporteur on the Situation of Human Rights Defenders* in 2000 is indicative of the profile of the issue. Human rights organisations have also developed systems of protection for human rights defenders (Towers 2022; Nah 2020). The OHCHR defines human rights defenders by, saying that they 'must accept the universality of human rights as defined in the Universal Declaration' and 'must be peaceful' (OHCHR 2004: 9–10), but this approach excludes many people who are caught up in often violent struggles (Nah 2020: 11). An alternative approach is to focus on the 'right of everyone to defend human rights' (Nah 2020: 164), not focusing on a distinct category of people (human rights defenders), but the act of defending human rights. Whilst this spreads the question of protection more broadly, it still focuses on human rights as the object of protection, not addressing those people, who for whatever reason, do not focus on advancing human rights issues.

Across the board, perhaps the biggest obstacle to protection mechanisms for survivors of torture is that the body that is often asked to provide protection is also often related to the perpetrator of the abuse. In human rights terms, the state has the duty to protect, but it is also the violator. Torture, under the Article 1 definition of the UN Convention Against Torture, includes the direct or indirect involvement of the state, and the state is therefore, at best, an awkward provider of security, and is deeply distrusted by many survivors. If torture is carried out by the police, the police—even another branch of the police—are unlikely to be viewed as a straightforward source

[11] Republic of the Philippines, Department of Justice, Witness Protection, Security and Benefit Program. Available at: https://www.doj.gov.ph/witness-protection,-security-and-benefit-program.html

[12] CAT/C/PHL/CO/3 (2016), paragraphs 25–26. UN HRC, Concluding observations on the fourth periodic report of the Philippines, CCPR/C/PHL/CO/4, 13 November 2012, paragraph 16. CAT, Concluding observations: the Philippines, CAT/C/PHL/CO/2, 29 May 2009, paragraph 21.

of protection. If the state is not to provide protection, it is often assumed that human rights organisations are the next best place to start. Under Brazil's PROVITA, NGOs are directly involved in providing protection, allowing the state to be kept at a distance (Jesus *et al.* 2022, this issue). However, at the same time, PROVITA has also faced severe budgetary constraints and is only available to survivors willing or able to take part in criminal proceedings. More generally, international and national human rights organisations are not necessarily the best place to start when looking for protection strategies for many survivors of torture. Our previous research has shown that many human rights organisations are too geographically and socially distant, as well as being too stretched for resources, to have a comprehensive and holistic picture of needs on the ground (Jensen *et al.* 2018). International and national human rights organisations often only come into contact with the survivors who are willing and able to report their experiences. This group of survivors constitutes only the tip of the iceberg, and they also, by definition, represent a very particular and unrepresentative set of aspirations and concerns that does not necessarily reflect those of the wider population.

There are therefore serious problems in current international human rights approach to protection: a focus on particular rights fails to take into account overlapping violations; a focus on dignity is too abstract; a focus on accountability and prevention risks not paying enough attention to immediate risks; existing protections mechanisms are unreachable; strategies around human rights defenders focus on too narrow a group of people, and human rights groups are often too distant from many survivors. Importantly, these problems with human rights protection are not simply questions of implementation or resources, but matters of fundamental aims and objectives. The point here is not to point fingers at formal mechanisms, treaty bodies or human rights organisations. Human rights organisations will often be the first to acknowledge the gap between our present protective mechanisms and the lived realities of vulnerable populations. But human rights approaches to protection need to be rethought if they are to adequately respond to the needs of survivors and those closest to them. To see this, we need to consider violations from the point of view of survivors.

Protection from the perspective of survivors?

Conceptualising protection from the perspective of survivors allows us to appreciate the multiple and overlapping forms that protection needs and practices take, as they are embedded in particular social, economic and political contexts. This approach involves paying attention to how people perceive both threats and security in ways that might exceed current legal and organisational frameworks, whilst acknowledging

that these practices can also be counter-productive and exclusionary. The related move within humanitarianism over the last decade to rethink protection has often included human rights concerns, and these developments might be instructive, but also offer some possible warnings (Ferris 2011; Goodwin-Gill 2008; Walker & Purdin 2004). Most particularly, the humanitarian turn to 'community' or 'self-protection' was an attempt to move away from top down, even paternalistic forms of protection by rooting its concerns in the practices of vulnerable communities, but has resulted in accusations that protection responsibilities are being placed on the shoulders of already vulnerable populations (Duffield 2012; ICRC 2018; Sphere 2011). Furthermore, in thinking through such issues in relation to human rights, it is also crucial not to reveal too much about the protection strategies that people use. They work because they are clandestine, unknown and under the radar. Taking this into account then, in this final section, we examine some of the general ways survivors try to find a measure of protection.

In the face of the threat of torture and related forms of violence, survivors are forced to find creative ways to simply stay safe in their day-to-day lives. In such situations, protection strategies are rarely an after the event response—although they might sometimes be that too—as by then it is often, almost by definition, too late. For many people there is a not one violent singular event, a human rights abuse, to which they might then seek redress or reparation, but a series of abuses. Favela dwellers in Brazil, for example, face ongoing and intersecting forms of gang and police violence (Jesus *et al.* 2022, this issue). In Nairobi, risks of state and gang violence permeate everyday life in urban slums (Kimari 2022, this issue). Migrants in Tunisia experience ongoing violence from a host of human traffickers, border control agents and local gangs (El Ghali, this issue). This means that protection breaks down the boundary between the before and the after, between prevention and response (Agier 2019). Protection can be poised, sometimes awkwardly, between long-term concerns and short-term imperatives.

Above all, protection strategies are embedded in intimate relationships—they are as much about the need to look after family members, loved ones and others, as they are protecting the rights of lone individuals. In doing so, protection practices are linked to ties of knowledge, trust and obligation. They are about giving shelter, passing on knowledge and warnings, or providing sustenance to those that you care for (see also Nah 2020: 163). Deep relations of trust and responsibility are therefore a crucial resource in situations of high level insecurity. As Tegal & Piyadasa (2022, this issue) show in Sri Lanka, it is family members, and mothers in particular, who lead on the protection of survivors, as they try to negotiate systems of legal redress, providing moral, psychological and social support. Similarly, as Jesus *et al.* (2022, this issue) show in Brazil, it is the mothers of victims who play a leading role in protecting their children, negotiating with state officials and making public demonstrations, whilst

utilising cultural tropes around maternal sacrifice and responsibility. Whilst Kimari (2022, this issue) argues that, in Kenya, close personal friendships and relations of solidarity, not just kinship, are an essential part of the tactics that people develop to avoid state violence. Kimari also shows how children can be used as part of protection strategies, by, for example, being used as lookouts. It is through such relationships that people develop knowledge about the threats that they face, the sense of responsibility to help, and the trusting relationships that allow them to do so. In this process, protection and care often run into one another.

Given the embeddedness of protection concerns and strategies within intimate relationships and obligations, human rights strategies that focus particularly on civil and political rights alone can be less effective, as they fail to grapple with the interacting and multi-dimensional concerns of survivors. As Hapal *et al.* (2022, this issue) illustrate, worker and land organisations provide safe houses and sanctuaries, but the tactic can mean that survivors find it difficult to earn a living and support their families while seeking shelter. In Sri Lanka, there are very few, if any, organisations that provide more rounded forms of support, and what does exist frequently focus on medical or psychosocial support, which was not necessarily prioritised by survivors due to time it took and the risk of losing a daily wage (Tegal & Piyadasa 2022, this issue). Without the ability to earn a living, provide for their families or have shelter, more specific protection strategies that focus on physical safety will fall short. Yet, at the same time, our research in both Kenya and the Philippines suggest that it is often these same social relations that perpetrators prey on when they hold children in detention waiting for relatives to come up with the bribe to set them free (Jensen & Hapal 2022; Gudmundsen *et al.* 2017).

Maneuvering between social roles and labels is another of the significant ways in which people seek to protect themselves, as the ways in which survivors are classified is a crucial part of their vulnerability. Being labelled a criminal, terrorist, or drug addict can serve to legitimise violence. In Brazil mothers are often particularly concerned to fight against their children being labelled as gang members as a way to provide protection. In Sri Lanka, survivors are similarly concerned with maintaining a sense of social standing, of fighting accusations of criminal activities for example, fearful that once their status is eroded, their vulnerability to abuse increases. But some labels can—in the right circumstances—create their own forms of protection. Philippine land activists struggle to be seen as land activists or human rights defenders, due to the protection, although limited, that this might provide, to escape the ever-possible label of communist insurgent. Perceived vulnerability, in so far as it is linked to innocence, can also be a possible source of protection, hence the involvement of children and mothers in many protection strategies. This is a difficult tightrope to walk—as trade unionists and human rights defenders can themselves be targeted, or children can be abused themselves.

Protection is not all warm and welcoming; it can involve integrating oneself in vertical relations of patronage, where protection is given in exchange for loyalty and even payment. Protection from the police by gangs, political groups, or even other police officers comes at a price. Protection is itself, double edged. The very word protection can imply both care and support, and a more malignant and threatening embrace. It evokes both the sense of a comforting presence providing shelter against enemies and images of criminal rackets, whereby the locally powerful demand tribute in order to stave off their own violence (Dua 2019; Kelly & Shah 2006; Tilly 1985). We can see the double edge of protection in the link between police corruption and torture, as people feel compelled, for example to negotiate their release from police detention for their own safety (Dragsted 2019). In the Philippines (Jensen & Hapal 2022), often highly intimate exchange relations play a central role in how people protect themselves against torture and extra-judicial killings. Violence is often the immediate way to gain a measure of protection from violence, creating both security and insecurity. The Philippine war on drugs is an evident example, as is the policing in the *favelas* that Jesus *et al.* (2022, this issue) explore in Brazil. In Tunis, migrants create gangs to protect themselves, but who also demand protection payments and become involved in violence (El Ghali 2022, this issue). Protection can itself be hierarchical, violent and exclusionary.

Conclusion

Protection can be seen as the foundation upon which successful human rights work may build. Without protection, prevention, accountability and reparation necessarily rest on unstable foundations. But current human rights approaches to the protection of survivors of torture are not fit for purpose. If human rights interventions are to respond effectively to the needs of survivors it is important that they work with and not against the grain of the ways in which vulnerable populations live. In making this argument, we do not want to imply that protection should replace other human rights approaches, such as prevention, accountability and reparation. Neither is it to make vulnerable populations responsible for their own protection. Protection organised primarily by survivors has important limits. Such protection practices seldom deal with the structural causes of domination that produced the violence in the first place. They often respond to the world around them and seek to work at its edges, looking for crevices and opportunities in which to work. What they do less often is grapple with the structural causes of domination that produced the violence in the first place. Where they might help someone feel safe and secure in the immediate term, they do not confront the long-term causes of insecurity and always start from the position of relative disempowerment. It is this disempowerment that land activists in the

Philippines, for instance, address when they advocate for land reform as a long-term strategy of protection that relies on short-term protection and survival (Hapal *et al.* 2022, this issue). We argue though that a cross-cutting focus on protection from the perspective of survivors may yield new and complementary insights and interventions.

Looking at protection from the perspective of survivors does not inherently assume that protection needs to be organised from the ground. It is crucial not to let the state 'off the hook' from its primary responsibility to protect its citizens and residents. The involvement of other groups—including NGOs, religious institutions, families or friends—can only ever be filling a gap. The question of how human rights protection is best delivered and by whom is therefore left as an open question, where local, national, regional and international institutions and laws may sometimes be both desired by populations in need, and the most effective form of intervention. Survivors can seldom stay safe alone, and must rely on other organisations and relationships to help.

The protection strategies of survivors and their communities might sometimes sit awkwardly with the norms and objectives of formal human rights organisations, and the key challenge is therefore to make them meet in a productive manner. At the moment, they all too often talk past one another. One key place to start is the actions of survivors who themselves become human rights defenders, such as the examples of Mama Alex and Amitha Priynathi that follow this introductory article. And even if human rights organisations are not necessarily the best place to start when thinking about protection, this does not mean though that there are not plenty of actors and groups on the ground who seek to support survivors around protection. Often they will not formally carry the name human rights—although sometimes they will. They might be churches, youth groups, or public health organisations, amongst others, but the important point is that these are people who have developed relationships of trust with affected communities and are often best placed to respond to the immediate needs and concerns. Often they will not involve 'professional' forms of expertise, but will combine political mobilisation with gendered notions of care to find shelter and provide support, sometimes inviting reprisals from the police.

Where does this analysis leave human rights scholars and activists? What are the ways forward? Our first and main task is to reveal, to some extent celebrate and always support the practices of protection that people are engaged in. As Towers (2022, this issue) suggests, to take one example, the UN Committee Against Torture should be much more precise in their recommendations to States. By reflecting on and potentially shifting international norms, we may provide people and organisations on the ground with means to question and protest against state violence. We may contribute to an emerging language of rights that allows for the experiences of people to find their ways to international and national forums. Supporting these strategies is also

about realising the limitations and sometimes counter-productive forms of protection practices, such as when gangs of migrants begin to 'protect' their communities against the Tunisian state and citizens (El Ghali 2022, this issue) or when mothers pay police in money or sexual favours to release their sons (Gudmundsen, Hansen & Jensen 2017). Such work may entail human rights activists and scholars engaging with organisations even if they do not speak the language of human rights.

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Survivors' perspectives: how to stay safe and struggle for justice

Sarah Wangari and Amitha Priyanthi
interviewed by Wangui Kimari, Thiagi Piyadasa and Ermiza Tegal

Abstract: How does one stay safe and protect one's family while fighting for justice? What are the dilemmas of protection when everyday life is a constant struggle against police and state brutality? These are questions addressed in interviews with Sarah Wangari and Amitha Priyanthi from Kenya and Sri Lanka respectively. Both women are survivors, grassroots human rights defenders and community activists, working on the frontline of the fight against torture. They were interviewed here as experts on the question of protection rather than as informants of human rights violations. As the interviews illustrate, the boundary between survivor and experts on protection is hard to draw for Sarah and Amitha. The position and practices of survivor-experts gives them a privileged point of view from which to understand what protective strategies from the point of view of survivors of state and police violence may entail. Human rights organisations would do well to heed their challenges, practices and implicit call for support and recognition if they want to stay relevant for survivors and their families.

Keywords: Torture, survivors, acrivists, protection, human rights.

Note on the authors: see end of article.

Introduction

How does one stay safe and protect one's family while fighting for justice? What are the dilemmas of protection when everyday life is a constant struggle against police and state brutality? These are questions that the following section will explore through two interviews with Sarah Wangari and Amitha Priyanthi from Kenya and Sri Lanka respectively. Both women are survivors, grassroots human rights defenders and community activists, working on the frontline of the fight against torture. They were interviewed here as experts on the question of protection rather than as informants of human rights violations. As the interviews illustrate, the boundary between survivor and experts on protection is hard to draw for Sarah and Amitha. Their expertise emanates from the experiences as well as from the enormous courage with which they have acted after their experiences and integrated them into their activism. The experiences are not, as we can gauge from the interviews, one-off events. Rather, the violations run through their lives. The position and practices of survivor-experts gives them a privileged point of view from which to understand what protective strategies from the point of view of survivors of state and police violence may entail. This is exactly what this special issue attempts to uncover, explore and recognise. Human rights organisations would do well to heed their challenges, practices and implicit call for support and recognition if they want to stay relevant for survivors and their families.

In the first interview, we hear the voice of Sarah Wangari talking to researcher Wangui Kimari. The interview was conducted in Swahili and translated into English by Wangui Kimari. Sarah Wangari is a grassroots activist and second-generation resident of Mathare, Nairobi, a poor urban settlement east of Nairobi. She is 48 years old, was born in Mathare. She became an activist after her son was the victim of an extra-judicial killing by the police in October 2017. Alex, her son, was 19 years old when he was shot by the police at around 10 pm on his way back home from work—fetching water for residents. She continues her quest for justice for herself and other families who have been bereaved in the same way. She is also a key member of the Mothers of Victims and Survivors Network, a group formed by family members, mostly mothers and wives, who have lost their kin through police brutality. We asked her if she wanted to remain anonymous, given the threats often posed by the Kenyan police. However, Sarah is adamant that we should publish her name and not anonymise her because, as she says, 'if we are not open and courageous, how will we get justice?' In the interview, Sarah describes the extent of police violence, intimidation and attitudes to law enforcement in her community. She relates personal experiences, including those involving assistance provided by state and non-state actors, her own efforts to provide support to victims of police brutality and their families, and her determination to use dialogue to change law enforcement and stop the use of lethal police force.

In the second interview, Amitha Priyanthi speaks to Thiagi Piyadasa and Ermiza Tegal. Amitha Priyanthi is a human rights defender based in the Southern Province of Sri Lanka, where she lives with her husband. Amitha is 55 years old. She is among seven siblings of a Sinhala Buddhist family. Her father was a farmer and her mother's family owned a general store in her village. Her journey began with a personal experience of torture and the death of her brother. At the time of her brother's death Amitha was reading for an external arts degree. She was unable to complete the degree because of the time, energy and emotional resources that went into caring for her family, and the effort to hold those who tortured and killed her brother responsible. For over two decades, Amitha has worked in her local community supporting victim-survivors of torture and their families. She has worked closely with local human rights organisations, such as Janasansadaya in Panadura, and currently with Right to Life, Colombo. Both organisations work primarily on addressing torture in Sri Lanka. Amitha provides extensive support, guidance and advice to survivors of torture and their families. Her indefatigable activism, determination and depth of compassion is visible in her interventions, and to many survivors and their families her contribution is invaluable. Amitha is currently the convenor of the Citizen's Forum for Justice, a national forum for survivors of torture. In the interview, Amitha speaks about torture in Sri Lanka, her views on torture in Sri Lanka and describes the protection mechanisms available by state and non-state actors, and the challenges she faces in seeking protection for survivors and their families, including her own.

Sarah Wangari: 'We have a right to live'

Background and motivation for joining the Mothers of Victims and Survivors Network

My parents moved here from Murang'a in 1965. They had eight children and now I am the only one left, along with my sisters' children. Now, my parents are dead, and I have also lost one of my two children, who was killed by the police.

The pain I felt when my child was killed was what motivated me to become a grassroots defender. I wanted to fight for other parents who are suffering because they have lost their children to police violence. I wanted to become a defender, so that together we can seek justice for the youths who are being killed. It is against basic human rights for children to be killed. They should be arrested and taken to a police station.

I volunteer for the Mothers of Victims and Survivors Network [affiliated to Mathare Social Justice Centre]. When a child is killed [like mine], I feel that the mother has been left with a vast emptiness; her child, who would have helped her, has died. I try to visit the parents whose children have been killed, to give them some form of counselling. I also tell them we should come together and fight for justice so that the police will stop killing our children.

Challenges faced in the struggle to prevent police brutality

The challenges I face in my work as a grassroots defender are that sometimes, even after joining forces with the women from the Mothers of Victims and Survivors Network, you can find yourself being threatened by the police. They tell you what you are doing is not right, and that you should not attack the police. But I tell them that everyone has the right to fight for justice. So, I am not afraid, because I am not committing a crime: I am standing up for those who have been killed and explaining to the mothers who have lost their children that everyone has a right to live; that their children also have a right to live, and that we should demonstrate solidarity and work together.

I have been threatened but stood my ground. I know my rights, so I came out and faced them, which shocked them. I told them to stop threatening me because I had done nothing wrong. I am fighting for the rights of my child and all the other children who have been killed. I tell them that is not a crime. I must exercise the right to fight for the rights of my child.

Forms and prevalence of torture

The torture that people endure here in Mathare is, for example, when police find our youths seated quietly somewhere and beat them for no reason. When youths are doing their work, such as planting grass, they are accused of making a 'base' [a hangout spot for youths where they are accused of 'idling' or 'conspiring']. Sometimes youths try to use their talents, for example, by starting a football team or a dance troupe, and even then, the police come and disperse them. They tell them they should not have a *base*, that ten youths or more should not congregate. They beat them up, harass them and threaten them, and the youths are afraid. Once their faces are noted or their photos have been taken, then afterwards they are killed.

A stark chronology of victimisation

Since I became a defender, I feel the level of victimisation has decreased. That is because before, the police were killing a lot, but when we began protesting, with slogans such as 'no shooting', 'stop killing' and 'justice', the number of killings decreased. Recently, however, the killings have started again. And now they are killing twice as many. It is as if they are furious with us for protesting.

Youths are the main victims of the attacks. Yet, we, as parents, are also affected, because when a youth is killed, people become extremely incensed and there are protests, during which our businesses are damaged, women's businesses are damaged, there are criminal acts such as looting, and vehicles are damaged. As a result, many individuals are injured by the police, in addition to the killing.

Violence avoidance tactics

Since the youths are afraid, even if you try to send a youth to the shops at night, they refuse to go and that is how they protect themselves. Youths are unable to enjoy themselves because they fear they may run into the police. Boys refuse to leave the house or they return home early. By 9:00 pm, you won't find any youths walking around in Mathare. It is as if a curfew has been imposed: 'No youths on the streets after 11:00 pm'. If a young man's child falls ill at night, he cannot leave the house. He has to find a woman to send to the shop. Life in Mathare is very bad.

Retaliating through human rights organisations—and potential reprisals

People are afraid to join organisations such as Mathare Social Justice Centre (MSJC) and engage in work connected with justice because if they do, the police start trailing them. When my child was killed, I asked myself, 'If my child can be killed, who am I to the police [what is the value of my life]?' and I became strong. My child's spirit makes me strong even when I am threatened by the police. I am able to face the police and tell them that what they are doing is not right.

Reporting mechanisms—delays and cases pending

People can report violations to MSJC or at the police station if they have anything to report here in Mathare. If they are afraid of the justice centres, they go and file a report with the police. But when they report crimes to the police, their statements are not followed up. They reach the Occurrence Book (OB) and end there. Afterwards, [the complainants] realise, for example, regarding a report filed at Pangani Police Station, that they have no assistance. Then they come and join a justice centre in order to obtain help, to pursue the rights of their child, or whatever violation has happened here in Mathare. Recently, some women asked me how they can pursue the rights of their children who had been killed. That was not related to police killings but was a case of youths killing each other. They wanted to know if IPOA [the Independent Policing Oversight Authority] and the justice centre can get involved in such cases and help them.

Apart from organisations such as MSJC, or maybe the police, some other organisations also follow up on minor cases, or sometimes even major cases. People go to the Chairlady of Mathare [an informal leadership role in Mathare wards], or Nyumba Kumi [a community policing formation]. But these organisations are linked to the police. You can tell them your problem to get help, but they work with the police. So your case never makes any progress. It just remains pending. Consequently, many people turn to justice

centres. When you go to a justice centre like Mathare Social Justice Centre (MSJC), your case is followed up. No matter how long it takes, even if it takes ten years.

Court proceedings—the route to justice?

In an effort to find justice, I, and other women as well, went to Mathare Social Justice Centre (MSJC) because we wanted to stand up for our children's rights. We don't expect compensation from the police because our child was killed. We want justice to be done; the police officer to be imprisoned as a lesson to other police officers.

Another woman, Nura's mother [Halima Malicha], was forced to leave Nairobi ... But no, I am not afraid. My child was killed at a place I see every time I leave my house. Also the manner in which my child was killed ... And my child is not alone. I have seen many parents crying like me. That is why you see me relying on my strength. I say 'solidarity' and I say 'comrade'—I don't fear anything in the least.

I took my case, including the OB report and my child's post mortem to IPOA. They phoned me a short while ago and said they are still continuing with the case investigations, and that they would call me again.

I first approached IPOA in 2019, two years ago, when we were taken there by Victor's mother [Mama Victor—another mother, who lost two children to police killings on the same day].

And yes, I trust them.

Supporting survivors and families who experience police violence

I am not afraid, but I protect myself by not going out. I don't go out at night. I avoid moving around from place to place. I settle in one place and continue with my business. But what provokes me is hearing a boy has been killed somewhere. I go there immediately, and I want to know what happened—was the boy in the wrong or was it the police? I get really upset when a boy is killed, because the boy had a right to be arrested and taken to the police station. What I am saying is that the police should stop killing boys. We, as grassroots activists, are telling the police to leave our youths alone, stop killing our children. I feel really furious when the police take the lives of our children.

The Mothers of Victims and Survivors Network, religious organisations and other potential national and international sources of support

I have come a long way with the Mothers of Victims and Survivors Network. The organisation has motivated me, and I have stopped crying all the time. But now what

really hits hard is when I hear another boy has been killed, the pain is ten times worse when I think of the boy's mother going through the same challenges I endured. When I remembered my own son, I used to take alcohol and use drugs. But I had to stop because, as an activist, we are constantly getting phone calls, we have meetings, so there is no time for drinking.

I also go to church and yes, it has helped me in the sense that I received counselling and stopped drinking and using drugs. I had to go to church so that I wouldn't go back to using drugs whenever I remembered my child. The people at church tell me it is good for me to defend other mothers. They help me to find peace by helping me to forget my child and not to keep remembering him.

What I can say is, besides the work we do in our communities, countries such as America and China should come together to ensure that justice continues, and there is justice everywhere. Justice should be foremost, and all countries should have justice. Uganda, America, everywhere.

Here in Mathare, to achieve justice and for the killings to decrease or cease altogether, our president should intervene. Because even as we cry that our children are being killed, we have never heard our president speak out. He should say, 'These people have cried enough. These killings should stop'.

Fear of pursuing legal action

People are afraid to file reports because even when they do, they receive no help. Our government has become useless. For example, if you report to the police that your child was raped, the police will ask, 'Where were you?' Or if a woman is bleeding from injuries and reports that she has been beaten by her husband, the police will accuse her of denying her husband his conjugal rights. So, you find yourself receiving more injuries and insults. That is why, here in Mathare, people kill each other, because even if a victim is slashed and reports the incident, nothing is done to the perpetrator. So the perpetrator knows even if the case goes forward, it will simply fizzle out.

Changing police attitudes through activism

Here in Mathare, we should make sure there is more activism, and more work carried out by justice centres. We should gather the youth of Mathare and the police, sit down together and discuss why our youths are being killed. Also, the issue of drugs is contributing to our youths being killed. We also need to ask the government to eliminate the drug problem here in the ghetto. And the government should also change because it is largely at fault. It ignores and despises us here in Mathare. I don't know how they view us. Children in affluent areas such as Runda are not shot, and yet they are also

involved in criminal activities. Recently, two boys were killed here in Mathare. On the day they were killed, I didn't see the same process taking place as in the case of the two boys who were killed in Meru. In Mathare, our youths are viewed as garbage; when someone is killed, the police come, shoot in the air, disperse people, then the deceased is thrown into a vehicle and taken to City Mortuary. But the police never ask why the youth was killed by police, what did he do? What crime did he commit? No. In the case that I was telling you about, recently, a young man was wearing a blanket and was coming from Garissa on a motorcycle. There were two youths, and they were shot dead. The police did not ask what the youths had done. The police really look down on us here in Mathare, and they ignore us. I don't know what sort of life they think we live. For example, recently, they came here to Mathare and found a youth who had been beaten and slashed with a machete. Instead of asking what had happened, they just commented that he was bleeding like a chicken. And that is human blood. They should stop acting that way, and they should stop looking down on us. Justice centres will fight for us. The police should start with their own children so they will know the pain we feel. The day one police officer starts with his own child, killing will stop because they will know how we feel.

Amitha Priyanthi: Navigating a broken system, the experiences of a human rights defender in Sri Lanka

On becoming a human rights defender and supporting survivors and families who experience torture

When I worked on my brother's case, I met other people who had been subjected to police brutality. I also came across other cases where people had died due to torture. I never intended to be an activist and, at first, I simply helped people in any way that I could. Mostly by sharing my own experiences and knowledge about what to do and what to expect. As I helped people, I realised that this was a fairly common problem. Until my family experienced it, I did not realise that torture could happen to anyone.

I usually receive calls from people at the time their husband or brother is being beaten or just after the incident. I immediately help them to report the incident in writing to the respective authorities, and call either the police headquarters or the Human Rights Commission hotline. Sometimes, interventions by higher officials have been successful in stopping the violence. It is a huge relief to the survivors and their families when we are able to stop the violence. I am very happy when I am able to prevent any further violence.

In my experience, survivors and families have many difficulties after they experience an incident of torture and are seeking advice. Sometimes lawyers wrongly advise them, even suggesting that they plead guilty to false charges against them. Sometimes,

various individuals intimidate them by trying to scare them into withdrawing complaints they have lodged or compelling them to 'settle' a complaint so that the complaint is not further investigated. Sometimes individuals get scared and lose courage. I have found that I can help them to regain their courage and move forward. When I intervene, I realise that my experience and knowledge are useful to them. I have learnt a lot through my experiences, especially about the law. I have met and worked with many human rights activists and lawyers. I observed how they responded to various situations. I have gained valuable experience and insights.

Forms and patterns of torture

Before, police would use batons and poles to hit people; they would handcuff people and suspend them or they would use a cigarette or some other object to burn survivors. In these cases, there are visible wounds that are often noted in medico-legal reports, and because of this, it has been possible to prove torture. Now, police have found new methods that do not leave visible or external injuries. This includes hitting the bottom of the feet; placing thick books on the head and hitting the individual; tying string onto fingertips and suspending the individual. These methods do not leave much visible injury but survivors experience severe pain and nerve damage. Police also use the '*dharmachakra*' method where the survivor's hands and feet are spread out and tied onto a wheel which is then made to spin. Police also use chilli powder on genitals and eyes; force individuals to breath from a bag doused in petrol; hold a water hose on victims' faces and other similarly severe forms of torture that people cannot bear. In addition, some survivors are made to strip naked, and are spoken to in foul language. I have heard of cases of torture even in prisons. Some schoolteachers have also subjected children to similar forms of punishment. With time, perpetrators find new ways to torture, simply to avoid leaving any evidence. Many of these new forms of torture leave no external trace and therefore many medical examinations also make no mention of these forms of torture.

Vulnerability to torture

Very rich or affluent classes do not experience torture. If they do, it seems very rare. People who are politically powerful or influential do not appear to experience torture. Those who are educated and qualified are also less likely to experience torture. In my experience, youths who do not do well in their secondary level education, who are engaged in casual labour such as selling fish or vegetables for a living—they are more likely to experience torture. Only very academically gifted children are supported by the education system. Those who do not excel academically quickly become

marginalised. These youths become targets of those who promote social vices—consumption of alcohol and drugs, and those who maintain political cronyism. These young people are seen in a particular way—as *rasthiyathukarayo* (loosely translated as a 'jobless person' or 'loiterer') or ruffians, and society expects the worst from them.

Those who engage in organised crimes involving drugs, or underworld figures, also do not experience torture. Torture and police brutality are closely associated with corruption. There may be situations where they are shot, but very rarely are they subjected to torture. Very often, it is the powerless, those who belong to low-income groups or daily wage earners who are subjected to torture. Frequently, police are in a rush to produce a suspect. They are not interested in solving crimes, they simply want to produce someone—regardless of whether there is any evidence. The individual is tortured to obtain a confession and is produced as the suspect in a criminal case.

Challenges in supporting survivors of torture

In cases of torture, initially, those who experience torture need a lot of support. Mainly to recover and re-establish their lives. They need support to regain livelihoods or generate income, emotional support, medical assistance, and socialisation. It takes some effort to bring them back to the position they were in before the incident. Even if we identify their needs, we do not have sufficient resources to provide for those needs. For example, we have been unable to support litigation costs, or to refer to counseling—so few organisations provide such help. Providing safety and protection, especially if survivors are facing many threats, is a challenge for us. Some cannot afford transport to travel to court. Some have nothing to eat all day. Sometimes, there is no proper place to meet, discuss matters and support them, psychologically—to build their morale. There have been times when the survivors become frustrated with me because they are unable to find justice.

Finding legal support can be a challenge. When false allegations and cases are filed against survivors, they require legal support. Instead, they are treated as criminals. This has caused some to ask me to help them find a 'good lawyer'. There are not many to recommend. Sometimes local lawyers have close relationships with the police, or do not accept cases against the police. Several times, lawyers have advised clients to plead guilty and 'solve' the matter. People ask for lawyers who will defend their interests without judging them. People do not trust lawyers who have close links with police.

Survivors fear seeking medical attention. Police threaten them about seeking any treatment at hospital or even visit the survivor in hospital. As activists, we refer them for medical assistance. Sometimes people are unaware that they can go to a hospital in another location. They are scared to go to the local hospital because they fear the police may have friends or influence at the hospital and that they may be harassed.

Support for mental and emotional impact is also extremely important. Very often, survivors are reluctant to seek help for themselves. Sometimes this is due to not realising

that they need psychological help. Some tend to just continue their work as usual, and do not have the time to think about this. I know survivors who have later needed help.

How do people protect themselves?

When police come looking for people, for whatever reason, many get scared because regardless of the complaint, they fear they will be subjected to violence. Therefore, at the first indication of police looking for someone, people will activate all social networks, including any political networks to try and avoid being arrested. Some may try to flee from their hometown or village. Some may try to speak to the police and try to negotiate a settlement. Some, if suspected of some petty theft, even if they are completely innocent, plead guilty simply to avoid torture. Some promise to replace the stolen item even if they are innocent. Many survivors come seeking some assistance. Even though we assist them with lodging complaints, many withdraw them during the course of the case, due to intimidation and threats.

People seek out protection from the Buddhist monk at their temple, or some influential person in their village. Some even contact individuals who are involved in crime, who have close links with police, in an effort to influence the police to back down. There are instances where survivors offered money to the police for protection.

Support from families of survivors of torture, especially women

Very often, mothers come forward to support the survivor, sometimes the father or the siblings. Many relatives do not get involved for fear that their family or children might be harmed. Community members are also hesitant to get involved but there are also people who find torture to be wrong and who will provide support in some way. But in practice, other than your closest family, it is very rare for others to come forward to help.

Generally, women come forward if the incident involves her husband or son. They may feel there is less threat to women compared to men. Women have shown a lot of strength and determination compared to men in the fight for justice. Cases where women have taken an interest in pursuing matters have gone further because women are less influenced by the various attempts to settle the matter or deter the survivor. It may also be because women have more capacity to bear challenges.

Reporting torture

Survivors want justice. They know that injustice has taken place. Parents tend to recognise that their child continues to experience trauma after torture. But they always ask me if they will face problems and threats if they make a formal complaint. They are

worried that if they report torture, they may not get bail or may be further harassed. This is because there is no faith in the law in our society. Very often, in the initial stages, they are very keen to take action and complain about the torture, however for several reasons their interest fades as time passes. Sometimes even lawyers discourage families from reporting an incident of torture and advise them to just focus on the more immediate concern of getting bail. There are times survivors have been dissatisfied with a court's inaction to their complaints of torture. In many cases police tend to influence survivors through third parties, and apply pressure to withdraw cases. All these factors bear down on the individual. If the survivor engages in an illegal activity, they tend to not report any torture because they feel it will hinder their illegal activity. It becomes a trade off with the police. This is very rare, but there are cases.

Many survivors complain to the Human Rights Commission. When they hear the words 'human rights' they believe that it is an institution that will prioritise their interests. They hope there will be some protection and essentially want some pressure to be applied on the perpetrators—to cause a sense of fear. They sometimes harbour hopes of justice or a reasonable remedy, perhaps even some compensation.

Some make complaints to the police headquarters and the Inspector General of Police in the hope that the police will take quick disciplinary measures to suspend, transfer or even arrest the relevant police officer. They complain to higher officials, believing that they may get some justice. People have high hopes when they report violence. They believe some action will be taken in their favour. When nothing is done, when police officers continue to work in their post, are not transferred, are not arrested or questioned, survivors who see this lose faith in the system. They think twice before reporting anything further. It affects survivors psychologically if nothing transpires from the complaints and cases even after many years, because they feel they have been let down many times. The very experience of pursuing justice is very hard on the survivor, so when they do not see any justice or remedy, it is very difficult to bear. I am now not surprised when survivors withdraw fundamental rights cases. I sympathise with the plight of survivors. I help them to stay strong, hoping that they will pursue their justice and hopefully one day get it.

I explain this system to every survivor—the court delays, the HRC and related process, and the fact that public officials have a duty to us because they are paid by taxpayers' money. I explain that though this is one case, we (as survivors) need to fight back to change the system and ensure that others do not experience this violence. There have been some survivors who, despite numerous opportunities to settle, have chosen to continue with their case because they were fighting for justice. Others who have some political support and are accustomed to seeking support from those in power, tend to view pursuing complaints as too cumbersome.

Dealing with threats and undue influence

We need to swiftly report the threats that we experience. We should report them as they are happening. If there is an ongoing case, we should report any threat immediately to court. We shouldn't even wait a week. When you report swiftly, the other offending party will be concerned and more cautious in their actions. They will feel that they are being watched. In one of our ongoing court cases, the judge had warned the perpetrator and said that if any further complaints of threats were reported, his bail would be withdrawn, and he would be remanded until the conclusion of the case. When perpetrators see the law being applied, they think twice.

Challenges in relation to reporting torture and working with formal mechanisms

The Human Rights Commission, the Supreme Court, or even the Attorney General's Department—for criminal matters, all these processes take a long time, and a lot of money. For many people, time is precious. It is difficult for people to give so much time. Some cases can take up to 20–25 years. Survivors and their families are not able to hold on for so long. Due to inordinate delays in many cases, survivors are unable to get any justice. Evidence is destroyed, witnesses pass away, or they face other economic and social issues. If the survivor is a child, the case sometimes continues until adulthood. Our biggest challenge is to conclude these matters within a reasonable time. For some cases, time periods have been stipulated in the law but in practice they are not adhered to. A Supreme Court case can take up to between eight and 10 years. Criminal cases can take up to 15–20 years. This delay is a significant challenge to our goal of addressing torture as a public issue. If these cases can be concluded within a few months or at least within two years of the incident, then that will send a clear message to society about how torture will not be tolerated. People will know that there is a punishment, and that you can face a prison sentence. After 20 years, everyone has forgotten about the incident and the case becomes insignificant. There is no justice for the survivor, and because of delays, many perpetrators are able to escape the law.

Protection by state machinery

The state machinery provides no protection. In 2018, my bag with important court documents relating to a torture case was snatched, and even though I complained to the Victim and Witness Protection Authority, there was no response. They do not know if I am alive or dead. There is a lot that they can do but they have done nothing. In a case where the survivor was kept in police custody for six days and beaten every day, I called the authorities daily, complained about the incident and begged them to

take action. Finally, a lawyer (woman) had to go to the police for the beatings to stop. That man could have died.

Comparatively, NGOs do much more. When people cannot continue to live in their homes, there are NGOs who provide protection and shelter. NGOs speak to neighbours and encourage people to support survivors. I have personally facilitated safe houses for many survivors. No state institution has ever gone to villages to speak up for survivors. Even within civil society, though, there are some who, despite having the capacity to support, choose not to. NGOs and human rights defenders working in those NGOs ought to understand that protection and assistance, in the first instance, are survivors' top priority. Providing protection to survivors requires a collective effort. We need better coordination even among NGOs. Each case is different. It depends on where survivors live, their social contexts and their family situation. In my own case, there were many who supported us. We had the support of the majority in our village. People in the village were very concerned about the safety of my family. Essentially, we had the protection of our village. But not everyone has that. There is a belief in our society that police only beat thieves and criminals. Because of this belief, many survivors are isolated.

Organisations and individuals most helpful in providing support and protection to torture survivors

With regard to the Human Rights Commission, I have built a relationship with it over time and it has been helpful. Human rights organisations like Right to Life and *Janasansadaya* have supported survivors mainly to pursue legal cases. However, there are only a handful of such human rights organisations. Providing protection to survivors requires many different people including doctors. This is difficult to secure as many influential people, either politically, socially or economically, tend to support the perpetrator and not the victim.

There are certain lawyers, senior and junior lawyers, who regularly help us, sometimes on a pro bono basis or for reduced fees. Some continue to help us even if they have left Sri Lanka. They have been helpful in many cases. There are a few media personnel who help us to highlight certain cases. Sometimes, there is protection in making your case public. But only very few journalists highlight issues of systemic torture. If someone with high social standing is affected, there is more media coverage compared to someone with lower social standing. When a politician's son and law student was beaten by the police, there were many who publicly called it out. There is no one to do so if police beat a village youth. The general idea in society is that violence is necessary. There is acceptance of police violence and a belief that unless you use

violence, you cannot reform the country—that mindset prevents society from coming together to support torture survivors.

There are also some government officers and police officers who were helpful. I remember when I used to travel to Colombo for my brother's case. There was a court sergeant who was very helpful, who would recognise me because I attended court regularly. If I arrived late, he would listen out for my case and inform me that the case was rescheduled for another date, or inform me if there was some other development. He was kind, not just to me, but also to many others who were helpless and had little knowledge of the court system. I have seen him checking the daybook in court and informing parties of the next date.[1] Similarly, there are some retired police officers who boldly express their views against police violence.

I have seen many instances in which members of the clergy have supported the police. I have also come across some Buddhist priests who have gone out of their way to help survivors by providing all three meals when individuals were in police custody, providing affidavits to confirm what they witnessed in a particular case, by visiting the survivors at home and generally looking out for their wellbeing. But the majority do not condone taking action against the torture. In fact, very often members of the clergy also advise survivors to settle cases.

Protecting survivors of torture

The system is broken and must change. Corruption is rife and insufficient resources are directed to essential services and institutions. We need a strong social discourse against torture. I will continue to fight for justice and am grateful for the exposure that I have received, I cannot put a price on that. But, the long delays in achieving justice are overwhelming. Survivors need all the support they can get. They feel lonely and isolated. If they feel there are others to support them, they get some courage to stand up against the injustice. Civil society organisations need to be more transparent about their work, what they can offer and how they can help, and they also need better systems and larger networks to really address the issues faced by survivors.

It is imperative to raise awareness among youths about the system so that they can be alert to the realities before them. We have a duty to protect and inform the youth in our communities. My personal experience of torture of a family member opened my eyes to the fact that people are routinely subjected to torture by the police, and that pursuing court cases is immensely difficult. My own experiences have given me a

[1] In Sri Lanka, it is not unusual for a litigant, particularly in a criminal case, to miss a court date, or even while being in court not hear announcing of the next court date. In such instances, these persons usually need to check with the court registry as to when the case would be called next. This can be time consuming. It is in this context that the court sergeant's kindness is particularly noteworthy.

good sense of what institutions can do, how they operate, what they value, what their limitations are and how to navigate them. If I hadn't experienced this, I would also be as ignorant as many others. If I did not try to pursue complaints, I would not be able to assess the system and the people who are supposed to help survivors. My own family's suffering opened our eyes to what is actually taking place in this country. Many may have a rosy impression of the world. They believe that the system works—that the police and courts are working to protect them. It is not true, and to change it, we need to acknowledge that it is not working.

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How can we strengthen the obligation to protect from reprisals under Article 13 of the Convention against Torture?

Rachel Towers

Abstract: Protection from reprisals plays a fundamental role in enabling victims of human rights violations to seek accountability and redress. Despite its relevance to the fight against torture and impunity, this protection is ineffective or lacking in many states where torture is practiced. This article considers the state's obligation to protect under Article 13 of the UN Convention against Torture and how this has been interpreted by the Committee against Torture. It discusses whether there is a need to elaborate on what the obligation to protect from reprisals entails. The article then compares the interpretative guidance from other UN treaty bodies and experts on similar protection obligations under their respective treaties. In doing so it provides examples that could guide the Committee against Torture in elaborating on its interpretation of Article 13 UNCAT to strengthen the protection for victims and witnesses of torture.

Keywords: Protection from reprisals, UN Convention against Torture, Committee against Torture, Article 13 UNCAT, victims and witnesses of torture.

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Introduction

Protection sits at the core of international human rights law. The imperative to protect works to both restrain states from violating human rights and compel them to act to protect individuals against violations by state actors or other individuals. It is imbued in the notion that states should ensure a safe and enabling environment for the enjoyment of rights.[1] Protection is no less critical when we take the prohibition of torture and ill-treatment. It is recognised that Article 13 of the UN Convention against Torture (UNCAT) places a duty on the state to protect from ill-treatment or intimidation.[2] In the context of the UNCAT, the term 'reprisals' is used to describe ill-treatment or intimidation that a victim or witness of torture or ill-treatment is exposed to on account of reporting or providing evidence in relation to the violation. Protection is also an integral component of other rights under the UNCAT such as the right to justice and remedy and the right to rehabilitation.[3] The former UN Special Rapporteur on Torture (Manfred Nowak) highlighted the critical role that protection from reprisals plays as a deterrent to others who may consider raising allegations in the future and the major impact it has on the general credibility and therefore functioning of the complaints mechanism. Nowak underlined that states are obliged 'to inquire into all reported cases of intimidation and set up a program that protects complainants, witnesses and those who might be further endangered'. Despite the critical nature of protection, Nowak stated that he could 'hardly think of any other safeguard where the legally required protection and the actual reality differ in such a glaring and devastating way'.[4]

It is apparent that the reality remains unchanged since Nowak's remarks in 2010. Firstly, the fear of reprisals is one of the main reasons that so few complaints of torture or ill-treatment are lodged in many countries.[5] Reprisals can take many forms, including being falsely charged for a criminal offence, receiving threats or harassment from local law enforcement officials, or stigmatisation that can lead to a loss of livelihood or alienation from the community. Secondly, as noted by Nowak, 'most victims of torture are ... ordinary persons suspected of having committed criminal offences. They usually belong to disadvantaged, discriminated and vulnerable groups, above all those suffering from poverty'.[6] Yet, efforts at the international level to provide

[1] Forst, M. (2016: 21).

[2] Convention against Torture and other Cruel, Degrading and Inhuman Treatment and Punishment (1984).

[3] The UN Committee against Torture recognises that a failure to provide protection 'stands in the way of victims filing complaints and thereby violates the right to seek and obtain redress and remedy' in its General Comment no. 3 on Article 14 (2012).

[4] Nowak, M. (2010: paras. 112–113).

[5] Nowak, M., Birk, M. & Monina, G. (2019: 367).

[6] Nowak, M. (2010: para. 251).

guidelines on protection from intimidation and reprisals have tended to focus on protection for human rights defenders, individuals in places of detention or individuals who cooperate with the human rights work of the UN.[7] This leaves many 'ordinary' victims of torture or ill-treatment unable or unwilling to access formal protection mechanisms, even if such mechanisms do exist.[8] Finally, victims of torture and ill-treatment perpetrated by state actors will be expectedly wary of seeking protection from the same state authorities responsible for their suffering.[9] These factors underline the many challenges that states face when implementing the obligation to protect from reprisals under Article 13.

In response to these challenges, this article considers whether more attention needs to be given to the critical role that protection from reprisals plays. It considers whether there is a need for more guidance from the Committee against Torture (hereafter 'CAT') and other experts on the scope of the obligation to protect under Article 13 UNCAT to encourage states to implement their obligations to protect in ways that more effectively meet the needs of 'ordinary' victims and witnesses. The article first considers the interpretative guidance of CAT and the UN Special Rapporteur on Torture on the obligation to protect from reprisals. It then explores how other international human rights treaties address the obligation to protect and whether the interpretation of similar protection obligations under other human rights treaties presents opportunities or inspiration for elaborating on the scope of protection obligations under Article 13 UNCAT. By focusing on the obligation to protect from reprisals (as one limb of state parties' obligations under Article 13 UNCAT), the article aims to start a discussion on how CAT and anti-torture experts could encourage states to implement protection mechanisms that better serve the needs of victims, witnesses and others who report on torture and ill-treatment as part of the wider debate on strengthening complaints mechanisms.

[7] Discussion of these groups is outside the scope of this article. Examples of guidelines include: Office of the United Nations High Commissioner for Human Rights (2004), Human Rights Defenders: Protecting the Right to Defend Human Rights (Fact Sheet No. 29); Chairpersons of Human Rights Treaty Bodies (2015), Guidelines against Intimidation or Reprisals, San José Guidelines; UN Committee against Torture (2015), Guidelines on the receipt and handling of allegations of reprisals against individuals and organisations cooperating with the Committee against Torture under articles 13, 19, 20 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Sub-Committee on Prevention of Torture (2016), Policy of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on reprisals in relation to its visiting mandate.

[8] See key research findings from Kenya, Bangladesh and Nepal in: Jensen, S., Kelly, T., Koch Andersen, M., Christiansen, C. & Raj Sharma, J. (2017).

[9] DIGNITY—Danish Institute Against Torture (2016).

The article provides a legal analysis of protection from reprisals under international human rights law. It focuses on state obligations to protect as interpreted in individual cases, state reviews or soft law instruments, such as general comments/recommendations or thematic reports. The discussion on the obligation to protect from reprisals under Article 13 UNCAT includes an analysis of the state reviews conducted by CAT between 2016 and 2019.[10] In addition, the article gives a comparative analysis of related protection obligations under the Convention for the Protection of All Persons from Enforced Disappearance (CED), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) to illustrate similarities or differences in the approach taken to the obligation to protect from reprisals under other human rights treaties.

Protection under Article 13 UNCAT

This section considers state obligations to protect victims and witnesses from ill-treatment and intimidation in Article 13 UNCAT, as interpreted by CAT and the UN Special Rapporteur on Torture. It questions whether enough attention has been given to the obligation to protect in Article 13 and whether there is a need for more guidance on what the obligation to protect from reprisals entails to encourage states to implement these obligations more effectively.

Article 13 UNCAT acknowledges the fundamental role that the protection of victims and witnesses from threats and reprisals plays in the exercise of their right to complain and to have their case promptly and impartially examined. By including the obligation to protect against reprisals in Article 13, the drafters recognised that a lack of effective protection for victims of torture and ill-treatment will directly impact on their willingness to file a complaint, thereby reducing their ability to access justice and reparation, and allowing impunity to prevail.[11] The obligation to protect is also central to the realisation of the right to redress and reparation under Article 14 UNCAT, as affirmed in CAT's General Comment no. 3, which recognises that the '[f]ailure to provide protection stands in the way of victims filing complaints and thereby violates the right to seek and obtain redress and remedy'.[12]

But how has the obligation been interpreted to date and has sufficient interpretative guidance been given to states on what the obligation entails?

[10] Between 2016 and 2019, the UN Committee against Torture conducted 66 country reviews of states parties' implementation of the UNCAT. It addressed the issue of reprisals or victim and witness protection in 35 of the concluding observations in this period.

[11] DIGNITY (2016: 8).

[12] UN Committee against Torture (2012: para. 31).

Firstly, there is a clear understanding of the type of harm and individuals that fall under the obligation to protect in Article 13 UNCAT. In terms of harm, CAT has clarified that 'reprisals constitute a form of cruel treatment or punishment under article 16 of the Convention and may amount to torture in certain circumstances'.[13] The reference to 'ill treatment or intimidation' in Article 13 obliges states to protect victims from treatment falling below the threshold for ill-treatment. For example, CAT has held in individual complaints that a violation of Article 13 may occur where the victim received threats and attempts at bribery following the filing of a complaint.[14] In terms of the individuals to be protected, Article 13 refers narrowly to 'the complainant and witnesses'. However, CAT has interpreted the obligation to protect under Article 13 more broadly to also cover other actors such as journalists, lawyers, medical experts, and human rights defenders who report on torture or ill-treatment and subsequently face harassment and intimidation from the authorities.[15] CAT has also provided recommendations on the protection of specific groups of victims, including victims of domestic and sexual violence and asylum-seekers and refugees.[16] Further, the broader definition of victim used by CAT when interpreting state obligations under Article 14 UNCAT extends the obligation to protect to include 'immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization'.[17]

This takes us to the question of whether there is sufficient interpretative guidance on what the obligation to protect from reprisals entails from CAT and other experts. It is submitted that on closer examination of CAT's concluding observations and recommendations, there is a lack of clarity and detail in the guidance provided to states on how to fully implement state obligations to protect from reprisals under

[13] UN Committee against Torture (2015).

[14] *Asfari v. Morocco* (2014) UN Doc CAT/C/59/D/606/2014, para. 13.5 (threats); *Gerasimov v Kazakhstan* (2010) UN Doc CAT/C/48/D/433/2010, paras. 5.4, 5.10, 8.8 & 12.6 (threats and attempts at bribery).

[15] UN Committee against Torture, UN Doc CAT/C/CZE/CO/6 (2018: para. 13); UN Doc CAT/C/QAT/CO/3 (2018: para. 48); UN Doc CAT/C/TJK/CO/3 (2018: para. 22); UN Doc CAT/C/AFG/CO/2 (2017: para. 44); UN Doc CAT/C/ARG/CO/5–6 (2017: para. 24); UN Doc CAT/C/BHR/CO/2–3 (2017); UN Doc CAT/C/PAK/CO/1 (2017: para. 23); UN Doc CAT/C/LKA/CO/3–4 (2011: para. 13); UN Doc CAT/C/MDA/CO/2 (2010: para. 19); *Asfari v Morocco* (2014) UN Doc CAT/C/59/D/606/2014, para. 13.5 (lawyer); *Niyonzima v Burundi* (2012) UN Doc CAT/C/53/D/514/2012, para. 8.5 (family and lawyer).

[16] UN Committee against Torture, UN Doc CAT/C/GRC/CO/7 (2019: para. 17) (asylum-seekers and migrants); UN Doc CAT/C/COD/CO/2 (2019: para. 33) (sexual violence); UN Doc CAT/C/IRL/CO/2 (2017: para. 32); UN Doc CAT/C/BHR/CO/2–3 (2017: para. 35) (victims of domestic and sexual violence). This is also reflected in the overarching principle of non-discrimination whereby states are obligated to protect certain minority or marginalised individuals or populations especially at risk of torture (see the UN Committee against Torture, (2008) General Comment No. 2: Implementation of article 2 by State parties, para. 21).

[17] UN Committee against Torture (2012: para. 3).

Article 13 UNCAT. Nowak et al., note that '[t]he Committee has regularly criticised the lack of victim and witness protection in law and practice and called on states to take adequate measures ... without further elaborating on what this means'.[18] There are very few examples where CAT has provided more detailed recommendations on the specific measures that a state party should take to fully implement the obligation to protect under Article 13.[19] As outlined in Nowak et al. (2019), specific measures could include: suspension of the suspected officials from duty; moving the person who made the complaint to a safe location; change of identity; providing on-site security, hotlines, and judicial orders of protection to prevent violence and harassment against complainants, witnesses, or close associates of such parties; assigning special personnel to victims and witnesses; arranging for regular examinations by doctors in places of detention.

An analysis of the state reviews between 2016 and 2019 shows that the most frequent measure that CAT urged states to take in relation to their protection obligations was to immediately suspend suspected perpetrators from duty to prevent them from committing reprisals, repeating the alleged act, or obstructing the investigation.[20] On several occasions, CAT has recommended in general terms that a state party revises its legislation, or strengthens the implementation of protection measures, or allocates more resources to the state's witness protection agency.[21]

On only two occasions (in 2016), CAT made more detailed recommendations in its state reviews of Sri Lanka and the Philippines. Firstly, it called on Sri Lanka to 'ensure that complainants can file their complaints safely without risk of reprisals'. It also recommended that Sri Lanka revise the relevant legislation to 'ensure that witnesses to and victims of human rights violations, including torture, sexual violence and trafficking, are effectively protected and assisted, in particular by ensuring that the Victims and Witness Protection Division is an autonomous entity independent of the police hierarchy and that its members are fully vetted ... [and] take prompt criminal and disciplinary action against police officers responsible for threats or reprisals against victims of and witnesses to torture'.[22] In relation to the Philippines, CAT recognised the holistic nature of the protection needs of victims, witnesses and others

[18] Nowak, M., Birk, M. & Monina, G. (eds) (2019: 369).

[19] Nowak, M., Birk, M. & Monina, G. (eds) (2019: 369).

[20] UN Committee against Torture, UN Doc CAT/C/SEN/CO/4 (2019: para. 20); UN Doc CAT/C/QAT/CO/3 (2018: para. 24); UN Doc CAT/C/CMR/CO/5 (2017: para. 24); UN Doc CAT/C/ITA/CO/5–6 (2017: para. 41); UN Doc CAT/C/RWA/CO/2 (2017: para. 23); UN Doc CAT/C/TLS/CO/1 (2017: para. 17); UN Doc CAT/C/PAN/CO/4 (2017: para. 23); UN Doc CAT/C/ARG/CO/5–6 (2017: para. 30); UN Doc CAT/C/ISR/CO/5 (2016: para. 31); UN Doc CAT/C/TUR/CO/4 (2016: para. 9).

[21] See for example, UN Committee against Torture, UN Doc CAT/C/ECU/CO/7 (2016: para. 38); UN Doc CAT/C/LBN/CO/1 (2017: para. 45); UN Doc CAT/C/BIH/CO/6 (2017: para. 17).

[22] UN Committee against Torture, UN Doc CAT/C/LKA/CO/5 (2016: para. 18).

supporting them. Its recommendations included providing ample protection in light of the urgency of the protection needs; strengthening the witness protection programme through legislative amendments and by prioritising its funding; expanding benefits to witnesses such as secure housing, financial or livelihood assistance; and ensuring health professionals documenting torture and ill-treatment are adequately protected from intimidation and reprisals and are able to examine victims independently and confidentially.[23] None of the other state reviews between 2016 and 2019 include recommendations on specific measures for protection to this level of detail.

As mentioned in the introduction, previous UN Special Rapporteurs on Torture have highlighted the critical nature of protection from reprisals, pointing to the glaring gap between the protection legally required to be provided by states and the reality on the ground. The analysis of state reviews by CAT highlights that many states lack an independent body to receive and investigate complaints regarding torture and ill-treatment by law enforcement officials, let alone an independent victim and witness programme which would encourage victims to come forward.[24] Where victim and witness programmes do exist, these often have restrictive admission criteria, for example requiring that the person is involved in a significant or high-profile criminal trial or considered to be a crucial witness. However, despite the critical role that protection against reprisals plays, the analysis of state reviews by CAT suggests that the importance of fully implementing this obligation is somewhat overlooked. The paucity of interpretative guidance and lack of attention given to the implementation of this obligation in state reviews is unlikely to improve the poor implementation record of states. Therefore, there is an argument that more detailed guidance from CAT and other experts in the anti-torture field is needed that draws on the experiences and challenges on the ground and which would help to better frame this obligation. Further, in addressing this obligation in more detail, we may find that the interpretation of protection obligations under other treaties presents opportunities or inspiration for elaborating on the scope of the protection obligations under Article 13 UNCAT. This is explored in the next section.

Alternative ways of interpreting the obligation to protect from reprisals

This section looks at how the obligation to protect from reprisals under other international human rights treaties has been interpreted by the relevant UN treaty bodies or other experts. The section explores whether any of these comparative interpretations

[23] UN Committee against Torture, UN Doc CAT/C/PHL/CO/3 (2016: para. 25).

[24] For example, recommendations on this issue were made to the following states (2016–2019): the Philippines, Kuwait, Honduras, Turkey, Tunisia, Israel, Sri Lanka (2016); Panama, Timor-Leste, Rwanda, Cameroon (2017), Senegal, Qatar (2018).

could contribute to a more detailed discussion on the obligation to protect under Article 13 UNCAT.

Protection under Article 12 of the International Convention for the Protection of All Persons from Enforced Disappearance (CED)

The obligation to protect under Article 12 CED is very similar to the obligation in Article 13 UNCAT and is directly linked to the participation of the individual in an investigation into an enforced disappearance. Article 12 CED explicitly extends the obligation to protect to a wider group of beneficiaries than is covered by Article 13 UNCAT by including relatives of disappeared (i.e. secondary victims), defence counsel and persons involved in an investigation.[25] The CED goes further than the UNCAT by explicitly placing an obligation on states to 'take the necessary measures to prevent and sanction acts that hinder the conduct of an investigation' and ensure those implicated in the violation are not in a position to influence the investigation 'by means of pressure or acts of intimidation or reprisal'.[26]

The Working Group on Enforced and Involuntary Disappearances (WGEID) assists families to discover the whereabout of family members reportedly disappeared and acts as a conduit between families, other sources of support and the government concerned. It presented a report on standards and public policies for the effective investigation of enforced disappearances at the 45th session of the Human Rights Council in 2020. The report highlighted the importance of prompt investigations lead by autonomous and independent authorities, in part to protect witnesses and relatives from intimidation, reprisals and to prevent revictimisation.[27] It also underlined the key role that victims, civil society and other NGOs play in investigating cases of enforced disappearance and highlighted the important protective role that family or civil society organisations play by reducing victims' exposure to risks, both physical and psychological.[28] The report emphasised that there is an essential need for adequate protection programmes and incentives for witness testimony, particularly when relatives are afraid to file complaints or testify. In the report, the WGEID considered it of paramount importance that states establish adequately funded institutions to protect and assist victims, their families, witnesses and other stakeholders. In addition, the report emphasised that protection programmes 'should be established within functional independent institutions'.[29]

[25] International Convention for the Protection of All Persons from Enforced Disappearance (2006: Article 12(1)).

[26] International Convention for the Protection of All Persons from Enforced Disappearance (2006: Article 12(4)).

[27] Working Group on Enforced and Involuntary Disappearances (2020: paras. 14, 17, 37 & 63).

[28] Ibid (2020: para. 61).

The report recommended that 'comprehensive witness protection measures [are] guaranteed' by states. Measures should include informing witnesses of the opportunity to benefit from identity protection, informing them when their testimony is to be disclosed to the defence or made public. States should also consider the use of witness relocation schemes in situations where serious danger exists and ensure that procedures and mechanisms facilitate continued communication between authorities and witnesses to allow authorities to respond effectively to the concerns of witnesses.[30]

The WGEID's report clearly outlines the essential role that protection plays in ensuring accountability and provides useful guidance that is of relevance to elaborating on the obligations under Article 13 UNCAT. The challenges in providing effective protection in cases of enforced disappearance are similar to those relating to victims of torture because of the dual role played by state authorities in the alleged violation and as the duty-bearer responsible for providing protection. Therefore, of particular significance to the context of victims of torture is the WGEID's strong recommendation that protection programmes must function independently of the investigative authorities and receive adequate funding from the state. In addition, the important protective role that family and civil society play in reducing risks to the safety of victims is particularly relevant to contexts where torture and ill-treatment is prevalent, yet formal protection mechanisms are lacking.

Protection under the International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR) places a duty on states to protect, *interalia*, the right to life and the right to security of person.[31] The Human Rights Committee (hereafter 'HRC') which monitors the implementation of state obligations under the ICCPR has developed several general comments to guide states on how they should interpret their obligations under Article 6 and Article 9 ICCPR. In particular, the most recent General Comment no. 36 on Article 6 goes far beyond the HRC's own jurisprudence in explaining the scope of the right to life, in contrast to the HRC's previous general comments.[32]

[29] Ibid (2020: para. 65).

[30] Ibid (2020: paras. 65–67).

[31] International Covenant on Civil and Political Rights (1966). Article 6 (Right to Life) and Article 9 (Right to Liberty and Security) are both fundamental rights. The latter is broader in scope as it also addresses injuries that are not life-threatening. See, also: UN Human Rights Committee (2014: para. 55).

[32] Joseph, S. (2019: 348).

Protection obligations under the right to life (Article 6 ICCPR)

As with the UNCAT, the duty to protect the right to life is closely linked to the duty to investigate, prosecute and provide an effective remedy.[33] The duty to investigate also arises in circumstances in which a serious risk of deprivation of life was caused by the use of potentially lethal force, even if the risk did not materialise.[34] The HRC has emphasised the particular duty placed on states to investigate alleged violations of Article 6 ICCPR 'whenever State authorities have used or appear to have used firearms or other potentially lethal force outside the immediate context of an armed conflict'. This includes exploring whether superior officials are legally responsible for violations of the right to life committed by their subordinates.[35] This is especially significant in countries where law enforcement officials are the main perpetrators of acts of torture or ill-treatment and extra-judicial killings. The HRC also draws on the recommendations of the WGEID and UN Special Rapporteur on extrajudicial, summary or arbitrary executions in relation to the protection obligations associated with investigations into violations of the right to life, clarifying that '[s]tate parties must also take the necessary steps to protect witnesses, victims and their relatives and persons conducting the investigation from threats, attacks and any act of retaliation'.[36]

Given the fundamental nature of the right to life and the fact that it must not be interpreted narrowly, the HRC has also elaborated on the measures that states should take to combat threats to life arising from non-state actors by adopting an appropriate criminal framework. In General Comment no. 36, the HRC considers that states are required to 'take special measures of protection towards *persons in situation of vulnerability* whose lives have been placed at particular risk because of *specific threats or pre-existing patterns of violence*' (emphasis added).[37] Persons in situation of vulnerability are considered by the HRC to include, human rights defenders, officials fighting corruption and organised crime, humanitarian workers, journalists, prominent public figures, witnesses to crime,[38] victims of domestic and gender-based violence and human trafficking, children (especially in situations of armed conflict, street

[33] UN Human Rights Committee (2019: para. 19).

[34] Ibid (2019: para. 27). This is reflected in jurisprudence of regional human rights courts e.g. European Court of Human Rights, *Acar et al. v. Turkey* (2005), para. 77; Inter-American Court of Human Rights, *Rochela Massacre v. Colombia* (2007), para. 127.

[35] UN Human Rights Committee (2019: paras. 27 & 29).

[36] Ibid (2019: paras. 27–28).

[37] Ibid (2019: para. 23). With reference to 'specific threats', the Human Rights Committee drew on the Inter-American Court's judgment in *Barrios Family v. Venezuela* (2011: para. 124), where the claimants and their families had suffered threats and acts of violence committed against them meaning that the 'State's obligation of diligence to prevent the violation of their right to life became more specific and more precise'. See also, Forst, M. (2019: para. 30).

[38] UN Human Rights Committee, UN Doc CCPR/C/COL/CO/6 (2010: para. 14).

situations and unaccompanied migrants), members of ethnic or religious minorities and indigenous peoples, LGBTI persons, displaced persons, asylum seekers, refugees and stateless persons.[39] According to the HRC, states have an obligation to respond 'urgently and effectively in order to protect individuals who find themselves under a specific threat, by adopting special measures'. These may include around-the-clock police protection, protection and restraining orders, and protective custody (in exceptional circumstances, with the consent of the victim).[40]

Protection obligations under the right to security of person (Article 9 ICCPR)

Protecting the right to security of the person includes the obligation on states 'to take reasonable and appropriate measures' and to protect individuals who have received threats to their life, whether or not they are detained.[41] In its General Comment no. 35 on Article 9, the HRC clarifies that this obliges state parties 'to take appropriate measures in response to death threats against persons in the public sphere, and more generally to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors'. The HRC confirms that states must take measures to prevent future injury, for example by 'respond[ing] appropriately to patterns of violence against categories of victims such as intimidation of human rights defenders and journalists, retaliation against witnesses, violence against women, including domestic violence, the hazing of conscripts in the armed forces, violence against children, violence against persons on the basis of their sexual orientation or gender identity, and violence against persons with disabilities'.[42]

The HRC has found violations of Article 9 ICCPR where there was an objective need for protection measures to guarantee a person's security, but the state failed to provide protection. In individual complaints, the HRC has identified an 'objective need for protection' where for example, human rights workers were threatened in the past,[43] victims were threatened by police officers after filing a complaint,[44] and in circumstances where an individual received threats, an attack on his/her person, and experienced the murder of a close associate.[45]

[39] UN Human Rights Committee (2019: para. 23).

[40] Ibid.

[41] UN Human Rights Committee, *Delgado Páez v. Colombia* (1985) UN Doc CCPR/C/39/D/195/1985, para. 5.5; *Peiris v. Sri Lanka* (2009) UN Doc CCPR/C/103/D/1862/2009, para. 7.5.

[42] UN Human Rights Committee (2014: para. 9).

[43] UN Human Rights Committee, *Marcellana and Gumanoy v. Philippines* (2007) UN Doc CCPR/C/94/D/1560/2007, para. 7.7.

[44] UN Human Rights Committee, *Rajapakse v. Sri Lanka* (2004) UN Doc CCPR/C/87/D/1250/2004, paras. 9.7 & 11.

[45] UN Human Rights Committee, *Delgado Páez v. Colombia* (1985), para. 5.6.

The obligations placed on states to protect individuals in relation to the right to life and to personal security extend far beyond the obligations to protect under Article 13 UNCAT. Of particular interest to the context of 'ordinary' victims of torture or ill-treatment is the broad interpretation of 'persons in situation of vulnerability' whose lives are at risk due to the nature of threats or pre-existing patterns of violence. The obligation under Article 6 ICCPR is couched in terms of protection from violence perpetrated by non-state actors, but there is an argument that CAT should consider a broader categorisation of 'persons in situation of vulnerability' in relation to victims of torture and ill-treatment to ensure the obligation to protect from reprisals is more effective and its scope broadened to not only cover victims or witnesses who have filed a complaint. If such an approach is sustainable, the question of independence will be key to the effectiveness of 'special measures' in cases where the state is both the perpetrator of the violation and bears primary responsibility for providing protection.

Protection of women against violence under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[46]

Women's right to a life free from gender based violence (hereafter 'GBV') is indivisible from and interdependent on other human rights, including the rights to life, liberty and security of the person, and freedom from torture, cruel, inhumane or degrading treatment.[47] In certain situations, GBV may amount to torture or cruel, inhuman or degrading treatment but even where it does not, the obligations under CEDAW will be engaged where an act of violence (or discrimination) is perpetrated against a woman.[48]

As with other international human rights treaties discussed in this article, the obligation to protect in CEDAW is closely linked to the duty on the state to investigate, prosecute and punish perpetrators and provide remedies once a victim has lodged a complaint. Yet this overlooks the challenges that many victims have in reporting violations in the first place, for fear of humiliation, stigmatisation, arrest, torture, including at the hands of law enforcement officials.[49] In view of the broad nature of duty-bearers' obligations under CEDAW, the Committee on the Elimination of Discrimination against Women (hereafter 'CEDAW Committee') has insisted in individual complaints that the state is additionally obligated to investigate the existence of failures, negligence or omissions on the part of public authorities, which may have caused a victim to be deprived of protection.[50]

[46] Convention on the Elimination of All Forms of Discrimination against Women (1979).

[47] UN Committee on the Elimination of Discrimination against Women (2017: para. 15).

[48] UN Committee on the Elimination of Discrimination against Women (2017: paras. 16, 18 & 21). See also, Mendez, J. (2016: para. 8).

[49] UN Committee on the Elimination of Discrimination against Women (2015: para. 10).

[50] UN Committee on the Elimination of Discrimination against Women, *González Carreño v. Spain* (2014) Communication No. 47/2012.

The CEDAW Committee has provided very detailed guidance to state parties on what it considers to be effective protective measures for victims of GBV, perpetrated either by state or private actors in a number of general recommendations—most recently General Recommendation no. 35 (adopted in 2017).[51] The CEDAW Committee recommends that in order for protection to be effective, implementation measures must ensure victim and witness privacy and safety, provide appropriate and accessible mechanisms 'without the precondition that victims/survivors initiate legal action' and irrespective of the victim's ability or willingness to cooperate in legal proceedings against the alleged perpetrator. Such mechanisms should include an immediate risk assessment and where appropriate the issuance and monitoring of a court order against the alleged perpetrator, including adequate sanctions for non-compliance. In addition, protective measures should not place any undue financial, bureaucratic or personal burden on the victim;[52] they must respect and strengthen the victim's autonomy and be accessible to all—taking into account particular needs (e.g. dependants) or challenges in accessing measures faced by some victims.[53] The CEDAW Committee has also recommended that states cooperate fully with non-governmental organisations when implementing protection measures, by 'establishing and implementing appropriate multisectoral referral mechanisms to ensure effective access to comprehensive services'.[54]

The CEDAW Committee has provided detailed guidance to state parties on the obligation to protect against forms of violence perpetrated by both state and non-state actors. While on paper the obligation is closely linked to duties to investigate, prosecute and provide redress to victims, the CEDAW Committee and UN Special Rapporteur on violence against women have both underlined that protection must be provided irrespective of the victim's participation in legal proceedings. States have been guided on how to implement measures that ensure that protection is effective through the issuance of a general recommendation and a thematic report. In addition, the CEDAW Committee's recommendation that state and civil society actors need to collaborate and take an interdisciplinary and holistic approach to protection

[51] UN Committee on the Elimination of Discrimination against Women (2017: para. 31). This consolidates the previous work of the Committee in its General Recommendation no. 19 and the work of the UN Special Rapporteur on violence against women and other UN treaty bodies and experts. See also, Šimonović, D. (2017).

[52] UN Committee on the Elimination of Discrimination against Women (2017).

[53] UN Committee on the Elimination of Discrimination against Women (2017). The Committee emphasises that protective and support measures must be provided to women in institutions, including residential care homes, asylum centres and places of deprivation of liberty.

[54] UN Committee on the Elimination of Discrimination against Women (2017: para. 31).

is highly relevant to the way in which the protection from reprisals for victims of torture and ill-treatment could be more effectively implemented in many contexts.

Protection of children under the Convention on the Rights of the Child (CRC)

Several articles in the CRC establish high standards for the protection of children. The core provision—Article 19—places a broad obligation on states to take legislative, administrative, social and educational measures to protect children from violence.[55] Torture and ill-treatment is a form of violence specifically covered in Article 19 and explicitly in Article 37 CRC.[56] The Committee on the Rights of the Child (hereafter 'CRC Committee') emphasises that child victims of torture and ill-treatment are often marginalised, disadvantaged and discriminated against and lack the protection of adults responsible for defending their rights and best interests.[57] The state obligations to protect child victims and witnesses from human rights violations under the CRC are closely linked to obligations to investigate, punish those responsible and provide access to redress.[58]

The state's obligations to protect child victims and witnesses in criminal justice processes are clearly outlined in provisions of the Optional Protocol to the CRC (in relation to proceedings regarding sale of children, child prostitution and pornography) and in the Economic and Social Council resolution 2005/20.[59] Both emphasise the importance of protective measures being available throughout the legal process, including measures to protect the privacy and confidentiality of the victim/witness and that provide for the safety of the victim, family and witnesses from intimidation or retaliation. Resolution 2005/20 recommends that safety measures include avoiding direct contact with the alleged perpetrator; using court-ordered restraining orders; ordering pre-trial detention or house arrest for the accused; providing protection by the police or other relevant agencies and safeguarding the victim's whereabouts from disclosure.

The CRC Committee provides guidance on the 'appropriate measures' that states should take to implement their obligations under Article 19 CRC in its General

[55] Convention on the Rights of the Child (1989). See also articles 28 (school discipline), 32–36 (protection from various forms of exploitation), 38 (armed conflict) and 40 (juvenile justice).

[56] Convention on the Rights of the Child (1989). See also, UN Committee on the Rights of the Child (2011: paras. 26 & 36) on 'Torture and ill-treatment' and 'Perpetrators of violence'.

[57] UN Committee on the Rights of the Child (2011: para. 26). Victims of torture and ill-treatment often include: 'children in conflict with the law, children in street situations, minorities and indigenous children, and unaccompanied children'. See also, UN Committee on the Rights of the Child (2017: para. 32).

[58] UN Committee on the Rights of the Child (2011: para. 5).

[59] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000), Article 8; Economic and Social Council (2005: paras. 19, 26, 32–34).

Comment No. 13. For example, it considers that '[a]n integrated, cohesive, interdisciplinary and coordinated system is required', noting that isolated programmes and activities will have limited impact. It emphasises the essential role that child participation should play in the development, monitoring and evaluation of protective measures.[60] The CRC Committee reiterates that legislative measures must include those that '[e]nsure the protection of child victims and witnesses and effective access to redress and reparation'.[61] It provides detailed guidance on the types of administrative measures it considers appropriate at different levels of government, highlighting the importance of coordination across government and provision of support to independent national human rights institutions.[62] Moreover, the CRC Committee emphasises the importance of participation between government, professional and civil society institutions in a number of places. For example, it highlights that while targeted protection services should be initiated and implemented by both state and civil society actors, the state remains primarily responsible for implementation.[63] It also recognises the need to develop and implement protection policies 'through participatory processes which encourage ownership and sustainability'.[64] In a separate general comment the CRC Committee highlights the need for '[s]pecific, immediate and urgent measures' to protect children in street situations. It recommends that '[s]pecial mechanisms might have to be established to deal with individuals reported by these children as threats to their well-being, such as some members of the police and those involved in organized crime and drug trafficking'.[65] However, it does not expand on what these special mechanisms should include.

The CRC Committee has provided detailed interpretative guidance on state obligations to protect child victims and witnesses involved in criminal justice processes but also broader guidance on how to implement effective and targeted protection services. The CRC Committee's recommendations highlight the importance of the participation of various stakeholders, in particular the victim. It also underlines the importance of collaboration between the state and professional and civil society institutions to ensure that there is an interdisciplinary, holistic and coordinated response to protection. These recommendations would be relevant in the context of providing more elaborate guidance to states on how to implement their obligations to protect victims of torture and ill-treatment from reprisals.

[60] UN Committee on the Rights of the Child (2011: para. 39).
[61] UN Committee on the Rights of the Child (2011: para. 41).
[62] UN Committee on the Rights of the Child (2011: para. 42).
[63] UN Committee on the Rights of the Child (2011: para. 43).
[64] UN Committee on the Rights of the Child (2011: para. 42).
[65] UN Committee on the Rights of the Child (2017: para. 57).

Revisiting protection from reprisals under Article 13 UNCAT—a way forward

This article considers the critical role that the protection of victims and witnesses of torture and ill-treatment from reprisals plays in the fight against impunity. The importance of the obligation to protect from reprisals is evidenced by its explicit inclusion in Article 13 UNCAT, alongside the obligation to provide complaints mechanisms. The obligation to protect from reprisals is also closely linked to state obligations to investigate, prosecute and provide redress for human rights violations. The close relationship between these state obligations is also reflected in the other UN human rights treaties considered.

In the first part of this article, it is argued that there is very little guidance from CAT (or other experts) on what the obligation to protect from reprisals entails or how it should be implemented by states. This is despite the fundamental role that protection from reprisals plays in encouraging victims to file a complaint and thereby enabling them to access justice and reparations and contribute to the fight against impunity.

The analysis of state reviews by CAT in the first part of this article shows that although more than half (35 out of 66) included recommendations relating to reprisals or witness protection, only two (on Sri Lanka and the Philippines) provided detailed recommendations that would enhance implementation at the state level. The lack of detailed recommendations addressing how states should fulfil their obligations to protect from reprisals arguably contributes to the poor implementation of these obligations. This is particularly concerning in countries where torture is widespread and systemic, meaning that victims are easily deterred from filing complaints due to distrust of authorities and concerns for their safety. The need for more detailed interpretative guidance on what the obligation to protect from reprisals in Article 13 UNCAT entails is further supported when you consider the interpretative guidance that has been provided to state parties on similar protection obligations under other human rights treaties, as discussed in the second part of this article.

It is arguable that despite its critical role, the obligation to protect from reprisals deserves—and would benefit from—more attention from CAT and other anti-torture experts. Moreover, there is a strong argument that more guidance is needed on how the protection obligations under Article 13 UNCAT should be interpreted and implemented by state parties to ensure that the protection needs of torture victims and witnesses are adequately met at the earliest point in time after a violation occurs.

A way forward

These concluding remarks propose how to move forward and some key elements that could be included in future guidance on state obligations, taking inspiration in part from the analysis of other human rights treaties in the second part of this article.

Firstly, in terms of a way forward, it would be of great benefit if CAT addressed the interpretation of Article 13 UNCAT—including the obligation to protect from reprisals—as the topic of a general comment. This would provide an opportunity to consolidate the jurisprudence on Article 13 and draw on comparative material from other UN treaty bodies and experts, including those outlined in this article. By taking a progressive approach, CAT could build on its own jurisprudence, using the jurisprudence of other UN treaty bodies, regional human rights courts, special rapporteurs etc. to fill the gaps and strengthen the framework relating to state parties' obligations to protect from reprisals. As part of the consultation process to formulate interpretative guidance, state actors, other UN institutions and experts, national human rights institutions, academia, and civil society (particularly organisations directly representing victims) would have an opportunity to provide input and enrich the discussion.

Secondly, in terms of the key elements that should be included in guiding principles from CAT, several areas stand out. Firstly, the types of individuals that are covered by protection obligations under Article 13 UNCAT should be clarified. Article 13 focuses on protection of victims and witnesses who have lodged complaints or are participating in investigations or criminal justice proceedings. States often implement these obligations by introducing strict admission criteria for victim and witness protection programmes which a large proportion of 'ordinary' victims of torture and ill-treatment will not meet. In revisiting the types of individuals covered by Article 13, CAT should consider how to ensure that a broader range of victims—particularly those not eligible for formal victim and witness protection programmes—are more explicitly included in the obligation to protect from reprisals. In doing so, it should consider the approach taken by other UN treaty bodies, for example the HRC's reference to 'persons in situations of vulnerability'.

Thirdly, guidance must recognise that protection needs are holistic, encompassing not only physical security but also protection of livelihood, socioeconomic status, physical and mental health and wellbeing. In addition, protection needs are gender-sensitive and culturally appropriate. It is important that victims and their representatives participate in the development of guidance to ensure their needs are reflected. If state obligations to protect under Article 13 reflected a more holistic approach this would also align more closely with state obligations under Article 14 UNCAT on access to redress and reparations for victims. In exploring this element, inspiration can be drawn from the guidance of the CEDAW and CRC committees. Both committees emphasise that state and civil society actors should take a collaborative and interdisciplinary approach when developing formal protection mechanisms.

Fourthly, guidance should highlight that state obligations to protect from reprisals encompass the implementation of effective protection mechanisms which are independent and autonomous from the authorities implicated in the violation. This is essential when victims are hesitant about relying on state authorities to ensure their

protection despite having valid and often urgent protection needs. This requirement also distinguishes the protection framework appropriate for victims of human rights violations perpetrated by state actors from the framework appropriate for victims of crime perpetrated by private actors. Again, inspiration can be drawn from the guidance adopted by other UN treaty bodies. The need for independence and autonomy is explored explicitly by the WGEID in relation to protecting victims and witnesses of enforced disappearances. In addition, other treaty bodies emphasise the importance of collaboration between state and non-state actors. This could mean protection mechanisms are funded by the state but administered by other actors, thereby maintaining a degree of independence and autonomy that helps to build trust.

Finally, domestic stakeholders play a critical role in revisiting state obligations to protect torture victims and witnesses from reprisals. The contribution of victims, civil society actors, experts from national human rights institutes, academia and relevant state authorities is essential to encourage a rich, interdisciplinary discussion on how to elaborate on state obligations to protect from reprisals in a way that meets the protection needs of victims, and witnesses and those supporting them. These domestic actors are well-placed to provide insight on the gaps and challenges in providing protection from reprisals at state level. They also play a critical role in enhancing implementation of state obligations by using the guidance from UN treaty bodies and experts to pressure and persuade their respective governments to act. In doing so, they too can look at the other protection frameworks for inspiration—including those discussed in this article.

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Protecting land activists from state violence: the case of NFSW and KMP in Negros, the Philippines

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Abstract: This article examines the concept of protection beyond the conventional human rights state-centric perspective. The article accounts for protective practices, strategies, and tactics that activists use to keep themselves and their livelihoods safe as they are engaged in rights promotion. The article draws on the case of the National Federation of Sugar Workers (NFSW) and Kilusang Magbubukid ng Pilipinas (KMP, translation: Peasant Movement of the Philippines), both of which have endured persistent attacks by the state as they fight for land reform. In examining the case of NFSW and KMP, this article explores how protective practices comprise both short-term tactics and long-term strategies; pursued with, independent of, or in opposition to the state; and, deployed on local, national, and global stages together with and through allies and supportive actors networks.

Keywords: Land activists, human rights, human rights defender, protection, state violence

Note on the authors: see end of article.

Introduction

On 20 October 2018, nine members of the National Federation of Sugar Workers (NFSW) were shot dead by armed assailants while resting in a makeshift tent after the first night of their *bungkalan* activity in Sagay City, Negros Oriental (CNN Philippines 2018). *Bungkalan* is a seasonal activity conducted by tenant farmers whereby they cultivate idle land during *tiempo muerto* (dead season), the period between the sugarcane planting and harvesting season. Shortly after the incident, the NFSW issued a statement condemning the massacre. The NFSW held President Duterte responsible and linked the massacre to the string of state attacks, accompanied by numerous instances of red-tagging (NFSW 2018a).[1]

The murder of nine farmers in Sagay City was not an isolated incident. Many activists and their allies have been murdered by either unknown assailants or killed during police operations.[2] From July 2016 to March 2021, human rights organisation Karapatan (2021) documented 394 cases of extrajudicial killings, including peasant activists. Although the extra-judicial killings attracted most of the media and human rights attention, they were accompanied by arrests, harassments and incidents of torture and ill-treatment. Various human rights organisations have described the situation in the Philippines as alarming. In a report, the international human rights organisation Global Witness (2020) noted that 'the Philippines has become even deadlier for activists since 2018.'[3] At national level, an inquiry by the Commission on Human Rights (2020) concluded that the state wilfully violated the rights of human rights defenders and demanded that 'all forms of violence against HRDs must cease immediately'.

The Sagay City incident, alongside the string of killings and other forms of abuses, has brought the protection of rights defenders into policy discussions and public discourse. However, while protection has become a major concern, it remains relatively understudied. According to human rights scholar Alice Nah, 'there has been insufficient debate about the meaning of protection ... and how protection is enacted' (2020: 9). This point is especially apparent when protection is explored beyond the institutionalised mechanisms and remedies offered by various international and domestic legal frameworks. As Kelly & Jensen (this issue) point out in the introduction to this volume, these limitations are due partly to the conventional perspective that sees

[1] Red-tagging may be defined as 'the act of labelling, branding, naming, and accusing individuals and/or organisations of being left-leaning, subversives, communists, or terrorists (used as) a strategy ... by state agents, particularly law enforcement agencies and the military, against those perceived to be "threats" or "enemies of the State" (Simbulan 2011)'.

[2] See for example the so-called Bloody Sunday incident. For more information, see: https://www.rappler.com/nation/dead-arrested-calabarzon-crackdown-progressives-march-7-2021/

[3] Globally, the Philippines was second only to Columbia.

protection in relation to the state. Yet, these conventional protection mechanisms are easily challenged when the state itself denigrates human rights. The Philippine state is no exception. Not only has it persistently and quite unashamedly committed various acts violating human rights; it has also brazenly undermined institutions and mechanisms providing protection. Given anaemic protection mechanisms, often vulnerable violent practices of political leaders, activists, rights defenders, and their allies had to fill the gap by employing strategies and tactics to keep themselves and their livelihoods safe. To understand these practices, this article expands the horizon by examining protection beyond the state, its practices, and institutionalised mechanisms. It examines local practices and notions of protection and explores how these strategies have allowed activists to continue with their activities notwithstanding the palpable threat of state violence. The article asks, 'How do activists protect or keep themselves safe amid a hostile political environment? What tactics and strategies do they use, independent of, with or against state institutions?'

These questions are explored using the case of the National Federation of Sugar Workers (NFSW) and *Kilusang Magbubukid ng Pilipinas* (KMP, translation: Peasant Movement of the Philippines). The NFSW was formed in 1971 at around the time Martial Law was imposed. Soon after, the NFSW began organising sugar workers to demand better working conditions in the haciendas, and ultimately land reform (Riedinger 1995; Putzel 1992). KMP was subsequently founded in 1985. In 1986, the KMP became the sole representative of the peasant sector in the Constitutional Commission that drafted the 1987 Constitution (Putzel 1992). The NFSW and KMP are allied organisations. Both are prominent militant organisations at the national level that have constituencies throughout the Philippines. For decades, they have championed land reform and promoted the welfare of farmers. NFSW and KMP are both part of a well-organised and strong coalition advocating structural and political change in the Philippines, a struggle that continues to the present day.

Interviews with four leaders were conducted to explore localised strategies and tactics. Three of them were chapter leaders on the island of Negros, one of the poorest areas of the Philippines and a hotbed of insurrectionist politics (Caouette 2004). One of the leaders interviewed occupied a national position. Secondary literature on and communications from the NFSW and KMP were additional sources. The conversations with the leaders of the NFSW and KMP offer a glimpse of their recent experiences of state violence and how they responded to them. Conversations with the NFSW and KMP were conducted remotely due to the pandemic restrictions in the Philippines as well as health and safety concerns for both researchers and leaders of the NFSW emanating from the ongoing state security operations on Negros.

In examining the case of the NFSW and KMP, it is useful to situate their protective practices in the broader socio-political and historical context. In the short-term, their protective practices are imperative for simply staying alive and continuing their

struggle for land reform and farmer welfare. From a long-term perspective, however, these practices are situated in the broader struggle for social justice, aimed at addressing extreme social and political inequalities where a few families have managed to occupy and dominate social life (Sidel 1999; Kusaka 2017; McCoy 1993). While the domination has often been hegemonic, domination has been maintained through violence and counter-insurgency campaigns (McCoy 1993; Hedman & Sidel 2005; Jensen & Hapal 2022; Quimpo 2008). State violence, including extrajudicial killings, mass persecution and torture, is a response to—and fuel for—large-scale insurrections that have extended throughout the twentieth century demanding social justice and equality (Jensen 2018). The conflict in Negros is a continuation of the struggles for rural justice that hark back to the Huk rebellion (Kerkvleit 1979; Kerkvliet 2002) as well as the Maoist insurgency launched by the New People's Army and anti-dictatorship organisations (Quimpo 2008; Abinales & Amoroso 2005; Caouette 2004; Rutten 2008). Long-term, substantive protection against state violence is only possible when rural, social justice is achieved against the coalition of state officials and agro-industrial corporations organised in the strong family networks of the elite. Seen in this light, for NFSW and KMP social justice (i.e., equitable re-distribution of land) is the ultimate form of protection.

This article offers two main contributions. Empirically, this article aims to provide an account of how protection is understood and enacted as actors like NFSW and KMP are engaged in rights defending and promotion (Nah 2020). This includes accounting for tactics and manoeuvrings to minimise their exposure to state violence, as well as multi-levelled and long-term protective strategies undertaken with, independent of, or in opposition to the state. Conceptually, the article contributes to understanding the various dimensions of protective practices from below (Jensen & Kelly, this issue). In exploring the dimensions of protective practices from below, this article renders visible the intersections and gaps between experiences of violence and abuse, everyday manoeuvrings, strategies to achieve long-term political goals, and formal protection mechanisms provided by the state and international bodies.

The article is divided into four main sections. The first section problematises the concept of protection. It discusses the limitations of the conventional perspective of thinking about protection through the state, and instead proposes to examine protection as rights defenders are engaged in the promotion of human rights. The second section introduces the human rights situation in Negros, in particular the issue of land ownership, and the case study of the NFSW and KMP. It discusses how activists have been besieged by the state, through violence and through their exclusion as legitimate members of the political community. The third section illustrates that while the state onslaught has been constant and persistent, the two organisations have considerable strategic and operational capacities to protect themselves. The final section returns to Negros and explores the various, protective strategies and tactics of NFSW and KMP

and illustrate how the various strategies rely on the ability to manoeuvre between different registers and invoke different networks, locally, nationally and globally, at different moments in time.

Unpacking protection

In exploring the ways land activists keep themselves safe from state violence, we must first unpack the concept of protection. As Nah (2020) points out, protection is a foundational concept in human rights discourse and practice; the state as the main duty-bearer possesses the obligation to respect, fulfil and protect human rights. In the Philippines, there is no shortage of protected rights. The 1987 Constitution of the Philippines protects a long list of rights, including the freedom of speech, expression, and assembly; protection from arbitrary arrest and seizure of property; the right to due process; and freedom from torture. The emphasis on protection was largely borne out of a history of state violence including, most notably, the atrocities committed by the Marcos dictatorship that left the Philippines bloodied and bankrupt (McCoy 2001).

Soon after democracy was reinstated in 1986, activists and human rights organisations began their work reinforcing the domestic legislative framework based on the foundations laid by the 1987 Constitution. These included advocating for human rights laws and supporting the ratification of international instruments and/or protocols (Pangalangan 2011).[4] Alongside their legislative advocacy work, activists and human rights organisations continued to monitor violations of state actors, provide assistance to victims, capacitate grassroots communities, and mainstream human rights. They also sought to make the state accountable for its abuses by participating in official inquiries conducted by domestic and international institutions. Together, these actions constitute an ongoing attempt to build what Bennet *et al.* (2015) call a 'rights defender's protection regime'. For Bennet *et al*. (2015) this regime is constituted by a constellation of actors located in different levels of society performing different albeit complementing practices and sharing a common goal of upholding human rights standards for all.

While activists and human rights organisations contributed significantly to achieving justice, accountability and in institutionalising protective mechanisms, a huge deficit remains in terms of the state's fulfilment of its obligations. The institutionalisation of protective mechanisms does not guarantee robust implementation. Take

[4] The work of these activists and human rights organisations has led to the passage of human rights laws. This includes the Anti-Torture Law of 2009; the Philippine Act on Crimes against International Humanitarian Law, Genocide and other Crimes Against Humanity of 2009; and the Human Rights Victims Reparation and Recognition Act of 2013.

the case of Republic Act 9745 or the Anti-Torture Act. Since the law was passed in 2009, only one conviction has been made despite the thousands of documented cases. Poor implementation renders the law mute, and thus offers little protection to vulnerable populations (Amnesty International 2014). Furthermore, these mechanisms are often reactive and are constrained by weak or ineffective institutions. According to Pangalangan (2011: 62), the poor implementation of protective mechanisms is further exacerbated by the proceduralisation and de-ideologisation of human rights. This reduces protective mechanisms 'to fixed rules to be enforced mechanically by non-political bodies ... [loyal only] to an abstract constitution or constitutional ideal.' However, the enforcement of human rights in the Philippines is hardly impartial and non-political. For Pangalangan (2011: 66), the proceduralisation and de-ideologisation of human rights have 'induced a fixation on procedure and indifference on actual results.'

Apart from its failures in fulfilling its protective obligations, the Philippine state itself has repeatedly undermined and denigrated human rights. This is not exclusive to land activists who have been repeatedly accused by state actors of being communist fronts. In the case of President Duterte, this also broadly encompasses human rights institutions and advocates, actors who he accuses of siding with criminals, lawless entities, or insurgents. As President Duterte said in a speech in 2020, 'Human rights, you are preoccupied with the lives of the criminals and drug pushers ... The game is killing ... I say to the human rights, I don't give a shit with you' (Luna 2020). However, President Duterte is not unique in terms of blatantly disregarding and denigrating human rights. The report by Philip Alston[5] on the string of killings and other human rights violations during the Arroyo (2001–2010) administration pointed to incidents of torture and/or killing and vilification of leftist activists; red-tagging activities targeted against civil society organisations; and critical deficits in the justice system, perpetuating the culture of impunity. Even Duterte's predecessor, President Benigno Aquino III (2010–2016), whose presidency was characterised by an unprecedented degree of cooperation between some civil society organisations and the security sector, was not immune to the violent potentials of the state against its perceived enemies.[6]

Given the significant deficits and excesses of the state, activists, civil society organisations and human rights organisations have filled the gap to ensure the safety of (or at the very least, mitigate risks faced by) their members and/or those who they represent or support. Safety and security may involve protecting bodily integrity, (digital) privacy, psychosocial well-being, political and economic freedoms and, minimising exposure to threats (e.g., violence, health and environmental hazards) (Nah 2020). The protective practices of activists and rights defenders point to the insufficiency

[5] Alston was the former UN Special Rapporteur on extrajudicial, summary, or arbitrary exactions. For the full report, see: https://www.hr-dp.org/files/2014/06/27/Mission_to_Philippines_2008.pdf

[6] See KARAPATAN (2016) report.

of examining protection solely through the state and its mechanisms. To borrow from Nah (2020: 13), understanding protection entails examining practices 'as [rights defenders and/or activists] *are engaged in* and *so that they can continue in* the promotion and protection of human rights.'[7] For Jensen & Kelly (forthcoming), understanding protection requires conceptualising protection *from below*. This may allow us to appreciate the many ways in which people seek protection as well as unearth how people and activists understand protection along with the gaps between formal and informal forms of protection.

In examining protection as activist or rights defenders are engaged in the promotion of human rights, it may be useful to examine it in three ways or categories. The first category relates to long-term strategies and short-term tactics (Jensen & Kelly forthcoming). Long-term strategies may refer to the protracted struggle of activist groups and/or human rights organisations and the protective effects of attaining broader social goals (e.g., land reform and equity). Short-term tactics on the other hand may pertain to ways in which activists address and mitigate clear and present dangers emanating from the current socio-political environment. The second category is concerned with protective practices that are undertaken with or independent of the state. This may include both formal and informal practices that are independent of, taps into, or directly opposes the state or state mechanisms (Ichim & Mutahi 2020). Finally, protective strategies and tactics may be examined or characterised based on where it is situated, whether at the local, national, or global level. This multi-levelled, albeit complementing practices, relate to the constellation of actors comprising what Bennet et al. (2015) refer to as a 'rights defender's protection regime'.

Besieged land activists

The National Federation of Sugar Workers (NFSW) was founded in 1971 due to the persistent issues of land ownership and unfair wages on sugar plantations (Riedinger 1995). The NFSW's work focused on claiming the rights of both sugar farm workers and mill workers, challenging the labour code violations, as well as denouncing unequal land ownership. Over the years, the NFSW has conducted various educational programmes and organised initiatives with sugar farmers, as well as with potential allies (Riedinger 1995). The KMP, on the other hand, is a broad coalition of landless peasants, small farmers, farmworkers, rural youths and peasant women. The KMP and NFSW have been close allies since the former's inception in the 1980s (Kilusang Magbubukid ng Pilipinas n.d.). Together, the KMP and NFSW form part of the wider peasant movement in the Philippines that pushes for genuine land

[7] Emphasis not ours.

reform. While both the NFSW and KMP have memberships in different parts of the Philippines, this article focuses on their chapter on Negros.

NFSW and KMP's history in Negros is situated in the skewed distribution of land, its adverse consequences for the dispossessed, and militant and insurrectionist struggle. Land is concentrated in so-called haciendas held by private landholders (Ibon Foundation 2017). The haciendas were products of Philippines' colonial past where a tenant system led to the accumulation of land and wealth by a few families and disenfranchisement of the rest (Franco & Borras 2007). Together, these haciendas form part of the local sugarcane industry worth roughly PHP 70 billion or roughly USD 1.4 billion (Sugar Regulatory Administration n.d.).[8] Despite the huge profits generated by the industry, farmers receive minimal pay for their labour. According to the government, an average sugar worker received a salary of USD 6.00 per day in 2019 (Philippine Statistics Authority 2020). The situation of sugarcane workers deteriorates throughout the *tiempo muerto season* (dead season). *Tiempo muerto* is the period between planting and harvesting when work in sugarcane plantations ceases for nearly six months. Seasonal work and meagre pay have therefore resulted in poverty, chronic hunger and malnutrition (Besana 2017).

The enduring issues of land ownership, inadequate government support, food insecurity, poverty and political repression fuelled the rise of militant action, and even armed insurrection (Rutten 1996; Putzel 1992). This escalated in the 1970s during the Martial Law era and especially during the sugar crisis, which reduced the price of this commodity from USD 0.36 to USD 0.15 per pound (*New York Times* 1976; Pineda-Ofreneo 1985). In the case of NFSW, Rutten (1996) describes how its militant action and rights-claiming activities were rendered ineffective by repressive policies and ineffective institutions. Soon after, NFSW leaders, which included priests and nuns, joined the New People's Army (NPA), while others became sympathetic (Rutten 1996).[9] Widespread recruitment in and out of the haciendas ensued, creating a political mass base that provided some degree of support and protection from the state's brutal counter-insurgency measures (Rutten 1996).

While the histories of both NFSW and KMP are inextricably linked to the Communist Party of the Philippines-New People's Army-National Democratic Front (CPP-NPA-NDF), its insurrectionist politics is not unique to them. Likewise, the unrest is not unique to the island of Negros, nor was it exclusive to the Marcos dictatorship. Seen from the perspective of Philippine history, regional peasant uprisings were a prominent feature of the country's colonial past. Ben Kerkvliet's (1979) account of the rise and fall of the Huk rebellion describes the widespread peasant unrest throughout the Philippines prior to and immediately after World War II. In

[8] USD 1.00 is equal to PHP 50.00.

[9] This included NFSW co-founder, and former Catholic priest Luis Jalandoni. Jalandoni is currently a senior adviser for the National Democratic Front of the Philippines (Inquirer.net, 2018a).

many ways, the militant action of sugar workers and farmers in Negros from the 1970s is a continuation of the struggle for due recognition of peasants' claims and land reform.

The Philippine state has often addressed peasant unrest with the threat or actual use of force. The government justified the violence in the name of reinstating law and order and eliminating the communist threat, which the state believes is the culprit causing unrest in the countryside. Based on the NFSW's analysis of the Philippine's political economy, the violent practices of the state against the farmers are a concrete manifestation of the landed elite's control over the state, particularly its law enforcement apparatus, both police and military. This has led to various incidents of human rights violations. For instance, the Escalante massacre in 1985 led to the killing of 20 farmers and farm workers during a protest. The perpetrators were believed to be the joint forces of the local police, the Civilian Home Defense Force, the Regional Special Action Forces, and unidentified armed civilians. The armed assailants were believed to be acting at the behest of a local politician. No high-ranking public official was held accountable for the massacre, except for three low-ranking policemen who were jailed in 1996 and later released on parole in 2007 (Ombion 2004; Guanzon-Alipasok 2011). Since the Escalante massacre, state violence against farmers has persisted.

Post-democratisation, the 1987 constitution made land reform an imperative. This led to the passage of Republic Act 6657 or Comprehensive Agrarian Reform Law (CARL) in 1988. CARL was later expanded in 2009 through Republic Act 9700 or the Comprehensive Agrarian Reform Program Extension with Reforms (CARPER). Despite this however, land reform remains weak and inadequate. For NFSW and KMP, land reform issues have remained unresolved due to the slow redistribution of land, which according to them is often caught in legal loopholes, the entry of huge agricultural corporations and, the poor administration of support services for farmers. However, the post-democratisation setting also saw the substantial weakening of the CPP-NPA-NDF, due to internal disagreements on ideology and strategy and to the intensified counter-insurgency campaigns of the government (Kerkvleit 1996; Borras 2001). This fragmented the bases of support of the CPP-NPA-NDF, including the peasantry. Consequently, this also led to the rise of reformist agendas, which militant peasant organisations associated with the CPP-NPA-NDF also pursued (Borras 2001). Nonetheless, peasant insurrection (as well as retaliation of the state) persisted in certain pockets of the Philippines. As Borras (2001) writes, in 1988 the KMP rejected land reform proposals forwarded by the Aquino regime, labelling it as pro-landlord and anti-peasant, and instead intensified its land occupation campaigns often with direct participation of the NPA.

Peasant militancy, or even insurrection, accompanied by the brutal retaliation of the state is a recurring theme in Negros despite the restoration of democracy in 1986. The presidency of Rodrigo Duterte is no different. Rodrigo Duterte seemingly began

on a high note when he assumed the presidency in 2016. Winning the popular vote and with the help of the Philippine left, garnering the support from no less than CPP founder Jose Maria Sison, President Duterte promised sweeping and radical changes (Lamcheck & Sanchez 2021). President Duterte, a self-proclaimed socialist, stressed the need for land reform and appointed the prominent peasant leader Rafael Mariano. Mariano was one among several leftist leaders who assumed a position in Duterte's cabinet. In the House of Representatives, leftist legislators from the MAKABAYAN bloc (Makabayang Koalisyon ng Mamamayan, translation: Patriotic Coalition of the People) joined the so-called super-majority coalition of Duterte (Lamcheck & Sanchez 2021).

The left's tenuous alliance with President Duterte may be seen as 'jumping into the pigsty,' a political move where progressive groups cooperate with powerful and resource-rich traditional politicians to achieve concessions—a move which, at best, has produced mixed results (Teehankee 2001; Quimpo 2008; Jensen & Hapal 2022). However, the honeymoon period was brief and soon after, state violence against farmers began to escalate. This may be seen in the case of the Sagay City massacre, an incident which led to the deaths of nine farmers participating in NSFW's *bungkalan* activity, described in the opening paragraph of this article. While the NFSW argues that cultivating idle land to feed hungry farmers is morally justifiable, the government took a different view. Oscar Albayalde, Chief of the Philippine National Police (PNP), argued that the incident was engineered by the CPP-NPA to 'create [an] untoward incident [and] then blame it on the government' (ABS-CBN News 2018). The Armed Forces of the Philippines (AFP) furthermore alleged that the NFSW was a front for the CPP-NPA and that the *bungkalan* activity was part of a wider effort to destabilise and overthrow the government (Philippine News Agency 2018).[10]

The Sagay City massacre triggered the issuance of two important orders from President Duterte. Directly citing the recent acts of violence in Negros and in other parts of the Philippines, the President ordered the immediate deployment of additional forces of the AFP and PNP in Samar, Negros Oriental, Negros Occident and Bicol through Memorandum Order 32, s. 2018. Shortly after, President Duterte issued Executive Order No. 70, s. 2018, which institutionalised the whole-of-nation approach to put an end to the local communist insurgency in the Philippines. One provision of this executive order created the National Task Force to End Local Communist Armed Conflict (NTF-ELCAC), a body notorious for its red-tagging activities. For some human rights organisations, the issuance of both Memorandum Order 32 and Executive Order 70 was eerily reminiscent of the Martial Law era and an instrument

[10] The Communist Party of the Philippines, through a statement, refuted government's claims that the New People's Army (NPA) was involved in the incident (Inquirer.net, 2018b). The NFSW also called-out the AFP for red-tagging NFSW leaders, calling the allegation 'ridiculous' (NFSW, 2018b).

of state harassment and repression against activists (Philippine Alliance of Human Rights Advocates 2019; KARAPATAN 2019).

In line with the implementation of Memorandum Order 32, the Central Visayas Police Regional Office (PRO-7), headed by then Director Debold Sinas, carried out Operation Plan (Oplan) Sauron, an intensified law enforcement campaign against rebel groups, criminals, and/or entities involved in the illegal drugs trade (CNN Philippines, 2019). The plan was set in motion through the Simultaneous Enhanced Managing Police Operation 1 (SEMPO 1) in December 2018. For a three-day period, the joint forces of the police and the military conducted raids in the towns of Guihulngan, Mabinay, and Sta. Catalina. The operation resulted in the killings of six members of the KMP and the arrest of 26 others for allegedly possessing illegal firearms (Karapatan 2019). The police insisted that the farmers had fought back (Inquirer.net 2018c; ABS-CBN News 2019). On 30 March 2019, between 2:00 AM and 5:30 AM, the Simultaneous Enhanced Managing Police Operation 2 (SEMPO 2) was conducted in the towns of Canlaon City, Manjuyod, and Sta. Catalina in Negros Oriental. By the end of SEMPO 2, 14 individuals had been killed, and 15 arrested. According to then PRO-7 Director Sinas, the police served 37 arrest warrants to various individuals for illegal possession of firearms. As during SEMPO 1, 14 individuals died because they allegedly either resisted arrest or engaged the security forces in a shoot-out.

Beyond the violence, there is also the persistent attempt to delegitimise NFSW and KMP. Authorities claim that NFSW and KMP's activities were nothing more than lawless acts. Seen as lawless actors, members of the NFSW became the object of prosecution and law enforcement. NFSW members were further delegitimised through the red-tagging activities of the government. The allegation was that their actions and causes were nothing more than a ploy of the communist insurgents and their allies. This was further exacerbated by the recent passage of the Anti-Terrorism Law, and the subsequent designation of the Communist Party of the Philippines, the New People's Army (CPP-NPA) as terrorists.[11] The criminalisation and delegitimisation of NFSW's *bungkalan* activity and the persistent red-tagging activities of the government obfuscate NFSW and KMP's political claims and exclude them from the mainstream political community.

[11] Petitions to junk the Anti-Terrorism Law were filed immediately after it was passed. Petitioners questioned the wide latitude of powers given to the executive to conduct warrantless arrests and hold persons under detention for up to 21 days. As of December 2021, the Supreme Court has declared the law constitutional. However, it struck down a provision (Section 4) of the law that may consider advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights, which are intended to cause death or serious physical harm to a person, to endanger a person's life or to create a serious risk to public safety as acts of terrorism.

Activism and mitigating violence

In response to the killings and the violence, the NFSW and KMP, together with its allied organisations, conducted a fact-finding mission called the National Fact-finding and Solidarity Mission (NFSM). Through the mission, police claims were refuted. For example, multiple witness accounts from both operations indicated that the police were unprovoked by those who were killed. Furthermore, witnesses claim that the victims were unarmed and already subdued by the police when they were killed. Other witnesses alleged that the police had robbed the deceased.[12]

Despite its compelling findings both the NFSW and KMP face considerable challenges in bringing these to court. According to the NFSW, many of the families in both the SEMPO 1 and 2 cases decided not to file charges against the police because they feared for their own safety. As with other cases, witnesses are afraid to testify because of continuing threats, fear of reprisals and uncertainties due to endemic delays in case trials (Asian Human Rights Commission 2011). Some family members had declared their intention to file charges but later withdrew. The NFSW and KMP suspect that the military and/or police had a hand in convincing them not to pursue legal proceedings. The NFSW and KMP also had to contend with counter-charges filed by the landowners in relation to the *bungkalan* activity.

These legal obstacles and counter-charges place additional strain on the already limited resources of the NFSW, KMP and their allies, rendering the process of seeking justice prohibitively inaccessible. Nonetheless, the fact-finding mission is a purposeful attempt to tap into the Philippine justice system that did sometimes, albeit rarely and slowly, provide a modicum of justice.[13] For NFSW and KMP however, the value of the fact-finding mission goes beyond the legal arena. By exposing the wrongs of the state, the NFSW and KMP, together with their allies, were able to energise and consolidate their domestic and international support networks. These networks of support in turn act in parallel with the NFSW and KMP to pressure the government to stop the attacks against peasants and other marginalised groups. Together with their allies, the NFSW and KMP organised demonstrations to highlight the gross human rights violations in Negros. The support networks also provided legal, non-legal and capacity-building support, especially at the local level. The mobilisation of

[12] For the full report of the National Fact-finding and Solidarity Mission see: https://www.karapatan.org/FINAL+REPORT+OF+THE+NATIONAL+FACT-FINDING+AND+SOLIDARITY+MISSION+IN+NEGROS+ORIENTAL%2C+PHILIPPINES+April+4–8%2C+2019

[13] One such case involved Karen Empeño and Sherlyn Cadapan, victims of enforced disappearance in 2006 perpetrated by the military. While Empeño and Cadapan remain missing, their families achieved justice in 2018 when former General Jovito Palparan was sentenced to life imprisonment nearly 12 years after they disappeared. Arguably, however, Empeño and Cadapan's case is the exception rather than the norm.

the NFSW, KMP and their allies prompted formal inquiries and the re-introduction of legislation protecting rights defenders. The cases in Negros were also central in the report submitted by civil society organisations to the United Nations Human Rights Council describing the critical situation of human rights in the Philippines.

While these actions made the killings in Negros a national and international issue, the government remained undeterred in its counter-insurgency and anti-criminality campaign. Duterte even promoted Debold Sinas as PNP Chief for his role in suppressing the violence in Negros. Furthermore, the situation in Negros remains difficult. According to the NFSW and KMP, in addition to red-tagging activities, state security forces also conducted 'hacienda hopping' operations. In these operations, state security forces persuade members to work with them to eradicate the CPP-NPA by acting as 'assets'.[14] Becoming an 'asset' entails identifying the members and leaders of the NFSW and KMP. Other members became members of the government-sponsored paramilitary force, the Civilian Armed Force Geographical Unity (CAFGU) (Rutten 1996).

To minimise the risk of victimisation, the NFSW and KMP deployed various measures at the local level. This includes the deployment of documentation teams. Beyond data collection, the documentation teams render the network of support outside Negros tangible and visible, reinforcing solidarity between and among communities in Negros and their allies. The documentation teams also conduct rights education and paralegal training programmes at the community level, often with the help of volunteer lawyers. Through these activities, local communities became aware of the legal remedies available to them, as well as support organisations that they may call for help. Farming communities also record daily activities and encounters with state forces or paramilitary forces. The journaling process is essential in informing reports and investigations.

Along with the human rights documentation, the NFSW and KMP are also engaged in consciousness-raising activities. As KMP National Chairperson Danilo Ramos said in an interview, 'community education is a key component of consolidation work'. Ramos further explains that education work is not limited exclusively to discussions of their sectoral issues. The topics covered also include Philippine history, its connection to various socio-economic issues, and how it impacts on their daily life. As one KMP leader emphasised, 'critical consciousness tempers the mind and reinforces the will to continue the struggle'.

However, the militarisation of the region and the mobility restrictions brought by the pandemic have posed new challenges to the effectiveness, speed and reach of

[14] 'Asset' is a euphemism for a local informant. As part of its broader counter-insurgency strategy, state security forces bring in former combatants or sympathisers to provide information on armed insurgents and their support networks. In exchange for information, state security forces facilitate their amnesty and reintegration.

these activities. The NFSW and KMP collect documentation through phone calls and have made efforts to conduct activities online. Furthermore, the NFSW and KMP attempt to adjust their daily routines and render them less predictable to reduce the risk of victimisation. These adjustments were borne out of intensive security assessments and risk profiling of its members and their workplaces. However, these adjustments need constant calibration and a heightened sense of vigilance concerning their surroundings.

According to one KMP leader, this was partly a hard-learned lesson after the publicised death of activist Zara Alvarez and other activists, which taught activists that no one was safe, regardless of their profile.[15] Relying on relative unpredictability entailed the constant changing of meeting venues and irregular working hours. Other adjustments included not travelling at night and keeping a low profile in public places so as not to attract attention. The measures increase with the status an individual has in the organisation. Red-tagged members avoid visiting the office. They sometimes avoid their homes because they may be under surveillance. Lesser-known members can continue working at their office, albeit with certain precautions in place. Furthermore, the NFSW and KMP have identified safe houses where leaders and members can stay. While in the community, NFSW and KMP members would usually cease their organising work at around 03:00 PM to avoid checkpoints and patrols. They have also prepared for surprise military visits in the community and advise only female household members to talk to the military troops, as women may diffuse tensions.

Despite these protective tactics, the risk of being killed is very real. 'It is as if we are awaiting our deaths' said one leader when asked about his decision to continue. Other members have decided to join the New People's Army. As another leader said, 'For them, joining the NPA would give them a fair fight (against the security forces), unlike continuing the struggle for land and just wages here, where you can die defenceless.' In this way, at the same time as the organisations actively distance themselves from the armed struggle, state violence pushed some farmers and activists into joining what state violence aimed to fight. Taking up arms may be seen as an act of defence against a hostile state. This also shows that while NFSW and KMP have their own strategies and tactics, protective acts may be variegated especially when seen from an individual level. This decision of some farmers to take up arms is not entirely surprising. The island of Negros has a long history of peasant radicalisation produced by repressive acts of the state.

Beyond the various tactics they employ, for NFSW and KMP protection ultimately is contingent on the integrity and strength of their organisation and collective action. As one KMP leader said, 'It is important that we, in our organisation, believe

[15] Notable examples of murdered activists include Zara Alvarez and Randall Echanis. Alvarez was gunned down by unidentified perpetrators in Bacolod City, Negros Occidental on 17 August 2020. Echanis was tortured and murdered on 10 August 2020 while at his home in Quezon City.

in the things that we are fighting for; these are for the betterment of the farmers and the Filipino people. ... that is why our collective belief is important to our mission'. The KMP leader continued,

> Right now, we are strengthening our organisation. With unity, conscientisation and collective action, we continue to face the landed class. We talk to local government units to encourage them to support us in our call for government aid, subsidies, as well as support for other basic sectors. We need all of these so we, together with the Negros farmers, can attain our aspirations.

It is important to note that while talks with government units may be framed as a way to access much needed support services for farmers, it may also be seen as an attempt to tap into or invoke patronage networks. As we wrote elsewhere, patron client ties were an important asset for urban poor organisations in preventing or mitigating the shocks brought by displacement and state violence (Jensen & Hapal 2022). Arguably, the tenuous alliance of the above-ground organisations by the CPP-NPA-NDF was an attempt to tap into and capitalise on the ultimate patron—the Philippine President—to gain protection and create space to usher social reforms (Lamcheck & Sanchez 2021).

The unity expands beyond Negros to a broader coalition struggling for social justice in the Philippines. The coalition was key in protesting repressive laws and policies that have legitimised state violence. The coalition was also active in the nationwide petitions to dispense with the Anti-Terrorism Law of 2020. Recently, however, these mobilisations have been limited, due mainly to the draconian policies implemented by the government in response to the COVID-19 pandemic (Hapal 2021). Despite these limitations, the coalition has remained persistent, albeit not always successful. Beyond the state, the coalition channels its grievances to the international community through various platforms. By focusing the attention of the international community about marginalised groups in the Philippines, the coalition aims to pressure the Philippine state to cease its violent acts. This was the case when the Office of the High Commission on Human Rights (OHCHR) recommended to the Philippine state that it should, among other things, rescind Memorandum Order 32, s. 2018 and review the implementation of Executive Order 70, s. 2018 (OHCHR 2020).

By way of a conclusion: strategies and practices of defending rights

Given the limitations of the legal and formal protection frameworks, activists often find themselves navigating through and around a perilous political environment. As the case involving the NFSW and KMP illustrates, activists have been the object of intense policing, surveillance, red-tagging, arrests, and killings. In response, the

NFSW and KMP have employed a broad set of activities that are either pursued independently of, or in coordination with, their allies to protect themselves. This section explores the strategies and tactics employed by the NFSW and KMP to protect the organisations and their members. It illustrates that the various strategies rely on the ability to manoeuvre between different spaces and invoke different networks, locally, nationally and globally, at different moments in time.

At the local and short-term, the NFSW and KMP have largely framed protection in terms of survival and maintaining their ability to continue their struggle for land reform. This is not to say that the NFSW and KMP have rejected the protection potentially offered by legal and formal mechanisms. On the contrary, and as demonstrated in their fact-finding mission, the NFSW and KMP are both keen to tap into these mechanisms. The NFSW and KMP have pursued these mechanisms with an implicit understanding that it would entail a long and arduous process that, at least from an immediate perspective, offers little protection. Relying on legal and formal mechanisms alone could possibly be fatal for the NFSW, the KMP. Survival entails not being harmed by the state either through killings, torture, or incarceration. It is achieved through the tactics of avoidance, laying-low or instituting precautionary measures. Survival also entails mounting some form of defence, often with the help of allies at the national level. This defence may come in the form of the deployment of documentation teams and the conduct of paralegal training programs in vulnerable communities.

These survival strategies are not entirely new, nor are they unique to the NFSW and KMP (Lopez 2021). Based on the continuing conversations with various human rights organisations conducted for this article, such survival strategies are integral to their work. Often, human rights organisations map out their strengths, weaknesses, opportunities and threats (SWOT) on an annual basis. This anticipatory exercise informs subsequent security and safety protocols such as adopting a buddy system while working in the field, conducting courtesy visits to local state forces, and using secure (end-to-end encryption) digital communication platforms. They also deploy rapid-response paralegal teams during mobilisations, installing closed circuit television (CCTV) within their workplace, and conducting human rights and paralegal trainings. Institutionalised and technology-based protection mechanisms are often features of human rights organisations situated in city centres. Meanwhile, those in the periphery, such as militarised areas, rely on daily tactics such as avoidance and laying low. Recently, the notion of psychosocial well-being has also emerged as an important component of safety and security (Lopez 2021). This entails emphasising both the bodily safety and mental health of rights defenders through the provision of services such as counselling, or psychological first aid (PFA).

Strategies geared towards maintaining the integrity of the NFSW and KMP as organisations complement the goal of survival. Keeping the NFSW and KMP intact,

especially at the local level, is an important concern as it allows them to continue the struggle in pursuit of their broader political goal. From this perspective, the collective strength of an organisation performs a protective function. This is the reason why the NFSW and KMP expend much energy on conducting political education amongst their ranks, primarily to reiterate the importance of collective action, and the virtue and necessity of their struggle.

Collective action is not restricted to the local level. At national level, the NFSW and KMP are part of a broad coalition of activists seeking transformation and social justice. Building coalitions and reinforcing networks of support perform a protective function through the demonstration of strength (through numbers) and the amplification of their claims through various channels. The protective tactics employed by the coalition include mass mobilisations, rallies, online petitions and campaigns and other acts of open resistance.[16]

The perceived legitimacy provides a modicum of protection and potentially insulates them from violence, despite the conflicts with the state and its policies. In the case of the Sagay City massacre, by reframing the killings as an issue of rights defenders struggling against dispossession, NFSW and KMP were able to counter the state's narrative that incident was nothing more than a case of lawless violence. This, in turn, rendered them defensible. Consequently, this has legitimised the conduct of Congressional inquiries and the reintroduction of legislation aimed at defending rights defenders. These inquiries leverage the work of the NFSW and KMP's allies in Congress, some of whom are members of the broad coalition of local activists. This reframing process also rendered the plight of Negros' farmers intelligible and actionable to the United Nations Human Rights Council. While the Council and Congress do little to provide immediate protection, such inquiries lay the foundations for interstate human rights mechanisms and the passage of laws to protect rights defenders.

Overall, the tactics of survival, collective action at local and national level, and multi-levelled advocacy campaigns form part of a protection regime (Bennett *et al.* 2015). This regime engages both legal and formal mechanisms of protection, while simultaneously enacting protection independent of the former. This two-pronged approach is reflective of two distinct, though related, objectives. In the short-term, it is imperative that organisations such as the NFSW and KMP survive the onslaught of state violence. The tactics of survival employed by the NFSW and KMP do not necessarily rely solely on mounting a defence (i.e., strengthening their resolve and reinforcing the integrity of their organisation) against state violence. The organisations also rely on tapping into interrelated claims that may render their issues intelligible and actionable for various local and international actors.

[16] See for example, https://www.facebook.com/DefendNegros

Seen this way, protection is not exclusively enacted by the NFSW and KMP. Instead, enacting protection is contingent on the ability of the NFSW, KMP and their allies to bring in other actors. Reinforcing this entails leveraging existing alliances, creating platforms of engagement for actors outside their coalition, and presenting compelling counter-narratives to further widen their networks of solidarity and support. This process of widening support relies not only on presenting their struggle as a moral and just cause; it also invokes and relates to their experiences of victimhood and their claims as human rights defenders.

While survival tactics, as well as the broadening and mobilisation of support networks are undertaken in the short to medium-term, it is always done in conjunction with the attainment of broader socio-political goals. In the case of NFSW and KMP, it is land re-distribution through genuine land reform. Seen this way, short-term tactics allow NFSW and KMP to continue with their work. For NFSW and KMP, full protection can be achieved only once the systematic and structural issues in Philippine society are resolved. Once these issues are resolved, the collective struggle for land rights arguably loses its relevance. As one leader of the NFSW contends, to address the unrest on the island of Negros, one must first address the root cause of conflict, which is land.

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To retreat or to confront? Grassroots activists navigating everyday torture in Kenya

Wangui Kimari

Abstract: How do grassroots activists in Kenya protect themselves from torture and related forms of violence when formal protection mechanisms are not guaranteed? In answering this question, this article details the diverse tactics activists use to keep safe while doing unsafe work. Informed by the concept of social navigation, I explore two broad Kiswahili emic terms that capture what I refer to as their tactical retreats and confrontations in the face of torture and violence: kujitoa and kupenya. By elaborating on these tactics to keep safe, key gaps and tensions in the implementation of formal protection mechanisms in Kenya are made evident, while also highlighting the importance of grassroots activism(s) as the 'first line of defense' in the protection of communities at risk in Kenya.

Keywords: Protection, activists, torture, social navigation, Kenya.

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Introduction

Diary Excerpt from A* 21/08/2020

> Police brutality and excessive use of force has been the new norm for the residents of Mukuru Ruben. Police have been known as the enemy of the people for decades in most of the informal settlements. *Police have been used to silence activists and other vocal leaders who speak against their brutality, and they threaten to arrest them.* Mukuru Ruben has seen the worst of police, from when eight young men were killed in 2012 while they were holding a meeting as a garbage collection group. Recently, one of the vocal youths was arrested for speaking against police brutality.

Grassroots activists from community-based organisations in Kenya respond to all types of violations: from sexual and gender-based violence, to fire, to police brutality, health emergencies and other inter and intra locality violence. Certainly, for those who live in poor urban settlements in Nairobi, the neighbourhoods of over 60 per cent of the city population yet constituting only 6 per cent of its surface area, the absence of basic services—including water, sanitation and adequate shelter—forms the backdrop for other human rights violations committed by both community members and the state—including extra-judicial executions, forced disappearances and torture on such a scale they have become a morbid and routine occurrence, and for which residents are habitually unable to get redress (Amnesty 2013; HRW 2020).

These activists, who may sometimes identify as human rights defenders,[1] take up advocacy on behalf of their communities more often as an intentional decision rather than a professional activity. In doing so, they respond to injustice via a constellation of actions: harboring victims, offering advice, notifying authorities, trying to find shelters for those impacted by sexual and gender-based violence to protesting, as but a few examples of their many situated interventions for protection. As the diary

[1] While the grassroots activists whose experiences included in this article sometimes take up the identity of 'human rights defender,' and especially when negotiating more formal NGO spaces that are invested in global human rights terminologies, for the most part, the activists I spoke with describe themselves as 'grassroots activists' or in Kiswahili 'mwanaharakati' or 'mtetezi.' This, often both implicit and explicit, distinction signified by the term grassroots, is established to signal the differences between them, grassroots activists, and those who are habitually recognised as human rights defenders—they who have more access to formal human rights mechanisms, are usually working as human rights defenders in a professional capacity and thus may have a more elevated class status and public profile than their grassroots counterparts. This article highlights some of these differences and tensions, while also recognising how grassroots activists may take up the moniker human rights defender as a necessary, but not irrelevant, identity should they choose to, or to access protection mechanisms. Because of this overlap, in this article, the terms grassroots activist(s) and human rights defender(s) are used interchangeably, since international law would recognise them equally, even as these terms are often invested with situated nuances and politics in Kenya.

epigraph from an interlocutor shows, those who speak out against police brutality continue to be at risk: their 'silence' is sought through arrest and threats, jeopardising both their lives and their ability to attain justice for the violations for which they were seeking redress. These risks notwithstanding, Kenyan activists, as elsewhere, continue to demand an end to human rights violations, and may take up a continuum of protection mechanisms, between retreating and confronting, to navigate the everyday torture that targets them and their communities.

The International Committee for the Red Cross (ICRC), uses the following definition of protection: [...] 'activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law and refugee law.' These activities are carried out 'in an impartial manner (not on the basis of race, national or ethnic origin, language or gender)' (ICRC 2009). While emerging from the ICRC, this definition has been taken up by actors such as the European Union and the Inter-Agency Standing Committee (IASC), which is the 'longest-standing and highest-level humanitarian coordination forum of the United Nations system' (IASC 2021). For the IASC, 'authorities at all levels of government hold the primary obligation and responsibility to respect, protect and fulfill the rights of persons on their territory or under their jurisdiction' (IASC 2016: 2).

In Kenya, protection remains a major challenge principally because the state, the humanitarian focal point for the IASC, does not 'protect and fulfill the rights of [all] persons on their territory.' These failures have been detailed in over a decade of the Universal Periodic Review process.[2] Furthermore, and of relevance to this article, Jones *et al.* (2017) document that 'avenues for legal, institutional and civil society redress, nominally expanded in recent years, display an ongoing tendency towards disconnection from the grassroots' (Van Stapele *et al.* 2019). Part of the disconnection is the result of an overly narrow focus on protection within Kenyan human rights organisations and mechanisms, one that upholds the protection of specific rights and focuses on individuals only in the context of criminal trials. This article, therefore, seeks to explore protection from the perspective of grassroots activists, dwelling in the everyday threats they face and the ways in which they try and keep themselves safe in a context where neither the state nor a 'disconnected' civil society offer a consistently

[2] See, for example, the 'Compilation on Kenya: Report of the Office of the United Nations High Commissioner for Human Rights' (2019), available on the Kenya National Commission for Human Rights (KNCHR) website: https://www.knchr.org/Portals/0/InternationalObligationsReports/Universal%20Periodic%20Review/Compilation%20of%20information%20from%20UN%20bodies-%20Kenya.pdf?ver=2020-01-14-095101-797

[3] This project, whose focus was on the protection mechanisms of grassroots activists in Sri Lanka and Kenya, was supported by the British Academy.

dependable safety net for those most impacted by the Kenyan government's inability (and often unwillingness) to protect the rights of individuals and communities at risk.

In the research project from which this article emerges, we aim, broadly, to discern and foreground the practical experiences of grassroots activists in Kenya and Sri Lanka in accessing formal protection mechanisms—those offered by the state or civil society organisations. Of interest are the practical steps they take to stay secure, in ways that often exceed the formal objectives of human rights norms. Informed by these collective processes, this article builds on interviews, diaries and ethnographic work with grassroots activists in Kenya, acquired and analysed as part of this broader project,[3] to reflect on their situated tactics for the protection of communities and person—interconnected endeavours. Our research in Kenya was situated primarily in Mathare, Nairobi, a poor urban settlement, in collaboration with the Mathare Social Justice Centre (MSJC), a local social justice organisation.[4]

To discern the different types of tactics taken up by grassroots human rights defenders, we launched our fieldwork process with a two-day workshop, organised in late November 2019, which brought together diverse activists from across the country. In attendance were human rights defenders from different parts of Kenya, and who focused on varied but interrelated issues, such as the negative impact of extractive industries, police abuse of power and LGBTQI rights, for example. Thereafter, over the subsequent months, I organised two focus groups in the settlement of Mathare, when stringent Covid-19 restrictions were suspended. Both focus groups were composed of young grassroots activists from social justice centres in Nairobi: the first one had eight participants, while the second session had 14 interlocutors. Complementing the focus groups were five participant diaries, our diarists were from different poor urban settlements in the city, and were chosen intentionally to represent diverse subjectivities. They were a young Muslim mother, a young person with a disability, a mother whose child had been killed by the police, a young Muslim man and a male community paralegal. Over the course of three months, between July–October 2020, these activists detailed events of everyday violence that

[4] Social Justice Centres are community-based organisations in poor urban and rural areas in Kenya, which emerged organically to create spaces to organise against and document the violations that continue to obtain in many poor and working-class Kenyan spaces. In the politics they embody, they also function as a critique of the elite middle class human rights organising in Kenya, which is located spatially and socially away from the communities where the most human rights violations occur. Related, in taking up the name 'social justice' and not 'human rights' in their monikers, they register the debatable tension (see Petrasek 2015) between human rights work that is anchored in international legal standards and social justice bids to challenge structures and ensure equality for all. You can read more about them here: https://www.ohchr.org/EN/NewsEvents/Pages/SocialjusticemovementinKenya.aspx

[5] Kiswahili is the most widely spoken national language in Kenya.

occurred in their communities—from gender-based violence to police killings, as well as how these situations were responded to by human rights defenders and the community at large.

The diaries, focus groups and workshop were coupled with semi-structured key informant interviews with ten civil society interlocutors, which took place between 2020–2021. The bulk of these key informants were working for non-governmental organisations that offer protection to Kenyans navigating different forms of state torture. Combined, these methods allowed for the discernment of two broad tactics taken up by grassroots activists in order to keep safe. To discuss and theorise them more comprehensively, I capture these tactics in emic Kiswahili[5] terms: *kujitoa* and *kupenya*. Though these expressions can be implicated in a diversity of contexts and usages, kujitoa, in the ways that it has been habituated by grassroots activists, generally refers to one's ability to physically escape a threatening situation—to retreat in a manner that keeps one safe while still implicating them in human rights action in the long term. Kupenya, on the other hand, signifies one's ability to deftly negotiate risk, usually through the employment of one's networks and/or knowledge of constitutional rights, coupled with the courage to assert these in encounters with, often, state authorities. As descriptive emic categories anchored in Kiswahili terms, while also acting as signifiers of material conditions that can necessitate both retreat and confrontation, ultimately, kujitoa and kupenya are contingent on one's capacity to read, in an embodied way, a situation sufficiently to discern gaps for action. This is an ability that accrues principally because of years in the 'struggle,' and that is coupled with a cultivated defiance that cannot be taken for granted.

In addition, and as is discussed in a subsequent section, both space and time are critical features in determining one's capacity kujitoa or kupenya. And, often, where one is located and the time an activist finds themselves in need of protection, can also be put down to luck. Fortune, however, as we will discuss later, is influenced by the years activists bring to the 'struggle,' and their effrontery and ability to discern the appropriate moment and the required action at the time: whether kupenya or kujitoa.

Since these protection actions are enacted in a dynamic environment, what Vigh (2009) refers to as 'motion in motion' or 'motion squared,' they can be captured by the term social navigation, which 'encompasses both the assessment of the dangers and possibilities of one's present position as well as the process of plotting and attempting to actualise routes into an uncertain and changeable future' (Vigh 2009: 425). Certainly, the tactical retreats and confrontations of young activists in Nairobi, in an environment of both 'volatility' and 'opacity' (Vigh 2009), feature this constant appraisal and calculation within their fields of action. For these reasons, it is my assessment that kupenya and kujitoa function as emic social navigation vernacular and praxis that condense the 'plotting' that is required to 'actualise routes' in the face of (usually state) danger.

It is important to note that tactics is used here in reference to De Certeau (1998), who puts forward that tactics, in contrast to strategies, are 'a calculus which cannot count on a 'proper' (a spatial or institutional localisation), nor thus on a borderline distinguishing the other as a visible totality. The place of the tactic belongs to the "other"' (De Certeau 1998: xxi). In this context, community activists embody the other, and by virtue of the 'territorial stigmatization' of their communities (Wacquant 2020), a 'stain' that leads to differential rights from those who have 'will and power' (De Certeau 1998: xxi) and which has a symbiotic relationship with their corporeality, the tactics that constitute kupenya and kujitoa, efforts to stay safe in ways that may not necessarily be safe, belong to them.

These reflections on the navigations of grassroot activists in Kenya are informed by the aforementioned larger project that explores the need to recognise the constellation of protection mechanisms taken up by those in poor communities and who are at risk, beyond those offered by more formal non-governmental and, even, government institutions, since these are often inadequate and inaccessible to those who continue to live in environments of everyday torture. The call is that we view these tactics as the 'first line of defense' against, primarily, state violence (Kimari *et al*. 2021), and which, ultimately, operates as the only constant mode of redress available to the most marginalised, despite the protection of fundamental rights and freedoms in the Kenyan Constitution (Article 25–51), and in international documents to which Kenya is a signatory, such as the UN Convention Against Torture.

Towards documenting these grassroots actions and mapping some of the manifestations and implications of kujitoa and kupenya, what follows is a brief detailing of the formal protection mechanisms understood to be in place in Kenya to prevent and respond to cases of torture. Thereafter, in a section titled Kujitoa and Kupenya, I elaborate on the conditions faced by grassroots activists, and their tactical retreats and confrontations for self and community protection. I conclude by summarising the main arguments of this article and pointing towards other directions for research on the 'first line of defence' in poor urban communities in Kenya.

Formal protection mechanisms in Kenya

The new Constitution of Kenya, which was promulgated in 2010, established explicit legal protections against torture. In this regard, Article 25A of this document asserts that Kenyan citizens' rights to 'freedom from torture and cruel, inhuman or degrading treatment or punishment' should not be limited. Complementing this provision, Article 26 emphasises one's 'right to life,' while Article 29 asserts the 'freedom and security of the person'; that citizens should not be arbitrarily detained without just cause, subjected to any form of violence from either public or private sources, torture,

corporal punishment or treated in a 'cruel, inhuman or degrading manner' (Republic of Kenya 2010). Related, Article 50 of the Constitution makes explicit the conditions under which evidence should be garnered to ensure a 'fair hearing,' and, in doing so, establishes barriers to the extraction of this information through torture.

Breathing legislative life into these constitutional provisions, *The Prevention Against Torture Act of 2017* allows for more clarity about what torture is, and concretises the ramifications for torturing a person, or aiding and abetting the process. This Act also calls for the creation of a Victims Trust Fund towards engendering 'compensation to enable families to rebuild and provide redress for the violations suffered' (Kiprono 2017, 2019). It is also important to note that The Prevention Against Torture Act (2017) permits the country to fulfill requirements of the UN Convention Against Torture to have adequate local 'legislative, administrative [and] juridical' measures to buttress this international agreement (Kiprono 2017, 2019). Kenya has been a signatory to the UN Convention Against Torture since 1997.

Furthermore, the National Coroners Service Act of the same year (2017) legislates the need for deaths in police or prison custody to be reported to the national coroner, established by the same Act, who would then forward their investigations of suspicious deaths to the Office of the Director of Public Prosecutions and the National Police Service. Ultimately, the main goal of this Act is to establish a 'framework for investigations and determination of the cause of reported unnatural deaths in the country' (KNCHR 2017). On a regional front, Article 5 of the African Charter on Human and People's Rights (1981), to which Kenya is also a signatory, prohibits 'all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.'

Correspondingly, Kenya's (2018) third periodic report for the UN Committee Against Torture emphasises the strides made in the improvement of police conduct and offers examples of judgements that demonstrate a judiciary adhering to the Bill of Rights, even in cases of suspected terrorism. However, this response also alerts readers to the (few) convictions of policemen accused of extra-judicial killings, and the procurement of evidence under torture.[6] Against the not too distant histories of colonialism and the Moi dictatorship (1978–2002), when torture of political dissidents was widespread and expected, these recent legal provisions go a long way to denaturalise this phenomenon, and potentially offer powerful formal mechanisms for redress should this violence be enacted.

Nonetheless, despite the expanding national legal protection framework, both mundane and spectacular torture persists in the country, and the police continue to be perceived as the main perpetrators of these violations (IMLU 2011). Other

[6] This Committee Against Torture report (CAT/C/KEN/3) is available through this UN link: https://digitallibrary.un.org/record/1659965?ln=zh_CN

government actors, such as county government officials, prison wardens, special police squads and related enforcement agencies are also widely implicated in torture practices in the country, and the weak enforcement of existing protection mechanisms is seen as a key cause for the endurance of these violations (IMLU 2011). In this regard, though The Prevention Against Torture Act of 2017 was assented to, the absence of both a Ministry and Minister of Justice (when the Act was assented to there was an actual Ministry of Justice), and attendant guidelines to implement it, have prevented the Act from being operationalised. Similarly, almost five years on, the Office of the Coroner General, created by the National Coroners Service Act of 2017, has not been established. These two examples offer symbolic glimpses into the difficulties of implementing the legal anti-torture mechanisms in the country, and, correlatedly, the obstacles to ensuring comprehensive protection for the activists who need it.

Other local protections against torture in Kenya

The Independent Medico-Legal Unit (IMLU) is the foremost non-governmental organisation that advocates explicitly against torture in Kenya, although, by virtue of the wide scope of torture phenomena, a significant number of different NGOs and community-based organisations work towards mitigating and redressing its constituting violences in their everyday activities. These bodies include Katiba Institute, the Kenya National Commission on Human Rights (KNCHR) (who have instituted a torture database), Haki Africa and grassroots social justice centres across the country, as but a few examples.

Though the Witness Protection Agency (WPA) and the Independent Policing Oversight Authority (IPOA), both government organisations, and Shield for Justice, an NGO, were established to assist with the protection of witnesses who may be at risk of torture and related violences, as continuously expressed by interlocutors, these provisions exist more in theory than in practice. In this regard, since state witness protection, through the WPA, is only launched when a matter has been brought before the court, potential witnesses do not have any protection while a case is being investigated—a process that can take years. In addition, it is informally acknowledged that the mandated witness protection process is rarely initiated by instituting organisations, and, moreover, because of its ties to the government, as well as its employment of former police officers, the WPA is not entirely secure for those needing its services.

While these formal witness protection services are inadequate, the Defenders Coalition in Kenya, as well as Front Line Defenders (FLD)—an international organisation, are able to offer relocation grants for activists who can demonstrate a heightened risk of violence to their person because of their human rights activities. This process is not without its challenges—it is quite bureaucratic and habitually available

to activists with a more prominent profile, or those able to navigate the paperwork. For those fortunate enough to receive these grants, they inevitably function as a useful, albeit short term, protection facility. Ultimately, however, the absence of sustained resources at the organisational level, within both 'big' and 'small' groups, limits the potential, scale and longevity of local protection mechanisms, be it relocation funds or witness protection. In addition, as becomes clear in the following section, interventions for safety emerging from contexts external to the communities where violations take place (both international and local) come with bureacracy that can challenge their applicability in areas of everyday torture. As a consequence, even while formal protection mechanisms exist and are being expanded, there still remains many obstacles—social, political, financial and even cultural—to taking them up, necessitating, thus, that mitigating everyday violence is principally the domain of the 'other'—those most at risk.

Kujitoa and Kujificha

On 7 July 2020, grassroots activists from over 16 justice centres in Nairobi organised a protest to commemorate the Saba Saba Day pro-democracy rallies of 1990. These earlier events were part of the watershed actions that led to the return of multiparty democracy in Kenya (Mutunga 2020). Mostly young and from poor urban settlements across the city, the plan was to peacefully flood the streets to protest the continued violence that was enacted on many residents of Nairobi on a daily basis. In particular, of critical concern was the continuous violence, harassment, disappearance and extrajudicial killing of citizens, as well as the government's incessant contravention of their constitutional rights: from the right to food, water and social security, to the right to protest.[7] While the social justice centres' activists had given notice to the relevant authorities that they would be marching to deliver a petition to the president—a courtesy established in view of an authoritarian government despite the constitutional right to assembly, over 60 grassroots activists were arrested for ostensibly contravening Covid-19 restrictions (Ombuor *et al.* 2020). Though they had been 'warned' by state officials and advised by some heads of formal civil society organisations not to go through with the protest, a key organiser stated that they were left with no choice: 'we were on our own [...] This is between us and destiny, because our lives depend on it' (Wilfred Olal quoted in Ombuor *et al.* 2020).

Activists like those mentioned above play an important role in the protection of communities prone to harassment and torture by the state. Despite the criticality of

[7] More information on the demands by the protestors can be read here: https://www.matharesocialjustice.org/solidarity/press-release-saba-saba-march-for-our-lives-tekeleza-katiba/

their work, in 2016, the Kenya National Commission on Human Rights (KNCHR) documented that this demographic is:

> often subjected to arbitrary arrests and detentions, death threats, harassment and defamation, restrictions on their freedoms of movement, expression, association and assembly among many other violations of human rights. This has an effect on their critical role of defending, promoting and protecting human rights. (KNCHR 2016: 7)

All of the above is evidenced by the events of 7 July 2020, although harassment, limits to assembly and the threat of detention, as but a few examples, continue to be daily fare for activists: were normal(ised) both before and after this protest.

In detailing the dangers involved in everyday local grassroots activism, similar to the KNCHR report cited earlier, there is literature that recognises the variety of situated tools that human rights defenders take up to enable individual and community protection. A 2017 study by Protection International (PI), on the criminalisation of rural based human rights defenders in Kenya, discussed how:

> Faced with increased criminalisation of their work and security threats, and the reality of weak protection mechanisms, HRDs have resulted to adopting and employing informal protection mechanisms in order to stay safe. By 'informal mechanisms', we mean the range of processes and resources that fall outside of the formal institutional protection structures ran and managed by NGOs and donors. This is not to suggest they are inferior in nature, but they are informal since they are not institutionalised in any manner. These include creating personal relationships and networks, being street smart, knowing the geographical area they live and having basic knowledge on what to do when faced with danger[sic] (Protection International 2017: 32–33)

The report goes on to further document some of the 'informal mechanisms' used by activists, including: avoiding being photographed by the media or being at the forefront of demonstrations, interchanging leadership roles so that no one person bears an inordinate burden of risk, or, even, acting only on human rights issues in localities far from where they live, so that they can retreat to their homes without fear (Protection International 2017: 33–34).

Ultimately, these practices that are 'motion in motion' (Vigh 2009) since are enacted in a changing environment, are enrolled to keep safe both in the present and future, and are important in areas of significant social, socio-economic and cultural dynamism (Nyairo 2006; Wa Mungai 2013; Kimari 2020), and, also, where there are high levels of poverty, police surveillance and criminalisation, crime and sexual and gender-based violence (Swart 2012; Jones *et al.* 2017; Kimari 2017). It is in these contexts of the other—a difference that is produced through structural violence and the attendant problematic tales that narrate into being othered subjects and their spaces—that kupenya and kujitoa tactics are most pronounced. Since they obtain, especially, in situations where formal institutions cannot be depended on, they become powerful descriptors of social navigation corporeal practices in the face of recurring risk

spatialised to particular geographies. Kupenya and kujitoa are some of the critical tactics that activists left on their own engage in. And from the descriptions of the 7 July march, these retreats and confrontations were social navigation actions sought, through various modes and nodes, by those involved in the protest.

Kujitoa

As part of their tactical retreats, notwithstanding whether they were eventually arrested, the activists who took part in the Saba Saba day protest took up a number of protection practices. Because of the heavy police presence in the central business district of Nairobi, there was coordinated dispersion: they gathered in 'scattered groups' (Ombuor *et al.* 2020) in order to break up the united police presence, and WhatsApp messages and phone calls helped these smaller sets of people to regroup. Convening in small numbers was also critical so as not to attract any attention until protestors could 'safely' assemble in a central area. On an individual level, some activists wore two shirts; one with a human rights message which could mark them as human rights defenders and another basic one underneath, and would remove the one on top—with the message—when they felt unsafe, to avoid being recognised by both uniformed and plain clothes police officers. In addition, speaking to this and other protests, one activist detailed how he always endeavoured to be hyperattentive to the environment: to be observant and to survey what was going on around him, mapping out the dangers, since protests usually had a lot of 'normal' looking people who would later be revealed to be plain clothes police officers when activists were being arrested.

Away from protests, kujitoa can constitute other spatially and temporally distinct practices. In this regard, the Protection International (2017: 33) report documents that:

> When physically attacked, most defenders said they rely on good personal relationships with family or friends in order to stay safe. This seemed the most common form of informal protection mechanism to assist in navigating security threats. Some of the HRDs talked of how family and friends always look out for them daily and help them escape when faced with danger.

In addition, other tactics, including those put forward by LGBTQIA activists, are: constantly letting people know where they are going, announcing a time they would be home, not inviting donors or others who could draw undue attention to their gatherings, moving to stay with another human rights defender for as long as was needed, and even, when necessary, 'going underground' for a while. This wide range of actions was tactically employed to ensure retreats from danger, and could be complemented by: 'switching off phones and removing batteries to avoid being tracked, not staying

[8] K, personal communication, October 15, 2020.

out [...] late in social places; operating and organising almost anonymously so that it is not easy for people to know the organisers or the schedules of activities' (Protection International 2017: 34).

While some of these practices were taken up more intensely during moments considered to be of elevated risk, kujitoa was also part of one's daily calculus, and could involve decisions as simple as not to walk down a certain path known to be where danger could lie, or efforts to make oneself inconspicuous through dress or comportment. Speaking to the gendered actions that women adopt to keep safe from all types of perpetrators, one interlocutor from Kiambiu conveyed how:

> They [women] will try and act inconspicuous: they try and blend in, especially if they are not from the area. [...] they identify people in their path that they can point to if stopped, or call to if they are confronted. They also send signals that they are from the area in the ways that they can. But they also walk around with other people, and like this they are usually fine on the main road. They should just avoid alleys [...].[8]

This interlocutor also spoke about how in his centre they took turns going to the police station, even if he is a known activist in his area, so that they could share the risk and allow others to retreat when needed. Personally, he also worked hard to make sure he knew what the police in his area looked like, so that he could avoid them. Ultimately, however, all of these actions hinged on the development and maintenance of close personal relationships with other activists, friends and family members, who could always provide support and information, and these kinship networks are also a central principle of kupenya described below.

Kupenya

When one is not able to extract themselves, kujitoa, in a situation of danger, there is always the hope that they can *penya*—negotiate a tactical breakthrough. One interlocutor shared that:

> Penya is useful because when you can't *hepa* [escape], you can only use your tact to negotiate and find a way out. Penya means and requires finding a way out, whatever is possible, as complete escape is not possible. For example, a way of kupenya is you go with someone you know to the police station. Someone who has built rapport [there], even if it is you. This works if the police know your work, which is increasingly the case for many justice centres.[9]

In this case, knowing a 'loud mouth' activist (Kimari *et al.* 2021), or even being one yourself, who knows their rights and is not afraid to speak to the police, can be the difference between being taken to court, detained on spurious charges and even assault.

[9] Z * personal communication, October 16, 2020.

[10] PO* diary entry.

Highlighting what can happen when one cannot penya, an interlocutor diary entry detailed the following:

> When the police have anything on you they can really capitalize on that. Keeping you at bay is one way of doing this. They tell you to report to the station at 08.00 am, but don't serve you until 11.00 am or 12.00 pm. This is so draining. They also don't present a substantial case against you but just take advantage of the current situation to build a case against you. The day was spent mostly on following up the cases of our comrades arrested on the previous day, but it was clear that mental torture is one thing that Kenyan police are good at, and they do it with a lot of threats and sarcasm. We live to fight another day but we shall not relent. A win is a win no matter how small.[10]

From this narrative we can discern the fates that befall 'comrades' who for some reason or another were unable to escape or manoeuvere from police officers' grasp. Those detained could have been new in 'the struggle,' and thus with insufficient knowledge or networks to help them 'plot' and 'actualize [the] routes' (Vigh 2009) needed to navigate this moment in the obstacle ridden terrain that is grassroots activism in Kenya.

Echoes of *penya* infrastructure are seen in Brazil, where mothers involved in advocating against police violence are helped to navigate bureaucratic state justice channels by grassroots activists and civil society actors (Alves 2018). Equally in Kenya, a relationship with civil society actors who can call Officer(s) in Command of Station(s) (OCS) directly, hire lawyers, or perform the imposing habitus of a learned professional at a police station, are often the means by which a grassroots activist can successfully evade long term police detention and/or violence.

Certainly, in view of the state's role in the perpetration of multiple human rights violations, it was not surprising that the majority of those queried were reluctant to get protection from state oversight organisations such as the Internal Affairs Unit (IAU) of the police, the Independent Policing Oversight Authority (IPOA) or the Witness Protection Agency (WPA). It is important to note that in some cases, grassroots activists were not even aware that institutions such as the Witness Protection Agency (WPA) existed.

In situations such as those above, where one would need to penya, formal human rights NGOs were recognised and contacted primarily by more experienced activists, who may call on them for several services, including, and as detailed by Nah *et al.* (2013: 412): 'supporting risk assessment and analysis, emergency hotlines, emergency grants, legal aid, medical and psychosocial services, temporary relocation, and safe houses.'

However, despite the existence of these mechanisms in Kenya, grassroots activists felt it was difficult to access them, and thus local efforts kujitoa and kupenya were foregrounded before seeking access to these institutional safety interventions. This is because, as documented earlier, the bureaucracy that one had to navigate before formal protection facilities were confered, and, even, the distance of the organisation

offering the service to the place of the 'other' where the violation took place, limited the number and profile of activists who could access these mechanisms.

In addition, Jones *et al*. (2017) detail the class hierarchies between those who work for the civil society organisations offering these services and those who habitually need access to them; a power dynamic that enacts social and psychic barriers that discourage grassroots activists from seeking these protections. What's more, civil society organisations that offered the mechanisms mentioned above were often considered to be in competition with each other by grassroots activists, and, perhaps as a consequence, favoured taking up the cases of more recognised human rights defenders, since these could help them rally much sought after donor funds.

In response to these claims, professionals working within more formal NGO settings spoke of how their desire to do more was impeded by internal capacity, which was ultimately shaped by their mandates and access to money. And while, in theory, the potential to lodge a case at the African Court of Human and Peoples Rights, or other similar international bodies, was available to Kenyan citizens who felt that their rights had been violated by their government, specialist knowledge and budgets were required to launch such a claim. Above all, there was also the reality that if a judgement in favour of activists was obtained—whether through local or international judicial processes, there was no certainty that this would be upheld.

Therefore, against the uneven access to protection mechanisms, and often the absence of political will, within both the state and NGOs, to change this situation (Jones *et al.* 2017; Van Stapele *et al*. 2019), citizen's bids for redress and protection, including those waged by activists themselves, remain hinged on the efforts of grassroots community advocates, their actions to retreat and confront, even if, at later periods and if attainable, they could be complemented by the formal protection facilities offered by civil society organisations, and, rarely, the state.

Correspondingly, kujitoa and kupenya, amongst other descriptors,[11] have been habituated to the everyday speech of activists to shine a light on the social navigation protection methods that make sense to them in the spaces in which they operate. However, akin to kujitoa which is also reliant on one's luck, kupenya appears to be specifically oriented around three critical axes: 1) enough knowledge of the law—personal or in one's networks; 2) a strong local and civil society 'loudmouth' network; and 3) the courage of the activist, in the face of violence, to put to use both knowledge and networks. These initial factors—knowledge and networks—are cultivated intersubjectively: in activist meetings and trainings (Protection International 2017), but also in the fluid informal encounters discussed by Jensen (1999: 82).

[11] This vernacular resonates with the term *kujificha*—or to hide oneself—used by street hawkers who are constantly harassed by Nairobi's administration, and have to negotiate the risks of selling their wares 'illegally' in the city on a daily basis. I am grateful to Brigitte Dragsted-Mutengwa for alerting me to this term.

These determined grassroots actions notwithstanding, one's ability to keep secure, regardless of their ability to penya and kujitoa, is also shaped by the dynamics of the space one finds themselves in (*is the environment and people known to them?*) and the time—both political and temporal (*is it a time when the government is being particularly heavy handed on activists* (political time)?, *or have you been detained on a Friday and thus can only get help or be allowed to leave on a Monday* (real time)?).

Furthermore, being able to retreat or confront does not mean that violence or torture will not happen to you at some point. As Jensen (1999) discusses, even while the materialities of violence can be avoided to some extent, it continues to haunt those who seek to avoid it, and these intangible effects instill fear, limiting the ways in which citizens who live with the threat of violence and torture are able to respond to such phenomena when they do materialise.

But, as the experiences of the human rights defenders consulted makes clear, community advocates rally all of their experiences of violence and the potential of violence to inform their ability to predict its occurrence. This capacity allows them to plot in real time, on the 'fly,' what calculus needs to be employed at that moment. And these safety tactics of the 'other'—broadly categorised here as tactically retreating and confronting—are strengthened and anchored, ironically, by the very thing that makes them unsafe: their ongoing activism for their communities.

Conclusion

In this article I have sought to detail the diverse mechanisms through which grassroots activists in Kenya protect themselves. Using the concept of social navigation, I have detailed dynamic practices, 'motion in motion' actions, broadly categorised here as kuijtoa [tactical escape] and kupenya [tactical breakthrough], to convey the varied means by which community activists with no consistent access to formal protection mechanisms use to keep safe while doing unsafe work.

Kujitoa practices are, for example, changing one's routine so that your movements are not so predictable. In addition, labours for a breakthrough, kupenya, involve a confrontation that is hinged on powerful local or civil society networks, information about one's constitutional rights—whether this is personal knowledge or accessible within an available network, and, above all, the courage to put networks and knowledge to use in the face of threats.

While dubbed 'informal' in the literature, these everyday tactics for protection are expansive, and form the most consistent infrastructure for grassroots activists unable to navigate the bureaucracy, elitism and selective assistance of non-governmental or state organisations (Jones *et al*. 2017; Van Stapele *et al.* 2019), and who don't have the power that would enable them to create long term strategies. Against these realities,

ultimately, the need to engage in tactical retreats and confrontations falls not only on the human rights defenders facing threats because of their work, but, as well, on the very people they are trying to protect: their families, friends and community members at large.

Documentation of the safety and security tactics taken up by grassroots activists is important in view of the continued recognition of the challenges they face in their advocacy, and the inadequacy of formal protection mechanisms. Elsewhere (Kimari *et al*. 2021), as part of the aforementioned project, we have highlighted the reality that the protection needs of activists are often subsumed within other individualised rights, that the focus of protection agencies is often on more known human rights defenders, and, as well, that the risks grassroots activists face are not one off issues, but are embedded in structural violence that has varied articulations—from police violence to the withholding of identity documents for minorities for example, creating the conditions for risks that may be diffuse and difficult to get comprehensive redress from.

Notwithstanding the persistence of a treacherous human rights environment, this 'first line of defense' continues to try and change an unsafe world into a safer one. Future research on human rights defenders in Kenya can explore avenues for engendering much more accountable and accessible formal protection mechanisms, so that they can offer a viable safety net to couch and amplify activists' tactical retreats and confrontations.

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Mothers, protection and care amongst communities affected by torture and state violence in Brazil

Maria Gorete Marques de Jesus, Giane Silvestre, Thais Lemos Duarte and Henrik Ronsbo

Abstract: This article examines the ways in which protection from torture and violence is understood and practiced by women in poor urban communities in Brazil. It demonstrates that despite a well-developed normative and institutional framework for the protection of survivors of torture and violence, such protection work grows from the notion of motherhood, which can be understood as an outlet for challenging various overlapping orders (race, class and gender) that legitimise torture and violence. Motherhood garners legitimacy in the fight for justice, for the truth and for restoring the positive memories related to the tortured, killed or imprisoned children and it generates moral and political capital that enable political participation for women. The article demonstrates that despite a well-developed institutional and normative framework for protection, everyday protection strategies respond to the perceptions and needs of survivors and their communities and can only be understood in the context of racial and gendered roles and performances of motherhood shaped by the historical enslavement of the Afro-Brazilian population.

Keywords: Torture prevention, Brazil, protection, gender, race, class, social movements.

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Introduction

Brazilian history is marked by high levels of state violence, including torture. This violence is rooted in colonial forms of slavery, it has continued during imperial (1822–1894) and early republican (1894–1945) rule into the military dictatorships of the second half of the twentieth century and the later period of democratisation (1984–), most recently under the authoritarian popularism of President Bolsonaro. At the same time, the Federative Republic of Brazil and to various degrees the different member states have highly developed anti-torture frameworks, driven forward by active human rights communities at state and federal levels with a complex network of governmental and non-governmental organisations responsible for preventing torture and protecting survivors and witnesses under different jurisdictions.

However, the normative frameworks (at both state and federal level) and the organisations and institutions tasked with implementing these, are all too often ineffective in preventing state violence against the poor and marginalised given that the formal mechanisms of justice are not only inaccessible and slow but often also hostile. Responding (through documentation, protection or litigation) to the overlapping and endemic forms of violence faced by marginalised communities in their daily lives is therefore a complex undertaking. This article, which focuses on the protection of torture survivors and their communities among the urban poor, will explore the complexities and challenges in this work.

The human rights protection needs of survivors from poor and marginalised communities are complex and originate on many fronts. Recent literature on 'human' and 'everyday' security has improved our understanding of such concerns, showing how security issues are embedded in contested cultural and political contexts (Crawford & Hutchinson 2016; Goldstein 2016; Loader & Walker 2007). The multi-dimensional and contradictory scope of protection needs and practices must therefore be considered. This article examines the ways in which protection from torture and violence is understood and practiced by communities directly affected. Rather than starting with formal definitions and categories, it examines the sources of fear for people living in marginalised urban communities and describes how they respond. Such knowledge is crucial in enabling human rights actors to support and enable effective protection strategies that respond to the everyday needs of survivors and their communities and which at the same time are sustainable in political, social and financial terms.

A range of social movements, networks and actors have attempted to close the protection 'gap' and respond to the complex needs of victims and survivors living in poor urban communities. This article examines one type of group that operates in this gap, namely 'mother activists'. These women participate in both formal and informal groups and organisations and are based in communities in the urban periphery affected by highly racialised and gendered forms of both police and gang violence.

By taking to the streets to protest, engaging with legal mechanisms, and providing advice and support, such 'mother activists' seek to provide some measure of protection for their off-spring, often young men who have been targeted by the police. In so doing, they move between the formal structures of the state, histories of racialised and gendered violence, and their own kinship relationships. These activists are simultaneously survivors, witnesses and human rights defenders. Their activities contribute to the general protection of their communities from police and gang violence but are initiated by issues and concerns related specifically to the protection of their own offspring from state violence.

The key argument in this article is that the protection work of groups of mother activists is rooted in gendered notions of care that go beyond formal legal rights and instead mobilise idioms of distress, obligation and sacrifice. Such protection is not only aimed at physical bodies, but also the reputation and memory of their children. This is a form of care that emerges out of intimate relations already marked by violence and compassion, exclusion and obligation (Jensen & Rodgers 2021). As such, these activities place a particular burden on already marginalised people, whilst simultaneously creating new possibilities for opposition to violence. Activist-Motherhood therefore represents an alternative model of protection from human rights mechanisms—one that works in complementarity and tension with this—but one that like formal human rights protection mechanisms offers no simple solutions.

The article is organised as follows. The first section outlines the methodology of the study. The second section examines the genealogy of current racialised and gendered violence in Brazil and the problems encountered when attempting to prevent torture and protect survivors and witnesses. The third section focuses on the specificity of motherhood as the grounds for political action. The subsequent two sections examine practices rooted in mourning, memory and claims of innocence. Finally, the conclusion shows that motherhood is a tool for facing oppression of varying degrees, particularly in an attempt to garner legitimacy to fight for justice, memory and truth in the cases of their own children.

Methods

The research presented in this article entailed two phases. Phase one consisted of surveying state and non-state institutions and organisations (n=25) in Rio de Janeiro and São Paulo to identify and describe current protection practices among state and non-state actors. Based on the survey, we identified the participation of victims' mothers as crucial for actually existing protection at community level. Phase two of the research involved, first systematically reviewing existing studies in Brazil regarding the actions of mothers of victims of state violence. Subsequently, through contacts with NGOs

and snowball sampling, we identified subjects for additional interviews. Finally, since interlocutors who do not participate in the movements were difficult to access, we mobilised personal networks to reach them, unfortunately a relatively simple task, given the prevalence of violence in Brazil.

A total of ten interviews were conducted, five with people from Rio de Janeiro and five with interviewees from São Paulo. Amongst them, two people said they were not involved with social movements, four were leaders of groups of mothers, and the remainder participated in political actions, without, however, taking a position of status. The interviewees have an average age between 40 and 50 years. Five of them have completed higher education, the others have completed at least elementary school. Some work in the area of health, others in the area of education. It is also interesting to point out that some interviewees mentioned that they attended college after the violence suffered by their children, as they felt the need to better know the laws and public policies.

The research also aimed at understanding more thoroughly the trajectory of existing studies on the subject. Interviews were therefore conducted with five researchers who had dedicated part of their professional careers to understanding the political participation of mothers.

The conversations, both with mothers and researchers, were based on scripts of semi-structured interviews (one aimed at each type of actor) and were conducted through digital means, via the Google Meet platform. Due to the Covid-19 pandemic, methodological procedures were adopted that avoided personal contact with our interlocutors. However, distance did not prevent people from sharing their experiences (Jesus *et al.* 2021). When a subject, especially this was the case for the mothers, engaged in painful memory work which overwhelmed the interviewee emotionally as well as physically, the interviewers broke out of the interview until the subject had recovered and was comfortable to continue with the dialogue or abort it.

Based on a rapid appraisal of the interviews six domains of meaning were identified that guided the analysis. These were: 1. Meanings of motherhood, 2. 'From mourning to struggle'—from individual suffering to collective struggle, 3. Moral cleansing speeches, 4. Reports of illness, 5. Reasons for mothers' non-engagement in social movements, and 6. Nuances between narratives. However, in this analysis, we focus on the first three categories, leaving the remainder for subsequent publications.

Torture, violence and inequality in Brazil

At a formal level, Brazil has strong anti-torture laws. The 1988 Constitution, in Article 5 III, expressly emphasises that 'no one will be subjected to torture or to inhuman or degrading treatment'. In addition, in 1989, the country ratified the Inter-American

Convention to Prevent and Punish Torture (1985), and in 1991, ratified the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (Rosenn 2011: 1048). In the 1997 Federal Law 9,455, torture was specifically criminalised, with torture defined as:

> embarrassing someone with the use of violence or serious threat, causing them physical or mental suffering in order to a) obtain information, a statement or confession from the victim or third parties; b) to provoke criminal action or omission; c) due to racial or religious discrimination (Brazil, 1997).

It is important to note that unlike in international law, torture in Brazilian Federal Law is a common crime; that is, anyone can be accused of this crime. For this reason, more than 90 per cent of convictions in torture cases target parents, mothers, caregivers, stepfathers and stepmothers, while state agents, such as police or correctional officers (Jesus 2010; Calderoni *et al.* 2015; Salla *et al.* 2016) are convicted only on rare occasions.

In formal and normative terms, Brazil is often considered an exemplary case in relation to protection against and prevention of torture. However, realities in marginal spaces of Brazilian society differ radically. The violence used to police communities that have descended from enslaved or indigenous people may best be understood as what we may call 'stigmatising torture'. That is, when an act of torture committed against torturable bodies goes unpunished. This impunity legitimises not only the torture itself, but also the rightfulness and superior moral and social value of the torturer. Class, race and gender distinctions are policed through the right to torture with impunity, thus recreating a patriarchal, racist and class-based society through each act of torture and state violence. This conundrum is reflected in many of the strategies pursued by community-based organisations in their work on protection against torture and care for survivors and it provides an initial answer to why advocacy, care and protection are often closely linked in the work of Brazilian organisations.

Any effort to analyse the violence perpetrated by the state in Brazil requires reflecting on dimensions of power related to aspects of gender, class and race. In 2020, 98.4 per cent of the victims of police interventions resulting in death was male, 78.9 per cent were black and among these, most inhabited marginal spaces (Bueno *et al.* 2021). Those usually denouncing violent state practices are mothers who are also black, poor and peripheral (Leite 2004, 2013; Farias *et al.* 2020).

Since we understand torture as one of several instruments for managing economically and socially vulnerable and marginal groups,[1] composed of poor, black people

[1] Other instruments include continued official support to contestation of occupancy and 'tenure rights of residents' in marginal urban zones, 'delivery of public services' based on support for specific municipal authorities, militarised police 'transit control', beneficiary status in 'cash-transfer programs' linked to compliance with health, schooling and other forms of 'human resource investment policies'.

and those living in urban and rural margins, torture is not a practice located in a delineated time (interrogation during pre-trial periods) and place (lockups and detention centres). Instead, it is distributed across different spatio-temporal contexts where it affects select social groups and actors (Jesus 2010; Gomes 2017; Prison Pastoral 2016). For this reason alone, the work of assisting torture victims in Brazil, by implication, becomes an extremely challenging task. Rather than focusing on an individual victimised in police custody during pre-trial detention, civil society and government organisations must focus on heterogeneous contexts, unclear circumstances and ambiguous actors. This practice is reflected in the ways in which practitioners working in Rio de Janeiro's and São Paulo's civil society talk about torture. As one interlocutor stated:

> In short, one often tends to think that torture is a crime committed in a specific situation because of the evil nature of a person who wants to punish another one. But no, torture is something very diffuse, and it is something systematic; it is within the structures of the prison space, it is within all the social structures in a certain way. (Interviewee 9—civil society)

Such a pragmatic critique of legal doctrine and popular notions of what torture is builds on observations and experiences shared by the interlocutors, stressing that many poor urban neighbourhoods are sites of quotidian police brutality and even lethality that could be understood and classified as torture. In Rio de Janeiro, the military and civil police operations guided by the metaphor of the 'war on drugs' (Leite 2012) epitomises this. In São Paulo informants from civil society highlight the persecutions of suspects of theft and trafficking carried out by military police in the peripheries of the capital, as well as recurring cases of home invasion without judicial authorisation, involving physical and psychological violence and abusive police tactics. The pragmatic critique of our interlocutors draws direct lines of connection between such militarised and lethal police tactics, the mass incarceration of poor men and the racial structure of Brazilian society, and to the extent that it explains what people that move within and between these different spaces are exposed to, we subscribe to this pragmatic critique.

It would therefore not be an exaggeration to claim that in communities systematically subjected to the above-described circumstances, violence becomes a kind of life condition, with life trajectories shaped by a permanent 'fear of being afraid' (Araújo 2019). That is, groups of socially and economically vulnerable individuals tend to live with instability and the expectation that, at any moment, a shootout or violent police intervention may disrupt their lives, rob them of their savings and potentially lead to death.

In addition, the narratives collected seem to extend our interlocutor's pragmatic critique of 'the rotten apple theory' suggesting that 'the crime of omission to provide' also encompass structural relationships, and just as 'omission to provide' is specified during specific *situations* of violence, the 'crime of omission to provide' could and

should be extended to the realm of social structure and its mechanisms of reproduction. This omission includes non-implementation of basic public policies in marginal territories, whereby such omissions ultimately not only perpetuate, but with a high degree of probability, also increase inequalities. The presence of criminal organisations, such as those related to drug trafficking and militias, would be one effect of this practice of omission, since they take the place of state institutions providing different types of assistance to residents (food, medicine, leisure, etc.) (Ramalho 2008; Dias 2011; Cano & Duarte 2012; Manso 2020; Feltran 2018; Misse 2007; Barbosa 2005; Biondi 2010).

In support of this pragmatic critique our interlocutors from São Paulo highlighted the state-like practices of the First Command of the Capital (PCC), which dominate a large part of São Paulo's drug market (Dias 2011; Feltran 2018; Biondi 2010). Their punitive practices, the so-called 'PCC courts', have substantially reduced homicide rates in São Paulo by developing their own means of resolving violent but non-lethal conflicts by practicing punitive torture, thus making examples of those considered violators of the codes of conduct for preventing crime, at the same time as they fill the void left by the rule-of-law and the presence of the Brazilian state.

The most impoverished population therefore sees itself as 'under siege' (Machado da Silva 2008). While subject to arbitrariness by state agents, it is under the control of criminal groups who enforce rules that are unpredictable and applied differentially depending on the characteristics of the persons involved in a situation. As a result, torture is an everyday event.

Despite the strong formal legal architecture promising the prohibition of torture, access to formal legal protection is all too often unavailable to the poor and marginalised. The legal system is largely unwilling or unable to provide justice and security. The slow processing of criminal cases against state-perpetrators of torture is widely identified as a major obstacle in the fight against torture. However, many organs of the justice system also avoid recognising victims as such, assuming instead that victims are responsible for the violence they have suffered. This assumption is so widespread that convincing victims' relatives to seek justice is sometimes a challenge. Even the victims have difficulty seeing themselves as such. Many do not even recognise the violations as torture when the violation does not 'leave [physical] marks'., and 'it is also very common for victims to naturalise treatments (...) that do not leave marks' (Interviewee 2).

Victims also fear reporting violations, as they fear reprisals and 'being in the hands of a state that has violated them'. Civil society actors assist in providing information to victims, especially those working in marginal spaces. However, human rights defenders are widely persecuted, threatened and incriminated by the state as a way to neutralise them. As one interviewee said, 'these defenders also end up becoming victims of political violence'.

In response to the problem of protection of persons who report incidents of torture, a government programme known as PROVITA (Federal Program for Assistance to Victims and Witnesses under Threat) collaborates with civil society organisations to provide protection and support at arm's length of the federal state. However, when protection is provided through the programme, the lives of beneficiaries is radically altered, creating major resistance to inclusion, as victims-beneficiaries are afraid to sever bonds of affection and mutual obligations, including those with work and school. Entry criteria are also prohibitive, the programme focuses on providing protection only for witnesses engaged in judicial processes. In addition PROVITA has experienced a series of budgetary and personnel problems for some years.

Conversely, civil organisations are reluctant to guarantee formal protection for victims and witnesses, arguing this is a state obligation. Some interlocutors stressed that civil society organisations are not created to carry out actions—such as protection—which are attributes of the state. 'We always take great care that ... we do not want to take the place of the state' (Interviewee 11). The task of non-governmental groups, according to our interlocutors, is therefore to encourage the state to welcome, investigate and seek accountability from public actors involved in violations, as well as ensuring state protection for victims. However, and despite this political and philosophical position regarding the respective roles of state and civil society, activists in formal and informal ways do provide some measure of protection in the cases of ineffective legal protection and state omission. One way in which this takes place is through the 'mother activists' which we will focus on in the remainder of this article.

Motherhood: an outlet for oppression and protection?

Organisations comprising the mothers of victims have been a significant feature in activism against state violence in Brazil, as they have elsewhere in Latin America (Maier 2010). Particularly common in the urban periphery of Brazil, this category includes groups such as 'Mothers of Manguinhos', 'Mothers of Acari', 'Mothers of Candelária', 'Mothers of May', and 'Mothers in Mourning from the East [of the city]".

The historical context of violence perpetrated against women, black women in particular, has influenced the growth of such groups and how they have responded. As black communities were subjected to particularly intense forms of violence, black women were and are the subjects of triple discrimination, generated by sexualised, racialised and class-based forms of violence (Gonzalez 2020). To offset the vulnerabilities associated with such predicaments, black women historically emulated the conduct

of white women and acquired status by association, that is, by joining white households as workers (ibid). However, under certain circumstances, black women have managed to garner an alternative social and economic status by mobilising images of themselves that are understood as positive, usually those portraying resignation and religiosity, who's most captivating characteristics are self-effacement and sacrifice for those they love. As hooks (2020) argued in the case of the United States, black women attempt to shift the focus from the derogatory representations surrounding them by emphasising their commitment to motherhood. They strive to prove their worth and dignity by demonstrating that their lives are strongly linked to family ties, caring for relatives, in particular their children, with incredible selflessness. In other words, black women reinforce and recirculate images related to their socialising role, with the intention of abandoning the position of purely racialised subalternation. We do not want to argue that this is the only form of motherhood available, or that our account contradicts other forms of Brazilian motherhood in the margins (Jesus 1962; Scheper-Hughes 1992), what we address in this article is how motherhood is used by relatives in the protection of victims, dead or alive, from torture and lethal state violence.

This article presents the argument that representations associated with motherhood and family care shapes a position, whence moral and emotional content for political performances that denounce state violence emerge. This form of politics has been identified in numerous contexts, from the public resistance of mothers in the Plaza de Mayo in Buenos Aires to more subtle forms of everyday resistance by Guatemalan mothers and widows documented by Linda Green and Judith Zur (Green 1999; Zur 1998).

However, before presenting the argument, we must map the spaces in which such representations of motherhood are produced and circulated, including the wider institutional and organisational environment. The following section will therefore discuss how motherhood is socially signified in different contexts of individual performance, and how notions of motherhood transcend female care, ultimately designating both action and the resignification of experiences, e.g. experiences of pain.

In Brazil, as elsewhere, motherhood has historically been linked to the 'greater good of society', associated with the idea of a suffering mother, the mother who cries, who sacrifices herself, who forgives everything, and who loves her children above all else and who must do everything to protect them (Araújo 2007; Freitas 2002; Santiago 2019). Interestingly, in all the interviews conducted for this research, mothers appear to be considered from a biological perspective, as if motherhood is not the product of a social construction that holds women accountable for care but is determined by nature (Quintela 2017). In addition, motherhood is considered to be divine, as described below:

> Look, being a mother is a very divine thing, you know? It's protection, it's love, it's affection, it's complicity. (...) Being a mother is that it's protection, it's being divine. It's protecting your son. (Interviewee F)

In this sense, while indicating personal 'fulfilment' linked to motherhood, women also alluded to the extreme poverty related to this role, especially when a 'loss' occurs. The excerpt below expresses the kind of ambivalence that, although superficially expressing 'extremes', in reality, describes an ambiguity of identity that can represent a simultaneous combination of many aspects, such as pain and achievement, sadness and happiness.

> Being a mother is an achievement, because when you're a teenager, you dream about being a mother. I was a mother too much, I'm a mother of 10. I have to thank God for the opportunity he gave me to be a mother, it's very good, you understand? We give birth, to give another life, a life from within us. It's very good, very good. A great happiness, only unfortunately, I did not want to have this loss. (Interviewee A)
>
> Mum's everything, isn't she? Mothers back you up in everything, carry you in their womb, seek to educate, seek to direct and hope that such a situation could never happen, that my son would go off to school, and what happened next would happen. (Interviewee D)

These representations index a moral-religious cosmology based on a Christian symbolic construction (Leite 2004). The idea of motherhood founded on 'maternal love' is reproduced as something extraordinary and sacred. Similarly, essentialised motherhood institutes the female body as a maternal body that speaks for its child and feels the child's pain (Santiago 2019).

> This mother thing is very strong. It's a very strong life bond. We're Mums, we have that feeling of pain for our kids. One glance, take a glance. You see the one that hurts your son. It's something like that that stirs mums a lot. It's the life connection. (Interviewee B)
>
> The mother rises in the morning praying for her son or daughter. She lives 24 hours for her children, she organises herself with what she earns to make sure the family survives, the mother is willing to introduce rules into her home. She always tries to keep a smile on her lips so that the home is happy. Being the mother, she passes things, feelings on to her son or daughter, so that this son or daughter takes something from the mother. (Interviewee B)

The mother category therefore has an ontological weight that entitles the owner to make claims and demand answers (Freitas 2002; Santiago 2019). And her figure includes an 'empathy' that no one else can foster (Efrem 2017). The activation of the condition of mother reaffirms a 'moral authority' (Vianna e Farias 2011), and motherhood is the element that makes women as subjects visible, forming new meanings and allowing their inclusion in the public world (Freitas 2002). According to the interviewees, mothers are taught to be strong and omnipotent. Precisely these characteristics place women in the position of authority to demand for their children their rights, including the dignified treatment by the state.

> We were taught to show our children that we are strong, omnipotent. So, when I'm sad, when I see danger approaching, when the police put a rifle to my son's head, it's not for him that I'll cry, because I have to show him that I'm strong, I'm there, I have to protect him. (Interviewee H)

However, it is necessary to consider that the issue of motherhood intersects other variables, especially in a context such as Brazil. The above account would not be given by any 'mother', especially if we think of non-black, middle-class women. In this sense, there is a specificity in the motherhood of black women in societies marked by racism. Unlike non-black mothers, women living and raising their children in marginal urban space perform protection and resistance daily, since their children's lives are constantly at risk (Leite 2018; Leite & Marinho 2020; Vianna & Farias 2011; Quintela 2017; Rocha 2020) and as our interlocutor above puts it: 'to show him that I'm strong'.

> My family is black, north-eastern, [[my son was the]] grandson of a north-easterner, I'm the daughter of north easterners, I'm the daughter of the North-east. Prejudice. Sometimes I feel as if they choose the family they're going to destroy. That's how it feels sometimes, you know. (Interviewee B)

Some women then engage in practices to demand a better future for their children and for the children of other mothers. The motherly position indicates that 'motherhood remains a symbol of hope for many of the black and poor women' (Collins 2020: 198).

> I am informed by black feminist thinking and its considerations about the experience of motherhood from a subaltern social position. I also assume that, for many women, especially non-white and/or poor women, motherhood not only awakens the moral issue of caregiving, but also very strongly the moral issue of justice. This presents the possibility that both configure their political engagement. These are the mothers who live in a reality where fighting for the survival of their children is an urgent requirement. And they do so politically, claiming rights, justice and democracy. (Quintela 2017: 8)

In other words, resorting to the category 'mother' and reinforcing elements of gender related to motherhood is an important strategy in the everyday protective practices as well as in the fight for justice and rights for poor urban Brazilians. The relationship between motherhood and a sense of 'female power' occupies a central position in these actions of resistance, especially for black women (Quintela 2017). In poor families, female authority is linked to the valorisation of the condition of mothers because society in general appreciates when low-status groups perform this role (Sarti 1996).

> Mothers' struggles become legitimate and make a difference because the mother will speak to the soul and the maternal feeling, whether of biological sons or daughters or not. What drives all this is love. Mum may not speak well, but she knows what she's talking about. Because you feel the strong connection of life with the son or daughter. (Interviewee B)

Therefore, many women, when experiencing a situation of state violence, say they turn 'mourning into struggle', in a process whereby experiences of pain, suffering and fear are resignified and reentextualised, thus leaving narratives of loss and entering narratives of hope and resistance.

‘From mourning to struggle’: from individual suffering to collective struggle

The expression ‘the mourning struggle’ was used repeatedly by our interlocutors, especially those participating in social movements. Likewise, the term is mentioned in research literature (Araujo 2007; Farias *et al.* 2020; Leite 2004; Vianna 2011). It refers to a process of resignifying pain and suffering, which was previously confined to the private sphere but has gradually spread to public spaces. This transformation starts with the engagement of women: some more, others less. However, the fact that their losses are verbalised and exposed constitutes a significant political configuration, which impacts not only on their personal but collective lives.

The major marker for these women is the loss of children to violence. They strive to know exactly the ‘how’, ‘why’, ‘where’ and ‘who’, among so many other questions that haunt them and motivate them to visit public agencies they previously did not even know existed. In this pilgrimage, they usually come to know human rights groups and social movements that welcome, accompany and motivate them to transform the pain of mourning into strength for the struggle. Some continue in these spaces, others do not. After the death of her son at the hands of the police, interviewee A never stopped seeking justice. When she encountered other mothers experiencing the same suffering, she understood that together they could be stronger. It was not only the mutual acknowledgement of pain that united them, but also their similar stories, their shared places of residence and community life, where precariousness and adversity are part of personal routines. The struggles converge and women begin to seek justice not only for their own dead children, but for those of other mothers like them. In fact, some women leave the secluded spaces of home or workplace to advocate publicly for justice for their children (or their memories).

In general, this involvement of new mothers in social movements occurs on the initiative of older militants who initiate the contact. During this initial contact, mothers who are more experienced in political practices instruct the new arrival about the legal procedures associated with investigating the death of a child and invite her to support the fight (Quintela 2017: 169). Nevertheless, some interviewees told us that participating in movements meant ‘awakening an awareness’ of reality:

> And then, I begin my trajectory in militancy and only after I start to join the social movement and know other movements, do I come to understand that everything that happens inside the favela is a process of genocide of black youth, which has been occurring for many years. Because, until then, you think that ... as the sensationalist media usually put it: they are all specific cases, it was a coincidence, it was a stray bullet. Today, even the understanding of the supposed stray bullet has changed. Today, a stray bullet only strays when it ends in the asphalt. In the favela, a bullet is found every day. To gain the knowledge I have today, I had to participate in social movements, and unfortunately it had to happen to my son so that I could understand this practice of the state against black youth. (Interviewee H)

Among our interlocutors, mothers participating in the movements all reflected on this transformation, through reshaped perceptions and knowledge of everyday life and social history they acquire what they themselves refer to as 'awareness'. As these mothers through their activism question the reality in which they live, they also provide a continuous care for their child, showing that these children have someone who looks after them and will not abandon them. The child is still protected, even in death. Militancy is then conceived as a continuation of maternal functions (Lacerda 2014; Quintela 2017). Caring also means fighting for and protecting the memory of the child, for a dignified burial, for a fairer society (Freitas 2001: 67).

Some mothers begin to play a strong role in movement activities. They acquire skills for engaging in dialogue with various audiences as well as for using resources and implementing performance strategies. They elaborate narratives that bring out not only the account of the loss of their children, but also the way in which the state is directly responsible for the violence perpetrated against this segment of the population. In fact, repertoires follow 'relatively regular scripts, more or less explicitly passed from older to more recent participants' (Vianna & Farias 2011: 87). Efrem (2017) called this performance 'collective weeping of loss' (Efrem 2017: 41).

Mothers and families of victims who are not linked to any movement do not necessarily stop fighting or seeking justice. Being in activist spaces enables individual experiences to be explored in more detail, shared and linked with common experiences, which transforms them into a struggle. However, alternate places of resignification of pain and suffering also exist, notably religious spaces such as catholic and evangelical churches, and *terreiros* (Afro-Brazilian religious space). Religious spaces enable some women to share and survive. Others seek support in their studies, investing in training, as was the case for interviewees B, G and H. In fact, these places are not exclusive, but intersect, connect and together produce meaningful experiences.

Moral cleansing speeches

One initiative of mothers, regardless of whether they are associated with movements or not, is to address the texts and reports produced by the press, police and institutions in the criminal justice system, such as the Public Prosecutor's Office. These actors overwhelmingly frame the children of these women as 'criminals' who resisted apprehension by state agents and therefore died during confrontations, in which the state agents' use of force were proportional and legitimate.

> And one of the barriers that we face the most is that, in addition to them (state agencies) executing young people in their houses, they still tarnish that person's image and reputation. Because, in the mainstream media, the person is portrayed as marginal, as an addict, as an offender. (Interviewee E)

> My son was portrayed as a bandit (...) to this day there are many unanswered questions. (...) With the last jury that I had, I thought, right, now my son will be recognised as innocent but that's not what happened. The prosecution came in and it was as if my son, who was a victim, was passed off like he was a bandit. (Interviewee D)

Another interviewee said that her son was killed twice: first the state agencies killed his flesh and then they killed his reputation. Several studies have analysed this 'moral cleansing' (Leite 2004, 2013), which refers to mothers gathering documents that prove the righteousness of their children.[2] Such disputes involve refuting accounts and narratives circulated by state agencies and the press to establish that the victim was innocent and recognised as such (Efrem 2017).

> My son was leaving for work at 5:00 a.m. and was shot. For the state, any young black man who leaves in the morning, early for any trade, is ... if he is a young slum man, identified as a target (...) He used to talk to me like this: Mum, I got arrested for a crime I didn't commit. I was shot for a crime I didn't commit. I see people coming in and out of prisons and I'm still here. (Interviewee H)

In addition to presenting 'moral proof' that their children were not 'bandits', mothers also feel compelled to demonstrate that they fulfilled their role as mothers and were loved for this. This is mainly because they are usually socially portrayed as 'mothers of traffickers', 'mothers of criminals', and they need, to the same extent, to fight to be recognised as mothers in search of justice. Therefore, showing photos in which their children appear smiling and happy has the purpose of showing that they were good people, that they were cared for and that they cared for their families (Rocha 2020). As highlighted by Vianna:

> The 'mother's pain' is thus mixed with the production of a moral career, even more valuable because it is permeated by all the sacrifices made to 'create right' children in the midst of multiple material difficulties and the absence of quality public equipment (Vianna 2014: 229).

The mother's effort to prove that her son was the victim of extermination can also be mobilised during court proceedings.

Among mothers who recognised their child's involvement in the 'world of crime' (Ramalho 2008), a different narrative is formed, but not totally out of touch with women who reinforce the 'purity' of their family members. Words such as 'unfortunately' appear along with the explanation that the son was related to illegal dynamics.

> Because my son, unfortunately, was a young author of infractions. Regardless of what he did, he paid for his mistake. He had left the prison 15 days earlier. (...) It's just that there are many cases like this, that he was killed by the police. Unfortunately, my son had passed through the system. The fact that he had passed through the system does not make him a bandit. He was not a bandit. (Interviewee A)

[2] Mothers 'produce' the so-called 'moral tests' of their children, presenting work cards that shows their sons were employed, their school reports to show that they were studying, teachers' statements, and reports from neighbours and colleagues (Leite 2013).

In other words, she recognises that her child had some involvement with illicit transactions. However, there is always the option of a gradation in the narratives of mothers describing individuals who can ultimately be categorised as 'bandits' and those who may even have passed through the justice system, but should not, effectively, be considered criminals. According to our interviewees, the mothers of the 'non-bandits' are the ones who must fight, as if the 'innocence' of the child were the passport to search for justice and reparation, in addition to ensuring the legitimacy of suffering.

> For me it's like this, if my son isn't shooting back, he's been killed unfairly. I must be in the fight, regardless of who he is or ceases to be. He was not exchanging shots; he had already surrendered. Cases of sons surrendering and being shot at close range happen frequently, you understand? So, these mothers must join in the fight, yes, for their sons. (Interviewee A)

One mother criticised the above position, indicating that all mothers, despite the behaviour of their children, should feel empowered to denounce the state for its actions. However, she acknowledged that many mothers blame themselves, as if it were their personal obligation to teach their child to be a 'good citizen' and thus keep him oblivious to the world of crime (Ramalho 2008). This structure of emotions is reinforced by the actors of the justice system and by the general public, who tend not only to criminalise and discriminate against the child, but also the mother and other close family members. Each act of torture that goes unpunished validates the moral righteousness of the stigma that was inflicted on the torture victim and, by implication, on the victim's family and kin.

> I've heard up to several mean comments that I didn't know how to address. That we only hear at the station when they go to jail.
> 'You didn't know how to educate; (...) and you've got to catch up really. Understand?'
> And sometimes, we even listen. One time when we were distributing flyers at the prison door, someone said to the mother that her child was there because he deserved it. That notion was put into her head. You see how the system is very perverse? You put it into her head that her son had to be there and that he had to catch up, be quiet and it's over. (...) The family itself excludes the son from everything. If there's a party, you're invited, but your son isn't. So, it's pretty hard, and then you also have your neighbours making some comments too. It's very sad that we talk and have this hypocritical society, because I'm a part of it too, and people forget that. So, it's very painful for us as mothers, as I've heard:
> 'Now you will spend what you have and what you don't have getting the little bandit out of jail.' So that's very painful for a mother. (Interviewee F)

It is important to recognise, however, that not all mothers of victims become publicly involved in social movements. The reasons for mothers' non-engagement in social movements may be diverse, but this is not examined extensively in the literature. Few studies seek to understand why some mothers do not participate in the struggles taking place in public spaces. Likewise, is not possible to say that they do not mobilise their efforts for their children just because they are not part of political groups.

Militancy can even be individual, in the sense of following on behind 'alone', without being engaged in collectives.

Still, becoming publicly active can come at a high cost. According to Santiago (2019), the engagement of these mothers takes place in settings in which they are responsible for supporting their families. They therefore cannot actively participate in acts, events, manifestations, etc. As Lacerda (2012) describes the cost of engagement by mothers and family members in militancy imposes difficulties. Our interlocutors emphasised that involvement with social movements is time consuming. As many women need to work to support their families, they cannot spare a moment for engaging in initiatives. 'Often, single mothers who have to work, who are breadwinners every day, do not have this availability'. (Interviewee F)

Other questions influence the lack of collective engagement of mothers, such as discouragement at not obtaining effective answers about the case in the criminal justice system, discrimination suffered due to state action and, furthermore, reprisals.

> Many of these mothers can't cope with joining in the fight because we're mistreated. The audience is always a bureaucracy, everything is engineered for us to give up. The hearing is too heavy ... So, a lot of mums can't cope with engaging in this fight. (Interviewee A)
>
> One [reason] is to believe, because you've already lost hope and you are trying to work it out and you can't achieve it. Another [reason] is that this issue creates a feeling of suffering too and evokes a feeling of impotence. (Interviewee F)
>
> Regarding the movement, we are still working, because many mothers do not want to join in the fight. They are not interested in knowing how the case is progressing, and do not want to be scarred. (Interviewee I)

One interlocutor indicated that the husbands of some women do not allow them to engage in social movements. They want their wives to dedicate themselves to the home or want to avoid systematically bringing to the fore feelings arising from political participation. Therefore, considering the many difficulties related to engaging with collectives, additional research should address why mothers remain involved in these activities and spaces, though, at first glance, they may not appear to 'compensate' individually for political participation.

Another aspect of interest is that mothers recognise the legitimacy of some motivations for women's non-involvement in social movements. However, a kind of 'moral judgement' exists concerning those who do not 'take the microphone'. There is an idea that these mothers are, in fact, 'mothers of thugs', and that is why they do not mourn their dead and could not legitimately seek justice (Vianna & Farias 2011). According to Freitas (2001) there is also a notion that some mothers do not develop a 'maternal feeling' that would urge them to campaign for the rights of their children. These factors result in marked differences in maternal initiatives, a theme of this article.

Conclusions

The composite case of Rio de Janeiro and São Paulo which we have explored in this article, was built around a set of attributes which these two Brazilian states share. They both have well-developed normative frameworks and quite elaborate governmental infrastructures both at federal and state levels for the implementation of the Convention Against Torture and its Optional Protocol. Yet, at the same time both states have high levels of torture and cruel, inhumane and degrading treatment of poor mostly Afro-Brazilian urban populations not only in custodial but also extra-custodial settings in an everyday life moulded by violence. Phrased differently, there is a high demand for protection, there is a fairly well-developed governmental supply of protection, yet the case reveals that the social sphere not the state is the starting point for providing protection to survivors of torture and state violence and their families. In this sense our case is paradigmatic because it enables us to question the assumption that the development of community-based or networked protection is an answer to the **absence** of state protection. This seems not to be the situation in the case of Rio de Janeiro and São Paulo.

In the interviews upon which this article is based, motherhood shapes an outlet for challenging various overlapping orders (race, class and gender). Its first order effect is that it garners legitimacy in the fight for justice, for the truth, and for restoring the positive memories related to the children in question. By associating with the maternal identity, greater social acceptance for women with this profile is generated and consequently a public sphere of (human rights) action opens. Female selflessness towards a mother's family, especially her son, translates into powerful moral and political capital. Instead of being black and poor, motherhood constitutes a poignant, but strong, identity. The secondary order effects generated by this moral and political capital are multiple. The social movements run by mothers offer as a first step **emotional protection** to women who have lost their children. They encourage these mothers to join the fight to **end impunity**, members accompany each other on pilgrimages to **document cases** and generate press coverage seeking to hold the authors accountable in the eyes of the courts and the public. In addition, these social movements work to **prevent torture and extra-judicial killings**, by deploying the term **genocide** as the strategic descriptor of the violations they suffer in everyday life largely due to **crimes of omission**. This way motherhood creates both the form and the content of the agendas for participation in human rights work, as case workers, or as audiences and organisers of events. Motherhood offers a repertoire of political avenues for women to explore, one key question which must be addressed by the human rights movement is how to best support such work.

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Exposed and alone: torture survivors in Sri Lanka bear the burden of their own protection

Ermiza Tegal and Thiagi Piyadasa

Abstract: Within a history and context of torture practised by state agents in Sri Lanka, this article discusses in relation to victims of torture who engaged with complaint mechanisms, the threats faced, the responses received from complaint mechanisms, and what victims and their families actually did to secure protection. The article is an analysis of the threats of fabricated criminal charges, personal and social humiliation, and physical threat and intimidation in retaliation to lodging of complaints against perpetrators and the strategies of aggression and mobilising social connections that are utilised.

Keywords: Torture, Sri Lanka, protection, police brutality.

Note on the authors: Ermiza Tegal is a senior lawyer with 15 years of legal experience and 20 years of experience in the human rights field. Thiagi Piyadasa has 15 years of experience in the development and human rights sectors and six years as a lawyer. Our legal practice primarily involves providing legal advice to survivors of torture and domestic violence, filing cases against perpetrators and appearing in defence of survivors in various legal forums. In addition, we work closely with grassroots activists and civil society organisations, and engage with advocacy and policy efforts on issues of women's rights, torture and protection.

Introduction

Sri Lanka has a long history of violence as a means of organising and structuring the governed as part of the country's post-colonial state building exercise (Dewasiri 2018). The country has experienced extraordinary brutal violence in the youth uprisings of the early 1970s, mid 1980s (Perera 1995; Hughes 2012) and the three decade long ethnic war (Barnes 2013). State responsibility and complicity also played a part in the several communal riots (Dissanayaka 1983; Kannangara 1984; Kearney 1985; Holt 2016; Nagaraj & Haniffa 2017) and experiences of prison massacres.[1] The Sri Lankan state has also failed to accept responsibility and hold accountable perpetrators of mass graves (Bopage 2018), and respond to the scores of families of victims of enforced disappearances. In 2013, the tiny island ranked second in the world for the highest number of enforced disappearances (UNHRC 2013). The state has also failed to take responsibility towards the countless victims of a permanent state of emergency and anti-terrors laws (Tegal 2021) and to respond to the reports of deaths in custody and complaints of torture recorded year upon year[2] (Pinto-Jayawardene 2010; Human Rights Commission of Sri Lanka 2020; Fernando 2021).

Authoritarian power grew with a course set by the second republican constitution of 1978, which introduced an all-powerful executive president and a weak judiciary. Over the decades a quagmire of oppressive security laws and extra judicial institutions have further undermined the judiciary, led to loss of independence of oversight bodies and resulted in several acquittals and failures to hold perpetrators accountable (International Commission of Jurists 2012).

The violence is a 'theater of power' (Kapferer 1989; 1996) for people of Sri Lanka and plays out in the everyday (Spencer 1990). Torture as an everyday form of state violence organises and structures the state's relationship to the citizen. It is a relational violence perceived as enmeshed in the fabric of social relations in Sri

[1] Sri Lanka has experienced at least 15 reported serious incidents of violent attacks of prisoners. Instances in which several prisoners were killed include 53 killed in Welikada Prison in July 1983, 27 killed in Bindinuwewa detention facility in October 2000, 27 killed in Welikada Prison in November 2012, 2 killed in Anuradhapura Prison in March 2020 and 8 killed and 59 injured in Mahara prison in November 2020.

[2] UN Committee Against Torture (CAT) Concluding Observations on the fifth periodic report of Sri Lanka, CAT/C/LKA/CO/5 dated 27 January 2017 states torture is 'a common practice' in Sri Lanka. UN CAT Concluding Observations on the combined third and fourth periodic report, CAT/C/LKA/CO3-4 dated 8 December 2011 refers to 'widespread use of torture and other cruel, inhuman or degrading treatment of suspects'. UN CAT Concluding observations on the second periodic report of Sri Lanka, CAT/C/LKA/CO/2 dated 15 December 2005 refers to 'deep concern about continued well-documented allegations of widespread torture and ill-treatment as well as disappearances, mainly committed by the State's police forces'. UN CAT observations on the initial report of Sri Lanka refers to grave concerns relating to serious violations of the convention, particularly torture linked to disappearances.

Lanka (Kapferer 2001; de Mel 2003; Munasinghe *et al.* 2015; Jayawardene & Pinto-Jayawardene 2016; Munasinghe 2017). For example recent reports on prisons in Sri Lanka described everyday violence experienced by inmates (Prison Study by the Human Rights Commission of Sri Lanka 2020) and another report on land rights described the use of humiliating language by land administrators towards people particularly from ethnic minorities (Our Land, Our Life: People's Land Commission Report 2019–2020). Maintaining moral order (Munasinghe *et al.* 2015) and security are the discourses moved to justify torture. This is reinforced in the use of language that others and politicises the criminal. Victims are often cast as terrorists, social deviants, drug addicts, disrupters of social harmony and other attributions of criminality. Some of the underlying motivations for the use of torture, which are also all forms of asserting power and control, have been identified as maintenance of corruption (Block *et al.* 2017), settling private and political vendettas (de Mel 2003) and silencing dissent (Freedom from Torture 2015).

The prevalence of torture as a form of state violence in the country has been recognised as widespread and common practice.[3] We know of the most common torture techniques (Peel *et al.* 2000; Perera 2007; Tegal & Piyadasa 2021)[4] and are aware of the physical and mental consequences on survivors, including the collective impact of the practice and threat of torture experienced by community as targeted by the Prevention of Terrorism Act at the time (Perera 2006; Perera 2007; Somasundaram 2008; Perera & Verghese 2011).

[3] UN Committee Against Torture (CAT) Concluding Observations on the fifth periodic report of Sri Lanka, CAT/C/LKA/CO/5 dated 27 January 2017 states torture is 'a common practice' in Sri Lanka. UN CAT Concluding Observations on the combined third and fourth periodic report, CAT/C/LKA/CO3-4 dated 8 December 2011 refers to 'widespread use of torture and other cruel, inhuman or degrading treatment of suspects'. UN CAT Concluding observations on the second periodic report of Sri Lanka, CAT/C/LKA/CO/2 dated 15 December 2005 refers to 'deep concern about continued well-documented allegations of widespread torture and ill-treatment as well as disappearances, mainly committed by the State's police forces'. UN CAT observations on the initial report of Sri Lanka refer to grave concerns relating to serious violations of the convention, particularly torture linked to disappearances.

[4] Peel's study medically documents mainly forms of torture by rape and sexual assualt. Perera's study medically documents 68 methods of torture including use of pilable and non pilable blunt weapons, cigarette burns, submergence in water tanks, petrol-soaked plastic bag over head, cuts by knives and razors, chilli powder in eyes, assualt including on soles of feet, burns by molten plastic. Tegal and Piyadasa by literature review and interviews documents torture techniques include derogatory words, threats, insults, intimidation, shoving and slapping, beating, kicking, trampling, removal of clothing, rape, sexual abuse and harassment, use of implements such as batons, wooden or bamboo sticks, firewood, poles or wickets, wires, and metal chains to inflict pain, made to kneel, made to walk on knees, beaten on soles of feet, hung by thumbs, by wrists and ankles, burns, various forms of asphyxiation and use of chilli powder or petrol to cause a stinging sensation.

In the context of long histories of violence and impunity described above, and the embedded nature of the practice of and social acceptance of torture, this article looks at the experience of survivors to understand their responses as victims after an incident of torture, and how protection is sought and secured.

Methodology

This article draws from the British Academy funded research conducted between 2019 and 2021 in Sri Lanka and Kenya on protection available to survivors of torture and ill treatment from poor communities.

The study methods included a scoping workshop with those familiar with providing protection to victims, case study documentation of experiences of survivors of torture, validation of survivor experiences at focus groups discussions with survivor communities, reviewing the anti torture legal framework of Sri Lanka, and identifying gaps in protection through interviews with key informants with experience of state and non state intervention connected to assisting victims of torture.

At the scoping workshop, participants emphasised that issue of torture was not a safe topic to discuss and that a level of trust was a prerequisite to engaging in a meaningful conversation about torture. Thereafter, the study period coincided with the immediate results of a Presidential election in November 2019 and a general election in August 2020, which ushered in a President and government that were associated with authoritarianism and an alarming record in relation to human rights. Constitutional amendments in October 2020 significantly affected the independence of institutions dealing with complaints of torture. There was heightened concern for civil liberties due to a spike in the incidents of 'lockdown' related arrests, complaints of police torture and police action against those critical of public officials or the government. The context did not lend to free participation of state officials and also survivors of torture.

Due to the COVID-19 pandemic travel restrictions and other precautions the methods were adapted. The three case studies interviews were conducted in person and the respective legal documents studied.

All key informant interviews were conducted over secure online platforms and the planned focus group discussions were abandoned. Those interviewed consisted of lawyers who represented survivors at different courts and two former prosecutors, human rights activists working at the community, national and international levels on torture in Sri Lanka, a psychiatrist, a psychologist and a medical professional who worked with victims of torture, a former Commissioner of the National Human Rights Commission and two researchers who had engaged with particularly vulnerable categories of victims.

The reliance on thick descriptions of three cases provides valuable insights and when supported with contextual insights, captures some of the complexities and variables in these lived realities of securing protection. While it is clear that poor communities, also poor members of Tamil and Muslim minority groups and marginalised categories of persons (i.e. sex workers, criminal suspects, LGBTQ+ persons) in Sri Lanka are extremely vulnerable to torture, the case studies documented are interesting in that they represent victims who belonged to the majority Sinhala Buddhist community, who enjoyed social standing in their communities, and who had degrees of trust and confidence in the state apparatus. Whilst it's important to be cautious about generalising from this study, the experiences of 'respectable' Sinhala torture survivors of threats, responses from complaint mechanisms and means of actually securing protection can illuminate the systemic challenges that exist.

Introduction to the case studies

All three families featured below identify as Sinhalese, the majority ethnic and language identity making up over 70 per cent of the Sri Lankan population. This ethno-linguistic identity is important given the history of political privileging of the Sinhala language and the impact that it has on trust of state institutions (Perera 2011).

In many ways, these cases are anomalies in the landscape of vulnerability and silence experienced by survivors which were described to us during the scoping workshop and in key informant interviews. These families are not from populations that are especially vulnerable to torture as identified by Fassin & Kutz (2018) or from marginalised political minorities, Tamils or Muslims. They were not located in the war affected territories and did not experience the everyday militarised governance that exists in the North and East of the country. They are different in that religion, ethnicity, class and existing social connections including to law enforcement officials empower their response to their experience. They are also victims who were linked with human rights organisations or defenders willing to help, in a context where only very few human rights organisations openly and directly work on assisting victims of torture in Sri Lanka. For these reasons, their experiences represent rare instances of victims' engagement with complaints mechanisms and the legal system against the perpetrators, as few survivors feel able to do so.

Below, we introduce the three cases. The names of all individuals have been changed.

Three cases

Torture and murder of an army deserter (2000): the story of Nimal and Chathuri

Nimal's family, lower middle-income household, owned a small shop and was engaged in paddy cultivation, in the Western Province of Sri Lanka. They were a close-knit family and had a reputation in their community of being generous and helpful towards those in need. Nimal had one sister and six brothers. At the time of the incident, one brother was in the police force and another in the army. Nimal was married to Shanthi, and had a two and half year old son. It had been a few months since Nimal had deserted the army and returned to his wife and child.

In June 2000, Nimal was arrested at his home by the local police, kept in police custody for six days and subjected to severe assault. Once, with his hands tied with rope he was beaten in front of his wife. His family visited him daily and saw the swellings and bruises on his legs and arms, and the difficulties he had to walk or stand up. They complained to various institutions mainly to secure his removal from police custody. They insisted that he be handed over to the military police or be produced before a court. When his sister, Chathuri, complained to the Assistant Superintendent of Police, he did not record her complaint and instead directed the local police to hand Nimal over to the military police. It is only when Chathuri shouted outside the police station threatening to complain to the Human Rights Commission that Nimal was produced before a court later that day. The police falsely charged him with possession of *kassipu* (illicit alcohol). A fabricated medical report was presented to court stating Nimal was physically unharmed. The court ordered that he be transferred to a remand prison. Nimal told his family that he had been too afraid to disclose to the court that he had been beaten. He was never produced before a medical professional during this time. After three days in remand prison, and nine days after his arrest, Nimal died in prison. The post-mortem report described Nimal as having 'twenty injuries (contusions and abrasions) on all parts of the body: on his head, chest and abdomen, and on every section of every limb—upper arm, forearm, hand, thigh, knee joint, leg and foot. His upper right arm was swollen and black in colour. The cause of death was acute renal failure due to muscule cutaneous injuries following blunt trauma'.

The family was distraught at the loss of their brother. Their lives, thereafter, involved regularly travelling to the capital, Colombo, to follow up on complaints at various institutions. Chathuri recalls vividly, enduring sexual harassment in the form of inappropriate remarks and requests by officials in the institutions she accessed and also catcalls and comments by men on the streets as she travelled. Of all Nimal's siblings it was only his sister, Chathuri, who undertook the burden of pursuing and participating in the several avenues for legal redress, the criminal case, the complaint before the Human Rights Commission, the civil cases for compensation against the

perpetrators and losses the judicial medical officer who fabricated the medical report to court, the disciplinary inquiry against the judicial medical officer for professional negligence and the fundamental rights in the Supreme Court of Sri Lanka.[5]

In 2003, the Supreme Court delivered a judgement in favour of Nimal. Shanthi had not been initially legally entitled to file the case on behalf of her husband and later in a landmark decision the court permitted her as a family member of the victim who had died consequent to torture, to petition court on the victim's behalf. The Supreme Court held that Nimal's right to be free from torture had been infringed and ordered compensation in sum of 800,000 Sri Lankan Rupees (approximately 4000 USD) to be paid to his wife and infant son. At the time judgement was delivered, Shanthi had left the family. Chathuri believes that the hardship of pursuing multiple legal cases, the unbearable financial toll of legal, travel, childcare and family welfare costs, and the physical and emotional costs caused Shanthi to leave. Chathuri took Nimal's son under her care and has been his sole caregiver since. Chathuri has dedicated her life to assisting other families who are affected by torture to navigate the legal system with some confidence. Chathuri recognises value in compassion, accompaniment and insists that the system ought to work for the rights of the common person.

Torture of two fishermen (2008): the story of Amal and Bimal

The second case involves Amal, 60 years old, and his son Bimal, 34 years old at the time of the incident. They are fishermen from low-income households in the Southern province of Sri Lanka. Amal has a history of left-wing political involvement and was very active in the social and political life in his village. Amal was very vocal about social injustice in his community. He has garnered the respect of members of his community as a result of his social activism and forthright personality.

Bimal lived in close proximity to the local police station, in a house donated to him after his small hut was destroyed by the Tsunami in 2004. Bimal said that he and his partner of eight years, Sonali, often quarrelled over relationships that Sonali was having with other men, including a Sub Inspector of Police at the local police station. Bimal lived in fear because the Sub Inspector had on several occasions attempted to arrest Bimal, which Bimal believes was at instigation of Sonali. When Bimal met with the Sub Inspector to explain his side of the story, to his dismay, the Sub Inspector had

[5] The Supreme Court of Sri Lanka is the highest court in the country and has original jurisdiction over violations of rights protected under the constitution. There is only one Supreme Court situated in the commercial capital of Colombo, in the Western Province of Sri Lanka. Key informant interviews highlighted the perception of this court as inaccessible mainly for reasons of cost of and access to legal representation. The study of the legal framework also drew attention to challenges such as a 30-day time limitation to complain and lack of access to medical records maintained by state medical officers documenting torture.

demanded that Bimal leave his home and allow Sonali to have sole occupation of the property.

A few days later, Bimal witnessed his household belongings being loaded onto a tractor with the Sub-Inspector and a constable present. When Bimal attempted to intervene, he was assaulted by the constable. Bimal ran to his father's house to escape. He was chased by the Sub-Inspector and constable, who caught and assaulted him in front of his father and neighbours. Bimal recalls receiving several blows to his head which caused him to collapse onto the floor. He was pinned to the ground face down and further assaulted. Amal intervened to question why the officers were treating his son in this way and also pleaded with them to stop. Amal too was then assaulted by the police. Amal and Bimal were restrained and taken before Sonali. The Sub-Inspector scolded them in foul language and slapped Bimal several times, appearing to demonstrate to Sonali that punishment had been meted out to Bimal.

The police produced Bimal in court falsely charging him of possessing cannabis and Amal on false charges of drunk and disorderly behaviour. The day after he was released on bail Bimal immediately admitted himself to a state hospital for treatment. His injuries were recorded by a judicial medical officer.

Amal and Bimal defended themselves against the fabricated criminal charges and six years later were acquitted from all charges. Eight years after the incident, the Supreme Court held that Bimal's right to be free from torture had been infringed but not Amal's. It appeared that the fact that Amal did not receive medical treatment at a hospital after the torture he experienced had disqualified him from receiving a judgment in his favour. The court found that both had been falsely charged with criminal offences. Compensation of approximately 200,000 Sri Lankan Rupees (approximately 1000 USD) was ordered to be paid to each.

Torture of young police officer (2020): the story of Dinesh and Sunila

The third case is about Dinesh, a 25-year-old police officer. Dinesh's family is a lower middle-income family in the Western Province of Sri Lanka.

Dinesh was the eldest of three boys. His mother Sunila was a homemaker and primary caregiver given that her husband was often deployed far away from home. Dinesh's father served in the police as a low-ranking officer for several decades. As a child, Dinesh had wanted to be a policeman. Dinesh told us that the village had a lot of respect for his father and this respect extended to them as a family. Dinesh's family is supported financially to some extent by his uncle who is employed abroad. Sunila has a strong personality and is the one mainly in charge of the affairs of the family. Another police officer once remarked that it was Sunila who was the 'police officer' in the family.

Dinesh had been in police service for only a few years. He enjoyed being in the front lines and being involved in drug investigations. He mentioned that there was pressure to arrest a target number of offenders each month. Dinesh said that police officers, especially in the crime division, were very supportive of each other in their day-to-day routines.

In early 2020, after a few weeks into a new placement, Dinesh was questioned about a pistol that was alleged to have gone missing from the station. Dinesh was beaten by the Officer in Charge on the back of his head and verbally abused. He was forced to kneel, one arm was raised over his shoulder and the other pulled back behind his waist so that both wrists were forced painfully behind him and handcuffed. Dinesh was repeatedly beaten with a wooden pole and his legs were stamped on by officers wearing boots. He was threatened, '*you will be killed right here*', and a confession demanded for the lost pistol. In the midst of this treatment, one police officer remarked that Dinesh had been seen being inappropriate with a female police officer, and another called him a '*ponnayek*', a term commonly used to insult a male as being impotent or effeminate. One suggested that they remove his trousers and check his genitals. He was kept in custody overnight without meals or water and Dinesh recalls that he was given some water by an officer who appeared to sympathise with his situation. His parents were permitted a brief meeting and then chased away, when they came to visit him. His father was threatened.

Dinesh was produced in court the following day. The police requested that court permit them to keep him in police custody for 48 hours citing that they required him for further investigations relating to the missing pistol, the judge refused to extend police custody and ordered that he be transferred into the custody of a remand prison. The judge also ordered that he be medically examined, however the police took Dinesh to a doctor at an outpatient medical facility, rather than to a judicial medical officer. On the way to the hospital, Dinesh was warned against reporting the torture. The police officers appeared to speak to the doctor beforehand, which Dinesh believes is the reason he was not properly examined. When Dinesh was in remand prison, his mother was very worried that as a police officer his life would be in danger from criminals who were within the prison system.

Dinesh's family experienced a mixed reaction from colleagues in the police, those who knew him expressed some sympathy for his situation and others believed him to have in fact stolen the firearm. Dinesh's father did not believe his son would get any justice through the formal system.

After securing some support and advice from family friends, known police officials, a known judge, a human rights defender and lawyers, Dinesh managed a month later to secure a proper medical examination by a judicial medical officer. He was diagnosed as suffering from post-traumatic stress disorder. Dinesh was contemplating legal action at the time of the interview. It was important for him to defend himself

against the false criminal charges made against him, return to his employment and secure his income. His mother was also concerned that the false charges would impact her son's future, including his impending wedding.

Dinesh's mother, Sunila was distraught at how her son was treated and she was also extremely fearful of the false allegation of theft of a pistol. She undertook the entire burden of making numerous complaints to various high ranking police officers, the Human Rights Commission, the National Police Commission, and even the President. She also spoke to those in her neighbourhood and the press.

The formal anti torture legal framework

Sri Lanka has a strong legal framework on accountability for torture. Sri Lanka's Constitution guarantees the freedom from torture as a non-derogable right, with domestic jurisprudence upholding an absolute prohibition and recognising a broad definition of torture. Citizens are legally entitled to make complaints directly to the Supreme Court. This remedy if successful results in a declaration from the Court that the person's fundamental right to be free from torture was violated and often is accompanied with a direction on the perpetrators and the state to make a token payment of compensation. The National Human Rights Commission (NHRC) and the National Police Commission are also mandated to receive public complaints relating to torture, to investigate and make recommendations related to disciplinary action affecting the employment of the perpetrator often in the form of transfers, denial of promotions for a period of time, or recommendations for criminal action to be taken. The Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment Act No 22 of 1994 (CAT Act) introduced domestic criminal law specific to torture and imposed on conviction a sentence of a minimum of seven years and a maximum of ten years and a fine not less than 50,000 rupees and not exceeding 200,000 rupees.[6] Victims are also legally entitled to file civil actions for compensation against state officials to recover actual loss caused. All of these legal measures are directed at holding the perpetrator accountable.

Sri Lanka is party to several United Nations human rights conventions including the Convention Against Torture. In 2016, Sri Lanka recognised the competence of the Committee Against Torture to receive individual complaints and in 2017 acceded to the Optional Protocol of the Convention.

Legal mechanisms providing services for victims are comparatively sparse. In 2015, the Assistance to and Protection of Victims of Crime and Witnesses Act was enacted

[6] Section 2(4) of Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment Act No. 22 of 1994.

and confers protection to victims and witnesses of crimes. To access protection the victim must have lodged an official complaint. There are no provisions specific to victims of torture. It established a National Authority for the Protection of Victims of Crime and Witnesses and legally obliges courts, various Commissions[7] and the Officers in Charge of police stations to provide information and protections to victims of crimes and witnesses.

Access to legal aid is important, given that accessing many of the above-described mechanisms requires legal representation. The Legal Aid Commission Law No. 27 in 1978 entitles people to legal advice and representation based on a means test, a monthly income of less than 25,000 Sri Lankan Rupees (approximately 215 USD).

It is against the backdrop of this legal framework that the experiences of the victims are examined below.

Threats faced by victims of torture and their families

This section looks at the threats perceived and faced by victims to place to some extent the context of the discussion that follows on protections sought and negotiated by victims and their respective families. We describe below three forms of threats: (a) the threat to physical liberty as a result of fabricated criminal charges, (b) personal and public humiliation, and social ostracisation, and (c) physical and verbal intimidation and harassment in response to formal complaints.

The threat to physical liberty as a result of fabricated criminal charges

In all three cases, there is a threat of fabricated criminal charges against the survivor. Nimal was charged with possession of illicit alcohol. Bimal was charged with possession of cannabis and Amal with drunk and disorderly behaviour. Dinesh was charged with stealing a firearm, which was also framed as a public property offence. We assume that the criminal charge is, in itself, a means of justifying the torture both in the eyes of the public and the legal system. It is difficult to say whether the charges are intended to prevent complaints against the torture. However, it puts the victim and their family on the backfoot, essentially directing physical, emotional and financial resources away from seeking medical, psychosocial and other assistance and potentially pursuing accountability and justice.

[7] The Human Rights Commission of Sri Lanka, The Commission to Investigate Bribery or Corruptions, Investigations Commissions or a Special President's Commission of Inquiry or any other Commission appointed under the Commission of Inquiry Act.

The filing of criminal charges themselves means that these survivors and their families are compelled to defend themselves in court and must secure legal representation to be released on bail. When the false charges involve drug offences or public property, the judge before whom the survivor is first produced, has no jurisdiction to order the accused to be released on bail. Therefore, continued incarceration is one of the immediate dangers that these survivors and families confronted. Drug and public property offences are also offences that carry severe penalties and therefore survivors face the additional threat of long-term incarceration if they do not defend themselves. A distrust of the criminal justice system to provide a fair trial and deliver just decisions intensifies their fears. The fabricated criminal charges also cast the survivor as a morally abhorrent character, immediately undermining social support within their community and placing the survivor within the class of the victimisable population.

Personal and public humiliation, and social ostracisation

Chathuri recalls an investigating officer at the National Police Commission attempting to shame her by commenting about her character as a 'loose woman'. She also experienced many officials making inappropriate and sinister suggestions to have 'relationships' with her. She believes these may also have been attempts to influence her to settle the cases. In the case of Dinesh, the young police officer, his torture involved the making of comments questioning his masculinity and also several remarks alleging that he had behaved inappropriately with a female police officer. The perpetrating police officers had also told the family of Dinesh's fiancé that he was a criminal causing him and his family distress and embarrassment. A woman human rights activist and a male lawyer interviewed in the course of the study also described to us routine harassment experienced by female family members who are compelled to interact with law enforcement officials in the course of pursuing cases.

Social ostracisation and attempts to alienate existing social support was a key part of the experience of survivors. As described previously, the nature of the fabricated criminal charges in themselves often served the purpose of undermining social support for the survivor. The heavy police presence at Nimal's funeral was a sinister signal that the state is involved and is a measure to discourage public support to the survivor's family. In the case of the fishermen, the perpetrators influenced the Chairman of the Urban Council (a local government body) and a school principal to lobby the survivors to withdraw the fundamental rights case that had been filed against the perpetrator police officers. Such influence further alienates the survivor and family members from commonly accessed state officials and institutions. Dinesh's mother spoke of rumours being spread in their neighbourhood of her son as an alleged thief. Dinesh's mother called on all her connections and even spoke at a press conference to

highlight the injustice and treatment of her son. Human rights activists and lawyers described similar tactics by perpetrators of filing false criminal cases, publicly humiliating survivors, publicising as news items videos made by the perpetrators in which survivors are shamed as criminals, and even spreading rumours that a survivor's sister was mentally ill.[8] In our three cases, each of the families had some social standing mainly as a result of their social works or employment. Yet, having to face the threat of social ostracisation meant their physical and emotional energies were significantly engaged in resisting this. Setting the record straight, required continuous engagement and expending of social resources by victims.

Physical and verbal intimidation and harassment in response to formal complaints

Retaliation was a common response to formal complaints being made by victims. Chathuri recalls how there were many police officers present at her brother's funeral. She remembers that they remained there the whole day and how 'horrified' the family was at their intimidatory presence. She says her brother's grave was sealed with concrete for fear of interference with his body once laid to rest. At other times, Chathuri was compelled to report to the judge that she was being followed from court after attending the case against the police. Chathuri also recalled that the phone number given at inquiries received several intimidating calls afterwards. Chathuri had felt anxious when travelling back and forth attending inquiries. In fact, with investigations ongoing even 20 years later, Chathuri who had continued to pursue cases against the perpetrators, was attacked by two men on a motorcycle while walking home and her bag of original court documents seized. Bimal described regular harassment by the local police after he and his father lodged complaints. He would often be bullied and threatened by police officers when he was simply walking or riding his bike on public roads. They would stop him, inspect his national identity card and question him on his movements.

The retaliatory violence, surveillance and threat of violence persisted for as long as the formal complaints were active. There was a sense of foreboding that incorporated itself into the life routines of these victims. Lawyers and human rights defenders we interviewed described retaliation as a foremost concern of survivors. One human rights activist stated that it was impossible for a survivor of torture to continue to reside in their locality or home if they pursue legal action.[9] His organisation, therefore, as a matter of routine, considered providing assistance for relocation, often to areas very far from the original homes of the victim. Consequently, he says survivors need to find new employment and start their lives all over again. He recalled an

[8] Interview Nos. 1, 2, 3, 4, 5, 6, 12.

[9] Interview No. 12.

instance of a survivor's house being burnt and another who after relocation, returned to his original home after six months only to be shot dead. Responding to retaliation has led to displacement, loss of livelihood, loss of social networks and disrupted education of children for victim families.

The multitude of threats experienced by survivors who stand up to, challenge or take formal action against acts of torture contribute to a social consciousness ingrained with strong sentiments of fear and hopelessness.

Why then do victims choose to complain and what comes of lodging complaints? Civil society actors viewed torture and ill treatment as experienced significantly more widely than reported,[10] a trend that has been observed (Jensen, Kelly, Sharma, Koch Anderson & Christiansen 2017). Those who did not report their experiences were described as poor or having limited social acceptance or political influence. These survivors were believed to be held back by feelings of shame and fear associated with speaking their experience particularly for reasons of drawing further attention to themselves or experiencing social stigma.[11] There was also a lack of trust or faith in the formal justice system. In this context, the decision to lodge a formal complaint frames itself as a risky one and we explore the 'why' and' how' of the decision to complain to shed light on the practical assessments and strategies of these victims.

The decision to lodge formal complaints

To understand the motivations in engaging formal complaint mechanisms, the narratives of the cases provided valuable insight. Lodging of formal complaints was often motivated by very immediate needs of securing physical safety. In the two cases which took many years before courts, motivations to continue with the case against perpetrators also changed over time.

In Chathuri's case, the visible torture and ill treatment of her brother in the days after he had been taken into custody prompted complaints to the NHRC. The purpose of the complaint was to stop the torture. However, Chathuri continued to pursue criminal and civil cases against the perpetrators of torture for over 20 years (at the time of interview). For herself, she firmly believed that it was necessary to hold the perpetrators accountable. She also spoke of wanting to prevent the experience of powerlessness and continued violence for others and of wanting to change the system, which also fuels her work as human rights defender. In Amal and Bimal's case, Amal spoke of maintaining, and perhaps even regaining, dignity and of pursuing justice as the reasons for pursuing formal complaints. His reasons appeared directly connected

[10] Finding of scoping workshop in October 2019 and Key informant interview Nos. 1, 2, 5, 10.

[11] Finding of scoping workshop in October 2019.

to the fabricated criminal charges levelled against them and having to restore their honour and standing in the community. Securing this dignity appeared to also be directly linked to their ability to move around and live somewhat free from police intimidation. It was important to Amal not to show fear and lodging a formal complaint appeared to be one way of not showing fear. With Dinesh, the young police officer, formal complaints were initially motivated by the need to ensure his safety while he was in remand custody. Formal complaints were a means of officially recording his experience so that the family could contest the fabricated charges made against him, contest the social stigma associated with having such allegations made and also contest the decision to suspend him from service and stop payment of his salary.

Victim experiences of complaint mechanisms

In this section we look closely at the experiences of survivors and their families when they interacted and attempted to interact with complaint mechanisms.

Complaints to the National Human Rights Commission

Even though torture is often unreported, we found the number of complaints reported to the National Human Rights Commission of Sri Lanka (NHRC) to be considerable. The number of complaints received in the period 2010 to 2018, which were the eight years immediately after end of the war in 2009, was 4,365.[12] This translates to approximately three complaints of torture every two days. There is a stark difference between the complaints recorded by this independent NHRC and the complaints formally investigated and prosecuted. A rough comparison leads us to believe that less than 99 per cent of the complaints received were formally investigated and prosecuted, and less than 0.2 per cent resulted in convictions.[13] Read in the context of NHRC recommendations not being enforceable and that inquiries are not always completed, we wondered what motivates survivors to lodge complaints.

In her experience as a human rights defender, Chathuri has used the NHRC complaint mechanism to intervene and stop ongoing torture within police stations. She said that immediately upon receiving a complaint of ongoing torture, the NHRC called the relevant police station and inquired about the victim and

[12] Information was extracted from the Human Rights Commission of Sri Lanka (HRCSL) report to the UN Committee Against Torture in 2016 https://www.hrcsl.lk/wp-content/uploads/2020/01/Report-to-CAT-Committee-.pdf and statistics of complaints received on the HRCSL website.

[13] These figures compare information provided by the Attorney General's Office on prosecutions in 26 years with the number of complaints received in 8 years by the Human Rights Commission. It must be noted that the percentage of convictions must therefore in fact be much lower than 0.2 per cent.

demand that any ill treatment be stopped. In the other two cases, the experiences of torture are contained within the 24 hours between the arrest and production of the victim before a judge. Complaints were lodged thereafter at the NHRC on the advice of a human rights organisation. Formal complaints are one of the main ways in which human rights organisations assist victims of torture. Complaints to the NHRC involve the least formality as complaints can be made by phone, facsimile, email and submitting a brief complaint form to the regional office of the NHRC closest to the victim. There are no costs involved. The fact that a complaint has no serious or material consequences for the perpetrator means the risk of retaliation is likely to be low. Complaints to the NHRC also enable survivors to overcome the 30-day time bar that otherwise shuts out survivors from filing a fundamental rights case in the Supreme Court. It has also enabled, as demonstrated in Dinesh's case, victims to secure medical examinations and also access medico-legal reports, which may otherwise be denied to them. It is notable that this demonstrable confidence across the island in lodging complaints with the NHRCSL plummets to zero in the two heavily conflict-affected Northern and Eastern, where militarised social relations is intensely visible and persistent despite the end of the war over a decade earlier.

Criminal proceedings against perpetrators of torture

In our three cases, we note that the perpetrators were all locally stationed police officers. In Bimal's and Dinesh's cases, the survivors did not even attempt to lodge complaints with the local police station. Chathuri had attempted to record a complaint at the local police station but had been turned away. Thereafter, Chathuri lodged a complaint directly with the Inspector General of Police, the head of the national police force. No action was taken by the police department in response to the reporting of the crime that her brother was tortured. It was only much later, after Chathuri had several complaints and drawn much publicity to the issue, that the Attorney General filed indictments (criminal charges) in terms of the CAT Act against the perpetrators. This criminal case has taken close to 20 years without that trial being completed. Chathuri attends all court dates, numerous reasons including the chief suspect absconding from appearing before court, court hearings being taken up every three or four months and delays in taking the evidence of witnesses has contributed to the delay. In Bimal's case, no criminal proceedings were instituted against the perpetrators even after the Supreme Court made a finding that identified police officers had been responsible for the torture. In Dinesh's case, no criminal proceedings were initiated against the perpetrators even several months after the incident had been brought to the attention of all authorities and a medical report reported injuries consistent with torture.

The criminal justice system that recognises torture as a serious offence did not assist or provide protection to these survivors and their families. In 26 years of having a criminal law specific to torture, there have been only 115 cases prosecuted, 47 of which have been concluded, with a mere nine resulting in convictions (Communication under Right to Information Act from Attorney General to Law and Society Trust 2018). It is interesting to note that of the nine convictions, six are under appeal at the time of writing. Criminal cases in Sri Lanka are affected generally by laws delays,[14] low conviction rates,[15] alienating experiences for survivors and inadequate protections for victims and witnesses. This is compounded by the context of impunity associated with protecting state officials accused of human rights violations, which is well documented (International Commission of Jurists 2012). Even as we write, it is reported that the Ministry of Public Security is contemplating legal measures 'aimed at saving policemen from cases of alleged violation of fundamental rights made by the public against them', which will dismiss departmental inquiries against police officers if not proven within six months (Jayasekera & Balasuriya 2021).

Disciplinary action against perpetrators

In all three cases, complaints were lodged with the National Police Commission (NPC). Regardless of these complaints, no investigation or disciplinary action was taken by the NPC to remove the perpetrator police officers or suspend their services. Lawyers and human rights activists corroborated this experience by saying that they often did not receive favourable responses to complaints to the NPC. A human rights activist related the rare experience of a favourable decision by the NPC, which had resulted in the police officer being transferred. However, the same police officer had secured a cancellation of the transfer order and returned to the police station close to the survivor, with the assistance of a politician. While on paper the NPC identifies as an independent mechanism, it is constituted largely of retired police officers.[16] Its investigations are also conducted by in-service police

[14] A serious criminal case takes on average 17 years as stated in the 'Recommendations Pertaining to the Expeditious and Efficient Administration of Criminal Justice by the Parliamentary Sectoral Oversight Committee on Legal Affairs (Anti Corruption) and Media' dated 20 September 2017. As of December 2020, Sri Lanka had 4620 unresolved cases pending before the courts for more than 20 years as reported in the Newswire—shorturl.at/dyL58

[15] The rate for grave crimes was 13.8 per cent in 2019, 16.5 per cent in 2018 and 18.6 per cent in 2017. The rates were calculated based on Plaint filed and ending in conviction figures disclosed by the Sri Lanka Police in the Disposal of Grave Crimes Abstract for the years 2019, 2018 and 2017. The assumption is made that the number of cases said to be 'Ending in conviction' directly relate to cases represented as 'Plaint filed'.

[16] Interview No. 4.

officers. The NPC's decisions are also only recommendations and require the Inspector General of Police to make relevant orders to implement these. All these characteristics severely undermine the independence of the NPC. Therefore, it is unsurprising that the NPC does not appear to always exercise its powers of investigation, and where it does its decision can be undermined by political and other influence.

National Authority for Protection of Victims and Witnesses

As the National Authority for the Protection of Victims of Crime and Witnesses (NAPVCW) only came into being in 2015, of the victims in the three cases discussed, it was only accessible to Dinesh who experienced torture in 2020. No application was made to the authority in his case. There is little awareness or confidence in the NAPVCW.[17] Lawyers mentioned somewhat half-heartedly, that they had communicated with the NAPVCW, without much expectation or any success.[18] Lodging a complaint to the NAPVCW was felt likely to attract the risk of criminal charges being framed against clients and attract the possibility of incarceration. Activists and medical professionals interviewed for this study had no experience engaging with the NAPVCW. One interviewee revealed knowledge of political influence over the composition of the Authority, stating that all members of the NAPVCW were unexpectedly compelled by the government to resign on one occasion, which called into question the independence of the institution.

There is not much publicly available information on the protection work of the NAPVCW. In 2017, the Authority reports handling 57 applications of which it had responded to nine requests for protection. The responses as reported were 'providing protection' in one case, and the other cases were closed for reasons including the complainant failing to communicate, failing to cooperate, failing to disclose a threat, police investigations revealing no threat, complainant had requested the case be closed and the NAPVCW had determined the complainant to be an offender. These reasons are alarming and suggest there is little commitment to mobilising protection. The emphasis on the burden of the complainant to pursue protection and be a 'good' victim, and the dependence on the police to investigate applications undermines the effectiveness of and public confidence in the NAPVCW. Without properly funded specific protection services including creation of safe houses and provision of transport and communication facilities, there is no meaningful victim and witness protection machinery in place.

[17] Interviews Nos. 1, 2, 3, 4.

[18] Interview Nos. 1, 2, 3, 4.

Legal Aid Commission

Of the three cases, only Chathuri accessed the Legal Aid Commission of Sri Lanka. She was given compassionate and effective legal advice by a legal officer at the Commission. It was there that she learnt about fundamental rights applications to the Supreme Court. The Commission took up Chathuri's brother's case and found a senior lawyer who was willing to appear pro bono. Chathuri stated that without this timely assistance, she would never have been able to conceive of any legal action due to the costs involved. In Chathuri's life, this was a turning point. However, 20 years later, Chathuri does not find the Commission as helpful to other victims as it was to her. She reflects, more generally, on the fact that not all lawyers are 'good' and says she has experienced lawyers being influenced by their close relationship to police officers, and that she had come across several cases where lawyers had advised survivors facing fabricated criminal charges to plead guilty to the charges.

Judicial medical officers

In all three cases, medical professionals failed the victims. In Nimal's case, a judicial medical officer falsified a medical report to state that Nimal was not subjected to torture. Chathuri complained against that JMO and eventually the medical association revoked his license to practice. In Amal's case, soon after his arrest, when he was produced before a doctor, the doctor attempted to falsely record that Amal was in a state of intoxication. Amal's threat to report the doctor to the Medical Council prevented a false report against him. In Dinesh's case, he was not presented to a JMO and instead taken to a doctor treating outpatients at a hospital. The doctor conversed with the police, then failed to properly examine Dinesh, and when Dinesh informed him of his treatment and injuries the doctor dismissed him saying that the injuries were not severe enough to be recorded. JMOs and medical professionals are not obligated to flag complaints of torture documented by them. However, their reports are a crucial part of the evidence if survivors choose to pursue a legal case against the perpetrators. A JMO reflected on the tactics of police officers of threatening survivors and also presenting survivors to a JMO during the night knowing that only a junior medical officer would be on duty.[19] An activist explained that only some JMOs were found to be supportive of victims.[20]

[19] Interview No. 14.

[20] Interview No. 06.

Protection from human rights organisations and activists

In the three cases, non-governmental organisations provided some limited support. Chathuri was assisted mainly with introductions to 'good' lawyers for her cases, some of whom appeared *pro bono*. Apart from the *pro bono* legal representation, she has had to personally financially support all the cases on behalf of her brother. Amal and Bimal were also assisted to secure 'good' lawyers to conduct their fundamental rights case. However, Amal and Bimal had to pay for the legal costs involved and sold the engine of their fishing boat to support these costs. Dinesh was also assisted by an activist to identify lawyers who would take on his case. His family was uncertain as to whether they would be able to bear the legal costs of a fundamental rights case, and a human rights organisation agreed to support it. In Dinesh's case, the human rights organisation also publicised Dinesh's case by including Dinesh's mother at a press conference on torture. No other assistance or support was provided by non-state individuals or organisations in these cases.

Chathuri stated that human rights organisations do not support survivors to defend themselves against fabricated criminal charges. There is some support for filing fundamental rights cases which is also in terms of supporting victims to attend court is minimal as the case is based entirely on affidavit evidence and written documents. As criminal and civil cases take a very long time, human rights organisations do not undertake these cases as their funding is limited and cannot be guaranteed for more than a year. Indeed, support to defend against fabricated charges do not seem to be viewed by human rights organisations as a vital part of protecting torture survivors.

Chathuri's relationships with survivors in some instances spans over a decade, and she describes the fact that victims experience a continuum of violence over this time. Amal recollects that they had experienced frustration at long delays in their case and that without constant support, he may have given up. There are serious constraints in the provision of immediate protection and also sustained and long-term support to victims by non-governmental organisations.

This section recounts the frustrating experiences of victim engagement with complaint mechanisms. In terms of protection, apart from the first calls by the NHRC to stop ongoing torture often accessed on the advice of a human rights activist, there were no experiences of complaints systems, governmental and non-governmental, providing adequate protection and support. State mechanisms failed these survivors, and each site of failure was also a site of threat and risk. We also observe no systematic assistance from the state and non-governmental institutions provided for the medical, psycho-social and economic needs of these survivors. Therefore, the protection gap resembles less of a gap and more a barren wasteland with scarcely any signs of protection.

At this juncture we inquire into how, in what forms and where protection is found by survivors. By doing so, we privilege the lived realities in which protection is sought and shed understanding on what is realistically and possibly materially significant to survivors of torture and their families in a country such as Sri Lanka.

What do survivors do to protect themselves?

In the narratives of the three cases of torture we find that protection was negotiated and secured within the realm of personal responsibility, in the acts, omissions, decisions and strategies deployed by survivors and their supporters. We recount below two strategies that were deployed, a language of resistance, fighting back and aggression and mobilising social connections.

Protection as demeanour, behaviour and language of resistance or aggression

Amal's strong personality was a crucial element of their response to the torture and continued violence he and his son experienced. He challenged the police officers found to be assaulting his son and later pursued a case against the perpetrators who had fabricated charges of drunk and disorderly behaviour against them. Remembering the threats made by police officers after his formal complaints, Amal said '*I made it very clear to the police that if they wanted to silence me, they would need to kill me. There was no other way. I would not be silent and would not back down.*' Amal said that if the police filed cases against them, they should file cases against the police too. '*We should give evidence and not be scared*', he said. Amal advised Bimal that he had to be firm if the police tried to harass him and said, '*if you show weakness or that you are scared, then they try to overpower you and control you.*' He refused to be subjugated. After the fundamental rights application was filed against the perpetrators, Amal and his son were approached by the officer in charge of the police station with an offer to withdraw the fabricated criminal proceedings if Amal agreed to withdraw the case against the police. Amal recognised that the tables had turned in terms of the power he now held as a result of the case, which was evident to him in the way that the Officer in Charge had referred to him as 'Aiyya' or elder brother.

When Amal and his son were acquitted of the false criminal charges against them, Amal said they spoke to local journalists and publicised the fact that the police had framed them. Amal felt that the routine threats by the police stopped after the publicity. Amal remarked that he and his family are now known to the local police officers. It seemed that this was another measure of protection.

Chathuri was relentless in her advocacy for her brother. She argued with the police about not admitting him to hospital for his injuries. She shouted outside the police station and threatened to complain to the NHRC if her brother was not produced before a court immediately. During one of the numerous inquiries, Chathuri challenged a police officer at the NPC for speak disparagingly of her to other police officers and reproached him for spending his time discrediting her when he should be inquiring into the actions of the perpetrator police officers. Chathuri remembers that the women police officers who were outside were shocked to see her speak to their superior that way, because no one ever spoke to 'Sir' like that. While they were quick to label her 'mad' for her actions, Chathuri claims she would have to have been mad not to speak out in that instance. Chathuri believed it was important to break the culture where government officials, police and public officials are worshipped when they are paid with taxpayer money—she asks, if people like her do not speak up, then who will?

Chathuri was the force of resistance behind her family. Over 20 years, Chathuri has pursued various complaints and five legal cases connected to her brother's killing. Her tenacity has had a cost. The toll of long and tiring days spent at various institutions, advocating for her brother's cases to be attended to and the financial costs involved were too much for the family. In later years, also as success appeared elusive, even her family members discouraged her from pursuing the cases.

Dinesh's mother, Sunila mounted a tremendous effort to respond to his torture. She exhibited great outrage at how her son was treated. She accompanied her son to all his medical examinations, inquiries he was required to attend and court appearances. She complained to all authorities, including the President of the country. She worried that the pistol that the police falsely accused her son of stealing would turn up in a crime that caused harm to someone and that too would be pinned on her son. She conducted her own inquiries and visited soothsayers and temples, to collect information and prepare for the threat of further false charges. Sunila said it was important to speak firmly with the authorities, she believed the government of the day owed her an explanation for her son's treatment as she had voted for them. She advised her son to fight back if the torturers were to return to harass him. She reflected that she regrets not bringing up sons to be more tough and aggressive.

Protection as support from social connections

The three stories of torture made several references to connections with others who helped individuals after the incidents of torture and in engaging formal complaints mechanisms. It was interesting to observe that in each of the stories that the protector personalities mobilised their social capital.

In Amal's case, his political activism meant he had a reputation and many contacts in his village. As such, people from his community came forward to support him in his case against the police. Amal feels that he had earned their trust. Amal's brother-in-law was a lawyer who was acquainted through youth club activities with a community activist who helped them file their fundamental rights case. The long delays in legal proceedings were very discouraging and Amal says that without the support of and accompaniment by the community activist it would have been difficult to maintain their interest in the case.

In Chathuri's case, her family had been very helpful to neighbours and was well loved. On the day of her brother's funeral many police officers were present observing the house. Despite this, and the fact that her brother died in police custody and was known as an army deserter, the village rallied round her family during the funeral by attending the funeral in large numbers and the younger men helping cook food for those attending the funeral. Chathuri recalls how the bakery owner provided bread and tea for the crowds gathering at the funeral. Later, he would provide his three-wheeler free of charge for her to attend court, and a van to transport other witnesses, at no cost. Chathuri was active in youth groups and those connections helped her to understand and navigate the court process. The villagers expressed concern for Chathuri's safety and would accompany her from the bus stand to her home at night.

In Dinesh's case, his mother Sunila pursued all possible social connections to protect Dinesh. Dinesh's father was acquainted with a judge in the course of his employment and Sunila approached the judge to seek advice and also obtain a character certificate for Dinesh. Sunila telephoned many high-level policer officers. Once she even threatened to take poison if any harm were to come to Dinesh. Dinesh received advice and assistance from a community activist in their neighbourhood to lodge complaints, to contact a lawyer and secure legal support from a human rights organisation.

In stepping back and looking at the two strategies discussed, it is evident that they are contingent on many variables that victims cannot often control and are not sustainable or certain of success.

Conclusion

It is in a context of socio-political violence and a silencing of the experiences of torture that survivors negotiate their experiences of torture and seek protection, if at all.

In the case of Nimal, Bimal and Dinesh, their families accessed complaint mechanisms mainly as urgent reactive measures in the moment of torture or under threat of incarceration. It was towards the specific end of stopping the ongoing torture, pushing back against social stigma associated with false criminal charges, and securing release from prison. It is important to recognise these ends as legitimate forms of protection.

The decision by the three families to engage the formal legal framework exhibits some degree of entitlement and expectation that the legal system will work as advertised. Perhaps there was not much confidence but there was certainly some hope. In each case, the individuals had links to state or social power—Nimal's family's connection to the military, Bimal's father's political reputation, and Dinesh's family connection to the police. In all cases the connections were at a low level and each expressed in their own way that they did not have the connections that they perceived were necessary to address their situations. There is a recognition of the 'way things work'. This is why Chathuri and Amal insist that the system needs to change and also perhaps why Sunila feels entitled to better treatment by the government she helped elect. Chathuri reflected 'I didn't know the weight of this violence till it happened to me, to my family. My brother's killing brought to light how the law, law enforcement and the officials in these institutions worked. It is a very different standard of service and justice afforded to upper-class and working-class people.'

The three cases also amply demonstrate that complaints, particularly within the justice system, bear heavy personal and financial costs. There exists a paradox of protection, whereby engaging complaint mechanisms as part of the protection strategy resulted in a new pathway of threats. Survivors find themselves facing new threats by old and new perpetrators. Interestingly, making complaints is what non-governmental organisations mainly assist survivors to do. However, complaints opened up a vortex of counter claims whereby the case becomes a threat to the perpetrators and the perpetrators mobilise resources at their disposal to stave off negative effects on them—often increasing the threats to survivors' protection.

Where survivors secured some protection, it appeared to be contingent on their own existing social relationships, social acceptability and having some means or resources to negotiate the justice system. Overall, protection for these survivors meant mobilising personal resilience, exercising aggression and sustaining a resistance to the many continued measures that sought to delegitimise their claims and deny them protection. It is also striking that the protection burden was often both borne and left to women in the victim families. The case studies speak to powerful use of emotion and drawing on depths of strength and endurance by the female protective figures.

State responsibility to protect has failed given the ways in which institutions deny and hinder survivors seeking protection and redress. The state's relationship with the citizen reflects more fundamentally political control deploying notions of security, order and social organising disconnected from citizen experience. It is why addressing torture necessarily attracts a wide range of recommendations for political change, independence of institutions, addressing systemic issue of laws delays and introducing strong protection frameworks. Practically, however, if anything worked it seemed tethered to care, concern and commitment of individuals within and outside the formal system. In a landscape of a trust deficit in social networks and institutions, which

leads to victims and their families being alone and exposed, interventions on protection must go beyond calling for state responsibility. Interventions ought to recognise and respond to real and practical protection needs of survivors, especially immediate needs, and invest and support social networks of protection and care for survivors of torture.

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The protection of sub-Saharan migrants in Tunisia: community responses and institutional questioning

Adnen El Ghali

Abstract: This article explores the kind of violence endured by migrants in Tunisia, the kinds of formal protective mechanisms exist and the ways migrants themselves attempt to remain safe. The article reveals significant gaps in the formal protective frameworks and their implementation. Migrants are trapped in a state of precariousness and vulnerability that exposes them to violence. Such violence comprises ordinary everyday forms of violence as well as state violence and neglect, often the result of the EU's externalisation of border management to Tunisia. Consequently, migrants are caught in a protective limbo with few rights and opportunities and must compete with the Tunisian population, which is also becoming increasingly precarious. To address this lack of protection, migrants have developed protective skills and resorted to a set of communal protective responses and strategies that comprise national, religious, territorial and virtual communities of protection. Though effective, these forms of protection entail the risk of increased and potentially dangerous visibility leading to what we have called the invisibility paradox and generating the migrant stigma.

Keywords: Migration, protection skills, community responses, migrant stigma, invisibility paradox.

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Introduction

Victim of a robbery gone wrong, Falikou Coulibaly, president of the Association of Ivorians in Tunisia, lost his life on the night of Sunday, 23 December 2019. Coulibaly was the father of two children and a pillar of the sub-Saharan community of Soukra, a neighbourhood in the northern suburbs of Tunis. The crime that cost him his life sheds light on the violence to which sub-Saharan migrants are exposed in Tunisia, as well as the vulnerability that affects them and the precariousness in which they live (Crépeau 2013; Veron 2020). Following the news of his death, sadness and indignation drove hundreds of protesters to march the six miles from the hospital where Coulibaly died to the Ivory Coast Embassy in Tunis. This, the first protest of its kind, was repeated the next day on the stairs of the Municipal Theatre of Tunis on Bourguiba Avenue, in the very centre of Tunis. While the Minister in charge of Relations of Constitutional Bodies, Civil Society and Human Rights Mohamed Fadhel Mahfoudh expressed doubts concerning the racist motive, he gave his assurance that the government would undertake an investigation. The protest was the first of a series of public protests demonstrating the sub-Saharan community's fears and calling for protection. It revealed the existence of a large community of migrants in Tunisia, who until then had intentionally remained politically invisible. The protest also drew attention to the institutionalised blindness to their presence. The violence against the migrants brought the community and the lack of institutional attention into full view. Consequently, this article asks, 'What kinds of violence do migrants experience, both state and non-state? What kinds of protection does the state extend to them? And how do they attempt to protect themselves and stay safe?'

These questions require closer conceptualisation of the protection and of the potential risks that make protection necessary. As the article explores the context of migrants, humanitarian protection may bring to mind something akin to what is provided by the United Nations High Commissioner for Refugees (UNHCR). However, while some migrants in Tunisia may fulfil the requirements for humanitarian protection, they rarely apply for it. The UNHCR has very little presence, except for one camp in the southern part of the country. Migrants find ways to enter legally and then exceed their stay. Some enter illegally and attempt to find ways to survive and, not least, move on to Europe and elsewhere. However, as the EU has tightened and externalised its border control (Lemberg-Pedersen 2013), increasing numbers of migrants are finding themselves in a semi-permanent state in Tunisia, in need of a different kind of protection against the violence of both state and non-state actors. As part of Tunisia's recent transition from dictatorial to democratic rule, the new democratic state is a signatory to a range of human rights instruments and frameworks (Anders and Zenker 2014; Ticktin 2006). This includes ratifying the Convention against Torture, Cruel, Inhuman and Degrading Treatment and Punishment. However, as Kelly and Jensen

(this issue) argue in the Introduction to this volume, the formal protective frameworks must be studied critically. The means by which and extent to which the frameworks work for specific groups and how the groups themselves try to stay safe in the contexts of both state and non-state violence should also be explored. As shown in this article, it is fair to question whether the formal frameworks are effective in dealing with quotidian violence against migrants in Tunisia. Indeed, as the article shows, migrants have begun to engage in a range of innovative as well as counter-productive protection strategies, most of which are communitarian in nature.

We based the study primarily in the northern part of Tunis, which has attracted sizeable migrant populations in various stages of transit. Some have established themselves in more permanent manners while others still aspire to migrate onwards. The area, which includes the municipalities of Soukra, Raoued and Bhar Lazrag, is also the part of the city that was home to the murdered Falikou Coulibaly. These peri-urban and rapidly expanding spaces attract migrants wishing to settle. They are therefore also spaces where issues concerning protection loom large. The data for the article comprise interviews and focus group interviews with migrants in the northern parts of the city supplemented by a number of interviews with state institutions and NGOs working within the fields of human rights and humanitarian protection mechanisms. Whereas the latter interviews highlight the existing frameworks as well as the gaps, the interviews with migrants allow us to explore what Kelly & Jensen (forthcoming) conceptualise as protection from below, that is, how potential victims of human rights violations navigate fields of insecurity (Nah 2020). Clearly, the pandemic and charged political situation in Tunisia following the presidential take-over[1] in July 2021 has made fieldwork and data collection difficult. However, working with the material revealed new trends in the migration, urban politics and protective strategies employed by migrants struggling to find ways to survive in the country. This task is not easy in a country that does not consider itself a migrant-receiving country but has been enticed to assume a central role in EU migration management, and in a society that is struggling with hard political, economic and social issues and dilemmas.

The discussion is presented in three sections. Immediately after these introductory remarks, the article explores the normative frameworks of protection against migration and torture set out by the Tunisian transition successive governments. The section illustrates that although Tunisia has indeed adopted many of the international frameworks, they have little or no impact, partly because they work on assumptions that make little sense in Tunisia. The second section, describes the violence against migrants in the emerging peri-urban areas to the north of Tunis. These areas are rapidly expanding, not solely due to an influx of sub-Saharan Africans. The emergence of

[1] On 25 July 2021, Kais Saied, the Tunisian Republic president elected in October 2019, dismissed the Government, dismissed the parliament and assumed executive authority.

these areas has reconfigured and transformed the urban dynamics of Tunis in important ways, introducing new forms of violence and challenging the state authorities on new fronts. The third section explores the different strategies that migrants employ to stay safe. We identify four scales of protection—national/racial, religious, territorial and virtual. As already mentioned, some of these are innovative and suggest new means of protection. Others are counter-productive, perpetuating violent urban politics. The article concludes by consolidating the insights on wider forms of protection.

The politics of protection in Tunisia

Following the 2011 revolution, which marked the fall of the regime of Zine El Abidine Ben Ali, president of Tunisia from 7 November 1987 to 14 January 2014, Tunisia embarked on a democratic transition that has been heralded as the only successful transition of the increasingly bleak Arab Spring. In 2014, a democratic constitution was passed, guaranteeing Tunisians a range of new rights. Parallel to, indeed often as a direct result of, the constitutional development, institutional reform was set in motion across the state apparatus (El-Issawi 2012; McCarthy 2019). As with other democratic transitions, the international community played a decisive and important role by providing legal and institutional support (Teitel 2003; Anders & Zenker 2014). This support was, however, conditional. Particularly the EU, the most important donor, made a series of demands related mainly to migration control and management as part of what is referred to as the externalisation of the EU border (Badalic 2019; Casas-Cortes Cobarrubias & Pickles 2015). In this way, the architecture and politics of migrant protection in Tunisia were animated by both legalistic understandings of human rights from the transitional democracy manuals and migration concerns. Important gaps emerged in the institutional and legal means of protection available to migrants. This is clearly reflected in two of the more important normative frameworks related to protection—anti-torture and anti-trafficking legislation—as they emerged after 2011.

The National Authority for the Prevention of Torture (INPT) was established by law in 2013 with three tasks: monitoring places of detention, collecting and disseminating documentation to advocate against torture, and collecting data, ensuring protection through the reception of complainants and the gathering of their testimonies. The Authority was established in response to the ratification of the Optional Protocol for the Convention Against Torture (OPCAT). The Authority became operational in March 2016 and began verifying prison conditions, accessing prisoners' files and meeting prisoners individually and in strict confidentiality to protect them from reprisals.

[2] All interviewees' names have been changed.

The establishment of the Authority and the passing of the anti-torture law have been major milestones. However, a number of problems beset the implementation. As Narjess,[2] employed by the Authority, asserts in an interview, contrary to the normative framework around the OPCAT, the Authority does not have the legal authority to demand an interview with a prison warden or guards. Furthermore, the Authority's organisational architecture allows for conflicts between a strictly legalistic versus a psychosocial approach that also attends to issues of vulnerable groups (LGBTQ+, women, migrants and children). The legalism of the lawyers frequently prevails, as testified by one magistrate working with torture cases. He asserts, 'The victim does not provide a definition of torture; that is the role of the law! And the definition is only the one provided by the law, and not by the victim'. The rigid local interpretation of the law also stipulates, against alternative readings of the Convention against Torture (Choudhury, Jensen & Kelly 2018), that the violation must be motivated in 'obtaining confessions and information'. This excludes violations that would otherwise be classified as torture. Finally, the Authority also limits its work to places of detention as per the OPCAT mandate. These issues, the very strict and legalistic implementation, the narrowing of the monitoring scope and the focus on places of detention—all legitimate limitations—de facto ensure that almost no migrants can avail themselves of the Authority's protection. To mitigate the gaps, several civil society organisations attend to broader issues related to torture that can also include migrants. Such organisations include the Tunisian Organisation Against Torture, Terre d'Asile, Red Crescent, Caritas, the Nebras Institute, and the Tunisian Association for Justice and Equality 'Damj'.

In addition to the gaps in torture protection, there is a lack of formal visibility and recognition of migrants in Tunisia, not least before 2011 (Cheikh & Chekir 2008). After 2012, the government developed a National Migration Strategy (NMS). This quite general document discusses 'the protection of the rights of immigrants, whatever their status and situation'. It also pays attention 'to the protection of the most vulnerable migrants, particularly through a gender-sensitive approach, as well as the informal work of immigrants' by referring to the Constitution. Finally, the policy recognises the right to political asylum (OTE 2017). The right to asylum was passed into law and a bill established the National Institute for Refugee Protection in 2018 (Bisiaux 2020). It was tasked with, for example, granting refugee status and access to education, health care and the labour market (Ben Achour 2018). However, as Vasja Badalic (2019) suggests, the state and the police often circumvent the right to apply for asylum through a range of policing strategies. These practices are anchored in the Tunisian migration policy which routinely condone, even perpetuate, the excesses, primarily through the service of externalising EU border control to complying North African states, including Tunisia.

Arguably, the most concerted effort to protect migrants related to the passing of anti-trafficking laws and the National Authority to Combat Trafficking in Persons. This body was created in 2016. Operational since February 2017, it aims to develop a national strategy to prevent and combat trafficking, as well as establishing coordinated mechanisms for the identification, care and protection of victims and the prosecution of perpetrators. According to Samia, a high-ranking Authority staff member interviewed for this article, it has limited resources and has focused on training lawyers and judges at the expense of access to potential victims. Samia explained that staff have tried to mitigate this and ensure 'protection at all levels: social protection, medical protection, judicial protection, social reintegration' through mobilising connections, for instance, in the Ministries of Social Affairs and Health. Furthermore, Amina, another staff Authority member added that the Authority has consolidated identification issues by linking the support network to one of identification spanning from judicial police officers to customs, including child protection delegates, labour inspectors, the police and magistrates. She went on to assert that the staff considers it an important task to inform 'the beneficiaries [...] to help them regularise their situation and obtain appropriate compensation for the harm they have suffered', which is extended by providing assistance in following up their cases with the public authorities, in coordination and collaboration with state institutions, civil society and international partners. A specific advisory board composed of migrants has been constituted inside the Authority to convey the concerns of the migrants to the Authority and integrate them into the decision-making mechanism. However, many of these initiatives are hampered by their reliance on project-based funding. As Neil, a volunteer at a local humanitarian association, asserts, 'Projects for migrants are programmed only for a certain period of time. Once they are over, there is nothing left for them'.

Although the protection of trafficked migrants is marked simultaneously by challenges and goodwill, the focus on human trafficking arguably illustrates how authorities and their European backers conceive of migration and protection. Human trafficking suggests that migration into Tunisia is less relevant than migration through Tunisia. Tunisia is perceived as a transitory country, not a destination. Furthermore, the focus on human trafficking aligns with one of the most important aspects of the EU externalisation of borders, namely the fight against human smugglers (Lucht 2015; Richter 2019; 2021). While no one—neither the EU nor the Tunisian authorities—will contemplate regularising migration, they can agree on fighting human smuggling. Furthermore, as Tunisia will not recognise the increasingly important migration into Tunisia, migrants remain in a legal and political limbo (Badalic 2019). This limbo is characterised by important forms of ambiguity where violence against migrants and detention go hand in hand with often generous forms of permissiveness. At the same time, EU funding to Tunisia is conditional on the country playing its part in stopping migrants reaching European soil. This is what the Tunisian Forum for Economic

and Social Rights (FTDES) condemns under the name of 'policies of non-hosting in Tunisia' (Bisiaux 2020). As Libya and Algeria are becoming increasingly violent and insecure, anecdotal evidence from our interviews suggests that migrants are congregating in Tunisia in a semi-permanent legal limbo. Therefore, ambiguous 'non-hosting' policies seem to be the only response of a Tunisian state constrained by the demands of its main partner and financial backer (Dini & Giusi 2020). In some ways, Tunisia is becoming a vast storage facility for migrants with few rights and no recognition. The Ouardia detention centre may be emblematic of this. As Neil suggests, 'the Ouardia centre is more of a hostel than anything else. There is no real provision for the needs and no information centre'. Ilyes, a staff member from the Tunisian section of an international humanitarian organisation, echoes Neil's sentiments, suggesting that what is anomalous about the centre is its limited accessibility for humanitarian organisations and even for the lawyers of the migrants who are 'housed' there, generally against their will. The migrants do not exist as legal entities. This is also the case for the thousands of other migrants across the country who are 'stranded' in Tunisia because of EU and Tunisian policies. Increasingly, they gravitate towards the northern areas of Tunis, which are developing into a hub for permanent migrants who exist in a legal limbo but with a physical presence that is becoming undeniable. Their increasing numbers and permanence are causing protection issues to shift and transform.

Migrants and urban violence

This section explores the kinds of violence that migrants experience from state and non-state actors, as well as the way in which violence relates to the transformation of urban space and politics. Migrants are increasingly seeking accommodation in specific districts in the Greater Tunis area to the north of the old centre. These areas are newly developed and still developing. It is fair to say that while migrants are attracted to this part of the city due to the availability of cheap, often illegal housing, they are also reconfiguring this urban space. First the migrants' habitation of this new periphery will be outlined and then their precarious social position and the state and non-state violence to which they are subjected and the violence that they sometimes perpetrate themselves will be explored. The protective strategies in which they engage can then be identified and situated.

The 'new' periphery

Since 1950, Tunis has developed from a rather small, provincial town of less than 500,000 inhabitants into a sprawling, cosmopolitan area with almost 2.5 million

inhabitants. The growth of Greater Tunis has affected the urban form, functions and city practices inherited from the period of the protectorate (1881–1956) and onwards. Successive waves of rural migrants ensured massive growth rates from the 1950s onwards (Stambouli 1996; Chabbi 2012). This marked the emergence of what Morched Chabbi refers to as 'neo-urban' migration (Chabbi 2012). While transitioning from a socialist to a liberal model of development in the early 1970s, the Tunisian State established clientelist housing programmes intended for the middle classes (Chabbi 2012). This reorientation of urban policies in the early 1980s (Miossec & Signoles 1984; Stambouli 1996), led to unprecedented urban expansion thanks to transport networks (the tramway in particular) to the north and west. While the European city centre was largely dedicated to the tertiary sector, business and central administration, the old Medina of Tunis remained a relatively poor, under-serviced neighbourhood with a resident population that has emerged mainly from the different successive waves of rural migration since 1957 (Chemlali *et al.* 2018).

While home ownership expanded for the middle classes, the working classes were confined to unregulated neighbourhoods that developed from the so-called '*gourbivilles*' (literally towns made of huts, referring to rural migrants) constructed with rudimentary materials by poor rural households freshly arrived in the city. The new city dwellers (auto)-constructed the unregulated neighbourhoods from the 1970s through a process of land grabbing carried out by 'illegal developers' for the working classes who had been excluded from the official market. Areas such as Douar Hicher and Ettadhamen came to epitomise these semi-legal but also fundamentally marginalised spaces (Lamloum & Ben Zina 2015). They were marked by high levels of poverty, violence, imprisonment and drug abuse, and were also branded as areas from where Islamist challenges had emerged. All this made these areas particularly liable to police and intelligence surveillance and intervention (Lahlou & Fahmi 2020).

In recent years, Greater Tunis has begun to expand northward, past the airport and the historical site of Carthage. Historically, these areas, Soukra, Bhar Lazrag and Raoued, constituted the urban-rural frontier, and have grown rapidly in recent decades. Soukra, for instance, almost doubled in size between 2000 and 2015. Among these peripheral areas, Raoued experienced the most rapid and dynamic development. For several decades, it attracted inhabitants from the hinterland because of the low cost of land in a coastal urban area largely dominated by illegal settlements. Between 2004 and 2014, Raoued's population growth exceeded 4 per cent, one of the highest national rates (Zari 2018) and in 2014, the municipality registered one of the highest concentrations of inhabitants (between 500 and 3000/km^2) in the country. A part of this growth relates to sub-Saharan migrants settling in the area. According to Jihene, a municipal agent interviewed for this article, 'there are more than 2,700 sub-Saharan nationals in Raoued, all ages included'. 'In most cases', he continues, 'they are families with a larger number of men. They live in working class neighbourhoods. Most of

them are illegal migrants. They have specific needs and they have difficulties adapting, especially in workplaces'. Many of the adjacent areas, such as Soukra, Dar Fadhal, and Bhar Lazrag, resemble Raoued and host a sizeable population of sub-Saharan migrants.

Sub-Saharan migrant's motivations for travel to Tunis vary significantly. Tunis appears first as a city of transit for migrants en route to Europe. However, opportunities and risks have turned the city into a permanent destination. Migrants are attracted by employment and education opportunities, but some are also motivated by protection from their war-torn countries. They use the right to legally enter the country in an attempt to secure stable employment. Having overstayed their visas, they drift towards the informal settlements in the north and are exposed to new sets of risks. The lack of residence permits leads to the violation of labour rights of refugees, asylum seekers and migrants, and increases the risks of facing both state and non-state abuse and violence.

Violence against migrants

Interviews with migrants, civil society organisations and municipal authorities allow for us to distinguish between three forms of violence. These comprise (i) localised, everyday forms of violence perpetrated by Tunisians, (ii) police abuse, and (iii) violence occurring in gang-like structures among migrants. First, this article explores the localised, everyday forms of violence.

Soukra, Bhar Lazrag and Raoued have been identified as particularly unsafe for migrants, with a multitude of protection abuses reported there (Aouani, Giraudet & van Moorsel 2020). Not least women are at risk, as sub-Saharan women are particularly exposed to sexual harassment, and limited accessibility to the labour market and regular housing. Charles, president of a sub-Saharan association in Raoued, mentions the case of migrant women abused by employers 'who refuse to pay their employees, and who go as far as committing offences, sexual abuse of women. He'd take her as a housemaid and would make advances to her; if the girl rejects them, he'd kick her out often without paying her'.

Irregular migrants, both men and women, who choose to live in these neighbourhoods for the affordable rental costs have no housing contracts and face abusive practices. The Covid-19 lockdowns, from March 2020, also dramatically impacted on the migrant population and increased their vulnerability. For instance, due to financial constraints from lack of employment and support networks, these individuals gave up safety and comfort for cheaper rent in a less safe area in overcrowded shared flats. The vulnerability and precariousness have caused deep frustration, exacerbated by the legal and administrative void in which migrants find themselves. Not having a residence permit means being unable to travel, unable to receive public healthcare and

unable to defend oneself against dishonest employers (Planes-Boissac 2010). Neil, the volunteer mentioned above, considers the single mothers as the most vulnerable category: 'a woman with a baby is sometimes denied rent in a residential area. Some landlords take advantage of this vulnerability and demand housework, apart from the rent'.

However, ethnicity and nationality also animate these risks and the presence of 'the other' generates ethnic tensions at a local level (Boubakri & Mazzella 2005). This has led to increasing hostility from the local Tunisian population. Ilyes, concludes regretfully about Tunisian reactions locally, 'The migrants let it go once, twice, and then when the neighbourhood is entirely populated by sub-Saharans and Ivorians, they resort to violence'. In July 2021, violent clashes broke out in Raoued between a community of sub-Saharan migrants and Tunisian men. The conflict was caused by the armed robbery of an elderly Tunisian man, presumably by a migrant. This incident came as a response to a series of clashes between migrants and young Tunisian men from the community, which migrants describe as 'part of daily life' and with no clear motivation, while, in the words of Umberto, a member of an Ivorian NGO in Raoued, 'we said no, enough is enough!'. For three days, violent clashes occurred between Tunisians and sub-Saharan migrants in Raoued, and particularly the popular district of Aichoucha.

The police, the second category of violence explored in this section, intervened in the conflicts and, assisted by municipal officials, became the migrants' preferred interlocutor on matters of violence. Gaston, a member of an association of Ivorian migrants, insisted for instance, 'when it is impossible to come to a gentleman's agreement in a fight between a Tunisian and a sub-Saharan, the police are the preferred interlocutor'. According to Umberto, the support provided by the police included real assistance, such as identifying the perpetrators. This is also confirmed by Bobo, spokesperson for a migrant political movement: 'To be honest, if we face a problem, we bypass these [municipal, organisational] structures and go directly to the police. We trust the police, who have been responsive, more than those different structures and their administrations that have been so slow'. In interesting ways, this resonates with experiences from South Africa where the police became the most important protector of migrants, in some cases against xenophobic violence (Hornberger 2008). However, as was also the case in South Africa and elsewhere, police often constitute the most serious risk to migrants, as, for instance, documented by Vadja Badalic (2019). For most migrants, security forces are part of the problem. According to Norbert, a sub-Saharan refugee and community worker, the police are the main source of obstacles in daily life, 'when a sub-Saharan is assaulted, the officers do not even take a statement'. Norbert also endured corruption while travelling with friends in the coastal cities of Sousse and Hammamet. After being asked to show their ID cards, he and his friends were requested to give 30 dinars each for permission to circulate freely. In

Hammamet, that was followed by a more ambiguous request from a police officer: 'What would you do for me?' While corruption and extortion do not necessarily lead to physical violence, the success of extortion practices is based on potential violence, as Jensen & Andersen (2017) argue. Fear of corruption and police abuse also discourages migrants from seeking police assistance or leads them to drop their charges or withdraw their statements at the last minute.

The migrants also seem to be hampered by their inability to understand Arabic, and find it hard to make themselves understood in French at police stations. Arabic is also the only administrative language, which puts more constraints on the sub-Saharans. The latter are indeed unable to read and countersign the reports presented to them, as attested by Norbert: 'They wrote documents in Arabic that they wanted us to sign'. But it is legally and practically impossible for police offices to produce such documents in French. The language barrier is thus at play and further reduces the status of these 'invisible' inhabitants who are asked for a residence permit to register complaints. These remarks suggest that the role of the police is entirely ambiguous. In some cases, they constitute the most important ally in dealing with violence. In other cases, the administrative and legal void renders migrants vulnerable. Finally, extortion and corruption are based on potential police violence and the threat of deportation. Indeed, while our interviews do not reveal direct police violence, Badalic (2019) has documented that this does occur regularly.

Finally, groups of migrants, organised in criminal bands, constitute an increasing problem for ordinary migrants. According to Ilyes, the staff member from the Tunisian section of an international humanitarian organisation mentioned above, 'mafias have formed on both sides. There are mafias among the sub-Saharans themselves. Smugglers, drug traffickers, etc. They used to operate only within the communities, but now tend to go beyond this framework to attack Tunisians. [...] There are groups that have formed solely in response to the feeling of rejection'. Raoued was formerly perceived as peaceful by migrants, however, the security situation deteriorated in 2020 due to the Covid-19 pandemic and the decline of the living conditions of the vulnerable Tunisians and migrants in the locality. Norbert, a migrant himself, condemns the misdeeds of an armed band of migrants that 'acts here with impunity'. He continues, 'They chiefly target the sub-Saharan community here in Raoued. But they have started to attack the Tunisians, and this is where the danger lies'. Indeed in Bhar Lazrag, one organised crime group has a name, the 'Black Brigade', and is rampant in the neighbourhoods occupied by sub-Saharans, where it engages in racketeering, robberies and knife attacks on the population, whether Tunisian or sub-Saharan. Norbert asserts that the gang was originally composed of sub-Saharans but now includes some Tunisian members (Aouani, Giraudet & van Moorsel 2020). 'They are everywhere in Tunisia. All over the country. It is a brigade formed by sub-Saharans; there are even Tunisians; and this brigade provides security, so they say; but actually,

they are bandits: they assault, they rape, they do evil things'. Norbert denounces the deeds of this brigade in Raoued, which has not been spared. Drug-dealing and pimping seem to be the main activities of the Black Brigade, which has spread its influence throughout the country. The emergence of such criminal groups, engaged in protection rackets, constitutes an increasingly serious risk for migrants, both because the groups target and prey on migrants, but also, as Norbert's comments suggest, because they attract the hostility and attention of local Tunisians and the police.

Scales of protection

This section examines the various protection mechanisms brought to light through the study. These mechanisms are part of the community's response to the various forms of violence its members experience, and aim to address the absence and inadequacy of the institutional mechanisms put in place. While they are difficult to separate in everyday life, a heuristic distinction is made between four different scales of protection: the West-African/national, the religious, the territorial and the virtual.

The 'African' family: solidarity, identities and exile

Sub-Saharan Africa comprises a group of countries and a multi-ethnic constellation with borders that are somewhat in accordance with the administrative divisions made during their respective accesses to independence (N'Goulakia 2015). It is more of a geographical expression than a real political entity. Nevertheless, our interviews and literature (e.g. Richter 2019) suggest that migration played a part in creating a distinctive extra-territorial identity that brings together various ethnicities and nationalities, some of which, in their native territories, would have been conflictual rather than exhibiting solidarity. Thus, French-speaking sub-Saharan Africans define themselves as 'brothers' who are members of the same 'family'. The territorial identity is arguably the result of the marginalisation and stigmatisation as 'same' that they have experienced during migration. The community is a safe system, a haven according to Neil, the volunteer mentioned above, who notes that 'once they are left to their own devices, migrants try to get closer to join their national community. Housing is rented in groups then each one makes its own way'. The protest that followed the murder of Falikou Coulibaly (Haddad 2018) can be considered the first time 'the family's' existence publicly materialised through a collective action.

Our study of the phenomenon of belonging and of these families of diaspora standing together reveals a mechanism of multi-scale solidarity. If the 'family' and the status of 'brother' and 'sister' are overall components, a finer breakdown reveals that there is a gradation in community levels and in respective solidarity. The second scale

is nationality, which make ethnic differences less salient even in the case of countries where civil wars and ethnic conflicts have taken place. These conflicts were passed on although they have somewhat abated, but in Tunis, a land of exile, ethnic and religious affiliations do not seem to remain latent. They are triggered when the potential limits of general community aid emerge, those of the 'Family', of the national communities, and of the country of origin. In this case, the fact of belonging to the same ethnic group or, in some cases, to the same village or territory of origin offers an additional 'guarantee' for receiving deeper and more binding help and assistance. Norbert sums up succinctly this multi-scale sub-Saharan-solidarity: 'In Tunisia, when I come across a black kin, I feel close to him, and soon would seek to know where he's from; if he's Ivorian, I would get closer to him, then I'd get to know what region he's from; if he's from the Midwest like me, that we make us even closer. Then I'd seek to know his ethnic group; if he's Bete like me, I'd feel even closer; I'd seek to know what town he's from, and if we happen to be from the same district, then I'd say he is a kin; that's how it works. Otherwise, the violence endured as well as the needs are quite the same in the different ethic groups'.

Religious protection: the church of poor or the invisible actor

Neglected by human rights organisations, the religious component is quite startling in that it is paradoxically absent from the migration discourse and conspicuously present in the lives of the migrants we met. Religious affiliations are structured around the main religions and movements: Sunni Islam, Catholic Christianity, Protestant Christianity, and Evangelical movements. The latter brings together members of churches and disparate prayer communities.

At the religious level, solidarity finds expression in spaces of worship, whether official or not. Very few of the migrant spaces of worship are formalised or recognised. Thus, Charles confirmed that there was a church at Raoued beach located in a garage, which he described as a place of meeting and community exchange where everyone can discuss their situations and seek advice and assistance from the community. Solidarity generates an intra-community protective field that operates through private prayer groups created for evangelical services, Facebook groups and announcement-specific WhatsApp groups. The latter also relay messages from important community members during moments of tension. Charles explains that through these WhatsApp groups, 'we call our brothers to ask them to stay calm, and to tell them that we are fighting to restore peace and that harbouring vengeful or aggressive thoughts is unnecessary'. The practices of solidarity and fund-raising enable needs to be covered and difficulties to be overcome. A task that shows a community wishing to integrate in a country of destination and demonstrates that cohabiting with the Tunisians will facilitate acceptance. These religious celebrations are supplemented by those of

the officially recognised churches in Tunisia, such as the Roman Catholic Church, the Reformed Church and the Anglican Church. Prayer groups and other informally constituted 'congregations' voluntarily operate in clandestine, underground fashion with respect to local authorities, but not necessarily with respect to other sub-Saharan migrant communities. The motives of churches and congregations were described as sometimes self-serving. Our study revealed the practice of 'migration blessings', a lucrative business consisting of selling collective prayers, or 'spiritual protection' to facilitate migration. This resembles the practices that Hans Lucht (2015) identifies in Ghana where considerable spiritual investment is made to make dangerous migration safe. Many of the practices of self-proclaimed evangelical pastors escape control and surveillance because of the absence of official clergy in the Reformed churches.

The fact that the informal religious players are inconspicuous to the authorities can be explained partly by the poor knowledge of the ways sub-Saharan communities operate and, in particular, of the crucial role played by religious institutions. Thus, Ilyes explains that the religious dimension does exist, but does not pertain to cult or practice, rather to its underground aspect, insofar as 'underground churches are not controlled by the state or by an official religious body'. For sub-Saharan communities, which are generally religious, 'pastors have the status of sacred persons'. Humanitarian organisations have therefore used the pastors' stature to access these evangelistic networks and to detect cases of control, psychological or cultic abuse and exploitation, which would open the door for trafficking.

Left to their own devices, these self-proclaimed churches can offer the worst as well as the best to these vulnerable migrants. When pastors work for the broader community, these religious spaces act as focal points for humanitarian organisations to help solve the problems of migrants and to organise information sessions on trafficking. This was the case with an evangelical pastor who was sensitive to the problems of his flock and concerned about the well-being of his community. He discovered a number of minors who were victims of violence, including one who was raped at the age of twelve in Libya and who reached Tunisia illegally via Algeria. When she entered Tunisia, he took her from the smuggler and informed a humanitarian organisation. The chain of protection was thus set in motion with the help of the regional child protection services, the Anti-Torture Authority and a number of in-situ international organisations that allowed her to be housed, protected and recognised as both a minor and an asylum seeker. It is also worth noting that solidarity between sub-Saharan migrants transcends existing religious divides. This takes on its full symbolic force in the case of Evangelical and Muslim communities that help each other during periods of fasting and worship, offer each other assistance and food donations, and exchange courtesy visits. Thus Charles testifies that 'when it is the fasting period for our Muslim brothers, we make contributions and reach out to them. It's the same for the Christians. The mix is indeed there, and we live in harmony'. This conduct

reveals a degree of 'tolerance' and 'respect' that is generated in exile and born of the need to face adversity in an existence generally marked by the irregularity of sources of income and settlement—shortly after entry into the territory. Similarly, during the unrest in Bhar Lazrag, one of the main associations of sub-Saharan migrants sought the intervention of imams in the neighbourhood, thus acknowledging their influence on the local Tunisian population.

However, some of our interviews indicate that some of the churches, often transitory in nature, can become relays for criminal gangs engaged in human trafficking and act as the tentacles of trafficking networks. Furthermore, the status of cults in Tunisia and more particularly of Christian churches sustains the current situation. Since 1964, the Roman Catholic Church has had only four churches in Tunisia, following the *Modus Vivendi* established between the Vatican and the Tunisian Republic (Boissevain 2014). The Russian Orthodox, Anglican and Reformed churches have only one church each, and the Greek church has three places of worship, including a cathedral located in Tunis; and almost all of them are in the city centre. The churches and official places of worship are not only limited in number, but also far from the localities where the sub-Saharan migrant communities live and work. These populations, who make up the bulk of the church parishioners of various denominations today, are thus denied the effective enjoyment of the freedom of worship and the practice of their religious rites. They end up gathering in church-garages that are 'community spaces in solidarity', as Ilyes puts it. Here, they 'pray together, cry together and have their children blessed' and where, according to Charles' own experience, 'they no longer feel alone'. This group activity in informal places of worship in a country hard hit by radicalisation and extremist discourse exposes them to major risks. Indeed, in the name of combatting radicalisation and terrorism, religious proselytising as well as unwarranted religious meetings are banned in Tunisia. Clearly, this drives the churches further underground, limiting their protective potential and increasing the risk of abuse. In this way, while religious institutions and affiliations may offer migrants a *modicum* of protection, they may sometimes also expose migrants to risks.

Virtual protection: from neighbourhoods to social media

As shown above, much of the communication and engagement between church-based religious congregations or even national communities takes place via online platforms. In fact, at the associative level, the observed tendency to gather rarely transforms into the actual creation of an official association. Many are only *de facto* associations and exist nowhere but on Facebook pages and in WhatsApp discussion groups. Nevertheless, the important role they play as a communication and mobilisation tool if a member expresses a need should be recognised.

These platforms, spanning from job searches to reports of abuse or economic violence, function as a priority community relay for migrants who are geographically located far from the residential areas of larger communities. The tools are also used to mobilise the communities who are most present on the territory when matters arise concerning rights and appeals, and to focus public opinion in their favour. As Umberto, the member of an Ivorian NGO in Raoued mentioned above, testified: 'we toss our complaints on social networks'. The Ivorian community, which originally comprised isolated young adults who came for work or to pursue higher education, seems to have evolved firstly as a result of the alliances made within the sub-Saharan community, transcending national, ethnic, and sometimes even religious differences, and secondly thanks to the fruit of these alliances, their children, for whom issues of status, nationality, access to health care, and access to public educational facilities are crucial. Consequently, the extent of virtual scales of protection deserve attention, not least in the contexts of pandemic lockdowns and xenophobic violence against migrants.

Territorial protection and urban communities: the 'invisibility paradox'

The fragility of migrants was noted by all the informants interviewed for this article and takes on a particular dimension when analysed from a territorial perspective. Indeed, the practice of mobility is a daily struggle for a population that carries the stigma (Tyler 2018) of its status and its vulnerability marker. For Neil, the Tunisian humanitarian NGO officer, 'migrants are fragile. They are afraid of the police and avoid all contact with the authorities. [...] They do not go out at night! When we make donations, they request that they receive them during the day because at night they are afraid of being robbed or attacked. This is true for those living in working-class neighbourhoods'.

This points to what this article refers to as the invisibility paradox of the sub-Saharan migrant community. In order to avoid being the victim of assaults or segregation, migrants fade into the urban fabric in an attempt to become invisible. But this intentional invisibility is a source of vulnerability. As noted in the previous section, migrants appear to be living together in the same neighbourhoods as a result of seeking low-cost housing solutions rather than seeking protection. The first communitarian protests and the ability to provide protection in districts where the number of sub-Saharan residents is high revealed that collective action is possible and that resorting to invisibility has its disadvantages (Bjarnesen & Turner 2020).

Associative grouping facilitates access to police services. However, the concentration of migrants in territories where they have become a dominant element reinforces

their ghettoisation and generates an alternative territorial management. In some cases, this territorialisation has reached quite sophisticated levels. In Sfax for instance, a city to the south of Tunis, informants asserted that migrants ended up with their own police station. This situation presents some similarities to Morocco where each sub-Saharan migrants' ghetto is ruled by a chief, and each national unit is managed by a president and a council, which includes some 'police officers' who are in charge of upholding 'law and order' (Richter 2019).

For these communities, the fact of sharing a common fate is a community- and identity-affirming feature that can help stage public events, mainly cultural and, less so, religious ones. These events are not only intended to mark important celebrations in the countries of origin, but also to unite communities around structuring elements that provide them with a territorial anchor. Arguably, it affirms their presence and creates a local identity embodied by their offspring born in Tunisia. This process is not specific to migrant communities as it is observed among vulnerable populations in disadvantaged areas for whom the special relationship maintained within the neighbourhood stem from them being the only places that young people can appropriate and control (Bachman 1992). With the risk of ghettoisation that this entails, such neighbourhoods therefore play the role of both a refuge and a prison (Chemlali *et al.* 2018).

Migrants base their identity on a strongly developed sense of the locality and community entities that foster cohesion and pride in belonging to a territory where specific aspects of their culture of origin have a rightful place. As such, parades and commemorations enact the appropriation of the territory and the restoration of peace. For instance, in February 2021, to celebrate Mardi Gras [Pancake Day], the children from 'Les Chérubins' day care centre, defined by members of the community as a 'day care centre for sub-Saharan children', paraded through the streets of the locality of Bhar Lazrag, a district that houses a large sub-Saharan community. The children were dressed in Ivorian traditional costumes but with a few items from Tunisian clothing culture such as the *djebba* and the *chechia*.

Sport is also mobilised by associations active in the field, such as the association 'Jeunesse Consciente et Engagée' (i.e. aware and committed youths—who do not have legal residency status in Tunisia). On 29 August 2021, this association organised a football tournament with young participants from both communities, which was assumed to drive 'communion and integration of the migrant population' in the district of El Aouina. The photographs of the event and captions accompanying the publication were provided by the online magazine *Afrikyes*. This initiative was a follow-up to a football tournament in Raoued organised by the Union of Ivorians of Tunisia with the same objectives and support from the municipality. This process of territorial anchoring seems to have succeeded, at least to some extent.

In fact, neighbourhood solidarity is now demonstrated towards migrants even when the latter are involved in fights or settling scores. As Hassib, a young Tunisian student living in Raoued, explained:

> They [the migrants] are attacking people more and more now, maybe because there are people who support them; people who are always ready to defend them; maybe they even think that if they attack other people, local youths will side with them. They also cover for each other, claiming victim status and calling us racist'.

Norbert, the sub-Saharan refugee and community worker mentioned above, confirmed that 'the solution does not lie in revolt [...] we must aim to be adopted by the Tunisian people [...] with a view to becoming integrated'. In this way, territorial affiliations (Rhein 2002) with specific areas and increasing visibility are central aspects of how Norbert views protection. It is surely a strategy that works to some degree. We may even say that the Black Brigade plays along the same lines, even if Norbert is strongly critical and anxious about their illegal but allegedly protective practices. However, it also illustrates the deep ambiguity of protection in relation to the invisibility of individual migrants and visibility of migrant communities (Bjarnesen & Turner 2020).

Conclusion: social stigma, integration or exclusion?

This article has explored the kinds of violence experienced by migrants in Tunisia, both state and non-state; the formal protection offered by state mechanisms; and how the migrants attempt to protect themselves and stay safe. Significant gaps have been revealed in the formal protective frameworks and their implementation. Migrants, trapped in precariousness and vulnerability, are consequently exposed to violence spanning from ordinary everyday forms of violence to state violence and neglect. To some extent, the violence and neglect emanate from the specific context of migration in Tunisia. Tunisia does not perceive itself as a migration destination. Similarly, the EU's externalisation of border management to Tunisia has produced a large population of transitory but also increasingly permanent migrant populations in the country. Consequently, migrants are caught in a protective limbo where they have few rights and opportunities and must compete with a Tunisian population that is also becoming increasingly precarious. This situation has led to increasing forms of violence, not least in the areas investigated in this article in the northern periphery of Tunis.

In the face of this violence, sub-Saharan migrants with similar interests have banded together in communities that overlook differences of faith and nationality with a view to forming an active and protective 'family'. These protection mechanisms aim to close the gaps where protection, though expected, is not provided by official

institutions, and where non-governmental actors are inadequate, deemed as they are to be aloof from the actual site and unequipped for sufficient and effective means of action. These protection mechanisms are organised along religious, ethnic, virtual and territorial lines of community-based solidarity (Roulet 2020) structures that become operational in situations of vulnerability and violence. While these communal forms of protection work to a large extent, they are potentially counterproductive as they generate potentially risky visibility. Migrants therefore often attempt to stay out of sight and invisible (Bjarnesen & Turner 2020). Emerging as a group to claim their rights does afford some degree of protection, as this article describes in the case of the group that called on the police to mitigate in conflicts with Tunisians. However, it also compromises some aspects of protection. Overall, therefore, communal protection mechanisms are highly ambiguous, as they attract the attention of both the police charged with keeping migrants out, and Tunisians worried about competition for limited resources. As the situation currently stands, a new generation of migrants' children born on Tunisian soil is being deprived of schooling and often of civil status, including citizenship only open for third-generation legal immigrants. Ultimately, this heightens the risk of inequality, discrimination and the inevitable emergence of violence that, to date, has affected only adult newcomers. Not least human rights organisations must realise that Tunisia is becoming a migration destination where these vulnerable youths will need protection and inclusion now and in the future. One place to start is by recognising the opportunities and limitations in the protective strategies employed by migrants themselves.

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