CAN CHINA FULLY PROTECT AND PREVENT ALL DETAINED PERSONS FROM TORTURE UNDER ITS CURRENT LEGISLATIVE, INSTITUTIONAL AND POLITICAL MODEL?

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ABSTRACT

Far-reaching reforms are influencing every aspect of governance within the People's Republic of China, including in its criminal justice system. Against this backdrop, this thesis critically considers current concerns regarding torture and other ill-treatment in China. It assesses to what extent persistent allegations of ill-treatment of detainees indicate endemic practices; examines the effectiveness of nascent torture prevention measures and identifies the factors that may enable resilience of abuse. Overall, it investigates whether torture prevention is effective within the PRC legal framework or whether it can become so on the current reform trajectory.

To do so, the thesis sets out the scope of available legal protections against torture and ill-treatment in China, and assesses these in light of international law requirements so as to identify protection gaps and broader obstacles to prevention. The analysis examines these through the lens of three different justice processes: the criminal, administrative and Party. These are representative of China's wider criminal justice system and the different routes through which persons can be deprived of their liberty.

The analysis finds that while the criminal justice system is becoming more regulated, even here protection gaps remain. In the administrative and Party justice processes, almost all key safeguards against torture are missing: these remain legally 'grey' spheres. All three justice processes thus fail to protect every category of detainee and torture and ill-treatment continue. The thesis identifies the key factors contributing to the resilience of torture and ill-treatment in China and the required reforms. The analysis concludes that while China is taking significant steps towards preventing torture and ill-treatment, these have insecure foundations and suffer from fundamental deficiencies that can only be addressed by further legal, structural, institutional and political reform. This China case study can provide valuable lessons for other countries where ill-treatment has become endemic.

IN MEMORY

OF

PROFESSOR SIR NIGEL RODLEY

AND

CLARA GORDON

This thesis is dedicated to the memory of one of my supervisors, a ‘giant’ in the world of human rights and an outstanding human rights scholar, Professor Sir Nigel Rodley.

Nigel has been a great source of inspiration for this research both through his passion for torture prevention globally and his quietly determined efforts in helping China with its first steps in torture prevention. His patient mentoring and advice during this research have been of immeasurable value.

This research is also dedicated to the memory of my late grandmother, Clara Gordon, who ever since January 1945 and the loss of her father to the Nazi concentration camp of Mauthausen, has been a passionate supporter of those who speak out for people without a voice of their own.

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GENERAL INTRODUCTION

Modern China has been described as a country of paradoxes; it is the world's largest purchaser of Louis Vuitton products and second only to the United States in number of Lamborghini 'supercars' imported annually,[1] yet it has had the word 'luxury' banned from its billboards and has an official government policy that targets excessive spending by its civil servants.[2] "Reform/revolution" (*gai ge*) is underway in China, with the dual aims of strengthening economic progress and development while at the same time ensuring national stability and security.[3] Indeed, China's One-Party State, with its guiding philosophy of "socialism with Chinese characteristics", has been undergoing ideological and structural change since the start of Xi Jinping's rule in late 2012.[4] Far-reaching and deep-seated reforms are changing all parts of the governance model in China,[5] including its legal system.[6]

As the Chinese legal landscape begins to change, there is some early reform of its criminal and justice laws. Emphasis on strengthening the precept of the 'rule according to the law' (although not necessarily 'rule of law')[7] has been established by the Chinese Communist Party (CCP) leadership as a priority, as evident in the recent Party Plenums and Five-Year Plans.[8] Reforms include the strengthening of protections available to detainees and prisoners, added into the revised Criminal Procedure Law in 2012, and other laws governing the criminal, administrative and Party justice spheres.

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1 E. Osnos, *The Age of Ambition: Chasing Fortune, Truth and Faith in the New China*, (New York: Farrar, Straus and Giroux, 2014).

2 Personal conduct of officials is regulated by the CCP Discipline Regulations, 中国共产党纪律处分条例, Central Committee of the CCP, 21 October 2015, Article 126: 'Where luxurious lifestyles, hedonism, or the pursuit of vulgar interests causes a negative impact, a sanction of a warning or serious warning is given; where the circumstances are serious, a sanction of removal from internal Party positions is given' [sic]; See also R. McGregor, 'What if Xi Jinping succeeds in restructuring the economy and strengthening the CCP?', in '*China's Core Executive, Leadership styles, structures and processes under Xi Jinping'*, (ed. S. Heilmann and M. Stepan), *Mercator Institute on China Studies ('Merics') Series on China,* Vol. 1 June 2016; See also Osnos, *The Age of Ambition: Chasing Fortune, Truth and Faith in the New China*, (2014); Author's interview with Mr. Y (*name anonymised by request*), Chinese national and teacher, Strasbourg, April 2016.

3 October 2015, 授权发布:中国共产党第十八届中央委员会第五次全体会议公报, Official Communiqué of the Fifth Plenum of the 18th Party Congress.

4 President of the People's Republic from 14 March 2013 to the present; General Secretary of the CCP, 15 November 2012 to the present.

5 See Thesis Chapter 2, Section 2.2 'Political and governance models in China'.

6 See Chapter 2, Section 2.3 'The Chinese criminal justice system: an overview'.

7 See Chapter 1, Section 1.3.3 and Chapters 2 and 4.

8 See Chapter 2 for more details on recent judicial reforms and China's Twelfth and Thirteenth Five-Year Programmes (2011–15 and 2016–2020).

On the other hand, there is significant tightening of State control, a gradual concentration of power afforded to the Central (top-level) CCP. The priority is social and economic development for all of China's citizens, with a focus on strengthening the middle classes and narrowing the inequalities and gaps between the very rich and the poor. To achieve this, the Chinese authorities consider social stability and countering public disorder a pre-requisite.[9] There is a tangible shift in power structures under Xi. The CCP has, since 2012, concentrated on increasing centralised power by reigning in the discretion afforded to local governments, procurators and judicial bodies.[10] This has manifested itself in a raft of reforms, including to the justice sphere. China scholars argue that these are yet another avenue to strengthen centralised power by limiting the broad discretion afforded to local bodies.[11] If anything, the 'iron fist' of the State is hardening.[12]

Progressive reform and consolidation of power may appear paradoxical, yet China scholars argue that the reform of certain areas does not always equate to the conferring of greater human rights' protections for all persons. Persons perceived by the authorities to have the potential to undermine national stability, jeopardise security or challenge the status quo, can be considered as obstacles to the State's priority of achieving smooth and 'harmonious' economic progress.[13] China scholars note that Xi's rule builds on traditional factors of stability (improvement in material living standards, Leninist institutions of control, economic progress and development). [14] Yet, they also point to 'powerful sources of fragility'[15] that undermine the CCP's claim to power (economic pressures, authoritarian political control and lack of alternative voices, powerful factional groupings, etc.). China is at a significant crossroad between providing more robust legal protection for those suspects of run-of-the-mill crimes (within the criminal-law justice process), and the gradual tightening of control over other groups of people perceived to have the potential

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9 See Chapter 2, Section 2.2 'Political and governance models in China'.

10 See Chapter 2, Section 2.2 'Political and governance models in China'.

11 A. Saich, 'Controlling political communication and civil society under Xi Jinping', *Merics China Series* Vol. 1, June 2016; V. Shih, 'Efforts at exterminating factionalism under Xi Jinping: Will Xi Jinping dominate Chinese politics after the 19th Party Congress?' in *Merics China Series* Vol. 1 June 2016; A.L. Ahlers and M. Stepan, 'Leadership Structures and Processes Top-level design and local-level paralysis: Local politics in times of political centralisation', *Merics China Series,* Vol. 1, June 2016.

12 See Thesis Chapter 2, Section 2.2 'Political and governance models in China'.

13 See Thesis Chapter 3.

14 S. Heilmann, B. Conrad, M. Huotari; 'Scenarios for political development under Xi Jinping's rule', *Merics China Series,* Vol. 1, June 2016; V. Shih, 'Efforts at exterminating factionalism under Xi Jinping: Will Xi Jinping dominate Chinese politics after the 19th Party Congress?', *Merics China Series,* June 2016.

15 Heilmann, Conrad, Huotari; 'Scenarios for political development under Xi Jinping's rule', *Merics China Series,* June 2016; Shih, 'Efforts at exterminating factionalism under Xi Jinping: Will Xi Jinping dominate Chinese politics after the 19th Party Congress?', *Merics China Series,* June 2016.

to jeopardise national stability and security.[16] An extra layer of complexity is that of implementation of the law; while the letter of the law may be strengthening on paper, there are significant concerns as to whether this translates into actual implementation and practice.[17] From an international human rights' law (IHRL) perspective these raise various concerns and provide significant context for the examination of torture prevention undertaken in this research.

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With this backdrop in mind, this analysis focuses on the current state of torture and other ill-treatment in China. The key concern remains that there is a persistence of allegations of torture and other ill-treatment – despite some judicial reform – and that this may be indicative of an embedded or endemic practice of torture and other ill-treatment. From an IHRL 'torture prevention' perspective, this provides considerable scope for analysis. Here is a country that, despite a raft of legal reform to prevent torture, is still showing signs indicative of resilient torture practices. When some reforms are initiated to regulate and decrease the risk of torture in one area, other loopholes appear to circumvent protection.[18] Equally, it is possible that legal reforms are also being ignored in practice.[19] Thus, the current situation in China provides significant scope for detailed examination of the degree of implementation and effectiveness of nascent prevention measures. Is the current governance model conducive to, or does it afford, the right foundation for torture prevention initiatives to operate properly, as per their design and intent? Put more simply, is torture prevention working within the current legal framework in China, and can it do so on the current reform trajectory? These are questions that directly link to the safety of China's detainees. Overall, there is a need to assess how safe detainees are in some of China's most common types of detention.

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16 See Thesis Chapter 2, Section 2.2 'Political and governance models in China'.

17 See Thesis Chapter 3; See also J. Rosenzweig, F. Sapio, J. Jue. T. Biao and E. Pils, 'Comments on the 2012 revisions of the Chinese Criminal Procedure Law', in M. McConville and E. Pils (Eds.) *Comparative Perspectives on Criminal Justice in China*, (Cheltenham, UK and Massachusetts, USA: Edward Elgar, 2013); I. Belkin, 'China's tortuous path toward ending torture in criminal investigations', in *Comparative Perspectives on Criminal Justice in China* (2013); E. Nesossi, S. Biddulph, F. Sapio, and S. Trevaskes, 'Opportunities and Challenges for Legislative and Institutional Reform of Detention in China', in *Legal Reforms and Deprivation of Liberty in Contemporary China* (eds. E. Nesossi, S. Biddulph, F. Sapio, and S. Trevaskes)(London and New York: Routledge, 2016); S. Biddulph, 'Rights in the new regime for treatment of drug dependency', *Comparative Perspectives on Criminal Justice in China* (2013).

18 See Thesis Chapter 3.

19 See Thesis Chapter 3.

Ultimately, one overarching question needs to be answered: given the current trajectory of reform, may the risk of torture be expected to change over the next 10 years that, more or less, define Xi's CCP leadership term? This study examines and weighs evidence to support two possible hypotheses. A positive answer would find that gradual change is likely to affect the sphere of torture prevention in China and that reforms, while nascent, will provide robust and sustainable protections to detainees (i.e. yes, China can provide a framework under its current governance model to protect detainees from torture). The negative answer would find that despite reforms, the risk of torture remains high and the protections remain insufficient or ineffective and will likely remain so – resulting in an unsafe environment for detainees (i.e. no, China cannot and, in the balance of probabilities, will not be able fully to protect all detainees from torture). If this is the case, the research will identify what may need to change to ensure that prevention can work effectively, and the extent of the required change(s).

To address this question and provide evidence to support one of the above positions, the following specific questions will be examined:

(i) What is the current system in place to protect detainees from, and prevent, torture and other ill-treatment? What is the scope of the available protections?

(ii) Where are the protection gaps? Is it a matter of 'plugging the gaps'?

(iii) Are acts of torture or other ill-treatment still occurring in places of detention, despite protections, and on what scale? Is the current preventive approach effective and sustainable?

(iv) If considered endemic, why does it remain so? What are the obstacles preventing effective prevention?

(v) What, if anything, needs to change to ensure prevention is as full and effective as possible in China?

These questions will be examined through the lens of a cross-selection of different justice processes and detention types in China. The focus will on the deprivation of people's liberty by

law enforcement officials; whether by the Public Security Bureau (PSB) (Police) or Party investigation units; as this sphere carries the greatest risk of torture both in China[20] and more generally.[21]

Equally, any analysis of the prevention of torture necessitates examination of the overall criminal justice system, from initial custody and investigation to sentencing procedures and due process. This is to assess compliance with due process guarantees and safeguards. These regulate and provide for the proper treatment of, and adequate conditions for, detainees at all stages of their deprivation of liberty. Together, these safeguards and guarantees are sometimes referred to as 'transparency' safeguards;[22] designed to ensure that detainees are not held in an opaque space, subject to an non-transparent, unregulated or opaque justice process, but instead have access to, and oversight from, others who are external to the place of detention[23] to help reduce the risks of torture.[24]

This thesis selects three justice processes that can result in a person's deprivation of liberty by law-enforcement as a compulsory measure. They are used as a lens through which to analyse China's torture prevention measures and progress. These comprise:

a) the criminal law justice system; primarily the investigatory period of initial custody and then remand in police-run detention (the *Kanshousuo* (KSS)),[25]

b) two types of administrative justice, the *de jure* punitive administrative justice system (investigation and sentences of administrative offences resulting in administrative detention (Punitive Administrative Detention or 'PAD')), and the *de facto* administrative drug enforcement system, resulting in the administrative sanction of Compulsory Drug Rehabilitation (CDR), and

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20 See Thesis Chapter 1.

21 See Thesis Chapter 1.

22 Author's discussion with Professor Sir Nigel Rodley, Supervisor of this research, on his views on groupings and categorisation of preventive safeguards, August and September 2016.

23 See Thesis Chapter 1.

24 See Thesis Chapter 1; See also, in particular, paragraphs (para.) 8, 11 to 13 of 'the Provisional statement on the role of judicial review and due process in the prevention of torture in prisons', adopted by the UN SPT at its sixteenth session, 20 to 24 February 2012, CAT/OP/2, October 2012.

25 The scope of this research does not include the prison system, as this is run separately from PSB responsibility in China (see Chapter 2, Section 2.3 'The Chinese criminal justice system: an overview'). However, those held on remand under criminal law in China can spend many months detained before and after the decision of procurators in a KSS, before coming before a judge (see Chapters 2 and 3).

c) the Chinese Communist Party (CCP) system of detention by CCP Investigation and Discipline Committees, for the purposes of investigation and discipline for Party infractions, including an investigatory process known as '*shuanggui*'.[26]

These have been selected as representing a cross-section of China's justice processes and detention types. These vary from the most common (pre-trial detention pursuant to the criminal justice process), to less common types of quasi-judicial processes that are administrative and lie outside of the criminal law sphere. All three processes involve detainees being held in police or Party custody or detention, pursuant to a decision taken by an administrative body, without the approval from a judge. All involve extended periods of time in police or Party custody and detention. Two types of detention, administrative and Party, remain administrative in nature throughout the investigation and sentencing process, and comprise an initial period of time in police and/or Party custody and then a potential administrative sanction of detention.

[26] The categorisation of the different types of administrative detention is outlined in a later section of this General Introduction.

A. Why China?

The People's Republic of China (PRC) is in some ways an unlikely focus for a study on the prevention of torture, not least because of the continuous flow of reports of torture and ill-treatment in Chinese detention.[27] The criminal justice system and its reforms have been covered extensively by scholarly literature.[28] Equally, cases of torture in China have been well documented and examined by China scholars.[29] China has started to develop some torture prevention measures, yet very few scholars document or publish analysis on this.[30] There also remains little to no scholarship, from an international law perspective, on China's first steps in torture prevention and on its fulfilment of its IHRL obligations in this regard.

More generally, there is relatively little scholarship on torture prevention and on its impact and effectiveness globally.[31] Similarly, there is scarce literature available on how governance models and legal systems in One-Party or autocratic states can affect the effectiveness of torture

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27 See Chapter 3.

28 See, *inter alia*, E. Nesossi, S. Biddulph, F. Sapio, S. Trevaskes. J. Rosenzweig, C. Lei, N. MacBean, '*Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); See S. Lubman, J. Cohen, J. Rosenzweig, E. Pils, M. McConville, F. Sapio, S. Biddulph, Chen Weidong, *Comparative Perspectives on Criminal Justice in China*, (2013); I. Belkin, 'China's tortuous path toward ending torture in criminal investigations', *Comparative Perspectives on Criminal Justice in China*, (2013); S. Biddulph, *Legal Reform and Administrative Detention Powers in China*, (Cambridge: Cambridge University Press, 2007); F. Sapio, *Sovereign power and the law in China*, (Brill, 2010); E. Nesossi, 'China's Pre-trial Justice: Criminal Justice, Human Rights and Legal Reforms in Contemporary China', in *Law in East Asia Series*, (Wildy, Simmonds & Hill, 2012); Fu Hualing, 'The upward and downward spirals in China's anti-corruption enforcement', in *Comparative Perspectives on Criminal Justice in China* (2013); Chen Guangzhong, 'Issues in the Reform of China's Public Prosecution System against the Backdrop on New Revisions to the Chinese Criminal Procedure Law', in *Comparative Perspectives on Criminal Justice in China*, (2013); S, Lubman, '*Bird in the Cage: Legal Reform in China after Mao*', (Stanford: Stanford University Press, 1999) and S. Lubman, 'Concluding Observations', in *Comparative Perspectives on Criminal Justice in China* (2013); See also Thesis Chapter 2.

29 See, *inter alia*, W. Wu and T. Vanden Beken, 'Police torture in China and its causes: a review of the literature', *Australian and New Zealand Journal of Criminology*, Vol. 43(2010); Z. Guo, 'Exclusion of illegally obtained confessions in China: an empirical perspective', *International Journal of Evidence and Proof,* Vol. 21, no. 1-2, (Sage); C. Guangzhong, G. Zhiyuan, 'Some issues on the implementation of exclusionary rule of illegally-obtained evidence: An empirical perspective', *Jurisprudence Journal*, 2014, 9: 1–16; J. Daum, 'Tortuous progress: Early cases under China's new procedures for excluding evidence in criminal cases', in *New York University Journal of International Law and Politics*, 2011, 43(3): 699–712; He Jiahang and He Ran, 'Wrongful conviction and tortured confessions: empirical studies in mainland China', in *Comparative Perspectives on Criminal Justice in China*, (2013); See also Thesis Chapters 2 and 3.

30 A notable exception is the work of Renmin University Professors Chen Weidong and Cheng Lei; See Chen Wei Dong and T. Spronken, *Three Approaches to Combatting Torture in China*, (Intersentia 2012), as well as Thesis Chapters 2 to 4, for more details.

31 See work by M. Evans in the field torture prevention, including M. Evans and R. Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, (Oxford: Oxford University Press, 1998); R. Morgan and M. Evans, *Protecting Prisoners: the Standards of the European Committee for the Prevention of Torture in Context*, (Oxford: Oxford University Press, 1999); M. Evans and R. Morgan, 'Getting to grips with Torture', *International and Comparative Law Quarterly*, 51 (2002); See also N. Rodley, *The Treatment of Prisoners under International Law*, (Oxford: Oxford University Press 2009 (3rd ed.) and 'Reflections on working for the prevention of Torture, *Essex Human Rights Review*, Vol. 6 (2009); R. Murray, E. Steinerte, M. Evans, and A. H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (Oxford: Oxford University Press 2011); R. Carver and L. Handley, *Does Torture Prevention Work?*, (Liverpool: Liverpool University Press, 2016); C. Giffard and P. Tepin (eds.), *The Torture Reporting Handbook*, Essex Human Rights Centre, (2nd ed.)(2015); See also Thesis Chapter 1.

prevention work in particular, as opposed to their impact on human rights' compliance or torture prohibition more generally.[32] This research touches upon all these areas, through the lens of China.

There are various further reasons to examine China's torture prevention obligations. First, China is not alone in having potential protection asymmetries in areas of its justice system. Second, China is a country undergoing a period of significant change and is reforming many of its core operating structures, as well as revising many of its laws, including within its criminal justice system. It is, therefore, a good time to examine China's compliance with its torture prevention obligations and assess its evolution.[33]

Equally, an analysis of China from a 'prevention' perspective could be pertinent to other states with similar governance structures and facing similar evolution challenges. Systemic obstacles that may be hindering effective torture prevention in China may also similarly be impeding progression in other countries, even if their contexts differ. Thus, there is scope for a renewed focus on China in the context of torture prevention more generally. Some aspects drawn from this analysis of torture prevention through the lens of China may prove useful for the overall scholarly discourse on the trajectory of development of torture prevention internationally.

China has a range of different justice processes and detention types, some more comparable globally than others. Torture and ill-treatment occurring in initial police custody is not unique to China; that it may constitute a pattern or entrenched culture of police torture practice based on a 'confession-based culture' would be less common, but also is not unique to China. To cite just one example, Russia, too, has been found by international treaty and monitoring bodies to have a pattern of systemic ill-treatment by the police embedded in its places of initial custody.[34]

China's punitive administrative legal system and detention process is more unusual. However, China is again not unique in its use of punitive administrative detention as a parallel legal system

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32 See, for example, S. Karstedt, 'Does democracy matter? Comparative perspectives on violence and democratic institutions', in *European Journal of Criminology*, Vol. 12: 4; O.A. Hathaway, 'Do Human Rights Treaties make a difference', in *Yale Law Journal* 111 (2002); D. Rejali, *Torture and Democracy'*, (Princeton University Press, 2007); J. Hollyer and B. Rosendorff, 'Do Human Rights Agreements prolong the tenure of Autocratic Ratifiers?' *New York University Journal of International Law and Politics*, 44 (2012); See also Thesis Chapter 4.

33 See Thesis Chapter 2.

34 HRC, Concluding Observations on Russia 2015, CCPR/C/RUS/CO/7, para. 14; CPT, Report to the Russian Government on the visit to the Russian Federation carried out by the CPT from 21 May to 4 June 2012, CPT/Inf (2013) 41 para. 17.

to the criminal justice system. Azerbaijan, Armenia, Georgia, Moldova, Russia and Uzbekistan all also provide examples of countries that use punitive administrative detention. IHRL bodies have highlighted the risk that this parallel justice process may serve to bypass stricter and more regulated procedural safeguards in their criminal law systems.[35] Consequently, there has been a trend to reduce of the use of punitive administrative detention in police stations (and transfer detainees to prison) and to decrease the length of time persons can be held on administrative offence grounds by the police in some post-Soviet legacy countries (for example, Moldova, Russia and Lithuania).[36] Nevertheless, other countries (such as Azerbaijan and Uzbekistan) appear to be extending their use of punitive administrative detention and its scope.[37] Thus, the use of punitive administrative detention continues in some countries and this aspect of the China case study could provide some useful learnings on some common problems typically associated with this administrative justice process.

Further, scholarly critique and the IHRL mechanisms' (United Nations and regional treaty bodies, special procedures and international courts established to interpret areas of IHRL law) examination of administrative justice in China has, until recently, focused mainly on the Re-education through Labour System (RETL),[38] as one of the more extreme forms of punitive administrative detention. Other forms of detention (such as administrative sanctions pursuant to administrative offences governed by the public order laws) and wider forms of administrative detention, such as Compulsory Drug Rehabilitation (CDR), have been subject to less extensive

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35 See, for example, European Prison Rules (EPR), Rule 10.2; CPT Report on its visit to Moldova, CPT/Inf (2016), 16 para. 13; CPT Visit report on Armenia, CPT/Inf (2016) 31, para. 12; CPT visit report on Georgia, Georgia: Visit 2014 CPT/Inf (2015) 42, paras. 24 and 115; Azerbaijan, Appendix I, para 13, in CPT/Inf (2017) 12; HRC on Israel's use of punitive administrative detention: CCPR/C/ISR/CO/3, para. 7 and CCPR/C/ISR/CO/4, para. 10; the WGAD, No. 43/2014 (Israel), Communication addressed to the Government on 16 September 2014, concerning Ahmad Ishraq Rimawi.

36 CPT Report on its visit to Moldova, CPT/Inf (2016), 16 para 13; CPT Visit report on Armenia, CPT/Inf (2016) 31, para. 12; CPT visit report on Georgia, Georgia: Visit 2014, CPT/Inf (2015) 42, para 24 and 115.

37 See, *inter alia*, Human Rights Watch, World Report 2015, Uzbekistan, which highlights increasing administrative arrests such as the cases of Umida Akhmedova, sentenced to administrative detention for protesting at an embassy and administratively arrested; detention and fines for Christians who conducted religious activities contrary to administrative offences, such as illegal religious teaching; see also US Department of State 2012 Report on Uzbekistan, highlighting that the authorities use administrative measures as alternatives to criminal sentences for non-violent offenders; See also M. Bayram, 'Uzbekistan: Harshened Criminal and Administrative Code punishments', *Forum 18*, 15 June 2016, available at: http://www.refworld.org/docid/57617da64.html [accessed 30 August 2016] highlighting the case of journalist Sergey Naumov, who was sentenced to 12 days' administrative detention for "petty hooliganism" on 21 September 2013.

38 See Biddulph, *Legal Reform and Administrative Detention Powers in China,* (2007) and 'What to make of the abolition of re-education through labour?', in *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); See also the CAT Concluding Observations (COs) on China, in its country Periodic Reports, 2008 and 2015.

analysis.[39] This is not helped by the fact that a considerable amount of primary legislation remains in Chinese only, and is thus generally less accessible to Western scholarship, (where this is the case and is relevant for this thesis, the author has translated the relevant regulations). From a 'torture prevention' standpoint, the relative lack of focus on certain areas of administrative justice is pertinent given the risks associated with the less-regulated systems in which they operate.[40]

Many of the institutions and legal structures in China are Soviet-inspired and retain a post-Soviet legacy. As similar legacy structures can be seen in the former Soviet states, some of the lessons from an analysis of China may also be pertinent for some of these countries. One such area is the relationship between the rule of law and effective torture prevention. This research seeks critically to assess, through the lens of China, the extent to which prevention can operate effectively in states that are governed by a One-Party system or ones that have aspects of their legal systems and governance models that lie outside of a Rule of Law system.

Further, China may not be alone in having its torture prevention efforts affected by its institutional set-up or governance model. Interviews with experienced monitoring experts, such as those at the UN Sub-Committee on Prevention of Torture (SPT), the European Committee for the Prevention of Torture (CPT) and scholars in this area,[41] point to a growing sense of the need for a different and broader approach to the more traditional measures of torture prevention (i.e., ensuring safeguards are legally robust and operational in practice) for countries with embedded systemic torture and that repeatedly ignore or reject recommendations for change.[42] This also links into wider questions about the impact of some elements of torture prevention, such as preventive monitoring and the wider discussions underway by all bodies involved – national,

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39 See Thesis Chapter 3; See also Biddulph, 'What to make of the abolition of re-education through labour?', in *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016) and M. Lewis, Statement of M. Lewis, 'China's pervasive use of torture', Hearing of the Congressional-Executive Commission on China, 14 April 2016, Congressional Committee testimony; For definitions, see 'Categorisation of detention types' (Thesis General Introduction) and Thesis Chapter 2, Section 2.3 'The Chinese criminal justice system: an overview'.

40 See Thesis Chapters 3 and 4.

41 Author's interviews and correspondence with: S. Casale, former President of the CPT and SPT (September 2017); M. Amos, member of the SPT (June 2012 and September 2017); M. Kelly, Vice President of the CPT (August 2017); P. Muller, CPT Staff, (July 2017).

42 See, for example, author's interview and correspondence with M. Amos, SPT member, (June 2012 and September 2017); See also the CPT, which, for example, has held High level Talks with Azerbaijan (16 and 17 February 2017). The objective of the talks, was to discuss the state of co-operation between the CPT and the Azerbaijani authorities and, in particular, the implementation of the CPT's long-standing recommendations concerning law enforcement agencies, prisons, psychiatric hospitals and social care homes (http://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-holds-high-level-talks-in-azerbaijan) [accessed 14 June 2017].

regional and international – on opportunities to improve prevention work.[43] China has not been the subject of a detailed analysis from an IHRL 'preventive' standpoint and this research aims to address this and may offer wider lessons in this respect.

Thus, while the primary focus is on China, this analysis raises broader questions and highlights wider implications that may apply to torture prevention work in other countries that may be facing structural impediments to their prevention efforts.

B. Research structure and scope

Part I of the thesis lays out the framework for the later analysis of the context of China. Chapter 1 examines the nature of the obligation of torture prevention, its scope under international law, the universal and treaty obligations to prevent torture and other ill-treatment and the range of prevention measures required under IHRL. It also examines how the prevention measures interrelate, assesses questions of effectiveness and considers how far the legal prevention obligation should reach. Chapter 1 identifies and then groups together various core measures of prevention that later serve as elements to be assessed in each detention type in the later chapters.

Part II assesses China in the context of the current state of its torture prevention measures. First, the research examines China's legal system and recent developments in its torture prevention efforts (Chapter 2). To start with, the criminal justice system is examined, to provide a yardstick by which to compare the (less reformed and less common) administrative and CCP justice processes. Each of the three justice processes are assessed in turn, to understand the status and scope of prevention measures available in each type, and to identify differences in the protections available.

Second, the current nature and scope of torture and ill-treatment in the three detention settings are examined, to assess the scale of torture in practice and the risk of torture in each type of detention

[43] See Thesis Chapter 1; the Author also conducted interviews and correspondence with detention monitoring specialists and members of IHRL monitoring bodies such as Mark Kelly (CPT Vice-President)(August 2017), S. Casale (September 2017)(former CPT and SPT president) and Mari Amos (SPT member)(September 2017), on their views on the impact of preventive monitoring.

setting (Chapter 3). Each area is then examined against some of the core elements needed for effective prevention identified in Chapter 1. The gaps between the guarantees established in Chinese law and the extent to which they are implemented are critically assessed in the context of torture prevention requirements (together the 'protection gaps'). Overall, Chapter 3 seeks to identify both the deficiencies in the existing legal safeguards, as well as the areas where important safeguards are missing. The analysis seeks to establish whether the current preventive safeguards are robust, effective and sustainable.

Third, the thesis examines other wider structural, institutional and political obstacles that might be impeding or hindering the full and effective prevention of torture in China (Chapter 4). This is required for critical assessment and understanding of why the existing safeguards in China may not be effective as they could or should be.

The Concluding Chapter examines what may need to change for China to be able to fully protect all detained persons from torture and other ill-treatment.

The analysis of the Chinese legislation is accurate up to June 2017, all new or draft legislation thereafter will not be included in the thesis or, if especially relevant, will be alluded to only.

Scope of research, its limitations and target audience

This research does not aim to develop an integrated global theory of prevention, rather it breaks down prevention into a core set of minimum prevention measures;[44] it examines how these should be applied given China's context[45] and assesses the challenges inherent in their application in China's political context.[46] This is an explicit choice; there is significant scholarly discourse (c.f. M. Evans, R. Murray, A. Hallo de Wolf et al.) - as well as evolving torture prevention practitioner and IHRL bodies' views - regarding the appropriateness of creating an exhaustive integrated theory of prevention.[47] Generally, a (non-defined, and thus non-limited) plurality of prevention measures is recommended by scholarship and practitioners.[48] The author follows this approach,

44 Thesis Chapter 1.2 and 1.3.
45 Thesis Chapter 2 and 1.3.
46 Thesis Chapters 2.2, 4 and Conclusions, Section C(ii).
47 Thesis Chapter 1.2, in particular, Professor Sir Malcolm Evans and Professor Sir Nigel Rodley's work as well as the SPT's views.
48 See Thesis Chapter 1.2, for more details.

but does focus on a selected set of essential minimum "common core" of preventive measures. These are preventive measures that many scholars and practitioners[49] have agreed upon (grouped together in Chapter 1).These are used here to provide an analytical framework through which to understand the state of torture prevention in China. The set of measures selected are considered to represent the key elements of prevention within torture prevention academic literature, and in prevention work practice.[50] It remains, however, a non-exhaustive list, given the indefinite nature of prevention.[51]

Measuring effectiveness of prevention measures is at an early stage within academic and practitioner spheres.[52] There are few studies and the very nature of "preventive" work means that measurement is fundamentally challenging in that measuring success (i.e. the non-occurrence of torture is *de facto* difficult). Nonetheless, the research sets out what evidence does exist regarding effectiveness, often drawing on torture prevention bodies' (i.e. "practitioner") experience.[53] With the exception of Carver & Handley's work,[54] there is no commonly agreed analytical foundation available to assess *effectiveness* of prevention as a whole: practitioners tend to look at their own approaches and record change/improvement to recommendations made if and when it occurs[55], while academics look to practitioners given the paucity of conclusive data.

In China's context, this is even more challenging. In China, the mere existence of prevention measures is difficult to establish, let alone assess compliance and effectiveness. The lack of ready

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49 See Thesis Chapter 1.2 and notably Carver & Handley, Professor Sir Nigel Rodley, Professor Sir Malcolm Evans and the monitoring bodies such as the CAT, SPT, CPT. Evans and Morgan, Preventing Torture: *A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998); Rodley, *The Treatment of Prisoners under International Law* (2009); Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011); Carver and Handley, *Does Torture Prevention Work?* (2016), among others (see Thesis Chapter 1.2).

50 See Thesis Chapter 1.2.

51 See Thesis Chapter 1.2.

52 See Thesis Chapters 1.2, and 1.3, notably the work of Evans and Carver and Handley, as well as the monitoring bodies' work in assessing their own impact, for example, through follow-up visits from the CPT and successful implementation of past recommendations (see, for example, CPT Cyprus report references in Thesis Chapter 1) and the NPMs' efforts in assessing their own impact (c.f. Chapter 1.3.4 and notably the UK NPM's self-assessment tool) (for more details see Thesis Chapter 1).

53 Thesis Chapter 1.2, 1.3 and Chapter 3.

54 Referenced in Thesis Chapter 1.2 and 1.3.

55 The CPT applies this approach on every country visit. The CPT takes, as a starting point, the recommendations made in its previous report (usually 2-4 years previously) on a given country and uses its current findings to assess and measure the rate of change to specific recommendations made previously on the same or similar places of deprivation of liberty in the respective country. This is not an uncommon approach and is followed by many other monitoring bodies and 'prevention practitioners', such as the NPMs, who more regularly visit the same places of detention and can see tangible change (or not) within in shorter time span. It also enables a snapshot of the macro picture of the rate of progress of a given country in light of the overall number of recommendations made, and can act as an indication of the level of action take by a state in the sphere of torture prevention (c.f. for example, HMIP/UK NPM who after each report and before each following visit assess how many recommendations have been fully, partially or no implemented (see HMIP's 'Expectations', a set of standards and methodological guide that it uses, which is published on it website). The author, as a former inspector for HMIP and staff member at the CPT, regularly uses and sees this approach in action.

access to places of detention; of independent oversight bodies; of external reporting avenues; as well as a censored media and civil society restricting the fourth estate's ability to play a 'watch-dog' role; the lack of impartiality and independence of the judiciary are but a few of the essential elements needed for prevention but that are being impeded from operating properly (Chapter 4).[56] This situation links to (but is not the only result of) China's approach to its specific governance mode and One-Party State model (Chapter 2.2) and in particular the lack of autonomy or independence allowed for various oversight bodies within China's One-Party system (Chapter 4).[57] The Concluding chapter examines how, when facing such limitations, a state, such as China, can ensure the proper operation of its prevention measures.

In spite of these challenges, China has shown appetite to formally prohibit torture and ill-treatment and to embark on establishing some prevention measures (Chapter 2). Given this context, and the above general and China-specific limitations facing the research, the research focuses in on the set of "common core" preventive measures. This is to provide a basic analytical framework through which to assess the rapidly evolving state of torture prevention in China, their compliance with IHRL norms and expectations, and the challenges in their application.

Target audience

There is considerable overlap between practitioner and academic views on torture prevention (the experts are often both).[58] Thus, while the research uses a set of common core preventive measures, drawn from practitioner experience, the target audience of the thesis includes both scholars interested in the sphere of torture prevention globally and experts/practitioners in international and Chinese torture prevention work.

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56 Thesis Chapter 4.

57 Thesis Chapter 4 and Conclusions.

58 See, for example, the composition of the UN SPT's membership, where the current Chairman is both a scholar and a member/Chairman of the SPT; or the CPT, where again, its President is a Professor of international law, a practicing lawyer and a member/Chairman of this monitoring treaty body. At the CPT, out of its 47 members, 18 are academics. The same goes for many of the former UN SRTs: Juan Mendez and Manfred Nowak, two recent Special Rapporteurs, were also both active in academia at the same time as being mandate-holders.

Definitional limitations and discrepancies

China does have its own views of what constitutes torture and ill-treatment (c.f. Chapter 2.4 (I)(i)), and in some notable aspects these are different from the international definition and scope of obligations in the UN CAT (c.f. Chapter 1(2)). Yet, as a signatory of the UN CAT it is bound by the international definition of these terms, and should be guided by the interpretative texts from IHRL mechanisms. As such, this analysis focuses on China's compliance with international norms, based on international definitions.

Differences in interpretation do, however, provide a useful starting point in understanding the Chinese perspective. Thus, the key definitional discrepancies are briefly examined to enable a fuller understanding of how torture and ill-treatment are framed and understood in China by the authorities, key bodies involved in investigating and prosecuting torture cases, such as the procurators and the judiciary, as well as national scholars (c.f. Chapter 2.4 (I)(i) and Chapters 4.4.1, 4.4.2 and 4.4.4). This serves as a contextualisation for the evaluation of China's prevention measures and their progress in China. It also highlights different perceptions of the sense of progress held between the Chinese and international actors: dialogue on prevention progress can be challenging when the starting point of what is and is not torture and ill-treatment is not the same. When national law doesn't fully prohibit such abuse, this also has ramifications on how torture is defined by investigators and prosecutors, and can impact what they perceive as qualifying for prosecution and lays open loopholes in interpretation, which can facilitate abuse. The thesis briefly examines this to highlight where the key definitional discrepancies lie and what impact this may have on evaluating prevention progress (c.f. Chapters 4.4.1, 4.4.2 and 4.4.4 and Conclusions, Section C(ii)).

Protection gaps: regulatory deficiencies or implementation problems

The issue of torture and ill-treatment in the criminal justice system has been acknowledged by the Chinese authorities, who have shown some appetite to reform to address this, notably through a number of legal initiatives initiated since 2012 (c.f. Chapter 2). These include significant revisions to China's criminal justice laws and regulations and the drafting of multiple procedural

rules, judicial interpretations and other guidelines (c.f. Chapter 2.3). However, a considerable number of allegations and cases of torture and ill-treatment in Chinese detention remain, and these are proving to be resilient despite reforms (c.f. Chapter 3). IHRL and civil society[59] point to various reasons for this: first, regulatory deficiencies, where the existing protection provision is missing certain elements, omissions that allow torture and other ill-treatment to go undefined, ambiguously open to interpretation and fail to meet international law obligations (c.f. below and Chapter 2.4(I)(i)). Alternatively, there are aspects of the law where fundamental protections are entirely missing, creating entire protection gaps or vacuums. This is evident, for instance, in the virtually entirely missing raft of regulatory protections needed to adequately protect against and prevent torture of detainees in the spheres of PAD and CDR administrative detention and 'shuanggui' (CCP detention for investigation and discipline purposes) (c.f. Chapters 3.2 and 3.3). Second, there are systemic deficiencies evident in China's criminal justice system that enable certain bodies to stand above or outside of the protections in the law, for political or other reasons, and result in discretionary and misuse of numerous laws and regulations. This can be seen, for example, in the treatment of corrupt government officials within the 'shuanggui' justice system (c.f. Chapter 3.2), as well as in the pervasive co-ordination and influence that the central CCP and government yield over bodies such as the judiciary (cf. Chapter 4.3). Third, there are also implementation gaps that are evident, where difficulties in implementation that can either be due to genuine lack of understanding of the law, or deliberate unwillingness to enforce the law. An example of this can be seen in the practice of the systematic denial of access to lawyers and third party notification for certain 'sensitive' case categories of suspects (corrupt officials, those seen to severely disrupt public disorder, among others), when theoretically these rights exist, but can be delayed indefinitely – and are in practice – by the investigating bodies (c.f. Chapters 2.4 and 3.1). Chapters 2.4 and 3 examine these protection gaps and the effect that these can have in practice on the current state of prevention of torture and ill-treatment.

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[59] See, for example, UN CAT 5th Periodic Report on China, December 2015, published February 2016; Amnesty International, 'No End In Sight: Torture and Forced Confessions in China', November 2015, p.18-20.

C. Categorisation of terminology and detention types

This section provides a brief general classification, and clarification, of the terminology used throughout the thesis.

Torture and other ill-treatment

This research addresses types of abuse that could amount to torture[60] as well as other cruel, inhuman, degrading, treatment or punishment treatment or punishment[61] (other ill-treatment), as defined in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), to which China is a ratified State Party. Nonetheless, its primary focus remains on the processes and safeguards needed to prevent torture and other ill-treatment from occurring at any stage of the deprivation of liberty process (from investigation to post sentence), rather than on the legal classification of the abuse itself. Thus, while there remain differences in definitions, for the purposes of this thesis, they will be grouped together under the umbrella term of "torture" or "torture and other ill-treatment"– unless specified otherwise.

Administrative detention

No single international definition exists for administrative detention and it is not the subject of a dedicated international-law treaty. It is, however, covered (albeit indirectly) by other international and regional treaties and soft law norms. It is widely understood as a type of detention that is not covered by the criminal law and is mentioned in treaty body reports and Concluding Observations,[62] jurisprudence,[63] opinions in Deliberations or General Comments,[64] soft law

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60 UNCAT, Article 1: 'For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

61 Article 16, UNCAT.

62 For example, see HRC Lithuania Concluding Observations, 2004, para. 13 and HRC Concluding Observations on Israel, 1998, para. 317.

63 HRC, *A. v. Australia*, paras. 9.5 and 5.10, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997).

64 For example, WGAD, Deliberation No. 9 and HRC General Comment 35.

instruments,[65] among other sources, under the umbrella generic term "administrative detention" or by its sub-categories or types. The way that the international bodies[66] have approached the nature of administrative detention under IHRL has been generally to break it down by type (see below) and/or to treat it on an individual case-by-case basis. In addition, various descriptions of this specific type of detention have evolved in order to help explain its nature. A useful working definition of administrative detention, which will be used for this research, is one proposed by M. Louis Joinet[67] in his report on the practice of administrative detention. Namely, a practice "is considered administrative detention if, *de jure* and/or *de facto*, it has been ordered by the executive and the power of the decision rests solely with the administrative or ministerial authority, even if a remedy a posteriori does exist in the courts against such a decision."[68]

For the purposes of this thesis, two key types of administrative detention are distinguished.

a) *De jure* punitive administrative detention is a sanction based on grounds established in law or regulations for the commission of an administrative infraction, offence or misdemeanour (hereafter 'punitive administrative detention').

b) *De facto* administrative detention (hereafter simply general 'administrative detention', unless otherwise specified) includes any form of deprivation of liberty – that is where a person is unable to leave without consent – where the detention decision rests solely with the administrative or ministerial authority.[69]

This thesis acknowledges that the legitimacy of administrative detention *per se* can be questioned and that there is an important ongoing debate around whether regulations 'normalise' or implicitly endorse certain types of deprivation of liberty that should not be permitted in the first place. The focus of this thesis is, however, on the current reality of torture and other ill-treatment

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65 The UN Nelson Mandela Rules (revised Standard Minimum Rules on the treatment of prisoners), para. 4: 4. (1) Part I […] is applicable to all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to "security measures" or corrective measures ordered by the judge."; paras. 94 & 95 for example, refer to "persons arrested or imprisoned without charge shall be accorded the same protection as that accorded under part I and part II, section C." It covers those convicted and those detained but not convicted of criminal offences, which has been interpreted in HRC jurisprudence, for example, *A v Australia*, para 5.10, as including administrative detainees.

66 In particular, the HRC and WGAD (see, for example, Deliberation No. 9 of the WGAD).

67 The former member of the Human Rights Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, in his report on 'the practice of administrative detention', U.N. Doc. E/CN.4/sub.2/1989/27.

68 Louis Joinet, U.N. Doc. E/CN.4/sub.2/1989/27, para. 17.

69 HRC, *A v. Australia*, para. 9.5.

in these detention spheres in China and the safeguards that need to be established to prevent torture.

Punitive administrative detention (PAD)

Some countries have a twin-track mode of running their public order system, especially (but not solely) those linked to legacy structures from the Soviet era – such as Armenia, Azerbaijan, Belarus, China, Georgia, Lithuania, Latvia, Moldova, Russia, Ukraine and Uzbekistan. These countries have an Administrative Code or Law that proscribes certain administrative infractions or offences. These are offences not regulated by criminal law, but instead are governed by administrative laws, such as 'hooliganism' or traffic offences. In many countries these are described as 'misdemeanours' or 'administrative arrests' or 'administrative offences'.[70] Not all countries that have an Administrative Offence Code have their legal systems based on legacy Soviet structures, for example Austria. Under Austria's Administrative Criminal Code[71] persons suspected of having committed an administrative offence may be held in police custody for up to 24 hours.[72] If subsequently found guilty by the competent authority, the persons concerned may be subjected to an administrative custodial sanction of up to six weeks,[73] which is served in a police detention centre ('*Polizeianhaltezentrum*').

De facto administrative detention

There are multiple types of *de facto* administrative detention, each with differing grounds and purposes. The main general (non-exhaustive) categories include:

- ***Initial detention in police custody (garde a vue)***

Arrest and initial deprivation of liberty in police custody by law enforcement staff (before bringing a suspect before a judge) falls under Joinet's working definition of administrative

[70] See, for example, Russia, where persons suspected of having committed an administrative offence may be held by a law enforcement agency for up to three hours; those facing trial in connection with certain administrative offences (e.g. minor hooliganism) may be detained for up to 48 hours (Section 27.5, Code of Administrative Offences). If found guilty, they may be sentenced to "administrative arrest" of up to 15 days (pursuant to Section 3.9, Code of Administrative Offences). Other countries with a soviet structure to their legal and administrative systems also have the administrative arrest justice track, including China (see Chapter 2), Georgia (Code of Administrative Offences), Moldova (Section 249 of the Code of Administrative Offences).

[71] Sections 12, paragraph 1, and 16, paragraph 2, of the Administrative Criminal Code.

[72] Section 4, paragraph 5, of the Constitutional Law on the Protection of Personal Liberty and Section 36, paragraph 1, of the Administrative Criminal Code.

[73] Sections 12 and 16, Administrative Criminal Code.

detention. International and regional human rights law regulate the duration of this detention and specify guarantees afforded to those detained.[74]

- ***Compulsory drug rehabilitation (CDR) and detention on health grounds***

Many states worldwide also use domestic legislation providing for administrative detention to detain those suffering from a physical, developmental or mental disability[75], those in need of involuntary psychiatric hospitalisation and treatment (civil involuntary patients)[76] or for drug, alcohol or substance abuse.[77] Civil involuntary hospitalisation and treatment can be effected pursuant to a state's mental health laws or, in the context of forensic patients, according to a state's criminal law. In some countries, involuntary hospitalisation is pursuant to administrative laws. In China for example, people contravening the Drug Control Law, can be subject to an administrative sanction of compulsory drug rehabilitation (for two years, extendable for another year) conferred upon them by the Police (PSB), pursuant to the Regulations on Compulsory Drug Rehabilitation.[78]

- ***Chinese Communist Party (CCP) detention***

The current use, and regulation, of CCP investigation and discipline justice process ('*shuanggui*') appears unique in the world's justice systems, largely because the People's Republic of China is one of very few nations that still embraces communist ideology. *Shuanggui* is described and examined in Chapter 2, but for the purposes of definition, involves a period of detention in order to investigate violations of Party regulations and discipline, most notably in the area of official corruption. It is regulated by CCP regulatory norms, with

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74 See Thesis Chapter 1.

75 For example, HRC, 754/1997, *A. v. New Zealand*, para. 7.2 (mental health); HRC Concluding Observations on Moldova 2010, para. 13 (contagious disease).

76 HRC, *Fijalkowska v. Poland*, para 8.4.

77 See, *inter alia*, CPT reports on this, including its reports on Finland 2014, CPT/Inf (2015) 25, para. 93; Serbia 2015, CPT/Inf (2016) 21, para. 159; UN SRT Reports on China (2005)(2011) and the UNCAT Committee Concluding Observations on China (2008)(2015), on compulsory drug rehabilitation in China; See also a detailed analysis on this type of detention in China in F. Sapio, *Sovereign Power and the Law in China*, (2010) and S. Biddulph, *Legal reform and Administrative detention Powers in China* (2007) and 'rights in the new regime for treatment of drug dependence' (2013); See also Chapter 2 and 3 of this thesis for an examination of CDR in China.

78 See Chapter 2 for description and analysis.

deprivation of liberty decisions made by CCP officials. In short, it can be considered as a form of administrative detention.[79]

International human rights' law and associated bodies or mechanisms

Where this thesis refers to international human rights' law ("IHRL"), it refers to all sources of international law including hard law (such as international and regional treaties and conventions), international and national court jurisprudence and soft law (including universal and regional normative standards), as well as general principles of international law and customary international law.

The work of the authoritative international bodies and mechanisms established to interpret treaty law (such as the UN Treaty bodies and the international and regional Courts or UN Special Procedures) is also examined. These include mechanisms such as the UN Special Rapporteur on Torture (UN SRT), the UN Committee against Torture (CAT Committee) and the Working Group of Arbitrary Detention (WGAD). In this respect, these mechanisms will be grouped together under the term 'IHRL bodies' or 'IHRL mechanisms', unless a specific body is individually relevant.

While all IHRL mechanisms' interpretations are important, two in particular, are often referred to in the thesis, namely, the CAT Committee and the UN SRT. The reasons for this are clear, their mandates touch most closely on the present focus of torture, they are directly applicable internationally and thus also to China, and China has ratified the relevant treaty (the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)) or has accepted their applicability to China.

[79] See Chapter 2 for a detailed analysis of this type of detention power.

D. Glossary of selected abbreviations

ASEAN	Association of South East Asian Nations
ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and People's Rights
CAT Committee	UN Committee against Torture, pursuant to the UNCAT
CCP	Chinese Communist Party
CDR	Compulsory Drug Rehabilitation
CL	Criminal Law (China)
CPL	Criminal Procedure Law (China)
CoE	Council of Europe
CPT	(European) Committee for the Prevention of Torture
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECPT	European Convention for the Prevention of Torture
GBCC	Great Britain-China Centre
HMIP	Her Majesty's Inspector of Prisons (UK)
HRAP	Human Rights Action Plans of the PRC
HRC	UN Human Rights Committee, pursuant to the ICCPR
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICPED	International Convention for the Protection of All Persons from Enforced Disappearance
KSS	*Kanshousuo* police-run pre-trial detention centre
MPS	Ministry of Public Security of the PRC
OPCAT	Optional Protocol to the (UN) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
PAD	Punitive administrative detention
PRC	People's Republic of China
PSAPL	Public Security Administrative Penalties Law of the People's Republic of China
PSB	(Chinese) Public Security Bureau

SPT	UN Sub-Committee on Prevention of Torture, pursuant to OPCAT
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNCAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UPR	Universal Periodic Review of the Human Rights Council (HRC)
UN SRT	UN Special Rapporteur on Torture and Other Cruel Inhuman or Degrading Treatment or Punishment

PART I: LEGAL FRAMEWORK

Chapter 1: Universal and treaty obligations to prevent torture and other ill-treatment

Chapter 1: Universal and treaty obligations to prevent torture and other ill-treatment

1.1 Introduction

The risk of torture and other ill-treatment exists whenever persons are deprived of their liberty. The act of deprivation of liberty creates an imbalance of power, weighted towards those detaining. It creates a reliance or dependence on those in charge. It also places a positive duty on them to ensure that those detained are safe and come to no harm from either staff, other detainees or from themselves.[80] The risk of torture and other ill-treatment exists within any closed facility or broader place of deprivation of liberty (i.e., where a person is not free to leave at will).[81]

Any person who has been deprived of his or her liberty could potentially be at risk, although some societal groups have been considered as particularly vulnerable. Various authoritative and specialist IHRL mechanisms (whose mandates specifically focus upon or cover torture, including the SPT, UN SRT, the HRC and, at the regional level, the ECtHR and the CPT) consider that vulnerable groups include, *inter alia*, racial, ethnic or religious minorities, women, children, migrants, and persons with disabilities.[82]

Equally, the timeframe of the deprivation of liberty is also an indicator of the risk of torture. The CAT Committee, the SPT, the UN SRT, the HRC, the ECtHR and CPT,[83] supported by many

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80 See, *inter alia*, CPT Standards CPT/Inf 2002, 1 Rev 2016 and CPT Report on its visit the United Kingdom, March / April 2016, CPT/Inf (2017) 9.

81 See analysis by IHRL bodies such as the SPT, 'The approach of the Subcommittee on Prevention of Torture to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', CAT/OP/12/6, 30 December 2010; UNCAT Committee General Comment No. 2; HRC General Comment 35; for analysis of ECtHR case law on deprivation of liberty see P. Van Dijk and G. Van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd ed.) (Netherlands: Kluwer Law and Taxation, 1990); A. Mowbray, *Cases, Materials and Commentary on the European Convention of Human Rights*, (Oxford University Press, 2012)(3rd edition); D. Harris, M. O'Boyle, C. Warbick, *Law of the European Convention on Human Rights*, London: Butterworths 1995); M. Evans and R. Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998); N. Rodley, *The Treatment of Prisoners under International Law* (2009); and R. Murray, E. Steinerte, M. Evans, and A. H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011).

82 See, for example, the SPT, 'The approach of the SPT to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under OPCAT', CAT/OP/12/6, 30 December 2010, para 5(j); HRC General Comment No. 23, CCPR/C/21/Rev.1/Add.5 26 April 1994; UN SRT, Report on China, 2005; the CPT's specific standards focused on the specific vulnerabilities and safeguards needed for detained juveniles, women and foreign nationals, CPT Standards CPT/Inf 2002, 1 Rev 2016.

83 SPT, 'The approach of the SPT to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under OPCAT', CAT/OP/12/6, 30 December 2010; ECtHR Grand Chamber, *Salduz v. Turkey*, Application no. 36391/02 (requiring access to a lawyer from the outset of deprivation of liberty to ensure both due process as a crucial element

legal scholars and specialists,[84] all consider that a period of particularly high risk is during initial custody of suspects by the police (i.e., the first 24 hours or so). This is premised on the risk of abuse in view of coercive extraction of confessions. This can be systemic or a matter of individual practice by police or law enforcement officials (i.e., the apocryphal "bad apple")[85]. Nonetheless, other periods of detention can also carry heightened risks of torture or ill-treatment. For instance, in some countries, a failed asylum-seeker transferred to the airport to await deportation, whose deportation is aborted at last minute on legal grounds, can risk reprisals on the return journey to the immigration detention centre.[86]

Similarly, when persons are deprived of their liberty and certain due process guarantees and safeguards are missing or are inadequate, the risk is of torture or ill-treatment also increases. Leading scholar Professor Sir Nigel Rodley considered that such safeguards could fall into two categories, procedural guarantees and "transparency measures", both of which form part of the concept of the "opacity paradigm" (i.e., the principle of shedding light into otherwise opaque places of deprivation of liberty, where the risk of torture remains high). Better regulation of safeguards and transparency measures are both needed to reduce the risk of torture in otherwise opaque – and thus higher risk – places of detention.[87]

Risk is a broad concept; and is challenging to assess in the context of torture. It can be difficult to measure and create definite legal obligations that effectively counter and prevent torture. Scholars, IHRL bodies and civil society specialists[88] broadly agree that torture prevention requires a variety

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of fair trial and as a preventive safeguards against torture, especially pertinent in the first few hours of police custody). This right cannot unduly be restricted or delayed *(Ibrahim and Others v. the United Kingdom*), (Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09), Grand Chamber judgment, 13 September 2016); CPT Standards CPT/Inf 2002,1 Rev 2016; HRC, Concluding Observations on Sudan, CCPR/C/SDN/CO/4, para. 18.

84 Evans and Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998); Rodley, *The Treatment of Prisoners under International Law* (2009); Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011); Carver and Handley, *Does Torture Prevention Work?* (2016).

85 See, for more analysis on the causes of torture, P. Zimbardo, *The Lucifer Effect: how good people turn evil*, (Rider Books, Random House 2007); and on the criminological perspective on the historical evolution of specific torture practices, M. Foucault, *Discipline and Punishment: the Birth of the Prison*, (Penguin Books 1977), Part 1.

86 See, for example, CPT Cyprus report 2013, and (not yet published) 2017 report on Cyprus, as well as the CPT Immigration Detention Factsheet, March 2017; another recent example can be seen in the UK, the Panorama documentary: 'Britain's Immigration Secrets', on the Immigration Removal Centre Brook House, September 2017.

87 Discussion on this topic with Professor Sir Nigel Rodley, PhD Supervisor, Supervision Session, August 2016.

88 See, *inter alia*, CAT Committee, General Comment No. 2 on UNCAT Article 2; HRC General Comment No. 20 on ICCPR Article 7; SPT, 'SPT Approach to the Concept of Prevention', 4th Annual Report; SPT, 'Provisional statement on the role of judicial review and due process in the prevention of torture in prisons', adopted by the SPT at its sixteenth session, 20 to 24 February 2012, CAT/OP/2; Evans and Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998); Rodley, *The Treatment of Prisoners under International*

of different strategies or measures. These measures can include, *inter alia*, the establishment or strengthening of:

- laws on torture prohibition and sanctions;
- external and internal complaints avenues;
- prosecution of allegations of torture and other ill-treatment and eradicating impunity;
- investigation techniques;
- conducting regular external and independent monitoring of all places of deprivation of liberty;
- effective, accessible and confidential complaints mechanisms;
- protective safeguards afforded to detainees in law; and
- professional law enforcement training methods, among others.[89]

The identification, content of, and need for these 'preventive measures' has been widely examined by a range the IHRL bodies and legal scholarship.[90] Yet, there has been relatively little scholarship on the precise weight or relative effectiveness, and thus importance, of the preventive measures, although this is starting to change.[91] Some consider that procedural safeguards established in law and the regulation of correct detention practices are the most crucial measures to prevent torture.[92] Others consider that independent and unannounced system of regular monitoring are more effective.[93] Overall, there is broad agreement is that prevention requires a

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Law (2009); Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011); Carver and Handley, *Does Torture Prevention Work?* (2016); Association for the Prevention of Torture (APT), 'Understanding the risk of torture', http://www.apt.ch/en/understanding-the-risk-of-torture/ [accessed 14 June 2017].

89 See, *inter alia*, the SPT, 'The approach of the SPT to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under OPCAT' (2010); CAT Committee General Comment No. 2; HRC General Comment Nos. 20 and 23; UN SRT, Report on China (2005); CPT Standards CPT/Inf 2002, 1 Rev 2016.

90 See, *inter alia*, CAT Committee, General Comment No. 2 on UNCAT Article 2; HRC General Comment No. 20 on ICCPR Article 7; SPT, 'SPT Approach to the Concept of Prevention', 4th Annual Report; SPT, 'Provisional statement on the role of judicial review and due process in the prevention of torture in prisons', adopted by the SPT at its sixteenth session, 20 to 24 February 2012, CAT/OP/2; Evans and Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998); Rodley, *The Treatment of Prisoners under International Law* (2009); Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011); Carver and Handley, *Does Torture Prevention Work?* (2016).

91 See, for example, Carver and Handley, *Does Torture Prevention Work?* (2016), Introduction and Conclusion.

92 CAT Committee, General Comment No. 2 on UNCAT Article 2; see Carver and Handley, *Does Torture Prevention Work?* (2016).

93 Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011); See also author's interviews and correspondence: S. Casale (September 2017) and M. Amos (June 2012 and September 2017).

multi-layered approach, requiring many different elements within a wide strategy to combat and eradicate torture.

For the purpose of this analysis, the key preventive measures required to counter the risks of torture from materialising can be roughly grouped into five categories. These include:

i. The international obligations and legal framework prohibiting and criminalising torture and other ill-treatment.

ii. The legal framework regulating the protective safeguards and due process guarantees that should be afforded to those in detention, as well correct detention practice.

iii. An effective and operational criminal justice system with proper investigation and adequate prosecutions of torture and other ill-treatment allegations; linked with this is the need for a strong independent judiciary and action taken to address any impunity.

iv. Regular independent monitoring of places of deprivation of liberty ('preventive monitoring').

v. The establishment of internal and external complaints mechanisms.

IHRL bodies, legal scholars and experts have regularly identified all five elements as contributing to reducing and preventing incidences of torture and other ill-treatment. These can be seen to represent some of the key elements within the consensus preventive nexus within torture prevention academic literature and in prevention work practice.[94] Nonetheless, as outlined in the Introduction, these are only a selection of some minimum "common core" preventive measures. These are set out to provide an analytical framework through which to understand a snapshot of the state of torture prevention in China. It is, however, a non-exhaustive list, given the indefinite nature of prevention.[95] Some specific measures are not included explicitly in this grouping but can be seen as being part and parcel of the above-listed wider groupings. An example of one such

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94 Thesis Chapter 1.2 (see, notably, Carver & Handley, *Does Prevention Work*? (2016) and the work of the CAT Committee,, SPT and CPT, outlined in Chapter 1.2.

95 Thesis Chapter 1.2, notably UN CAT Committee's General Comment No. 2, paragraph 25..

measure is the reparation for victims of torture, which is alluded to in Chapter 4.4.4 within the context of the effect on prevention of the lack of an impartial, robust and independent judiciary.[96]

Nonetheless, wider actions may also be needed, in line with a broad prevention strategy, to prevent torture effectively, especially in certain countries where torture may have become an embedded or systemic problem. Chapter 4[97] examines certain broader socio-cultural factors that can contribute to an increased risk of torture or to torture practices becoming embedded and that need to be addressed to reduce the overall risk of torture.

[96] See for example a comparative lack of reparations in China (see for example, REDRESS, 'Reparation for Torture: A Survey of Law and Practices in Thirty Selected Countries' (2003), and one of the causes is the impotence of the judiciary to comprehensively award or enforce compensation and other enforceable measures of reparation for torture victims (Thesis Chapter 4.4.4).

[97] Thesis Chapter 4.7.

1.2 Scope of obligations under IHRL

There is a general legal obligation under international human rights law to prevent torture and ill-treatment. The obligation to prevent severe abuse more generally has been the subject of detailed examination and critique by many scholars and experts, including Sir Nigel Rodley,[98] Sir Malcolm Evans, Rachel Murray, Elina Steinerte, and Antenor Hallo de Wolf,[99] among others.[100] They point out that the obligation to prevent abuse generally has long been established as a legal obligation under international law (as seen, for instance, in the ICJ case of *Bosnia and Herzegovina v Serbia and Montenegro*[101]). It has been adopted across a broad range of topics including the prevention of attacks on diplomatic agents, international organised crime, genocide and torture.[102] These scholars argue that various international legal instruments that have focused on prevention have relied on the methodology of requiring states to criminalise acts in their national legislation and assert jurisdiction over "individuals who commit certain acts that are considered unacceptable to the international community."[103] These acts include genocide and torture. Many legal instruments, including the UNCAT and the Genocide Convention,[104] were considered as requiring the prevention obligation to be fulfilled through ensuring adequate prosecution and conviction, thereby providing a form of deterrence once acts of torture or other ill-treatment had been committed.[105]

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98 Rodley, *The Treatment of Prisoners under International Law* (2009).

99 Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011), p.4.

100 See, for example, Carver and Handley, *Does Torture Prevention Work?* (2016), chapter 1; Nowak and MacArthur, *The United Nations Convention Against Torture: A Commentary* (2007); Evans and Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998).

101 ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007.

102 OPCAT Research Team, 'Prevention under International Law', Bristol University, May 2009, p. 1 citing Article 29 of the Vienna Convention of Diplomatic Relations, Article 1 and VIII of the Convention on the Prevention and Punishment of the Crime of Genocide, Article 2(1) and 16 of the UNCAT.

103 Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011), p.4; Nowak and MacArthur, *The United Nations Convention Against Torture: A Commentary* (2007), p. 114, para. 52.

104 The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly on 9 December 1948 as General Assembly Resolution 260 and entered into force on 12 January 1951.

105 Nowak and MacArthur, *The United Nations Convention Against Torture: A Commentary* (2007), p. 114, para. 52.

The general obligation to prevent has been widely acknowledged by IHRL mechanisms and scholars as extending to torture.[106] The obligation to prevent torture and other ill-treatment is complementary to strengthening the prohibition of torture. In the context of treaty law, this primarily stems from the UNCAT Convention Articles 2(1) and 16(1). Article 2(1) specifies that "each State Party shall take effective legislative, administrative, judicial or other measures to *prevent* acts of torture in any territory under its jurisdiction."[107] It has gradually become accepted that the obligation to prevent torture extends to preventing other forms of ill-treatment.[108] UNCAT Article 16(1) extends this prevention obligation "to *prevent* […] other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity […]."[109] The CAT Committee has explicitly addressed the extension of the prevention obligation to cover all forms of torture and other ill-treatment.[110] The rationale behind the CAT Committee's broadening of the interpretation of prevention to other ill-treatment is that 'experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment'.[111] Moreover, as noted by the SPT, "whilst the obligation to prevent torture and ill-treatment buttresses the prohibition of torture, it also remains an obligation in its own right and a failure to take appropriate preventive measures which were within its power could engage the international responsibility of the State, should torture occur in circumstances where the State would not otherwise have been responsible."[112]

The context, rationale and inspiration underpinning the obligation in UNCAT Article 2(1) for State Parties to undertake "effective legislative, administrative, judicial and other measures to

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106 See below references in this Chapter section, and in particular, the SPT, para I(1).
107 UNCAT 2(1) [emphasis added].
108 CAT Committee, General Comment No 2; See analysis in Nowak and MacArthur, *The United Nations Convention Against Torture: A Commentary* (2007), p. 112.
109 UNCAT 16(1) [emphasis added].
110 CAT Committee General Comment No. 2, CAT/C/GC/2, 24 January 2008.
111 CAT Committee General Comment No. 2.
112 SPT, 'The approach of the Subcommittee on Prevention of Torture to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', 30 December 2010, para. I(1).

prevent acts of torture" (including discussions during the drafting process and inspiration drawn from other legal instruments) has already been examined extensively by the CAT Committee[113], SPT,[114] and scholars[115], to fully understand the nature of prevention obligations. One area of focus is whether the Article 2(1) obligation to prevent torture extends in its entirety to other forms of ill-treatment and any safeguards necessary to prevent this, or whether it only extends to specific measures contained in Article 10 (training), Article 11 (systematic review of interrogation rules and policies), Article 12 (prompt impartial investigation) and Article 13 (right to complain).[116] The CAT Committee in its General Comment No. 2 has stated that the obligation to prevent other forms of ill-treatment should be read as widely as possible. It points to the use of the term '*in particular*' in UNCAT Article 16 as meaning that it should not be read exhaustively. It further refers to the obligation to prevent as extending, in its view, to Article 14 (outside of the original Articles specified in the treaty): 'Article 16, identifying the means of prevention of ill-treatment, emphasizes 'in particular' the measures outlined in Articles 10-13, *but* does not limit effective prevention to these Articles'.[117] Similarly, this is a view reflected by other IHRL bodies whose mandates also touch upon the subject of torture and other ill-treatment, such as the HRC.[118]

According to various IHRL mechanisms and scholars, the obligation to prevent can also be read into other treaties and other sources of international law preventing torture. For instance, the ICCPR specifically prohibits torture and ill-treatment[119] and articulates that detainees should be treated humanely and with respect.[120] While the ICCPR does not expressly mention the duty to prevent torture, the HRC (the body mandated to interpret and assess compliance with the

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113 CAT Committee General Comment No. 2.

114 SPT, 'The Approach to the Prevention of Torture' (2010), para I(1).

115 See, *inter alia*, A. Hallo de Wolf, OPCAT Bristol Research Team, 'Prevention under International Law', 20 May 2009, Bristol, Chapter 1; M. Nowak & E. MacArthur, The United Nations Convention Against Torture: A Commentary (Oxford: Oxford University Press: 2007); Rodley, *The Treatment of Prisoners under International Law* (2009); 'Preventing Torture in the 21st Century: Monitoring in Europe Two Decades On, Monitoring Globally Two Years On', Essex Human Rights Review Volume 6 Number 1, December 2009, Special Issue 2009, S. Casale, 'A System of Preventive Oversight', N. Rodley, 'Reflections on Working for the Prevention of Torture', W. Tayler, 'What is the Added Value of Prevention?', A. Olivier and M. Narvaez, 'OPCAT Challenges and the Way Forwards: The ratification and implementation of the Optional Protocol to the UN Convention against Torture', E. Steinerte and R. Murray, 'Same but Different? National human rights commissions and ombudsman institutions as national preventive mechanisms under the Optional Protocol to the UN Torture Convention'; M. Leidekker, 'Evolution of the CPT's Standards Since 2001'; Y. Ginbar, 'Celebrating' a Decade of Legalised Torture in Israel'.

116 See analysis in Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011).

117 CAT Committee General Comment No. 2, para. 3.

118 CAT Committee General Comment No. 2.

119 International Covenant on Civil and Political Rights (ICCPR), adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, Article 7.

120 ICCPR, Article 10.

ICCPR)[121] has interpreted a requirement for state parties to do so, pursuant to ICCPR Article 2, which 'requires that state parties adopt legislative, judicial, educative and other appropriate measures in order to fulfil their legal obligations'.[122] Additionally, it points out that 'in general, the purposes of this Covenant [ICCPR] would be defeated without an obligation integral to Article 2 to take measures to prevent a recurrence of a violation of the Covenant'.[123] Equally, the HRC's General Comment No. 20, in relation to ICCPR Article 7 (prohibition of torture and cruel treatment or punishment) shows the HRC's perspective on the scope of prevention. The HRC observes that 'it is not sufficient for the implementation of Article 7 to prohibit such treatment or punishment or to make it a crime. State Parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction'.

1.2.1 Broader interpretation of the scope of torture prevention requirements

While there is general consensus among the IHRL bodies and scholars that the prevention of torture obligation is a legal obligation, its scope is a different matter. In all the international instruments' treatment and analysis of prevention, the concept of prevention itself tends not to be described nor do the majority of these conventions include the actual content of the obligation to prevent.[124] Given the indefinite nature of the preventive obligation, interpretations and parameters of the prevention obligation have evolved over time.

'Legislative, administrative, judicial and other measures', included in UNCAT 2(1), are relatively broad and it is left open as to what precisely states must do to avoid being found in contravention of Article 2(1). This has been examined the CAT Committee (the body mandated to interpret and assess compliance with the UNCAT) in its General Comment on Article 2, to identify certain specific preventive measures and procedural safeguards required to effectively fulfil this obligation. Paragraph 4 of the General Comment comes close to suggesting what states should

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121 ICCPR, Part IV.
122 ICCPR 2(2); HRC General Comment 31, para. 7.
123 HRC General Comment No. 31, para. 17.
124 See more generally, Hallo de Wolf, 'Prevention under international law' (2009), p. 1; and Evans, 'The Legal Concept of Prevention?', shared with author on 19/04/2012.

undertake to comply with this obligation, including stating that 'state parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are prevented'.

The CAT Committee refers to the broad and progressively evolving nature of the measures needed to comply with the obligation to prevent torture and ill-treatment and states that 'the Committee's understanding of, and recommendations in respect of, effective measures are in a process of continual evolution, as, unfortunately, are the methods of torture and ill-treatment.'[125] The challenge with a relatively broad and evolving interpretation of scope and content of the legal obligation of prevention under UNCAT (2)(1) is that it remains hard (but not impossible)[126] to measure.[127] Equally, the CAT Committee considers that the interpretation of 'effective measures' for the purpose of Article 2 needs to remain broad to cover different contexts. It stresses that new prevention methods, when tried, tested and found to be effective against torture and ill-treatment, should be continually included in the prevention obligation to prevent.[128] It considers that UNCAT Article 2 provides 'the authority to build upon the remaining Articles and to expand the scope of measures required to prevent torture'.[129]

The SPT (the body mandated to interpret and assess compliance with the Optional Protocol to the UNCAT (OPCAT))[130] supports this view on the broad concept of prevention.[131] Moreover, it considers that the obligation to prevent torture is an obligation in its own right and 'a failure to take appropriate preventive measures which were within its power could engage the international

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125 CAT Committee, General Comment No. 2, para 4.

126 See an examination of the impact and effectiveness of a range of different preventive measures conducted by Carver and Handley, *Does Torture Prevention Work?* (2016); see also an example of NPM self-assessment with the HMIP's (one of the 21 bodies that make up the UK NPM) 'Self-assessment Tool' for assessment against SPT NPM Guidelines, 2014-2015 https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2015/06/HMIP-self-assessment-2014-15.pdf [access 12 June 2017]; see also H. Singh Bhui, 'Can Inspection Produce Meaningful Change in Immigration Detention? *Global Detention Project Working Paper No. 12*, May 2016 (on the impact of HMIP preventive monitoring in immigration detention settings); see also OPCAT Group discussions in Copenhagen, 2009, on the measurability and impact of prevention, APT Presentation, May 2009.

127 See OPCAT Group discussions held in Copenhagen, 2009, on the measurability and impact of prevention, APT Presentation, May 2009.

128 Ibid, para. 14.

129 Ibid, para. 14.

130 Optional Protocol to the UN Convention against Torture, adopted 18 December 2002, 57th Session of the UN General Assembly, A/RES/57/199; entered into force on 22 June 2006 (see Section 1.3.4 for a description and analysis of preventive monitoring).

131 SPT 'Approach to the Concept of Prevention', 4th Annual Report, paras. 1 and 2

responsibility of the State […]'.[132] The HRC also underlines the need for wider prevention measures, such as awareness-raising and information dissemination to the population at large of the prohibition on torture and the need for adequate training of law enforcement officials and others involved in depriving persons of their liberty.[133]

Various scholars[134] assessing the scope of prevention obligations have observed that there appears to be a pull in two directions. On the one hand, there is impetus to create a concretely defined minimum core content of prevention to allow states to realistically achieve preventive safeguards and be measured in their compliance. On the other, there is an evolving context to define an increasing number of measures necessary to prevent torture and the challenges associated with ring-fencing their precise content. This has led to a concern that the scope and content of the legal obligations to prevent torture are relatively unclear and potentially difficult to implement as a matter of legal obligation.[135] Legal scholars, Murray, Steinerte, Evans, and Hallo de Wolf, point out that "the real tension that underlies this – and other – explorations of the concept of prevention is that between a generic, but open-ended, 'obligation to prevent' on the one hand, and the existence of discrete obligations which have a preventive impact upon the other."[136] Nevertheless, an increasing body of IHRL mechanisms' jurisprudence and interpretation, as well as scholarly analysis, indicate an emerging view that the obligation should encompass as many as possible elements in a given context that can contribute to reducing the risks of torture and should progressively and continually evolve.[137]

Generally, scholars and IHRL mechanisms broadly agree that torture prevention goes far beyond merely respecting the prohibition of torture; as the SPT has highlighted, "torture prevention is not about fulfilling international commitments concerning the prohibition of torture. This is the result

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132 SPT, Ibid, para. 1.
133 HRC, General Comment No. 20, in relation to ICCPR Article 7.
134 Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011), p. 60.
135 Ibid, p. 60; See also discussions between the OPCAT Contact Groups of NGOs and the SPT representatives in Copenhagen, 2009, on the measurability and impact of prevention, APT Presentation, May 2009.
136 Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011), p. 71.
137 CAT Committee General Comment No. 2, para. 3; SPT, 'SPT approach to the Concept of Prevention', para. 2, 4th Annual Report; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, para. 429 (on the general obligation to prevent); SPT, 'SPT Approach to the Concept of Prevention', 4th Annual Report; Carver and Handley, *Does Torture Prevention Work?* (2016); Nowak and MacArthur, *The UNCAT: A Commentary* (2007); Association for the Prevention of Torture (APT), 'Understanding the risk of torture', http://www.apt.ch/en/understanding-the-risk-of-torture/ [accessed 14 June 2017].

of torture prevention. Torture prevention embraces – or should embrace – as many as possible of those things which in a given situation can contribute to lessening the likelihood of risks of torture and ill-treatment occurring […] prevention casts a wide net embracing more easily matters such as education and training which have a clear preventive nexus but may appear more tangential when viewed from the perspective of 'protection'."[138]

Scholars Manfred Nowak and Elizabeth MacArthur, in their commentary on the UNCAT,[139] and jurisprudence from the IHRL mechanisms [140] support the view that UNCAT Article 2(1) formulation goes past the element of respecting the right not to be tortured, and triggers a positive obligation of the State Parties to fulfil the prevention obligation proactively. These scholars and the HRC and CAT Committee point to the duty of states to ensure measures taken by States remain within the general purpose of the UNCAT, and point to the equivalent interpretation of ICCPR Article 2(1)[141]. The CAT Committee has adopted this broad interpretation of UNCAT Article 2(1) in *Guridi v. Spain*[142] where the Committee found that 'the absence of appropriate punishment is incompatible with the duty to prevent acts of torture'. Similarly, the CAT Committee considers that the provision of no, or inadequate, reparation to victims of torture also is incompatible with the spirit of the UNCAT. The HRC has also interpreted the obligation to prevent torture as requiring states to take various positive and effective measures of a preventive character to prevent torture from occurring.[143] In this vein, authoritative IHRL bodies[144] have also stressed that impunity for acts of torture constitutes a clear violation of State Parties' obligations under Article 2(1) to take effective judicial measures to prevent acts of torture.[145]

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138 SPT, the Approach to the Concept of the Prevention of Torture' (2010), para. 3; see also analysis in Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011), p. 62; and, on links between protection, promotion and prevention, Rodley, *The Treatment of Prisoners under International Law* (2009); HRC, General Comment No. 7; CAT General Comment No. 2.

139 Nowak and MacArthur, *The United Nations Convention Against Torture: A Commentary* (2007).

140 See, for example, CAT General Comment No. 2; CAT Committee's adoption of this broad interpretation of Article 2(1) in *Guridi v. Spain, CAT/C/34/D/212/2002*, 24 May 2005, Thirty-fourth session 2-20 May 2005, Decision, Communication No. 212/2002.

141 MacArthur, *The United Nations Convention Against Torture: A Commentary* (2007); CAT Committee, General Comment No. 2; HRC General Comment General Comment No.20.

142 *Guridi v. Spain*, CAT/C/34/D/212/2002, 24 May 2005, Communication No. 212/2002.

143 HRC, General Comment No.20.

144 SPT, 'SPT Approach to the Concept of Prevention', 4th Annual Report; SPT, 'Provisional statement on the role of judicial review and due process in the prevention of torture in prisons', adopted by the SPT at its sixteenth session, 20 to 24 February 2012, CAT/OP/2. CAT Committee General Comment No. 2; UN SRT, China Report on China Visit 2005, CPT, CPT Standards, 'Combating Impunity', Part VIII, (see Chapter 1, Section 1.3.3 for more details).

145 See Thesis Chapter 1, Section 1.3.3.

International and regional courts are increasingly taking a similar position. They build their views upon several layers of reasoning: the rationale for positive obligations generally, initially in the right to life and genocide cases, and then building on this to read across to similar obligations to the requirement to prevent torture. For instance, in the case of *Velasquez Rodriguez*,[146] in the context of the violation of ACHR Article 4 (right to life), the IACtHR found that "taking the above evidence, along with the State's failure to investigate or to take steps to prevent such forced disappearances from happening, the Court found that the State violated Article 4 (right to life)." While the positive prevention obligation was referenced in the context of its reasoning on Article 4 (right to life) specifically, the Court also acknowledged that forced disappearance and torture findings can be intrinsically linked. Although there was no direct evidence showing that Mr. Velásquez Rodríguez was tortured, the Court concluded that Mr. Velásquez Rodríguez was 'disappeared' (kidnapped and imprisoned) by government officials, and, because the State had been shown to subject detainees to torture in the past, the Court held that the State had violated Article 5 (right to humane treatment) in this case of forced disappearance.[147] Equally, the International Criminal Tribunal for the former Yugoslavia (ICTY) has shown in the case of *Furundzija* - in the context of torture - that states have the obligation to 'expeditiously institute national implementing measures'[148] as part of an integral part of the torture prohibition obligation. Here, States were found to be required to immediately undertake all those procedures and measures that may make it possible, within their municipal legal system, 'to forestall any act of torture or expeditiously put an end to any torture that is occurring.'[149]

The different layers of prevention

Scholars Evans, Murray, Hallo de Wolf and Steinerte highlight findings of the International Court of Justice (ICJ) to argue that no exhaustive content of the prevention obligation exists in treaty law. They argue that in the *Bosnia and Herzegovina v Serbia and Montenegro*[150] case, while

146 IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).
147 Ibid, paras. 185, 187.
148 ICTY, *Prosecutor v. Furundzija* (10 Dec 1998), case no. IT-95-17/I-T, para 149.
149 ICTY, *Prosecutor v. Furundzija* (10 Dec 1998), case no. IT-95-17/I-T, para 149.
150 ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007.

recognising the existence of the general obligation to prevent, the ICJ refrained from outlining the contours of any general normative content of prevention obligations, and has limited itself to determining the scope of the prevention obligation within the framework of the Genocide Convention.[151] They highlight this case as providing "a rare example of a state being found liable for a breach of a preventive obligation in inter-state litigation in a human rights context."[152] This case is considered to help shape the interpretations that the various IHRL mechanisms and scholars in torture prevention have had regarding the potential scope of a prevention obligation.[153] Other torture prevention scholars[154] support this view, considering the methodology that the ICJ uses to explore the scope of a prevention obligation as important, albeit in the context of the prevention of genocide, rather than torture *per se*. Hallo de Wolf highlights the importance of the ICJ's reasoning in the construction of the prevention obligation: "the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide, and that legislation punishing genocide has a deterrent effect and could thus be considered as meeting the undertaking to prevent the crime of genocide."[155] The ICJ also is seen to go a step further, and specifies that it is the positive obligation of a state to prevent acts of genocide from occurring, through stopping an action and more broadly from deterring it from re-occurring.[156] Thus, the ICJ *Bosnia* case is considered to reference the different layers of prevention[157]. The first legally enforceable layer is the absolute prohibition against genocide and measures to be taken to ensure this prohibition through criminalisation, prosecution and punishment (i.e., reactive measures to penalise and stop acts of genocide).[158] Then, there is an additional, positive obligation to take further steps necessary beyond what is required by the relevant Convention.[159]

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151 Hallo de Wolf, OPCAT Bristol Research Team, 'Prevention under International Law', 20 May 2009, Bristol, chapter 1; M. Evans, 'The Legal Concept of Prevention?', shared with author on 19/04/2012, p. 5; See also Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011).

152 Evans, 'The Legal Concept of Prevention?', shared with author on 19/04/2012, p. 5; see also Murray, Steinerte, Evans, and Hallo de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011).

153 Hallo de Wolf,, 'Prevention under International Law', 20 May 2009, chapter 1; M. Evans, 'The Legal Concept of Prevention?', shared with author on 19/04/2012, p. 5; see also Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011).

154 See for example, Hallo de Wolf, 'Prevention under International Law' (2009), chapter 2.

155 See paras 166 and 159 of the *Bosnia Genocide* case; for detailed analysis see Hallo de Wolf, 'Prevention under International Law' (2009), p. 2; and M. Evans, 'The Legal Concept of Prevention?', shared with author on 19/04/2012.

156 *Bosnia Genocide* case, para. 432; and, more generally, Hallo de Wolf, 'Prevention under International Law' (2009), p. 2.

157 See Hallo de Wolf, 'Prevention under International Law' (2009), p. 2; and M. Evans, 'The Legal Concept of Prevention?', shared with author on 19/04/2012, p. 5.

158 Ibid.

159 Ibid

The treatment of the general obligation to prevent is an important foundation for the treatment of the specific obligation to prevent torture. IHRL bodies and scholars[160] have stressed that the two layers are important for any prevention obligation and should be extended to the prevention of torture. The criticism of only taking into consideration one layer of prevention (i.e., the initial reactive measures) is that it needs the act to have occurred in the first place; the positive duty includes proactive measures to deter an act from materialising.[161] In the context of torture prevention, the solution to an only reactive prohibition of torture is seen to lie in the concept of complementarity and the establishment of various 'ancillary obligations',[162] such as various due process rights for detainees, which complement the prohibition of torture. Cumulatively, these are considered to reach further than the obligation of prohibition and carry their own legal standing.[163] Evans argues that while the obligation to prevent torture does have a standing in international law, the legal standing of the complementary prevention obligations does not necessarily need to be established in international law.[164]

The relationship between a primary legal obligation and linked ancillary obligations also can be seen in practice in the regional sphere, epitomised in the relationship between the ECPT and the ECHR. The ECPT Explanatory Report directly refers to the judicial sphere of competence of the ECtHR as assessing violations of ECHR Article 3 (prohibition of torture) and mandates a preventive monitoring body (the CPT) to work alongside and complement the ECtHR in its work, through normative but non-judicial monitoring work. This has the aim to proactively identify risks of torture and other ill-treatment, contributing to the prevention of torture.[165] This model can

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160 See, for example, Evans, 'The Legal Concept of Prevention?', shared with author on 19/04/2012; Rodley, *The Treatment of Prisoners under International Law* (2009); Hallo de Wolf, 'Prevention under International Law' (2009); Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011); CAT Committee General Comment No. 2.

161 See Evans, 'The Legal Concept of Prevention?', shared with author on 19/04/2012, p. 6; and the SPT's 'Approach to the Concept of Prevention of Torture' (2010).

162 Ibid.

163 Ibid.

164 Ibid.

165 European Convention for the Prevention of Torture (ECPT), adopted 26/11/1987, in force, 01/02/1989, Explanatory Report, p. 15 to 32; see also relationship between CPT and ECtHR, as of August 2017, more than 900 ECtHR judgments refer to the CPT (Interview with P. Muller, CPT, July 2017); the author is a staff member of the CPT and is involved in cross-thematic meetings to boost complementarity of the CPT and ECtHR work on the prevention of torture.

also been seen at the international level, in a similar (but not identical) fashion with the SPT, NPMs and their relationship with the OPCAT.[166]

IHRL bodies, such as the SPT, the CAT Committee and the UN SRT, and scholarly literature[167] increasingly interpret this 'second layer of prevention' as comprising "as many as possible of those things which in a given situation can contribute towards the lessening of the likelihood or risk of torture and ill-treatment occurring."[168] This positive preventive obligation can comprise a range of different measures and work cumulatively to complement the prohibition of torture; its crucial element being its requirement for the plurality of measures to act in a given situation to counter the risk of torture.

The obligation to take proactive preventive measures in specific contexts has also been examined at the regional levels by regional human rights mechanisms. In Europe, the ECtHR has established the interpretation of a positive obligation under Article 2 (Right to Life) of the ECHR, where the state is under an obligation to proactively take preventive measures to protect a life at risk[169]; and similarly, in the Americas, with the case of *Velasquez Rodriguez*[170]. The ECtHR has also held that the procedural obligation for a State to carry out an effective investigation, applies to breaches of the substantive limb of ECHR Article 3 (torture and ill-treatment) (among other Articles), as it would be ineffective in practice if there existed no procedure for reviewing its breach.[171] The ECtHR has held that this derives from the general duty under ECHR Article 1 (obligation to respect human rights) and is distinct and broader than from obligations deriving from ECHR Article 13 (effective remedy).[172] This increasingly goes further than the mere prosecution of torture as a crime in a given state's national jurisdiction, but, cumulatively (in line

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166 See Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011); Nowak and MacArthur, *The United Nations Convention Against Torture: A Commentary* (2007).

167 See, for example, Evans, 'The Legal Concept of Prevention?', shared with author on 19/04/2012; Rodley, *The Treatment of Prisoners under International Law* (2009); Nowak and MacArthur, *The United Nations Convention Against Torture: A Commentary* (2007); Hallo de Wolf, 'Prevention under International Law' (2009); Carver and Handley, *Does Torture Prevention Work?* (2016).

168 SPT, 'Approach to the Concept of Prevention', p. 1, available in the SPT's 4th Annual Report.

169 *Osman v. UK*, Judgment 28.10.1998; for detailed analysis see Hallo de Wolf, 'Prevention under International Law' (2009), p. 6.

170 *Velasquez Rodriguez v. Honduras*, Merits, judgment 29 July 1988, para. 174; see analysis in Hallo de Wolf, 'Prevention under International Law' (2009), p. 7.

171 ECtHR, Judge Turkovic presentation during a CPT and ECtHR exchange of views, 6 March 2017, Strasbourg.

172 General principles are summarised in ECtHR, *Armani da Silva v. United Kingdom*, application no. 5878/08, 30 March 2016, paras. 229-239; while this primarily relates to ECHR Article 2, the ECtHR case law applies the procedural obligations of impartiality/independence, adequacy, thoroughness, promptness and scrutiny to ECHR Article 3 (ill-treatment investigations), according to ECtHR Judge Turkovic presentation during CPT and ECtHR exchange, 6 March 2017, Strasbourg.

with the gradual development of ECtHR jurisprudence[173] and soft law norms)[174] it requires the creation of the right environment for a holistic platform in states to investigate torture allegations adequately[175] and impartially, [176] a duty to effectively prosecute,[177] promptly impose sentences commensurate with the crime of torture[178] and to enforce such sanctions properly.[179]

Given the indefinite nature of the preventive obligation, interpretations and parameters of the prevention obligation have evolved over time and the scope of the obligation remains flexible.[180] Evans suggests that this should deliberately not be defined:[181] he argues torture prevention should not be constrained by an exhaustive proscribed list of activities.[182] Yet, IHRL mechanisms such as the CAT Committee and HRC see the need for some more specific indications as to the content of preventive measures that states should take to be in compliance with the prevention obligation. As outlined above, the CAT Committee has been evolving a more detailed interpretation of UNCAT Article 2, to understand and promote the some core elements of prevention as minimum standards to which states should comply. While it is generally acknowledged that preventive measures continually evolve, some key preventive measures have been identified by IHRL bodies, legal scholars and experts as contributing elements to reducing and preventing incidences of torture and ill-treatment.[183] These can be considered as some of the minimum core elements required to

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173 Relevant worldwide as a source of international law.

174 See *Armani da Silva v. United Kingdom*; see the Guidelines on "eradicating impunity for serious human rights violations' (2011), Council of Ministers of the Council of Europe.

175 *Giuliani and Gaggio v. Italy*, Application no. 23458/02, Grand Chamber Judgment, 24 March 2011,para 301; *Mustafa Tunç and Fecire Tunç v. Turkey*, Application no. 24014/05), Grand Chamber Judgment, 14 April 2015, para. 172; *Kaya v. Turkey*, Application no. 158/1996/777/978, 19 February 1998, para. 87.

176 *Giuliani and Gaggio v. Italy*, Application no. 23458/02, Grand Chamber Judgment, 24 March 2011,para 301; *Mustafa Tunç and Fecire Tunç v. Turkey*, Application no. 24014/05), Grand Chamber Judgment, 14 April 2015, para. 172; *Kaya v. Turkey*, Application no. 158/1996/777/978, 19 February 1998, para. 87.

177 *Öneryildiz v. Turkey*, Application no. 48939/99, Judgment, 30 November 2004, para. 95; *Giuliani and Gaggio v. Italy*, Application no. 23458/02, Grand Chamber Judgment, 24 March 2011, para. 306.

178 ECtHR judgments: *Kasap and others v Turkey*, no. 8656/10, para 59, 14 January 2014; *A v. Croatia*, no. 55164/08, para. 66, 14 October 201 and *Ali and Ayse Duran v. Turkey*, no. 42942/02, para 66, 8 April 2008.

179 *Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*, Application no. 2319/14, 2016 (execution of sentence), Judgment of 13 October 2016, final version 13 January 2017.

180 See more generally, Hallo de Wolf, 'Prevention under international law' (2009), p. 1; and Evans, 'The Legal Concept of Prevention?', shared with author on 19/04/2012.

181 See Evans, 'The Legal Concept of Prevention?', shared with author on 19/04/2012, p. 8; Murray, Steinerte, Evans, and de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011), concerning the concept of prevention.

182 Ibid.

183 See jurisprudence and interpretation from the CAT Committee, HRC, SPT, UN SRT, CPT, ECtHR (see references in footnotes throughout Chapter 1, for examples).

prevent torture effectively.[184] For the purposes of this analysis, they can be roughly collated into five thematic groups and will be examined, in turn, below.[185]

1.3 Architecture of key 'preventive measures'

1.3.1 Criminalisation, prosecution and punishment: the legal prohibition

One of the precepts upon which torture prevention is based is the fundamental prohibition of torture and other ill-treatment in international law and in any given country's domestic legislation.

Torture and other cruel, inhuman or degrading treatment or punishment is an absolute prohibition established by various international human rights treaties[186] and by wider humanitarian and refugee law. The prohibition of torture is generally recognised as one of a small number of fundamental peremptory norms of general international law (*jus cogens*);[187] and is widely recognised as a rule of customary international law, binding on all nations irrespective of any ratification of any given treaty.[188] The prohibition is also established in the core laws that form the body of International Humanitarian Law.[189] The prohibition has been widely recognised and extensively commented upon by various experts on this area.[190] This research will therefore not

184 See Introduction for the rationale and scope of this choice.

185 This is an indefinite and non-exhaustive list, following the rationale of a non-defined content of prevention measures (see above M. Evans et al., the CAT Committee General Comment No. 2, etc.), but serves as a analytical framework incorporating some 'core minimum measures' through which to understand the state of torture prevention in China (See Introduction).

186 UNCAT (Article 1), ICCPR (Articles 7 and 10), CRC (Articles 3 and 19); Convention on the Rights of Persons with Disabilities (CRPD) (Article 15); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CPMW) (Article 10); the Convention on the Rights of the Child (CRC)(Article 37); more generally Convention on the Prevention and Punishment of the Crime of Genocide (1948) (Article II); International Convention on the Elimination of All Kinds of Racial Discrimination (CERD)(Article 5); for detailed analysis see Rodley, *The Treatment of Prisoners under International Law* (2009), p. 53.

187 ICJ, Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*), Judgment of 20 July 2012, para. 99; UN General Assembly resolution 66/150; *Prosecutor v Furundzija* (IT-95-17/1), International Tribunal for Former Yugoslavia (1998) paras. 153-157.

188 *Ahmadou Sadio Diallo, Guinea v the Democratic Republic of the Congo*, International Court of Justice, Judgement of 30 November 2010, para 87; for detailed commentary see Rodley, *The Treatment of Prisoners under International Law* (2009).

189 Geneva Conventions, 1949 along with their Additional Protocols, 8 June 1977 prohibit torture and other ill-treatment, pursuant to Article 3 common to the four Geneva Conventions, Article 12 of the First and Second Conventions, Articles 17 and 87 of the Third Convention, Article 32 of the Fourth Convention, Article 75 (2 a & e) of Additional Protocol I and Article 4 (2 a & h) of Additional Protocol II. Article 3 common to the Geneva Conventions, Article 75 (2 b & e) of Additional Protocol I and Article 4 (2 a & h) of Additional Protocol II also prohibit "outrages upon personal dignity, in particular humiliating and degrading treatment."

190 Rodley, *The Treatment of Prisoners under International Law* (2009); Evans and Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998); Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011); Carver and Handley, *Does Torture Prevention Work?* (2016); A. Cassese, '*Inhuman States: Imprisonment, Detention and Torture in Europe today*' (Oxford: Polity Press and Blackwell Publishers, 1996); K. Roth, M. Worden, A, Bernstein '*Torture: does it ever make us safer? Is it ever ok*?'(New York: the New Press, 2005), among others.

undertake a detailed analysis of the prohibition of torture, but instead summarise some key facets, for context.

Scholars and practitioners of public international law consider the Universal Declaration of Human Rights (UDHR) to have entered the sphere of general international law[191] and to be binding on all States.[192] Article 5 of the UDHR prohibits torture or other ill-treatment. In respect of treaty law, the ICCPR establishes that torture and ill-treatment shall be prohibited (Article 7) and, in its Article 10 states that all persons who have been deprived of their liberty shall be treated with dignity and humanity. These stipulations are absolute in so far as international law does not allow for any derogation.[193] The UNCAT[194] comprises the most detailed international treaty prohibiting torture and other ill-treatment. Moreover, it also confers some obligations upon ratified states to undertake various measures of torture prevention. In addition, many other international treaties contain articles relating to the prohibition of torture and ill-treatment, and have the purpose to protect groups of persons, that would make torture or ill-treatment a violation of the respective treaties[195] in a variety of different contexts.

At the regional level, regional human right treaties and standards have also been established to prohibit torture. In Africa, torture and ill-treatment are prohibited by Article 5 of the African Charter on Human and People's Rights (ACHPR).[196] In the Council of Europe geographic sphere, the ECHR[197] Article 3 prohibits torture and ill-treatment; the ECtHR has shaped the interpretation and understanding of the content of Article 3 in its jurisprudence.[198] This case law is also shaped by findings of non-judicial mechanisms established to prevent torture at the regional level, such as CPT, mandated by the ECPT. In the Americas, the prohibition of torture and ill-treatment is

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191 The arguments have been detailed in Rodley, *The Treatment of Prisoners under International Law* (2009); Draper, *The juridical Aspects of Torture*, Acta Juridica (Cape Town 1976), 221; APT and Centre for Justice and International law (CEJIL), 'Torture in International law: A guide to Jurisprudence', 2008, ISBN 2-940337-27-5, among others.

192 Rodley, *The Treatment of Prisoners under International Law* (2009).

193 See HRC General Comment No. 20 on ICCPR Article 7.

194 UNCAT, 1984.

195 CRPD (Article 15); CPMW (Article 10); CRC (Article 37); more generally see the Convention on the Prevention and Punishment of the Crime of Genocide (1948) (Article II); CERD)(Article 5); for detailed analysis see Rodley, *The Treatment of Prisoners under International Law* (2009), p. 53.

196 African Charter on Human and Peoples' Rights (ACHPR), 1981.

197 European Convention on Human Rights, 1950, as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13.

198 See above footnotes for ECtHR case law on ECHR Article 3 (footnotes 152 to 160).

established in both Article 5 of the American Convention on Human Rights (ACHR)[199] and the Inter-American Convention to Prevent and Punish Torture.[200] The IACtHR has shaped the interpretation of the content of this prohibition through its case law.[201] In the Middle East, the Arab Charter on Human Rights was adopted and provides for the prohibition and prevention of torture in its Article 8, but it does not yet have an operational regional court.[202] Unlike other regions, Asia remains without a single comprehensive human rights convention, treaty or court that can be compared to those of its regional counterparts. However, some sub-regional groupings do exist that have established loose declarations on the protection of human rights, such as the Association of Southeast Asian Nations[203] and Inter-governmental Commission on Human Rights.

In short, as a *jus cogens* and as established in international human rights law, the torture prohibition is applicable to all states universally, regardless of any treaty ratification and its obligation is absolute. Its relevance to torture prevention is clear; it is widely considered as the 'first layer' of prevention and should be the reactive and essential first component to any state's prevention efforts.

1.3.2 Protective safeguards for detainees and correct detention practice

The legal framework to criminalise, investigate and prosecute torture and other ill-treatment has been considered insufficient in and of itself fully to reduce or prevent the risk of torture.[204] Legal procedural safeguards and guarantees designed to protect detainees from torture and afford them certain rights can complement the legal prohibition framework; these are widely considered to contribute significantly to reducing the risk of torture.[205]

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199 American Convention on Human Rights, 1969.

200 Inter-American Convention to Prevent and Punish Torture, 1985.

201 See, for example, IACtHR cases, *Bámaca Velásquez v. Guatemala*, 2000 (including Article 5); *Barrios Family v. Venezuela* 2011 (including Article 5); and *Cantoral Huamaní and García Santa Cruz v. Peru* 2007 (including Article 5).

202 In September 2014, the Arab League approved the statute of a future Arab Court for Human Rights. However, it will be several years before the court is fully operational.

203 A geo-political and economic organisation of 10 Southeast Asian countries, established in 1967.

204 HRC General Comment No. 20, para. 8; see analysis by Rodley, *The Treatment of Prisoners under International Law* (2009); Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011); Carver and Handley, *Does Torture Prevention Work?* (2016); Evans, 'The Legal Concept of Prevention?', shared with author on 19/04/2012; Nowak and MacArthur, *The United Nations Convention Against Torture: A Commentary* (2007), among others.

205 CAT General Comment 2; HRC General Comment 20, and jurisprudence such as *Guridi v. Spain*, CAT Communication No. 212/2002.

Treaty requirements, such as those contained in the UNCAT, OPCAT and other regional treaties, such as the ECPT, explicitly refer to some preventive measures, but by no means all of the measures.[206] The CAT Committee[207] and HRC[208] have identified some specific safeguards that they consider as key to preventing torture effectively. These include, *inter alia*,

- the systematic review of interrogation rules, instructions, methods and practices as well as arrangements and on-going staff training for the custody and proper treatment of persons deprived of their liberty,
- ensuring that detainees are held in places officially recognised as places of detention,
- right of third party notification of the fact of detention and provisions made against *incommunicado* detention,
- maintaining an official register of detainees' names and detention locations,
- the right of detainees to be informed of their rights,
- the systematic recording of the time and place of all interrogations, together with the names of all those present, and this information being made available for judicial or administrative proceedings,
- the right promptly to receive independent legal assistance, independent medical assistance, and (under appropriate supervision when the investigation so requires) to family members,
- ensuring that places of detention are free from any equipment liable to be used for inflicting torture or other ill-treatment,
- establishment of impartial mechanisms for inspecting and visiting places of detention and confinement, and

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206 HRC General Comment No. 20, para. 8; see detailed analysis by Rodley, *The Treatment of Prisoners under International Law* (2009); Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011); Carver and Handley, *Does Torture Prevention Work?* (2016); Nowak and MacArthur, *The United Nations Convention Against Torture: A Commentary* (2007), among others.

207 CAT Committee General Comment No. 2, on UNCAT Article 2.

208 HRC General Comment No. 20, in relation to Article 7 of the ICCPR.

- availability of judicial and other remedies to detainees and persons at risk of torture and ill-treatment that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment.[209]

These measures are non-exhaustive and are considered as some of the minimum guarantees that State Parties to the ICCPR and UNCAT should have in place in order to fulfil their prevention obligation under Article 2 of UNCAT and their obligations under Article 7 ICCPR.

Various other measures have also been considered as 'preventive' by the CAT Committee and HRC,[210] the UN SRT,[211] the SPT[212] and CPT.[213] These include training and educating law enforcement personnel on professional ethics and on the prohibition of torture, on the prohibition of refoulement, the prohibition of the use of evidence obtained by torture in court, among others. Indeed, various preventive safeguards, such as training law enforcement personnel in the prohibition of torture,[214] prompt and impartial investigation of alleged acts of torture,[215] the right to complain of alleged torture to, and to have his/her case promptly and impartially examined by competent authorities[216] are explicit obligations under UNCAT.

Other broader safeguards highlighted by the IHRL mechanisms are not specifically referenced within the UNCAT or ICCPR, but stem from them and are considered necessary for the intent of the UNCAT prevention obligation to be able to take effect.[217] These include preventive measures designed to target institutional sub-cultures within the police or law enforcement agencies, to ensure that, institutionally, torture is viewed as unacceptable. These are manifested in a variety of

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209 CAT Committee General Comment No. 2; HRC General Comment No. 20 on ICCPR Article 7; ECtHR case law on ECHR Article 3 (footnotes 152 to 160), among others.

210 HRC General Comment No. 20.

211 See, for example, UN SRT report on visit to China, 2005, and 2010/2011 Follow-Up analysis by the UN SRT.

212 See, for example, SPT 'Concept of Prevention; SPT on 'corruption and the prevention of torture and ill-treatment', CAT/C/52/2, 20 March 2014 Fifty-second session, 28 April–23 May 2014, SPT, Provisional statement on 'the role of judicial review and due process in the prevention of torture in prisons', adopted by the SPT at its 16th session, 20 to 24 February 2012, CAT/OP/2, 1 October 2012.

213 See for example, 'Combating Impunity' standards and recommendations by the CPT, CPT Standards, Part VIII.

214 UNCAT Article 10.

215 UNCAT Article 12.

216 UNCAT Article 13.

217 Along the lines of the reasoning provided at the start of this Chapter, as ancillary or complementarity requirements that give effect to the intent of the prevention obligation included in the UNCAT and to the prohibition of torture in international law.

recommendations by preventive monitoring bodies, such as the SPT or the CPT, for example, to ensure that a state establishes whistle-blower protections in its regulations.[218]

While some of these safeguards are not explicitly established in international treaty law, one of these safeguards, preventive monitoring, is specifically provided for in its own treaty. At the universal level, there is an established obligation enshrined in the OPCAT for State Parties to establish National Preventive Mechanisms against torture (NPMs), as well as for the SPT to monitor all places of deprivation of liberty in ratified states.

Preventive monitoring has been established as one of the key measures in preventing torture and ill-treatment. While previously it has not been the subject to much scholarship, this is changing and there is an increasing focus on this area developing in scholarly literature and through developing monitoring practice.[219] In the regional sphere, the ECPT[220] establishes the role of preventive monitoring, in the form of the CPT, as necessary and complementary to the ECtHR's reactive and judicial role regarding the prohibition of torture and ill-treatment (ECHR, Article 3). The ECPT recognised that in order to effectively stop torture from occurring both criminalisation/prohibition (Article 3) and the establishment of preventive measures, such as monitoring, are required.[221] The preventive measure of monitoring is generally accepted as an effective (but not the only) means of preventing torture and other ill-treatment.[222]

Various due process guarantees have also been identified as crucial for the prevention of torture. These procedural safeguards include the right of *habeas corpus* (the right of the detainees to challenge the legality of their detention) and provisions against incommunicado detention,

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218 See, for example, the CPT's report on its visit to Montenegro in 13-20 February 2013, CPT/Inf (2014) 16; CPT report on its Visit to Cyprus from 23 September – 1 October 2013, CPT/Inf (2014) 31 and 'combatting impunity' in Part VIII of the CPT Standards.

219 See, *inter alia*, Rodley, *The Treatment of Prisoners under International Law* (2009); Murray, Steinerte, Evans, and H. de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011); Carver and Handley, *Does Torture Prevention Work?* (2016); Evans, 'The Legal Concept of Prevention?', shared with author on 19/04/2012; Nowak and MacArthur, *The United Nations Convention against Torture: A Commentary* (2007), Singh Bhui, 'Can Inspection Produce Meaningful Change in Immigration Detention?' (2016).

220 See ECPT Explanatory Report.

221 See ECPT Explanatory Report; see detailed analysis on Evans and Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998); Morgan and Evans, *Protecting Prisoners: the Standards of the European Committee for the Prevention of Torture in Context*, (1999); Evans and Morgan, 'Getting to grips with Torture' (2002).

222 Ibid; it is also be examined in detail in Section 1.3.4 of this Chapter.

including the right of third party notification to be afforded at all stages of detention.[223] These guarantees are enshrined in international treaty law.[224] Equally, these two due process rights have been considered by many IHRL mechanisms and scholars[225] to have become part of general international law: as a norm of customary international law (incommunicado detention) and as a *jus cogens* (*habeas corpus*), and thus carry the legal status of having universal applicability, regardless of any treaty ratification. Scholars point to an increasing body of jurisprudence, state practice and *opinio juris* supporting this (such as States' deliberations during drafting, ratification and compliance with the ICPED).[226]

Other procedural safeguards have been established in the form of soft law normative standards that regulate the treatment and conditions in detention at both the international and regional level. For example, in the universal sphere, these are evident in the revised Standard Minimum Rules for the Treatment of Prisoners (the 'Nelson Mandela Rules'),[227] the Basic Principles for the Treatment of Prisoners,[228] the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[229] Rules for the Protection of Juveniles deprived of their Liberty[230] and UN Rules for the Treatment of Women Prisoners and non-custodial Measures for Women Offenders (the Bangkok Rules).[231] Other standards have been established that regulate the work of law enforcement officials.[232]

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223 CAT General Comment No. 2; Nowak and MacArthur, *The United Nations Convention Against Torture: A Commentary* (2007); Rodley, *The Treatment of Prisoners under International Law* (2009); HRC and WGAD on the status of the due process right of notification of custody and communication between the detainee and the outside world (prohibition of incommunicado detention).

224 UNCAT and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED), adopted by the General Assembly, December 2006; see analysis in Rodley, *The Treatment of Prisoners under International Law* (2009).

225 As underlined by the HRC, CAT, WGAD, IACtHR, ECtHR and the Human Rights Chamber for Bosnia and Herzegovina (see above references); see detailed analysis in Rodley, *The Treatment of Prisoners under International Law* (2009).

226 See detailed analysis in Rodley, *The Treatment of Prisoners under International Law* (2009).

227 UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), the UN Standard Minimum Rules for the Treatment of Prisoners (SMRs) were adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and approved by the UN Economic and Social Council in 1957, in December 2015 a revised version of the Standard Minimum Rules were adopted unanimously by the 70th session of the UN General Assembly in Resolution A/RES/70/175.

228 Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990.

229 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988.

230 United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly resolution 45/113 of 14 December 1990.

231 UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, 2010/16, (the Bangkok Rules), adopted by the UN Economic and Social Council.

232 The Code of Conduct for Law Enforcement Officials, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials), medical doctors (Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (Istanbul Protocol).

Equally, similar normative standards that regulate the treatment and conditions in detention exist at the regional level, and help inspire or form part of the sources of general international law. At the European level, the European Prison Rules (EPRs) and the standards set by the CPT include various safeguards that have been considered as crucial to preventing torture or other ill-treatment. These cover all stages of deprivation of liberty, and especially during the first 24 hours of initial police custody, which many IHRL mechanisms[233] consider as one of – if not the – time of the highest risk of torture.[234] These are based around a core trinity of safeguards: access to a lawyer, a doctor and notification of the fact of detention to a third party. These safeguards are derived from more than 25 years of the CPT's preventive monitoring experience and have been compiled into a body of standards, which go in depth into the range of procedural and other guarantees that should be in place to protect persons deprived of their liberty from the very outset of their detention.[235] These standards are derived from CPT visit reports and their recommendations. These reports start as confidential – given to a visited state a few months after a CPT visit – and then the relevant state decides whether to allow publication of the report (most do). Certain recommendations and standards that may applicable more widely and are repeated in a variety of different contexts are discussed by the CPT and added thematically into a body of public standards, the so-called 'CPT Standards'. The CPT Standards go beyond protecting detainees during the initial detention process and cover all stages of detention and all types of safeguards. These include the need for decent and safe living conditions, medical screening and assessments, effective complaints' avenues, regular contact with the outside world, limitations of use of solitary confinement, safeguards around the use of restraints and seclusion, amongst others.[236]

Although many of these procedural safeguards are set out in non-binding soft law norms, considered as codes of conduct, scholars[237] consider that they provide 'concrete guidance'.[238] They have been used as benchmarks against which state practice is assessed by the IHRL

233 See HRC, CAT, ECtHR, UN SRT jurisprudence and interpretation in the footnotes of Chapter 1.
234 See, for example, CPT Standards, CPT/Inf/E(2002)1, Rev 2016.
235 CPT Standards, CPT/Inf/E(2002)1, Rev 2016.
236 See CPT Standards, CPT/Inf/E(2002)1, Rev 2016.
237 See, for example, Evans and Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998); Rodley, *The Treatment of Prisoners under International Law* (2009).
238 Evans and Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998).

mechanisms, such as the HRC (regarding ICCPR Articles 7 and 10),[239] UN SRT[240] and the CAT Committee.[241] At the regional level, the ECtHR has also developed a range of its own safeguards in its case law, adding the weight of legally-binding case law to the original normative status of the soft law normative safeguards, such as those in the European Prison Rules (EPR) and the CPT Standards. For instance, now more than 900 ECtHR cases refer to the CPT's reports and standards and many of the CPT's standards have been relied upon in the Court's rationale in its findings of Article 3 (prohibition of torture and ill-treatment) violations.[242] Similarly, in the Americas, there has been a rapid development of a considerable body of jurisprudence by the IACtHR[243] and IHRL mechanisms.[244] Equally, in the African sphere, safeguards necessary for the prevention of torture have been incorporated in soft-law norms, such as the 'Robben Island Guidelines'.[245] These highlight the importance of certain basic procedural safeguards for detainees, considered essential to prevent torture. These include notification of detention to third parties, access to a lawyer and an independent doctor, and the use of only officially registered and authorised places of detention for any deprivation of liberty.[246]

As for their effectiveness, until recently relatively little scholarly analysis had been undertaken into measuring the effectiveness of safeguards in particular. One of the reasons is that these safeguards link substantively with other prevention measures, such as preventive monitoring and complaints avenues[247], that also include monitoring compliance with procedural safeguards. One recent scholarly work that has managed to isolate the impact of procedural safeguards as a preventive measure against torture is that of Carver and Handley.[248] These scholars assessed the impact of detention safeguards and correct detention practice as a preventive measure, in

239 HRC General Comment No. 21(44), 6 April 1992, para 4.
240 E./CN.4/1990/17 para 261-70 SRT stressed declaration on Principles of Detention as important to his findings.
241 A/45/44 para 73 (France), for example.
242 Author interview: P. Muller, CPT, July 2017; CPT/ECtHR Conference for exchange of views between the CPT and ECtHR, presentation by ECtHR Judge Turković (Croatian judge), March 2017, Strasbourg.
243 See, for example, IACtHR cases, *Bámaca Velásquez v. Guatemala*, 2000 (including ACHR Article 5); *Barrios Family v. Venezuela* 2011 (including Article 5); and *Cantoral Huamaní and García Santa Cruz v. Peru* 2007 (including ACHR Article 5).
244 See SPT report on its visit to Mexico and need for due process guarantees as a key to effective torture prevention, in CAT/OP/MEX/1, 31 May 2010; SPT, Provisional statement on 'the role of judicial review and due process in the prevention of torture in prisons' (1 October 2012).
245 Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa, African Commission on Human and People's Rights.
246 Robben Island Guidelines, Part II.
247 See below Chapter Sections.
248 Carver and Handley, *Does Torture Prevention Work?* (2016).

comparison to three other measures, in a series of different countries. They concluded that establishment and compliance with detention safeguards had significant impact on reducing the incidence of torture.[249]

1.3.3 A more effective criminal justice system, without impunity for abuse

In addition to a robust and comprehensive legal framework required at the domestic level to prohibit and prevent torture, it has become widely recognised[250] that the legal prohibition has little weight without an effective criminal justice system; one that can adequately prosecute torture allegations and ensure that impunity is not afforded to perpetrators of acts of torture.

There is no specific reference to the obligation to eradicate impunity *per se* in the UNCAT or other international or regional treaties that concern the prohibition and prevention of torture. Yet, many provisions in the UNCAT are inherently connected with this principle through the cumulative effect of specifying the requirements for a strong judicial process, including the establishment of an adequate investigation and prosecution system of cases of alleged torture, as well as requiring states to offer sufficient redress to the victims.[251]

Removing impunity for acts of torture is increasingly considered as a key preventive measure by IHRL mechanisms, scholars and legal practitioners.[252] Each considers that ensuring adequate prosecution and ending impunity is crucial to preventing torture from re-occurring.[253] IHRL treaty law, jurisprudence and concluding observations show that there is a requirement for states to ensure they have a legal system that adequately addresses torture with a fully functional and impartial judiciary, thorough and adequate investigation and prosecution mechanisms, a system free of judicial corruption and one that ensures a fair trial. These are considered fundamental parts

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249 Carver and Handley, *Does Torture Prevention Work?* (2016).

250 N. Rodley and M. Pollard, 'Criminalisation of Torture; state obligations under the UNCAT', *ECHR Review* (2006), p.115; see also Carver and Handley, *Does Torture Prevention Work?* (2016).

251 Such as Articles 4 to 16 of the UNCAT

252 See CAT Committee jurisprudence and reports (such as on Spain) on UNCAT Articles 4 to 16; UN SRT, see China Report 2015, 2010 (Follow-up); SPT, Provisional statement on 'the role of judicial review and due process in the prevention of torture in prisons' (1 October 2012); ECtHR *Giuliani and Gaggio v. Italy* (Application no. 23458/02), *Mustafa Tunç and Fecire Tunç v. Turkey* (Application (no. 24014/05), *Kaya v. Turkey*, (Application no. 158/1996/777/978); CPT Standards, Part VIII; see 'Eradicating impunity for serious human rights violations', Guidelines adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies, among others.

253 Ibid; see also detailed analysis in, *inter alia*, Rodley and Pollard, 'Criminalisation of Torture; state obligations under the UNCAT' (2006); Carver and Handley, *Does Torture Prevention Work?* (2016), p. 12; Evans and Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998); Rodley, *The Treatment of Prisoners under International Law* (2009).

of any rule of law system[254] and key measures to ensure that torture prevention is effective (both in terms of effective prohibition and as a deterrent for any potential acts of torture).[255] Consequently, this means that a legal culture that tolerates abuse and allows impunity for abusive acts is an environment where it is likely that torture prevention measures would be hindered from operating effectively. Such a culture cannot provide an adequate environment in which the preventive safeguards necessary to prevent torture can operate effectively.[256]

Various scholars have analysed the link between impunity and the heighted risk of torture. Studies on the impact and effectiveness of torture prevention have shown that in many countries impunity was the biggest obstacle to effective torture eradication. For example, in Turkey and Albania, legal scholars, Carver and Handley, point out that "torture persists when certain preventive steps are absent. Impunity for alleged torturers is frequently cited as a key factor."[257] Scholar Sebnem Korur Fincanci argues that, in the context of Turkey, impunity can significantly influence the resilience of torture practices and that a persistent state policy for torture can exist, despite the state's ratification international treaties:[258] 'impunity has a significant influence on the persistence of torture, since this result indicates a state policy for torture, despite ratified international treaties, and the expression of "zero tolerance for torture"'.[259] Equally, in the context of the penal system in Albania, Blitz argues that 'in spite of its considerable investment in Albania, the European Union and associated partners have not managed to curb occurrences of torture and have had a limited impact over substantive penal reform […].' Blitz finds 'the principal reasons for Albania's non-convergence with European norms lie with the weakness of

254 See detailed analysis on the concept of the Rule of Law in T. Bingham, *The Rule of Law* (UK: Allen Lane, Penguin Press 2010); and A.V. Dicey 'An Introduction to the Study of the Law of the Constitution', 8th ed. (UK: Macmillan, 1915).

255 SPT on 'corruption and the prevention of torture and other ill-treatment' CAT/C/52/2 (20 March 2014); SPT, Provisional statement on 'the role of judicial review and due process in the prevention of torture in prisons' (1 October 2012); CAT Committee General Comment No. 2; See also CPT Cyprus and Montenegro reports (2013)(on impunity); CPT standards, Part VIII (impunity); Bingham, *The Rule of Law* (2010).

256 See CAT Committee jurisprudence and reports (such as *Guridi v Spain*); UN SRT, China Report 2015, 2010 (Follow-up); SPT, Provisional statement on 'the role of judicial review and due process in the prevention of torture in prisons' (1 October 2012); Author's Interview on this topic with M. Kelly, Second-Vice President to the CPT, dated 17 August 2017; see also analysis in Carver and Handley, *Does Torture Prevention Work?* (2016).

257 Carver and Handley, *Does Torture Prevention Work?* (2016), Chapter 2.

258 S. Financi, 'the role of jurisdiction on the persistence of torture in Turkey and public reflections', *Torture*, 18, Vol.1, (2008), pp.51-55.

259 Financi, 'the role of jurisdiction on the persistence of torture in Turkey and public reflections' (2008), p. 55.

Albanian state structures and the persistence of systemic illiberal practices', including a culture of impunity. Reform of the judiciary is a key pre-condition to curbing torture.[260]

Similarly, Rejali[261] and Karstedt[262] examine whether the prevalence of torture is causally linked to a non-democratic environment. Rejali concludes that although democratic structures are not a preventive factor *per se* to counter torture (i.e., torture could, and did, still happen in democratic countries), impunity and adequate legal systems to counter it was still an important factor in reducing incidences of torture.[263] Karstedt[264] supports this view but nuances this further. She argues that both inter-personal abuse (i.e., murder or bodily harm) and state abuse (including torture) is more likely in a transitioning governance model (i.e., one that is transitioning from authoritarianism towards democracy), rather than in a full democracy (with some notable exceptions (the United Sates being one)) or a full authoritarian state. Indeed, Karstedt concludes that while *democracy* is not the pre-condition for less state abuse, there is a correlation between established and effective *rule of law* structures and reduced incidences of state violence.[265]

While facets of the rule of law go hand in hand with the model of democratic structures and institutions, scholars point out that it is too simplistic to attribute a reduction in torture in a given state to democracy alone. For instance, scholars Rejali and Karstedt, point out that despite democratic institutions having a positive influence on the incidence of torture, torture persists in modern-day democracies. While democracy has not been proven as a pre-condition for effective torture curtailment, however, findings by IHRL mechanisms[266] and scholarly analyses do note that incidences of torture occur less in democratic societies. Nevertheless, the same analyses also point to the continuance of torture practices in some modern-day democracies.

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260 B. Blitz, 'post-socialist transformation, penal reform and justice sector in Albania', *Southeast European and Black Sea Studies, 8*: *4* (2008), pp. 345-364.

261 D. Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2007).

262 S. Karstedt, 'Does democracy matter? Comparative perspectives on violence and democratic institutions', *European Journal of Criminology* 2015, Vol. 12(4) 457– 481.

263 D. Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2007).

264 S. Karstedt, 'Does democracy matter? Comparative perspectives on violence and democratic institutions', *European Journal of Criminology* 2015, Vol. 12(4) 457– 481.

265 Ibid.

266 See, for example, the SPT on the effect of corruption and the need for democratic principles and the rule of law for effective torture prevention, in paras. 99 to 100, Seventh Annual Report of the SPT, CAT/C/52/2, 20 March 2014.

While not all democracies respect the principles of torture prevention,[267] scholars and torture prevention treaties bodies, such as the UN SPT, underline the correlation between democracy, the rule of law and effective torture prevention. The SPT, for instance, views democracy and the rule of law as crucial elements to torture prevention: "democracy inhibits repression, and where democracy and the rule of law are absent, the incidence of torture, ill-treatment and corruption is generally greater since such acts go undetected or unpunished. In a democracy where, *inter alia*, transparency, a free press, freedom of information, education of the public to curb corruption and human rights abuses, independent oversight and complaints mechanisms, and an independent and impartial judiciary and judicial process are all valued and protected, there is more information available relating to the actions of State agents and hence greater accountability. Accordingly, the importance of adherence to democratic principles in effectively preventing and eradicating torture, ill-treatment and corruption cannot be overstated."[268]

This is not to say that torture prevention cannot work in all States with *de facto* 'Rule of Party', or even autocratic (i.e., 'Rule of Man') governance models. Notionally, in these contexts when an order is given to prohibit torture and establish prevention measures, it is followed through. Professor Sir Nigel Rodley cites the former Soviet Union as an illustration of this and argues that while in Soviet Russia there were extremely problematic issues with the gulags and re-education concept, police torture through coercive extraction of information from suspected 'ordinary criminals' was rarer.[269] This could of course, to some extent, be attributed to the natural deterrence of a reign of terror and fewer citizens daring to step out of line. However, it also could be that law-enforcement officers were expected to toe the official line or face similar consequences. Either way, it is not a given that a 'Rule of Party' or 'Rule of Man' State cannot protect its citizens from torture. This view is supported by research in the criminological field. For instance, scholars such as Lafree, Pinker and Karstedt, have undertaken empirical research across 138 countries (including China) to support the nuanced view that democracies are not a

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267 See, *inter alia*, Rejali, *Torture and Democracy* (2007); Hathaway, 'Do Human Rights Treaties make a difference' (2002).

268 SPT on corruption and the need for democratic principles and the rule of law for effective torture prevention, Seventh Annual Report of the SPT, CAT/C/52/2, 20 March 2014, para. 100.

269 Discussion on this topic with Professor Sir Nigel Rodley, PhD Supervisor, Supervision Session, August 2016.

sole pre-requisite for reducing inter-personnel violence (such as homicides) and state violence. These scholars support the view that "democracies obviously have the potential to reduce violence to the lowest levels; however, they share this with a number of autocratic states. The fact that 'nearly democratic' and 'mixed regime types' have the highest homicide rates points to towards a role for institutional stability, more generally, and an interactive effect between regime type and stability/weakness of institutions."[270] While democracies are not a pre-requisite for lower levels of violence (inter-personnel or state), as prominent exceptions such as the USA indicates,[271] scholars are finding a correlation that the *rule of law* situation in a country can affect its violence levels. For instance, Pinker and Karstedt point out "that highly functional rule of law institutions are related to distinctly lower levels of violence."[272] In their empirical research, 'low' rule of law countries do generally correlate with higher levels of state violence.

Both impunity and corruption (police and judicial) also have been considered to increase the risk of torture. Many IHRL bodies, legal, criminological and psychology scholars and civil-society experts stress that a reduction in police abuse can often be linked to concerted efforts by states to reduce systemic police corruption and tackle a culture of impunity for the perpetrators.[273] Police reform in Georgia can be seen as an example of this.[274] From 2004, the Georgian authorities recognised that they had a systemic problem of police corruption. Georgia undertook a series of police reforms including abolishing problematic police units, reducing other units, including dismissing staff suspected of involvement in corruption and other illegal and/or abusive acts. Overall, around half the police force was dismissed. The remaining police officers were issued with redesigned uniforms and were given increased salaries and careful selection and training of new recruits was undertaken. Although the direct impact of these reforms are difficult to link causally, scholars and civil-society experts have highlighted some improved police practices,

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270 Karstedt, 'Does democracy matter? Comparative perspectives on violence and democratic institutions', *European Journal of Criminology* 12(4) (2015), p. 470; G. LaFree, K Curtis and D McDowall 'How effective are our 'better angels'? Assessing country-level declines in homicides since 1950, *European Journal of Criminology*, 12 (482-504) (2015).

271 Rejali, *Torture and Democracy* (2007); Karstedt, 'Does democracy matter? Comparative perspectives on violence and democratic institutions' (2015),

272 Karstedt, 'Does democracy matter? Comparative perspectives on violence and democratic institutions' (2015), p. 471.

273 M. Devlin, 'Seizing the Reform Moment: Rebuilding Georgia's Police, 2004 – 2006', Princeton University, Innovations for a Successful Society, 2010; J. Boda and K. Kakachia, 'The Current Status of Police Reform in Georgia', Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2005; see, for detailed analysis, Penal Reform International police reform activities in Georgia at https://www.penalreform.org/where-we-work/south-caucasus/ [accessed at 21 June 2017].

274 Ibid.

mirrored in subsequent findings in reports by IHRL bodies[275] and regional monitoring bodies, such as the CPT.[276] These bodies have long recommended various measures needed to counter both corruption and impunity as an integral part of a broader approach to torture prevention. Many focus their recommendations on the strengthening of the judicial process, including the establishment of adequate prosecution and sanctions commensurate with the crime of torture in domestic legislation as these are considered crucial elements for deterrence.

A legal system that tolerates impunity and circumvents legal safeguards has been widely considered to exacerbate not only the risk of torture but also the probability of widespread endemic torture.[277] For instance, the CAT Committee[278] stressed that a culture of impunity led to systemic police violence in Nepal.[279] The CAT Committee found, in 2011, that torture practices had become routine and pointed to the climate of impunity for human rights violations as a contributing factor. It underscored that there was a general failure to prosecute torture (i.e., there were few to no torture prosecutions or convictions in Nepal). Further, it found that police generally refused to register alleged cases of torture and /or, together with prosecutors, delayed or only conducted cursory investigations. The situation was exacerbated by too few (and too lenient) disciplinary sanctions imposed for torture or other abuse and very little criminal prosecution. All these factors, according to the CAT Committee, contributed to the culture of impunity.[280] Nepal is not alone; generally the Indian Sub-Continent has frequently seen a culture of impunity leading to systemic police violence.[281]

This view is supported widely; IHRL bodies have increasingly perceived combatting impunity as a key element in torture prevention. For example in 2005, the UN highlighted its overall increasing concerns in this area by updating its set of principles for the protection and promotion

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275 HRC, Concluding Observations on Georgia, CCPR/C/GEO/CO/3, 15 November 2007; CAT, Report on Georgia, CAT/C/GEO/CO/3, 25 July 2006; CRC, Concluding Observations on Georgia, CRC/C/GEO/CO/4, 9 March 2017; See also, more generally, the SPT on 'corruption and the prevention of torture and other ill-treatment' CAT/C/52/2 (20 March 2014); SPT, Provisional statement on 'the role of judicial review and due process in the prevention of torture in prisons' (1 October 2012).

276 Report to the Georgian Government on the visit to Georgia carried out by the CPT from 1 to 11 December 2014, CPT/Inf (2015) 42; HRC 2007 Report on Georgia; CAT 2006 Report on Georgia.

277 See Chapter 2.

278 Report of the CAT Committee, 2012 (A/67/44), Annex XIII.

279 Sir Nigel Rodley, former UN Special Rapporteur against torture and member of the HRC, Supervisory comments with the author, 2016.

280 Report of the CAT Committee, 2012 (A/67/44).

281 For example, see HRC Concluding Observations on India, CCPR/C/79/Add.81, 4 August 1997 and the Report of the Working Group for the UPR on India, A/HRC/21/10, 9 July 2012, paras 48, 138.4 and 138.7.

of human rights through action to combat impunity.[282] The UN SRT has found that impunity has been a root cause of ongoing torture in many countries and becomes systemic "when rule of law institutions fail to provide accountability, including through impartial investigations and prosecution of perpetrators."[283] This view has broad support; for instance, on the regional level, the CPT considers, in its standards[284] (and more specifically in its 2013 reports on Cyprus[285] and Montenegro[286]), that countering impunity was key to reducing the risk of torture and other ill-treatment in these countries.

The principle of the Rule of Law inherently includes the need to address impunity and strengthen the judiciary to properly fulfil its task impartially and independently. Lord Bingham,[287] in his analysis of the practical working definition of the Rule of Law, accentuated the key and widely-recognised principle of the structural separation of the judiciary from the Executive and Legislative bodies in any given State claiming to be one governed by the Rule of Law. Bingham argued, drawing upon his judicial experience and precedent,[288] that a situation where a single person, government or any body stood above the law (even in exceptional circumstances) effectively resulted in an erosion of the concept of the Rule of Law. He further links the analysis of the gradually curbing of the commission of routine acts of torture across Europe to the increasing power of the law and the strengthened judiciary. In other words, the contributory factors to the prevention of torture are a strong and independent judiciary with robust criminal justice legislation, which applies to all and acts as a check and balance on those in power.

Conversely, a state with a weak judiciary, a legal system that tolerates impunity and circumvention of criminal justice safeguards could foster an environment that is conducive for torture to become embedded. This has been increasingly recognised both in the legal / criminological sphere, but also in other academic fields. For instance, psychologists Zimbardo (in

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282 Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum Updated Set of principles for the protection and promotion of human rights through action to combat impunity (2005) (E/CN.4/2005/102/Add.1).
283 See UN SRT Report, 2010 (A/65/273).
284 CPT Standards, Part VIII, Combating Impunity.
285 CPT report on Cyprus 2013.
286 CPT report on Montenegro 2013.
287 Bingham, *Rule of Law* (2010), Conclusions.
288 Dicey, *An Introduction to the Study of the Law of the Constitution* (1915).

the context of US soldiers' abuses in Abu Ghraib),[289] Zimbardo, Huggins and Haritos-Fatouros (in the context of military and civil police in former military-rule Brazil)[290] and Lifton (in the context of armed forces in the Vietnam war)[291] argue that the checks on the power of the police (in Brazil) and US armed forces (in Iraq and Vietnam) were eroded as the wars or internal strife progressed. While relevant rules existed (albeit to differing extents) that prohibited abuse of civilians, in both situations, the police and soldiers were gradually conferred an increasingly broad mandate, with few limits imposed on them by the authorities or the judiciary and minimal oversight or structures of accountability, thus allowing them to circumvent established protections.[292]

In short, an effective and independent criminal justice system that does not tolerate (i.e., that adequately investigates and prosecutes) acts of torture can be considered as a prerequisite element of a state's torture prevention obligation.

1.3.4 Regular independent monitoring of all places of deprivation of liberty

Overview

Independent preventive monitoring has been increasingly recognised at the international level,[293] the regional level[294] and at the national levels (by a considerable number of States that have ratified the OPCAT and established NPMs) as being a key tool in preventing torture. Preventive monitoring was set up to complement and strengthen the prohibition of torture in international and domestic legislation and normative standards.[295] It aims to establish a system of regular independent national and international regular visiting of all places of deprivation of liberty in a

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289 Zimbardo, *The Lucifer Effect: how good people turn evil* (2007).

290 M. Huggins, M. Haritos-Fatouros, P. Zimbardo, '*Violence Workers: Police Torturers and Murderers Reconstruct Brazilian Atrocities'* (California: University of California Press (2002)).

291 R.J. Lifton, *Home from the War* (Simon and Schuster, American Book-Stratford Press, 1973).

292 Zimbardo, *The Lucifer Effect: how good people turn evil* (2007); Lifton, *Home from the War* (1973).

293 By treaty bodies, such as the CAT Committee, the HRC, and the UN SPT and special procedures (such as the UN SRT), in normative standards such as the UN Nelson Mandela Rules, the European Prison Rules and (still draft) Council of Europe Committee of Ministers' Recommendation on the Rules on the Administrative Detention of Migrants (Author participating in the drafting process as an observer on behalf of the CPT).

294 The ECtHR, the ECPT and CPT (as of Autumn 2017, more than 900 ECtHR judgments refer to CPT findings and recommendations in their ECHR Article 3 reasoning), and Robben Island Guidelines.

295 For a detailed analysis of the history of preventive monitoring see Morgan and Evans, *Protecting Prisoners: the Standards of the European Committee for the Prevention of Torture in Context*, (1999); Evans and Morgan, 'Getting to grips with Torture' (2002); Rodley, *The Treatment of Prisoners under International Law* (2009) and 'Reflections on working for the prevention of Torture (2009); Murray, Steinerte, Evans, and de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011); see also ECPT Explanatory Report on the complementarity of judicial and non-judicial work to strengthen the prohibition of torture and ill-treatment.

given state to identify protection gaps and promote their closure by legislative or administrative means.[296]

As a preventive measure, monitoring has a privileged legal status in comparison to many of other prevention measures discussed above in that it is expressly provided for in treaty law, the OPCAT and, at the regional level, the ECPT. For those states that have ratified OPCAT, there is an obligation to set up a fully functional and independent NPM within one year of ratification,[297] to publish its findings[298] and to allow the UN SPT to visit its places of deprivation of liberty and make recommendations for improvements.[299] Various IHRL mechanisms[300] consider that even for those countries that have not ratified OPCAT (but have ratified UNCAT), regular monitoring is still an effective prevention measure against torture and ill-treatment and can be linked to a wider prevention obligation in light of UNCAT Article 2(1). It is noteworthy that some States that have not ratified OPCAT, such as Russia, are still setting up preventive monitoring bodies (for example, Russia's Public Monitoring Committees). As preventive monitoring has been widely considered one of the core elements of torture prevention, has a large number of bodies and standards in this sphere and because of its privileged legal status, this research undertakes a relatively more detailed analysis of this preventive measure.

- ***Effectiveness & Impact of preventive monitoring***

Measuring the effectiveness of preventive monitoring is challenging given that the practice is essentially forward-looking. It can be difficult to establish concretely and causally that torture did not occur due to one specific reason; usually a range of different elements are responsible for a reduction in torture and it can generally be difficult (but not impossible[301]) to isolate a single

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296 OPCAT; See also SPT Guidelines for NPMs (2010) and Self-Assessment Tool (2016); for analysis of OPCAT see commentary by Murray, Steinerte, Evans, and de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011).

297 Article 17, OPCAT.

298 Articles 16 and 23, OPCAT.

299 Part III, OPCAT; for a detailed analysis see Murray, Steinerte, Evans, and de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011).

300 CAT Committee, UN SRT, among others; See also Nowak and MacArthur's commentary on the UNCAT.

301 Carver and Handley, *Does Torture Prevention Work*? (2016); Singh Bhui, 'Can Inspection Produce Meaningful Change in Immigration Detention?' (2016); the UK NPM, for example, has assessed its own impacts according to SPT NPM guidelines in 2015 (https://s3-eu-west-2.amazonaws.com/npm-prod-storage-19n0nag2nk8xk/uploads/2015/08/UK-NPM-self-assessment-write-up.pdf)[accessed 27 June 2017)]; CPT measures its own impact on specific previous recommendations in preparation and during follow-up visits (author is a CPT staff member and involved in preparing and conducting CPT visits).

reason.[302] Equally, establishing a system of regular monitoring can also lead to an increase in the number of actual complaints of torture due to improving detainees' ability to communicate with the outside world and the creation of complaints/investigative procedures or mechanisms. Thus, an increase of complaints may not mean that the incidences of torture have increased but that the reporting structures or more contact with outside monitoring bodies are picking them up more; or, conversely, it may actually mean torture is, in practice, on the rise. This highlights one of the complexities of assessing the effectiveness of torture prevention measures.

The question of the impact of preventive monitoring is increasingly being examined. The CPT for example has been taking concrete steps to investigate its own impact following through its recommendations in successive visit reports to see what can be improved and what has worked.[303] For instance, an example of concrete change pursuant to a CPT recommendation can be seen following the CPT's Cyprus visit of 2013. The Council of Europe's Human Rights Commissioner visited Cyprus in 2016 and both he and the Cypriot authorities publicly cited that the capacity of the Cypriot immigration detention centre (Menoyia) had halved (creating better conditions) as a direct result of the CPT's 2013 report recommendation.[304] In addition, parts of the Cypriot Prison Regulations that currently impose severe restrictions on inmates undergoing disciplinary solitary confinement are being amended as a direct result, according to the Cypriot authorities, of the ECtHR ruling of a violation of ECHR Article 3 (*Onofirou v Cyprus*)[305] and in light of the CPT's 2013 visit recommendations made in this respect.[306]

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302 Author interview and correspondence: S. Casale, former CPT and SPT President (September 2017).

303 Previous work on assessing the CPT's impact has been conducted on-going according to Dr Silvia Casale, interview and discussions with author (September 2017) and Mark Kelly, 2nd Vice president of the CPT (author's interview with Mark Kelly, 2nd Vice president of the CPT (August 2017)); For an example of concrete change pursuant to a CPT recommendation, see CPT Cyprus visit 2013 and CoE Human Rights Commissioner Report on his visit in 2016 and CPT Cyprus visit 2017 (when published), where for example, the capacity of the immigration detention centre (Menoyia) was halved, according to the authorities, as a direct result of the CPT's 2013 report recommendations (acknowledged in the CoE Human Rights Commissioner report on Cyprus (2016), and the CPT's 2017 public visit summary (report unpublished as of September 2017).

304 See CoE Human Rights Commissioner's report on Cyprus (2016) and the CPT's 2013 Visit Report; Author (CPT) organised and participated in the CPT's Cypriot visit in February 2017.

305 ECtHR, *Onoufriou v. Cyprus*, (Application no. 24407/04), 7 January 2010.

306 Minister of Justice and Public Order of the Republic of Cyprus, Ionas Nicolaou and Nicosia Central Prisons' prison director (February 2017) discussions with the CPT, published in Cyprus Mail, February 2017; Interview with Cypriot NPM, Kalliopi Kambanella, February 2017, Nicosia, Cyprus.

The SPT and NPMs also examine ways to improve their own impact, through bi-and multi-lateral work and through peer-review.[307] Bristol University and Ludwig Boltzmann Institute conducted a recent study to examine how NPMs assess their own impact and what methodology NPMs were using to measure this. Some NPMs, such as the UK NPM, have initiated peer-review mechanisms such as its NPM Self-Assessment Tool (based on the SPT's NPM Assessment Tool)[308] to seek and measure their own impact incorporating input and advice from other NPMs, civil-society experts and IHRL mechanisms, such as the UN SPT.[309] Many monitors can see regular impact and change as a result of their preventive monitoring work: through assessment during follow-up visits, interviews with detainees and staff, reforms in law and policy in line with past recommendations. Overall, preventive monitoring bodies are gradually gaining a greater understanding of the impact of their work.[310]

Scholarly debate and critique on the impact (and limitations) of preventive monitoring is also increasing.[311] Carver and Handley have conducted a study into the effectiveness and impact of torture prevention measures.[312] They conclude that preventive monitoring has a tangible effect in reducing or preventing torture in the 16 country case studies they researched.[313]

Where their recommendations have not been acted on, monitors can, and regularly do, insist on implementation with the institution management, and will report to other relevant authorities, if needed.[314] Repeated non-fulfilment of recommendations can end up in a public statement (in the case of the CPT, for example, with Greece on immigration detention issues), in High-Level Talks

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307 Various initiatives have been focused on this, including, the CoE NPM Project 2009 to 2012, established to develop this (which Author project managed); Peer Review Study on NPM impact, run by Bristol and Ludwig Boltzmann Institute, 2016 (Author participated as an expert and one of three peer reviewers); Interview with Mari Amos, SPT, June 2012 and September 2017.

308 Author interview and correspondence: Mari Amos, SPT member, September 2017.

309 See UK HMIP (part of the UK NPM) Self-Assessment Tool, 2014: http://www.nationalpreventivemechanism.org.uk/wp-content/uploads/2015/08/UK-NPM-self-assessment-write-up.pdf

310 Author's Interviews and correspondence with: Silvia Casale, September 2017; Mari Amos, June 2012 and September 2017; Mark Kelly, August 2017.

311 See Murray, Steinerte, Evans and Hallo de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011), p. 26; Rodley, *The Treatment of Prisoners under International Law* (2009), p. 240, and UNGA Res 57/199 (18 December 2002); H. Sing Bhui, 'Can Inspection Produce Meaningful Change in Immigration Detention? (2016); Carver and Handley, *Does Torture Prevention Work*? (2016).

312 Carver and Handley, *Does Torture Prevention Work*? (2016).

313 Ibid, Introduction and Conclusions.

314 See Peer Review Study on NPM impact, run by Bristol and Ludwig Boltzmann Institute, in 2016 for number of European NPMs who use their mandate to initiate policy change; see also, in the context of the CPT, High Level Talks, which are used to confidentially discuss pertinent topics or repeated non-implementation of CPT recommendations at the highest political level.

with the authorities[315] or in submissions to national Parliaments (in the case of NPMs). The relative lack of such public statements / submissions is indicative that monitors believe that the majority of their recommendations are being acted upon.

The SPT has developed a non-exhaustive list of the guidelines for NPM monitoring to be effective in its 'SPT Guidelines for NPMs' and 'SPT Assessment Tool for NPMs'.[316] In summary, some of the requirements considered as key for monitoring to be effective include, *inter alia*:

- the monitoring body to be functionally, personally and institutionally independent, with this independence enshrined by law, with specific immunities and protections so monitoring bodies are not hindered in giving truthful recommendations,
- a body with sufficient resources to carry out its mandate,
- have adequate powers and guarantees, especially unrestricted access to all places of deprivation of liberty at all times,
- ability to interview any person (staff or detainees),
- opportunity to meet those in charge of the place of incarceration; before, during and after the visit to those incarcerated,
- permission to collect, receive and compile data on the occurrence of torture and verify whether there has been any change in this over the years,
- powers to make recommendations to the authorities following a visit and to discuss those recommendations with the authorities in charge of the actual place of detention as well as national authorities, and
- make reports of its activities public.

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315 See, for example, recent CPT-UK High Level Talks with then Secretary of State for Justice Liz Truss, April 2017 http://www.coe.int/en/web/cpt/-/cpt-holds-high-level-talks-in-london (in which the author participated).

316 SPT Guidelines on NPMs, CAT/OP/12/5, 9 December 2010 and SPT Assessment Tool for NPMs, CAT/OP/1/Rev.1, 25 January 2016.

- ***Limitations of preventive monitoring***

Monitors can also see the limitations of preventive monitoring. For example, Hindpal Singh Bhui, Lead Inspector on Immigration Detention at Her Majesty's Inspectorate of Prisons (HMIP) (part of the UK's NPM), has reflected on the impact of HMIP in preventive monitoring in immigration detention. He examines whether monitoring can indeed produce meaningful change. Singh Bhui explores the effectiveness of the current detention inspection undertaken by HMIP and others – and argues that inspecting can produce meaningful change in certain aspects but not without compromise and inherent limitations. He ultimately argues that "in liberal-democratic societies there are two broad approaches to promoting human rights reforms and challenging abuses: working from the inside to achieve progress with the risk that principles may be compromised and good intentions confounded; or promoting change from the outside, which is more uncompromising but less influential, at least in the short-term. This is a dilemma that confronts human-rights based inspection of immigration detention in the UK. The main focus of HMIP is on improving the treatment of detainees and conditions in detention, not challenging the system of detention, even if immigration detention policy arguably lacks legitimacy in a way that criminal imprisonment does not."[317] Civil society experts argue that while the emphasis on preventive monitoring in the overall range of preventive measures has been positive, it is important to see this measure as one of many, acting in combination to best counter and prevent torture.[318]

Other limitations on regularity or quantity of preventive monitoring visits include budgetary hurdles, such as limited resources given by states or internationally. This can be seen for example with some of the NPMs. The Cypriot NPM for example has only 50% of one staff member to plan and conduct all of its NPMs functions. This was considered woefully inadequate by the CPT in 2013[319] and the SPT in 2016.[320] Despite the recommendations to confer additional resources on the NPM Unit within the Ombudsperson's Office, this has still not been implemented.

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317 See H. Singh Bhui, 'Can Inspection Produce Meaningful Change in Immigration Detention?' (2016).
318 Author interview: Andrea Huber, Penal Reform International, phone interview April 2012 and correspondence September 2017.
319 CPT Report on Cyprus visit 2013.

Resource constraints do not only limit the impact of NPM work, but it has also had an impact on the work of international monitoring bodies, such as the SPT. The SPT itself increased from 10 to a 25 strong-member body, making it the largest treaty body in the United Nations. However, even with the enlarged membership, the numbers of places of deprivation of liberty to cover is significant.[321] The role of the SPT cannot feasibly be one of deterrence through regular visiting to every country under its mandate, as this is impossible in practice. Further, the SPT has been under-resourced since its inception, hindering the SPT from conducting regular visiting to every OPCAT ratified-member states (i.e., even as often as once every 4 to 5 years).[322] Although the UN General Assembly established a Voluntary Fund for Victims of Torture, the Fund has, for a long time, not been able to provide the requisite funding to the SPT or NPMs and the SPT Secretariat functions with a minimal staff provided by the OHCHR. The financial restrictions initially severely hindered the work of the SPT, and the SPT Chairman, Sir Malcolm Evans, points out that the SPT has had to re-look at its own role and what it can feasibly and realistically do given the funds and resources it has available. The SPT then concentrated its efforts into undertaking fewer preventive visits itself but more NPM 'advisory visits', with the aim of strengthening those who can more regularly inspect all places of deprivation of liberty nationally. More recently, the SPT has changed its focus away from NPM advisory visits to more general visits and high-level talks on the wider political environment in a given state.[323]

According to the former SPT president, Dr. Silvia Casale, "it is generally agreed that the current provision of resources for the SPT to visit – permitting three to four visits a year in other words, one visit 'regularly' every 12-17 years to each state Party – is woefully inadequate."[324] However, Dr Casale argues that the accumulation of visits by the different monitoring bodies at different

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320 SPT Report on Cyprus, unpublished, but news Article indicates this: 'UN experts urge Cyprus to address migrant detention conditions, improve overall monitoring', 1 February 2016, http://www.un.org/apps/news/story.asp?NewsId=53134#.WPYtDWewepo; Author's interview with Cypriot NPM staff member, Kalliopi Kambanella, February 2017, Nicosia, Cyprus.

321 As of summer 2017, the number of ratified OPCAT states stood at 83, of whom 65 have designated NPMs.

322 S. Casale, former President of the SPT, in S. Casale, 'A System of Preventive Oversight', in *Essex Human Rights Review*, Vol. 6, no. 1, Dec. 2009, special issue 2009, part 1, p. 13.

323 Author interview and correspondence: Mari Amos, SPT, June 2012 and September 2017.

324 Author interview and correspondence: Dr. Silvia Casale, September 2017; and S. Casale, 'A System of Preventive Oversight', *Essex Human Rights Review*, Vol. 6, no. 1, Dec. 2009, special issue 2009, Part 1.

levels "may hold the key to regularity, or increased frequency, of preventive visiting."[325] This is where the two-pillar (SPT and NPM) system shows its benefit. Given that the challenges that the SPT is facing, it has been argued that the future of the regularity of visiting, and deterrence that this brings, falls increasingly to the NPMs. Casale argues "for the foreseeable future, it will fall to the NPMs, the unique feature of the OPCAT, to form the front line of preventive visiting, a role that they are best suited to perform, given that they are on the spot" and that "State Parties undertake to make available the necessary resources for the functioning the NPMs"[326]. The current SPT chairman emphasised "with such a double-tier system, the OPCAT can almost guarantee very frequent oversight over the places of deprivation of liberty in state parties, ensuring the true regularity of systematic visiting".[327]

However, as the number of preventive monitoring bodies increase, there is an urgent need for more co-operation between the different torture prevention bodies.[328] This need for co-operation to avoid duplication or overlap was an initial concern at the drafting stage of OPCAT after 1991 as the UN watched the European model of preventive monitoring progress.[329] It is has now become all the more crucial given that there are up to three specifically mandated torture prevention bodies with similar complementary - but not identical - mandates, who could theoretically operate within the same countries (e.g., in Europe, the SPT, CPT and NPMs). The complexities of, and continued need for, ensuring complementarity of monitoring between the bodies was highlighted at a recent conference in June 2017 in Strasbourg between the international preventive monitoring bodies (SPT, CPT, NPM and others).[330] Here, the SPT

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325 Casale, 'A System of Preventive Oversight' (2009); see also Murray, Steinerte, Evans and Hallo de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011).

326 Author interview and correspondence with Silvia Casale, September 2017; see also Casale, 'A System of Preventive Oversight' (2009), p. 13.

327 University of Bristol article, 'Relationship between the OPCAT and other international and regional visiting mechanisms', by the OPCAT Research Team, Bristol University, August 2009; M.D. Evans, the place of the optional protocol in the scheme of international approaches to torture and torture prevention and resulting issues, in H. C. Schew & S. Hybnerova (eds.) International and national mechanisms against torture (2004) University Karlova (Prague) law School Publication.

328 See analysis of the drafting stages of the OPCAT (Murray, Steinerte, Evans and Hallo de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011)); CPT 25th anniversary conference on the need for co-operation among the SPT, CPT and NPMs, November 'The CPT at 25: taking stock and moving forward', Strasbourg, France, 2 March 2015; see rationale for peer-to-peer projects, such as the Council of Europe's European NPM Project, 2009 to 2012, which brought together the SPT, CPT and NPMs to discuss common themes: http://www.apt.ch/content/files_res/evaluation-european-npm-project.pdf .

329 See Murray, Steinerte, Evans and Hallo de Wolf, *The Optional Protocol to the UN Convention Against Torture* (2011) for detailed analysis.

330 NPM Consultation Meeting of 31 May – 1 June 2017 on the draft set of Rules on the Administrative Detention of Migrants and the Observatory of NPMs ("NPM Obs"), Strasbourg.

representative[331] explained that the SPT's work is based on the principle of non-selectivity and it must ensure that all regions are treated equally. Consequently, it has become difficult for the SPT not to focus on all NPMs (including in Europe) and not to carry out fully-fledged visits in the same way it does in other regions, which may occasionally overlap with the more regular Council of Europe region monitoring work of the CPT. Thus, there was indeed a need for on-going co-operation between the two monitoring bodies.

The need for more co-operation and communication between the different layers of torture prevention bodies has been raised at various other international and regional consultations, including those organised by the OHCHR[332] and by the CPT.[333] Members of the CAT Committee, the SPT, CPT and UN SRT highlighted the growing impact of NPMs and their advantage over the international bodies in terms of, in particular, regularity of visits. The local knowledge, language, contextual cultural understanding and other factors also put NPMs in a strong position to have impact in both monitoring and other torture prevention work, such as addressing recommendations on legal or administrative frameworks or legislation that hindered effective torture prevention. The CPT, who has also been reaching out to increase communication with other torture prevention bodies,[334] stressed the need for increased *direct* contact and regular communication between the international, regional and national torture prevention bodies. This aims to foster complementary activities between the international torture prevention bodies and the NPMs,[335] to strengthen both in the common goal of the reduction and prevention of torture.

Despite the challenges and limitations of resources and coordination, Casale considers that the advent of the SPT and NPMs has heralded, 'a new era of prevention of ill-treatment'.[336] Yet, preventive monitoring cannot be a panacea: while it can help identify systemic issues that create

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331 Marija Definis Gojanović, SPT member and representative of the SPT.

332 OHCHR, 15-16 December 2011, Regional consultations between the international and regional torture prevention bodies, Geneva.

333 'New Partnerships for the 21 Century', 5 November 2010, CPT and APT organised, held in Strasbourg, Briefing Paper available on: http://www.cpt.coe.int/en/documents/cpt-apt-proceedings.pdf and CPT 25th anniversary conference on the need for co-operation among the SPT, CPT and NPMs, November 'The CPT at 25: taking stock and moving forward', Strasbourg, France, 2 March 2015.

334 'The CPT at 25: taking stock and moving forward', Strasbourg, France, 2 March 2015.

335 OHCHR, Consultations on torture prevention between international and regional prevention bodies, 15-16 December, Geneva.

336 Author interview and correspondence: Dr. Silvia Casale, 2010 to 2017.

protection loopholes, it cannot alone address the facilitating/influencing cultural factors that can lead to torture. It needs to act in combination with the other preventive measures identified above.

1.3.5 Confidential complaints mechanisms

The availability of internal and external complaints' mechanisms has increasingly been cited as an example of a concrete measure of prevention in normative standards established to protect those deprived of their liberty by human rights mechanisms, scholars and civil society.[337] Non-judicial external complaints mechanisms, such as Ombudspersons and National Human Rights Institutions (NHRI), have grown rapidly in recent years, in part due to a sustained campaign by UN and regional bodies (such as the Council of Europe) to promote such bodies.[338] This has also been reflected at the regional level, with, for example, increasing funds provided by the European Commission[339] to support the establishment and growth of independent NHRIs, Ombudsperson institutions and NPMs. These bodies have been considered to have the potential to act as an important conduit for torture and other ill-treatment allegations to be aired externally, investigated and reach the prosecutorial authorities, if necessary.

The principle is that detainee complaints' systems are accessible channels for a detainee to confidentially air grievances, including on abuse, about a situation or member of staff. These can be internal (to the detention facility director and complaints handling staff) or external (to outside bodies). They can mostly be resolved non-judicially, but serious complaints should be passed on to prosecutorial authorities in the relevant country to investigate the complaint further. It is important that the channels are both easily accessible to detainees and confidential to reduce the risk of any staff reprisal or intimidation for the act of complaining. IHRL mechanisms, such as the CAT Committee, the SPT, the UN SRT and regional preventive monitoring bodies, [340] such as

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337 For example, the CAT Committee General Comment No. 2; HRC General Comment Nos. 7 and 35; CPT standards; CPT Report Malta 2015; UN SRT, China 2005, Follow-Up 2010; Robben Island Guidelines, para 40; European Prison Rules.

338 See, for example, the EU/Council of Europe Peer-to-Peer Project from 2009 to 2012 that aimed to strengthen and provide network forums for thematic exchanges between the CoE region NHRIs and Ombudspersons and NPMs (which the author project-managed on behalf of the CoE); see also Carver and Handley, *Does Torture Prevention Work?* (2016), p.12.

339 Ibid.

340 See, for example, CAT General Comment No. 2, para. 13; CAT country reports, such as on Bahrain, Concluding Observations, 29 May 2017 CAT/C/BHR/CO/2-3, paras. 28 to 29.

the CPT[341] and national preventive bodies, such as the NPMs,[342] have stressed the importance of providing detainees with an effective avenue to complain confidentially, internally and externally, as a measure to reduce and prevent torture and other ill-treatment. The ECtHR, for instance, regularly draws upon findings from Ombudspersons on their received complaints in its reasoning on ECHR Article 3 (torture and other ill-treatment) cases.[343] The CPT also considers that both internal and external confidential complaints avenues are important in all types of deprivation of liberty settings, including immigration detention settings[344] and, increasingly, even custodial police settings. Thus, in its Gibraltar report, the CPT has recently said that an independent police complaints body should regularly visit police stations to collect complaints from detainees in police initial custody.[345]

There has been relatively limited scholarly literature that analyses the effectiveness of complaints mechanisms *per se* as a preventive measure, with the exception of Carver and Handley's recent work.[346] Carver and Handley have assessed its impact as a preventive measure in comparison to three other measures. They concluded that: "complaints mechanisms are the one set of preventive measures that, according to our analysis, have no significant impact on the incidence of torture." They do concede, however, that there was an exception to this general finding, namely, when a complaints mechanism is 'tied organically' to the process of prosecuting torturers.[347] They argue that complaints mechanisms that are mandated to refer cases directly to the prosecutor [348] correlate more strongly with a decline in torture than mechanisms that do not.

Nevertheless, despite some doubts raised over the relative effectiveness of this preventive measure, it is generally acknowledged[349] that effective complaints mechanisms can play an important role – in combination with other preventive measures – in preventing torture.

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341 See, for example, CPT Malta Report, September 2015.
342 See, for example, HMIP (Part of the UK NPM), reports on Cookham Wood 2014.
343 See ECtHR, *Case of Georgia v Russia (i)*, Application no, 13255/07, Grand Chamber Judgment, 3 July 2014.
344 CPT Immigration Detention Factsheet (March 2017), para. 8.
345 CPT Gibraltar, CPT/Inf (2015) 40, Report on the CPT's visit to Gibraltar from 13 to 17 November 2014, para. 19.
346 For example, Carver and Handley, *Does Torture Prevention Work*? (2016).
347 Ibid, Introduction and Conclusions.
348 Such as those complaints mechanisms in Northern Ireland, England and Wales and South Africa.
349 See above references, such as, CAT (Report on Bahrain 2017), CPT (Malta Report 2015), and ECtHR (*Georgia v Russia*).

1.4 Summary

There is a wide (and non-exhaustive) range of measures of prevention required under the 'prevention obligation' in UNCAT 2(1) of torture. Some of the key ones can be grouped into five thematic areas: the legislative prohibition, established procedural safeguards in the law for detainees, a robust criminal justice system, along with an impartial and independent judiciary to confidently prosecute and adequately sanction crimes of torture, regular independent preventive monitoring and accessible external and internal complaints mechanisms within places of detention.

Prevention measures need to operate in combination with each other to offer the most effective protection against torture. Equally, each measure individually needs to be as effective as possible. Yet, to be as effective in preventing torture, they also need the right environment in which to operate successfully. By way of illustration, the procedural safeguard of affording a detainee 'access to a lawyer' is rendered less effective, if not obsolete, if the lawyer cannot bring proceedings after meeting the detainee, either directly or through the competent prosecutorial authorities. Equally, the safeguard is rendered meaningless if the allegation cannot be impartially investigated, nor does the safeguard work if there is no fully functional and impartial criminal justice system to allow proper prosecution, confer a sentence on the perpetrator that is commensurate with the crime of torture and enforce that sentence (i.e., a system that does not tolerate impunity for abuses). Without all the different elements in place, this safeguard becomes meaningless and the detainee could quickly lose faith in the system of protections available. The preventive measures thus interweave together and need to be considered in their wider context.

This Chapter sets out the framework of necessary prevention measures under IHRL, in order to provide a yardstick by which to understand and examine the current situation in China in Part II. Part II examines the nature and scope of torture and other ill-treatment in China, identifies which prevention measures are in place and which are missing, the type of environment in which they operate and the likely trajectory of reform. This is in order to reach an assessment of the

effectiveness of the identified prevention measures in China and an indication of the current level of risk of torture facing detainees deprived of their liberty by the police and/or the CCP in China.

PART II: CHINA

Chapter 2: China's current legal system and available protections against torture and other ill-treatment

Chapter 3: Effectiveness of China's preventive measures & current nature of torture and ill-treatment

Chapter 4: Wider institutional, structural and political obstacles to reform

Chapter 2: China's current legal system and available protections against torture and ill-treatment

2.1 Introduction

As a result of the ratification of the UNCAT,[350] China has an obligation to take 'effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction',[351] and the obligation also extends to other ill-treatment.[352] To examine how, and to what extent, China's legal system meets this obligation, this chapter examines the current system in place that protects detainees from, and prevents, torture and other ill-treatment and assesses the scope of these protections.

The analysis first focuses on the most common type of deprivation of liberty, namely, pursuant to the criminal justice system and criminal law in China. It examines the scope of the available protections currently afforded in law to those arrested and detained in initial custody and pursuant to the Chinese criminal-law system. This analysis also situates and contextualises detention external to the criminal-law (i.e., non-criminal detention) and thus provides a meaningful comparison.

The analysis next explores two types of justice process that lie parallel to the criminal-law in the administrative justice sphere, as well as the Party justice process: first, administrative detention pursuant to the Law on Administrative Penalties for Public Security; second, Compulsory Drug Rehabilitation (CDR); and third, detention pursuant to the Party interrogation and discipline process known as '*Shuanggui*' for infraction of Chinese Communist Party norms. It examines the background to these detention powers, their legislative frameworks, recent reforms, the availability and scope of the protections against torture and other ill-treatment in law and the continued justification offered by the national authorities for their use.

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350 UNCAT, adopted by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987.
351 UNCAT, Article 2(1).
352 See Thesis Chapter 1.

The core (but by no means the only) elements necessary for effective torture prevention under IHRL, examined in Chapter 1, will be used as a framework for analysis of these three justice processes. These are: (i) the legal prohibition of torture, (ii) availability of preventive safeguards and guarantees, as well as regulation of correct detention practice, (iii) an effective and fully functional criminal justice system, (iv) regular, independent preventive monitoring of all places of deprivation of liberty, and (v) confidential complaints' mechanisms. Cumulatively, they are some of the key measures of prevention (hereafter 'key preventive measures'). By assessing the different forms of detention against this framework, this analysis derives the availability and scope of key current preventive measures in China.

2.2 Political & Governance models in China

A full legal analysis of torture prevention in a One-Party State, such as China, needs to be seen in the context of the wider governance model and political landscape. This is the backdrop to China's justice system, its laws and scope of regulation and protections available for detainees. This also defines the context in which reforms are happening, or are likely to happen, and helps situate the contours of any hindrance to effectiveness.

All of China's governance structures, including its legal system, are interwoven into its Soviet legacy and the current rule of the Chinese Communist Party (CCP). The One-Party State model means that the CCP has overarching responsibility for all elements of governance and increasing amounts of central control. Political and legal reforms cannot be divorced from each other; and thus need to be examined hand-in-hand.

President Xi has summarised his vision for his leadership term in a guiding motto: "the Chinese dream of the great rejuvenation of the Chinese nation."[353] No other recent official CCP document epitomises this more than CCP official communiqué, Document no. 9, which includes the "Seven Nos." This sets out, in its first paragraph, an assertion that Western constitutional democracy

[353] See Article 1, "Document No. 9", April 2013, CCP Central Leadership, *Communiqué on the Current State of the Ideological Sphere,* A Notice from the Central Committee of the Communist Party of China's General Office Provinces, autonomous regions, municipalities directly under the Party committee, Central ministries and state organs, Party ministries, People's Liberation Army headquarters, major Party committees, and Party leadership groups of civilian organizations', April 22, 2013; see also Thesis Introduction, China's 12th Five-Year Plan.

negates key features of the Chinese socialist system.[354] Its second paragraph asserts that the promotion of "universal values" weakens the theoretical foundations of the Party's leadership.[355] A China scholar has critiqued this document as "one of the most conservative documents in official channels since the reform period"[356] (i.e., the period when China emerged out of the Cultural Revolution (late 1970s) and started a new policy, from the 1980s onwards, of developing and then expanding economic development pursuant to the policy of '改革开放' (*gaige kai fang*)).

Since 2012 and the start of the Xi rule, there has been a steady agenda for economic, structural and institutional reform evident in China's Five-Year Plans (medium-term objective setting) and the CCP Plenums (annual assessment and direction setting of the Party).[357] The changes underway aim to strengthen economic progress and ensure national stability.[358] Hand in hand with this push for national stability through economic reform is the authorities' campaign or 'war' against corruption (*fu bai*).[359] Xi's reforms aim to eradicate vested interests, or procedural fiefdoms, which he considers to have prospered and become integral to the governance process and bureaucracy under his two predecessors.[360]

Eradication or 'weeding out' of corrupt officials is considered to have two advantages. The first is that, publicly, Xi is seen to prioritise ensuring that society gets an honest, professional service from its governance officials and structures. Xi's aim is that this will lead to increased public trust in government and CCP leadership. This also links to a socio-political advantage, according to

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354 Article 1 'Promoting Western Constitutional Democracy: An attempt to undermine the current leadership and the socialism with Chinese characteristics system of governance', in Document No. 9, April 2013.

355 Ibid, Article 2.

356 A. Saich, 'Controlling Political communication and civil society under Xi Jinping', in *China's core executive, leadership styles, structures and processes under Xi Jinping*, eds. Heilmann and M. Stephan, MERICS, No 1 Series, June 2016.

357 2012 – 2015 China's 12th Five-Year Plan: primarily focused on social development, whereas the 2016 – 2020: China's 13th Five Year Plan focuses on deepening economic development, promoting national unity / harmony, tighter national security (as epitomised in the New Security Law, 1 July 2015) and consolidating CCP central co-ordination and control; see highlights of the 13th Five Year Plan at http://news.xinhuanet.com/english/photo/2015-11/04/c_134783513.htm; See analysis in 'Policy Brief, China's 13th Five-Year Plan: In Pursuit of a "Moderately Prosperous Society"', *Centre d'Etudes Prospectives et d'Informations Internationales CEPII – Policy Brief No 12*, September 2016 and K. Koleski, 'The 13th Five-Year Plan', *U.S.-China Economic and Security Review Commission*, 14 February 2017.

358 Ibid.

359 Notice from the CCP's General Office, 'Communiqué on the Current State of the Ideological Sphere', Introduction: '[…] The new session of the central leadership group has: put forth a series of new principles for conduct in political administration, furnished an interpretation of the Chinese dream of the great rejuvenation of the Chinese nation, improved our work-style, maintained close ties with the masses, rigorously enforced diligence and thrift, opposed extravagance and waste, increased vigour in the fight against corruption, and won the widespread endorsement of cadres and the masses' [sic], Document No. 9, April 2013; See also Fu Hualing, 'The upward and downward spirals in China's anti-corruption enforcement', in *Comparative Perspectives on Criminal Justice in China* (2013).

360 See, *inter alia*, scholarly critique in V. Shih, 'Efforts at exterminating factionalism under Xi Jinping: Will Xi Jinping dominate Chinese politics after the 19th Party Congress', *Merics China Series* (June 2016); R. MacFarquhar, 'Leadership styles at the Party centre: From Mao Zedong to Xi Jinping', *Merics Papers on China* (June 2016).

scholars, in that increasing public trust in government may correlate to decreasing the use of social pressure as an avenue to complain (so-called "petition") to government. This in turn can contribute to reducing common catalysts for social unrest.[361] Further, Xi considers that corruption jeopardises economic progress and is an ill imported from the West, as a by-product of capitalism.[362] As such, stemming corruption also carries nationalistic overtones, frequently expressed as a political desire to promote pride in Chinese culture, learn from ancient China and move away from perceived Western values and influence.[363]

There is a traditional Chinese saying "the heavens are high and the Emperor is far away" (天高皇帝远 (*tian gao, huangdi yuan*[364])), alluding to local officials' potential to disregard the wishes of central authorities in distant Beijing.[365] To counter the risk associated with this, the second advantage of Xi's focus on eradicating corruption is that this supports the consolidation of CCP power at a centralised rather than local, municipal or provincial level. Since coming into power, Xi has personally led a wide-scale crackdown on corruption across government.[366] Key members of the secret services, members of the (originally nine, now seven-person) most senior Politburo Standing Committee, senior figures in the Army, as well as many senior provincial/local government officials[367] have been charged with corruption. China scholars argue that Xi's

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361 12th Five-Year Plan included improving avenues for petitioners (public complaints); however, the draft proposals for the 13th Five Year Plan show an emphasis on social management and control and only refer to 'orderly public participation' in decision-making.

362 See Minister of Education removal references to Western values and concepts at Chinese universities, The Guardian: '*China says no room for 'western values' in university education'*, these include 'separation of powers', multiparty elections and the corrupting influence of capitalism, 30 January 2015; for scholarly critique see A. Saich, 'Controlling political communication and civil society under Xi Jinping', *MERICS China Series* (June 2016); author's interview with Mr. Y (*name anonymised by request*), Chinese national and teacher, Strasbourg, April 2016.

363 See Osnos, *The Age of Ambition: Chasing Fortune, Truth and Faith in the New China* (2014), p. 285 describing how Confucian scholars have been taken on board as private advisers on Confucian thought employed by Xi; echoed in discussions during author's interview with Mr. Y (*name anonymised by request*), Chinese national and teacher, Strasbourg, April 2016.

364 Author's translation.

365 See S. Heilmann, B. Conrad and M. Huotari, 'Scenarios for Political Development under Xi Jinping's Rule', *MERICS China Series* (June 2016).

366 See, *inter alia*, Fu Hualing, 'The upward and downward spirals in China's anti-corruption enforcement', in *Comparative Perspectives on Criminal Justice in China* (2013); R. MacFarquhar, 'Leadership styles at the Party centre: From Mao Zedong to Xi Jinping', *Merics Papers on China* (June 2016); See '*China's corruption crackdown 'netted 300,000 in 2015'*, BBC, 7 March 2016.

367 China has investigated around 300,000 officials for corruption in 2015. 200,000 officials were given so-called "light punishment", while more severe penalties were conferred further 80,000, according to official statistics released during China's annual parliamentary session; See '*China's corruption crackdown 'netted 300,000 in 2015'*, BBC, 7 March 2016; see also the investigation into Zhou Yongkang, who was one of the nine most senior politicians in China until 2012. The former Head of China's Security Services was investigated by the Communist Party Discipline Committee for various serious disciplinary violations, including charges of corruption, bribery, abuse of power and leaking state secrets. He was expelled from the CCP in December 2014, investigated during several months and is currently in prison; See also Fu Hualing, 'The upward and downward spirals in China's anti-corruption enforcement', in *Comparative Perspectives on Criminal Justice in China* (2013).

consolidation of CCP power at a centralised level is being achieved through the removal of other factional vested interests that were integral to his predecessor's (Hu Jintao) system of governance.[368]

While the two above advantages may appear to be of equal benefit to the CCP, according to many China scholars,[369] the second is prioritised over the first:[370] the key reason for the war on corruption has been to avoid fragmentation of centralised CCP power – with the added benefit of increasing societal trust in government. Moreover, according to some critics, the war on corruption has provided Xi with an opportunity to remove or 'purge' potential political opponents.[371]

Reform and consolidation of power may appear paradoxical, yet scholars argue that the reform of certain areas does not necessarily equate with opening up or the conferring of greater protections. China scholars acknowledge that Xi's rule builds on factors of stability, such as improving living standards, strengthening Central CCP leadership and institutions of control, economic progress and development.[372] Yet, they also point to 'powerful sources of fragility' that undermine the CCP's claim to power, such as external and internal market pressures, monopolistic political control and the gradual tightening of control over alternative voices or competition to the status quo.[373]

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368 Similarities and differences in Xi's leadership style to all of his predecessors have been highlighted in a Panel discussion with leading sinologists and scholars in a Podcast aired on 23 June 2016, "*The Xi Jinping challenge: Will top-down leadership achieve political stability in China?*" with R. McGregor, R. MacFarquhar, S. Heilmann and A. Saich; for more details on the operation of the CCP see 'the Party', R. McGregor, *The Party: The Secret World of China's Communist Leaders*, (UK; Allen Lane, 2010); See also Xi's approach to recent reorganisation (2015-2916) of the PLA (China's Military), where China scholar, You Ji, 'Military reform: The politics of PLA reorganisation under Xi Jinping', argues that 'the emphasis on Central Military Commission chair one-man rule, along the lines of a Maoist Politburo, will further fragment civilian oversight of People's Liberation Army (PLA) activities', *MERICS China Series* (June 2016), p. 46.

369 See V. Shih, 'Efforts at exterminating factionalism under Xi Jinping: Will Xi Jinping dominate Chinese politics after the 19th Party Congress?', *MERICS China Series* (June 2016); See Panel discussion with leading sinologists and scholars in Podcast aired on 23 June 2016, 'The Xi Jinping challenge: Will top-down leadership achieve political stability in China?' with R. McGregor, R. MacFarquhar, S. Heilmann and A. Saich; See also Anna L. Ahlers and Matthias Stepan, 'Top-level design and local-level paralysis: Local politics in times of political centralisation', *MERICS China Series* (June 2016).

370 See Panel discussion with leading sinologists and scholars in Podcast aired on 23 June 2016, 'The Xi Jinping challenge: Will top-down leadership achieve political stability in China?' with R. McGregor, R. MacFarquhar, S. Heilmann and A. Saich.

371 Ibid; see also Fu Hualing, 'The upward and downward spirals in China's anti-corruption enforcement', in *Comparative Perspectives on Criminal Justice in China* (2013).

372 Heilmann, Conrad, Huotari 'Scenarios for political development under Xi Jinping's rule', *MERICS China Series* (June 2016); Shih 'Efforts at exterminating factionalism under xi Jinping: Will Xi Jinping dominate Chinese politics after the 19th Party Congress?', *MERICS China Series* (June 2016).

373 Heilmann, Conrad, Huotari 'Scenarios for political development under Xi Jinping's rule', *MERICS China Series* (June 2016); Shih 'Efforts at exterminating factionalism under Xi Jinping: Will Xi Jinping dominate Chinese politics after the 19th Party Congress?', *MERICS China Series* (June 2016).

The Chinese authorities have acknowledged the challenges of juggling the needs of a rapidly more informed society (and along with it the need for economic, social and legislative development) with the ongoing need to retain State unity, stability and harmony.[374] This balance manifests itself as progress, on the one hand, on some rights – articulated in three-yearly Human Rights Action Plans (HRAP) (the most recent of which is for 2016-2020)[375] – while, on the other, continuing to restrict other rights that help the State deal with individuals that jeopardise public order.[376] Even within the sphere of the HRAP, the balance is weighted towards certain rights over others and the predominant emphasis remains on economic, social and cultural rights, as illustrated in a recent White Paper on assessing the impact of the most recent HRAP.[377]

The authorities have highlighted significant developments in many areas of human rights' protection, but also acknowledge that certain areas of human rights are in need of further strengthening:[378]

> *"There is no best, only better human rights protection. The Chinese government is keenly aware it still faces many challenges despite China's tremendous achievements in the development of human rights. Its economic development mode is still crude and it is still fraught with problems from unbalanced, uncoordinated and unsustainable development. There is still a big gap between urban and rural development. There are still problems of immediate concern to the people remaining to be solved […]. The corruption and misconduct in some sectors cannot be ignored. There is still a long way to go to realize higher-level protection of human rights in China and hard efforts must be made."*[379]

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374 Fifth Plenum of the 18th Party Congress, October 2015 and the proposals for the 13th Five Year Plan, 2016.

375 From 2009 onwards China has been publishing tri-annual Humans Rights Action Plans (HRAP), see the most recent HRAP (2016-2020): the National Human Rights Action Plan of China (2016-2020) issued by the State Council Information Office of the PRC on 29 Sept 2016 at: http://english.gov.cn/archive/publications/2016/09/29/content_281475454482622.htm [accessed 29 June 2017].

376 See Chapters 3 and 4.

377 The State Council Information Office of the People's Republic of China, White Paper entitled "Assessment Report on the Implementation of the National Human Rights Action Plan of China (2012-2015)", Published 14 June 2016 on Xinhuanet news; available at: http://news.xinhuanet.com/english/china/2016-06/14/c_135435326_3.htm.

378 Ibid, part I.

379 CCP Official translation of ibid, part I, published on Xinhuanet.

While there is a focus on economic, social and cultural rights' development in policy-setting, there is less emphasis on civil and political rights' development.[380] Moreover, even in the sphere of social, economic and cultural rights, it is clear that the weight of emphasis is on protecting national harmony and security.[381] Following along these lines, two recent laws have been passed that illustrate this priority, namely, the National Security Law, adopted on 1 July 2015[382] and the 2016 Law on the Management of Foreign Non-Governmental Organizations' Activities within Mainland China.[383] Both underline the weight that the authorities are currently giving to national unity and security and both curb freedoms previously available.

A recent comparison of the most recent two Five-Year Plans and outcomes from the annual October CCP Plenums by sinologist and political-science scholar, Antony Saich, highlights an emphasis in the reform policy agenda away from promoting public involvement in economic development and other reforms to a newer emphasis on tighter central control in all aspects of governance.[384] Saich highlights: "the difference in attitude towards civic association from encouragement to control is shown by the different treatment in the Twelfth and Thirteenth Five-Year Programmes (2011–15 and 2016–2020 respectively). The Twelfth Programme devoted a whole section to social management innovation. It called for more public participation to improve public services and policies using the phrase the 'Party leads, government takes responsibility, society coordinates, and the public participates.' This progress seemed to be maintained in the resolution of the 18th Central Committee's 3rd Plenum (December 2013) where 'social management innovation' was replaced by 'social governance', encouraging social actors to have a role in governance alongside government and business. Subsequently, the actions outlined above reveal that the CCP has pulled back from this stance, presumably fearing the kind of activism that

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380 See, for example, the ordering and priorities elaborated in the two most recent Five-Year Plans (12th and 13th), in China's HRAP (2016-2020) and in the CCP central policy setting agenda to improve the living conditions and prosperity for the average Chinese citizen (see above).

381 See Panel discussion with leading sinologists and scholars in Podcast aired on 23 June 2016: 'The Xi Jinping challenge: Will top-down leadership achieve political stability in China?' with R. McGregor, R. MacFarquhar, S. Heilmann and A. Saich; see also Saich, 'Controlling political communication and civil society under Xi Jinping', *MERICS China Series* (June 2016).

382 National Security Law of the People's Republic of China, passed at the 15th Meeting of the 12th National People's Congress Standing Committee on 1 July 2015.

383 PRC Law on the Management of Foreign Non-Governmental Organizations' Activities within Mainland China, adopted at the 20th meeting of the Standing Committee of the 12th National People's Congress on 28 April 2016.

384 Saich, 'Controlling political communication and civil society under Xi Jinping', *MERICS China Series* (June 2016).

it seemed to be encouraging. By contrast, the recent Thirteenth Five-Year Programme [385] emphasises control and monitoring."[386] The Thirteenth Five-Year Plan (FYP) (2016–2020) seeks to address China's 'unbalanced, uncoordinated, and unsustainable growth' and create a 'moderately prosperous society in all respects' through innovative […] and inclusive growth.[387] The section on innovation in social governance calls for a 'law-based social governance system under the leadership of party committees.'[388]

This background provides context to the priorities steering the CCP as it embarks on a series of law reforms. It aims to give a flavour to the constant pull evident in the later analysis of the reforms of the criminal justice sphere, towards the conferring of more protections for detainees, while at the same time, tightly controlling any aspect that might be considered as jeopardising stability.

2.3 The Chinese criminal justice system: an overview

The Chinese legal system has two main processes that allow for the deprivation of liberty of a person: the criminal-law justice system and administrative law. There is, in practice, an additional track, an unofficial tertiary process: the Party Constitution and Chinese Communist Party (CCP) discipline regulations that govern the *shuanggui* detention and interrogation of Party officials for unspecified durations of time on suspicion of violations of Party norms[389] – most notably in the area of official corruption.

As such, persons deprived of their liberty can be subject to one of three systems: criminal detention (police initial custody and remand in police detention) and then imprisonment; punitive administrative detention (*de jure* or *de facto*); or under *shuanggui* rules. The interplay between

385 13th Five-Year Plan (2016–2020), ratified by the National People's Congress (NPC) in March 2016.
386 Saich, 'Controlling political communication and civil society under Xi Jinping', *MERICS China Series* (June 2016).
387 K. Koleski, 'The 13th Five-Year Plan', *U.S. China-Economic and security review Commission: Policy Brief*, February 14, 2017, 'The 13th Five-Year Plan', Executive Summary.
388 Ibid, p. 24.
389 Decision of the Central Committee of the Chinese Communist Party on establishing Central and Local Commissions for Discipline Inspection; 9 November 1949, Article 2; as translated by F. Sapio, China scholar, blog *Forgotten Archipelago*, published 1 September 2015.

these three 'justice pillars' is ambiguous, boundaries can be porous, and detainees can be moved from one to another relatively easily.

The two main pillars of the legal system (criminal and administrative) are intrinsically linked. Both deal with acts that are contrary to the relevant laws, however, the difference hinges on whether the given crime or infraction is, in the given circumstances, "minor" or "severe."[390] The relevant laws (the Criminal and Criminal Procedure Laws and punitive administrative laws[391]) are, in essence, codes proscribing a variety of actions as offences or administrative misdemeanours. The administrative laws cover, in theory, less serious actions and can result in shorter, administratively conferred, detention sanctions. Whereas the criminal laws cover more serious offences and can result in longer, and heavier, penalties. National and international scholarly discourse has focused on the term "circumstances", which is not defined in the relevant laws. Scholars generally agree that it has a very broad meaning and that the Supreme People's Courts and procuratorates have a key role to play in providing interpretation and clarification. [392] For example, Ira Belkin, a China law scholar, has stressed the importance of different bodies' roles in helping to guide and interpret administrative and criminal law in China:

> *"The Supreme People's Procuratorate (SPP) […] publishes non-binding interpretations of the law that guide procurators nationwide, while the Supreme People's Court (SPC) publishes binding interpretations and the Public Security Bureau (PSB) publishes advisory interpretations. These interpretations are important because Chinese legislation, particularly criminal legislation, is often vague. Determining what constitutes a criminal and capital offense can turn on interpretations of phrases such as 'serious,' 'large amount', or 'special circumstances"'.*[393]

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390 V. Mei-Ying Hung, 'Improving Human Rights in China: Should Re-Education Through Labor Be Abolished?', *Columbia Journal on Transnational Law*, 41:303, 2003, p. 304.

391 Each analysed in turn, later in the below Section.

392 For examples see Shizhou Wang, 'The Judicial Explanation in Chinese Criminal Law', 43 AM. J. COMP. L. 569, 575 (1995); see also Hung, 'Improving Human Rights in China: Should Re-Education Through Labor Be Abolished?' (2003); see also I. Belkin, 'China's Criminal Justice System: a Work in Progress', Criminal Justice in China, *Washington Journal of Modern China*, 2000.

393 I. Belkin, 'China's Criminal Justice System: a Work in Progress', (2000), p. 3.

Belkin also points to the crucial need for such interpretation, given that the Chinese legal system overall is a civil one, based on statutory law; judges' reasoning are not accompanied by written legal opinions, nor do judicial decisions set precedent, although they are binding. This view is mirrored in national discourse. For example, a leading national criminal justice scholar, Shizhou Wang, considers such guiding interpretation as 'indispensable' for lawyers, procurators and other relevant bodies to fully understand and practice Chinese law.[394] Nevertheless, other national scholars, for example Veron Mei-Ying Hung, have pointed to the limitations in such interpretations. Hung argues that the language found in the interpretations is often so broad and indeterminate that it still affords a wide scope of discretion in application and often lacks genuine clarification and guidance.[395]

It is clear that interpretations evolve; allowing the guidance and interpretations to develop continuously. For example, a comparison by the author between the First Set of SPP Guiding Cases in 2010 and the most recent Set 7 in 2016, as well as the recently published SPP provisions on Case Guidance Work 2015, shows a relative increase in the detail and sophistication of the judicial reasoning.[396] Some of the guidance instruments are becoming comparatively more specific and progressive. An illustration of this is the Supreme People's Court Interpretation on the Application of the Criminal Procedure Law of 2012, which recognises the infliction of mental suffering as torture and thus prohibits it.

Background

The current Chinese criminal justice system is relatively new[397] and has undergone significant overhaul in recent years.[398] From a modern historical perspective, China's legal institutions

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394 Shizhou Wang, 'The Judicial Explanation in Chinese Criminal Law', 43 AM. J. COMP. L. 569, 575 (1995).

395 V. Mei-Ying Hung, 'Improving Human Rights in China: Should Re-Education Through Labor Be Abolished?' (2003), p. 304.

396 The "Supreme People's Procuratorate Provisions on Case Guidance Work", *Gao Jian Fa Yan Zi* [2015] No.12; Set 1 of SPP Guiding Cases in 2010 and Set 7 in 2016.

397 China's Criminal Law was adopted by the Second Session of the Fifth National People's Congress on 1 July 1979 (revised subsequently but remains approximately its original format) and China's 1979 Criminal Procedure Law, also adopted by the NPC in 1979, which was revised on 14 March 2012, when China's National People's Congress (NPC) adopted a series of amendments.

398 For a detailed analysis of the origins and early reforms of China's criminal justice system see K. Turner, J. Feinerman and R. Kent Guy, *the Limits of the Rule of Law in China*, (Washington: University of Washington Press, 2000); in particular the problem of paradigms, p.3; see also Yuanyuan Shen, 'Conceptions and Perceptions of legality: understanding the complexity of law reforms in Modern China', *The Limits of the Rule of Law in China*, eds. K. Turner, J. Feinerman, and R. Kent Guy, (Washington: University of Washington Press, 2000), p. 20; Nesossi, Biddulph, Sapio and Trevaskes, *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016), Introduction and Conclusions; see also *Comparative Perspectives on*

struggled to develop during much of the early and mid-twentieth century until the start of the Deng Xiaoping era[399] and the start of far-reaching and wide-scale reform across many of China's governance and judicial structures.[400] China scholar Belkin describes post-imperial China from 1911 to 1979 as a bleak period for the Chinese legal institutions with 'little opportunity to develop during much of the twentieth century amidst the chaos of civil wars, World War II, and disruptive political campaigns'.[401] The most recent and one of the most chaotic of these political movements was the Cultural Revolution, from the mid-1960s until the late 1970s. This resulted in almost all of legal institutions being abolished, including the traditional court and prosecution system. With Deng Xiaoping, the reform era began in 1979 and the legal institutions were gradually re-established.[402] The CCP, however, remained both the predominant motivator and influencer in the decisions on how to shape and model the legal institutions, which reflect Soviet legacies and priorities, most notably in the structure and operation of the procuratorate.[403]

Scholars specialising in China's criminal justice system point to an increasingly number of protections for detainees in the revised criminal justice sphere as evidence of the political appetite to reform the legal system.[404] There are various indications of positive developments from the late 1990s onwards.[405] These include the reform of the practice of prosecution by analogy 'whereby a person could be charged with a crime if their conduct was analogous to other conduct specifically prohibited, even if the offence in question was not delineated in the criminal code'.[406] Other early reforms included the abolition of the administrative detention ground of 'shelter and

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Criminal Justice in China, ed. McConville & Pils (2013), 'Postscript: the 2012 PRC Criminal Procedure Law', Part VII, p. 455-503; see also I. Belkin, 'China's tortuous path towards ending torture in criminal investigations' (2013) and 'China's Criminal Justice System: a Work in Progress', (2000), p. 63-64; S. Lubman, 'Bird in a Cage: Chinese Law Reform after Twenty Years', *Northwestern Journal of International Law & Business* Vol. 20:3 Spring 2000.

399 Deng Xiao Ping.

400 See, *inter alia*, Nesossi, Biddulph, Sapio and Trevaskes, *Legal Reforms and Deprivation of Liberty in Contemporary China*, (2016); *Comparative Perspectives on Criminal Justice in China*, ed. McConville & Pils, (2013); Belkin, 'China's tortuous path toward ending torture in criminal investigations' (2013); Biddulph, *Legal Reform and Administrative Detention Powers in China* (2007); Sapio, '*Sovereign power and the law in China*', (2010); Nesossi, 'China's Pre-trial Justice: Criminal Justice, Human Rights and Legal Reforms in Contemporary China' (2012); Chen Guangzhong, 'Issues in the reform of China's Public Prosecution System against the Backdrop on New Revisions to the Chinese Criminal Procedure Law' (2013).

401 Belkin, 'China's Criminal Justice System: a Work in Progress' (2000), pp. 63-64.

402 Ibid, p. 63-64.

403 See Nesossi, Biddulph, Sapio and Trevaskes, *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016).

404 Belkin, China's Criminal Justice System: a Work in Progress', (2000); Chen Weidong, Chen Lei and T. Spronken, *A Three-Way approach to the fight against torture*, (Intersentia Publishing, 2012). Trevaskes, *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); *Comparative Perspectives on Criminal Justice in China*, ed. McConville & Pils, Part VII (2013).

405 For a detailed analysis of the revisions made in 2012, see Trevaskes, *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); *Comparative Perspectives on Criminal Justice in China*, ed. McConville & Pils, Part VII (2013).

406 Belkin, China's Criminal Justice System: a Work in Progress', (2000) p. 63-64

investigation', whereby police could hold a suspect indefinitely while investigating the person's actual identity.[407]

In March 2012, there was a second revision of the Criminal Procedure Law (CPL). The revision affected a large number of Articles, and expands the CPL from 225 to 290 Articles. The CPL, in force from 1 January 2013, has been strengthened considerably and establishes various procedural guarantees for criminal suspects. It now specifies timeframes and required steps in the interrogation and initial detention process and restructures (and curbs) of the powers of law enforcement bodies.[408] This has the objective of rendering the procedure more transparent.

The Criminal Law (CL) has also undergone an overhaul, and was amended in 2015. In contrast to the CPL revisions, which saw protections added, the reforms here are reflective of a tougher stance on social and official control. The additions confer heavier sentences for various offences, *inter alia*, endangering the public security of the state (for example, amended Article 120), officials' abuse of power (amended Article 164, on bribery prohibition), obstruction of the administration of social order (amended Article 291-1, on additional sanctions for prohibition of assembling a crowd in a public place to disrupt public order), expanded crimes of organising mystic sects or cult organisations and exploiting superstition to undermine the implementation of law (amended Article 300) and obstruction of justice (for example amended Articles on ethical conduct in court and court order (Articles 307 to 313).[409]

The 1994 Detention Centre Regulations, which also govern the treatment of, and safeguards for, criminal-law suspects on remand (as well as some non-criminal (administrative) detainees) in KSSs, are in need of significant revision. The main problem is that the Detention Centre Regulations currently in force still date back to the early 1990s and confer only bare minimal guarantees and protection for detainees. The need for significant revisions to the KSS Centre

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407 Nesossi, Biddulph, Sapio, Trevaskes, MacBean, *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); See Lubman, Cohen, Rosenzweig, Pils, McConville, Sapio, Biddulph, Chen Weidong, *Comparative Perspectives on Criminal Justice in China*, (2013); Biddulph, *Legal Reform and Administrative Detention Powers in China* (2007); Sapio, *Sovereign power and the law in China* (2010); S. Lubman, 'Concluding Observations', in *Comparative Perspectives on Criminal Justice in China* (2013).

408 Criminal Procedure Law of the People's Republic of China, Issued: July 1, 1979; Amended: March 17, 1996 and March 14, 2012; revisions in force on 1 January 2013.

409 Criminal Law, amended 2015.

Regulations has been widely highlighted by Chinese and international scholars and civil society.[410] While the Regulations have been widely criticised, nonetheless, despite the reform momentum in other areas, holistic revision and the much-needed conversion of these Regulations into legislation had stalled.[411] In 2014, China's MPS announced that that the Ministry was drafting a new Detention Centre Law (DCL). The progress of the passage of the DCL in 2015-2016 had stalled, and in some scholars' views,[412] has been stymied, but as of 2017, it appears to be back on track.

In 2017, a proposal for a draft law was published for public consultation. The MPS underlined that the draft DCL is focused on bringing the law into line with the new Criminal Procedure Law (CPL) in order to serve the entire criminal justice system better. In June 2017, a draft proposal of a PRC Detention Centre Law was published for public consultation.[413] While this draft law does propose more concrete safeguards for detainees (better access to bail and medical care for detainees and mandatory audio and video recordings of interrogations), other provisions have not changed and KSS remain under the sole responsibility of the PSB/police.[414] National legal scholars[415] argue that while it is a step forward,[416] it may well have a limited impact on reducing police torture given that despite repeated calls for courts or prosecutors to have control over detention centres (in light of many deaths in custody due to extraction of confessions) these remain under the responsibility of the PSB, along with insufficient transparency and oversight.[417] So far, there has been criticism levelled at the proposed draft law by lawyers and national scholars,

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410 Hou Xinyi, Law Professor at Tianjin University of Finance and Economics; Chen Ruihua, Professor at Peking University's School of Law; Cui Xiankang, Shan Yuxiao and Li Rongde, 'Draft Law on Detention Centres Won't Help Reduce Police Torture', *Caixin*, 20 June 2017; See also Cheng Lei, 'Expert Proposal for a Draft Detention Centre Law', *Three Approaches to Combatting Torture in China* (2012); Xu Xiaotong, 'Can a Detention Centre Law End "Death by Blind Man's Bluff", China Youth Daily, 14 May 2014; MacBean, 'China's pre-trial detention centres: challenges and opportunities for reform' (2016); Nesossi, Biddulph, Sapio, Trevakes, 'Opportunities and challenges for legislative and institutional reform of detention in China' (2016).

411 Nesossi, 'China's Pre-trial Justice: Criminal Justice, Human Rights and Legal Reforms in Contemporary China', in *Law in East Asia Series,* (Wildy, Simmonds & Hill, 2012); Trevaskes and MacBean, *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); *Comparative Perspectives on Criminal Justice in China*, ed. McConville & Pils, Part VII (2013); Chen Wei Dong, T. Spronken, *Three Approaches to Combatting Torture in China*, (Intersentia 2012).

412 See above.

413 On 15 June 2017, the draft PRC law on Detention Centres was published for public consultation.

414 See later analysis in this Chapter.

415 Hou Xinyi, law professor at Tianjin University of Finance and Economics; Chen Ruihua, professor at Peking University's School of Law; see Cui Xiankang, Shan Yuxiao and Li Rongde, 'Draft Law on Detention Centres Won't Help Reduce Police Torture', *Caixin*, 20 June 2017.

416 See interview with Associate Professor Cheng Lei, China News, **看守所法征意**见 侦查阶**段可**见**近**亲**属**显**人道精神**, 2017-06-21.

417 As the draft law is not in force currently (summer 2017), the regulations that are currently in force with be focused upon in this thesis and any proposed amendments will be highlighted where relevant.

who foresee that the proposed revisions do not go far enough to eradicating the risk of torture (coerced confessions) by leaving the process under the sole responsibility of the PSB, without sufficient transparent and external oversight mechanisms in place.[418]

The Chinese authorities, in a recent White Paper on the (self) assessment on the implementation of China's most recent Human Rights Action Plan (2012 – 2015) have highlighted their efforts at reforming the criminal justice system:

> *"to deepen the reform of the judicial system, to optimize the allocation of judicial powers, to improve the system of judicial responsibilities and to promote judicial transparency. The system of legal proceedings was revised and improved and the legal principles were strictly implemented to ensure legally prescribed punishment for a crime, innocence until proven guilty and the exclusion of illegal evidence. Stringent efforts were made to guarantee lawyers' rights to perform their duties and to guard against and rectify wrong or false convictions. Guarantees were in place to ensure that judicial organs can perform their duties independently and justly in accordance with the law. Citizens' rights of the person and rights to a fair trial were protected in accordance with the law to ensure that they can feel fairness and justice in every judicial case."*[419]

Equally, some China legal scholars point to a general gradual 'softening' or leniency in terms of sentence lengths and alternatives to imprisonment, compared to two decades earlier.[420] Legislative changes have also been in line with the national authorities' emphasis on the policy of '*yifa xingzhong*' ('administrative rule according to the law').[421] Scholarly critique of the reforms has

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418 See above.

419 White Paper, Implementation of China's HRAP (2012 – 2015), official media Xinhuanet, http://english.gov.cn/archive/white_paper/2016/06/15/content_281475372197438.htm [accessed 30 June 2017].

420 For example, Professor Fu Hualing points out that in the late 1980s nearly 40% of defendants at a criminal trial were sentenced to terms of not less than 5 years and that percentage has since dropped to 25% in 2001. Further 20% of defendants were sentenced to non-custodial punishments, in sharp contrast to administrative offenders, who did not have alternatives to custody provided by the PSB sentencing procedure.

421 See CCP emphasis on this at 18th Party Congress; and academic discourse on this in MacBean and Trevaskes, *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); *Comparative Perspectives on Criminal Justice in China*, ed. McConville & Pils, Part VII (2013); Lubman, 'Concluding Observations', *Comparative Perspectives on Criminal Justice in China* (2013).

generally acknowledged that the reforms have been significant and are slowly moving the Chinese criminal justice system to becoming closer in line with international human rights law, while arguing that many key areas need further attention and strengthening.[422] Some China scholars, such as Belkin and Lubman, point out that while the concept of 'rule of law' (*yifa zhiguo*) is an official policy of both the Chinese Communist Party and the government, 'it would be more accurate to describe the rule of law as a long-term goal. China's legal system is, in fact, very much a work in progress'.[423]

There remain tensions between this long-term goal of 'rule of law' (*yifa zhiguo*) with the actual policy of 'administrative rule according to the law' (*yifa xingzhong*). Such tensions have been subject to detailed debate in national academic and wider circles to establish whether China should, or would want, to adhere to a wider notion of the 'rule of law', which is seen by many Chinese to be a 'Western' and non-culturally specific concept.[424] Moreover, various documents setting out the CCP's wider political agenda, such as Document No. 9, establish that the 'Western' concept of 'rule of law', (separation of powers and complete judicial independence)[425] is explicitly not considered by the Chinese authorities to form part of the 'socialist rule with Chinese characteristics'.[426] This policy is an illustration of the underlying precept that, in China, governance should be regulated by, and abide by, laws and regulations, to ensure greater transparency; but that this does not imply the separation of powers, as all elements of governance, including the judiciary, ultimately are subject to Party rule.

Equally, many China legal scholars point to other limitations in the reforms undertaken in the legal sphere since 2012. They argue that the reforms reflect Xi Jinping's wider political objectives and ensure top-level centralised CCP influence remains over the legal system.[427] They point to the

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422 See for example, Belkin, 'China's Criminal Justice System: a Work in Progress' (2000).

423 Belkin, 'China's Criminal Justice System: a Work in Progress', Criminal Justice in China (2000), p. 64; in MacBean and Trevaskes, *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); *Comparative Perspectives on Criminal Justice in China*, ed. McConville & Pils, Part VII (2013); Lubman, 'Concluding Observations', *Comparative Perspectives on Criminal Justice in China* (2013); and Lubman, '*Bird in the Cage: Legal Reform in China after Mao*' (1999).

424 For a detailed analysis of the origins and early reforms of China's criminal justice system see K. Turner, J. Feinerman and R. Kent Guy, *the Limits of the Rule of Law in China*, (University of Washington Press, 2000).

425 see Bingham and Dicey for an analysis of the concept of Rule of Law: Bingham, *The Rule of Law* (2010); and Dicey 'An Introduction to the Study of the Law of the Constitution', 8th ed. (1915).

426 See CCP Communiqué Document No. 9, April 2013.

427 See G. Chen and K. Shi-Kupfer, 'the Function of judicial reforms in Xi Jinping's agenda: rectifying local governance through reforms of the judicial systems, *MERICS papers on China, No.1* (2016).

contrast between judicial reform at the local level, which is gradually rendering local judicial organs more independent from local government interference, compared to the lack of similar reform to protect against top-level central government interference.[428] In addition, many are concerned at the remaining procedural protection gaps in the revised laws, as well as pointing out that the letter of the law – with the notional added protections - does not necessarily equate with the actual practice in China currently.[429] Indeed, many China scholars see a pattern and current contraction in the reform process: while on the one hand strengthened rights are gradually being afforded, one the other more restrictions are being applied (e.g., increased restriction placed on the conduct of lawyers, internet censorship, on civil society, etc.).[430] Scholars argue that this reform cycle does not necessarily equate with the adoption of more liberal, or strengthened, rights in practice.[431]

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428 Ibid, p. 67.

429 For an analysis of the protection and implementation gaps, see Chapter 3; for scholarly discourse on the area see Nesossi, Biddulph, Sapio and Trevaskes, *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); and *Comparative Perspectives on Criminal Justice in China*, ed. McConville & Pils, Part VII (2013); and Lubman, Concluding Observations, *Comparative Perspectives on Criminal Justice in China* (2013).

430 See Thesis Chapters 3 and 4.

431 See Nesossi, Biddulph, Sapio and Trevaskes, *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); and *Comparative Perspectives on Criminal Justice in China*, ed. McConville & Pils, Part VII (2013), among others.

2.4 Analysis of the scope of existing protections & key 'preventive measures' in three justice processes: Criminal, Administrative and Party

This Section identifies and documents the extent to which any protections, safeguards and 'preventive measures' are available within the three Chinese justice processes in focus (criminal, administrative and Party), and examines their current scope, in light of the requirements under IHRL.[432] Chapter 3 will examine the effectiveness of the measures in practice, and assess any deficiencies or protection gaps evident in these safeguards.

I. Analysis of current criminal law prevention measures & their scope

The numerous laws and regulations governing criminal procedure in China have been subject to a series of reforms. The primary texts, in this respect, are the CPL, which was significantly revised in 2012 and the CL, revised in 2015. Other laws and regulations have also been changed or are under revision, including the People's Procuratorate Rules of Criminal Procedure (Provisional) and the Detention Centre Regulations. Both primary criminal law instruments (CPL and CL) set out the parameters of the various criminal offences, grounds for arrest, investigation and initial custody by law enforcement officials (PSB/police and – in some cases[433] – procurators).[434]

Within the Chinese criminal-law justice process, the groups of key 'preventive measures', as identified under IHRL norms (Chapter 1), are examined in turn:

(i) Torture prohibition

The Criminal Procedure Law (Article 50), the Criminal Law (Articles 247 and 248) and the Detention Centre Regulations (Article 3) prohibit and punish specific acts that could be considered as torture or other ill-treatment. There are also similar prohibitions in the Prison

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[432] As identified in Thesis Chapter 1.

[433] In cases involving official corruption, negligence in official functions, torture cases, gangs, terrorism and state secrets.

[434] CPL, Article 3, 'Public security authorities are responsible for criminal investigation, detention, execution of arrest warrants, and interrogation in criminal cases. People's Procuratorates are responsible for procuratorial supervision, approval of arrests, investigation of cases directly accepted by procuratorial authorities, and initiation of public prosecution. People's Courts are responsible for trial and sentencing.'

Law,[435] the Judges Law,[436] the Prosecutors Law and the Police Law,[437] as well as the Chinese Constitution (although not as an explicit prohibition[438]). There are, however, concerns that those provisions do not include all the elements of the definition of torture set out in Article 1 of the UNCAT.

IHRL bodies, including the CAT Committee and the UN SRT, have underscored their serious concerns about the lack of a comprehensive definition of torture in China and its effect on prevention.[439] The concerns include that acts in the above laws focus primarily on extracting confessions through torture or obtaining witness statements through violence (*xingxun bi gong*). Issues lie in the ambiguity in the national legislative prohibitions of torture and ill-treatment, as to specifically what types of acts can qualify as 'torture'. There has been some progress in the definition in China and some interpretative guiding texts have been drafted (such as the SPP's Provisional Criminal Procedural Regulations)[440] and the SPC has now published its own interpretation regarding the torture definition in the CPL, as including direct bodily punishment, indirect physical punishment and "use of other methods that cause the defendant to suffer severe pain or suffering, either physically or mentally".[441] However, the CAT Committee, civil society bodies and national scholars are concerned that these interpretations are perceived as primarily applying to issues of exclusion of evidence rather than criminal responsibility.[442]

IHRL bodies and civil society stress that lawyers and procurators are regularly encountering definitional challenges, highlighting perceptions held by procurators and the judiciary that acts

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435 Articles 14 and 22, 1994.

436 Adopted at the 12th Meeting of the Standing Committee of the Eighth National People's Congress on 28 February 1995, amended 30 June 2001.

437 Article 22, as amended in 2012.

438 The Chinese Constitution does not contain an express prohibition of torture. The relevant provisions of the Constitution in this context are Articles 37 and 38 that protect the personal dignity of China's citizens. Article 38 reads: "The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false charge, or frame-up directed against citizens by any means is prohibited."

439 See, inter alia, 5th Reporting cycle of the CAT Committee Concluding Observations on China, December 2015, paragraph 7 and 8; the UN CAT Committee General Comment No. 2 (2008); the UN SRT Report on China, 2005 and Follow-up report, March 2011; Amnesty International, 'No End in Sight: torture asnd Forced Confessions in China', December 2015 and Amnesty International, Submissionon: List of Issues to the CAT Committee for China's fifth periodic report at the UN Committee Against Torture's 54th session, Index: ASA 17/005/2015; Human Rights Watch, 'Tiger Chair and Cell Bosses', December 2015, Chapter 1.

440 "People's Procuratorate Criminal Procedural Regulation (trial version)", issued on 16 October 2012 and effective on 1 January 2013, http://www.spp.gov.cn/flfg/gfwj/201212/t20121228_52197.shtml, English translation is available at New York University School of Law's US-Asia Law Institute: http://usali.org/wp-content/uploads/2013/08/IBJ-Translation- SPP-Regs1.pdf .

441 SPC Interpretation on the Application of the CPL, issued on 5 November 2012 and came into force on 1 January 2013, http://www.court.gov.cn/fabu-xiangqing-4937.html.

442 See 5th Reporting cycle of the CAT Committee Concluding Observations on China, December 2015, paragraph 8; Amnesty International, 'No End in Sight' (2015), p.25, Human Rights Watch, 'Tiger Chair and Cell Bosses', (November 2015), chapter 1, among others.

such as punching, kicking, beating with water bottles, prolonged exposure to cold and heat are not being considered as 'serious' enough to qualify as torture. [443] These point to both regulatory protection gaps in the torture definition in national legislation, but also to implementation gaps in understanding and applying the few existing protections in practice.

Another regulatory deficiency is evident in article 247 of the CPL, which specifies that extraction of confession by torture needs to be carried out by 'judicial officers' (*sifa gongzuo renyuan*). These are defined in article 94 of the CL as including investigators, procurators, adjudicators, supervisors and court officials. Article 248 of the CL does cover prison or KSS staff abuse of detainees and prisoners and issues of inter-prisoner violence when instigated by officials or through negligence to protect detainees. Nevertheless, these above provisions do not cover all persons that could be involved in torture or ill-treatment, such as CCP discipline officials or private individuals or companies acting with consent of, on behalf of, the state. This regulatory protection gap has drawn severe criticism internationally. The CAT Committee has specifically expressed its concern that the Chinese torture and other ill-treatment prohibition does not cover all public officials and persons acting in an official capacity.[444] It highlights that the crime of beating or ill-treating detainees (Article 248 of the Criminal Law), 'restricts the scope of the crime to the actions of officers of an institution of confinement or of other detainees at the instigation of those officers. It is also restricted to the infliction of physical abuse only'. [445] Overall, all these concerns persist, despite the reforms of 2012 (which have not specifically addressed these), and notwithstanding the deficiencies being highlighted repeatedly by IHRL bodies such as the UN SRT and the CAT Committee,[446] China scholars[447] and civil society.[448] Thus, despite some progress, China still lacks a comprehensive definition of torture and ill-treatment in its national law. This is a clear regulatory protection gap that needs to be addressed.

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443 See 5th Reporting cycle of the CAT Committee Concluding Observations on China, December 2015, paragraph 7; Amnesty International, 'No End in Sight', (November 2015), p.24-26,

444 5th Reporting cycle of the CAT Committee Concluding Observations on China, December 2015, paragraph 7(a).

445 See 5th Reporting cycle of the CAT Committee Concluding Observations on China, December 2015; see also Thesis Chapter 3.

446 See, for example, 5th and 4th Reporting cycles of the CAT Committee Concluding Observations on China, December 2015 and 2008 and the UN SRT report on China in 2005 and Follow-up in 2010/2011.

447 See, for example, 14 April 2016, the Congressional-Executive Commission on China (CECC) examination of China's systemic use of torture and maltreatment in the criminal justice system, where 'torture experts have concluded that the lack of a definition of torture in China's legal code is highly problematic'.

448 See Shadow Reports for the 5th Reporting cycle of the CAT Committee Concluding Observations on China, December 2015, including Amnesty International, Redress, Rights Practice, among others.

Further, it impacts how investigators, procurators and the judiciary view abuse and what can or can't constitute torture (as seen above). If these bodies and persons consider an act to not be serious enough, many potential torture or ill-treatment allegations will not be investigated or prosecuted. This could be one (of many) reason(s) for such low prosecution of torture cases in China (cf. Chapter 4.4.4). It also links with the issue of impunity (Chapter 4.4.1, 4.4.2 and 4.4.4.), as underlined by the CAT Committee that considers that discrepancies in torture definitions generally,[449] and in China specifically,[450] create a loophole in which impunity flourishes.[451]

(ii) Key existing preventive safeguards and guarantees in Chinese criminal law

While there have been various protections added to the CPL, this section selects, for analysis, certain of the core procedural guarantees and safeguards most relevant for the context of torture prevention. The section identifies the existing safeguards in Chinese law and examines their scope.[452] Chapter 3 will look at their actual practice, and assess any deficiencies or protection gaps evident in these safeguards.

The system of interrogation and detention is complex but can be unpacked into discrete sections depending on the nature of the crime allegedly committed and by whom. The areas of police custody depend on different levels of police hierarchies. At a national level there are '*gong an bu*' (national police HQ), at a provincial level, '*gong an ding*' (provincial police Headquarters), at a city level, '*gong an ju*' (city police stations), at a township and village level, local police station HQs and local police stations. The PSB/police investigate ordinary crimes and a branch of the procuratorate investigates crimes allegedly committed by public officials.

449 CAT Commitee General Comment No. 2 (2007) on the implementation of article 2 by State parties, paragraph 9.
450 5th Reporting cycle of the CAT Committee Concluding Observations on China, December 2015, paragraph 9
451 5th Reporting cycle of the CAT Committee Concluding Observations on China, December 2015, paragraph 9.
452 As identified in Thesis Chapter 1.

- **Time-limited police custody & right to be brought before a judicial authority promptly**

Time-limited custody

The CPL specifies that for criminal offences the PSB / police has the power of arrest on various grounds, including on suspicion of the commission of a crime.[453] The arrest[454] is subject to the approval of the Procuratorate[455] or the Courts.[456] The CPL stipulates that police – or in specific cases, the procurators – shall conduct interrogation within 24 hours of detention.[457] However, this is subject to certain exceptions.

While maximum time-periods for interrogation and the interrogation process have been revised, some lengthy exceptions remain. The practice, until recently, was that once arrested, suspects were held in initial police custody and initially interviewed, then held in '*juliusuo*' (further police custody), where they could remain while the police further investigated and gathered evidence to prepare a case against them. In the case of minor crimes, if the police need longer to investigate a given case, detainees could be taken from the '*juliusuo'* to a '*juyisuo*' – a police lock-up or custody suite facility from post-charge and pre-sentence or for sentenced prisoners of minor crimes.

A recent amendment in the law[458] stipulates that detainees should now be moved to a *Kanshousuo* (KSS) police-run pre-trial detention centre within 24 hours of arrest. Some Chinese scholars[459] consider that this was a move initiated by Chinese legislators to try to mitigate the risk of torture and other ill-treatment in initial police custody and to move detainees to police detention centres (for those on remand and under PSB or procuratorate investigation, or those sentenced to an administrative detention penalty[460]).[461] Nevertheless, in practice, suspects can be taken out from, and slotted back into, the KSSs throughout the investigation for interrogation purposes. Before

453 Article 80.
454 Article 78.
455 A Soviet-legacy body that functions in an administrative legal oversight role.
456 Article 78.
457 Article 84, CPL.
458 14 March 2012, new revised CPL came into force on 1 January 2013.
459 See Peking University submission to the CAT Committee for the 5th periodic reporting cycle on China, November 2015; see also Chen Weidong, Cheng Lei and Spronken, *A Three-Way approach to the fight against torture* (2012), p. 13.
460 Detention Centre Regulations.
461 Renmin University scholars Chen Weidong, Chai Yufang and Cheng Lei and international sinologists and scholars such as Gerard de Jonge and Taru Spronken, many of whom have published articles on China including in '*A Three-Way approach to the fight against torture*' (2012).

procurator approval of deprivation of liberty (the official 'arrest' approval), detainees can be held for up to 15 days, and with exceptions, up to 38 days.[462] Once arrest has been approved by the procurator, there is technically a maximum of two months to prepare the case; however, this can be extended for certain complicated cases to a maximum of 7 months,[463] including all permissible delays and exceptions.[464] In practice this can be far longer.[465]

The CPL itself, however, creates so many exceptions that many detainees, due to the seriousness or complexity of their alleged offences, by law, stay in some type of police custody (whether initial custody, interim policy custody or pre-trial police detention) for weeks, if not months, into the investigation. Even when moved across to different places of police detention, they ultimately remain in the same place for interrogation and custody operated by the same body, the PSB, with procuratorial oversight.

The Procuratorate has seven days from receipt of the investigator's request to approve the arrest. The Procuratorate itself is an administrative body that retains some judicial characteristics in that although it is not part of the Court system, it retains an official oversight function of the legality of the processes run by the respective bodies over which it has jurisdiction and, in addition, exercises prosecutorial powers.[466] Once the arrest has been approved, the time limit for holding a criminal suspect in the police detention facility (KSS) during investigation is a maximum of two months, which is extendable for another month for normal cases and by another two months and then two more months for complex cases.[467] The maximum timeframe that a case can be investigated for and that a detainee can be held in a KSS on remand / pre-trial is up to 13 months.[468] If sentenced by the court to a term of imprisonment, those detained on remand are then moved to a '*jian yu*' (prison). KSSs can also hold some persons sentenced to administrative

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462 See Article 89, exceptions cover major crime suspect involved in crimes committed in different places, repeated commission of crimes / recidivism, or crime committed in a gang'; See also Part VII on CPL revisions in *Comparative Perspectives on Criminal Justice in China* (2013).

463 Summary of CPL criminal procedural maximum timeframes: Criminal Procedure Timing Chart, dated 07/10/2015, depending on PSB or Procuratorate investigation, at http://chinalawtranslate.com/case-handling-chart/.

464 M. Dutton and Xu Zhong Run, 'A question of difference: the theory and practice of Chinese prison', *Crime, Punishment and Policing in China*, ed. Børge Bakken, (Lanham: Rowman and Littlefield Publishers, 2005); see the revisions in the CPL in 2012 and 2014 in Criminal Procedure Timing Chart, dated 07/10/2015 at http://chinalawtranslate.com/case-handling-chart/.

465 Author's interview with wife of Mr. X, (a detainee in remand detention) (name anonymised) and see Thesis Chapter 3.

466 Article 5, CPL.

467 Articles 124 – 126.

468 一审办案期限最长为 13 个月, Criminal Procedure Timing Chart, http://www.chinalawtranslate.com/case-handling-chart/.

detention penalties, compulsory measures ordered by PSB or procurators in investigation, and those awaiting deportation.[469]

The right to be brought before a judicial authority speedily

There are several concerns regarding the full respect of the right for a criminal suspect to be brought promptly before a judge or competent judicial authority as well as the possibilities, permitted by law, of prolonged detention. The right of the criminal suspect to be brought before a judicial authority and of anyone deprived of their liberty to challenge the lawfulness of their detention (*habeas corpus*) have been widely recognised as rights established in general international law and as necessary guarantees to prevent torture.[470] Various problems are evident in this respect in China's CPL. First, China's criminal suspects are not brought before a judge, instead it is a procurator who is involved in approving detention (i.e. an administrative, rather than judicial, authority). Second, the procurator *remotely* approves the arrest (i.e., does not directly see the suspect). Third, the need for short time-frames in initial police custody and the nature of being brought 'promptly' before a judge has been subject to detailed examination by the IHRL bodies and international and regional courts, with some bodies (such as the HRC) holding that this should be within 48 hours and others (such as ECHR case law) underlining that four days is the maximum time-limit. The seven-day period in which the procurator can approve the arrest would be unlikely to be considered 'prompt' under IHRL, in line with the obligations and jurisprudence highlighted in Chapter 1.

The permissibility of extended detention / prolonged detention had been a cause for concern nationally, especially in the legal circles and academic discourse.[471] So much so that the Chinese Ministry of Justice has, in 2015, issued 'Provisional Provisions on Efforts to Prevent and Correct Cases of Extended Detention and Prolonged Detention without Resolution by Criminal

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469 See list and analysis of China's Administrative Detention Regulations in Biddulph, *Legal Reform and Administrative Detention Powers in China* (2007); *Comparative Perspectives on Criminal Justice in China*, Part V (2013); and Biddulph, 'What to make of the abolition of re-education through labour?', *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); and Part 1 of *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016).

470 See Thesis Chapter 1.

471 See Nesossi and Cheng Lei, 'China's pre-trial detention centres: challenges and opportunities for reform', *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); MacBean, 'Addressing the 'hide and seek' scandal: restoring the legitimacy of *Kanshousuo*' (2016); Sapio, Trevaskes, Nesossi and Biddulph, Part III, *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016).

Enforcement Prosecution Departments of People's Procuratorates'.[472] This includes the definition of extended detention in Article 2:

> *"Where the period of detention for criminal suspects or defendants in the investigation, review for prosecution or trial phases exceeds the legal prescribed period of detention, it is a case of extended detention. Where criminal suspects or defendants have been detained for more than five years, and the case is still in the investigation, review for prosecution, first-instance or second-instance trial phase, [these] are cases of prolonged detention with no resolution."*

It also sets out how the issue of extended detention should be countered in Article 3: 'prevention and correction of cases of extended detention and prolonged detention without resolution, follows the principles of peer supervision, hierarchic oversight, facilitating work, and emphasizing prevention'. Articles 17 and 18 specify that corrective opinion or discipline sanctions will be given by the chief procurator for prosecuting procurators' use of extended detention and 'where the circumstances are serious or a crime is suspected, pursue criminal liability in accordance with law'. To bolster the review system of the necessity of detention, in 2016 the Procuratorate issued the 'People's Procuratorate Provisions on Handling Cases of Reviewing the Necessity of Detention (Provisional)'[473] in order to 'strengthen and normalise the review of the necessity of detention, safeguard the lawful rights and interests of criminal suspects or defendants under arrest, and to guarantee the smooth proceedings of criminal procedural activities.'[474]

These 'Provisional Provisions', however, act as interpretative guidance to prosecuting procurators only, and do not alter the CPL or CL. The fact of initial steps to address the problem of prolonged detention is a positive move. Nevertheless, four problems with the current system remain.

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472 Provisions on Efforts to Prevent and Correct Cases of Extended Detention and Prolonged Detention without Resolution by Criminal Enforcement Prosecution Departments of People's Procuratorates (Provisional), April 2015 (人民检察院刑事执行检察部门预防和纠正超期羁押和久押不决案件工作规定（试行）).

473 The Judicial interpretation of 22 January 2016; and accompanying Circular of the Supreme People's Procuratorate of the People's Republic of China, *Gao Jian Zhi Jian [2016] No. 37*, Circular on Issuing the Guiding Opinions of the Supreme People's Procuratorate's Prison Management Bureau on Implementing the Provisions on the Handling of Detention Necessity Review Cases by People's Procuratorates (for Trial Implementation), 8 July 2016.

474 Article 1.

a) Permissibility in the law *per se* allows for prolonged extension – and the legally permissible terms are extremely, if not excessively, long.

b) Even these long permissible terms can be bypassed in reality, to such an extent that procurators are being reminded to keep the legal limits in check.

c) The inherent set up of the procuracy: prosecuting procurators extending detention terms for reasons of prolonging investigation times, onsite procurators supervising lengths of detention terms and higher-level procurators overseeing and able to criticise the extensions. The current structural set-up lacks checks and balances.

d) There is no explicit right in law affording the suspect to be brought in person before a judge or proactively to challenge the detention decision (lack of *habeas corpus* rights).[475]

- **Audio-visual recording of interrogations & physical separation**

Other strengthened preventive safeguards in the CPL taken with a view to mitigating the risk of torture and other ill-treatment include the requirement of CCTV in police interrogation rooms, physical separation of the interrogator and suspect, a requirement of no fewer than two investigators to conduct the interrogation / interview and increased recordings of interrogations.[476] These are seemingly positive moves towards establishing the necessary safeguards in law to strengthen detainees' protection and help prevent torture.[477] Nevertheless, these are subject to the discretion of the interviewer, in the law, and are only applicable for suspects of certain crimes. An illustration of this is the safeguard of audio-visual recording of interrogation, established in Article 121 of the CPL. This stipulates:

"When investigators interrogate a criminal suspect, they <u>may</u> make audio or video recordings of the interrogation process, for suspects that might be sentenced to life in

[475] See further analysis in Chapter 3 and the deficiencies and protection gaps identified with this safeguard.
[476] For example, Articles 116 to 121, CPL.
[477] See Chen Wei Dong and T. Spronken, *Three Approaches to Combatting Torture in China*, (Intersentia 2012); MacBean, 'addressing the 'hide and seek' scandal: restoring the legitimacy of Kanshousuo' (2016).

prison or death, or in other major criminal cases, they shall make an audio or video recording of the interrogation process. Audio or video recordings shall be made of the entire process, to preserve their integrity."[478]

This preventive safeguard is only available for suspects of major crimes (such as gang-related crimes, repeated public order crimes), due to the fact that heavier penalties are specified in law for recidivism, cases of corruption, bribery or graft, or those suspects who, if sentenced, face potential life-imprisonment or the death penalty (i.e., not 'ordinary' / 'run of the mill' criminal suspects). This is an area where the 'ordinary' suspect (the majority) is afforded less protection in regulation than suspects of more serious or sensitive offences (the minority).[479]

In order to help interpretation of this safeguard, in 2014 the MPS issued the 'Regulations on Making Audio-Video Recordings by the Public Security Organs When Interrogating Criminal Suspects' and the SPP amended the 'Provisions on Making Synchronous Audio-Video Recordings Throughout the Entire Process of Interrogation of Duty-Related Criminal Suspects'. Both guide interrogators to use audio-video recording throughout the entire process of interrogating all criminal suspects. Nonetheless, they act as guidance only. As it is not the law, it is unsurprising that in practice there are no systematic and full recordings of all suspects' interrogations.[480]

- **Access to a lawyer, doctor and third party notification guarantees**

The 'trinity' of core procedural safeguards for those deprived of their liberty, namely (i) access to a lawyer and (ii) doctor, as well as for (iii) notification of detention to a third party are established in the CPL in China for criminal suspects. Some of these (i and iii) are also afforded in the current Detention Centre Regulations governing KSSs (police-run remand detention centres)[481].

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478 121, CPL; emphasis added.

479 See Thesis Chapter 3 for analysis of current protection gaps; for further analysis see N. MacBean, 'Addressing the hide and seek scandal', *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016).

480 See Thesis Chapter 3 and, in particular, Amnesty International, 'No End in Sight', *Torture and forced confessions in China*, 11 November 2015, ASA 17/2730/2015 and Human Rights Watch, 'Tiger Chairs and Cell Bosses: Police Torture of Criminal Suspects in China', May 13, 2015.

481 'Detention Centre Regulations for Notification of Detainees of their Rights and Obligations', December 11, 2012, Regulation 10.

Articles 31 to 47 of the CPL stipulate that suspects have the right to contact legal defence lawyers or other representatives, whom they can consult in private. Nevertheless, the scope of this right is limited. First, access to a lawyer is only mandatory within 48 hours of deprivation of liberty and only possible after the initial interrogation has taken place.[482] Further, this safeguard is not afforded to all criminal suspects, only those suspected of 'ordinary' crimes. For those suspected of more serious crimes, and any crime endangering national security, permission has to be first sought from the procurator for a detainee's access to a lawyer. This permission may be withheld, without specifying a time limit for review of the reason.[483] These are all contrary to the international law requirements regulating this area, identified in Chapter 1.

Similarly, suspects are afforded, in law, the right of third-party notification of the fact of their detention[484] and the right only to be detained pursuant to a valid detention order/warrant.[485] Regarding right of third-party notification of the fact of their detention, the CPL establishes that:

> *'the family of the detainee shall be notified of the detention within 24 hours [of] the detention, <u>unless</u> the notification cannot be processed or where the detainee is involved in crimes endangering State security or crimes of terrorist activities, and such notification may hinder the investigation. The family of the detainee shall be notified of relevant information immediately after the circumstances impeding investigation has been eliminated.'* [486]

As is clear from the wording of this safeguard, the scope is limited. The same potential for indefinite delay for certain suspects (those endangering national security) as seen in the access to lawyer safeguard is also applicable to this third party notification right. Moreover, the right is not available from the very outset of detention and the wording lacks precision and legal certainty, leaving considerable room for ambiguity. China legal scholars, such as MacBean, Lubman,

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482 Article 33 and 37, CPL.
483 Article 37, CPL.
484 Article 83, CPL.
485 Article 83, CPL.
486 Article 83, CPL.

Trevaskes and Pils,[487] have pointed out that there remain various controversial aspects to the CPL's amendments including that the new provision (Article 83) does not include a requirement to indicate the person's whereabouts to the relatives.[488]

Automatic access to a doctor from the outset of detention is not established as a right in the CPL. Article 130 does however stipulate that 'to ascertain certain features, conditions of injuries, or physical conditions of a victim or a criminal suspect, a physical examination *may* be conducted, and fingerprints, blood, urine and other biological samples may be collected. If a criminal suspect refuses to be examined, the investigators, when they deem it necessary, may conduct a compulsory examination. Examination of the persons of women shall be conducted by female officers or doctors.' This is a generally weak safeguard owing to non-systematic nature of initial medical screening for all detainees upon arrival.

- **Safeguards to protect lawyers and ensure they can represent clients**

Criminal Law provisions have been amended in 2015, to better guarantee the Courts' independent and impartial adjudication according to the law. In this respect, there are two notable amendments. First, the criminalisation of 'conduct of judicial personnel, defenders, agents ad litem or other parties to litigation who reveal information that should not be disclosed about a case that, according to the law, should not be tried in public', and disseminating such information openly (Article 34). Second, the amendment to the crime of 'disrupting the courtroom order' and its expansion to 'gathering a crowd to racket or attack the court, beat judicial work personnel' as well as 'other conduct that severely disrupts the courtroom order', including insulting, defaming or threatening judicial work personnel or other parties to litigation, and generally not obeying the courts' orders (Article 35). These provisions are aimed at improving professional ethics and

487 See MacBean, 'Addressing the hide and seek scandal', *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); T. Biao, J. Rosenzweig, E. Pils, F. Sapio, *Comparative Perspectives on Criminal Justice in China*, Part VII (2013) and Lubman, Concluding Observations, *Comparative Perspectives on Criminal Justice in China* (2013); also Trevaskes, *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016).

488 S. Lubman, *China's Criminal Procedure Law: Good, Bad and Ugly*, 21 March 2012.

courtroom etiquette, in that they criminalise improper behaviour. They do not *per se* act as safeguards to ensure that lawyers can defend their clients without hindrance or fear or reprisals.[489]

- **Exclusion of evidence obtained under duress**

Another recent amendment to the CPL, made to strengthen the protection against torture in initial police custody, is the addition of the new provision to exclude any evidence coerced by means of torture from being used as evidence in court proceedings.[490] Scholars and civil society have acknowledged this as a positive move.[491] Yet, this protection too has seen gaps between the theory of the law and actual practice: its effectiveness has been questioned by legal scholars, IHRL bodies and civil society and is examined in Chapter 3.[492]

(iii) Overall functioning of the criminal-law justice system: current status

The criminal justice system operates along the lines described above. The objectives of the recent reforms to the criminal justice system have been to deepen transparency, accessibility, cut bureaucracy / 'red-tape' and remove previously embedded interference from local government in the remit of judiciary (i.e., to strengthen the institution of the judiciary from local bureaucracy and interference). As emphasised in the authorities' own assessment of their progress in implementation of the China's NHAP 2012 – 2015, reforms in the criminal justice sphere now ensure

> '*legally prescribed punishment for a crime, innocence until proven guilty and the exclusion of illegal evidence. Stringent efforts were made to guarantee lawyers' rights to perform their duties and to guard against and rectify wrong or false convictions. Guarantees were in place to ensure that judicial organs can perform their duties independently and justly in accordance with the law. Citizens' rights of the person and*

489 See Thesis Chapter 3 for analysis of various protection gaps associated with the actual practice, and China's IHRL obligations identified in Chapter 1.

490 Article 54.

491 See T. Biao, J. Rosenzweig, E. Pils, F. Sapio, *Comparative Perspectives on Criminal Justice in China*, Part VII (2013); also Nesossi, Biddulph, Sapio and Trevaskes, 'Deprivation of liberty under scrutiny', *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016).

492 F. Sapio, 'A paper tiger?', http://chinalawandpolicy.com/tag/flora-sapio/ [access July 2017]; See also Thesis Chapter 3 for references to scholarly articles , IHRL mechanisms' criticisms and this research's analysis on the gaps between law and practice on this issue.

rights to a fair trial were protected in accordance with the law to ensure that they can feel fairness and justice in every judicial case.'[493]

The rationale and scale of the reforms have been examined in detail by various China legal scholars, such as Lubman,[494] Chen and Shi-Kupfer,[495] McConville and Pils,[496] Nesossi, Sapio, Biddulph and Trevakes.[497] Chen and Shi Kupfer argue that 'Xi's new blueprint for judicial reforms is different to those of his predecessors in that it neither allows local Party committees to exert overwhelming control over the local court system (as under Jiang Zemin), nor imposes severe punishment on judges for making controversial court decisions that may have widespread social impacts (as under Hu Jintao).'[498] They point to reforms undertaken to restore a credible court system by curbing nepotism and corruption and moves to make courts and procuratorates more independent from local governments to preclude interference and enhance working efficiency. They also highlight evidence indicative of change: 'starting in 2015, the CCP leadership has transferred the power of local governments over the budget plans of judicial organs in their administrative districts uniformly to financial departments at the provincial level. Moreover, some pilot local courts (e.g., in Shanghai) have been established to hear trials across different jurisdictional zones. These measures mark a progressive reform scheme that permits the convergence of budgetary control of all the judicial organs within a province only at the provincial government level. As the financial nepotism between sub-provincial governments and judicial organs in their municipalities is cut off, the political clout of those local governments with local judicial organs dwindles.' [499]

Nevertheless, these same scholars argue that despite some moves to rationalise the operation of the judiciary, in reality the reforms serve to 'amplify the fundamental lack of judicial independence at the central level'. They argue that 'the judicial reforms so far have turned the

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493 White Paper on Assessment of Implementation of NHAP, the State Council Information Office of the PRC, "Assessment Report on the Implementation of the National Human Rights Action Plan of China (2012-15)", 14 June 2016. http://english.gov.cn/archive/white_paper/2016/06/15/content_281475372197438.htm [accessed July 2017].

494 Lubman, *China Criminal Procedure Law: The Good, the Bad and the Ugly* (2012).

495 Chen and Shi-Kupfer, 'the Function of judicial reforms in Xi Jinping's agenda: rectifying local governance through reforms of the judicial systems', (2016), p. 64.

496 *Comparative Perspectives on Criminal Justice in China* (2013).

497 *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016).

498 Chen and Shi-Kupfer, 'the Function of judicial reforms in Xi Jinping's agenda: rectifying local governance through reforms of the judicial systems', (2016).

499 Ibid, p. 65.

heat on local judicial and government functionaries. Whereas local judicial organs may be more independent from local governments than before, Xi and his colleagues are well aware that the monopolistic rule of the Party may soon disintegrate if they introduce an exhaustive process of liberalising China's judicial system. The failure to adopt equally efficient measures for inoculating judicial organs against political control at the central level, remains a fundamental flaw that enervates the professional ethos of judges even at higher levels.'[500]

These findings are supported by many other China scholars,[501] who point to obstacles facing the judiciary's notional impartiality and a pattern of persistent CCP top-level interference in judicial affairs, despite the legal reforms that, in theory, have been aimed at strengthening the overall independence of the judiciary.

(iv) Complaints avenues

There is scant publicly available information, even in Chinese, about the complaints' mechanisms in places of detention in China. This may reflect that it is a nascent and developing area. This analysis draws on two main sources: one publicly accessible, from the Chinese authorities' detailed response to the CAT Committee's List of Issues sent to China in June 2015, and responded to in October 2015, in preparation for China's Fifth Periodic Reporting cycle; the second is information shared with the author by Renmin University Chinese scholars, senior procurators and their partners, who are advising the government and leading the work on draft proposals for legislation in this area.[502] Since 2006/7, they have been working in partnership with external international partners such as the Great Britain China Centre (GBCC) (a specialist body that implements projects and facilitates exchanges on judicial and legal reform in China), the Max

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500 Ibid, p. 66.

501 E. Nesossi, 'Compromising for "justice"? Criminal proceedings and the ethical quandaries of Chinese lawyers', *Comparative Perspectives on Criminal Justice in China* (2013); E. Pils, 'Disappearing human rights lawyers', *Comparative Perspectives on Criminal Justice in China* (2013); see also Thesis Chapter 4, for analysis on the key obstacles facing the judiciary.

502 Author's interviews with Renmin University Law Professor Cheng Lei, Procurator Hu and Marina Mella, Senior Project Manager, Great-Britain China Centre (GBCC)(a specialist body that implements projects and facilitates exchanges on judicial and legal reform in China), on 24 November 2016, in Wuhu, China; these also were covered by discussions on 23 August 2016, in the framework of a GBCC and the Centre for Criminal Justice and Reform project "Eradicating the roots of torture in the Chinese legal system", in cooperation with the Directorate General of Human Rights and Rule of Law of the Council of Europe, whereby a Chinese delegation comprising Chinese procurators, lawyers and scholars, specialising in torture prevention (promoting complaints mechanisms and monitoring in China), met with international experts, including the author of this research, to share monitoring experiences.

Plank Foundation and Essex University (Professor Sir Nigel Rodley), among others, on proposals to strengthen certain torture prevention measures in China, including the complaints mechanisms in KSSs and, increasingly, in prisons.

China has recently trialled and then introduced an internal complaints' system in both the prisons system and in the KSSs (police-operated remand detention); first, in various regions across China, and then, increasingly, nation-wide. Hundreds of procurators are now based in prisons ('onsite procurators') and KSSs across China, mandated, among other aspects, to receive and address detainee and prisoner complaints.[503] Moreover, onsite procurators can now receive and address complaints about different aspects of the nature of detention (previously, procurators were only mandated to examine the legality of detention). This includes the right of the detainee to contact and see the procurator in person with complaints about potential ill-treatment, inter-prisoner bullying, aspects of his/her solitary confinement for discipline purposes or for the purpose of the protection of self or others, as well as other grievances that detainees may wish to air.[504]

The legal basis of prisoner and detainee complaints stems from Articles 21 to 24 of China's Prison Law. These establish:

> Article 22: 第二十二条　对罪犯提出的控告、检举材料，监狱应当及时处理或者转送公安机关或者人民检察院处理，公安机关或者人民检察院应当将处理结果通知监狱。 (A prison shall without delay handle the complaints or accusations made by prisoners, or transfer the above material to a public security organ or a people's procuratorate for handling. The public security organ or the people's procuratorate shall inform the prison of the result of its handling.)
>
> Article 23: 第二十三条　罪犯的申诉、控告、检举材料，监狱应当及时转递，不得扣压。 (A prison shall transfer without delay the petitions, complaints and accusations made by prisoners and shall not withhold them.)

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503 See China State Report for 5th Reporting Cycle 2014; China State Party Response to the CAT Committee List of Issues, 2015, p. 37.

504 See China's Response to CAT Committee's List of Issues 2015, para. 19, p. 37.

These provisions, along with the general right of complaint to the procurators established in the CPL (Articles 107 and 115) currently form the legal basis of detainees' right to complain in a prison setting. The scope of this legal basis has, however, been criticised by various Chinese scholars and legal practitioners in this area. In their view, there is lack of detail or guidance on complaints mechanisms at the national level in law, regulation or advisory texts, and this has led to problems in the implementation and standardisation across prisons across the country. In KSS settings, the legal basis for complaints' has until recently not existed, however, the recently proposed draft Detention Centre Law,[505] and MPS Regulation on KSS Handling of Detainee Complaints[506] aim to regulate this area, albeit relatively vaguely. In practice, current complaints mechanisms in KSSs and prisons vary significantly and there remain significant protection gaps.[507]

The Renmin University's Judicial Reform Research Centre (CCJR) and GBCC, through their project to strengthen complaints mechanisms in KSSs and, increasingly, in prisons in certain regions in China, have been able to shed light on the current practice in certain KSS and prisons.[508] The pilot detention places focussed upon had established a variety of avenues for complaints to reach the prison authorities and onsite procurators. These include (i) a complaints box, (ii) interviews with prison officers (should the detainee so request), (iii) the 'Detainee Handbook' (with compulsory weekly 'reflection forms' to be completed by detainees, where they can theoretically voice concerns or complaints) and (iv) access to the onsite procurator (with whom the detainee can request a one-one interview) and who is accessible, theoretically, on his/her daily walk around the detention areas.

The Chinese authorities have openly acknowledged that it has not established a completely external body that receives complaints in the form of an Ombudsperson or similar body, but they

505 Proposed draft Detention Centre Law, submitted for public consultation, June 2017.

506 See Thesis Chapter 4, 'Complaints' avenues'.

507 Lack of standardisation evident current nascent complaints mechanism pilot trials, discussions held in Wuhu China, 22-23 November 2016, between procurators, KSS directors (Wu Zhong and Ning Xia regions), front-line custody prison staff, members of nascent complaints' mechanisms and monitoring bodies, and leading Chinese scholars in torture prevention (Professor Cheng Lei, Renmin University) and discussions and interviews with the author of this research, who participated as an external expert.

508 Discussions held in Wuhu China, 22-24 November 2016, between procurators, KSS directors (Wu Zhong and Wuhu regions), senior prison staff and leading Chinese scholars in torture prevention (Professor Cheng Lei, Renmin University) and discussions and interviews with the author of this research, who participated as an external expert.

argue that there are, nonetheless, many public institutions that undertake similar duties.[509] For example, mechanisms exist within the Standing Committee of the National People's Congress for complaint letters and calls. The PRC government, at various levels, can also accept, investigate and deal with complaints. The higher levels of the Procuratorate are mandated by law to carry out the supervision of detention facilities and can also receive and address complaints concerning detainees' safeguards and protection rights.[510] Yet, there remain various obstacles facing nascent complaints' mechanisms and their effective operation in practice; these are examined in Chapter 4.

(v) Preventive monitoring

A recent Opinion from the Ministry of Justice on 'deepening transparency in prison affairs'[511] underscores the authorities' view that supervision / oversight is an essential measure to prevent abuse in prison:

> *"The guiding thoughts for further deepening openness in prison affairs are: […] (3) The principle of strengthening oversight. Strengthen internal oversight, lawfully accepting supervision of the procuratorates, conscientiously accepting supervision from people's congresses and political consultative conferences as well as social supervision; ensuring the sustainable and healthy development of openness in prison affairs."*[sic] [512]

A system of inspections and a type of (limited) preventive monitoring of some places of deprivation of liberty has, since 2006, started to be trialled in China. The prison system is also showing signs of become slightly more transparent and open in that Deputies to the People's Congresses and Chinese People's Political Consultative Conference (CPPCC) members can

509 China's response to CAT Committee List of Issues (2015), para 20; also raised in discussions with the Chinese delegation on 23 August 2016, organised by the Great Britain-China Centre and the Centre for Criminal Justice and Reform, pursuant to their project "Eradicating the roots of torture in the Chinese legal system."

510 China's response to CAT Committee List of Issues (2015), para. 20.

511 Published 4 July 2015.

512 Part II. "Guiding thought and principles for further deepening openness in prison affairs", published by the Chinese Ministry of Justice, 2015 Opinion.

inspect prison on an annual basis, and certain are open to the public during specific periods.[513] Equally, there are indications of some reforms in the KSSs where, according to the authorities, "specially invited supervisors, and more than two supervisors may inspect the detention house at any time."[514] Further, KSSs can also invite Deputies to the People's Congresses and CPPCC members to inspect them. The authorities emphasise that procuratorial organs have from 2008 until May 2015 undertaken 14,070 unscheduled visits to detention facilities and reported their findings to the Deputies to the People's Congresses.[515]

Moreover, the authorities point to a concerted push, by the MPS, to make KSSs more open and transparent.[516] This has been prompted, some scholars believe, by a series of scandals involving numerous reports of abuse,[517] with a view to increasing public scrutiny and confidence, by enabling visits by lawyers, the (strictly controlled) media, and – with valid permissions – visitors to detainees.[518] The authorities acknowledge, however, there is no data available showing the visitation of local civil society organisations.[519]

The first steps towards the recognition of the need for preventive monitoring, and consequently, the trialling of the preventive monitoring concept in China are significant and positive developments. These were initiated by Chinese scholars, lawyers and senior officials of the Procuratorate and Ministry of Justice, with the authorities' endorsement and active participation, in partnership with external experts.[520] The first trial pilot project began in 2006, to test the preventive monitoring concept in a selected recognised problematic detention sphere in China,

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513 See China's Response to List of CAT Issues, para. 20.

514 Ibid.

515 According to the Chinese authorities, there were: 1,498 visits in 2008, 1,618 in 2009, 1,743 in 2010, 1,729 in 2011, 1,792 in 2012, 1,981 in 2013, 2,342 in 2014, 1,367 in January to May of 2015; see China's Response to List of CAT Issues, para. 20.

516 China's Response to CAT Committee List of Issues (2015), para 20.

517 See, *inter alia*, Nesossi and Cheng Lei, 'China's pre-trial Detention Centres: challenges and opportunities for reform', in *Legal Reforms and Deprivation of Liberty*, (2016) and MacBean, ''Addressing the hide and seek scandal: restoring the legitimacy of Kanshousuo' (2016).

518 China State Party Response to CAT Committee List of Issues (2015), para. 20.

519 Ibid.

520 Interview and correspondence with M. Mella, Senior Project Manager, Great Britain China Centre (GBCC), 23 November 2016 and September 2017; and author's interviews and participation in components of the 'torture prevention' Project in China run by GBCC from 2013 to 2016: including acting as an expert on Chinese delegation study visit to Hackney police station (August 2013) with focus on preventive monitoring; and presenting and discussing challenges in torture prevention with a specialist Chinese delegation of torture during a Study Visit to the CoE (August 2016) where the author presented training on NPM and CPT standards and methodologies in preventive visiting and discussed experiences with the senior Chinese delegates and senior prosecutors from the Department of Supervision of Detention Facilities of the Procuratorate and the Prison Bureau of the Ministry of Justice and scholars from the Centre for Criminal Justice and Reform (CCJR), Law School of Renmin University. Other external experts and bodies involved in torture prevention initiatives in China include the Max Plank Institute, the Rights Practice, the UK Prisons and Probation Ombudsman Office, Maastricht University (Gerard de Jonge), among others.

namely the KSSs/remand detention centres. Pilot projects continued to test the feasibility of monitoring until 2012, when basic regulations were established to require KSSs to let monitors have access to their establishments.[521] While this is a start, there have been various hurdles facing the nascent monitoring system both in the regulations and in practice (Chapter 4). Moreover, it is notable that the legal requirement to preventively monitor is restricted to KSSs (and not other places of deprivation of liberty).[522]

Section Summary: protections in the *criminal-law* justice process

Scholars specialising in this area have acknowledged that the revised CPL, and associated other laws and regulations governing the criminal justice process, have made the criminal justice sphere considerably stronger than it was in terms of protection for criminal suspects and prisoners.[523] Protection in prisons and KSSs has been further strengthened by increasing procuratorial onsite presence and police / PSB and prison staff training, awareness-raising of human rights and other judicial, legislative and administrative prevention measures undertaken in the sphere of criminal justice.[524] Chinese and international scholarly discussions have noted the reforms made by the CPL and other relevant laws, and consider this a significant step forward in addressing the risk of torture and other ill-treatment. Yet, some scepticism persists given that deficiencies remain in the revised law, and the risk of circumvention of the nascent protective measures.[525]

At first sight, recent reforms to the Chinese criminal justice sphere are encouraging, and there are indications that certain torture prevention measures, including some safeguards and guarantees established in the law, are now in place in the criminal justice sphere. For example, hundreds of procurators are now based in prisons and KSSs across the country and, in theory, should be

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521 *Comparative Perspectives on Criminal Justice in China*, ed. McConville & Pils (2013), 'Postscript: the 2012 PRC Criminal Procedure Law', Part VII, p. 455-503 (Rosenweig, Sapio, Jue, Biao and Pils); *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016), Part II and Part III (Nesossi, Biddulph, Sapio, Trevaskes, Lei Cheng and MacBean).

522 Chapter 3 of the Thesis analyses the actual effectiveness of the system and remaining protection gaps.

523 For example, Chinese scholars Chen Weidong and Cheng Lei; de Jonge, Lubman, Chen and Shi-Kupfer, MacBean, among others.

524 See Chen Wei Dong, and Spronken, *Three Approaches to Combatting Torture in China*, (2012); UNCAT Committee Concluding Observations on China, December 2015.

525 *Comparative Perspectives on Criminal Justice in China*, ed. McConville & Pils (2013), 'Postscript: the 2012 PRC Criminal Procedure Law', Part VII, p. 455-503 (Rosenweig, Sapio, Jue, Biao and Pils); *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016), Part II and Part III (Nesossi, Biddulph, Sapio, Trevaskes, Lei Cheng and MacBean).

providing an essential oversight safeguard. These should increase accessibility of complaints' mechanisms for detainees' torture allegations and consequently amplify the possibilities and the number of prosecutions for torture allegations that progress to the Chinese courts.

Nevertheless, there remain two overarching issues. First, the scope of many of the preventive measures is limited; not all criminal suspects are afforded the same safeguards as 'ordinary' / normal criminal suspects (i.e., not those suspects considered 'serious' or 'endangering public or state security'). Second, many, if not virtually all, of the safeguards and preventive measures, established in law or regulation, are deficient in some way. Many allow for exceptions that effectively serve to negate the protection conferred (e.g., deferral in access to a lawyer or third party notification; permissible prolonged extensions to general deprivation of liberty and interrogation time-limits; lack of judicial approval of detention; lack of *habeas corpus* right; non-confidential avenues of complaints; limited scope and lack of independence of monitoring). These are regulatory protection gaps that are in need of closing and protections need to be established for all categories of suspect. In some cases, some aspects of the protection are missing, in others, whole protection provisions are entirely missing. In sum, many of the safeguards, as currently regulated, are not robust enough to confer adequate protection to all detainees. Regulatory gaps can make the law open to abuse, either through only partial protection afforded in the law (as for 'sensitive case' suspects), or in legal provisions that are ambiguously drafted – lacking legal certainty and specificity. Both can lead to considerable room for manoeuvre and implementation abuse by officials (c.f. for example, rights to lawyer and third party notification that can be legally delayed without time-limit for certain categories of suspect, and the indefinite withholding of these rights in practice).

This analysis supports, in some respects, various China scholars' analysis of the general trend of the CPL revisions: that ultimately the revised law will strengthen the protection of 'ordinary' criminal suspects' rights in a number of areas, "while at the same time weakening the rights of

certain categories of criminal suspects on a scale worthy of a police state".[526] This is due to the official priorities placed on state stability, security and unity and the consequent tightening of control over elements seen as hindering the achievement of these.[527] However, there are regulatory protection gaps and deficiencies evident in the existing criminal-law safeguards and preventive measures even for 'ordinary' criminal suspects (i.e., the majority); and the situation in the law is worse for a minority of suspects (especially those who repeatedly cause social disorder or endanger state or public security and state harmony). 'Ordinary' criminals are still not afforded the full range of preventive guarantees and safeguards that they should be in law, as required for a state's torture prevention measures to be implemented effectively (pursuant to UNCAT 2(1)), to which China is bound.

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526 B. Andreasen & P. Dalton, 'China Improves Legal Protection for the Majority and Introduces More Control of the Few', in FACT: China's Criminal Procedure Law, 29 March 2012, The Danish Institute for Human Rights, accessed at https://www.humanrights.dk/node/1535 [June 2017]; *Comparative Perspectives on Criminal Justice in China*, ed. McConville & Pils (2013), 'Postscript: the 2012 PRC Criminal Procedure Law', Part VII, p. 455-503 (Rosenweig, Sapio, Jue, Biao and Pils); and Lubman (2012), China's Criminal Procedural Law: good, bad and ugly', Real-time Report, 21 March 2012; Lubman (2013) 'What China's wrongful Convictions mean for legal reform', China Real-time, 17 July 2013; Lubman (2014), 'Quashing expectations for the Rule of Law in China', China Real-time, 17 January 2014; Lubman (2014) 'An encouraging sign for (limited) legal reform', China Real time, 25 February 2014.

527 See the above Section.

II. Administrative justice & detention (administrative offences & Compulsory Drug Rehabilitation (CDR))

Overview

The explanation for treating punitive administrative detention as a parallel system to the criminal-law justice process is benign. It is justified by the principle that those who commit minor misdemeanours or specific types of infractions should not be given the stigma of having committed a serious criminal offence, with the consequent repercussions of a criminal record.

The Public Security Administrative Penalties Law of the People's Republic of China (PSAPL) emphasises "that if a person's act that disrupts public order and causes social harm is not severe enough to be subject to criminal punishment, it shall be subject to public security punishment in accordance with this law."[528] The interplay between the PSAPL and the CPL is established in Article 2 of the PSAPL: "with regard to an act of disrupting public order, encroaching upon the right of the person, the right of property or impairing social administration, if it is of social harmfulness and constitutes any crime as provided for in the Criminal Law of the People's Republic of China, it shall be subject to criminal liabilities. If it is not serious enough to be subject to a criminal punishment, it shall, in accordance with this law, be subject to public security punishment by the public security organ." During the PSB investigation, the public security organ has the possibility to decide 'where the violation is suspected to constitute any crime', to transfer the investigation 'to the competent organ to subject the violator to criminal liabilities' [sic].[529]

Similarly, the authorities' motivation for treating a misdemeanour that involves substance abuse on a parallel track to that of criminal law (with exceptions[530]) is because it is considered that this is better addressed by a non-criminal (i.e., an administrative and thus non-judicial) process and in an environment that is better geared to ensuring more appropriate treatment of substance-

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528 Article 2, PSAPL.
529 Article 95(3), PSAPL.
530 Dealing drugs is a criminal, not an administrative, offence pursuant to the CPL and CL.

abusers.[531] The administrative law regulating this area is the Drug Control Law of the PRC[532] (as supplemented by the PRC Mental Health Law).[533] It specifies that if a person refuses an administrative order for community rehabilitation they shall be detained in a Compulsory Drug Rehabilitation Centre for a certain period of time. These facilities are regulated by the Regulations on Drug Rehabilitation.[534]

The collective objective of these types of justice processes that can result in punitive administrative detention is to promote adherence to a set of laws or regulations that are established to ensure social order.[535] Infractions that cause social harm, and are prohibited by such regulations, result in, from the official perspective, the requirement of education and punishment to teach respect of social mores and promote social harmony. This principle is seen in the opening Articles of the relevant administrative laws. For example, Article 5 of the PSAPL includes the "*principle of combining education with punishment to tackle public administrative security cases*"; Article 3 of the Regulations of Administrative Detention specifies that "*a detainee shall observe laws, administrative regulations, and administrative provisions of the detention facility, obey administration, and accept education*." The Drug Control Law focuses on its objective to "*prevent and punish drug-related illegal and criminal behaviours, protecting the physical and mental health of citizens and maintaining social order*"[536] combined with a period of either community-based or compulsory rehabilitation.

The legal basis of the administrative sanctions' system for public security has undergone a series of gradual reforms from its origin in the 1980s. The administrative penalties were first set out in the Regulations of the PRC on Administrative Penalties in 1986, which were revised in 1994 and turned into a law in 2005, namely the Law of the PRC on Penalties for Administration of Public

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531 See China State Report (2014) and Response to List of Issues addressed to the CAT Committee in preparation for Fifth periodic Reporting cycle (2015), para 7.

532 Adopted at the 31st meeting of the Standing Committee of the Tenth National People's Congress on 29 December 2007.

533 Adopted 26 October 2012.

534 Adopted at the 160th meeting on 22 June 2011, the Standing Committee of the State Council.

535 For a background of the history of administrative law established to prevent against social harm, and reforms within this sphere, see Biddulph, *Legal Reform and Administrative Detention Powers in China* (2007); *Comparative Perspectives on Criminal Justice in China*, Part V (2013); and 'What to make of the abolition of re-education through labour?', *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016).

536 Article 1, Narcotics Control Law of the People's Republic of China, 2007.

Security.[537] In late 2012, it was again revised under the new government administration headed by President Xi Jinping. During 2017, another round of revision has been envisaged, but remains in draft form only and is at the stage of public consultation at the time of writing.[538]

The legal basis for regulation of substance abuse, the Drug Control Law of China and accompanying Regulations of Compulsory Drug Rehabilitation were drafted and came into force in 2007. Most recently, in June 2016, the authorities (the Legislative Affairs Office of the State Council) circulated a draft of the Regulations on Compulsory Treatment Centres for comment (notionally by July 2016). These draft Regulations had the official objective "to further standardize compulsory treatment efforts, to safeguard the lawful rights and interests of persons subject to compulsory treatment, and to preserve social order and public safety."[539]

That the administrative penalties and drug control laws have been elevated to the status of a law from previous regulations, and are consequently binding in a court of law, and have been subject to revision, is noteworthy. Further, the crux of the revisions means that certain basic procedural guarantees have recently been added into the laws. These are positive developments in the context torture prevention.

However, the recent revisions to the sphere of Chinese punitive administrative detention have been relatively minor in comparison to those undertaken to the criminal justice system legislation. The PSAPL does now offer some basic procedural safeguards after some revision in 2012 and pending draft revisions in 2017.[540] Nevertheless, the majority of the PSAPL's grounds and specified penalties have remained the same in purpose, scope and sentencing procedure as in the previous 2005 Administrative Penalties Law,[541] and many are still almost identical to their 1994

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537 Adopted on 28 August 2005 and put into effect on 1 March 2006 promulgated by former President Hu Jintao; proposed revised draft provisions were announced by the PSB on 16 January 2017 and were still subject to public consultation at the time of this Thesis submission (Autumn 2017).

538 Summer 2017.

539 Article 1, Regulation on Compulsory Treatment Centres (Draft for Deliberation), June 2016; see also updated draft PRC Law on Detention Centres (Draft for Public Comment), published, 15 July 2017.

540 More revision is envisaged for 2017, but currently (summer 2017) remains in draft form only. The draft revisions look to proscribe more administrative offences than change the nature, length of sanction, scope, purpose or overall process of the administrative offences system, see: Public Security Administrative Punishments Law (Draft Revisions for Solicitation of Public Comments) dated 2017/01/18. For the purposes of this research only the PSAPL currently in force (PSAPL 2012) will be analysed and any amendments proposed in the 2017 draft law will be highlighted where relevant.

541 For example, much of the content of the 2005 Regulations of the PRC on Administrative Penalties for Public Security is approximately the same despite the revisions made in 2012 (and proposed in 2017). The major change was from the status of 'regulation' into 'law'. See later analysis in this section for the scope of the limited revisions.

and 1986 precedent regulations.[542] The same goes for the Drug Control Law, which has, despite revisions, still fewer procedural safeguards in place. Thus, overall, the administrative justice processes have not changed substantively after the recent round of reforms. There has been, however, a notable positive development in the sphere of punitive administrative detention, which saw the abolition of the widely criticised[543] Re-education through Labour (RETL) system in 2014.

(a) Analysis of the Administrative Penalties laws / PSAPL: administrative offences

Punitive administrative detention in China is a multi-layered concept. The PSAPL focuses on acts that disrupt public order and cause social harm, which are not severe enough to be subject to criminal punishment but comprise an administrative misdemeanour, offence or infraction. The PSAPL administrative offences can be best described as the first stage of the administrative sanction system: they generally result in lighter sanctions (of between 5 and 15 days administrative detention) spent usually in either a KSS or in a police station. Repeated infractions of the PSAPL previously used to result in a sanction of RETL, the second – and harsher – stage of the administrative justice process. The new PSAPL has been subject to little critique so far as compared to RETL,[544] but both the process and grounds of punitive administrative detention for misdemeanours can be considered problematic.[545] International jurisprudence and treaty-body reports, scholarly critique and civil society analysis and discourse have – in the context of China – primarily focused on one of its forms: Re-education through Labour (RETL).[546] The reason for

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542 The list of administrative infractions has increased and modified over time, but the substantive purpose, type, length, sentence procedure, decision-making and overall process of the administrative penalty system remains approximately unchanged from the 1994 and 1986 regulation versions.

543 See UPR on China, October 2013; CAT Committee Concluding Observations on China of 2008 and 2015; see scholarly analysis of reforms of RETL in Biddulph, *Legal Reform and Administrative Detention Powers in China* (2007); *Comparative Perspectives on Criminal Justice in China*, Part V (2013); and 'What to make of the abolition of re-education through labour?', *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016).

544 Within the general sphere of administrative penalties system (external to the criminal law) the PSAPL (administrative misdemeanours) has been of limited focus to scholars who have mainly focused on RETL and CDR, that carry longer sanctions than the PSAPL. For example, scholarly analysis in two of the most recent books on deprivation of liberty in China (that combine Western and Chinese scholarship) have dedicated parts concerning administrative detention or punishment regimes external to the criminal justice system, and they do not analyse the administrative misdemeanours' law. Overall, relatively little scholarly analysis exists on this area.

545 See later legal analysis in this Chapter.

546 See UPR on China, October 2013; CAT Committee Concluding Observations on China of 2008 and 2015; UN SRT visit to China 2005 and Follow-up in 2010/11. For scholarly analysis of RETL, its origins, purpose, legal framework, justification and reform, see Biddulph, *Legal Reform and Administrative Detention Powers in China* (2007); *Comparative Perspectives on Criminal Justice in China*, Part V (2013); and 'What to make of the abolition of re-education through labour?', *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); Xiaorong Li Statement for the Congressional-Executive Commission on China Roundtable on "The End of Re-education Through Labor? Recent Developments and Prospects for

this overarching focus by the international bodies on this form of PAD was that it had been widely considered one of the most problematic forms of administrative detention, due to its prolonged length (it could last for up to four years with minimal regulation law) and limited safeguards.[547] There has been considerable national and international scholarly debate on RETL and on its key issues. In a debate in front of the US Congressional-Executive Commission, during a China Roundtable on "The End of Re-education through Labour? Recent Developments and Prospects for Reform" in mid-2013,[548] one scholar, Ira Belkin, asked:

> *"Has Re-education Through Labour served the purpose of maintaining social stability?[…]. The point is that the standards for R[E]TL are so vague and ambiguous and the decision-making process so lacking in due process and transparency that it seems that R[E]TL could be used, or in the view of some, abused, to incarcerate a whole host of people the police simply find to be annoying or obnoxious. A system such as this can also be used and appears to have been used to stifle the freedom of expression and dissent."*[549]

However, Belkin also pointed out that "while R[E]TL gets most of the attention, I would urge the United States government to also take note of these other forms of detention and include them in its efforts to engage with the Chinese government."[550]

IHRL bodies, international and, increasingly, national scholars and civil society have all voiced concerns over the lack of due process in the way the RETL was undertaken and cited numerous allegations (and convictions) of torture and other ill-treatment in the RETL camps[551]. When open, and fully functional, the risk of torture and other ill-treatment remained high in such facilities.

Reform: 'The End of Re-education Through Labor? Recent Developments and Prospects for Reform', Dirksen Senate Office Building, Room 562 Washington, 9 May 2013; Veron Mei-Ying Hung, 'Improving Human Rights in China: Should Re-Education Through Labor Be Abolished?'; I. Belkin, Statement for the Congressional-Executive Commission on China Roundtable on "The End of Re-education Through Labor? Recent Developments and Prospects for Reform" (2013).

547 See Chapter 3.

548 Held just before the announcement was made in China in late 2013 that RETL camps would be discontinued.

549 Belkin Statement, Congressional-Executive Commission on China Roundtable on "The End of Re-education Through Labor? Recent Developments and Prospects for Reform", 9 May 2013.

550 Belkin Statement, Congressional-Executive Commission on China Roundtable on "The End of Re-education Through Labor? Recent Developments and Prospects for Reform", 9 May 2013.

551 See UPR on China, October 2013; CAT Committee Concluding Observations on China of 2008 and 2015; UN SRT on visit to China 2005 and Follow-up in 2010/11. For scholarly analysis of RETL, its origins, purpose, legal framework, justification and reform, see Biddulph, *Legal Reform and Administrative Detention Powers in China* (2007); *Comparative Perspectives on Criminal Justice in China*, Part V (2013); and 'What to make of the abolition of re-education through labour?', *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); Xiaorong Li Statement for the Congressional-Executive Commission on China Roundtable on "The End of Re-education Through Labor? Recent Developments and Prospects for

In 2013,[552] the CCP Central Committee abolished RETL, and there is evidence to suggest that the RETL detainees have been released.[553] In practice, however, it is as yet unclear what will replace the RETL system, if anything, or whether the specific grounds for RETL (for repeated administrative offences/misdemeanours) will be incorporated into a revised administrative penalties law (PSAPL) or into the criminal CPL.[554] International[555] and national civil society[556] have noted that the centres themselves have not been closed down; the staff are allegedly being re-trained and that these will be used for compulsory drug rehabilitation[557] or for 'legal education classes'.[558]

PSAPL: analysis of legal framework and current protections

The PSAPL is one of the key pieces of Chinese legislation that regulate the area of administrative justice. While recent revisions have been proposed by the MPS,[559] these remain in draft form only, thus this analysis will focus the PSAPL currently in force (since 2012), and will refer to any likely revisions where relevant. The five categories of key prevention measures under IHRL, selected and grouped together in Chapter 1, will be examined in the context of the PSAPL. This provides an indication of the available protections in the administrative justice system and acts as a yardstick by which to measure and compare the compliance with a selection of key IHRL prevention requirements.

Reform: 'The End of Re-education Through Labor? Recent Developments and Prospects for Reform', Dirksen Senate Office Building, Room 562 Washington, 9 May 2013; Veron Mei-Ying Hung, 'Improving Human Rights in China: Should Re-Education Through Labor Be Abolished?'; I. Belkin, Statement for the Congressional-Executive Commission on China Roundtable on "The End of Re-education Through Labor? Recent Developments and Prospects for Reform" (2013).

552 On 17 March 2013, after the annual meeting of the National People's Congress, Premier Li Keqiang told a press conference that with respect to RTL reform, "the relevant departments are working intensively to formulate a plan, and it may be laid out before the end of this year.' On 28 December 2013 RETL was abolished pursuant to the NCP Standing Committee of the Resolution on Abolishing Laws and Regulations on Re-education through labour (*Quanguo Renda Changweihui Guanyu Feichu Laodong Jiaoyang Falu Guiding de Jueding*).

553 Dui Hua (NGO), 'Petitioner's Account of RTL Reforms, 20 November 2013; Amnesty International, 'Changing the Soup but not the medicine?" Abolishing re-education through labour in China', December 2013.

554 Biddulph, 'What to make of the abolition of re-education through labour?', *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016).

555 Amnesty International, 'Changing the Soup but not the medicine? Abolishing re-education through labour in China', December 2013.

556 Dui Hua (NGO), 'Petitioner's Account of RTL Reforms, 20 November 2013.

557 Dui Hua (NGO), 'Petitioner's Account of RTL Reforms, 20 November 2013.

558 Amnesty International, 'Changing the Soup but not the medicine?" Abolishing re-education through labour in China', December 2013; Dui Hua (NGO), 'Petitioner's Account of RTL Reforms, 20 November 2013.

559 Public Security Administrative Punishments Law (Draft Revisions for Solicitation of Public Comments) circulated for public comment in January 2017, but currently (summer 2017) remains in draft form only. The draft revisions look to proscribe for more administrative offences than change the nature, length of sanction, scope, purpose or overall process of the administrative offences system.

(i) Torture prohibition

There are various legal provisions in place in the punitive administrative justice process that prohibit torture and certain (but not all) types of ill-treatment. Article 5 of the PSAPL establishes that: 实施治安管理处罚，应当公开、公正，尊重和保障人权，保护公民的人格尊严 (*the imposition of public security administration punishments shall be correct, impartial and fair, shall respect and guarantee human rights and shall protect the personal dignity of the citizens*).[560] Article 79 "prohibits the use of physical or verbal threats of torture during investigation and renders any illegally obtained evidence inadmissible in the administrative sentencing process": 严禁刑讯逼供或者采用威胁、引诱、欺骗等非法手段收集证据。 以非法手段收集的证据不得作为处罚的根据.[561]

Article 113 forbids the police/PSB to mistreat, humiliate or beat suspects. The Administrative Detention Facilities Regulations, Article 3, specifies, "*A detention facility shall protect the personal safety and lawful rights and interests of a detainee. It may not insult, physically punish, or maltreat detainees, or incite or conspire with any other person to do so*." The Detention Centre Regulations also prohibit inter-detainee bullying or violence: 在押人员必须履行以下义务: (四）不准拉帮解伙、恃强凌弱，**不准**殴打、体罚、虐待、侮辱其他在押人员，不准打架斗殴。[562]

Equally, the PSAPL establishes that there will be criminal liability or administrative sanction (depending on the nature of the case) for police who commit acts, *inter alia*, of "*torture, ill-treatment, abuse or humiliation"*[563]: 人民警察办理治安案件，有下列行为之一的，依法给予行政处分；构成犯罪的，依法追究刑事责任： （一）刑讯逼供、体罚、虐待、侮辱他人的.

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560 Author's translation.
561 Author's translation.
562 Author's translation of Article 4(4), Detention Centre Notice to Detainees Regarding Their Rights and Responsibilities, 2012.
563 Article 116, PSAPL 2012 (the 2017 draft revisions to the PSAPL were in draft form (and still (summer 2017) subject to public consultation) at the time of writing this thesis. As such, emphasis is on the PSAPL currently in force (2012)).

(ii) Procedural guarantees and safeguards against torture

The PSAPL and Detention Centre Regulations also afford some procedural guarantees and safeguards against torture and ill-treatment. Within this justice process, this section identifies the existence and scope of protection (or lack thereof) of certain key safeguards examined in Chapter 1, *inter alia*:

- *Interrogation in a timely matter, time-limits for initial custody and habeas corpus*

There is an obligation on the PSB to conduct the interrogation in a 'timely manner' and that the interrogation should not exceed eight hours (Article 83, PSAPL): 对违反治安管理行为人，公安机关传唤后应当及时询问查证，询问查证的时间不得超过八小时；情况复杂，依照本法规定可能适用行政拘留处罚的，询问查证的时间不得超过二十四小 时.

However, Article 83 also stipulates an exception in that, where the circumstances are 'complicated' and if the "punishment of administrative detention may be applicable", then the time for interrogation should not exceed 24 hours. Equally, although the administrative sentences can appear relatively short (maximum 15 days), the time in detention permitted by law is in reality far longer. Article 99 of the PSAPL specifies that the PSB has 30 days to investigate the case and another 30 if the case is complex, and, all the while, unless and person can afford bail, they are held in police custody. This is not likely to change under the 2017 draft revisions to the PSAPL, and the equivalent provision (draft Article 126) remains substantially the same as above, along with the same timeframes. In summary, the law permits administrative offence suspects to be held in initial or interim police custody during investigation for long periods of time. Equally, there is no right of *habeas corpus*, in that suspects do not have any judicial involvement in their deprivation of liberty, nor are there any avenues for detainees to be brought before a judge to challenge the lawfulness of their detention.

- *'Trinity' of safeguards: notification of fact of custody, access to a lawyer and access to a doctor*

Unlike in the CPL where there is a set timeframe (within 48 hours) for third party notification of custody, Article 83 of the PSAPL only specifies that "the public security organ shall inform a family member of the suspect the reason of the summons and his whereabouts in a timely manner." (**公安机关**应当及时将传唤的原因和处所通知被传唤人家属). While the safeguard is established in law, there are various concerns with the scope of this safeguard. For example, there is no definition of 'timely' and no interpretation or guidance is given in respect of maximum timeframes. Moreover, the Detention Centre Regulations create permissible delays to this safeguard, in that a detainee first has to seek approval from the unit handling the case, this can be delayed indefinitely on the ground of potential hindrance to its own investigation.[564] These concerns indicate that the protection offered by this safeguard can be diluted or circumvented.

Leading Chinese legal scholar, Associate Professor Cheng Lei, who specialises in criminal and detention centre reform, underlines that due to the Detention Centre Regulations requiring prior approval from the unit handling the case, in practice, the unit often does not permit contact with, or visits from, third parties in order to facilitate its own investigation. Moreover, Cheng Lei argues that the lack of clarity around the legal provisions in the Detention Centre Regulations causes "deviations in enforcement that lead to detainees being deprived of their lawful rights."[565]

The situation is worse as regards *access to a lawyer*. In direct contrast to the CPL, there is no right for the detainee to access to a lawyer at all if detained pursuant to the current PSAPL. Likewise, the PSAPL does not include the safeguards of prompt detainee *access to a doctor* and independent medical examination. However, the Chinese authorities consider that various normative documents (without specifying which) that guide interpretation in this area specify that all the detention centres should implement a system of medical examinations upon entry.[566] While

564 Article 28, Detention Centre Regulations, in force.
565 Cheng Lei, 'Expert Proposal for a Draft Detention Centre Law', *Three Approaches to Combatting Torture in China* (2012).
566 See CAT Concluding Observations on China, December 2015 paras. 16 to 17.

establishing compulsory medical screening upon entry to a detention centre would be a positive move towards preventing torture, there remain serious concerns about the independence of the doctors and medical confidentiality processes at the Detention Centres. The effectiveness of this overall safeguard has been questioned by both the UN SRT[567] and, more recently, by the UNCAT Committee in 2015.[568]

- *Audio-visual recording of interrogation: lack of a requirement under the PAD system*

In the administrative justice track, there is no requirement or reference at all in law to audio or visually record the whole interrogation. This is a structural safeguard to help keep the interrogation process as transparent as possible, and to enable its use as evidence to hold interviewers to account, or to prove their innocence, should an allegation be made of abuse during the interview. This is in direct contrast to the CPL. The only obligation is a requirement to make a written transcript of the interrogation and have this signed by the detainee:

询问笔录应当交被询问人核对；对没有阅读能力的，应当向其宣读。记载有遗漏或者差错的，被询问人可以提出补充或者更正。被询问人确认笔录无误后，应当签名或者盖章，询问的人民警察也应当在笔录上签名.[569]

- *Approved detention order & timely notification: no requirement under the PAD system*

Under Chinese criminal law, a public security organ must produce a detention warrant (Article 82), but there is no such warrant under the Administrative Penalties Laws.

In summary, there are different and more limited procedural guarantees and safeguards in law for those persons going through the administrative punitive legal system than those in the Chinese criminal legal system.

(iii) Overall operation of the administrative justice system: administrative penalties

The justice system in the context of administrative penalties is relatively straightforward. The PSB/police are mandated to investigate suspected administrative offences and, at county-level,

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567 During his visit to China in 2005 and Follow-up in 2010/2011.

568 See Chapter 3 for analysis and concerns raised by the IHRL bodies, for example, the CAT Committee has raised its concern that PSB officials in KSS can verify the health examination form recorded by doctors, and that doctors must report to the supervisory department of the PSB organ whenever they identify signs of torture. The Committee argues that these arrangements create a conflict of duties for medical practitioners and expose them to pressure to supress evidence.

569 Article 84, PSAPL.

decide on the administrative punishment (Article 91, PSAPL). An appeal can be made about the sanction conferred by 'application for reconsideration' or lodging an administrative lawsuit. No details are specified as to whom the appeal should be addressed, the timeframes within which to appeal or any other modalities to follow if a detainee wishes to appeal. Equally, with no right to access a lawyer while detained during an investigation into a suspected administrative offence, appeal would, in practice, be difficult.

Although the administrative detention sentences appear relatively short (maximum 15 days), the time deprived of liberty is in reality far longer. There is no compensation specified in the PSAPL for the length of time spent in detention should there not be enough evidence to confirm guilt. Equally, if a detainee has spent 60 days in custody pending investigation and the maximum administrative sanction is 15 days, while the amount of time spent during the investigation can be deducted from the sentence (15 days), there is no compensation available for the excess time spent in custody.[570] The long investigation period also renders the actual administrative sentence meaningless.

Most problematic is the lack of separation of powers of the PSB in the investigation and sentencing process. Similar to the criminal-law system, detainees are effectively investigated and detained by the same body (PSB). In the context of the administrative justice track, those detained pursuant to the PSAPL are not then brought before any independent judicial body or even quasi-judicial-administrative (such as a procurator) either to approve detention or to sentence. Rather, they stay within the same body's jurisdiction for investigation, initial custody during investigation, the sentencing process and the administrative detention sanction. Permission to withhold or restrict certain detainee rights and safeguards is made by the same body as that conducts the investigation. This creates an inherent potential for abuse.

Moreover, while some possibilities exist to transfer administrative suspects across to the criminal justice process to stand trial; generally, all cases deemed 'non-serious' will stay within the remit of the PSB, which has no external oversight other than higher levels of itself (i.e., different

570 PSAPL, Article 99.

hierarchies of internal oversight). This complete discretion conferred on the PSB creates an unprotected space, lacking oversight and safeguards.

(iv) Complaints Avenues and Monitoring

Unlike the criminal law process (CPL, CL and the Prison Law), there is no legal basis for the right for detainees to complain within the PSAPL track. There is only a possibility of filing an administrative lawsuit against the administrative sentence.[571] Nevertheless, some early stage initiatives are underway to render China's Detention Centres / KSS more transparent, where PAD detainees can serve out their administrative sentences. For example, as outlined above, the CCJR at Renmin University is working with the MPS to carry out pilot reform projects in KSS in some regions across China, including in the spheres of developing and improving complaints and monitoring.[572] Also, there are now MPS Regulations on the requirement for the establishment of these preventive measures in KSS, as well as a new draft Detention Centre Law that proposes to regulate for detainee complaints and monitoring,[573] albeit vaguely (Chapter 4).

Summary: protections in punitive administrative justice process pursuant to the PSAPL

In general, in comparison to the criminal law process and the CPL, the administrative justice process (the PSAPL) lags behind in a number of aspects. First, there are more limited protective guarantees and safeguards currently afforded in law to detainees within the administrative justice track. Second, complete discretion is afforded to a single overarching body, the PSB (including its different layers). This means that administrative offence suspects stay within the same body's jurisdiction for investigation, initial custody during investigation, the sentencing process and the administrative detention sanction. Inherent in this lack of structural separation, is a risk of abuse.

Third is the problematic inter-play between the two justice processes (criminal and administrative). This provides for an element of fluidity between the two processes with a porous border. The interplay between the PSAPL and the CPL is established in Articles 2 and 95 of the PSAPL. Article 2 of the PSAPL stipulates that "with regard to an act of disrupting public order,

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571 PSAPL.
572 See above Section and see analysis of effectiveness (Chapter 3) and obstacles encountered (Chapter 4).
573 Draft DCL, Articles 61 and 62 (Complaints) and 110 – 114 (Supervision); draft only, not in force.

encroaching upon the right of the person, the right of property or impairing social administration, if it is of social harmfulness and constitutes any crime as provided for in the Criminal Law of the People's Republic of China, it shall be subject to criminal liabilities. If it is not serious enough to be subject to a criminal punishment, it shall, in accordance with this law, be subject to public security punishment by the public security organ" [sic]. Equally, at the end of the PSB investigation, according to Article 95 of the PSAPL, the public security organ has the possibility to decide "where the violation is suspected to constitute any crime", to transfer the investigation "to the competent organ to subject the violator to criminal liabilities".[574] The CPL allows for a similar transfer of a suspected criminal case into the administrative process, should the investigator decide that it is more appropriate to do so ("protection arbitrage"). The administrative justice process's comparative lack of transparency and lesser guarantees for detainees on this track, coupled with the ease of transfer between the two justice processes, renders circumvention of more stringent CPL protections possible. Ultimately, the more opaque administrative justice process creates a less regulated – thus a risker – environment for detainees.

Fourth, in every prevention measure examined, the underpinning regulation is weaker in the administrative penalties than the criminal-law justice process. The preventive safeguards afforded to such detainees under the PSAPL, including in the proposed reforms, are deficient, and provide weak regulatory protection and permissible exceptions in law. There are many aspects of the law where fundamental regulatory protections are only partially provided for PAD detainees (e.g. access to a lawyer and third party notification, without a time limit), subject to exceptions (c.f. lengthy exceptional extensions permitted for timing of investigations) or are entirely missing (for instance, there is no right to access to a doctor from the outset of deprivation of liberty under the PSAPL). Further, there are significant indications of implementation gaps, where certain suspects should be investigated within the criminal law framework, but instead ambiguities in the relevant laws and considerable overlap between offences mean that suspects can instead be slotted into the lesser-regulated and less transparent PAD framework (c.f. Chapters 3 and 4.2).

574 Article 95(3), PSAPL.

However, merely bringing the administrative justice process in line with current protections afforded in the CPL may not itself guarantee better protection. The protections in the CPL are themselves insufficient to afford comprehensive or adequate protection, albeit comparatively stronger than those afforded in the administrative justice laws.[575]

[575] See Criminal Law Section I above.

(b) Compulsory Drug Rehabilitation (CDR) and drug offence investigation process

The PRC Drug Control Law specifies that its main objective is "to prevent and punish drug-related illegal and criminal behaviour, protecting the physical and mental health of citizens and maintaining social order"[576] combined with a period of either community-based or compulsory rehabilitation. The Drug Control Law of China came into force in June 2008. This is supplemented by accompanying Regulations of Compulsory Drug Rehabilitation of 2011 and by the relevant provisions of the CL, CPL and the Mental Health Law.[577] The investigation into suspected drug offences and the sentencing process are both conducted by the PSB. Moreover, the administrative detention sanction of CDR is undertaken in facilities run by the MPS under the State Council.

In June 2016, the authorities publicly circulated an MPS draft of the 'Regulation on Compulsory Treatment Centres' [578] for comment.[579] These proposed draft Regulations have the official objective "to further standardise compulsory treatment efforts, to safeguard the lawful rights and interests of persons subject to compulsory treatment, and to preserve social order and public safety."[580] One of the proposals is that the measures for determining substance addiction should be determined by the Administrative Department of Health, the Drug Supervision and Administration Department *and* the Department of Public Security under the State Council.

Analysis: legal framework and available protections

(i) Torture prohibition

As stipulated in the current Regulations, staff at the drug rehabilitation centres "may not physically punish, abuse or insult drug addicts."[581] This prohibition may be supplemented and expanded by new draft Regulations (still in draft form), which propose to establish that "compulsory treatment facilities shall ensure the lawful rights and interests of persons subject to

576 Article 1, Drug Control Law of the PRC, adopted at the 31st Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on December 29, 2007, in force as of 1 June 2008.
577 The National People's Congress adopted the first national Mental Health Law of the PRC on 26 October 2012.
578 The Legislative Affairs Office of the State Council.
579 July 2016.
580 Article 1, draft Regulation on Compulsory Treatment Centres (Draft for Deliberation), June 2016.
581 Article 44, Drug Control Law, 2007.

compulsory treatment, and must not insult, physically punish, or abuse persons subject to compulsory treatment, or direct or tolerate others to insult, physically punish or abuse persons subject to compulsory treatment."[582]

(ii) Safeguards and guarantees

There are few procedural guarantees and protective safeguards afforded in the current drug laws for detainees undergoing the investigation and administrative detention sanction of CDR. The existing safeguards in place are: (i) the decision of the PSB to isolate a drug addict should be in written letter format and served on the persons before effecting the isolation decision;[583] (ii) the family of the relevant person should be notified within 24 hours after the letter has been given;[584] and (iii) the person who has been served this compulsory rehabilitation decision has the right to apply for administrative reconsideration or appeal on administrative law grounds. Further, (iv) minors under 16 years old who are addicted to drugs should not automatically be subject to compulsory drug rehabilitation and instead have community drug rehabilitation; and (v) detainees are held separately according to their gender, age and type of addiction.[585]

Should the proposed draft Regulations be adopted, they would confer significantly more protection than the ones currently in force. Most notably, there is a provision establishing that the *decision for CDR will be one made by the court* (rather than as originally by the PSB)[586]. A judicial written compulsory treatment decision and written notification of enforcement of compulsory treatment would be required where it currently is not. The draft Regulations also contain reference to the possibility of *meeting a lawyer*, where the current Regulations and Drug Control Law do not. Draft Regulation Article 24 specifies that "where lawyers retained by persons subject to compulsory treatment or their guardians or immediate family members request to see persons subject to compulsory treatment, they shall hold the lawyers' practice certificate, their proof of law firm and a retention document or legal aid letter." The scope of this provision is,

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582 Article 4, draft Regulation on Compulsory Treatment Centres (Draft for Deliberation), June 2016.
583 Article 41, Drug Control Law, 2007.
584 Article 40, Drug Control Law, 2007.
585 Article 44, Drug Control Law, 2007.
586 Draft Article 12; draft Regulation on Compulsory Treatment Centres (Draft for Deliberation), June 2016.

however, limited. This is not a guarantee of access to a lawyer from the outset of a deprivation of liberty.

In the event of a *death of a detainee* in CDR, an additional level of oversight has been included in the draft Regulations. The proposed draft regulations specify that the PSB "shall make an evaluation of the cause of death. Where the guardians or immediate family members have objections to the evaluation of the cause of death, they may submit these to the People's Procuratorate."[587]

In the Drug Control Law and current Regulations there are currently no safeguards regarding regulation of *the use of means of restraint*. However, the proposed draft Regulations may change this. They specify that "compulsory treatment facilities may employ restraints, isolation or other protective treatment measures against persons subject to compulsory treatment who carry out or will carry out conduct that harms themselves, endangers others' safety, or disrupts the order of medical treatment. Persons subjected to protective treatment measures shall be closely observed, and after the possibility of dangerous conduct occurring has dissipated, the compulsory treatment facility shall immediately remove the protective treatment measures. The implementation of protective treatment measures shall follow medical diagnostic standards and treatment regulations, and their use to punish persons subject to compulsory treatment is prohibited."[588] Moreover, a detainee will be able to be *visited by relatives* under proposed new draft Regulations, Article 23.

Yet, not all the proposed new amendments strengthen the protective guarantees and safeguards afforded to detainees. For example, in respect of notification of detention, draft Article 13 proposes a time-limit of up to five days before a third party is required to be notified of a detainees' detention for CDR. This directly contrasts with Article 40 of the Drug Control Law, with a timeframe of 24 hour-limit on family notification. Further, while some additional safeguards may be strengthened should the draft proposed regulations be adopted, many of these safeguards remain far from conferring watertight protection. For example, the references to a lawyer in the draft Regulations do not guarantee access to a lawyer from the outset of the

[587] Draft Article 27, draft Regulations on Compulsory Treatment Centres (Draft for Deliberation), June 2016.
[588] Draft Article 31, draft Regulations on Compulsory Treatment Centres (Draft for Deliberation), June 2016.

deprivation of liberty. Worse, they provide situations where a lawyer can be denied access if, for example, they do not have the required or correct paperwork. Similarly, while there is a provision specifying that children under 16 years old should not be subjected to automatic CDR,[589] a recent PSB official interpretation of this prohibition has, however, specified that in the most severe cases a minor can still be sentenced by the PSB to compulsory drug rehabilitation.[590] The legal status of the draft MPS Regulations and current Regulations means that they are supplementary but subservient, in the case of conflict or contradiction, to the Drugs Law, which itself remains unamended since 2007. The view that not all the proposed new amendments actually serve to strengthen protections for detainees is also reflected by China administrative law scholars, such as Sarah Biddulph.[591]

(iii) Overall operation of the investigation and justice process for drug abuse

Articles 38, 40 and 41 of the Drug Control Law[592] outline the grounds under which the PSB can make a decision to order isolated compulsory drug rehabilitation. This can be when community drug-rehabilitation programmes have not worked for persistent or serious drug re-offenders.[593] Thus, it is ultimately the PSB that investigates and sentences a suspect of offences pursuant to the Drug Law to a two-year extendable period (for a further year) of administrative detention in a CDR facility.[594] This may change under proposals for new Regulation, which specify that the decision for CDR should be in the remit of a court.[595] This would change the nature of the sanction and would confer a degree of transparency into the current administrative process. Further, new proposed regulations also propose that the decision is not made solely by the PSB

589 Draft Regulation on Compulsory Treatment Centres (Draft for Deliberation), June 2016.

590 '[…] where the drug addict has dropped out of school for more than one year and his or her guardian refuses to perform guardianship responsibilities, or the drug addict has any illegal history of crime, the case-handling department shall report to the public security organ at or above the county level for making a decision on isolated compulsory drug rehabilitation. Where after admitting a minor under the age of 16 who are subject to isolated compulsory drug rehabilitation, the isolated compulsory drug rehabilitation Centre finds that the minor has normal study in school or his or her guardian performs guardianship responsibilities well, the isolated compulsory drug rehabilitation Centre shall bring forward an opinion on altering isolated compulsory drug rehabilitation to community drug rehabilitation to the original decision-making authority. The original decision-making authority shall, within seven days, make a decision on whether approving the alteration or not.'[sic]; Official Reply of the Ministry of Public Security on Issues concerning 'the Isolated Compulsory Drug Rehabilitation of Personnel under the Age of 16', 2014; 公安部关于未满十六周岁人员强制隔离戒毒问题的批复[现行有效].

591 See Biddulph, 'Rights in the new regime for treatment of drug dependency', *Comparative Perspectives on Criminal Justice in China* (2013).

592 Drug Control Law of the PRC, 2007.

593 Article 38, Drug Control Law of the PRC, 2007.

594 Article 47, Drug Control Law of the PRC, 2007.

595 Draft Regulation on Compulsory Treatment Centres (Draft for Deliberation), June 2016.

but "the measures for determining drug addiction are determined by the administrative department of health, the drug supervision and administration department and the department of public security (PSB) under the State Council."[596] Nevertheless, it remains unclear when the draft Regulations will be adopted and in what form, and how they will interact with the unrevised Drug Control Law, which provides different and, in some instances, contradictory provisions to those proposed (for example, the differing timeframes for family notification) and currently confers less protective guarantees for detainees.

One of the significant omissions from the current Drug Law and Regulations is that there is no clarity or precision on whether healthcare professionals – doctor, nurse or psychiatrist – should be involved in giving an opinion regarding the initial involuntary placement of a person deprived of their liberty in obligatory drug rehabilitation facilities, resulting in a two-year period of work, education and treatment. As regards international norms on a similar area, namely, involuntary placement and treatment in psychiatric institutions, the IHRL bodies consider that there should be an obligatory psychiatric expert opinion (independent of the hospital in which the patient is placed) in the context of the initiation and review of the measure of involuntary hospitalisation. In the context of CDR in China, the current processes of involuntary placement and involuntary treatment are problematic, given the lack of any reference to a healthcare professional opinion in the initial placement or review (let alone a second independent opinion) and almost complete lack of any safeguards regulating the involuntary treatment process or around the use of restraints in general.

(iv) Complaints' avenues and monitoring

Currently, there is no guarantee in law affording detainees the right to make a complaint and there are no complaints mechanisms in place to provide an avenue for detainee complaints. Moreover, there are no provisions in law to enable the external independent monitoring of CDR facilities; thus this does not happen in practice.[597] This may change, to some extent, if the proposed Draft

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596 Draft Regulation on Compulsory Treatment Centres (Draft for Deliberation), June 2016.

597 Interview with Cheng Lei and with Ms. Z., representative from the KSS and the linked CDR of City W. (*name anonymised*); discussions held at the GBCC-Renmin University conference on 'Strengthening complaints mechanisms' held in Wuhu, China,

Regulations are adopted, which propose an additional degree of oversight (of the PSB) by the procuratorate, albeit not independent.[598] Yet, in a similar vein to the CPL, while this would be external to the PSB, it would not be independent, as the procuratorate is the administrative organ of the State for oversight for compliance with China's laws.

No information is publicly available as to whether there are similar initiatives (establishing nascent complaints' mechanisms and preventive monitoring) underway as they are in KSSs and some prisons. Indeed, meetings between leading procurators in the field of legal supervision and the author indicate that the nascent system of procuratorate and special supervisors' inspections does not extend to CDR facilities.[599]

Section Summary: Protections in CDR

Given the long duration of the period of administrative detention (potentially up to three years), the current safeguards in the law and current Regulations in force afford detainees only minimal protection. Yet, the landscape of protections to detainees undergoing the CDR process is likely to change. There is a degree of reform proposed and protections for detainees undergoing the CDR process may be increased. Yet, the proposed change is minimal and various protections, even in revised form, are diluted or missing. Currently, it remains the case that it is the PSB that investigates and sentences a suspect of drug offences to a two-year extendable period of administrative detention in a CDR facility. It is also the PSB that places in custody, undertakes the investigation, sentences and operates the administrative detention facilities. If a person is suspected of having committed a crime (for instance, dealing drugs) he/she can be handed over to the criminal-law process to stand trial; otherwise all stages of their case will stay within the remit of the PSB, which has no external oversight. Appeal rights, mechanisms or avenues are not specified in any detail to make them readily comprehensible or accessible. These are similar concerns to those in the administrative penalties' justice process. In particular, the absolute

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on 23 November 2016, in which the author participated as an external expert. See also Biddulph, 'Rights in the new regime for treatment of drug dependency', *Comparative Perspectives on Criminal Justice in China* (2013).

598 Draft Article 6, Draft Regulation on Compulsory Treatment Centres (Draft for Deliberation), June 2016.

599 At meetings held on 23 August 2016, CoE, Strasbourg on exchange of preventive monitoring experience between Chinese scholars and procurators (organised by the GBCC and Renmin University) and, *inter alia*, the author on behalf of the CPT; author's interview with Renmin Professor Cheng Lei and Procurator Hu on 23-24 November 2016, Wuhu, China.

discretion conferred on one body, with no external oversight, contributes to rendering the process opaque, exacerbated by the existence of few protective safeguards. There is one specific area that may change under proposals for new Regulations, which propose that the decision for CDR should be in the remit of a court;[600] however, other protections against torture remain under-developed.

[600] Draft Regulation on Compulsory Treatment Centres (Draft for Deliberation), June 2016.

III. 'Shuanggui'

Overview

'*Shuanggui*' involves a period of *de facto* administrative detention for the purposes of investigating violations of Party regulations and discipline, most notably in the area of official corruption. It comprises, in essence, another parallel 'justice' process to the criminal justice track. It is officially premised on the concept that infractions of Party discipline should first be investigated by Party Discipline bodies and then, if deemed appropriate, handed over to either the criminal or administrative system or kept within the Party discipline process. The concept of Party discipline was originally established in the 1997 Administrative Supervision Law and the 1994 Party document "CCP Disciplinary Organs' Working Regulations on Case Investigation." These have since been amended and '*Shuanggui*' is governed by a variety of piecemeal and different regulations, as well as the CCP Constitution and CCP Discipline Regulations.[601]

The Communist Party Constitution[602] and new CCP Disciplinary Regulations, adopted in early 2016, currently regulate this Party justice process and establish Central and Local Commissions for Discipline Inspection. Article 2 of the Decision of the Central Committee of the CCP emphasises that one of the objectives of these bodies is to strengthen discipline within the Party. This aims to ensure that "Party members and cadres strictly observe Party discipline, carry out Party resolutions and government ordinances, to realize the unity and centralisation of the entire Party." These bodies have the power to discipline Party members (including all government officials (as to become, and meaningfully progress as, a government official, one has to be a Party member) if infractions are found.[603] The Central and Local Commissions for Discipline

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601 Fu Hualing, 'The upward and downward spirals in China's anti-corruption enforcement', *Comparative Perspectives on Criminal Justice in China*', (eds.) McConville and Pils (2013).

602 Constitution of the Communist Party of the PRC.

603 "These bodies 'a) inspect the conducts of all departments directly controlled by the Centre, Party organisations at all levels, Party cadres and Party members that contravene Party discipline; b) accept, examine and decide sanctions on departments directly controlled by the Centre, Party organisations at all levels and Party members that contravene Party discipline; or remove their sanctions; c) strengthen discipline education within the Party, so Party members and cadres strictly observe Party discipline, carry out Party resolutions and government ordinances (*faling*), to realize the unity and centralisation of the entire Party."[sic]; Article 2, Decision of the Central Committee of the Chinese Communist Party on establishing Central and Local Commissions for Discipline Inspection.

Inspection (the Party discipline bodies) are mandated under the CCP Constitution to investigate and verify the facts of suspected violations of Party laws and regulations[604].

Little is known or published nationally or internationally on the details of the operation of *shuanggui*. [605] At the international level, until the CAT Committee Concluding Observations on China in late 2015, it had been only mentioned (critically) in passing in reports and never examined in depth.[606] Other than an analysis by scholars Fu Hualing and Flora Sapio,[607] there has also been relatively little scholarly discourse on this area, and almost none in Western scholarship. Even in the CAT Committee's treatment of the system only three aspects are (very briefly) examined. First, in the context of reported cases of officials who have been subject to torture and other ill-treatment under this system; second, that the discipline inspection commissions can summon and investigate officials outside the ordinary law enforcement system; and third, that suspects do not have a right to access and retain a lawyer during the interrogation, which leaves them at risk of torture. Equally, at the national public level, there have been reports that the *shuanggui* process is so little understood that it has been open to imitation and manipulation by non-Party discipline officials to extort money.[608]

The obscurity of the process is fuelled by it not being run by the PSB but by Party discipline cadres often in different facilities and places of detention than those run for the criminal and administrative suspects. Further, it is a process that, up until 2015, has had very little grounding in legislation or regulations, and its legal framework has been in piecemeal, and often inaccessible, opaque Party norms. Moreover, the interplay between the jurisdictions for investigations by the PSB, the procuratorate and the CCP Discipline Committee has been relatively obscure. The division of investigation responsibilities appears to be as follows: the PSB has the power to investigate ordinary crimes and a branch of the procuratorate investigates crimes by public

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604 Article 41, Constitution of the Communist Party of China, adopted at the 17th CPC National Congress, October 2007.

605 With the notable exceptions of Fu Hualing, 'The upward and downward spirals in China's anti-corruption enforcement', *Comparative Perspectives on Criminal Justice in China*', (eds.) McConville and Pils (2013); and Flora Sapio, *Forgotten Archipelagos* (Blog), 'How I Did My Research on Shuanggui" - Notes Prepared for the Workshop "Methodological Approaches to Assess the Legal Development in China's One Party State"', 17 August 2017.

606 See WGAD, Report on China 2004, E/CN.4/2005/6/Add.4, para. 41, p. 13; and UN SRT 2005 Report on China.

607 Fu Hualing, 'The upward and downward spirals in China's anti-corruption enforcement', *Comparative Perspectives on Criminal Justice in China*', (eds.) McConville and Pils (2013).

608 See N. VanderKlippe, 'China systematically using torture in war on corruption', *the Globe and Mail*, 6 December 2016.

officials under the CPL. More or less all public officials are CCP members as, in reality, they have to be to meaningfully progress in their careers.[609] Thus, they are additionally regulated in their conduct by a parallel justice process governed by the CCP Constitution and the CCP Disciplinary Regulations. The bodies responsible for overseeing correct CCP conduct in line with these regulations are the CCP Disciplinary Committees at county-level.[610] Therefore, a public official could be investigated by the procuratorate for a suspected crime (e.g. corruption) as a public official and by the CCP Investigatory branch for improper conduct (e.g. corruption) contrary to the CCP Constitution and regulatory norms. In practice, the CCP Investigation is conducted first and then the official may be transferred to the criminal justice process and the procuratorate. The decision to transfer or not remains solely within the remit of the CCP Disciplinary Investigation, as the latter has its own parallel justice process, sentencing procedure and sanctions.

In line with reform of the Chinese legal landscape, this justice process has become more regulated pursuant to reforms undertaken in 2015/2016, namely, the adoption on 1 January 2016 of the new CCP Disciplinary Regulations. These new Regulations, however, have not substantially added any protections for detained officials undergoing the *shuanggui* process, but have merely expanded the list of offences and list of sanctions. It remains a justice sphere that is non-transparent and little understood. This is exacerbated by many of its texts being difficult to access, being piecemeal and remaining only in the original Chinese.[611]

Analysis of legal framework and available protections against torture

(i) Torture prohibition

The CCP Constitution and CCP Disciplinary Regulations do not specifically mention that torture or ill-treatment is prohibited during investigation by CCP Discipline Investigation Committees. Regulations merely refer to the requirement that *shuanggui* should be undertaken in compliance with the Chinese Constitution (which itself does not explicitly prohibit torture). Further, Article

609 McGregor, *The Party* (2010); Fu, 'The upward and downward spirals in China's anti-corruption enforcement' (2013).
610 Article 40, CCP Constitution, revised 2012.
611 The author translates these.

43 of the CCP Constitution establishes the requirement for application of *shuanggui* in a 'safe and proper manner' in accordance with the law (without specifying which). Indeed, the Chinese authorities, in response to a List of Issues sent to them by the CAT Committee in the preparation of the CAT Committee's Fifth reporting cycle on China, state that: *shuanggui* is a legal system and Party discipline of China; it is based on explicit provisions in national laws and Party rules. The torture to persons subject to *shuanggui* is not allowed by national laws, Party disciplines or government disciplines."[612] There is, however, no indication of which rules explicitly prohibit torture in the context of a CCP Discipline Committee investigation. The legal torture prohibition is at best weak, at worse, non-existent.

(ii) Safeguards and procedural guarantees

Despite recent reform in 2016 of the *shuanggui* process, no additional protective safeguards or procedural guarantees have been added to this justice process. The only safeguards remain embedded in Article 41 of the CCP Constitution. This establishes that, first, "when a Party organisation is deciding on a disciplinary measure against a Party member, it should investigate and verify the facts in an objective way." Second, that the Party member suspect should be told the reasons for a disciplinary sanction: "[...] be informed of a decision regarding any disciplinary measure to be taken and of the facts on which it is based." Third, the Party member should be heard during the investigation: "the person concerned must be given a chance to account for himself or herself and speak in his or her own defence." Fourth, there is an appeal right to the next, higher, level of the CCP Discipline organ: "if the member does not accept the decision, he or she can appeal, and the Party organisation concerned must promptly deal with or forward his or her appeal, and must not withhold or suppress it." The guiding principle for the investigation is that "those who cling to erroneous views and unjustifiable demands shall be educated by criticism."

There are several concerns with this article. First, the Party Discipline Commission's investigation is not time-limited as is the case in the Chinese criminal and administrative justice

612 China State Party Report sent to the CAT Committee, 2014, para. 17.

processes. The only restriction is that the investigation should proceed 'objectively'. Second, the right to self-defence and the right to appeal are not defined with sufficient clarity to enable certainty as to where one can appeal. In practice, this is merely to higher-level disciplinary committees.[613] Third, there is a lack of precision and legal certainty around the clause "those who cling to erroneous views and unjustifiable demands shall be educated by criticism", which could be readily open to abuse.

These are the only safeguards afforded in law to a detainee undergoing the *shuanggui* investigation process. Thus, there is a lack of almost all of the safeguards necessary to prevent torture (especially, the right of third party notification, access to a lawyer or the right of *habeas corpus*, among others).

(iii) General operation of the shuanggui investigation and sentencing process

Article 44 of the CCP Constitution outlines the Discipline Committees' main task:

> *"To uphold the Constitution and other statutes of the Party, to check up on the implementation of the line, principles, policies and resolutions of the Party and to assist the respective Party committees in improving the Party's style of work and in organizing and coordinating the work against corruption."*

Oversight is in the form of higher-level Party Discipline Committees. Higher levels of the Discipline Committee have the mandate to 'oversee Party members holding leading positions in exercising their power; they shall examine and deal with relatively important or complicated cases of violation of the Constitution or other statutes of the Party by Party organizations or Party members and decide on or rescind disciplinary measures against Party members involved in such cases; they shall deal with complaints and appeals made by Party members; and they shall guarantee the rights of Party members.'[614] 'Higher' discipline committees have the power to

[613] Article 43, CCP Constitution.
[614] Article 44, CCP Constitution.

examine the work of the lower commissions and to approve or modify their decisions on any case.[615]

The CCP Constitution and norms governing *shuanggui* investigations into Party violations, establish that it is the same overarching body, in this case the Disciplinary Inspection Committees, which enforce the Party laws and regulations, investigate suspected cases, decide to detain and for how long, and address appeals or complaints.[616] In short, similar to the PAD and CDR administrative detention processes, there is no structural separation (i.e., safeguards that structurally separate out the responsibility for investigation with those of custody and sentencing) for detainees going through the *shuanggui* procedure.

(iv) Complaints and monitoring mechanisms

There is currently no external monitoring undertaken of '*Shuanggui*' interrogation and detention facilities run by the CCP Discipline Committees; nor are there external detainee complaints avenues in place. The only available avenue either to appeal or to complain about the investigation's conduct is contact a higher-level Disciplinary Committee.[617] Details are not published on modalities on how to appeal or on the number of complaints that have reached a higher-level Discipline Committee or their outcomes (i.e., any prosecution or disciplinary action taken).

Section Summary: Protections in 'Shuanggui'

The *shuanggui* process remains deficient in many respects when assessed against the key preventive measures needed to counter the risk of torture. The torture prohibition is weak, there are few safeguards and guarantees and none of the core procedural safeguards needed to prevent torture (right to third party notification/prohibition of incommunicado detention, access to a lawyer or doctor from the outset of the deprivation of liberty, no right of *habeas corpus*, etc.). When examined through the lens of the protections necessary for the prevention of torture, 'shuanggui' falls short. First, there are many aspects of the CCP norms where fundamental

615 Article 45, CCP Constitution.
616 Article 44, CCP Constitution.
617 Article 44, CCP Constitution.

protections are entirely missing, creating entire protection gaps or vacuums for corrupt official detainees. Virtually the whole raft of regulatory protections needed to adequately protect against and prevent torture of detainees is missing. This creates a significant regulatory protection gap. Second, there are systemic deficiencies evident in China's CCP justice system that enable CCP inspection and discipline officials to stand above or outside of the (very few) protections in the norms and result in discretionary and misuse of numerous laws and regulations. This is also pervasive across the whole of the investigation and sentencing procedure when it comes to allegations of corruption: it is evident not only with the lack of fundamental procedural and protective safeguards in the CCP shuanggui system , but also with the permissible exceptions in the criminal justice laws that afford suspects facing corruption charges lesser protections. It can also be seen in the co-ordination and influence that the central CCP and government yield over bodies such as the judiciary (cf. Chapter 4.3). In summary, in the case of 'shuanggui', the law remains protection-deficient and thus open to abuse; when corrupt officials are slotted back into the criminal justice route, ambiguities in the CL and CPL (Chapters 2.3 and 3.2) mean that the protections in the law can be deliberately overridden for this category of suspect.

Similar to the PAD and CDR administrative detention processes, there are no structural separation safeguards for detainees going through *shuanggui* interrogation and detention procedure and it is the same overarching body that arrests, detains in custody, investigates, sentences and operates detention sanction premises. There are no external bodies in place for oversight or to monitor; nor is there an external process by which complaints may be made outside of the structure of the Party Discipline Committees. The decision to transfer a suspect into the criminal justice process is one made by the Party Committee Investigators, if they consider that the official has also committed a crime, as well as a Party norm infraction. There is, however, no external body oversight of, or involvement in that decision.

'*Shuanggui*' is an opaque process, sparsely regulated, governed by piecemeal regulations, the grounds and offences of which are vague and readily open to abuse. The deficient regulation renders the whole process non-transparent and little understood – and greatly feared by public

officials. Reform has come in the form of new Regulations, yet they do nothing to strengthen safeguards for detainees, rather they extend the offences, sanctions and powers of investigation. Indeed, in line with Xi's spearheading of the fight against corruption, the expansion of types of CCP infractions and extension of investigatory powers sits in line with the general current political trajectory and approach of establishing tougher measures to counter corruption (the 'iron fist' approach). This CCP justice process can thus be seen as an important and flexible tool for the CCP to effect government policy and reform.

2.5 Summary

Recent legal reforms mean that some justice processes have had certain protective and preventive measures afforded to detainees established in the relevant laws. Yet, there remain fundamental flaws and systemic deficiencies with the regulation and scope of the protections conferred by the measures. These deficiencies are evident in all types of justice processes examined, but the extent of the deficiency varies depending on the type of process.

Recent reforms in the Chinese *criminal law* now establish some aspects of the core safeguards and measures needed to prevent torture. There is a generic prohibition in torture in law, yet, it remains relatively weak and there are credible concerns about its limited scope. Similarly, there are some procedural guarantees and preventive safeguards afforded in law for detainees on the criminal justice track (access to a lawyer, third party notification of the fact of detention, etc.). Nevertheless, these available safeguards have three key fundamental flaws. First, they are limited in scope, in that they do not cover all criminal suspects. Second, many are diluted or negated by permissible exceptions provided for in the law. Third, the guarantees and safeguards themselves are not comprehensive: significant areas that should be regulated are left without protection.

While there is evidence of significant reform of the criminal justice system to deepen transparency and remove avenues of interference from local government, interference in judicial matters by Central Party (i.e., top-level) remains possible. Complaints' avenues and monitoring systems are nascent but evident in the criminal justice sphere, yet are minimally regulated for in law, and mechanisms vary by institution and region due to a lack of standardisation.

In comparison to the criminal-law justice process, the three non-criminal processes assessed are far less regulated. While the *punitive administrative process* pursuant to the PSAPL affords some basic protections to detainees, this remains a sphere that lags far behind the reforms seen in the criminal law. Detainees are afforded fewer and weaker safeguards than their criminal-law counterparts. While there is an element of fluidity between the criminal and administrative justice processes, it is, however, up to the PSB investigator to decide whether or not to transfer a

detainee into the criminal track or not – for alleged infractions or/and crimes that are nearly identical (for example, gathering a crowd to disrupt social order) and turns upon the 'severity' of the alleged offence. Without any external or judicial involvement either with the judiciary or the state administrative law supervision organ (the Procuratorate), as in the criminal-law process, the discretion as to which justice process to follow remains with the PSB investigator. Equally, this element of discretion is amplified by keeping the whole process of investigation, sentencing and detention process solely under the responsibility of one overarching body, the PSB. Complaints' avenues and monitoring are nascent, and do not cover places of initial police custody, where the risk of torture is greatest. The PSAPL has undergone some (very) limited reform, but still does not offer sufficiently robust protection to detainees, nor does it fully address and eliminate risks of torture. Its 2017 draft revisions do not substantially alter the current provisions and thus do not address these concerns and do not significantly reduce the risk of torture. The 2017 proposed revisions to the Detention Centre Regulations (into law) are following along a similar trajectory.

In the area of *administrative detention pursuant to China's Drug Control Law* and Regulations, there are also indications of some potential reform. Nevertheless, as the laws and regulations currently stand, this sphere also remains an area with few protective guarantees or safeguards. Those safeguards that do exist are relatively weak and do not comprehensively cover all the areas of risk. Investigation and sentencing currently remains with one body (the PSB) (although this may change), with no external oversight. There are also no rights established in the relevant current laws and regulations enabling detainees to complain about their treatment or to 'lift the veil' and allow external monitoring of the CDR facilities. The protections for detainees may be expanded if the new Regulations that are currently being proposed come into effect. Yet, in a similar situation to the criminal-law reform, proposed reforms superficially look encouraging and may strengthen protection, yet, when examined in detail, many of the proposals remain weak and confer diluted protection.

The *shuanggui* process remains deficient in many respects, when compared to the criminal – and even administrative – justice processes. The torture prohibition is weak; there are virtually no

safeguards and guarantees, and none of the core procedural safeguards needed to prevent torture. Similarly to the administrative detention processes, there are no structural safeguards for detainees going through *shuanggui* interrogation and detention procedure, and it is the same overarching body that arrests, detains in custody, investigates, sentences and operates detention sanction premises. There are no external bodies in place to monitor, nor is there an external process by which detainee complaints can be made. Moreover, given the official policy of eradicating corruption and the reforms that are tightening State control of this sphere, this CCP justice process can be a seen as a key instrument of State control; it is therefore unlikely to be reformed in the direction of the expansion of protective safeguards for its public official detainees.

The criminal-law process stands out, comparatively, as the most regulated sphere with relatively more safeguards afforded to detainees than the others in focus. Yet, even in this sphere, many of these guarantees only confer diluted protection, they only selectively cover some detainees and are negated by permissible exceptions to the safeguards, remain deficient or virtually non-existent: in short, more legal regulation does not mean better protection for all detainees. It is not a guarantee that should the other forms of non-criminal law justice process follow reforms in a similar vein to the criminal law, their protection would not suffer from the same deficiencies as the criminal-law safeguards.

Overall, none of the detention processes examined here provides the robust preventive measures in law needed to fully prevent the risk of torture. Worse, those safeguards established in general international law and applicable to all States worldwide, namely the prohibition of *incommunicado* detention (i.e., right of third party notification about the fact of detention and communication with the outside world) and the right of *habeas corpus*,[618] remain deficient or virtually non-existent.

[618] See Thesis Chapter 1.

Chapter 3: Effectiveness of China's preventive measures & current nature of torture and ill-treatment

This Chapter examines whether the protections that are afforded in law actually work in practice. It considers each of the justice processes outlined in Chapter 2: criminal, administrative and Party, and examines each justice process in turn, starting with the criminal-law and then turning to the two other justice processes that lie external to the criminal-law system, namely, administrative and Party justice. In each sphere, it considers the effectiveness of existing safeguards and the nature of any protection gaps in law or gaps in implementation of the law (i.e. gaps between law and practice). It documents various torture and other ill-treatment allegations and cases emanating from each area examined, to give an approximate indication of the scope and type of abuse in practice. Ultimately, this Chapter seeks to understand and assess, on the information available from interviews and research, the likelihood of whether torture and other ill-treatment in police and Party-operated detention is reducing as a result of the legal reforms and preventive measures taken, or whether it remains resilient despite the reforms.

3.1 The criminal-law justice process: effectiveness of legal safeguards

This section examines the protections offered under China's *criminal law* system[619] and gaps in implementation of those legal safeguards identified in Chapter 2, shaping their effectiveness in practice. They follow approximately the same sequence and grouping as in Chapter 2.

3.1.1 Protection & implementation gaps

(i) Torture prohibition

China still lacks a comprehensive definition of torture and ill-treatment in its national law (c.f. Chapter 2(4)(I)(i)). This is a clear regulatory protection gap that needs to be addressed. Moreover, it can impact how investigators, procurators and the judiciary view abuse and what can or can't

[619] The type of detention focused on here is initial police custody in police stations and remand detention in police-run KSSs, of persons detained pursuant to a suspected offence contrary to the criminal law, as described in Chapter 2.

constitute torture. If they consider that an act is not serious enough, then many cases will not be investigated or prosecuted. This could be one (of many) reason(s) for such low rates of prosecution of torture cases in China (cf. Chapter 4.4.4). It also links with the issue of impunity. The CAT Committee has expressly underscored that discrepancies in torture definitions risk creating loopholes in which impunity flourishes – and has directly raised this concern in its treatment of China.[620] Equally, this also links with how progress on reduction of torture and its prevention is perceived by the Chinese authorities and national scholars. This partially explains how national scholars and authorities can think that torture (but not ill-treatment) has significantly reduced, if not been effectively curbed, in police-run KSS (c.f. Chapters 3.1.2 and 3.1.3 and 4.4.), while IHRL bodies, national lawyers and civil society consider both types of abuse as pervasive, based on receiving hundreds of allegations of torture and ill-treatment emanating from Chinese places of detention every year (c.f. Chapter 3.1.2 (i) and (ii)).

Through the lens of prevention, the above is concerning; it shows discrepancies in regulation, in implementation and in approach. Progress in torture prevention needs, at the very least, the respective state's national law to be fully compliant with the UN CAT (c.f. Chapter 1), and in China's case, it is not. A good starting point would be both to address the regulatory gaps and to ensure training and awareness-raising for all persons involved in investigation, custody and detention of suspects and prisoners – including lawyers and the judiciary - for alleged criminal, administrative or Party infractions, of what constitutes torture and ill-treatment (c.f. Concluding recommendations (i) and (iv) and Conclusions, Section C (ii)).

(ii) Time-limited police custody, the right to be brought before a judicial authority speedily and requirements for judicial oversight[621]

The CAT Committee has clearly highlighted its concern that China has not shortened the 37-day maximum legal period during which detained persons can be exceptionally held in police

620 CAT Committee General Comment No. 2; CAT Committee 5th periodic report on China, December 2015.
621 Chapter 2 sets out the legal status, regulation and background of this area in Chinese law and examines its scope.

custody.[622] This includes an initial seven-day time limit before the procuratorate has to approve arrest.[623] The Committee has underlined that the "excessive period of time during which public security officials may detain persons without independent supervision[624] may increase the risk of detainees being subject to ill-treatment or even tortured."[625] The 'routine use'[626] of this exceptional prolongation to 37 days' custody has concerned not only the CAT Committee,[627] the UN SRT,[628] scholars and civil society,[629] but also the Chinese authorities themselves, as seen in the Ministry of Justice's 2016 'Provisional Provisions on Efforts to Prevent and Correct Cases of Extended Detention and Prolonged Detention without Resolution by Criminal Enforcement Prosecution Departments of People's Procuratorates'.[630]

There are several concerns here. First, the permissibility in the law allows for prolonged extension – and the legally permissible terms are extremely, if not excessively, long.[631] Second, even these long permissible terms can get bypassed in reality. The CAT Committee cites 'routine use' of the maximum 37-day timeframe in practice.[632] The SPP published guiding cases, which serve as a source of interpretation of the CPL, but also serve to show this. SPP cases show that detainees are often being kept in police custody for one month before arrest, and a further two months for the investigation and then a further month for prosecution review and preparation before trial.[633] Thus, the seven-day time limit for approval by the procuratorate of arrest can be

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622 The CAT Committee has assessed this to be 37 days, but China scholars point out it is in fact a 38-day maximum timeframe in the law (see for example, MacBean, *Legal Reforms and Deprivation of liberty in China* (2016); Nesossi, *Comparative Perspectives on Criminal Justice in China*' (2013)).

623 CAT Committee Concluding Observations on China, December 2015, para. 10.

624 The nature of current supervision available in China will be examined in Chapter 4.

625 CAT Committee Concluding Observations on China 2015, para. 10.

626 CAT Committee, Concluding Observations on China, 5th Periodic Reporting Cycle, December 2015.

627 Ibid, para. 10.

628 UN SRT, 2005 Visit to China; UN SRT Follow-Up Report on China 2011.

629 Nesossi, McConville, Belkin, Lubman, *Comparative Perspectives on Criminal Justice in China*' (2013); Trevakes, MacBean, *Legal Reforms and Deprivation of liberty in China* (2016); Amnesty International, 'No End in Sight', *Torture and forced confessions in China*, 11 November 2015, ASA 17/2730/2015; Human Rights Watch, 'Tiger Chairs and Cell Bosses: Police Torture of Criminal Suspects in China', May 13, 2015; Shadow Reports by civil society submitted to the CAT Committee in preparation for China's Fifth Reporting Cycle, August to November 2015 from the Rights Practice, Human Rights Watch, Amnesty International, among others.

630 SPP, 'Provisions on Efforts to Prevent and Correct Cases of Extended Detention and Prolonged Detention without Resolution by Criminal Enforcement Prosecution Departments of People's Procuratorates (Provisional)', April 2015, which provide SPP interpretation on what constitutes prolonged detention and how to regulate its use.

631 As examined in Thesis Chapter 2.

632 CAT Committee, Concluding Observations on China, 5th Periodic Reporting Cycle, December 2015.

633 See, for example, the SPP Guiding Cases Set 3, published by the SPP on 27 May 2013; the 'Case of Li Zeqiang Fabricating and Intentionally Disseminating Terrorist Information' in Procuratorate Case No. 9, 'on 7 August 2010, Li Zeqiang was detained by the Public Security Sub-bureau of the Beijing Capital International Airport (BCIA) on suspicion of the crime of fabricating or intentionally disseminating false terrorist information, was formally arrested on 7 September 2010, and on 9 November 2010, on the conclusion of investigation, this case was transferred to Chaoyang District People's Procuratorate of Beijing to be reviewed for prosecution. On December 3, 2010, the Procuratorate initiated a public prosecution against defendant Li Zeqiang for committing the crime of fabricating or intentionally disseminating false terrorist information' [sic].

circumvented by exceptions in the law, and often is in practice.[634] The CPL itself creates so many exceptions that some detainees, due to the seriousness or complexity of their alleged offences, stay in police custody (whether initial custody, interim policy custody or pre-trial police detention) for weeks, if not months, into the investigation.[635] Throughout the arrest and investigation period, suspects are held in custody by ultimately the same body, the PSB. All of these aspects can heighten the risk of torture or other ill-treatment, as identified in Chapter 1.

National lawyers, scholars and civil society bodies have outlined extensively how the system works in practice.[636] Briefly, the police first summon a suspect; they can then hold them for up to 24 hours before formal criminal detention is authorised. Thanks to reforms in the CPL,[637] suspects must be moved to a KSS within 24 hours of formal detention. However, there are various ways to circumvent this requirement: suspects can be held in police custody for many hours before they are put under formal detention. In practice, the police delay formal detention in different ways. These include issuing a 传唤 (*chuanhuan*), a non-coercive summons allowing for an additional 24 hours under the CPL or for informal 'chats' with the police (colloquially known as an invitation "to drink a cup of tea" (喝一杯茶) (*he yi be cha*)); or conduct an administrative detention investigation 留置盘查（*liuzhi pancha*), which under the Police Law enables suspects to be held for an additional 48 hours. According to national lawyers, police routinely – not exceptionally – take up to the full 37 days to hold a suspect, before the procuratorate approves their arrest. The CPL then allows for many months for the police to conclude their investigation and the procurator decides to prosecute the suspect.

634 See analysis in MacBean, 'China's pre-trial detention centres: challenges and opportunities' (2016); Trevaskes, Nesossi, Biddulph and Sapio, 'Deprivation of liberty under scrutiny' (2016); Human Rights Watch report, 'Tiger Chair and Cell Bosses', May 2015, Chapter II.

635 E. Nesossi, 'Reforming Criminal Justice in the People's Republic of China? The Black Hole of pre-trial detention', *Journal of Comparative law 3(2)*: 305-315 (2008), M. McConville, S. Choogh, P. Wan, E. Hong, I. Dobson and C. Jones (eds) (Cheltenham: Edward Elgar 2011); MacBean, 'China's pre-trial detention centres: challenges and opportunities' (2016).

636 A detailed analysis can be seen in MacBean, 'China's pre-trial detention centres: challenges and opportunities' (2016); Trevaskes, Nesossi, Biddulph and Sapio, 'Deprivation of liberty under scrutiny' (2016); Human Rights Watch report, 'Tiger Chair and Cell Bosses', May 2015, Chapter II.

637 See Thesis Chapter 2.

As previously established,[638] the risk of torture remains at its greatest in initial police custody. Time limits, designed to ensure people are transferred out of initial police custody as quickly as possible given the risks of coercion of confessions, are not working in practice in China. They are not working because the transfer is simply to another place of police detention (KSS), where investigation can continue by the same ultimate body (albeit differing departments) that investigates *and* detains. Circumvention of the protections conferred by the CPL is thus both possible and happens routinely. Notwithstanding the safeguards in law to separate investigators from suspects, record (some) interrogations, etc.[639], the whole set-up of this model means the investigators ultimately are in control of the length of custody. This presents a risk of potential manipulation using custody to facilitate their investigation. Prolonging police detention during arrest and investigation has thus become a routine and systemic practice.[640] It has not been resolved by legal reforms of the CPL in 2012. This issue has become so acute that Chinese procurators, in 2016, have been officially reminded by the SPP to keep the legal limits in check.[641]

Equally, even when detainees are transferred to KSSs, the investigation continues for months, during which time, suspects can be removed from KSSs for interrogations and returned to the KSSs afterwards.[642] Various Chinese procurators point out that is it both illegal and very hard in practice to take suspects out of the KSS.[643] Yet, some national lawyers and civil society bodies say that there are ways to do this and to circumvent the protections and infrastructure established by the CPL, such as the need for audio-visual recording.[644] Unofficial interrogations can happen in "offices of the police responsible for criminal investigations (*xingjing dadui*, 刑警大队), and in

638 See Thesis Chapter 1.
639 See Thesis Chapter 2.
640 Author interview with the wife of Mr. X., a current KSS detainee, March 2017; see also Nesossi, McConville, Pils, Belkin, Lubman, *Comparative Perspectives on Criminal Justice in China*' (2013); CAT Committee Concluding Observations on China, December 2015; UN SRT Report on China 2005, and Follow-up 2010/2011.
641 2015 'SPP Provisions on Efforts to Prevent and Correct Cases of Extended Detention and Prolonged Detention without Resolution by Criminal Enforcement Prosecution Departments of People's Procuratorates (*Provisional*)', at http://www.legaldaily.com.cn/index_article/content/2015-08/04/content_6204582.htm?node=6148 [accessed June 2017].
642 Human Rights Watch Report, 'Tiger Chair and Cell Bosses', May 2015; Draft PRC Detention Centre Law, circulated for public comment, June 2017.
643 Author's interviews on 22-23 November 2016 in Wuhu, China with procurators participating in the workshop 'Strengthening complaints mechanisms', co-organised by the GBCC and Renmin University in Wuhu, China.
644 Chinese lawyer interviews in Human Rights Watch, *Tiger Chair & Cell Bosses*, Chapter II, May 2015.

police stations (*paichusuo* 派出所), hostels, and other police-controlled facilities such as drug rehabilitation centres."[645]

An illustration indicative of the practice of using long extensions to police custody can be seen in an interview conducted by the author with the wife of a current detainee in KSS remand detention, Mr. X.[646] While it remains unverified, it does serve to illustrate the issue at hand.

Mr. X[647] is a Chinese national who was involved in various commercial developments in Province Y and was apprehended and detained in a KSS in late 2015, where he remains (2017). During the apprehension, initial custody and detention, he was allegedly not permitted contact with his family. He was not initially allowed direct contact with his lawyer, although the lawyer was able to speak with the Country B's police, however, no specific grounds for the arrest were given. One week after the detention in the KSS, the family received official notification of detention (see Section below '*third party notification*'). This notification still did not include any grounds of detention or reasons for arrest, but offered the possibility to appeal/challenge the detention. The deadline for the appeal had already expired before the notification was received.

In 2017, Mr. X is still in the KSS and still has had no direct contact with his family; he is not allowed to write, call or meet them. His only means of communication is through his lawyer, who passes on updates to the family. Even though he has been in detention since late 2015, his first court appearance to be placed formally on remand was in late 2016, almost a year after first being detained.

While this remains only a single case, notably it provides context to what can happen in practice within the criminal justice process, despite the safeguards in place requiring shorter detention timeframes and prohibiting prolonged police custody without judicial authorisation.

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645 Chinese lawyer interviews in Human Rights Watch, *Tiger Chair & Cell Bosses*, Chapter II, May 2015.

646 Author's interview with the wife of Mr. X., March 2017.

647 Names and specific details are anonymised by request of Mr. X's family; consent has been given for use of the content of the interview.

More generally, national legal scholars, such as those at Renmin University,[648] voice various concerns with the current situation, notably, that in practice "arrest mostly means [a] certain period of custodial detention." They also point out that as Detention Centre Regulations stipulate that the suspect should be detained in the KSS governed by the police, this means that during investigation the suspect is "totally controlled by the detection [investigation] organs." Further, they underline that "to meet the needs of their [police] own work, the compulsory measure, especially detention and arrest, is widely used to limit suspects' liberty more than the factual requirements of the situation in case would call for."[649]

There is no explicit right in law for the criminal suspect to be brought promptly, and in person, before a judge after apprehension by the police. Nor is there a right in law to challenge the detention decision proactively before a judicial authority (*habeas corpus*) for the long period of police custody while under arrest and investigation. In this context, it is thus unsurprising that detainees generally do not challenge the long period of police custody before a judicial authority; they cannot: it is the Procuratorate that has the mandate to supervise the legality of detention, and it is an administrative State organ reporting to Congress, rather than a judicial authority.[650]

The long extensions of police custody and the role of the procurator in approving and reviewing detention have been subject to critique by international bodies.[651] Recently, the issue of lengthy extensions has become the subject to additional regulation, along with tighter provisions around detention reviews, as the 2012 reforms the CPL still allowed for multiple extensions.[652] Scholars at Renmin University and the GBCC have recently organised a seminar on detention review.

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[648] See the Research Centre for Human Rights and Humanitarian Law of Peking University Law School, Implementation of the UNCAT in China: A Parallel Report, Submitted to the CAT Committee in advance of its review of the fifth periodic report of the People's Republic of China; see also submissions by the China Society for Human Rights Studies (CSHRS) (in special consultative status with ECOSOC) and the Centre for Education and Study of Human Rights, Southwest University of Political Science & Law (SWUPL) submissions to the UNCAT Committee, November 2015.

[649] The Centre for Human Rights and Humanitarian Law of Peking University, 'A Survey on the Rights Protection of Pre-trial Detainees in China', August, 2015, submitted as a shadow report to the CAT Committee in advance of its 5th periodic reporting cycle on China.

[650] Law on the Organisation of People's Procuratorates; see analysis of this area by the UN SRT, in the UN SRT Reports on China 2005 and 2011; see also analysis in Thesis Chapter 4.

[651] See, for example, UN SRT, in the UN SRT Reports on China 2005 and 2011, CAT Committee Concluding Observations on China (2015/2016), among others.

[652] SPP, 'Provisions on Efforts to Prevent and Correct Cases of Extended Detention and Prolonged Detention without Resolution by Criminal Enforcement Prosecution Departments of People's Procuratorates' (*Provisional*), 2015; and in 2016 the Procuratorate issued the 'People's Procuratorate Provisions on Handling Cases of Reviewing the Necessity of Detention (Provisional)', and accompanying Circular, Circular of the Supreme People's Procuratorate of the People's Republic of China, *Gao Jian Zhi Jian* [2016] No. 37, Circular on Issuing the Guiding Opinions of the Supreme People's Procuratorate's Prison Management Bureau on Implementing the Provisions on the Handling of Detention Necessity Review Cases by People's Procuratorates (for Trial Implementation), 8 July 2016.

Experts and procurators discussed the need to clarify the objectives of the review system to develop an adequate system to prevent any unnecessary deprivation of liberty; the need to ensure pre-trial detention judicial review (many Chinese scholars and the authorities consider the procuratorate a "quasi-judicial" body and thus competent to conduct the reviews); the need to simplify the (currently complex) procedure; and ensure that detention is a measure of last resort. Differing views were advanced by international experts, national scholars and participating procurators. International experts pointed out that given the mandate of the procuratorate, it was unlikely to be considered as meeting the criteria for a competent judicial authority, namely that the body be judicial, and has a degree of separation – or independence – from the investigative function. The Chinese scholars and many procurators considered that the current situation of having a different department of the procuratorate handle review is a positive step towards achieving more independence.[653] SPP Provisions where adopted in 2013 and 2016 to help judicial interpretation on the need to restrict prolonged extensions of custody and to regulate the review of the necessity of detention. These specify that the power of supervision should be centralised into one department of the Procuratorate, the Investigation Supervision Department, to make the procedure easier to handle.[654]

According to international bodies, extensions to initial police custody, lack of prompt judicial approval of detention and the lack of *habeas corpus* have not improved since the revision of the CPL. These have been repeatedly highlighted as problematic by IHRL bodies, including the UN SRT, who recommended in 2005, and again in 2011, that "those [persons] legally arrested should not be held in facilities under the control of their investigators for more than the time required by law to obtain a judicial warrant for pre-trial detention [UN SRT recommends 48 hours]. After this time, they should be transferred to pre-trial detention facility under a different authority where no

653 Interview and correspondence with M. Mella, Senior Project Manager, GBCC (a specialist body that implements projects and facilitates exchanges on judicial and legal reform in China), 22 November 2016 and September 2017.

654 SPP, 'Provisions on Efforts to Prevent and Correct Cases of Extended Detention and Prolonged Detention without Resolution by Criminal Enforcement Prosecution Departments of People's Procuratorates' (*Provisional*), 2015; and in 2016 the Procuratorate issued the 'People's Procuratorate Provisions on Handling Cases of Reviewing the Necessity of Detention (Provisional)', and accompanying Circular, Circular of the Supreme People's Procuratorate of the People's Republic of China, *Gao Jian Zhi Jian* [2016] No. 37, Circular on Issuing the Guiding Opinions of the Supreme People's Procuratorate's Prison Management Bureau on Implementing the Provisions on the Handling of Detention Necessity Review Cases by People's Procuratorates (for Trial Implementation), 8 July 2016.

further unsupervised contact with investigators is permitted."[655] This was not the case in 2005 or in 2011. Equally, the UN SRT recommended in 2005 that all detainees should be guaranteed the ability to challenge the lawfulness of their detention decision in front of an independent court or judicial authority (*habeas corpus*). The UN SRT noted that the procuratorates did not constitute an independent judicial authority, nor did the judicial system guarantee independence from political interference, to enable it to be considered as truly independent.[656] He observed that the situation had not changed in 2011 in his Follow-up report on China.[657] The CAT Committee also made the same criticisms in 2008 and again in its most recent Concluding Observations on China in December 2015. Similarly, despite legal reforms to strengthen the judiciary from 2012 onwards (including the Lawyers' Law),[658] the judiciary is, in many respects, still widely considered not to be truly independent (Chapter 4).[659]

The Procuratorate is an administrative organ and responsible to the National People's Congress. Procurators are starting to discuss disquiet among their colleagues – along with some reported resignations – due to the role of the procuratorate being subject to government proposals for reform. In 2016/2017 the Chinese authorities are discussing the possibility of removing the mandate of prosecution of corruption charges from the procurators (where it traditionally lay, providing an exception to most investigations conducted by the police) and instead transfer this role to a different department for supervision. Various pilots/trials in this area are coming to an end and it is nearly certain that a centralised State Inspection Committee will be created. However, there are practical difficulties in the creation of the new Committee and, according to leading scholars, it is important that this Committee operates using criminal procedure and is equipped with a special criminal investigation department (which is not currently envisaged).[660] The concern is that on current trajectory, it may operate outside of the CPL, and its regulated

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655 UN SRT (Manfred Nowak) Recommendations on his visit to China in 2005, E/CN.4/2006/6/Add.6, 10 March 2006; UN SRT (Juan Mendez) Follow-up on China report recommendations in 2010, A/HRC/16/52/Add.2, published 4 March 2011.

656 Ibid.

657 UN SRT Follow-Up Report (Juan Mendez) on the recommendations made on the China visit in 2005, A/HRC/16/52/Add.2, 4 March 2011, paras. (g) and (j).

658 PRC Law on Lawyers 2007, revised in 2015; see Thesis Chapter 4 for analysis.

659 See analysis in Section 4.3, Thesis Chapter 4; see also E. Nesossi, 'Compromising for "Justice"? Criminal proceedings and the ethical quandaries of Chinese lawyers', in *Comparative Perspectives on Criminal Justice in China*, McConville, Pils (eds) (2013).

660 Author interview and correspondence with M. Mella, Senior Project Manager, GBCC (a specialist body that implements projects and facilitates exchanges on judicial and legal reform in China), November 2016 and September 2017.

safeguards. This proposed reform is an unpopular initiative, with the procuracy at least, as it would remove some of its mandate. This also shows the relative lack of power the Procuratorate has over decisions about its own mandate.

Some reforms are gradually coming to this area, however, despite the law undergoing a series of revisions in 2012, the problems of prolonged extensions of time in police custody, the lack of prompt competent judicial approval of the deprivation of liberty, as well as the absence of avenues to ensure an effective *habeas corpus* right remain and continue to stymie China's criminal justice process.

(iii) Trinity of legal preventive safeguards – access to a lawyer, doctor and notification of detention to a third party

Another illustration of a protection gap in practice in the Chinese criminal justice system can be seen in the context of the 'trinity' of core preventive procedural safeguards: namely, access to a lawyer and doctor, as well as for notification of detention to a third party. In particular, the effectiveness of the rights of third party notification and to access, or communicate with, third parties has been subject to wide criticism, despite undergoing reform in the CPL.[661] As already established,[662] this right can be severely limited, by law, through the indefinite withholding of investigators' permission necessary for this right for certain groups of suspects, including those endangering public security, those suspected of malfeasance in public office, amongst others.[663] Even for those categories of detainees who could be afforded this safeguard under law, it appears to be restricted in reality. The CAT Committee, among others,[664] have pointed to "consistent reports indicating that public security officials constantly refuse […] notification to their relatives

661 See for example, Amnesty International, No End in Sight (2015); Shadow Reports to the CAT Committee in preparation for China's Fifth Reporting Cycle, November 2015 from the Rights Practice, Amnesty International, Human Rights Watch, among others.
662 Thesis Chapter 2.
663 See CAT Concluding Observations on China (2015), paras. 12 and 13.
664 UN SRT Reports on China in 2005 and Follow-up in 2011.

on the grounds that the case concerns State secrets, even when the detained person is not charged with State security crimes."[665]

Likewise, despite CPL reforms to strengthen safeguards against incommunicado detention, civil society organisations and China legal scholars[666] have documented several recent cases of criminal suspects who were not afforded the right of third party notification for several weeks, if not months, after arrest. These include the case of Su Changlan, who "was taken away by police on 27 October 2014. It was not confirmed where she was being held until her family received a notice of the charges against her on 3 December [2014]. Her family has not been able to visit her since she was first detained, despite repeated requests, and she was only allowed to see her lawyer for the first time in May 2015."[667] Further, this right has been denied in the cases of various prominent Chinese human rights lawyers and human rights defenders (including Wang Yu, Bao Longjun, Sui Muqing, Xie Yang, Liu Sixin, Wang Quanzhang, Zhao Wei (a.k.a. Kao La), Lin Bin (a.k.a. Monk Wangyun), Gou Hongguo, Xie Yuandong, Gao Yue, Li Chunfu and Li Heping).[668] In July 2015, they were apparently placed under residential surveillance at unknown locations without access to their lawyers and family members and have spent many months (in some cases years (Li Heping))[669] 'disappeared'.[670]

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665 CAT Concluding Observations on China, para. 12; see also Shadow Reports to the CAT Committee in preparation for the 5th reporting cycle on China (August to November 2015); see also 被打折的权利----未决在押人员亲属会见权现状与反思 Dongfang Fayan Web, 2 January 2015.

666 Such as Amnesty International and Human Rights Watch Shadow Reports to the CAT Committee, in preparation for the 5th reporting cycle on China', November 2015; see also Human Rights Watch, '*Tiger Chair and Cell Bosses*' (2015); see also Lubman, China Real Time reports, Wall Street Journal, including: 'China's Criminal Procedural Law: Good, Bad and Ugly', Real-time Report, 21 March 2012; Lubman (2013) ' What China's wrongful Convictions mean for legal reform', China Real-time, 17 July 2013; Lubman (2014), 'Quashing expectations for the Rule of Law in China', China Real-time, 17 January 2014; Lubman (2014) 'An encouraging sign for (limited) legal reform', China Real time, 25 February 2014; Rosenweig, Sapio, Jue, Biao and Pils 'Comments on the 2012 revision of the Chinese Criminal Procedure Law'; MacBean, 'Addressing the 'hide and seek' scandal: restoring the legitimacy of Kanshousuo' (2016), among others.

667 Amnesty International, *No End in Sight* (2015); Amnesty International, Shadow Report to the UNCAT in preparation for China's Fifth Reporting Cycle, November 2015.

668 Amnesty International, *No End in Sight* (2015); Amnesty International, Shadow Report to the UNCAT in preparation for China's Fifth Reporting Cycle, November 2015; Pils, 'Disappearing' China's human rights lawyers' (2013); Lan Rongjie, 'Killing the lawyer as the last resort: the Li Zhuang case and its effects on criminal defence in China', *Comparative Perspectives on Criminal Justice in China*, McConville and Pils (eds.) (2013); the Guardian, ''Emaciated, unrecognisable': China releases human rights lawyer from custody', 10 May 2017, https://www.theguardian.com/world/2017/may/10/emaciated-unrecognisable-china-releases-human-rights-lawyer-from-custody.

669 The Guardian, ''Emaciated, unrecognisable': China releases human rights lawyer from custody', 10 May 2017; for detailed analysis on this area see Thesis Chapter 4.

670 Amnesty International, '*No End in Sight*' (2015); Amnesty International, Shadow Report to the UNCAT in preparation for China's Fifth Reporting Cycle, November 2015.

Professor Lubman argues that, in practice, "despite the law on the books, the police have caused the 'disappearance' of criminal suspects and activists."[671] Lubman notes "in the recent past the police have held dissidents such as Ai Weiwei and human rights lawyer Gao Zhisheng in undeclared locations for months without notifying family members." Pursuant to the amended Law, he points out, "law enforcement agencies […] still have the power to detain persons suspected of crimes related to national security or terrorism in a designated location of the agencies' choice for up to six months and they would be allowed to deny suspects' access to a lawyer for the duration of the detention."[672]

Equally, the effectiveness of the safeguard of a detainee's access to a lawyer has also been a subject of widespread concern.[673] Similar restrictions in the CPL, as for the above safeguard of third party notification, are legally permissible and the right is not afforded from the outset of deprivation of liberty but within 48 hours. Various issues contribute to a lack of effectiveness of this safeguard. First, the law is not in conformity with the required safeguard, as identified by the CAT Committee and others, in that it does not guarantee the right of the detained person to meet a lawyer from the very outset of the detention (only within 48 hours).[674] This is the time of the greatest risk of torture. This is particularly concerning in a country that has a legacy of reliance on confessions as the primary source of evidence during investigations. Second, in certain cases, such as those of "endangering State security", "terrorism" or "bribery", the lawyer must obtain prior permission from public security investigators to meet the suspect, which may legally be withheld for an indefinite period of time, on the grounds that it could hinder the investigation or could result in the disclosure of State secrets.[675] Similarly, there is the potential for outright refusal by the investigators. Here, the CAT Committee has pointed to "consistent reports

671 S. Lubman, China Real time reports (2012-2016), Wall Street Journal; and Concluding Observations, *Comparative Perspectives on Criminal Justice in China* (2013).

672 S. Lubman (2012), 'China's Criminal Procedural Law: good, bad and ugly', Wall Street Journal China Real-time Report, 21 March 2012; Lubman (2014), 'Quashing expectations for the Rule of Law in China', China Real-time, 17 January 2014.

673 References in Shadow Reports submitted to the CAT Committee by, in particular, the Rights Practice, as well as references in Amnesty International, Human Rights Watch, and the Rights Practice and Beijing University submissions, among others, November 2015.

674 See analysis in Chapter 2 of this thesis; see criticism by the CAT Committee in its Concluding Observations on China, para. 12.

675 See analysis in Chapter 4 of this thesis; see CAT Committee in its Concluding Observations on China, para. 12.

indicating that public security officials constantly refuse lawyers' access to suspects […] on the grounds that the case concerns State secrets, even when the detained person is not charged."[676]

Those suspects allowed to benefit from this right can find that, in practice, this safeguard can still be rendered obsolete by several other restrictions to its impact. National scholars at the China University of Political Science and Law, have pointed out that "there are many restrictions when defence lawyers apply for the meeting with their clients, and because of the lack of regulations or judicial interpretations to elaborate these restrictions, it is easier for the investigation authorities to apply random explanation[s] or even extravagant explanation[s] to prevent lawyers from meeting with their clients. […] Meanwhile, [the] traditional stereotype that lawyers may hinder investigation authorities from resolving criminal cases is an important obstacle to […] the defence lawyer's right [ability] to meet their clients." [677]

Another factor that goes to the heart of this safeguard's lack of effectiveness is the protection vacuum that is created by the criminal laws. First, there is no right to access a lawyer from the very outset of deprivation of liberty for any criminal suspect. Further, access to a lawyer is not a mandatory right for the initial interview/interrogation. Indeed, regulations specify that initial interrogations should now be conducted within the first 24 hours of custody. These legal provisions thereby facilitate a timeframe whereby, in all likelihood, a lawyer will not be there during the very time that is considered to be the riskiest time for the commission of acts of torture.

In practice, the lack of prompt access to legal counsel, coupled with the lack of third party notification and access, means that many people can be, and are in practice, held incommunicado for many weeks, if not months.[678] Prolonged incommunicado detention in and of itself can amount to cruel, inhuman or degrading treatment, as well as further increasing the detainee's risk of torture.[679] The UN SRT and civil society organisations, such as Amnesty International, have

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676 CAT Committee in its Concluding Observations on China, para. 12.

677 Institute for Human Rights, China University of Political Science and Law's submission to the CAT Committee, in preparation for the Fifth reporting cycle on China, November 2015.

678 Amnesty International, Shadow Report submitted to the CAT Committee in advance of China's Fifth Reporting cycle, November 2015; UN SRT on China in his Follow-Up report 2010/2011 and UN SRT 'Observations on communications transmitted to Governments and replies received', addressed to China in 2016, A/HRC/31/57/Add.1, para 80 to 92, 24 February 2016; Human Rights Watch, '*Tiger Chair and Cell bosses*' (2015).

679 See Thesis Chapter 1.

documented several recent cases of suspects being denied their right of notification of detention, or access, to their relatives or third parties and their lawyers. These include, *inter alia*, "Tibetan writer Druklo (pen-name Shokjang) [who] was taken away by national security police on 16 March 2015 and has had no access to a lawyer or family since. The authorities have not told his relatives the reason for his detention or the charges for which he is detained."[680] Likewise, is the case of "Tibetan monk Choephel Dawa [who] has not been heard from since he was detained by police on the night of 28 March 2015. It is not known where he is being held and the reason for his detention. He has not had any access to his lawyer or his family."[681] In 2016, the UN SRT, in his recent report on communications received concerning China,[682] concluded that "the Government of China, by failing to protect the physical and psychological integrity of Mr. Tang Zhishun and Xing Qingxian [human rights defenders], including by subjecting them to enforced disappearance and prolonged incommunicado detention, has violated their right to be free from torture."[683]

It is of concern that this safeguard may be legally delayed without periodic reviews or maximum time limits for all suspects. It is worse, however, for categories of suspects, especially suspected corrupt officials, petitioners, complainants against the *status quo* or '*Falun Gong'* practitioners,[684] among others. It is these groups of persons who are generally perceived by the authorities as having the potential to repetitively disrupt public order and thus present a risk to the government priority of social harmony and economic development. They can be, and have been in practice, denied this right in the interest of the investigation.[685]

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680 Amnesty International, Shadow Report submitted to the CAT Committee in advance of China's Fifth Reporting cycle, November 2015, p.9.

681 Amnesty International, Shadow Report submitted to the CAT Committee in advance of China's Fifth Reporting cycle, November 2015, p.9.

682 UN SRT, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum, Observations on communications transmitted to Governments and replies received, A/HRC/31/57/Add.1, 24 February 2016, p. 20.

683 UN SRT, A/HRC/31/57/Add.1 (2016), Communication JUA 3/11/2015 Case No. CHN 12/2015 State Reply: None to date; Allegations concerning the enforced disappearance of two human rights defenders, Mr. Tang Zhishun and Xing Qingxian; and the house arrest of the 16 year old son of a detained human rights defender, para. (e).

684 Chinese religious/spiritual practice that involves meditation and qigong exercises; a practice that is considered, by the authorities, to jeapordise social security and is prohibited in China.

685 See, *inter alia*, Amnesty International, Shadow Report submitted to the CAT Committee in advance of China's Fifth Reporting cycle, November 2015; UN SRT on China in his Follow-Up report 2010/2011 and UN SRT 'Observations on communications transmitted to Governments and replies received', addressed to China in 2016, A/HRC/31/57/Add.1, para 80 to 92, 24 February 2016; Human Rights Watch, '*Tiger Chair and Cell bosses*' (2015).

(iv) Exclusion of evidence obtained under duress

Another significant recent amendment made to the CPL to strengthen the protection against torture in initial police custody, was the addition of the new provision to specifically exclude any evidence obtained by means of torture from being relied upon in court.[686] Moreover, this has been supplemented by recent Provisions on Several Issues regarding the Strict Exclusion of Illegal Evidence in Handling Criminal Cases'.[687] This has been widely acknowledged as a positive move by scholars and civil society.[688] It has also started to be seen in court practice.[689] China, in its State Party report to the UNCAT Committee argued that the exclusory rule is operational and effective and cited a few cases in support of this. These include, *inter alia*, the case of Lu Wu: "the defendant Lu Wu was arrested as a suspect of the crime of transporting drugs in 2013. In the hearing, while Lu Wu said his confession of guilt to the public security organ was extorted by torture […]. The court thinks, multiple evidence[s] can prove the condition of Lu Wu with cyanosis around eyes and a swollen face, while the procuratorial organ fails to provide more powerful objective evidence[s] such as synchronous audio or video recording. According to the existing evidences and clues, the existence of the unlawful collection of evidence[s] by the public security organ is not beyond reasonable doubt, all confessions of Lu Wu before the hearing are excluded." [sic][690]

Yet, this reform too has seen gaps between the law and actual practice and has also been subject to much IHRL bodies' criticism and scholarly critique.[691] Scholars and experts worry that this safeguard risks remaining a concept only – a 'paper tiger' (*zhi lao hu*) – a protective safeguard

686 CPL, Article 54.

687 Issued by the SPC, SPP and MPS, 27 June 2017.

688 M. Lewis, Statement at Hearing of the Congressional-Executive Commission on China "China's pervasive use of torture", 14 April 2016, Congressional Committee Testimony; CAT Concluding Observations on China (2015); Chen Weidong and Chai Yufeng, 'A summary of the exclusionary rule of illegally obtained evidence in China', 'An analysis of the issues concerning the development of China's exclusionary rule' and 'Improvement of the exclusionary rule in China', *Three Approaches to Combatting Torture in China* (2012), pp. 53 to 111; and J. Daum, 'Exclusive focus: 'Why China's exclusionary rules won't stop police torture', *CLT Originals, Legal News*, 1 July 2017.

689 Various cases listed where the exclusionary rule has been invoked can be seen in China's State Party report to the CAT Committee (2014), in preparation for its Fifth Reporting Cycle; see also analysis of a number of cases by Human Rights Watch involving the exclusionary rule (see below).

690 China State Party Report to the CAT Committee, 2014.

691 F. Sapio, ' A paper tiger', China Blog, http://chinalawandpolicy.com/tag/flora-sapio/; Statement of M. Lewis, Hearing of the Congressional-Executive Commission on China "China's pervasive use of torture", 14 April 2016; and Daum, 'Why China's exclusionary rules won't stop police torture' (July 2017).

with no 'bite' that does not translate into implementation or practice.[692] Likewise, there is a concern that the development of the exclusionary rules are overshadowed by long-standing major issues, which remain pertinent, such as the fact that 'the new rules inexplicably impede defence attorneys' access to some of the most critical evidence for requesting exclusion, which will inevitably cast doubt on the legitimacy of the entire process.'[693] The IHRL bodies, such as the CAT Committee, as well as numerous civil society bodies, remain concerned that "courts often shift the burden of proof back to defendants during the exclusionary procedures and dismiss lawyers' requests to exclude the admissibility of confessions."[694] Amnesty International, for example, in its Shadow Report to the CAT Committee illustrated how the burden of proof can be readily shifted in practice on to the defendant, in an extract from Feng County People's Court criminal verdict, 11 February 2015:

> "*…though the defendant […] claimed that his confession of guilt was extracted by investigators through torture, he did not provide any concrete leads or relevant evidence to prove the claim. Moreover, he never raised objections to his confession of guilt regarding these facts during his time in the Feng County Detention Centre. Therefore, this court rules that [the defendant's] confession can be used as evidence.*"[695]

Likewise, Human Rights Watch, which examined 432 court cases involving allegations of torture from January to April 2014, found that "only 23 resulted in evidence being thrown out by the court; none led to acquittal of the defendant."[696]

(v) Audio-visual recordings of interrogations & physical separation interrogator from suspect

Other strengthened procedural safeguards in the criminal law sphere have been taken with a view to mitigating the risk of torture and other ill-treatment. These include the requirement of CCTV in

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692 Ibid.

693 Daum, 'Why China's exclusionary rules won't stop police torture' (July 2017).

694 See CAT Concluding Observations on China (2015), para. 32; see also Shadow Reports submitted by Amnesty International, The Rights Practice, Human Rights Watch and many others in advance of China's Fifth Reporting Cycle, November 2015.

695 中国裁判文书网,(Judicial opinions of China), http://www.court.gov.cn/zgcpwsw; Amnesty International, Shadow Report to CAT Committee for the Fifth Reporting Cycle on China; see also Amnesty International, '*No End in Sight*' (2015).

696 Human Rights Watch, '*Tiger Chair & Cell Bosses*' (2015).

police interrogation rooms in some cases (death penalty and other 'serious' suspected crimes, including corruption), physical separation of the interrogator and the detained person undergoing interrogation, no fewer than two investigators participating in the interrogation/interview and the possibility for recording the interrogation.[697] These are all positive developments.

That said, without any monitoring of the implementation of this (or of any) safeguard(s) in police stations,[698] the authorities simply do not know whether this is, in practice, fully complied with. Many bodies, such as the CAT Committee, suspect not; it flagged its concern about the dubious independence of the auditing of these recordings. The Committee, in its most recent Concluding Observations on China, indicated that it had received evidence from several sources indicative that the police selectively only record a certain part of the interrogation or use areas outside of the camera's coverage to commit acts of alleged torture or ill-treatment.[699]

Professor Margaret Lewis[700] has examined the effectiveness of this safeguard and how it works in practice. Lewis considers that despite the positive move in establishing this safeguard in the criminal law,

> "*Preliminary indications are, however, that recording interrogations is not significantly changing the culture of extreme reliance on confessions as the primary form of evidence in criminal cases. When I viewed an interrogation room in a Beijing police station last October, the staff was keen to point out the videotaping technology. What I could not help but notice was the slogan "truthfully confess and your whole body will feel at ease" (that was written in large characters on the floor in front of the metal, constraining interrogation chair, otherwise known as a "tiger chair"). Faced with this slogan during prolonged questioning makes crystal clear to the suspect that there is no right to silence in Chinese law.*"[701]

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697 CPL, Articles 116 to 121.

698 See Thesis Chapters 2 and 4, outlining that currently no preventive monitoring is undertaken of, or external body complaints mechanisms established in, police stations, where initial interview and custody occurs.

699 CAT Committee Concluding Observations on China (2015), para. 34.

700 Statement of M. Lewis, Hearing of the US Congressional-Executive Commission on China "China's Pervasive Use Of Torture", 14 April 2016.

701 Ibid.

Lewis argues that "what are lacking are additional reassurances that these procedures are sufficiently rigorous to prevent tampering with the process, […] the value of recordings is further limited if the court does not view the interrogation process with a sceptical eye, if the defence has a difficult time accessing the recordings, or if there simply is no defence lawyer […]."[702]

The use and effectiveness of this safeguard is inherently linked to the wider context, operation and structure of the overall criminal justice system, which has a part to play in the safeguard's ultimate effectiveness. It is also linked to the embedded culture of the primacy of the confession as evidence in the investigatory process in China, despite reforms seeking to counter this. Many scholars support this view.[703] Further, it is not mandatory to tape all interviews, just the ones for suspected serious crimes and, in practice, many interviews are not recorded.[704]

There are also signs of deliberate circumvention of these infrastructural protective safeguards in practice. Various national lawyers and civil society bodies have pointed to the removal of suspects to other offices by police investigators during investigation. This includes removal back to areas where there are less regulated safeguards in place, such as areas without CCTV coverage, recording equipment, etc., in initial police custody (police stations) offices, or to other locations, such as CDR facilities or unmarked hostels or hotels, without infrastructural protective safeguards in place.[705]

(vi) Pockets of 'protection vacuums' for certain groups of detainees within the criminal-law process

Although there are now more protective safeguards in the criminal law than previously, there are still segments of the criminal suspect population who can be held with less transparent procedural protections in all aspects of the criminal justice process. This, in effect, creates pockets of safety vacuums. These include those held on charges of 'endangering state security', 'bribery' or

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702 Ibid.

703 See, *inter alia*, He Jiahong and He Ran, 'Wrongful convictions and torture confessions: empirical studies in mainland China', *Comparative Perspectives on Criminal Justice in China* (2013); Belkin, 'China's tortuous path towards ending torture in criminal investigations' (2013), MacBean, 'China's pre-trial detention centres: challenges and opportunities for reform' (2016); Statement of Teng Biao, Hearing of the Congressional-Executive Commission on China "China's pervasive use of torture", 14 April 2016.

704 MacBean, 'China's pre-trial detention centres: challenges and opportunities for reform' (2016).

705 Human Rights Watch, '*Tiger Chair and Cell Bosses*', Chapter IV, May 2015; Amnesty International, '*No End in Sight*' (2015).

'terrorism'. Indeed, it can also affect certain groups of detainees, such as disabled detainees or pregnant or nursing mothers.[706]

An illustration of a safety vacuum within the CPL is residential surveillance / confinement in a designated location (RSDL) (**指定居所**监视居住 (*zhidingjusuo jianshijuzhu*)).[707] This measure remains within PSB or procurators' discretion and can be in any designated place other than a KSS or prison. While it is 'designated', it is often unknown (to relatives and third parties), and, reportedly, on occasion, it has been in *shuanggui* facilities.[708] These detainees have diluted legal safeguards, including that there is no full requirement (i.e., it is subject to exceptions) of immediate and notification to the family of the whereabouts of detention (the law states that the suspect's family shall be informed of the placement under RSDL within 24 hours, *unless notification cannot be processed*).[709] Equally, there no right to prompt and effective access to a lawyer from the outset of detention at the RSDL, (indeed, the suspect "shall not meet or correspond with any one without the permission of the executing organ").[710] They are also typically held for longer periods of time than the general timeframes allowed for by law: six months rather than the 37 days for other criminal suspects in initial custody. This is an area within the criminal law sphere that epitomises the possibility of circumvention of protections afforded in the CPL. It is a detention process that is governed by the CPL (Articles 72-77), yet this discretionary custodial measure lacks virtually all preventive safeguards. RSDL comprises a high-risk opaque environment within the criminal justice process whereby torture can occur, and has, according to numerous reports.[711]

Scholars, national and international alike, have argued that as regulation develops, especially in the criminal sphere, there is an 'implementation gap', a gap between the law and practice in many

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706 For example, these groups of persons can fall within the remit of residential surveillance / confinement in a designated location, explained in the below Chapter Section.

707 CPL Articles 72 to 77; for a detailed analysis of the current use of RSDL, see the Rights Practice Shadow Report to the UNCAT for the 5th Reporting cycle, October 2015; and J. Rosenzweig, 'Residential Surveillance: evolution of a janus-faced measure', *Legal Reform and Deprivation of Liberty in China* (2016).

708 Rights Practice Shadow Report to the UNCAT for the 5th Reporting cycle on China (the example of lawyer Cai Ying is cited).

709 CPL, Article 73.

710 CPL, Article 75.

711 See, *inter alia*, J. Rosenzweig, 'Residential Surveillance: evolution of a janus-faced measure', *Legal Reform and Deprivation of Liberty in* China (2016); the Rights Practice Shadow Report to the CAT Committee, submitted October 2015; Amnesty International, Shadow Report to the CAT Committee, November 2015.

areas.[712] As Teng Biao, a Chinese legal scholar, has argued, "the major problem with rule of law in mainland China is not establishing legal provisions but rather implementing laws."[713] Others argue that this is exacerbated by deficiently protective regulation in the first place.[714] Overall, however, there is wide support for the view that the letter of the law does not necessarily translate into implementation or practice in China's places of detention.[715]

3.1.2 Current reality and nature of torture in police custody & detention

According to the Chinese authorities, cases of torture and other ill-treatment in initial police custody and cases of abuse in KSS have fallen since the 2012 reforms.[716] This needs to be unpacked and separated out: torture in initial police custody from torture (mostly through coercive interrogation) and other ill-treatment (often in the form of management-sanctioned intimidation or lack of protections from inter-detainee violence) in KSSs.[717] The authorities base their assertion on the number of cases that the SPP prosecute before the courts. They underline in their UNCAT submission that by approximately late 2014 more than 1000 cases nationwide of torture and ill-treatment have come before the courts since 2008.[718] This averages out at approximately 140 cases per year over a seven-year period. This is a surprisingly low number of cases for a country with a population greater than 1.3 billion, 2,800 KSSs, thousands of police stations, 700 prisons and a police force two million strong. Given the population size, according

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712 Legal scholars, He Weifang, *In the Name of Justice: Striving for the Rule of Law in China*, (Brookings Institution Press, 2012); Chen Weidong (exclusionary rule in China), Chapter 5, *Three Approaches to Combatting Torture in China* (2012); Cheng Lei, 'Expert proposal for a draft Detention Centre Law', *Three Approaches to Combatting Torture in China* (2012); Lewis, Statement at Hearing of the US Congressional-Executive Commission on China "China's Pervasive Use of Torture", 14 April 2016; Lubman, 'Concluding Observations', *Comparative Perspectives on Criminal Justice in China* (2013), Gerard de Jonge, 'Some personal notes on the draft Detention Centre Law', *Three Approaches to Combatting Torture in China* (2012); J. Cohen, 'Introductory reflections', *Comparative Perspectives on Criminal Justice in China* (2013), among others.

713 Biao, Statement at Hearing of the US CECC on China, "China's Pervasive Use of Torture", (2016).

714 See Chen Weidong (exclusionary rule in China), Chapter 5, *Three Approaches to Combatting Torture in China* (2012); Cheng Lei, 'Expert proposal for a draft Detention Centre Law', *Three Approaches to Combatting Torture in China* (2012); Lewis, Statement at Hearing of the US Congressional-Executive Commission on China "China's Pervasive Use of Torture", 14 April 2016; Lubman, 'Concluding Observations', *Comparative Perspectives on Criminal Justice in China* (2013), Gerard de Jonge, 'Some personal notes on the draft Detention Centre Law', *Three Approaches to Combatting Torture in China* (2012); Human Rights Watch, '*Tiger Chair & Cell Bosses*', May 2015, Amnesty International '*No End in Sight*', among other reports.

715 He Wei Fang, *In the Name of Justice: Striving for the Rule of Law in China* (2012); Lubman, 'Concluding Observations', *Comparative Perspectives on Criminal Justice in China* (2013); He Jiahong and He Ran, 'Wrongful convictions and torture confessions: empirical studies in mainland China', *Comparative Perspectives on Criminal Justice in China* (2013); Belkin, 'China's tortuous path towards ending torture in criminal investigations' (2013), MacBean, 'China's pre-trial detention centres: challenges and opportunities for reform' (2016), Statement of Teng Biao, Hearing of the Congressional-Executive Commission on China "China's pervasive use of torture", 14 April 2016, among others.

716 China's State Report to the CAT Committee (2014) and China's Response to CAT Committee's List of Issues (2015).

717 A detailed analysis is included later in this Chapter.

718 China's State Report to the CAT Committee (2014) and China's Response to CAT Committee's List of Issues (2015).

to these statistics, there is some 0.0001% chance of torture or ill-treatment in detention in China. At face value, these figures suggest that the risk of torture and ill-treatment when deprived of liberty in China is extremely low. Virtually every other source on the frequency of torture in China, including cases on the SPP database, show differing statistics and a different perception of the frequency of torture and ill-treatment.

There are various problems with the statistics presented by the national authorities. First, they are not disaggregated by place and therefore it is impossible to determine whether these cases only involve police torture and ill-treatment in initial police custody or elsewhere, such as KSSs. The CAT Committee has criticised this.[719] Second, SPP cases from January to April 2014 alone show 432 cases involving allegations of torture. Definitive statistics on torture and ill-treatment are difficult to obtain for various reasons but they vary widely. An interview with Renmin University Associate Professor Cheng Lei, confirms the difficulties encountered in gathering definitive information on the frequency of torture in China. This is especially challenging, he points out, in the non-criminal and extra-legal justice spheres such as administrative detention, where there is little oversight and very little co-ordination between different institutions and regions.[720] Cheng Lei shares Renmin University's developed methodology, whereby to form opinions on the current state of torture and other ill-treatment, they examine SPP cases on torture and gather empirical data from their three pilot region KSSs. Here they have monitoring and complaints mechanisms established and they have begun to analyse the effectiveness of these measures. This analysis, however, is limited to KSSs only and is in only in three of the 2800 KSSs that exist across the country. By amalgamating data from onsite procurators in their projects and those cases that have reached the court, they have come to a clearer view in the frequency and nature of torture and ill-treatment in China.[721] Third, these low torture statistics also may be indicative of the general lack of operational complaints mechanisms and reporting structures in all places of detention in China. While they are gradually increasing in KSSs and some prisons, in most others there generally lacks the reporting mechanisms in place to systematically receive and pass reports on to

719 CAT Committee Concluding Observations on China (2015).
720 Author's Interview with Associate Professor Cheng Lei, Renmin University, 24 November 2016, Wuhu, China.
721 Ibid.

prosecutorial authorities to bring cases of alleged torture to the courts. While the procurators do feel they can follow up cases of abuse and they do, the reality of the general discipline and accountability structures might mean that the perpetrator is not removed immediately from the vicinity of the victim or later adequately punished.[722]

The authorities assert that torture and ill-treatment has generally decreased and in KSSs in particular, given their focus from c. 2009 onwards on decreasing abuse in KSSs.[723] One of the reasons for this was social pressure generated by the many publicised detainee deaths from 'Detention Centre bullies' or 'cell bosses' in 2009, including the "hide-and-seek" death of Li Qiaoming.[724] The public outrage was so widespread that this forced the authorities to recognise the problem of 'cell bosses' - detainees who are linked to the guards and who supervise, organise and abuse others on behalf of detention authorities when required to do so. In 2009, the SPP and the MPS announced a series of measures, including increased monitoring of detainees' accommodation areas, to prevent violence by cell bullies.

Local and international civil society bodies[725] report that cell bosses continue to be commonly used as *de facto* managers of cells and act as the intermediaries between detainees and the police officers. Many facets of detainee life are under the management of the cell leaders. Equally, there are reports of severe ill-treatment as punishment for actions done within the detention centres (KSSs). For example, Amnesty International has documented cases where detainees have allegedly been punished with sanctions that, in its view, could well be considered as amounting to torture and other ill-treatment: the 'activist Yang Mingyu had his hand and feet cuffed to a bed for three days in retaliation for his complaint about the quality of food he was given in detention. As

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722 Author's interview and correspondence with M. Mella, Senior Project Manager, GBCC, 24 November 2016 and September 2017.

723 Ministry of Public Security, the agency in charge of the police, claims that the use of coerced confessions decreased 87 % in 2012; China State Report (2014) and Replies to List of Issues to UNCAT Committee (2015).

724 In February 2009, national media reported that Li Qiaoming, a criminal suspect in Yunnan province, had died from fatal brain trauma. Authorities initially claimed that he had died during a jailhouse game of "hide-and-seek." Yet, details of the case went viral over the Internet, and social pressure pushed the authorities to undertake a more thorough investigation into Li's death. This found that three fellow inmates had beaten Li to death; for more details see Human Rights Watch report 'Tiger Chair & Cell Bosses' (2015); G. de Jonge, *Three Approaches to Combatting Torture in China* (2012); MacBean, 'Addressing the 'hide and seek' scandal: restoring the legitimacy of Kanshousuo' (2016).

725 Human Rights Watch, '*Tiger Chair & Cell Bosses*' (2015); Amnesty International, '*No End in Sight*' (2015).

a result, he had to eat, urinate and defecate while strapped to the bed'.[726] Allegations of permitted inter-prisoner/detainee intimidation and violence exist both pre-and post-2012 reforms.[727]

First-hand interviews with a senior staff member of the Wuzhong (Ningxia province) KSS and the Regional Procurator for Wuhu (Anhui province) KSS, suggest that torture had significantly (and other-treatment, to some extent) decreased in their KSSs. They highlighted that only one or two cases of ill-treatment had occurred in their institutions over the last four years (post 2012).[728] Both underscored that torture had reduced dramatically in their institutions; however, they acknowledged that there were cases of torture or ill-treatment by the police, which could be seen when the detainee arrived at their institutions. Both also emphasised that, in their opinion, the CPL reforms and preventive initiatives were starting to have some effect.

The authorities also assert that torture has decreased in initial police custody but do not have sufficient evidence to support this.[729] This assertion is not echoed by national scholars, nor by KSS management or front-line staff. Many believe that torture is still a pervasive problem in initial custody and during interrogation.[730] While according to the authorities it has reduced, no official statistics are gathered or analysed to be able to *isolate* the number of cases of police torture. Moreover, there are no oversight, co-ordinating or monitoring mechanisms that cover police stations, unlike the developing situation in the KSSs. The Procuratorate, the body responsible for oversight of the implementation of the laws, does not regularly assess the implementation of CPL safeguards inside police stations. In practice, it is left to the discretion of the MPS to examine their own implementation. The jurisdiction between the MPS and the Procuratorate is siloed and discrete, and while there is some co-ordination and overlap, for example in prosecution powers of certain categories of suspects, the two entities remain discrete

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726 Amnesty International, '*No End in Sight*' (2015); Amnesty International, '*Torture in China: Who, What, Why and How*,' 11 November 2015.

727 See CAT Committee Concluding Observations on China (2015); UN SRT 2005, 2011 and 2016 report, follow-up and communications with China; see also Shadow Reports submitted to the CAT Committee in preparation for its Fifth Reporting Cycle by various civil society bodies

728 Author's interviews, Wuhu, China, 24 November 2016.

729 Ministry of Public Security, the agency in charge of the police, claims that the use of coerced confessions decreased 87 % in 2012; China State Report (2014) and Replies to List of Issues to UNCAT Committee (2015).

730 See, *inter alia*, He Jiahong and He Ran, 'Wrongful convictions and torture confessions: empirical studies in mainland China', *Comparative Perspectives on Criminal Justice in China* (2013); Belkin, 'China's tortuous path towards ending torture in criminal investigations' (2013), MacBean, 'China's pre-trial detention centres: challenges and opportunities for reform' (2016), Statement of Teng Biao, Hearing of the Congressional-Executive Commission on China "China's pervasive use of torture", 14 April 2016.

and relatively autonomous. Moreover, traditionally the MPS has been extremely powerful within China and the Procuratorate far less so. Power dynamics are changing but have not radically changed so far.

Post-2012, cases of police abuse in initial police custody, as well as in Chinese police detention (KSS), resulting in injury or death of a detainee are numerous, with many additional cases likely unreported. So numerous are cases of torture in Chinese places of detention, that many legal scholars and IHRL bodies[731] have labelled China's use of torture as 'systemic' and 'pervasive' in 2015 and 2016 respectively. There is however a wide disparity of views on this. Some Chinese legal scholars and procurators argue that while various forms of ill-treatment may be evident across the detention system and especially in initial police custody, torture may be less so.[732] Relying on the separate (and deficient, according to the CAT Committee) definitions of torture and ill-treatment in the Criminal and Criminal Procedure Law, they argue that ill-treatment (and, to a lesser extent, torture) is systemic only as regards police initial custody – and then in the first 24 hours or so – or while extensions persist during investigation outside of the KSS. They acknowledge, however, that their views are limited only to police detention and KSSs[733] and not to Party detention, where there are no official statistics on the frequency or current nature of torture and ill-treatment therein.

Definitive information on torture and other ill-treatment is difficult to obtain for various reasons, including the lack of fully-functional and effective complaints mechanisms in all detention settings, the lack of independent monitoring, restrictive media and internet censorship (the "Great Firewall"), under-reporting, as well as an underlying fear of detainees of the risk of reprisal by staff.[734] This fear also extends to the lawyers. Even if a detainee did get access to a lawyer immediately, some lawyers are fearful of taking cases that could jeopardise their own safety, lead

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731 UNCAT Committee report on China 2015; UN SRT China 2005 visit and Follow-Up in 2010/2011; the US Congressional-Executive Commission on China (CECC) examined China's use of torture and maltreatment in the criminal justice system and found torture to be pervasive and systemic, 14 April 2016; Human Rights Watch, '*Tiger Chair and Cell Bosses*' (2015); Amnesty International, '*No End in Sight*' (2015); Belkin, 'China's tortuous path towards ending torture in criminal investigations' (2013), among others.

732 Author's interviews with Chinese scholar Cheng Lei and Procurator Hu, 24 November 2016, Wuhu, China.

733 Ibid.

734 Issues discussed with participants at discussions held in Wuhu China, 22-23 November 2016, between procurators, KSS directors and staff (Wu Zhong and Wuhu regions), senior prison staff and leading Chinese scholars in torture prevention (Renmin University); and discussions and interviews with the author of this research, who participated as an external expert.

to harassment or damage their professional career trajectory.[735] Further, few detainees get any access to a lawyer for various reasons including cost, hindered access or a lack of awareness of this right, and around 70% of detainees are unrepresented at criminal trial.[736] According to Mr. Zhang Qingsong, a leading defence lawyer from the Shangquan Law Firm in Beijing, there are no official national statistics, but some lawyers and justice bureaus estimate that the number of cases in which defence lawyers are active in China is about 20%.[737]

Even if cases do reach the Courts, and few do, international jurisprudence has shed light on the questionable independence of the judiciary, which itself hinders the number of violations of police torture and other ill-treatment found and published.[738] Cases of torture and ill-treatment in initial police custody and in police detention (KSS) do exist and have been recognised as such by the courts in China. Many more have been documented by IHRL bodies, civil society and in the international media.[739] These occurred both before the revisions to the CPL came into force in late 2012 and thereafter. These cases include:

(i) Torture and ill-treatment in police custody: case examples of national courts' findings of torture or reasoning on the likelihood of torture

The following are two of the most prominent cases that have reached the Chinese national courts and have led to judgments on findings of police abuse. These are examined below with the objective of showing that cases of torture and other ill-treatment in police custody do exist and have been recognised as such by the courts in China.

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735 UNCAT Committee Concluding Observations on China (2015); CAT Committee List of Issues submitted (2015); UN SRT in Follow-Up on China in 2010/2011, Amnesty International, 'No End in Sight' (2015); Human Rights Watch, 'Tiger Chair and Cell Bosses' (2015), Other shadow reports submitted to the CAT Committee, November 2015; the Guardian, ''Emaciated, unrecognisable': China releases human rights lawyer from custody', 10 May 2017.

736 Interview with Mr. Zhang Qingsong, a leading defence lawyer from the Shangquan Law Firm in Beijing, by China Daily (Hong Kong), 15 February 2017; Pils, 'Disappearing' China's human rights lawyers' (2013).

737 China Daily (Hong Kong), 15 February 2017.

738 See analysis in Thesis Chapter 4 (judiciary).

739 See, *inter alia*, reports in: The Guardian, 'Gao Zhisheng: persecuted Chinese lawyer smuggles out book of abuses 'Human rights defender', 15 June 2016; The Guardian, 'Torture still routine in Chinese jails', 13 May 2015; Human Rights Watch report, '*Tiger Chair and Cell Bosses*' (2015)(reports of detainees being electrocuted, shackled to chairs, starved and deprived of sleep to elicit confessions); The Guardian, 'Four Chinese rights lawyers allege torture by police - Lawyers were investigating detention Centre in Jiansanjiang when they say they were seized and beaten', 15 April 2014; see also Section (iii) below for more documented cases.

In July 2002, Li Jiuming was held in initial police custody in Hebei on suspicion of murder and was taken by PSB officers[740] to the No. 1 Criminal Police Team of Tangshan PSB for interrogation. Li's fingers and toes were tied, and electric shocks were repeatedly administered. He was coerced into signing a fabricated confession (which he subsequently retracted). He was then transferred to another police custody facility in Yutian and interrogated again for seven days, which resulted in a confession that led to a suspended death penalty sentence for murder. Later, another man confessed to murder and Li's case was retried in August 2004 and he was acquitted. In December 2004, the provincial Procuratorate brought cases against the police officers involved, and the court of Hebei found the PSB officials guilty of inflicting excessive force to extract confessions. They were sentenced to two years' imprisonment.[741]

Given the reforms in 2012, one might expect the situation to have improved. Nevertheless, there are various examples of the national and district Courts findings of cases of torture or ill-treatment post-2012. For example, in March 2013, Liang Shiquan was detained by the PSB / police in Harbin on suspicion of drug trafficking and died in initial police custody after police administered electric shocks and hit him in the face and head with a shoe.[742] Liang's case, as well as seven other cases involving alleged ill-treatment by the PSB was investigated by the local Procuratorate and taken to court. The Daowai District People's court found three police officers and four police assistants guilty of extracting confessions by means of torture[743] and sentenced them to prison terms of between 12 and 30 months. According to the court judgment, one of the other detainees detained in the same PSB station at the same time on the same drug trafficking charges as Liang Shiquan, Mr. Zhai, had had mustard oil poured into his nose during the PSB interrogation and had been tied to a metal stool and subjected to electric shocks.

Other cases of torture during police interrogation have been cited by the Chinese authorities, in China's State Party report to the UNCAT. While the references were made to illustrate the

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740 PSB officials Wang Jianjun and Yang Ce, along with PSB colleagues.

741 Three cases of "severe infringement of human rights" issued by the Supreme Procuratorate, 27 July 2005; see also Chen Weidong and T. Spronken, '*A Three-Way approach to Combatting Torture in China'*, p. 67.

742 http://www.china.org.cn/china/2014-09/12/content_33491417.htm [accessed 10 January 2015].

743 At that point was a crime stipulated in the revised CPL (Article 54) (in force as of 1 March 2013); there was no murder charge according to reports as the body had been immediately cremated; prosecutors however raise this in the trial and the official responsible for this was found guilty of misconduct; http://www.Shuanghaidaily.com/national/7-jailed-for-fatal-torture-of-criminal-suspect/shdaily.shtml.

operation of the new provisions in the CPL of exclusion of illegal evidence derived from torture, of relevance here is that they give the court's views on the likelihood of police torture. These include the following cases, from 2012 onwards (i.e., after the CPL reforms), where the Chinese courts have considered that investigator's evidence was inadmissible due to the probability of torture, in line with Article 53 of the CPL:

The case of Tang Qihua: "the defendant Tang Qihua was arrested as a suspect of the crime of robbery in 2012. In the hearing, Tang Qihua said his confession during the criminal investigation was extorted by torture […]. The court considers [that, due to] the recording of skin wounds on the defendant's legs in the physical examination form upon his arrival at the detention house, the statement on the non-existence of extorting confession by torture provided by the public security organ cannot act as the single proof for lawful collection of evidence. Therefore, the existence of unlawful obtainment of confession is not beyond reasonable doubt, the confession of Tang Qihua during the criminal investigation is excluded."[sic].

The case of Xiang Fazhi: the defendant Xiang Fazhi was arrested as a suspect of the crime of offering bribes in 2013. In the hearing, Xiang Fazhi said that the confessions made in the criminal investigation are false, and are made due to extortion by torture, extended interrogation, hints and inducement. The court thinks, as the procuratorial organ fails to provide sufficient evidences to prove the legality of Xiang Fazhi's confessions before the hearing, such confessions cannot serve as the basis of conviction.' [sic][744]

Moreover, the Chinese authorities have specified that there have been more than 1,000 cases opened of torture and ill-treatment since 2008, nationwide.[745] Nonetheless, on analysis of provided breakdown of statistics, these resulted in only around 500 prosecutions for torture and other ill-treatment and fewer than half of those resulted in convictions.

744 China State Party Report to the CAT Committee (2014).
745 See China State Report to the CAT Committee (2014) and Response to List of Issues (2015).

(ii) IHRL findings and case examples of torture/ill-treatment of criminal and administrative suspects in initial police custody

The CAT Committee, in its two last periodic reports and concluding observations on China (2008 and 2015 respectively),[746] has raised significant concerns "about reports of abuses in custody, including the high number of deaths, possibly related to torture or ill-treatment, and about the lack of investigation into these abuses and deaths in custody."[747] The Committee recommended that China "should take prompt measures to ensure that all instances of deaths in custody are independently investigated and that those responsible for such deaths resulting from torture, ill-treatment or wilful negligence are prosecuted."[748] The CAT Committee has also raised a number of specific concerns on cases where it received credible allegations of torture and other ill-treatment of detainees by the police during interrogation in initial custody, which had not been fully or effectively investigated. These included the cases of Gan Jinhua, Yang Chunlin, Fan Qihang, Liu Ping, among others. Both Gan Jinhua and Fan Qihang, who had been sentenced to the death penalty in 2010 and 2012 respectively, were executed despite including allegations in their appeals that their confessions had been coerced.[749] The Chinese authorities have not (publicly) replied on the latter two cases in their response the CAT Committee's List of Issues nor in their State Report to the CAT Committee on the outcome or status of these cases. The authorities have, however, responded on the cases of Yang Chunli and Liu Ping. In the case of Liu, the authorities specified that the court had required explanations from the procurators regarding the allegations of torture (head wounds sustained during interrogation). The Court found the defendant's allegations were too ambiguous to be credible, and no detainee complaint had been made on arrival at the detention centre and no injuries had been recorded on the medical screening entrance forms.[750] As regards Yang Chunli, the Chinese authorities stated that "as Yang had made no complaint during his appeal, there was no reason for an investigation."[751]

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746 The CAT Committee 2015 Concluding Observations reports on China, p. 4, which echoes its previous concerns highlighted in the 2008 periodic report on China.
747 Ibid, p. 4.
748 Ibid.
749 The CAT Committee List of Issues to China, paras. 33(b) and (c) (2015).
750 The CAT Committee List of Issues submitted to the Chinese Government, para 33 (2015).
751 Ibid, para. 33.

The UN SRT, during his 2005 mission to China emphasised his serious concern that despite some reforms then underway in China to counter torture, torture still remained widespread in China.[752] The UN SRT repeated similar concerns in 2010, when examining China (among other countries) jointly with three other UN Special Procedures in the context of counter-terrorism, [753] as well as in 2011 in the UN SRT's Follow-up Report to his predecessor's 2005 report on China.[754] The UN SRT raised a number of cases of alleged torture and other ill-treatment in police custody, in particular during interrogations, derived from interviews during his and his predecessors' visits, which he considered as strong indications of cases of ill-treatment and torture. He pointed out that he had received more than 1,160 cases over a five-year period[755] from individuals and third parties about torture or ill-treatment allegations in Chinese detention. He stressed that this number was *not* indicative of the true scale of the problem, but was rather the 'tip of the iceberg'.[756] These allegations included, *inter alia*, Liu Xinjian, who petitioned the Communist People's Congress about the illegal demolition of her home and alleged abuse by village security brigade personnel. [Liu] "was subsequently detained on 16 February 2003 by police officers of Qibao Police Station, beaten by personnel with fists and feet, taken for a psychiatric evaluation, and held there for two days before being transferred to the Minghang Detention Centre. On 20 February, she was transferred to the Ti Lan Qiao Prison Hospital, restrained to a bed for five days and sedated, before being taken to the Minghang Psychiatric Hospital."[757]

The UN SRT noted in 2011, in a Follow-up Report on the 2005 China visit findings and recommendations, that confessions obtained under torture were still happening in China and was disappointed at the lack of response and progress that the Chinese authorities had made on many of the issues raised in the 2005 visit, which remained pertinent in 2011. In particular, the UN SRT "remains concerned about the reported cases of confessions obtained under torture […][and] the reports of excessive use and length of pre-trial detention, the lack of guarantees to challenge the

752 The UN SRT 2005 report on China.
753 Joint Study on Global Practices in relation to Secret Detention in the context of Countering Terrorism of the then Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; the then UN SRT, Manfred Nowak; the WGAD, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances, Jeremy Sarkin, A/HRC/13/42, 19 February 2010.
754 UN SRT, Mr. J. Mendez, Follow-Up Report on China, 2011 A/HRC/16/52/Add.2 .
755 From 2000 to 2005, as cited in the UN SRT 2005 report on China.
756 Ibid.
757 Ibid, p.42.

lawfulness of detention and the lack of the guarantee of the right to fair trial. He reiterates that the period of holding detainees in police custody should not exceed 48 hours, and that no detainee should be subject to unsupervised contact with investigators."[758]

The Working Group on Arbitrary Detention, in its jurisprudence, has also cited numerous allegations of ill-treatment in Chinese police custody, albeit as part of the contextual background that led, amongst other factors, to findings of arbitrary detention. One such case is the case of Ms. Gulmina Imin, where the WGAD references her attempts "to address the court with regard to the torture and ill-treatment she had experienced during her time in police custody." The WGAD also cites that [Ms Imin] "indicated that she and other detainees had been coerced into signing a document without knowing its content"[759]. While not specifically concluding that these persons were tortured, the WGAD did take account of these torture allegations as an element in its reasoning for its conclusions on arbitrary detention.[760]

(iii) Selected examples of allegations of torture in initial police custody and detention documented by civil society (scholars and specialist NGOs)

Numerous allegations of recent, post-2012, police torture in initial custody or in pre-trial detention (the KSS) are evident in national and international scholarly analysis and in Shadow Reports submitted by expert national and international civil society organisations in the run-up to China's UNCAT review in 2015. [761] These include:

> *"Beijing lawyer Yu Wensheng, was tortured or otherwise ill-treated during his detention in 2014 at the Daxing Detention Centre in Beijing, in order to get him to confess to having encouraged the Hong Kong pro-democracy protests. During the 99 days of detention without trial, in which he was housed together*

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758 UN SRT 2011, J. Mendez, Follow-Up Report on China, 2011 A/HRC/16/52/Add.2, p.50.

759 WGAD Communication No. 29/2012 (China), Communication addressed to the Government on 21 March 2012, Concerning Gulmira Imin.

760 Ibid, Conclusions.

761 See He Jiahong and He Ran, 'Wrongful convictions and torture confessions: empirical studies in mainland China', *Comparative Perspectives on Criminal Justice in China* (2013); Belkin, 'China's tortuous path towards ending torture in criminal investigations' (2013), MacBean, 'China's pre-trial detention centres: challenges and opportunities for reform' (2016), Statement of Teng Biao, Hearing of the Congressional-Executive Commission on China "China's pervasive use of torture", 14 April 2016; Shadow Reports by the Rights Practice, Amnesty International, Human Rights Watch to the CAT Committee in preparation for its 5th reporting cycle on China, CAT Committee Concluding Observations on China (2015), among others.

> *with death-row prisoners, Yu was questioned for 15 to 16 hours every day while seated on a rigid restraint chair, handcuffed for long hours and deprived of sleep. Prominent Uighur scholar Ilham Tohti, was not given food for two 10-day periods and had his feet placed in shackles for more than 20 days in 2014 at the Xinjiang Uighur Autonomous Region (XUAR) Detention Centre in Urumqi, the provincial capital of the XUAR. Detained for supporting the 2014 Hong Kong pro-democracy protests, Wang Zang was interrogated non-stop for five days, during which he was kicked, beaten and prohibited from sleeping when he was detained at Tongzhou Detention Centre in Beijing."*[762]

Various types of abuse derived from recent allegations against the police include: "being hit with hands, police batons, electric batons, hammers, iron bars; kicking; spraying with pain-inducing substances including chilli [and mustard] oil (poured into one's nose or onto one's genitals); exposure to sustained cold (cold water sprayed on a naked suspect in a sub-zero temperature room); blinding with a hot, white light; forcing individuals to maintain a stress position for prolonged periods; deprivation of sleep, water, and food."[763]

These and numerous other alleged cases[764] of police abuse in initial PSB custody have been documented by civil society organisations,[765] by other experts and scholars,[766] by international – and increasingly – national media.[767] Many of these involve the use of the so-called "tiger bench",

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762 Interviews conducted by Amnesty International, evidence submitted to the CAT Committee in 2015 in advance of the 5th periodic reporting cycle on China, December 2015.

763 See Human Rights Watch report, '*Tiger Chair and Cell Bosses*' (2015).

764 For example, 'Chinese Poet 'Tortured,' Suffers Heart Attack in Police Custody: Lawyer': "Beijing poet and political activist who posted a performance art "selfie" in support of Hong Kong's pro-democracy movement has been subjected to torture and mistreatment while in police detention, his lawyer said on Friday [26/12/2014]. Wang Zang is being held in Beijing's No. 1 Detention Centre on suspicion of "picking quarrels and stirring up trouble," after being taken away by police on Oct. 1. His detention came after he posted a photo of himself in gesture in support of Hong Kong's Occupy Central rallies. According to his lawyer Sui Muqing, Wang was held in a padded cell for the first five days of his detention and subjected to intense stress, leading to a heart attack. "He was deprived of sleep and forced to remain standing for four nights in a row, which led to his heart attack," Sui told RFA, adding: "He had never been diagnosed with heart disease up until that point."", Radio Free Asia, 26 December 2014; In December 2011, Xue Jinbo, died in a police cell in Wukan, Guangdong. International media and China's own People's Daily, cited the fact that Chinese citizens openly are doubting the reason of death on the official given reason of grounds of a natural heart attack; 'It is widely believed in China he was beaten to death during PSB interrogation'; cited in Chen Weidong, '*Three Approaches to Combatting Torture in China'* (2012), p. 116.

765 Amnesty International, '*No End in Sight*' (2015); HRW '*Tiger Chair and Cell Bosses*' (2015); Shadow Reports to the CAT Committee (2015).

766 See Statements M. Lewis and T. Biao, Hearing of the Congressional-Executive Commission on China "China's pervasive use of torture", (2016); He Jiahong and He Ran, 'Wrongful convictions and torture confessions: empirical studies in mainland China', *Comparative Perspectives on Criminal Justice in China* (2013); Belkin, 'China's tortuous path towards ending torture in criminal investigations' (2013).

767 See, for example, in February 2009, the "hide and seek case" the reporting of the death of Li Qiaoming, a criminal suspect in Yunnan province, who died in KSS custody from fatal brain trauma.

whereby "the individual's legs are tightly bound to a bench, and bricks are gradually added under the victim's feet, forcing the legs to bend backwards"[768] or the 'hanging restraint chair' ('*diaodiaoyi*'), whereby "a person seated in this restraint chair will be unable to lean back or have his/her feet rest on the ground. The chest will be bound to a board while the hands are cuffed, rendering the entire body immobile."[769] The Chinese authorities have not denied the use of these chairs, on the contrary, they have explicitly authorised their use as a means of restraint for detainee's 'self-protection' or for 'protection from harm to others'.[770] There are widespread concerns about the use (and abuse) of these chairs both during police interrogations and more generally. The CAT Committee "expresses concern at the State party's explanation that the use of the so-called "interrogation chair" is justified 'as a protective measure to prevent suspects from escaping, committing self-injury or attacking personnel', which is highly improbable during an interrogation."[771]

The Chinese authorities maintain that torture has reduced; one area that has partly contributed to this, according to Renmin University Professor Cheng Lei, is that "now, [after the 2012 CPL reforms], these temporary releases [from KSSs] must first get the signed approval of the principal person in charge at the local public security bureau, and [the law] requires that detainees be returned the same day and prohibits them from being held overnight. Moreover, [detainees] must be given physical examinations before they leave and upon return to the facility."[772] Yet, Cheng Lei notes that, despite these safeguards, ill-treatment and (to a lesser extent) torture still occurs. It has adapted so that "coercion of confessions through torture usually takes place prior to arrival at the detention centre or during temporary transfers outside the detention facility." This assertion is widely supported, by many civil society bodies,[773] scholars[774] and even members of the Chinese procuratorate. They argue that the police have adapted their locations and methods to coerce

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768 Amnesty International, '*No End in Sight*' (2015).

769 Amnesty International, '*No End in Sight*' (2015)

770 The Chinese delegation's explanation of these, raised at the CAT Committee meeting on the Concluding Observations on China, in Geneva in December 2015.

771 The CAT Committee Concluding Observations on China, 2015, para. 26.

772 Cheng Lei interview with Di Hua NGO, cited in 'Is the Detention Centre Law Enough to Prevent Police Abuse?', *Di Hua Human Rights Journal*, 2 July 2014; Human Rights Watch, 'Tiger Chair and Cell bosses' (2015).

773 See Shadow Reports submitted to the CAT Committee by Amnesty International, the Rights Practice, Human Rights Watch in 2015.

774 Associate Professor of Renmin University, Cheng Lei.

information from detained suspects. Police now appear to shift torture and ill-treatment to other areas with less strict monitoring including police stations, hostels and drug rehabilitation centres they control.[775] Procurator Wu Yanwu supports this view and considers that "the period between when suspects are apprehended and when they are taken to a detention centre is a period with high incidence of torture." [776] Moreover, civil society bodies highlight that police have increasingly learnt to "administer beatings and other torture in ways that left few or no marks but still caused significant suffering" to ensure that as few a possible indications of torture are evident.[777]

China legal scholars and civil society bodies[778] point out that despite several years of reform torture persists: "police still torture criminal suspects to get them to confess to crimes and courts are convicting people who confessed under torture."[779] They argue that until detained suspects have adequate safeguards in practice, such as "lawyers at interrogations and other basic protections and until police are held accountable for abuse, these new measures [the 2012 reforms] are unlikely to eliminate routine torture."[780]

Many of the above torture and ill-treatment allegations have not been prosecuted at the local or national courts, nor raised at the international levels and there are various reasons for this including the lack of ready access to lawyers, costs of lawyers, detainees' limited awareness of nascent complaints mechanisms, limited faith in those mechanisms and fear of reprisals.

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775 Human Rights Watch, Shadow Report to the CAT November 2015; The Guardian, 'Torture still routine in Chinese jails' (May 2015), Human Rights Watch, '*Tiger Chair and Cell Bosses*' (2015).

776 Human Rights Watch Report to CAT Committee (November 2015) citing Wu Yanwu.

777 See Amnesty International, '*No End in Sight*' (2015); HRW '*Tiger Chair & Cell Bosses*' (2015).

778 See Statements M. Lewis and T. Biao, Hearing of the Congressional-Executive Commission on China "China's pervasive use of torture", (2016); He Jiahong and He Ran, 'Wrongful convictions and torture confessions: empirical studies in mainland China' (2013); Belkin, 'China's tortuous path towards ending torture in criminal investigations' (2013); Belkin, Lubman, McConville, Pils, *Comparative Perspectives on Criminal Justice in China* (2013).

779 S. Richardson, China director at Human Rights Watch, testimony at US CECC Congressional Hearing (14 April 2016).

780 See S. Richardson, Testimony at US CECC Congressional Hearing (14 April 2016); Human Rights Watch, '*Tiger Chair & Cell Bosses*' (2015); Amnesty International, '*No End in Sight*' (2015); the Rights Practice, CAT Committee Shadow Report (November 2015), among others.

3.1.3 Summary: Current nature of torture in police custody and detention within the criminal justice system

The national authorities, procurators and national scholars point to a reduced level of torture cases in previously problematic police-run KSS, despite the limitations apparent in the evidence to support this. Yet, they acknowledge that ill-treatment in particular remains a problem in initial police custody.[781] IHRL mechanisms, international China law scholars and civil society experts generally argue that while torture and ill-treatment may have slightly decreased since the previous decade, numerous allegations of both torture and ill-treatment still are reported and many argue that they are still 'pervasive'. The number of actual cases going through the courts remains relatively low, but, for example, under-reporting and deficiencies in reporting mechanisms, among other factors (Chapter 4), can significantly skew the overall picture.

An overall trend in the nature of the current cases or allegations of torture and ill-treatment emanating from police detention can be extrapolated, namely, the element of coercion of confessions by the police or investigating procurators. This, many argue, it still an embedded and systemic practice in police interrogation, despite reforms. It is evident to such as extent that national and international legal scholars,[782] IHRL bodies[783] and civil society bodies[784] have identified that there is still a *culture* of over-reliance on confessions.

The revisions in 2012 were designed to establish protective safeguards to stem the culture of confession coercion but, in nearly every instance, their effectiveness appears diluted in practice. Thus, torture and ill-treatment post-2012 still remains a credible risk in police custody and detention. While it may be still relatively early to judge the reform measures taken in 2012 to strengthen detainee protections, sufficient time has now passed to be able to assess the law and

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781 Author's interviews with Scholar Cheng Lei and Procurator Hu, 22 to 24 November 2016, Wuhu, China.

782 Statements by M. Lewis and T. Biao, Hearing of the Congressional-Executive Commission on China "China's pervasive use of torture", (2016); He Jiahong and He Ran, 'Wrongful convictions and torture confessions: empirical studies in mainland China' (2013); Belkin, 'China's tortuous path towards ending torture in criminal investigations' (2013); Belkin, Lubman, McConville, Pils, *Comparative Perspectives on Criminal Justice in China* (2013).

783 See CAT Committee Concluding Observations on China (2015) and UN SRT Follow up on visit to China in 2005, (2011); Joint Study on Global Practices in relation to Secret Detention In The Context Of Countering Terrorism Of The Special Rapporteur On The Promotion And Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin; the UN SRT, Manfred Nowak; the WGAD, Shaheen Sardar Ali; and the Working Group On Enforced Or Involuntary Disappearances represented by its Chair, Jeremy Sarkin, A/HRC/13/42, 19 February 2010.

784 See Amnesty International, '*No End in Sight*' (2015); Human Rights Watch, '*Tiger Chair & Cell Bosses*' (2015); see also the various CAT Committee Shadow Reports submitted from August to November 2015 to the CAT Committee on this subject.

early practice. Moreover, it is not too early to identify various indications of implementation deficiencies, where the safeguards are known but are ignored in practice (i.e. merely ‘paper tigers’). These types of procedural and regulation protection gaps, as well as implementation gaps (gaps between law and practice), may not disappear over time with better legal regulation or implementation: they are indications of ingrained and deep-seated problems.

3.2 Justice processes external to the criminal law: effectiveness of legal safeguards

This section examines the effectiveness of existing safeguards, as well as the current nature and scope of torture and other ill-treatment allegations and cases, in the contexts of the punitive, wider administrative and Party justice processes.[785]

3.2.1 Punitive administrative detention: administrative offences

Little had been published nationally and internationally specifically about administrative detention for administrative punishments for public security violations pursuant to the PSAPL. The focus has tended to be on the RETL process and facilities.[786] In addition, interviews with national scholars, procurators and a member of senior management of a KSS[787] show that the punitive administrative detention process has not been subject to the same level of attention and scope of reform as the criminal justice process in terms of regulatory change, development of preventive measures or external scrutiny. China law scholars support this view.[788]

Places where the sanction of administrative detention are generally undertaken are police stations, interim police custody or KSSs. KSSs are used primarily for criminal suspects held on suspicion of violations of grounds of the CPL. They can, however, also hold some short-term prisoners (less than three months criminally-sentenced prisoners), those sanctioned to punitive administrative detention (PAD), immigration detainees or some death penalty cases.

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785 The types of detention focused upon here is punitive administrative detention contrary to the administrative justice laws, wider administrative detention, contrary to the substance abuse laws, and Party detention for investigation and discipline contrary to CCP discipline norms, as described in Chapter 2.

786 See UPR on China, October 2013; CAT Committee Concluding Observations on China of 2008 and 2015; UN SRT on visit to China 2005 and Follow-up in 2010/11. For scholarly analysis of RETL, its origins, purpose, legal framework, justification and reform, see Biddulph, *Legal Reform and Administrative Detention Powers in China* (2007); *Comparative Perspectives on Criminal Justice in China*, Part V (2013); and 'What to make of the abolition of re-education through labour?', *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); Xiaorong Li Statement for the Congressional-Executive Commission on China Roundtable on "The End of Re-education Through Labor? Recent Developments and Prospects for Reform: 'The End of Re-education Through Labor? Recent Developments and Prospects for Reform', Washington, 9 May 2013; Veron Mei-Ying Hung, 'Improving Human Rights in China: Should Re-Education Through Labor Be Abolished?'; I. Belkin, Statement for the Congressional-Executive Commission on China Roundtable on "The End of Re-education Through Labor? Recent Developments and Prospects for Reform" (2013).

787 Author's interview with Ms. Z., senior staff member of a KSS in City W., (*name anonymised*) 24 November 2016, China.

788 Biddulph, *Legal Reform and Administrative Detention Powers in China* (2007); *Comparative Perspectives on Criminal Justice in China*, Part V (2013); and 'What to make of the abolition of re-education through labour?', *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016); Xiaorong Li Statement for the Congressional-Executive Commission on China Roundtable on "The End of Re-education Through Labor? Recent Developments and Prospects for Reform; Cheng Lei and G. de Jonge, *Three Approaches to Combatting Torture in China*, (2012).

The nature of allegations of incidents of torture or ill-treatment by the PSB in police initial custody and detention (KSS) has been examined above. The risks remain the same for administrative suspects as for criminal suspects. The difference is that in addition to the risks of coercion with the objective to *extract information* during interrogation and the period of initial custody during an investigation, the punitive administrative detention sanction operates in an environment that is high-risk for ill-treatment, or even torture, meted out as a *punishment*.

The CAT Committee has raised its concerns at numerous and consistent allegations of torture and ill-treatment in the form of punishment during the administrative justice process and detention sanction pursuant to the PSAPL. It highlighted allegations of torture or other ill-treatment of lawyers, allegedly in retaliation for defending activists, dissidents or petitioners. These included the cases of 'Teng Biao[789] […], arrested on 19 February 2011 and allegedly ill-treated during detention; Yu Wensheng, detained in October 2014 and allegedly tortured during detention; Wang Yonghang, detained on 16 June 2009 and allegedly ill-treated in detention; and four human rights lawyers, who complained on 25 March 2014 of being arbitrarily detained, assaulted and tortured by police after demanding to visit their clients held in an education centre in the city of Jiansanjiang.'[790]

The Chinese authorities responded to these concerns, underlining that "after inquiry, […] the public security organ did not take coercive measures on Teng Biao, and there is no so-called "torture." Yu Wensheng and Wang Yonghang were not ill-treated. On March 22, 2014, Heilongjiang Jiansanjiang Agricultural Reclamation Public Security Bureau imposed a *five-day administrative detention sanction* on Zhang Junjie in accordance with law because he used cultic activities to disturb the social order, [and] imposed a *fifteen-day administrative detention sanction* on Jiang Tianyong, Wang Cheng and Tang Jitian, and imposed a fine of 1,000 Yuan. The licences of Jiang Tianyong and Wang Cheng to practice law as lawyers were taken back and revoked by the original verifying and issuing authorities of the places where they practices law. Tang Jitian [had] his licence to practice law revoked due to the reason of "disrupting the court order or

789 Former Lecturer of the Law School of China University of Political Science and Law and a visiting scholar to Harvard University.

790 CAT Committee List of Issues sent to China, 2015.

interfering with the normal conduct of litigation." Zhang Junjie still practices law as a lawyer at present. There were no so-called "assault and torture" during the detention of these persons."[sic][791]

The CAT Committee has also raised concerns about the quality of the investigations into these, and other, allegations of torture or ill-treatment. Of relevance here is that allegations of ill-treatment and torture can be seen in the context of reprisals or punishment for an action, rather than[792] as a method to extract information and/or confessions, in this context. In the above cases, the alleged torture or other ill-treatment is as *de facto* punishment for lawyers acting in defence of their clients.

Linked to the risk of torture or other ill-treatment as a punishment during administrative detention for certain actions or views, are the overly broad and overly ambiguous administrative offences, which lack legal specificity and certainty, according to IHRL mechanisms and scholars. The loose definitions of the grounds of detention, according to the CAT Committee, the UN SRT and members of international and national civil society,[793] allow for administrative penalties to be used as 'catch-all' offences to *de facto* punish dissenters to the status quo.

Yet, this is not only pertinent to the PSAPL sphere, the criminal law also suffers from various 'catch-all' offences, such as 'creating a public disturbance by gathering a crowd' and 'inciting illegal assembly'.[794] Chinese scholarly debate[795] has recently highlighted their concerns about the almost identical ground to that in the PSAPL of 'creating a serious disturbance' contained in Article 293 of the CPL. This provision, in their view, has become a 'pocket crime'. By this they mean an overly vague and non-defined crime that can become open to abuse by virtue of its lack of specificity. Various leading China legal scholars[796] have noted that the charge of 'creating a

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791 China State Party Response to the CAT List of Issues, 2015.

792 Or, in some cases, in addition to coercion to extract information and/or confessions.

793 See the CAT Committee Concluding Observations on China (2015), paras 36 and 37; UN SRT 2005 Report on China, and 2011 Follow-up examination of China, p. 50-65; Xiaorong Li, CECC Roundtable 'The End of Re-education Through Labour? Recent Developments and Prospects for Reform', (2013); Shadow Reports from Amnesty International and Human Rights Watch to the CAT Committee, November 2015.

794 UN SRT Follow-up examination of China (2011).

795 Zhang Qianfan, 'Don't Let "Creating a Serious Disturbance" Become a "Pocket Crime"', 5 February 2015; Yiyi Lu, 'Pushing Politics: Why China is Supercharging Dissident Trials', 12 August 2016, China Real-time, Wall Street Journal, among others.

796 He Weifang, *In the Name of Justice: Striving for the Rule of Law in China*, (2012); Yiyi Lu, 'Pushing Politics: Why China is Supercharging Dissident Trials', 12 August 2016, China Real time, Wall Street Journal; E. Pils, 'China's Human Rights Lawyers: Advocacy and Resistance, *Routledge Research in Human Rights Law*, 1st Edition, December 2014.

serious disturbance' […] has increasingly been applied in cases involving speech by citizens. Recent international criticism has been levelled at the detention of three women protesting about violence against women, who were detained on generic public disorder offences pursuant to the Administrative Penalties Laws for *de facto* reasons of peaceful protest[797].

While these 'pocket crimes' or 'pocket administrative offences' can be seen in both the administrative and criminal justice spheres, the CPL has been comparatively 'cleaned up' since 2012 in this regard. This CPL now contains fewer ill-defined offences than the PSAPL.[798] These grounds can still be seen in multiple parts of the PSAPL, despite its reform in 2012. Some illustrations of this can be seen in the following examples. Article 27 of the PSAPL stipulates:

> "*Anyone who commits any of the following acts may be detained for not less than 10 days but not more than 15 days, […]* (有下列行为之一的，处十日以上十五日以下拘留，可以并处一千元以下罚款):
>
> > *(1) Organizing, instigating, intimidating, inducing or inciting any other person to carry out activities of any cult or superstitious sect or secret society, or disturbing the social order or impairing the health of any other person by using any cult, or superstitious sect or secret society, or superstitious activity; or*（(一）组织、教唆、胁迫、诱骗、煽动他人从事邪教、会道门活动或者利用邪教、会道门、迷信活动，扰乱社会秩序、损害他人身体健康的)；

[797] The Guardian, 'Five Chinese feminists held over International Women's Day plans' and 'Activists are being criminally detained after reportedly planning to distribute stickers with slogans highlighting sexual harassment', 12 March 2015.

[798] See Thesis Chapter 2 for the extent of the reforms made to the CPL and criminal law sphere compared to the administrative justice sphere.

(2) Disturbing the social order or impairing the health of any other person in the name of any religion or Qigong. (（二）冒用宗教、气功名义进行扰乱社会秩序、损害他人身体健康活动的).”

Other Articles in the PSAPL that are also open-ended and lack legal precision and certainty include: Article 54 (new draft Article 69)[799], *persons engaging in activities without a licence* [issued by the PSB] (without specific definition of the activity) *can be detained for between 10 to 15 days and fined*; Article 55 (new draft Article 71) specifies that *persons who incite or organise illegal gatherings, parades or demonstrations can be detained for 10 to 15 days and fined*.

The case of Li Weiguo illustrates the concern about ‘pocket crimes’ or ‘pocket administrative offences’: a court in Guangzhou addressed a complaint submitted by Li Weiguo (李维国) about his punishment ordered by the PSB, for inviting people, in May 2013, to witness his delivery of applications to police authorities seeking permission to hold a march and a candlelight vigil to mark the anniversary of the June Fourth crackdown on the 1989 Democracy Movement .[800] On 23rd May 2013, police from the Haizhu District Sub-Branch of the Guangzhou Public Security Bureau placed Li under a 15-day administrative detention for “inciting illegal assembly.” In August 2013, Li filed a complaint at the Guangzhou Municipal Haizhu District People's Court against the police for deprivation of liberty and violation of citizens' constitutional right to freedom of assembly. The court initially refused to hear the case, but was ordered to do so by the Guangzhou Municipal Intermediate People’s Court in its 29 December 2013 ruling on an appeal filed by Li. Later the Haizhu District People's Court ruled that the information Li posted online to invite the public to observe his delivery of the applications on 22 May — where two spectators were present — constituted ‘inciting illegal assembly’, and that the police acted in accordance with the law in subjecting Li to punishment. The court cites Article 55 of the Law on Penalties for

799 Although not identical, the 2017 draft revision to the PSAPL is similar in substance to the equivalent current PSAPL Article in this respect.

800 Human Rights in China (HRIC), ‘Court Upholds Punishment for “Inciting Illegal Assembling” for June Fourth Commemoration Applicant’, 22 January 2014.

Administration of Public Security, which states that "*A person who incites or engineers an illegal gathering, parade or demonstration and refuses to listen to dissuasions shall be detained for not fewer than 10 days but not more than 15 days*"[801]. Chinese civil society bodies have voiced their concerns that the grounds of administrative penalties are so vague and lack judicial oversight that they can facilitate the abuse of certain fundamental rights – such as freedom of expression. This would most likely be considered a form of arbitrary detention (and similar cases have been)[802] contrary to international law.[803]

While China has not ratified the ICCPR, which includes the prohibition of arbitrary detention, it is still bound to not arbitrarily detain people, along the following principles. First, it has signed the ICCPR, and thus needs to ensure it does not act contrary to the spirit of the Convention[804] and the treaty prohibition on arbitrary detention (ICCPR Article 9(1)). Second, the principle of the prohibition of arbitrary detention has become widely considered as a *jus cogens* norm of international law, and is thus applicable to all States regardless of any treaty ratifications.[805] Equally, as regards the process involved with deprivation of liberty and the protection against arbitrary procedure, in the context of Chinese PAD and the context of the prevention of torture, there is a lack of preventive safeguards against torture, including some key guarantees needed under international law including third party notification / the prohibition of incommunicado and the right to *habeas corpus*. In this respect, the safeguards against torture are the *same* safeguards as those against arbitrary detention, which protect against arbitrary procedure. Moreover, the risk of retaliation or punishment remains especially pertinent in a more opaque detention process, with

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801 Ibid.

802 See, for example, WGAD jurisprudence on the case of Gulmira Imin and the WGAD ruling that the grounds of detention were *de facto* reasons of curbing freedom of expression and belief, and thus were considered arbitrary.

803 The UDHR, the ICCPR and the regional human rights treaties all protect the right to liberty of the person and, additionally, protect persons from arbitrary arrest or detention. States involved in the drafting process of the ICCPR Article 9 agreed certain underpinning characteristics and 'stressed that [the] meaning [of "arbitrary"] went beyond "unlawful" and contained elements of injustice, unpredictability, unreasonableness, capriciousness and disproportionality, as well as the Anglo-American principle of the due process of law' (M. Nowak, *The United Nations Convention against Torture: A Commentary*, p.225); See also HRC General Comment No. 35; This view is also reflected in regional jurisprudence (see ECtHR *Saadi v. United Kingdom* (Application no. 13229/03), 29 January 2008)).

804 A strict interpretation in accordance with the ordinary meaning should be given to provisions in their context, as required by the Vienna Convention on the Laws of Treaties, Article 31, and the *Tehran Hostage* case, 24 May 1980, para. 91, http://www.icj-cij.org/docket/files/64/6291.pdf.

805 The prohibition of arbitrary detention has been considered by the HRC (General Comment 29, para. 11), and the WGAD, to go beyond treaty law into the realm of a peremptory norm under international law. They consider that at the very least, it falls under a general rule of international law (see WGAD 2012 case of Gulmira Imin, for example, and its established practice in its opinions on China No. 29/2010, No. 15/2011, No. 16/2011 and No. 23/2011) and the established practice of the United Nations as expressed by the HRC in its General Comment No. 29 (2001) on States of Emergency, para. 11), and they qualify it as a *jus cogens*, and not subject to derogation (HRC General Comment 29, para.11).

fewer preventive safeguards and due process guarantees in place. This is illustrated in the 'opacity paradigm': in darker (i.e., closed and less transparent) spheres, the risk of torture and other ill-treatment is greater. This is the case with the PAD justice process. Thus, it risks being both arbitrary in its grounds and in its procedure and, intrinsically linked to this, a sphere in which there is a genuine risk of torture.

3.2.2 Compulsory Drug Rehabilitation process (CDR)

The CDR system affects a significant number of people; in 2000, UNAIDS estimated that half a million people are confined in such centres in China at any given time.[806] According to the authorities, this number has reduced, and the number detained in CDR facilities in China remains around 200,000.[807] There have been some minor reforms made to increase the regulation of this administrative process and detention type. Interviews with a senior staff member of a CDR facility indicate that there are national-level discussions underway examining the possibility of increasing procurator presence in CDR facilities.[808] The CDRs are often linked with nearby KSSs, share staff[809] and are seen as places of punitive re-education facilities run by the MPS, rather the health-care staff-led places of therapeutic support for those suffering from substance abuse and addiction. These issues manifest themselves, in practice, in the existence of numerous allegations of inhumane conditions and ill-treatment occurring in CDR facilities.[810] In short, the risk of torture or other ill-treatment in CDR facilities in China remains high.

IHRL bodies[811] and international and national civil society, have repeatedly accentuated their concerns about the risk of torture or other ill-treatment in China's CDR facilities. In 2012, twelve UN bodies[812] issued a Joint UN Statement for the closure of CDR facilities, and their replacement

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806 Biddulph, 'Rights in the new regime for treatment of drug dependency', *Comparative Perspectives on Criminal Justice in China* (2013).

807 Official statistics are 216,000 persons held in CDR facilities in 2012, cited in 'UN on Drug Detention: Ineffective. Illegal. Close it Down', March 12, 2012.

808 Author's interview: Ms Z., senior staff member at a KSS in City W. and who also has responsibilities at the linked CDR establishment next door.

809 Author's interviews with Ms Z., senior staff member at a KSS in City W., and with Procurator Hu, 24 November 2016, China.

810 Human Rights Initiative, Briefing No. 4, Human Rights and Drug Policy, Compulsory Drug Treatment, p. 2; Amnesty International, 'Changing the soup but not the medicine?": Abolishing re-education through labour in China' (December 2013).

811 The CAT Committee Concluding Observations on China (2008 and 2015) and the UN SRT Report on China (2005) and Follow- up (2011).

812 The UN entities that have signed the Joint Statement on Compulsory Drug Detention and Rehabilitation Centres are: International Labour Organisation (ILO); Office of the High Commissioner for Human Rights (OHCHR); United Nations Development Programme (UNDP); United Nations Educational, Scientific and Cultural Organisation (UNESCO); United

with voluntary, rights-based, evidence-informed programmes in the community.[813] The UN Joint Statement stresses that "the existence of CDR centres, which have been operating in many countries for the last 20 years, raises human rights issues and threatens the health of detainees, including through increased vulnerability to HIV and tuberculosis (TB) infection."[814]

Both the UN SRT[815] and the CAT Committee[816] have also raised concerns about ill-treatment allegations in Chinese CDR facilities. In particular, they criticise the lack of access to effective drug dependency treatment and alleged torture and other ill-treatment in coercive quarantine for drug rehabilitation. They have also raised concerns about due process issues.[817]

Scholars[818] and civil society bodies[819] report of 'abusive conditions' prevalent in many of China's compulsory drug detention centres, notwithstanding China's 2008 Anti-Drug Law that referred to drug users as "patients" and promised some legal protections for them. They point to issues in the law itself that gives the PSB widespread discretion to detain individuals suspected of drug use – without trial or judicial oversight. Civil society bodies have documented allegations of individuals who have been detained in Chinese drug detention centres who have been "routinely beaten, denied medical treatment, and forced to work up to 18 hours a day without pay."[820] One such report, documented by Amnesty International, is the case of Yu Zhenjie.[821] Yu was transferred to the Heilongjiang Provincial Enforced Drug RTL. Yu Zhenjie recounts her arrival at the CDR facility:

Nations Population Fund (UNFPA); United Nations High Commissioner for Refugees (UNHCR); United Nations Children's Fund (UNICEF); United Nations Office on Drugs and Crime (UNODC); United Nations Entity for Gender Equality and the Empowerment of Women (UN Women); World Food Programme (WFP); World Health Organisation (WHO); and Joint United Nations Programme on HIV/AIDS (UNAIDS); other IHRL bodies have also raised their concerns about CDR use in China specifically including the UN SRT in 2005 and 2011 and the UNCAT Committee in 2008.

813 Joint UN Statement Calls For The Closure Of Compulsory Drug Detention And Rehabilitation Centres, 9 March 2012.

814 Ibid.

815 UN SRT Report on China (2005) and Follow-up report (2011).

816 A/HRC/13/39/Add.6, para. 20 and p. 47; and CAT Committee, List of Issues prior to the submission of the fifth periodic report of China (CAT/C/CHN/5) (2015), Specific information on the implementation of Articles 1 to 16 of the UNCAT, including with regard to the Committee's previous recommendations 9(d), p. 4.

817 2011 UN SRT Follow-up report on China, p.50-65.

818 See Biddulph, ''Rights in the new regime for treatment of drug dependency', *Comparative Perspectives on Criminal Justice in China* (2013).

819 Human Rights Initiative, Briefing No. 4, Human Rights and Drug Policy, Compulsory Drug Treatment, p. 2; the Open Society Initiative, 'UN on Drug Detention: Ineffective. Illegal. Close it Down', March 12, 2012; Human Rights Watch Shadow Report to the UNCAT Committee (2015), among others.

820 Human Rights Initiative, Briefing No. 4, 'Human Rights and Drug Policy, Compulsory Drug Treatment', p. 2; See also Human Rights Watch, the Rights Practice and Amnesty International's Shadow Reports to the CAT Committee, November 2015.

821 Amnesty International, 'Changing the Soup but not the Medicine', 3 December 2013, p.9.

> "*When I first arrived at the camp the police told me "we've heard you are really fierce", and they put me into an iron cage and tied me to an iron chair. They asked me, "So, can you fly out of there? Then they gave me a shot. They told me I must be suffering and offered me a glass of water. I drank it without thinking. Then I lost feeling in my mouth. I began having extreme pain in my head. It felt like my head was being hit against a wall. Then they tied me up and gave me an IV drip. Suddenly I was unable to move. I fainted. They sent me to the Heilongjiang Provincial Hospital. The RLT police, who were monitoring me at all times in the hospital took off all my clothes – I was naked on this stretcher. The doctors there thought I was pretending to be sick and not able to move. They took something hard and stabbed my arm and leg. I couldn't move. They thought I was going to die. It was so painful and humiliating, worse than death. They left me there for three days*."[sic][822]

Amnesty International is also concerned that while RETL has been officially abolished, the law regulating RETL has still not been repealed. It has also identified a trend that is indicative of the notional closure of RETL camps and their re-labelling as CDRs, while maintaining similar staff, regime and operational models. It argues that:

> *"Based on individuals detained in drug R[E]TLs who spoke to Amnesty International, these institutions appear to operate very similarly to the regular R[E]TL camps, with the principle difference being that a greater proportion of their detainees may be drug addicts. […] The Dalian R[E]TL, for instance, which was reported to have shut down in September 2013, with at least some of its detainees being sent home is reported to have been renamed a drug R[E]TL camp. The Xinjiang Women's R[E]TL has also been reported to have been shut down but renamed an enforced drug R[E]TL camp in September, although it was not known what proportion of its detainees remained when this happened. The Jiangsu Province Women's R[E]TL reportedly changed its name to the Jiangsu Province*

[822] Ibid.

> *Women's Enforced Drug R[E]TL. Other RTL camps that have been reported to have been changed into enforced drug camps include the Sichuan Province Mianyang City Xinhua R[E]TL, the Shanghai Qingpu No. 3 Women's R[E]TL, and the Jilin Province Women's R[E]TL. This raises the concern that many former R[E]TL camps are simply being transformed into, or may re-open in a short while, as enforced drug R[E]TLs."*[823]

CDR facilities have been widely considered as a sphere where, in practice, detainees may be held for a number of years without due process, "in which harsh regimes of enforced labour are imposed, and in which torture and other ill-treatment are common."[824] There is relatively little information about CDRs in China from official sources. Interviews with a senior member of the KSS and CDR of Wuzhong indicated that there might be now more weight afforded to the opinions of doctors in the placement decision and reviews.[825] However, this is institution-specific and is not an initiative led centrally, nor is it contained in the regulations, or likely evident in other CDRs nationwide. There are no centrally co-ordinated national bodies that collect, share, or indeed analyse, statistics of complaints or cases of torture or ill-treatment in this sphere.

The 2007 Drug Control Law and associated Regulations while overtly purporting to be a more humane and rights-based approach for CDR patients and their rehabilitation, actually increases the time a patient can be compulsorily detained in a specific CDR facility. CDRs also lack resources – financial and human – to afford a purposeful regime and environment for therapeutic rehabilitation. Patients are required to work to cover the costs of running the facilities, in poor conditions.[826]

The evidence presented above is primarily based on former detainee testimony collected by NGOs. This reflects the challenge in obtaining direct onsite detention access and private detainee

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823 Ibid.

824 See the Rights Practice and Amnesty International's Shadow Reports to the CAT Committee, November 2015; D. Wertime, 'Inside China's Blackest Box', *The Foreign Policy Group*, 2 July 2014.

825 Author Interview with Ms. Z., City W., China, 24 November 2016.

826 Biddulph, 'Rights in the new regime for treatment of drug dependency', *Comparative Perspectives on Criminal Justice in China* (2013); Wertime, 'Inside China's Blackest Box', (2014); Human Rights Watch: 'China: Drug 'Rehabilitation' Centres Deny Treatment, Allow Forced Labor Anti-Drug Law Perpetuates Rights Abuses', 6 January 2010; '"Where Darkness Knows No Limits" Incarceration, Ill-Treatment and Forced Labor as Drug Rehabilitation in China', 7 January 2010; 'Torture in the Name of Treatment, Human Rights Abuses in Vietnam, China, Cambodia, and Lao PDR', 24 July 2012.

interviews. This is also the case for the Chinese monitors (who themselves cannot interview detainees without the presence of a staff member (c.f. Chapter 4.5), which inherently limits the quality of the information obtained, and also means that interviewers have to be careful about not putting the detainee at risk of reprisals (i.e. the 'do not harm principle)(c.f. Chapter 1) after they have left the institution). That said, these secondary interviews – in addition to international and national scholarly research into this area (c.f. below) and the author's own primary interviews with Chinese monitors, procurators, detention staff and members of the nascent complaints mechanisms (c.f. Chapters 3 and 4.4 and 4.5) – do cumulatively indicate a potential emerging pattern and snapshot of the state of prevention in this area both in theory and in practice.

As such, the above analysis of this area indicates there are, in fact, few to no safeguards for CDR patients, who can be detained for up to three years. It is an area that lacks both necessary due process safeguards – the ultimate decision of placement, and its extensions, is opaque and rests for the PSB. In addition there is no independent oversight of these facilities or for the process.[827] It is also an area that has been subject to some – albeit limited – reform, but this has not served to better protect those detained. One of the reforms has been to remove the CDR element from (now closing-down) RETL camps, and establish specific CDR centres and to split the operation of them between the Ministry of Justice and the PSB (aiming to separate out the investigation competence from the custody competence). It has not worked, and has resulted in a confused system. In theory, patients serve the first six months in their local PSB run CDR before being moved to a Ministry of Justice-run CDR. However, without sufficient resources or regulatory clarification, in practice patients tend to be kept under PSB responsibility.[828] It is also unlikely to be reformed more from the perspective of affording a greater number of protections for detainees, given how it sits squarely within a political social order and control management imperative by the CCP.[829]

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827 Biddulph, 'Rights in the new regime for treatment of drug dependency', *Comparative Perspectives on Criminal Justice in China* (2013).

828 Biddulph, 'Rights in the new regime for treatment of drug dependency', *Comparative Perspectives on Criminal Justice in China* (2013); this was the case in City W. in practice, author's interview with joint KSS and CDR senior staff member, Ms. Z., November 2016, Wuhu, China.

829 Biddulph, 'Rights in the new regime for treatment of drug dependency', *Comparative Perspectives on Criminal Justice in China* (2013).

Ultimately, this is a less regulated sphere where the few preventive safeguards available and the limited mechanisms in place to record, counter the risk and prevent ill-treatment or torture are not operating effectively.

3.2.3 Party justice: the 'Shuanggui' investigation process

An interview with leading scholar Cheng Lei, Associate Professor at Renmin University (who along with Professor Chen Weidong have helped advise the authorities on legislation on torture prevention measures as well as conduct pilot feasibility test of prevention measures that were then rolled out nationwide in KSSs), has shed some light on the legal basis and practice of this opaque Party justice process in China. He emphasises that the *shuanggui* investigation process is regulated by the CCP Constitution and discipline norms and is premised on the notion of advance consensual detention of the CCP member being investigated. The Party discipline system does not officially consider the *shuanggui* investigation as a deprivation of liberty. The concept of a CCP member's systematic advance consent to be subjected at a later date, if needs be, to the investigation and discipline by CCP Discipline Committees is part of the act of becoming a CCP member in the first place. Professor Cheng Lei acknowledges that this may raise concerns about the notion of advance consent to deprivation of liberty. Permissible deprivation of liberty must meet various criteria under IHRL: it must be necessary, proportionate, time-limited, judicially sanctioned, subject to *habeas corpus* and not arbitrary in character. Moreover, the analysis of the deprivation is a snapshot of the current situation: where one is not free to leave at will. Implied advance consent to later investigatory detention, as a mandatory element of becoming a CCP member, would in all likelihood be considered as *de facto* detention. Equally, it would also likely be considered arbitrary detention, given the lack of the necessary procedural guarantees (its lack of regulation, unlimited timeframes, lack of access to outside world, non-judicially sanctioned, etc.).[830] As mentioned above, the prohibition of arbitrary detention is a *ius cogens* norm of international law, applicable to all countries, including China. In addition, China has signed (but not ratified) the ICCPR, which includes in its Article 9 a prohibition against arbitrary deprivation

[830] The UDHR, the ICCPR and the regional human rights treaties all protect the right to liberty of the person and, additionally, protect persons from arbitrary arrest or detention. The prohibition of arbitrary detention has been considered by the HRC (General Comment 29, para. 11), and the WGAD, to go beyond treaty law into the realm of a peremptory norm under international law. They consider that at the very least, it falls under a general rule of international law (see WGAD 2012 case of Gulmira Imin, for example and its established practice in its opinions on China No. 29/2010, No. 15/2011, No. 16/2011 and No. 23/2011) and the established practice of the United Nations as expressed by the HRC in its General Comment No. 29 (2001) on States of Emergency, para. 11), and they qualify it as a *jus cogens*, and not subject to derogation (HRC General Comment 29, para.11).

of liberty. Upon signature, China is obliged to act in a way that is congruent with the spirit and content of the treaty.[831]

The risk of torture and other ill-treatment during the *shuanggui* (双规) period of interrogation and custody by the CCP Investigation and Discipline Committees, is not just extremely high, it is a reality in many cases. This is an extremely opaque process; there are limited records of cases of the use of *shuanggui* publicly available (and many references to it are censored from the internet[832]). Nevertheless, over time, a steady stream of allegations of torture and ill-treatment have arisen around this interrogation process, used primarily to fight official corruption, which is itself a violation of Party laws[833]. The numbers of allegations have been increasing since 2012 and the start of Xi Jinping's presidency, as it is much-used Party-justice process to investigate corruption. Equally, *shuanggui* can also be considered a tool of political control, given that to be a high-ranking official within the government or senior leader within a state owned enterprise one has to be a member of the CCP and thus subject to Party discipline.[834] Thus, the nature of the CCP and government become intrinsically intertwined, and the CCP discipline and control mechanisms can reach into the heart of government.

Since 2012, there have been reports of various top-ranking officials who have been subjected to *shuanggui* investigation and detention.[835] As the deprivation has no time limit, the detention period under the CCP disciplinary investigation can last months, even years. Moreover, there is no obligation to hand the suspect over to the criminal-law system, as the CCP Party Discipline regulations provide for its own system of justice, along with its own procedure and sanctions. An illustration of this is the case of Wan Qinqliang. On 30 June 2014, the State-sponsored national media reported that the Chinese central authorities had announced that President Xi Jinping's war

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831 A strict interpretation in accordance with the ordinary meaning should be given to provisions in their context, as required by the Vienna Convention on the Laws of Treaties, Article 31, and the Tehran Hostage case, 24 May 1980, para. 91, http://www.icj-cij.org/docket/files/64/6291.pdf.

832 Wertime, 'Inside China's Blackest Box', (2014); Human Rights Watch, 'China: Drug 'Rehabilitation' Centres Deny Treatment, Allow Forced Labor Anti-Drug Law Perpetuates Rights Abuses', 6 January 2010; '"Where Darkness Knows No Limits" Incarceration, Ill-Treatment and Forced Labor as Drug Rehabilitation in China', 7 January 2010.

833 See the Rights Practice and Amnesty International's Shadow Reports to the CAT Committee, November 2015; Wertime, 'Inside China's Blackest Box' (2014), among others.

834 See R. McGregor, *The Party* (2010); Fu Hualing, 'The upward and downward spirals in China's anti-corruption enforcement' (2013).

835 See the Rights Practice, CAT Committee Shadow Report on China, November 2015.

on corruption had found another high-ranking Party official guilty. In this case, Wan Qinqliang, former Party Secretary (and thus the highest-ranking politician) of the city of Guangzhou, had been subject to *shuanggui*. China's official media reports that Wan "allegedly committed serious disciplinary and legal violations", but gives no details about what his crimes might be or if he will be afforded any form of due process.[836] Only in 2016 (i.e. two years later), was Wan handed across to prosecutors for prosecution under the criminal justice process. On the 30 September 2016, the Court sentenced Wan to life-imprisonment.[837] Other cases of high-ranking officials recently subjected to *shuanggui* interrogation include Su Rong, formerly Vice Chairman of China's Parliamentary Advisory Body, and Wang Guangxun, former Head of Public Security at China's Railway Corporation.[838] The investigation process into alleged CCP officials' corruption is so commonplace that it has its own colloquialisms: the investigation of high-ranking CCP officials is known as "catching tigers", and mid-to low-ranking officials, as "catching flies".

Civil society organisations argue that some of the key problems with *shuanggui* in practice are the limited preventive safeguards available for suspects; legal scholars support this view.[839] Many argue that *shuanggui* is generally conducted in secret, without time limit. Suspects are denied any form of legal counsel or family visits and are at risk of being subjected to torture and other ill-treatment.[840] For example, in April 2013, Yu Qiyi, a chief engineer at the state-owned Wenzhou Industry Investment Group, was detained on suspicion of receiving a 2 million RMB bribe from a local company CEO, and died during his *shuanggui* interrogation.[841] The news caused a significant degree of public shock and outrage especially when pictures circulated online of his bruised and swollen body.[842] In May 2013, Jia Jiuxiang, a Henan court official subjected to *shuanggui* for a property-related graft investigation, also died whilst in detention. The authorities'

836 J. Areddy, 'China Launches Probe of Guangzhou Party Chief Wan Qingliang; Is Under Investigation for Suspected 'Violations of Discipline and Law', Wall Street Journal, June 2014, 'Wan Qingliang, a 50-year-old who briefly served as Guangzhou's mayor before he became the city's Communist Party chief about two years ago, is under investigation for "suspected serious violations of discipline and law," said a brief statement from the Party's Central Commission for Disciplinary Inspection'.

837 South China Morning Post, 'Former Guangzhou Party Chief Wan Qingliang jailed for life for corruption' 30 September 2016.

838 See the Rights Practice, Shadow Report to the CAT Committee, November 2015; Wertime, 'Inside China's Blackest Box' (2014); Amnesty International, Shadow Report to the UNCAT Committee, November 2015.

839 See, for example, Fu Hualing, 'The upward and downward spirals in China's anti-corruption enforcement' (2013).

840 See Amnesty International, CAT Committee Shadow Report, November 2015.

841 See civil society blog, 'Tea-leaf Nation', http://www.tealeafnation.com/2013/06/for-some-chinese-cadres-a-grisly-end/

842 Ibid.

claims that Jia died of a heart attack were rejected by his family, who stated that he had no history of heart problems.[843]

A recent Guangzhou report in the *South Review* (南风窗) [844] has shed a degree of light onto the practice of the *shuanggui* process and locations, which include specific CCP discipline facilities, state hotels (mostly commonly used), guest houses and military bases. It also notes that there is a degree of flexibility in the conduct of the *shuanggui* process. Interrogators number between six and nine, working three eight-hour shifts and are selected by the CCP Investigation and Discipline Committees from different organisations or offices on a temporary basis.

The concerns around the opaque process and the lack of procedural safeguards are manifold. These include the risks of *incommunicado* detention and the creation of a legally grey zone where abuse can be facilitated rather than prevented. The international community has raised numerous reports of allegations of torture and ill-treatment arising from the *shuanggui* detention period, including "sleep deprivation, simulated drowning, burning the detainee's skin with cigarettes, and beating."[845]

Fu Hualing is one of the very few scholars who has published research in this area,[846] and supports these concerns. Fu emphasises that this sphere has been traditionally one with very little regulation and at the total discretion of Party investigatory officials. Some regulation is gradually coming to the area, however, the major change is not greater protection for detainees but rather the movement of power from the local CCP to the central CCP. Over the past few years the responsibility for investigating corruption has been taken away from its traditional roots of the local CCP and the procuratorate (if passed to them as a crime) and moved to the central-level CCP discipline and investigation committees. These are becoming increasingly more powerful.[847]

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843 Ibid.

844 叶竹盛：纪律与法律之的"双规" (Yezhu Sheng, 'the law and ordinances / regulations of *shuanggui*'), 12 June 2013; http://www.21ccom.net/Articles /zgyj/ggzhc/article_2013061285404.html

845 Dui Hua, 'Official Fear: Inside a Shuanggui Investigation Facility', *Human Rights Journal*, 5 July 2011; Chu Zhaoxian, 'Corrupt Officials Fear Most: Exploring a Shuanggui Investigation Facility', 28 April 2011; see also Human Rights Practice, Shadow report to the CAT Committee, November 2015.

846 Fu Hualing, 'The upward and downward spirals in China's anti-corruption enforcement' (2013).

847 Fu Hualing, 'The upward and downward spirals in China's anti-corruption enforcement' (2013).

In the absence of legal safeguards, the Party discipline process becomes an opaque sphere. Here there is a heightened risk of torture for those undergoing interrogation and sanction not only due to the lack of safeguards, but exacerbated by the heightened incentive of confession-extraction to provide evidence for the top-level prioritised ‘war on corruption’. Torture is not just a risk but, according to various reports, is virtually inevitable.

3.3 Summary of key IHRL mechanisms' recommendations for the PRC

There are signs of some incremental positive change in China in the sphere of torture prohibition and prevention. That said, despite reform in some areas, most notably in the criminal law, many of the CAT Committee and other IHRL bodies' recommendations (such as the UN SRT, UN CRC, UNCERD, UN Special Procedures[848] remain unchanged over several reporting cycles (i.e., over many years) and remain focused on effective torture prevention and issues of lack of implementation.

There is repeated only partial, or non-, implementation of most of the recommendations made by various IHRL bodies in the remit of torture prevention in China. By way of illustration, the CAT Committee, in its most recent Concluding Observations of China, has directly criticised the deficient implementation of specific prevention safeguards.[849] The state of non-implementation of these safeguards remains almost the same as the previous CAT reporting cycle, seven years previously.[850] Indeed, some areas are distinctly worse than before (notably the situation of lawyers and human rights defenders in China and the increase of the use of *shuanggui* practices, among others). Equally, many similar concerns raised and recommendations made by the UN SRT in his 2005 China report[851] remain unimplemented and in the same – or a worse shape – in 2011 during his Follow-up Analysis,[852] than when identified in his 2005 China report.

Likewise, the CAT Committee has repeatedly expressed significant concerns regarding China's failure to fully comply with the UNCAT prohibition of torture and prevention obligations, as established in Articles 1 and 2. In its previous Concluding Observations on China in 2008, the CAT Committee underlined its deep concern regarding "the continued allegations, corroborated by numerous Chinese legal sources, of routine and widespread use of torture and ill-treatment of suspects in police custody, especially to extract confessions or information to be used in criminal

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848 UN Special Rapporteurs on the Independence of the Judiciary and on Counter-Terrorism have also referred to the situation in China recently.
849 CAT Committee Concluding Observations on China, 5th reporting cycle, 2015.
850 CAT Committee Concluding Observations on China, 4th reporting cycle, 2008.
851 UN SRT, Report on Visit to China, March 2005.
852 UN SRT, Follow-Up Report on China, 2011.

proceedings."[853] In its 2015 Concluding Observations, the CAT Committee stresses its continued concerns that "notwithstanding the numerous legal and administrative provisions prohibiting the use of torture, the Committee remains seriously concerned over consistent reports indicating that the practice of torture and ill-treatment is still deeply entrenched in the criminal justice system, which overly relies on confessions as the basis for convictions."[854] In short, there are numerous indications that torture remains unabated, and is still a resilient problem in China, seven years on.

The CAT Committee acknowledged some developments, such as the 2012 amendments to the CPL and the abolition of the RETL system in 2013/2014, but underlines that the overall outcome remains the same for many persons detained by the police in China: there is a high risk of torture in initial police custody (among other detention spheres). Moreover, it explicitly mentions that it "regret[s] that recommendations identified in the previous concluding observations have not yet been implemented." These recommendations relate to "the legal safeguards necessary to prevent torture; the State Secrets Law and reported harassment of lawyers, human rights defenders and petitioners; [and] the lack of statistical information and accountability of the events in the autonomous region of Tibet and neighbouring Tibetan prefectures and counties."[855] The repeated non-implementation of UNCAT recommendations in China has also been raised as a concern by national and international civil society.[856]

The UN SRT visited China in 2005 and highlighted a series of areas in need of reform to strengthen torture prevention. The UN SRT followed up on the recommendations made in the 2005 report in 2011. Each recommendation was assessed in light of its current state of implementation. Out of all the recommendations, the UN SRT identified that only very few had been fully implemented. The majority remained in the same, if not in a worse state, six years on.[857]

Other IHRL mechanisms have also examined China relatively recently. These too have echoed the same persistent concerns as those highlighted by the UN SRT in 2005 and the UNCAT in

853 CAT Committee Concluding Observations on China, 4th reporting cycle, 2008.
854 CAT Committee Concluding Observations on China, 5th reporting cycle, 2015.
855 CAT/C/CH/CO, paragraphs 11, 15, 17 and 23.
856 See Amnesty International and Human Rights Watch Shadow Reports submitted to CAT Committee, November 2015.
857 UN SRT, Follow up on China (2011).

2008 respectively. Many of their concerns have remained unchanged in nature, despite recommendations for change. For example, in 2010, a "Joint Study on global practices in relation to secret detention in the context of countering terrorism" undertaken by four UN Special Procedures, namely, the then UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the UN SRT, the WGAD and the Working Group on Enforced or Involuntary Disappearances. These mandate-holders all voiced their concerns regarding cases of alleged torture and other ill-treatment and alleged secret detention of ethnic minorities. These involved, in particular, the treatment and detention of Tibetans accused of separatism and other State security offences, as well as the secret detention of various Uyghur Muslims in the aftermath of unrest in the Xinjiang Autonomous Region in July 2009. The same, or similar, problematic situation concerning the treatment and detention of ethnic Tibetans and Uyghur Muslims was found in 2015 when highlighted by the CAT Committee its Concluding Observations on China.[858] In short, the situation had not improved despite repeated IHRL mechanisms' recommendations for change.

Despite some positive signs of change in China's torture prevention efforts, some of which in line with recommendations made by the IHRL bodies, these remain in selected areas only. This may reflect that China perceives these recommendations as 'Western' imports,[859] rather than as norms of universal applicability and concern – as well as a matter of obligation under China's ratification of the UNCAT.[860] In general, repeated non-compliance with the UNCAT and other human rights' treaties has been the subject to extensive scholarship.[861] In some cases, non-compliance may reflect States using – and potentially abusing – the ambiguity conferred in UNCAT 2(1), despite the identification of a list of concrete safeguards offered by the CAT Committee and others. This ambiguity allows States to focus on some areas of reform only. In China, this is manifested through the concentration on criminal law reform, leaving other parallel processes under-regulated.

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858 Paragraphs 24, 36 and 40.
859 See Section 1 of Thesis Chapter 2 and Introduction.
860 Author's interview with Associate Professor Cheng Lei, 24 November 2016, Wuhu, China.
861 Hathaway, 'Do Human Rights Treaties make a difference' (2002); Rejali, *Torture and Democracy'* (2007); Hollyer and Rosendorff, 'Do Human Rights Agreements prolong the tenure of Autocratic Ratifiers?' (2012).

3.4 Summary

This chapter has examined the effectiveness, in practice, of the preventive safeguards afforded to detainees in law and, assessed the scope and current nature of the allegations and cases of torture and ill-treatment in the three justice process in focus, criminal, administrative and Party. The *criminal-law justice process* has seen significant amount of reform and affords the most protection to detainees. Interviews with scholars, procurators, police detention staff/guards, lawyers, scholars and detention centre management indicate that they are hearing of fewer cases of torture and other ill-treatment within KSS detention centres.[862] A leading national scholar also considers that generally torture appears to be reducing, and it is ill-treatment only that is now mainly evident in initial police custody, but it has not entirely disappeared elsewhere.[863]

The impression is that ill-treatment in KSSs still does occur and is problematic across all detention locations[864] but due to the existence of very limited mechanisms in most places of detention, and likely under-reporting, it is extremely hard to adequately assess the true situation.[865] The UN SRT has also noted the steady decline in torture and ill-treatment since the 1990s, in his 2005 report and follow-up in 2011. Yet, the UN SRT still flags that torture remains prevalent throughout Chinese places of detention. Many IHRL bodies and international scholars torture remains 'pervasive' throughout the detention system in China.[866]

Numerous allegations of severe abuse continue to emanate from detention institutions, in addition to police stations (places of initial police custody). In practice, concrete and aggregated data that reflects the true situation across China is lacking and thus the true situation is impossible to

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862 Author's discussions and interviews with Chinese procurators, preventive monitors, KSS detention directors, member of the local Legal-Political Committee, Wuhu, and front-line KSS staff at a conference on 'Strengthening Complaints' mechanisms in KSS', organised by Great Britain China Centre and Renmin University in Wuhu, China, 23-24 November 2017.

863 Author's interview with Associate Professor Cheng Lei, Renmin University, in Wuhu China, on 24 November 2016.

864 Belkin, 'China's tortuous path towards ending torture in criminal investigations' (2013); Z. Guo, 'Exclusion of illegally obtained confessions in China: an empirical perspective', *International journal of evidence and proof*, Vol. 21, no. 1-2, Sage publisher; J. Daum, 'Tortuous progress: Early cases under China's new procedures for excluding evidence in criminal cases', in *New York University Journal of International Law and Politics*, 2011, 43(3): 699–712; He JiaHang and He Ran, 'Wrongful conviction and tortured confessions: empirical studies in mainland China', in *Comparative Perspectives on Criminal Justice in China*, (2013).

865 Author's interview with Associate Professor Cheng Lei, Renmin University, in Wuhu China, on 24 November 2016.

866 Belkin, 'China's tortuous path towards ending torture in criminal investigations' (2013); Z. Guo, 'Exclusion of illegally obtained confessions in China: an empirical perspective', *International journal of evidence and proof*, Vol. 21, no. 1-2, Sage publisher; J. Daum, 'Tortuous progress: Early cases under China's new procedures for excluding evidence in criminal cases', in *New York University Journal of International Law and Politics*, 2011, 43(3): 699–712; He JiaHang and He Ran, 'Wrongful conviction and tortured confessions: empirical studies in mainland China', in *Comparative Perspectives on Criminal Justice in China*, (2013); See also Thesis Chapters 2 and 3.

determine. One of the reasons for this is that no one body is responsible for overseeing or collecting data across all areas of deprivation of liberty in China, or for assessing the impact of the CPL's and other relevant legislative safeguards.

From the limited data and information that is available through interviews and research, there are enough indications to suggest that, at the very least, ill-treatment still occurs in some detention areas. This means that the effectiveness of many of the revised CPL's safeguards have been negated or, at least diluted, in practice. Numerous scholars have argued that this is due to a gap between law and practice, namely an implementation gap.[867] In the criminal-law context, proper implementation of the existing safeguards is indeed needed. The revisions in 2012 were designed to stem the culture of confession coercion, but in nearly every instance, their effectiveness appears diluted and torture post-2012 still remains a credible risk in police custody and detention.

The volume of torture and ill-treatment allegations in China do however highlight that the preventive safeguards are not working effectively. Not only is torture still prevalent, it also appears to be resilient in pockets of detention, despite efforts made to eradicate and prevent it through legal reforms undertaken at the national level and despite repeated recommendations made at the international level. Torture was previously acknowledged to be a problem in China; the problem now is that torture has remained resilient despite the various legal measures taken to prevent it.

The problem however runs deeper than mere implementation gaps. First, the criminal laws do not afford comprehensive protection in their current reformed state and, worse, the law permits circumvention. Thus better implementation is insufficient: there needs to be oversight and accountability.

Turning to the *administrative justice process* (with the examples of (i) PAD and (ii) CDR) and to the examination of the effectiveness of its safeguards and the current nature of torture in this

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867 See Introduction and Conclusions, *Comparative Perspectives on Criminal Justice in China*, ed. McConville & Pils (2013), 'Postscript: the 2012 PRC Criminal Procedure Law', Part VII, p. 455-503; see also Belkin, 'China's tortuous path towards ending torture in criminal investigations' (2013) and 'China's Criminal Justice System: a Work in Progress', (2000), p. 63-64; Lubman, 'Bird in a Cage: Chinese Law Reform after Twenty Years' (2000); Statement of Teng Biao, Hearing of the CECC "China's pervasive use of torture" (2016), among others.

sphere. Here, despite reforms, the safeguards lag behind the CPL and afford less protection in regulation. Worse, the few safeguards that are in place are not working in practice, as numerous torture allegations currently exist in these processes and places. Some of the torture allegations are slightly different in nature to those during the PSB or procuratorate criminal investigation, whereby the primary form seems to be the coercive extraction of information and/or confessions. In the punitive administrative context, the allegations also comprise physical and psychological torture and ill-treatment meted as a punishment. This appears to be as reprisal for certain actions that are considered to challenge 'social order' in China. Reforming this administrative process in line with the CPL reforms will not solve this, as it will likely rub up against the same problem, notably, that the criminal laws do not afford comprehensive protection in their current reformed state and they permit circumvention. Again, merely better regulating this administrative sphere will not be the key to affording adequate protection to PAD and CDR detainees (although it will be a start); deeper change may be needed.

Turning to the *Party* investigation and disciplinary process and *shuanggui*, here the preventive legal safeguards are virtually non-existent; this is an almost completely opaque sphere with ultimate discretion given to CCP Discipline Committees with no oversight. It is a sphere in which CCP officials suspected of corruption can disappear for many months in *de facto* deprivation of liberty. This is a notoriously closed system and little information is available. It is also a process that goes to the heart of top-level CCP governance and is an instrument of Party control: it is used to target corruption, but also potential dissent or challenge to the status quo. It sits alongside the other legal justice processes and is self-regulated. It is thus unsurprising that this forms an extremely risky sphere for detainees and one where numerous allegations of torture emanate, despite tough internet and media censorship. This highlights a key challenge for torture prevention in modern-day China: the balance between the need to protect One-Party (CCP) rule and its commitment to effectively protect the rule of law and human rights.[868]

[868] See M. Lewis, 'Hearing of The CECC "China's Pervasive Use Of Torture"', 14 April 2016; Yi Wu, 'Pushing Politics: Why China is Supercharging Dissident Trials', 12 August 2016, China Real Time Report, Wall Street Journal, 2016; also examined further in Thesis Chapter 4.

Overall, this assessment only partly agrees with the view of some scholars that the criminal justice system now affords ordinary, 'run of the mill', criminal law suspects the required protection against torture, and that the risk of torture lies primarily with the minorities or pockets of types of suspects. Indeed, the risk of torture is still prevalent for *all* criminal suspects, especially during the first 24 hours of deprivation of liberty. This is because the safeguards designed to prevent the risk are not working. That is not to say that that the risk of torture is not 'higher' for some categories of criminal or administrative suspect. In all probability, it is. These are the minority of suspects who have allegedly done something to jeopardise social order and harmony, and have the potential to incite others, or hinder the smooth running of the economy and development or who question the government and the CCP. For these subjects, the risk of being transferred into (less protected) administrative processes is high, as is the risk of torture and other ill-treatment in administrative justice processes. For those suspects undergoing the Party justice process, *shuanggui,* the risk of torture is so great that it is almost inevitable.

Chapter 4: Wider institutional, structural and political obstacles to reform

There has been relatively little scholarship on the influence of political structures and broad social processes on the effectiveness of torture prevention specifically,[869] even if practitioners and experts allude to these factors.[870] Although not the primary focus of their scholarship, the theory has been referenced in Carver and Handley's examination of torture prevention:[871] they highlight the importance of having an understanding of how preventive measures might work in different social and political contexts. They:

> *"accept the assumption that certain political preconditions must be met to reduce or eradicate torture; conversely, we assume that in certain situations, where both the preconditions and political commitment are absent, it will be fruitless to use essentially technical measures to address the problem. Our study therefore takes account of the influence of political structures and broad social processes. In our country narratives, we have attempted to understand how specific political developments and social context have influenced the struggle against torture. In our quantitative analysis, we control for democracy, conflict and economic development. We still conclude that effective detention practice [i.e., robust work ethics, professional training to conduct law without abuse, etc.] contributes most to the prevention of torture."*[872]

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869 Within the specific remit of torture prevention, there has been comparatively little focus of scholarship on the political and governance models needed for prevention to work. It has been alluded to in Evans and the SPT, 'The approach of the SPT to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under OPCAT', CAT/OP/12/6, 30 December 2010; Carver and Handley, *Does Torture Prevention Work*? (2016)(briefly, mainly in Introduction) and, more generally on torture prohibition (i.e., outside the specific remit of prevention) by authors such as Rejali, *Torture and Democracy* (2007) and S. Karstedt, 'Does democracy matter? Comparative perspectives on violence and democratic institutions', *European Journal of Criminology* 12(4); APT, 'What is torture prevention', http://www.apt.ch/en/understanding-the-risk-of-torture/.

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871 Carver and Handley, *Does Torture Prevention Work*? (2016), Introduction and Chapter 1.

872 Carver and Handley, *Does Torture Prevention Work*? (2016), Introduction, p. 4.

Thus, the wider social, institutional and political context and the whole governance model in China need to be examined to understand how it influences, and may impede, full torture prevention efforts. This chapter identifies and examines the broad structural, institutional and political factors that could present obstacles that underpin the protection gaps identified. This chapter loosely groups these obstacles into seven structural issues:

i. A lack of separation of powers.

ii. Parallel legal processes on unequal footings, allowing ‘protection arbitrage’.

iii. A weak judiciary.

iv. Signs of a degree of impunity for acts of abuse, along with limitations in effective investigations into allegations of abuse and nascent complaints’ mechanisms in need of strengthening.

v. Preventive monitoring in its infancy and facing systemic challenges.

vi. Restricted civil society, hindered from performing a ‘watchdog’ role.

vii. Wider inhibiting socio-cultural aspects that can contribute to endemic torture practices in certain spheres.

While some of these have been alluded to or described in previous chapters in the context of specific justice processes, this chapter examines the overall impact they each have currently on torture prevention measures underway in China and how, if left unaddressed, they can hinder torture prevention efforts.

Above these sits one overarching structural, institutional and political influence on torture prevention measures, namely the influence of the CCP. This intrinsically cuts across and affects each of the structural issues. This is inherent in the nature of the CCP model in China. It yields ultimate control and explicitly acts to secure and retain a pervasive influence. This chapter examines this influence in each of the structural obstacles identified above: each has its own discrete aspects that can impede full and effective torture prevention, as well as a political aspect.

Thus, any torture prevention efforts undertaken in China cannot be examined without also examining the overarching role of the CCP.

4.1 Lack of separation of powers

On an institutional level, each of the institutional structures internally has multiple roles that can inherently conflict with each other. On a general level, each of the institutional structures, most of which were established in line with Communist Party thought, are, in practice, ultimately subservient to the will of the General Secretary of the CCP, who is also the President of China (a more ceremonial title).[873] Not only does the CCP have the ability to control all institutions in China, it is increasingly doing so.[874]

4.1.1 The multiple roles of the procuratorate in the criminal justice system

In China's criminal law sphere, the procuratorate plays multiple roles: that of the prosecutor (of certain complex and 'serious' cases[875]), approver of arrests in criminal cases, overseer of the correct application of laws and exercising oversight over the legality of detention. Having all of these roles undertaken by one body inherently creates tension and a conflict of interest, if examined through the lens of Dicey's core components for the Rule of Law and, in particular, the need for the separation of powers.[876]

Nevertheless, the need for formal structural separation of powers, as a core element of the Rule of Law, is considered by the Chinese authorities to be an ultimately Western-imported concept.[877] CCP Document No. 9 demonstrates the CCP thinking behind the concept of the Rule of Law. The rationale is that the Rule of Law does not need the formal separation of power, but merely to ensure that all institutions and processes are subordinate to the law. In this sense, this is more akin

873 See Thesis Introduction and Chapter 2 on the establishment of the modern Chinese legal system.
874 Outlined in the Thesis Introduction and Chapter 2.
875 CPL stipulates that the Procuratorate has the jurisdiction to, *inter alia*, investigate suspect gang crimes, recidivists' offences, major criminal offences and corruption cases; see Thesis Chapter 2.
876 See an analysis of the concept of the Rule of Law in Bingham, *The Rule of Law* (2010); and Dicey 'An Introduction to the Study of the Law of the Constitution', 8th ed. (1915).
877 See Thesis Chapter 2.

to 'rule according to the law' theory.[878] The CCP emphasises that legal reforms undertaken from 2012 onwards have the ultimate aim to strengthen the laws, and thus fulfil this concept.[879]

The question of the respective roles of the procuratorate and the judiciary has been subject to extensive scholarship and critique.[880] Historically, the police and procuratorate compromised two of the most powerful institutions in the Chinese governance model and they enjoyed wide latitude of manoeuvre. Nevertheless, reforms have increasingly given the courts a comparatively stronger role than they once had. Judges tend to be better educated than the procurators appearing before the courts as a party to the legal proceedings, and procurators have to observe court rules.[881] However, the Chinese Constitution also affords the procuracy the mandate to supervise the courts. Chinese legal scholars, such a Randall Peerenboom[882] and Murray Scot Taner,[883] point to increasing tensions between the courts and the police and procuratorate as their respective roles flex and change shape with time.[884]

This tension manifests itself, Peerenboom argues, in a number of negative outcomes.[885] These include inconsistencies in interpretation of key legislation. For example, the procuracy openly criticised the Supreme People's Court (SPC)'s practice of interpreting the law during the drafting of the Law on Legislation. Second, there are signs of co-operation failure between the procurators (and police) and the court. For example, police investigators often fail to provide documents or evidence requested by the courts. Third, there are numerous reports of police and procurators harassing lawyers and the detention of lawyers on trumped up or spurious charges (Section 4.3.2). Peerenboom argues that the nature of the CCP overarching control is that the Party is often forced to intervene in such disputes to maintain control. Nevertheless, Taner argues that there is a growing social consciousness and awareness of working officials and scholars/think-tanks within

878 See Thesis Chapter 2.
879 See Thesis Introduction and Chapter 2.
880 See, for example, R. Peerenboom, 'Judicial independence in China: common myths and unfounded assumption', *Judicial Independence in China: lessons for global rule of law*, (ed.) R. Peerenboom (Cambridge University Press, 2010); Zhu Suli, 'The Party and the Court', *Judicial Independence in China: lessons for global rule of law*, (ed.) R. Peerenboom (Cambridge University Press, 2010); K. Henderson, 'Half-way home and a Long way to go: China's Rule of Law Evolution and the Global Road to judicial Independence, judicial Impartiality and Judicial Integrity', *Judicial Independence in China: lessons for global rule of law*, (ed.) R. Peerenboom (Cambridge University Press, 2010); among others.
881 Peerenboom, 'Judicial independence in China: common myths and unfounded assumption' (2010), p. 83.
882 Peerenboom, 'Judicial independence in China: common myths and unfounded assumption' (2010), p. 83.
883 M. S. Tanner, 'Rethinking Law Enforcement and Society', *Engaging the Law in China: State Society and Possibilities of Justice*, (eds.) N. Diamant, S. Lubman and K. O'Brien, (Stanford University Press, 2005).
884 Ibid.
885 Peerenboom, 'Judicial independence in China: common myths and unfounded assumption' (2010), p. 83 to 84.

the police,[886] as in other institutions[887], for more autonomy and less Party interference, despite the tight control still wielded by the Party over all institutions.

The independence of the procurators' supervision of the investigation of torture allegations in China has also been an ongoing source of concern to IHRL bodies, especially the CAT Committee. In 2015, it highlighted its concern that "the dual functions of the procuratorates, namely prosecution and pre-indictment review of police investigation, creates a conflict of interest that could taint the impartiality of its actions, even if carried out by different departments."[888] In terms of torture prevention, this structural conflict of interest could act as an impediment to fair and impartial prosecution of torture allegations, which is a requirement in a state's effort to combat impunity for acts of torture and a fundamental aspect of a state's prohibition and prevention obligation.[889] Additionally, the procurators' role in approving detention is a concern, given that while it maintains links with the judiciary, it is, in essence, a governmental and non-judicial body. This poses serious questions as to the legitimacy of detention orders. It also raises questions as to the perception of impartiality, crucial to ensure trust in the oversight system and a key element needed for adequate independence.

The situation of the dual role of the procurators has not changed substantively since the 2012 reforms, and the procuratorate's lack of true impartiality remains a source of concern to scholars, civil society and IHRL bodies.[890] Despite a raft of legal reforms and despite repeated concerns raised by the IHRL mechanisms, little has changed. Back in 2005, the UN SRT raised concerns about the role of the procuratorate's impartiality,[891] and in 2008, the CAT Committee highlighted its concern about the lack of an effective mechanism for investigating allegations of torture, in particular, "serious conflicts of interest with the role played by the Office of the Procuratorate";[892]

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886 Tanner, 'Rethinking Law Enforcement and Society' (2005), p. 206 to 207.

887 Peerenboom, 'Judicial independence in China: common myths and unfounded assumption' (2010); Zhu Suli, 'The Party and the Court' (2010); K. Henderson, 'Half-way home and a Long way to go: China's Rule of Law Evolution and the Global Road to Judicial Independence, Judicial Impartiality and Judicial Integrity' (2010).

888 CAT Committee Concluding Observations on China (2015), para 22.

889 As identified in Thesis Chapter 1.

890 See, *inter alia*, CAT Committee Concluding Observations on China (2015); UN SRT Report and Follow Up on China (2005 and 2011); He Weifang, *In the name of Justice: Striving for Rule of Law in China* (2012); S. Lubman, 'The Path to Legal Reform Without Revolution', China Real Time Report, Wall Street Journal, Commentary, 7 December 2012; Amnesty International, Humans Rights Watch, Shadow Reports to the CAT Committee (2015).

891 UN SRT, Report on the visit to China (2005).

892 CAT Committee Concluding Observations on China (2008).

these concerns were echoed by the UN SRT in 2011.[893] The Chinese authorities outlined various new procuratorial oversight measures adopted, in its State Party report to the UNCAT in 2014 (it has not formally responded to the UN SRT's 2011 Follow-up Report). However, there remain significant doubts, raised by the CAT Committee, about several aspects of the operation of the procuracy and its independence.[894] One of these relates to continuing ability for the CCP to influence the procuratorate. There is also a similar concern regarding the judiciary. This can be seen in the impact of the political-legal committees (*zhengfawei* 政法委) on the functioning of the procuracy and the courts. These committees are tasked with "unify[ing] the thinking and actions of various political and legal affairs departments based on the Party's line, principles, policies, and deployment. To achieve this aim, political-legal committees have intervened in "politically sensitive" cases, from the investigation stage (police), to the indictment stage (by the procuratorate), to the ruling of the case (by the court)."[895] According to civil society reports, there have been various conflicting policy statements made regarding the political-legal committees. For example, Human Rights in China (HRIC), a specialist NGO, documents that "in late 2014, Meng Jianzhu, the current Secretary of the Central Political and Legal Affairs Committee, stated that "leaders should stop instructing on the handling of specific cases and allow all judicial organs to have a free hand." However, at the same time, statements by Party leaders, including President Xi Jinping, emphasi[sed] the on-going importance of these committees."[896]

National critique of the current status of the Rule of Law in China and lack of separation of powers can be seen in the work of leading Chinese legal scholar He Weifang.[897] He argues that the Rule of Law in China can only be achieved through an acknowledgement that formal separation of powers are needed in all Chinese institutions and legal processes. He calls for the "deconstruction of socialist ideology" in order to give way to a view of governance marked by the separation of powers, which he acknowledges would constrict the CCP's current grasp on State

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893 UN SRT, Follow-Up Report on China, March 2011.

894 CAT Committee Concluding Observations on China (2015),

895 For detailed analysis see Shadow Report to the CAT Committee by Human Rights in China (HRIC), November 2015; and Human Rights Watch, 'Tiger Chair & Cell Bosses' (2015).

896 Shadow Report to the CAT Committee by Human Rights in China (HRIC), November 2015.

897 He Weifang, *In the name of Justice: Striving for Rule of Law in China* (2012); Lubman, 'The Path to Legal Reform Without Revolution' (2012).

institutions.[898] Many legal scholars agree and support these views.[899] Ultimately, in the context of the procuratorate, the conflicts of interests inherent in the procuratorate's many functions hinder it from being truly effective or free from political interference.

Notably, it is the procuratorate in particular that is expected to take responsibility for many of China's torture prevention measures, including significant involvement in the nascent complaints mechanisms and monitoring initiatives,[900] as well as their traditional role as oversight over the correct application of the law. The lack of true separation of powers can, and does, adversely impact the work of torture prevention. Without formal separation of powers in all Chinese institutions and legal processes, or truly impartial oversight, it is hard to argue that China has the right foundation or environment needed to enable the necessary legal and technical preventive safeguards to operate effectively.

4.1.2 Multiple roles of the police, and subject to Party oversight & involvement

(i) Police: a triple role

The PSB / police play a triple role in the administrative detention process where they are responsible for investigating, sentencing and managing detention.

This triple role is seen both in punitive administrative detention (PAD) and wider forms of administrative detention, such as Compulsory Drug Rehabilitation (CDR). Overall, the PSB is involved in the enforcement of the administrative laws, the placement in custody, undertakes the investigation, decides on the guilt and the duration of sentence, operates as an appeal body, as well as being responsible for the operation of administrative detention facilities. Exceptionally, if it is expressly decided, a person can be handed over to the procurators and will stand trial before the criminal court. Otherwise, the majority of administrative cases (all cases deemed 'non-serious') will stay within the remit of the PSB, which has no external oversight body. Granted,

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898 He Weifang, *In the name of Justice: Striving for Rule of Law in China* (2012).

899 See, for example, Lubman, 'The Path to Legal Reform Without Revolution' (2012); and Professor Xu Xin, cited in Cheng Li, Chinese Politics in the Xi Ji Ping Era: Reassessing Collective Leadership (the Brookings Institution Press, 2016).

900 See Thesis Chapter 2, as well as Sections 4 and 5 of this Chapter.

there are separate departments and organs within the PSB structure that take on the different roles. However they ultimately report to the differing higher levels of PSB direct hierarchy.

The lack of separation of powers and functions is concerning in that it confers almost total discretion on police for the majority of administrative (both punitive and wider) detention sanctions with minimal external oversight. Surprisingly, this area has not been subject to as much scholarly analysis as the criminal law sphere and the general rule of law situation in China.[901] The focus by legal scholars and IHRL mechanisms has commonly been on one of the more extreme aspects of punitive administrative detention: the sanction of Re-education through Labour (RETL).[902] Administrative arrest / punitive administrative detention governed by the PSAPL, in particular, has been comparatively less critiqued.

This is concerning due to the wide discretion afforded by the mandate and triple role of the police for the majority of administrative and punitive administrative sanctions, which is conducive to creating an insular and opaque environment. This can create a particular risk of torture and ill-treatment. Unsurprisingly therefore, despite some reforms and some signs of a more "socially-conscious" police force at an operational level,[903] there are indications that torture, at least ill-treatment, remains systemic in initial police custody.[904]

(ii) PSB/police structure; pervasive CCP influence over the police

The Ministry of Public Security (MPS) is responsible for the four levels of PSB and operates discretely, drafting its own regulations to regulate its own body.[905] Nonetheless, there remains a pervasive Party and executive influence in the set-up, reporting lines and resources. IHRL bodes, such as the CAT Committee[906] and the UN SRT,[907] scholars and civil society[908] have all flagged

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901 The major scholarship that focuses on the operation and procedure of administrative detention in China has been conducted by Biddulph, *Legal Reform and Administrative Detention Powers in China* (2007); *Comparative Perspectives on Criminal Justice in China*, Part V (2013); and Biddulph, 'What to make of the abolition of re-education through labour?', *Legal Reforms and Deprivation of Liberty in Contemporary China* (2016).

902 See Thesis Chapter 2.

903 Tanner, 'Rethinking Law Enforcement and Society' (2005), p. 206.

904 See, *inter alia*, CAT Committee Concluding Observations on China (2015), para 20; Tanner, 'Rethinking Law Enforcement and Society' (2005), p. 206.

905 See MPS Regulations on Complaints and Regulations on Inspection / Monitoring in KSS, 2011, Regulation 379 and 385, for example.

906 CAT Committee Concluding Observations on China (2015), para 23(d); UN SRT Report and Follow-Up Report on China (2005 and 2011).

907 UN SRT Report and Follow-Up Report on China (2005 and 2011).

their deep concerns about this. They point out that that, ultimately, it is the local leaders (CCP Committee and government officials) that fund the police force, appoint local police personnel (including local police chiefs), decide police salaries, and set the strategic vision and policies for policing. CCP control – or at least influence – over the police remains evident. This is manifested through CCP Committees in each level of the PSB, and, in particular, through its Political and Legal Committee (*zhengfawei* 政法委). The Political and Legal Committee plays a fundamental role, both leading and coordinating the police, the procuratorate, and the courts on law and order matters. While local political influence has been subject to reform, it remains powerful,[909] and the police are susceptible to its influence.

The dynamics between the PSB and CCP influence have flexed over time; the power of the PSB had been considerably strengthened under Zhou Yongkang MPS Minister (2002 to 2007).[910] Zhou shifted the power dynamic by enabling police chiefs to be appointed as secretaries of the CCP Political and Legal Committees and expanded the powers of the police as a key to "stability maintenance."[911] However, with the shift in leadership priorities and the greater emphasis placed by Xi Jinping on reinforcing CCP-top level control over all institutions and eradicating local vested interests,[912] the MPS has been progressively been put under greater control by the top-levels of the CCP.[913]

Yet, the PSB still remains extremely powerful, despite reforms to curb this and to pass more power to the judiciary. It can, and does, stymie reform in practice.[914] Without a significant

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908 See, *inter alia,* Wu and Vanden Beken, 'Police torture in China and its causes: a review of the literature' (2010); He JiaHang and He Ran, 'Wrongful conviction and tortured confessions: empirical studies in mainland China' (2013); Tanner, 'Rethinking Law Enforcement and Society' (2005); Human Rights Watch, 'Tiger Chair & Cell Bosses' (2015); Amnesty International, 'No End in Sight' (2015).

909 See Thesis Introduction and Chapter 2; this was also evident in a recent discussions among procurators, KSS directors and prison staff involved in piloting nascent complaints mechanisms in prisons in Ning Xia, held at the GBCC-Renmin University conference on 'Strengthening complaints mechanisms' held in Wuhu, China, on 23 November 2016, in which the author participated as an external expert; here the local political and legal committee participated and intervened substantively on conclusions.

910 See, for detailed analysis of the power dynamics between the PSB and CCP, Tanner, 'Rethinking Law Enforcement and Society' (2005); M. S. Tanner, 'Campaign-style policing in China', *Crime, Punishment and Policing in China,* B. Bakken (ed.) (2005); McGregor, *The Party* (2010); Cheng Li, C*hinese Politics in the Xi Jinping Era: Reassessing Collective Leadership* (2016); Human Rights Watch 'Tiger Chair & Cell Bosses' (2015); Amnesty International, 'No End in Sight' (2015).

911 Ibid

912 See Thesis Introduction and Chapter 2.

913 Ibid.

914 See *inter alia,* Taner, Rethinking Law Enforcement and Society' (2005); M. S. Tanner, 'Campaign-style policing in China', *Crime, Punishment and Policing in China,* B. Bakken (ed.) (2005); See also Belkin, 'China's tortuous path toward ending torture in criminal investigations' (2013); MacBean, 'Addressing the 'hide and seek' scandal: restoring the legitimacy of

recalibration of police powers, reforms are facing steep obstacles to their adequate operation.[915] This can be seen throughout the cross-section of detention types analysed here, including manifestly in the non-implementation of CPL safeguards, as well as in the (overly) broad police powers for CDR and PSAPL decision-making and lack of oversight (Chapter 3).

Overall, there appears to be broad consensus[916] that under the current set-up, the PSB has too many hats, maintains too broad a discretion in decision-making in its powers for coercive measures, and is not free from political control; all of which can impact its decision-making and its conduct. In the context of torture prevention, these ultimately can create an environment conducive to abuse.

4.2 Parallel justice processes on unequal footings: 'protection arbitrage'

The investigating police/PSB officer is, in effect, afforded the discretion to choose whether to trigger the criminal or administrative justice process for a given infraction or offence, in light of the degree of overlap in the nature of the grounds of the offences.

4.2.1 Administrative and criminal justice spheres: unequal footing & 'protection arbitrage'

An offence, for example, 'picking quarrels' or 'disturbing public, or court, order' can be a criminal offence or an administrative penalty/punitive administrative infraction.[917] This affords the initial choice of which justice system to pursue. The ease of transfer between justice processes and discretion afforded to investigators to choose is compounded by overly broad offences creating a lack of legal precision and certainty. This is a particularly problematic area both in theory and practice (see below).[918] Given that the punitive administrative detention process is one that is currently less regulated than the criminal one (and thus more flexible), it is hardly

Kanshousuo' (2016); Nesossi, Biddulph, Sapio, and Trevaskes, 'Opportunities and Challenges for Legislative and Institutional Reform of Detention in China' (2016); 'Tiger Chair & Cell Bosses' (2015); Amnesty International, 'No End in Sight' (2015).

915 See Thesis Chapter 3.

916 The UN SRT Report and Follow-Up on China (2005 and 2011); CAT Committee Concluding Observations on China (2015); Human Rights Watch, 'Tiger Chair & Cell Bosses' (2015), Taner, 'Rethinking Law Enforcement and Society' (2005); Belkin, 'China's tortuous path toward ending torture in criminal Investigations' (2013); MacBean, 'Addressing the 'hide and seek' scandal: restoring the legitimacy of Kanshousuo' (2016); Amnesty International, 'No End in Sight' (2015), among others.

917 See Thesis Chapters 5 and 6.

918 See CAT Committee Concluding Observations on China (2015).

surprising that there are instances where PSAPL grounds of 'disturbing public order' or 'picking quarrels' can be easily chosen over their CPL equivalents. This is especially pertinent in the cases of those who are seen to jeopardise social order by questioning the system and status quo.[919]

This discretion not only acts as a protection gap but its existence is a structural impediment to effective torture prevention, given the choice to steer towards one more-regulated and protected system (affording some safeguards against torture and ill-treatment) or another under-regulated one.

The general lack of accurate reporting in China, the lack of ready and private access by anyone to detainees[920] (including limited access to detainees by their own lawyers and families) (c.f. below) and the fact that the PSB's discretion in choosing one justice route over another is not transparent or recorded, all make providing concrete evidence that 'protection arbitrage' occurs challenging. That said, this research draws on primary interviews with those in regular contact with PAD detainees, such as procurators, monitors and complaints mechanisms' members (cf. Chapters 4.4.1, 4.4.2 and 4.5). Additionally, the author also conducted an interview with the wife of a detainee remanded in a KSS who is facing either a potential PAD infraction or a criminal charge, based on the same evidence (see below). These discussions all point to protection arbitrage occurring in practice, rather than being a theoretical – analytical – construct.

The risk of abusing powers of investigation by using the porous borders between the different justice systems has been acknowledged by the SPP, but it has stopped short of proposing reform to address this. This can be seen in the SPP Guiding Cases. For example, in the Case of Hu X and Zheng X (Procuratorate Case No.7), CCP officials were accused of using their office for personnel enrichment by not transferring a case into the criminal justice system and keeping it

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919 See Zhang Qianfan, 'Don't Let "Creating a Serious Disturbance" Become a "Pocket Crime"', 5 February 2015; Yiyi Lu, 'Pushing Politics: Why China is Supercharging Dissident Trials', 12 August 2016, China Real-time, Wall Street Journal, among others.

920 The author was involved as an external expert in training nascent complaints mechanism members in November 2016 in Wuhu, Anhui, which included access to a KSS as part of the training. Despite being part of the programme, the authorities did not grant permission for the two international experts involved in the training to access the relevant KSS. Moreover, given that even Chinese monitors are not able to interview detainees privately (i.e. without an accompanying staff member)(c.f. Chapter 4.5), had access been granted to the author, any information derived from an onsite detainee interview would not have been compatible with a 'do no harm' monitoring interview principle (i.e. ensure the detainees is free from potential reprisal after the interviewer has left)(c.f. Chapter 1). Equally, any information shared by the detainee would not have been fully trustworthy, given the presence of staff. This is illustrative of the difficulties encountered in accessing primary evidence from detainee interviews in China currently.

within the (less-regulated) administrative law enforcement sphere. This case has been cited by the SPP as a guiding case for other procurators to follow when prosecuting similar cases:

> *"Supervision of proceedings is an important component of people's procuratorates' lawful performance of legal supervision. In practice, procuratorates and case handling personnel shall attach equal importance to case handling and supervision, establish and improve work mechanisms effectively linking administrative law enforcement and criminal justice, beneficial to discovering all manner of leads on crimes abusing public office while handling cases. Where administrative law enforcement personnel selectively enforce for personal gain and do not transfer a criminal case, and this constitutes a crime, it shall be pursued for criminal responsibility in accordance with law."*[921]

'Protection arbitrage'

The risk of procuratorial or police abuse powers of investigation by using the fluid borders between the different justice systems can also be seen, in practice, from the interview with the family of Mr. X,[922] a detainee currently held in KSS remand detention in China (Chapter 3). Mr. X's lawyer was informed that the police were investigating Mr. X pursuant to two possible grounds simultaneously. The first was commercial corruption, contrary to the criminal law; the second was an administrative misdemeanour contrary to the administrative justice laws. The specific charges were not shared with the Mr. X or his lawyer. The lawyer has been informed that if the local government is 'unhappy' with Mr. X, then he will be sentenced for commercial corruption, a crime pursuant to the CPL. This carries a sentence of 10 years. If the government is 'ambivalent', then the PSB/police will be permitted to sentence him for an administrative offence (unspecified). This sanction would be for the duration of less time than Mr. X has already spent in police detention (typically a sentence for 15 days, the investigation process, however, takes many

[921] The SPP, 'The Case of Hu X and Zheng X using office for personnel enrichment by not transferring a criminal case (Procuratorate Case No.7), SPP Guiding Cases Set 2.

[922] Name anonymised; case set out in Thesis Chapter 3.

months[923]). In late 2016, a judge found that there was insufficient evidence to continue holding Mr. X in detention. This ruling has, however, been ignored by the police investigators, who continue to hold Mr. X in police detention.[924]

While this is a single case only, it is illustrative of what can happen in practice. It is indicative of: a lack of legal certainty (simultaneous use of both criminal and administrative justice system and the possibility of 'protection arbitrage'); using a lesser-protected (administrative) legal process to extend investigation and detention time to circumvent criminal law safeguards; systemic issues with the administrative offence process (which can result in a sanction of 15 days to be served in the same KSS, where the detainee has already served more than a year and a half in detention); and apparent non-implementation of judicial decisions by the police in 'sensitive' (corruption) cases.

In other words, while legal reforms have strengthened the CPL, in practice they appear not to have taken the discretion or opportunity for 'protection arbitrage' away, which can facilitate the circumvention of detainees' safeguards by investigators in the interests of their investigation. This legal and institutional discretion to choose a less-regulated justice process serves to weaken torture prevention.

4.2.2 'Shuanggui': an extra-legal, less-protected detention sphere

Further, the *shuanggui* process is a parallel justice process that operates outside both the criminal justice and administrative justice processes. This process confers almost total discretion on certain administrative and political bodies to deprive persons of their liberty without any judicial authorisation or external oversight.

CCP officials can disappear (no time-limit for family or third party notification of detention exists) into the *shuanggui* system and then be transferred to, and re-appear in, the criminal justice system months, if not years, later. The decision to transfer a suspect from the CCP Party justice sphere into the criminal justice process is one that the CCP investigators make without external

923 See Thesis Chapters 2 and 3.
924 As of summer 2017.

involvement or oversight (i.e., bodies outside the Party justice system). The lack of safeguards and the opaque process not only create great risk of torture, the number of torture allegations are reportedly increasing[925]. Scholars and IHRL bodies point to a credible and serious risk of torture in this tertiary justice system. Moreover, inherent in the CCP Investigatory and Discipline Committees' name is an apparent flaw in its impartiality. These two elements – investigation and discipline – should be separated to reduce the risk of torture. When combined under one body's responsibility there is a risk that investigators can use, and abuse, the threat of detention (and discipline) as incentives to facilitate their investigation.

Ultimately, while *shuanggui* is its own discrete justice system, it also epitomises the current problem in China: namely, the ability of the Party to override the law when it suits its own needs. This is especially pertinent in areas that touch upon the CCP priorities, such as economic development, social harmony and public order. Thus, persons who have the potential to jeopardise or undermine credibility in the smooth operation of the economy, or threaten public order and harmony, or undermine CCP leadership and public faith in the governance system are at particular risk (e.g. corrupt officials, among others). Its existence is both a significant impediment to effective torture prevention efforts and epitomises the key problem with realising fully effective torture prevention in China: the Party's ability to override the law when it needs to serve its interests.[926]

4.3 A judiciary still subject to influence, despite reform

4.3.1 A judiciary insufficiently strong to act independently

There remains significant scope for political organs in China to interfere in court decisions. The CCP has the mandate to co-ordinate the work of the judicial bodies and can interfere in certain cases where it sees fit.[927] IHRL bodies are concerned by the remit of various CCP political committees' mandates, in particular the CCP and Law Committees, affording the possibility to

925 See, *inter alia*, Te-Ping Chen, 'Prone to Abuse: Rights Report Criticizes China's Secret Investigations', Wall Street Journal, China Real Time Report, 6 December 2016; also Amnesty International, 'No End in Sight' (2015).

926 See Thesis Conclusions.

927 CAT Committee Concluding Observations on China (2015), para 22; CAT List of Issues for China, para. 28(a) (2015).

co-ordinate legal proceedings and thus interfere in judicial affairs. The Chinese authorities have underscored that various reforms have been undertaken regarding these political-legal committees and that they coordinate the work of judicial bodies without directly taking part in investigations or suggesting lines of action to judges. However, IHRL bodies, such as the CAT Committee[928] and the UN SRT[929], and civil society bodies and scholars,[930] remain concerned at the existence of a political body that co-ordinates and influences legal proceedings. The CAT Committee expressly points to the risk of political interference in judicial affairs, particularly in sensitive cases of political relevance or state security.[931]

More generally, the question of the independence of the judiciary in China has been subject to wide scholarship and critique.[932] There are those who, like Chinese scholar Zhu Suli, argue that "there is no universal framework of reference for evaluating when judicial independence exists and when such independence is beneficial or costly insofar as the larger constitutional order."[933] In light of this, Zhu Suli argues that incremental reforms have – in the context of China – made significant inroads to strengthening judicial independence. Other legal scholars specialising in the Rule of Law in China agree to some extent, and acknowledge that there have been some reforms and tangible changes in strengthening some protections for judicial impartiality, integrity and against blanket political interference.[934] Yet, many legal China scholars also point out that China is only 'half-way there' and that there is still a long way to go before China could safely be said

928 CAT Committee Concluding Observations on China (2015); UN SRT Report and Follow-up on China (2005 and 2011).

929 UN SRT Follow-up on China (2011).

930 See, for example, M. Dutton, *Policing Chinese Politics: A History* (Duke University Press 2005), Dui Hua Foundation, 'Taming Police Influence in Politico-Legal Committees', *Human Rights Journal*, 29 November 2011; Human Rights Watch, 'Tiger Chair and Cell Bosses' (2005).

931 CAT Committee Concluding Observations on China (2015), para. 22.

932 See, for example, Peerenboom, 'Judicial independence in China: common myths and unfounded assumption' (2010); and Zhu Suli 'The Party and the Court' (2010); Henderson, 'Half-way home and a Long way to go: China's Rule of Law Evolution and the Global Road to judicial Independence, judicial Impartiality and Judicial Integrity' (2010); Nesossi, 'Compromising for "Justice"? Criminal proceedings and the ethical quandaries of Chinese lawyers' (2013); Amnesty International, 'No End in Sight' (2015); Amnesty International, Shadow Report to the UNCAT in preparation for China's Fifth Reporting Cycle, November 2015; Pils, 'Disappearing' China's human rights lawyers' (2013); Lan Rongjie, 'Killing the lawyer as the last resort: the Li Zhuang case and its effects on criminal defence in China' (2013).

933 Zhu Suli, 'The Party and the Court' (2010), p. 58.

934 Peerenboom, 'Judicial independence in China: common myths and unfounded assumption' (2010); Henderson, 'Half-way home and a Long way to go: China's Rule of Law Evolution and the Global Road to judicial Independence, Judicial Impartiality and Judicial Integrity' (2010).

to have a comprehensively independent judiciary, free from Party political and other types of interference.[935]

Some scholars, for example Zhu Suli, argue that influences are nuanced, and that political or other interferences should be differentiated. Zhu argues that "given the CCP's far-reaching influence, it is often difficult to distinguish Party influence on the Court and influence by the government, people's congress or other state actors."[936] Thus, it is difficult, if not impossible, to unpack and truly understand whether reforms have succeeded in reducing political influence. Further, Zhu argues that not all influences by Party members are consistent with Party politics and "legitimate Party influence should be distinguished from illegitimate Party influence by individual party members pursuing their own agendas."[937]

Nevertheless, other scholars[938] argue that despite some progress, the Party and the Courts are still inherently interconnected and more could, and should, be done to separate and protect judicial independence. In a 2016 analysis of the impact of judiciary reforms, two legal scholars, Chen and Shi-Kupfer, argue that there has been some progress in the strengthening of judicial independence, but not enough. They argue that reforms have succeeded in curbing problematic *local* political interference with the judiciary work.[939] This is a positive development as local interference in judicial matters was a significant hurdle to judicial impartial reasoning. However, they argue that *top-level* CCP control and political interference in judicial matters is still possible, despite reforms. This trend, they argue, is consistent with an analysis of current leadership priorities, to eradicate local vested interests and strengthen CCP top-level control over all elements of governance, including the justice process and the judiciary. Yet, these scholars consider that the central government continues to use arbitrary legal measures such as coerced confessions of guilt

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935 See Peerenboom, 'Judicial independence in China: common myths and unfounded assumption' (2010); Zhu Suli, 'The Party and the Court' (2010); 'Henderson, 'Half-way home and a Long way to go: China's Rule of Law Evolution and the Global Road to judicial Independence, judicial Impartiality and Judicial Integrity' (2010); He Weifang, *In the name of Justice: Striving for Rule of Law in China* (2012); Zhengrui Han, 'Legal Communication of Chinese Judiciary: A Discourse-Based View' (Pub. Peter Lang AG, Internationaler Verlag der Wissenschaften 2012); Pils, 'Disappearing' China's human rights lawyers' (2013).

936 Zhu Suli, 'The Party and the Court' (2010), p. 67.

937 Ibid.

938 Peerenboom, 'Judicial independence in China: common myths and unfounded assumption' (2010); Chen and Shi-Kupfer, 'the Function of judicial reforms in Xi Jinping's agenda: rectifying local governance through reforms of the judicial systems', (2016); Henderson, 'Half-way home and a Long way to go: China's Rule of Law Evolution and the Global Road to judicial Independence, Judicial Impartiality and Judicial Integrity' (2010).

939 Chen and Shi-Kupfer, 'the Function of judicial reforms in Xi Jinping's agenda: rectifying local governance through reforms of the judicial systems' (2016).

on China Central Television. Equally, Chen and Shi-Kupfer point out that "Xi's efforts to combine anti-corruption campaigns with judicial reforms can only be branded as selective, since the campaign has excluded important members of the coalition of princelings [children of veteran high-ranking early Communist cadres from the 1950s and 60s]. Consequently, local judicial functionaries will be punished for rent-seeking practices, whereas the egocentric behaviour of the central Party leadership (e.g., Panama Papers) is not subject to legal prosecution."[940]

Leading Chinese scholars He Wei Fang[941] and Professor Xu Xin[942] argue that it is fundamental that China ensures better judicial independence in order for it to achieve legal reform without revolution. In a series of recommendations, they argue that various key steps need to be taken to achieve this. These include, *inter alia*, that leadership over judicial reform should be given to a special committee of the National People's Congress; that the presidents of Chinese courts should not be chosen by CCP officials as they are now, but by an independent selection committee; that there should be no CCP interference in the outcome of cases in the courts, and that there should be no CCP cells in courts or law firms; that the powers over judicial outcomes exercised by 'political-legal commissions' composed of senior representatives of the courts, police and prosecutors must be reduced; and that a constitutional review agency or court should be established to measure official conduct against standards in the Constitution.[943]

Numerous scholars support this stance:[944] there is wide consensus that more reform is needed to strengthen the judiciary, including to strengthen meritocratic judicial selection process; ensure a greater role of the higher courts and other legal professionals in the judicial appointment process; ensure the judiciary is sufficient remunerated; publish more judgments with reasoned opinions; change the incentive structures so that judges are not penalised for reversals on appeal (as they

940 Chen and Shi-Kupfer, 'the Function of judicial reforms in Xi Jinping's agenda: rectifying local governance through reforms of the judicial systems' (2016), p. 66.

941 He Weifang, *In the name of Justice: Striving for Rule of Law in China* (2012) and Lubman, 'The Path to Legal Reform Without Revolution' (2012).

942 Beijing Institute of Technology

943 He Weifang, *In the name of Justice: Striving for Rule of Law in China* (2012) and Lubman, 'The Path to Legal Reform Without Revolution' (2012).

944 N. Diamant, S. Lubman and K. O'Brien, 'Law and Society in the PRC'; M. Gallagher, "Use the law as your weapon!": Institutional Change and legal Mobilisation in China', *Engaging the law in China: State, Society and Possibilities for Justice*, (eds.) eds. N. Diamant, S. Lubman and K. O'Brien (Stanford University Press, 2005); See also M.S. Tanner, 'Rethinking Law Enforcement and Society: Changing police analyses of social unrest', *Engaging the law in China: State society and possibilities for justice* (eds.) N. Diamant, S. Lubman, K. O'Brien (Stanford University Press 2005). p. 205-206; Zhengrui Han, 'Legal Communication of Chinese Judiciary: A Discourse-Based View' (Pub. Peter Lang AG, Internationaler Verlag der Wissenschaften, 2012).

currently are), ensure immunity and sufficient protection for judges to fulfil their role on politically sensitive cases without fear of reprisals; eliminate the role of political-legal committees adjudicative committees from higher courts and lower courts due to the possibilities of judicial interference; and increase the supervision by civil society.[945]

In the context of torture prevention, a strong and independent judiciary is an important condition for torture prevention measures to function effectively.[946] It is crucial in a number of aspects. First, following on from the reasoning on the opacity/transparency paradigm (the more a detainee is isolated from contact with the outside world, the greater the risk of torture and ill-treatment),[947] the right to consult a lawyer is an important means to prevent torture and other ill-treatment, as well as a safeguard of due process.[948] If a detainee either has no access to a lawyer, or if a lawyer is unwilling or unable to represent a detainee, then torture allegations are unlikely to surface. Second, a weak judiciary subject to interference is unlikely to rule independently or impartially on cases involving torture allegations. Consequently, incidences of torture could go unpunished, resulting in weak deterrence for repeated incidences torture. The need for effective investigations into allegations of torture goes beyond the need for an impartial and properly functioning judiciary, and extends to the complaints investigation process as a whole. Without these fundamental elements in place, there is a risk of the creation of a sphere where investigators and custody staff can act undeterred and unpunished (i.e., with impunity), and where torture practices can become entrenched. Countering impunity is an essential ingredient for effective torture prevention, especially in states where torture practices have become endemic. Yet, there are many indications that impunity remains a key problem in China. This is an obstacle to the building of the right environment for torture prevention safeguards to operate effectively; worse, it risks rendering them obsolete.[949]

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945 Peerenboom, 'Judicial independence in China: common myths and unfounded assumption' (2010), p. 93; see also references above [supra].

946 As identified in Thesis Chapter 1.

947 SPT report on its visit to Mexico and need for due process guarantees as a key to effective torture prevention, in CAT/OP/MEX/1, 31 May 2010; SPT, Provisional statement on the role of judicial review and due process in the prevention of torture in prisons, adopted by the SPT at its sixteenth session, 20 to 24 February 2012, CAT/OP/2.

948 SPT, Provisional statement on the role of judicial review and due process in the prevention of torture in prisons, adopted by the SPT at its sixteenth session, 20 to 24 February 2012, CAT/OP/2.

949 See Thesis Chapter 2.

An independent judiciary is also inherently linked to other fundamental due process safeguards necessary to prevent torture, such as the right of third party notification (and thus the prohibition of incommunicado detention) and of *habeas corpus*. As accentuated by the SPT, "State parties should consider effective judicial review and due process during the detention of individuals in criminal proceedings as a prerequisite for the prevention of ill-treatment or torture of persons deprived of their liberty and as a means of conferring legitimacy on the exercise of criminal justice."[950] Indeed, to enable the legal safeguards of prevention (such as access to a lawyer) to have their full effect, a strong and independent judiciary is an essential and foundational pre-condition. Despite legal reforms in this area, China's judiciary is still far from being truly strong and independent; this has direct implications for the effectiveness of many of its torture prevention measures currently in place. The absence of a strong and independent judiciary in China risks undermining the few torture prevention safeguards that it has established.

4.3.2 Lawyers inadequately protected and actively targeted/harassed

China officially considers that improvements to "the judiciary is an important part in the comprehensive promotion of rule of law in China, and relevant competent Departments are actively carrying out research on the introduction of specific measures, to further strengthen and [improve] the safeguard for lawyers' right to practice law as well as relevant services and administration. Lawyers will play a bigger role in China in terms of promoting rule of law, safeguarding the lawful rights and interests of relevant parties as well as maintaining the social fairness and justice."[951]

This governmental focus underpins some positive developments in China's efforts towards the Rule of Law;[952] namely the strengthening of the independence of the judiciary from local level (but not top level) executive interference. At the political level, the Chinese authorities have stressed that they consider that "lawyers constitute an important force in China's efforts to

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950 SPT, Provisional statement on the role of judicial review and due process in the prevention of torture in prisons, adopted by the SPT at its sixteenth session, 20 to 24 February 2012, CAT/OP/2, para 19.

951 China's Response to the CAT Committee List of Issues (2015), para. 4(2), p. 11.

952 Chen and Shi-Kupfer, 'the Function of judicial reforms in Xi Jinping's agenda: rectifying local governance through reforms of the judicial systems', (2016); Henderson, 'Half-way home and a Long way to go: China's Rule of Law Evolution and the Global Road to judicial Independence, Judicial Impartiality and Judicial Integrity' (2010).

implement the fundamental strategy of rule of law and to build a State ruled by law."[953] The authorities highlight that the Law on Lawyers was amended in 2007[954] to strengthen the rule of law. It has been amended in a number of aspects including elaborating the professional goals and mandates of lawyers (i.e., protecting the legal rights and interests of a client), strengthening the scope of lawyers' rights to practice law and their independence. In particular, it enshrines the rights of a lawyer to undertake his/her legal practice, including, *inter alia*, the rights to meet clients, consult evidential material and to investigate. The amendments are also geared at strengthening the regulation of legal conduct and bolstering supervision measures. To facilitate implementation of the Law on Lawyers, the 'Measures for the Administration of Practicing Law by Lawyers' were also amended in 2008. These regulate the licences of lawyers to practice law and regulate the conduct of lawyers in practice and in court. These measures were added to in 2012 and 2015 by reforms to the CPL and CL, aiming to strengthen lawyers' ethical conduct in their legal proceedings and in court conduct, such as extending grounds of criminal offences to include unruly behaviour in court, disruption of court proceedings, amongst others. Recently, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice have jointly promulgated the 'Provisions on Legally Safeguarding the Right of Lawyers to Practice Law'.[955] In all, China officials argue that China has "strengthened safeguards, improved remedies for infringement of the protections and improved accountability for those who infringe the safeguards."[956]

Yet, while these are positive developments in theory, they have been widely criticised by IHRL mechanisms, scholars and civil society for failing to strengthen the judiciary in practice. Scholars and IHRL bodies point out that these developments have actually served to weaken the protection of lawyers and have led to deteriorating conditions for lawyers to effectively practice law in reality. [957] The UN Special Rapporteur on Independence of the Judiciary, [958] the CAT

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953 China's Response to the CAT Committee List of Issues (2015), para. 4(2), p. 11.

954 Amendment came into force as of 1 June 2008.

955 MPS, the Ministry of State Security and the Ministry of Justice, 'Provisions on Legally Safeguarding the Right of Lawyers to Practice Law'; see commentary in China's Response to the CAT Committee List of Issues (2015), para. 4(1).

956 Ibid.

957 Nesossi, 'Compromising for "justice"? Criminal proceedings and the ethical quandaries of Chinese lawyers', *Comparative Perspectives on Criminal Justice in China* (2013); Pils, 'Disappearing human rights lawyers', *Comparative Perspectives on*

Committee,[959] the Committee on the Elimination of Racial Discrimination[960] and the UN SRT[961] have all voiced their serious concerns that the relevant new laws and regulations are, in practice, actually curbing the independence and ability of many lawyers to fulfil their roles properly.

These bodies have emphasised that various current and amended legal provisions undermine the independence of lawyers. These include Articles 306 to 315 of the CL and Articles 39 of the Criminal Procedure Law and amendments to the Law on Lawyers.[962] These IHRL mechanisms, as well as many bodies in civil society, have criticised Article 306[963] as the so-called 'Big Stick 306'.[964] The result of Article 306, they argue, is that many Chinese lawyers fear being punished on spurious perjury grounds, under Article 306, for *de facto* defence work and for taking on cases that go against the status quo or for advising their client to repudiate a forced confession.[965] The author saw an indication of this in a recent workshop on strengthening complaints mechanisms in China, in which she participated.[966] The workshop focused on prisons but invited previous KSS staff project implementers to give encouragement to the prison implementers. Here Wuzhong procurators and management of its KSS shared a case where a lawyer, who represented a detainee complainant, had had their licence revoked after the (nascent/trial) KSS Complaints Handling Committee found the complaint to be a 'malicious complaint'. While this is only one case illustration, it, cumulatively along with the above points, can be indicative of the various reasons

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Criminal Justice in China (2013); MacBean, 'addressing the 'hide and seek' scandal: restoring the legitimacy of Kanshousuo' (2016).

958 UN SRT, Report and Follow-Up on China (2005 and 2011).

959 During its preparation of its Fifth Reporting Cycle on China (2012 – 2015)).

960 CERD/C/CHN/CO/10-13, para. 19.

961 UN SRT, Report and Follow-Up on China (2005 and 2011).

962 See the CAT Committee List of Issues sent to China (2015); and the UN CERD, CERD/C/CHN/CO/10-13, para. 19.

963 Article 306, CL: 'In a criminal prosecution, a defender or agent ad litem who destroys evidence, fabricates evidence, helps a party destroy or fabricate evidence, or threatens or entices a witness to go against the truth and change their testimony or give false evidence, is punished by up to three years imprisonment or short-term detention, and where the circumstances are serious, sentence to not fewer than three but not more than seven years imprisonment. Where defenders and agents ad litem submit, present, or cite witness testimony or other evidence that is false, and are not intentionally fabricating, it is not fabrication of evidence.'

964 'The Big Stick 306', New York Times, 5 May 2011, http://www.nytimes.com/2011/05/06/opinion/06fri3.html.

965 UN SRT 2005 Report on China and Follow-up report in 2011 (Article 306 of the CL was not amended in the latest 2015 revisions); Human Rights Watch, 'Tiger Chair and Cell Bosses' (2015); 'The Big Stick 306', New York Times (2011); CAT Committee Concluding Observations on China (2015).

966 GBCC-Renmin University conference on 'Strengthening complaints mechanisms' held in Wuhu, China, on 23 November 2016, in which the author participated as external expert on behalf of the CPT.

why some lawyers fear taking on cases that could jeopardise their right to practice the law ongoing.[967]

Other contentious amendments to the CL have also further extended potential criminal liability for lawyers for their conduct in legal proceedings. Amended Articles 309, 311 and 314 of the CL stipulate:

> **Article 309 (Disrupting Order in the Court):** *"In any of the following circumstances [of] disrupting courtroom order, give a sentence of up to three years imprisonment, short-term detention, controlled release or a fine: (1) Gathering crowds to make a racket or attack the court; (2) Beating judicial personnel or litigation participants; (3) Insulting, defaming, or threatening judicial personnel or litigation participants and not heeding the court's admonitions, seriously disrupting courtroom order; (4) Exhibiting conduct disrupting courtroom order such as undermining courtroom operations or stealing or destroying litigation documents or evidence, where the circumstances are serious."*[sic][968]
>
> **Article 311:** *"Refusing to provide relevant evidence one has collected when so requested by judicial organs investigating a matter, while knowing that others have exhibited criminal conduct of espionage, terrorism or extremism, where the circumstances are serious, is sentenced to up to three years imprisonment, short-term detention or controlled release."* [sic]
>
> **Article 313:** *"Where one has the ability to carry out a people's court's judgment or ruling but refuses to do so, and the circumstances are serious, the sentence is up to three years imprisonment, short-term detention or a fine; where circumstances are especially serious, the sentence is between three and seven years imprisonment and a concurrent fine."*

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967 Presentation by Ms Z., senior staff member at a KSS of City W., at the GBCC-Renmin University conference on 'Strengthening complaints mechanisms' held in Wuhu, China, on 23 November 2016.

968 Article 309, CL, amended 2015.

Many IHRL bodies, scholars and members of civil society consider that these grounds are overly broad, undermine the principle of legal certainty, and are open to abusive interpretation and application.[969] These bodies highlight a particular concern with unlawful or unjustified interference with the work of human rights lawyers, such as the detention or eviction from court of lawyers during the exercise of their duties. The CAT Committee has pointed to various recent reports of complaints received of cases involving lawyers, including:

> *"Wang Quanzhang, detained in April 2013 in the courtroom allegedly for speaking loudly during a hearing; of Zhang Keke, detained in December 2014 in the courtroom; and of Xiangdong and Wu Liang Shu, evicted from the courtroom while exercising their duties as defence lawyers; and the revocation of lawyers' licences to practice law, as in the cases of Tang Jitian and Lieu Wei and of Teng Biao, Jiang Tianyong, Li Heping, Wen Haibo, Liu Shihui, Chen Wuquan, Wang Cheng and Wan Quanping."*[970]

China refutes that there has been unlawful or unjustified interference with the work of lawyers.[971] For example, in the case of Wang Quanzhang, the Chinese authorities have responded stating:

> *"On April 3, 2013, when Jingjiang People's Court was trying the case involving the public prosecution initiated by Jingjiang People's Procuratorate against a defendant whose family name is Zhu for using a weird religious organisation to undermine the implementation of laws, the defendant's defender Wang Quanzhang violated the order of the court hearing and the circumstances were serious, so Jingjiang People's Court decided to detain Wang Quanzhang in accordance with law. On April 6, 2013, Jingjiang People's Court decided to terminate the detention of Wang Quanzhang ahead of time as the detention has played the role as discipline."* [sic][972]

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969 UN SRT 2005 Report on China and Follow-up Report in 2011; Human Rights Watch, 'Tiger Chair and Cell Bosses' (2015); CAT Committee Concluding Observations on China (2015), para. 18; Amnesty International, 'No End in Sight' (2015).

970 The CAT Committee List of Issues on China (2015), para. 4(a).

971 China State Response to the CAT Committee List of Issues during the CAT Fifth reporting cycle, para. 4(1).

972 China's Response to CAT List of Issues during the CAT Fifth reporting cycle, para 4(1)

The CAT Committee has underscored its 'deep concern'[973] about numerous and consistent reports of crack-downs on defence lawyers and activists[974] and, in particular, those lawyers involved with cases of "government accountability, issues such as torture cases against public officials, the defence of human rights activists and religious practitioners."[975] Moreover, IHRL mechanisms and civil society flag that not only are many lawyers fearful in practice of reprisals for effectively doing their job, there are also numerous reports of lawyers being detained and some ill-treated for their defence work, on spurious *de jure* reasons.[976] The CAT Committee has criticised the authorities for the numerous reports received of lawyers being "detained on suspicion of broadly defined charges, such a 'picking quarrels and provoking trouble'."[977]

There are also indications that the punitive administrative detention system is being used to punish lawyers. For example, in the cases of defence lawyers, Zhang Junjie, Jiang Tianyong, Wang Cheng and Tang Jitian, the administrative *de jure* ground relied upon was "cultic activities to disturb the social order."[978] This resulted in sentences of punitive administrative detention (ranging from 5 days (Zhang Junjie) to 15 days (Jiang Tianyong, Wang Cheng and Tang Jitian). Moreover, the licences of Jiang Tianyong and Wang Cheng to practice law as lawyers were revoked due to reasons of "disrupting the court order or interfering with the normal conduct of litigation."

Equally, the CAT Committee has received a number of allegations of torture and other ill-treatment of Chinese lawyers by the police while in punitive administrative detention.[979] China, however, refutes this and none of these cases have reached the courts.[980] The CAT Committee and the UN SRT remain seriously concerned by reports of ill-treatment and torture as acts of punitive reprisals against such lawyers in detention.[981]

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973 CAT Concluding Observations (2015), para. 18, p. 5
974 CAT Concluding Observations (2015), para. 18, p. 5.
975 CAT Concluding Observations (2015), para. 18, p. 5.
976 For example, CAT Concluding Observations (2015), UN SRT Reports on China 2005 and 2011 (Follow-Up) and the UN Special Rapporteur on the Independence of the Judiciary [supra].
977 CAT Committee Concluding Observations on China (2015), para 18.
978 Imposed on 22 March 2014 by Heilongjiang Jiansanjiang Agricultural Reclamation Public Security Bureau; see further details in China's State Response to the CAT Committee List of Issues during the CAT Fifth reporting cycle, para. 4(3), p. 11.
979 See CAT Concluding Observations (2015).
980 China's State Response to CAT List of Issues during the CAT Fifth reporting cycle on China, para. 4(2), p. 11.
981 CAT Concluding Observations on China (2015), para. 18.

From July 2015, there has been a series of arrests of high profile lawyers, which has been the subject of wide criticism by the CAT Committee in December 2015[982] and by many members of civil society. Amnesty International notes "the detention of lawyer Wang Yu and her family on 9 July [2015] marked the beginning of an unprecedented government crackdown on human rights lawyers and other activists. Over the following weeks, at least 248 lawyers and activists were questioned or detained by state security agents, and many of their offices and homes were raided. At the end of the year, 25 people remained missing or in custody, and at least 12 of them, including prominent human rights lawyers Zhou Shifeng, Sui Muqing, Li Heping and Wang Quanzhang, were held in "residential surveillance in a designated location" on suspicion of involvement in state security crimes. […] Family members were also subject to police surveillance, harassment and restriction of their freedom of movement. Human rights lawyer Pu Zhiqiang was given a three-year suspended sentence on charges of "picking quarrels and provoking troubles" and "inciting ethnic hatred", primarily on the basis of comments he had made on social media. He was barred from practising law as a result of the conviction. […]."[983]

In 2016, reports of harassment of other lawyers, including Xia Lin, Ai Wei Wei's former lawyer, continued to circulate. Xia Lin was sentenced to twelve years for fraud in September 2016.[984] In June 2016, a lawyer (Wu Liangshu) was allegedly attacked (strangled, beaten, stamped upon and clothes ripped off) by court policemen in the Qingxiu district court in Nanning, Guangxi province, in front of two judges, after his request to file a case was rejected; photographic evidence of Wu leaving the court room with bruises and ripped clothing went 'viral' online.[985] In May 2017, Le Heping, a human rights lawyer, emerged emaciated from an unknown detention location after two years of detention, where, his wife alleges, he was starved and beaten.[986]

Many China legal scholars see the crackdown on lawyers as symptomatic of the trend of the gradual tightening of State control under Xi Jinping's leadership, and consider the law as being "a

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982 CAT Concluding Observations on China (2015).
983 Amnesty International Report on China for 2015/2016.
984 'China: lawyer for Ai Weiwei jailed for 12 years in 'severe retaliation'', the Guardian, 22 September 2016.
985 'Trousergate: Chinese lawyer left half naked after police ripped his clothes in court rejects official apology', South China Morning Post, 10 June 2016.
986 The Guardian, ''Emaciated, unrecognisable': China releases human rights lawyer from custody', 10 May 2017, https://www.theguardian.com/world/2017/may/10/emaciated-unrecognisable-china-releases-human-rights-lawyer-from-custody

knife held firmly in the hands of the Party."[987] Jeff Wasserstrom, Professor of Chinese history at the University of California, has argued that "the trend lines, that seemed to be moving in at least [a] gradually encouraging direction, just don't seem to be going that way anymore.[…] Faced with a slowing economy and widespread popular discontent […] China's communist leaders appeared to have decided their country now needed to live under a near permanent "state of control.""[988] Other China scholars, such as Lu Yiyi, agree and argue that the increasing trend of tightened control over Chinese lawyers is more evident than before. Lu highlights that "the authorities perceive human rights defenders and prominent lawyers as increasingly linking together, through social media and other avenues, to question the Party and system".[989] Previously, legal scholars and lawyers knew that they could critique and recommend some improvement to individual elements of the laws, under the understanding that legal reform overall strengthened China. However, Lu and other experts[990] argue that lawyers are increasingly being perceived as crossing a 'red line' when they question the Party and the overall wider operation of the One-Party system.[991] Criticising the system has repercussions. Leading Chinese lawyer, He Weifang, who recommended systemic reform in his 2012 book on the Rule of Law in China, was 'exiled' (his own words) to a university in XinJiang for several years after publishing recommendations for systemic change to the Party and institutional bodies in China.[992]

Access to a lawyer who is both willing and unhindered from acting in his/her client's best interests to the best of their ability, is a pre-condition to enabling legal preventive safeguards such as 'access to a lawyer' to have any meaning or impact. This area is another illustration that mere implementation of the law (such as affording a detainee 'access to a lawyer') may not *per se* be sufficient to operate effectively as a safeguard against torture. The preventive legal safeguards

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987 Ibid.

988 Interview with J. Wasserstrom by the Guardian newspaper, 'China; lawyer for Ai Weiwei jailed for 12 years in 'severe retaliation'', 22 September 2016; see also Amnesty International China Report 2015/2016; 'Rule of law in China, a country which locks up its lawyers', the BBC, 13 July 2015.

989 Yiyi Lu, 'Pushing Politics: Why China is Supercharging Dissident Trials', 12 August 2016.

990 See Human Rights Watch, 'Tiger Chair and Cell Bosses' (2015); Amnesty International, 'No End in Sight' (2015); Yiyi Lu, 'Pushing Politics: Why China is Supercharging Dissident Trials', 12 August 2016.

991 He Weifang, *In the Name of Justice: Striving for the Rule of Law in China,* (2012); Yiyi Lu, 'Pushing Politics: Why China is Supercharging Dissident Trials', 12 August 2016; Pils, 'China's Human Rights Lawyers: Advocacy and Resistance' (2014); Human Rights Watch, 'Tiger Chair and Cell Bosses' (2015); Amnesty International, 'No End in Sight' (2015).

992 See Lubman, 'The Path to Legal Reform without Revolution', China Real Time Report, Wall Street Journal, Commentary, 7 December 2012; He Weifang, *In the Name of Justice: Striving for the Rule of Law in China,* (2012).

need certain wider conditions to operate meaningfully. Without the pre-conditions of a free and independent judiciary, where lawyers can represent their clients without fear, and a judge who can decide impartially, preventive legal safeguards are rendered ineffective.

4.4 Signs of effective impunity for abuse perpetrators, non-independent investigations & complaints' mechanisms in need of strengthening

4.4.1 Nascent complaints' system

As outlined in Chapter 2, China is just beginning to introduce a complaints' system in the KSSs (police-operated remand detention) and some prisons.

The system has been introduced in certain pilot region KSSs, and looks set to roll out to all KSS nationwide.[993] It has been regulated for in KSSs (only) by MPS Regulation no. 385, 2011.[994] This area has seen a number of positive developments aimed at strengthening complaints' avenues and the Chinese authorities have reached out nationally (to leading domestic scholars) and internationally, to work with penitentiary experts and monitoring experts. Thousands of procurators are now based in prisons and KSSs across China, mandated, among other aspects, to receive and address detainee and prisoner complaints.[995] Moreover, in KSSs, procurators can now receive and address complaints about different aspects of the nature of detention (previously, procurators were only mandated to examine the legality of detention). This includes the right of the detainee to contact and see the procurator in person with complaints about aspects of his/her solitary confinement for discipline purposes or for the purpose of the protection of self or others.[996] According to the Chinese authorities, the "12309 procuratorate reporting platform" has been the main channel for many torture and other ill-treatment allegations to reach the courts.[997]

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993 Author's interviews with Cheng Lei and Procurator Hu, as well as discussions at the GBCC-Renmin University conference on 'Strengthening complaints mechanisms' held in Wuhu, China, on 23 November 2016, in which the author participated as an external expert.

994 MPS, KSS Management Department, 'Regulations Governing the Treatment of Detainee Complaints', published 7 September 2011 (Chinese only) (author translation).

995 China State Report for the CAT Committee's Fifth Reporting Cycle (2014), and China's Response to CAT Committee's List of Issues (2015), p. 37.

996 China's Response to the CAT Committee List of Issues on China (2015), para. 19, p. 37.

997 See China's Response to the CAT Committee List of Issues on China (2015) and China State Party Report to the UNCAT (2015).

The Chinese authorities have openly acknowledged that China has not yet established an independent body that can receive complaints, but they argue that there are, nonetheless, many departments undertaking similar duties.[998] For example, mechanisms exist within the Standing Committee of the National People's Congress for complaint letters and calls. The PRC government, at various levels, can also accept, investigate and deal with complaints. The Procuratorates carry out the supervision of detention facilities in accordance with law and can receive and address complaints concerning detainees' safeguards and protection rights.[999]

Careful thought and training have gone into initiatives to strengthen the role of onsite procurators, as a conduit for detainee complaints. For instance, there are internal prison rules specifying that onsite procurators should change / rotate posts every two to three years; with the aim to ensure their independence.[1000] Likewise, pilot prison initiatives are underway to adopt an emergency complaints mechanism, whereby staff are obliged to immediately inform onsite procurators about violent incidents or complaints made by detainees who fear for their safety. Risk-assessment procedures are also underway to assess the level of risk of reprisal facing a complaining detainee or prisoner.[1001]

It is both a positive and a significant development in the context of torture prevention that China is beginning to develop complaints' mechanisms in some of its places of deprivation of liberty. Much thought and discussion has gone into the trialling of the feasibility of complaints' mechanisms in KSSs and some pilot prisons.[1002] Nascent Complaints Handling Committees do have certain positive features, including that they are made up of not just onsite procurators and managerial staff, but also, in some cases, external volunteers such as lawyers[1003] (carefully selected / invited).[1004]

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998 China's Response to the CAT Committee List of Issues (2015), para. 20.

999 China's Response to the CAT Committee List of Issues (2015), para 20

1000 Author's interview and correspondence with M. Mella, Senior Project Manager, GBCC (a specialist body that implements projects and facilitates exchanges on judicial and legal reform in China), 23 November 2016 and September 2017.

1001 Ibid.

1002 For example, the recent discussions at a conference organised by GBCC and Renmin University on 'strengthening complaints mechanisms', Wuhu, China, 23-24 November 2016.

1003 Author's interview with one such lawyer, Monitor A. (*name anonymised*), Wuhu, China, 24 November 2016.

1004 Author's interview with Professor Cheng Lei, Wuhu China, 24 November 2016; discussions held at the GBCC-Renmin University conference on 'Strengthening complaints mechanisms' held in Wuhu, China, on 23-24 November 2016, in which the author participated as an external expert.

While it is positive that complaints' mechanisms are evolving, there remain various structural and deep-seated problems with their operation in China. These deficiencies can undermine the operation of the complaints mechanisms as key safeguards against torture. First, the complaints' system does not cover all places of detention in China. At the moment, complaints avenues have been established in KSSs and in some prisons and do not extend to other places of deprivation of liberty, such as most prisons (although consideration is underway to extend to these), police stations, psychiatric facilities, juvenile or welfare homes that can hold persons subject to social welfare or care orders, court custody, military or immigration detention settings.[1005] Second, there lacks standardisation and regulation of complaints procedures nationwide, with the result that each mechanism varies depending on the institution and region. Third, nationally there is no overall single body with the power to co-ordinate, gather and analyse complaints arising within the various different Ministries' jurisdictions, as well as from the different operational bodies with their discrete functions. If established, this would allow for a comprehensive overview of patterns of problems within the different deprivation of liberty settings and enable a more strategic approach to addressing complaints and countering patterns of recurrent torture and ill-treatment practices.

Fourth, pilot projects run by leading Chinese scholars have highlighted that there remain some shortcomings with the current set-up of complaints system that they have examined, especially in the pilot prisons. These problems go to the heart of the whole functioning of the complaints mechanism analysed. For example: complaints boxes are situated in public areas under CCTV, and various prison officers have the keys and forward them on to the relevant department. This undermines the principle of being able to complain anonymously and/or confidentially and contributes to rendering the system one whereby prisoners feel they can only complain about

[1005] Author's discussions with senior Chinese Procuratorate prosecutors and lawyers of a visiting delegation on exchange of practices on torture prevention with the CPT at Council of Europe, Strasbourg, 23 August 2016 (organised by the GBCC, Renmin University and the Council of Europe, Directorate General 1), referenced in the CPT Annual General Report 2016, published Spring 2017; discussions held at the GBCC-Renmin University conference on 'Strengthening complaints mechanisms' held in Wuhu, China, on 23-24 November 2016.

small issues, such as food and the points/rewards system, but would not dare to put forward complaints about potential staff member abuse.[1006]

While there is notionally a channel of complaints through personal detainee interviews with prison officers, pilot project findings indicate that these interviews are in practice hard to organise and do not serve as a ready and regular channel. Similarly, in the context of KSSs, an interview by the author with an onsite procurator highlighted that the quality of the complaints' channel depended significantly on the character or personality of the staff member or procurator involved. In positive cases, approachable procurators were able to instil some trust in detainees. However, this varied by institution and depended on the type of personnel.[1007]

The 'Detainee Handbook', a booklet given to prisoners upon arrival in which they are meant to complete weekly self-assessments and raise problems, is also meant to serve as another channel for detainees to complain. Scholars assessing this area, however, have found that this is a deficient avenue in several aspects. First, it is not an anonymous form, and various prison officers read the detainee's input on a weekly basis; second, its compulsory nature does not lend itself easily to the confiding of a sensitive complaint.

Complaints' mechanisms in need of development

The Renmin University scholars, leading initiatives to strengthen the functioning of complaints mechanisms in prisons and KSSs, highlight that while the introduction of complaint channels is a significant and positive development, some serious concerns remain with the mechanisms that they have examined. They worry that the lack of accessibility to confidential avenues to complain promotes a lack of detainee faith in the onsite procurator as a complaint avenue. They also demonstrate that in one large prison (over 3000 inmates) examined, over a period of four years, a considerably low number of written complaints were received by the onsite Procuratorate. Of those few complaints received, only a third concerned matters related to the prison itself and then

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1006 Ibid.

1007 Author's interview with Procurator Hu (involved in establishing and trialling a pilot complaints mechanism establishment in a Wuhu KSS) and Ms. Z., (senior staff member of a KSS in City W., and also involved in establishing and trialling a pilot complaints mechanism in her KSS), 23-24 November 2016, Wuhu, China; and discussions held at the GBCC-Renmin University conference on 'Strengthening complaints mechanisms' held in Wuhu, China, on 23-24 November 2016, in which the author participated as an external expert.

only a couple about staff treatment and deaths in the prisons.[1008] While the number of complaints did increase four times over the years examined, the total number was still minimal. Scholars consider that it is doubtful whether this number reflected the true situation in the prison. A comparison can be seen with the UK prison system, where prison complaints' departments typically receive between 100-300 complaints per month.[1009] In general, Chinese scholarly analysis and ongoing national discussions highlight: the need to strengthen complaints mechanisms in prisons across China through better training of prison staff on complaints' rationale and mechanisms; the need to strengthen the procurator's role and legal mandate to systematically and promptly follow-up on complaints and ensure thorough and more effective investigations, among others.

Equally, definitional discrepancies and an ambiguity, or misunderstanding, among some lawyers and procurators as to what actually qualifies as torture or ill-treatment does not facilitate the systematic identification of relevant allegations by complaints mechanisms (c.f. Chapter 2.4(I)(i)). Complaints mechanisms, composed of procurators, lawyers and others, have an active role play to play in correctly identifying allegations of torture and ill-treatment and, where necessary, passing them on to the competent authorities for investigation. The low numbers of abuse complaints received and passed on is indicative that this is not happening as much as it could or should (c.f. Chapters 4.4.2 and 4.4.4).

Renmin University scholars have had unprecedented access to prisons and have been able to work alongside the procuratorate. These scholars have been trusted advisers to the government on criminal law reform and torture prevention safeguards, as well as having access to senior policy makers, operational managers and detainees.[1010] They are not the only ones to assess the nascent complaints mechanisms; senior members of the judiciary and supervisory branch of the procuratorate have also discussed their concerns with the current complaints' system. They worry

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1008 Renmin University Pilot Project, name of prison and specific details kept confidential.

1009 The author was a prison inspector for HMIP and, as part of this role, undertook analysis of UK prisons complaints' systems.

1010 Author interview: Professor Cheng Lei, Renmin University, one of leading Chinese scholars, along with Professor Chen Weidong, working on developing the field of torture prevention in China, through research, pilot projects and providing advice to the authorities on relevant draft legislation and, in particular, KSS and prison reform in China, on 24 November 2016, Wuhu, China.

that onsite procurators can occasionally have too 'cosy' a relationship[1011] to be fully impartial, and this can affect the quality of their work and hinder fully effective operation of complaints' mechanisms as a safeguard against torture.

The approach to strengthening detainee trust and faith in the nascent complaints' system, and increasing detainee and prisoner use of this avenue to air concerns about abuse was the subject of a recent (2016) workshop in China, led by Renmin University and GBCC. Discussions between procurators, legal-political committee members, prison and KSS detention directors and front-line detention staff drew on experiences in two pilot KSSs, with input from two international experts (including the author).[1012] Many highlighted that the mechanisms were a valuable addition, however, they pointed out that too few detainees used the complaints' system to air serious grievances about abuse, rather they only used the system to bring complaints about procedural, living conditions or more minor grievances. Even then, only few detainees used the system.[1013] Chinese scholars' analysis of various trial project results, as well as detention staff and procurators themselves, all raised concerns that very few detainees were using the system to air torture or other ill-treatment complaints. While monitors have found that torture and other ill-treatment had reduced, they noted that ill-treatment did still occur (especially in the form of inter-detainee violence or sponsored abuse from detention officials);[1014] and the avenues to complain about alleged acts of torture or ill-treatment were not as accessible or effective as they could be.[1015] More faith in the system was needed to be established.[1016] This was one of the reasons for a programme of ongoing training on complaints mechanisms' establishment and functioning in KSSs and prisons, run by Renmin University and GBCC for police, local procurators, prison staff

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1011 Author's discussions with senior Chinese procuratorate senior prosecutors and lawyers: members of a visiting delegation on exchange of practices on torture prevention with the CPT at Council of Europe, Strasbourg, 23 August 2016 (organised by the GBCC, Renmin University and the Council of Europe, Directorate General 1), referenced in the CPT Annual General Report 2016, published Spring 2017.

1012 Discussions held at the GBCC-Renmin University conference on 'Strengthening complaints mechanisms' held in Wuhu, China, on 23 – 24 November 2016, Wuhu, China.

1013 Author's discussions with senior Chinese procuratorate senior prosecutors and lawyers: members of a visiting delegation on exchange of practices on torture prevention with the CPT at Council of Europe, Strasbourg, 23 August 2016; and discussions held at the GBCC-Renmin University conference on 'Strengthening complaints mechanisms' held in Wuhu, China, on 23-24 in 23 – 24 November 2016, Wuhu, China; and author's interview with Professor Cheng Lei, Renmin University, 24 November 2016, Wuhu, China.

1014 Renmin University and GBCC, Report on Liaoyuan Trial Monitoring Mechanisms, 2008-2010.

1015 Ibid.

1016 A reason for piloting and then strengthening complaints mechanisms in China by Renmin University and partners; also the rationale behind the 2011 MPS Regulations governing KSS Treatment of Detainee Complaints (September 2011).

and KSS staff.[1017] Experts involved in trialling and setting up complaints' mechanisms in KSS and prisons point out that while there are increasing numbers of such committees, and the importance of external oversight mechanisms is acknowledged in national legal circles, there remains, however, ongoing discussion about how to make the current committees fulfil their function, how to widen the scope of membership of the committees, to ensure that committee members have sufficient professional and impartial judgement and training. National and international bodies and experts are working on addressing many of these issues with the aim to strengthen complaints' mechanisms to reduce risk of torture.[1018]

It is, however, notable that no avenues exist, in addition to the establishment of these – nascent – internal avenues, for complaints of torture to be independently investigated by a completely external body. The Complaints Handling Committees comprise detention staff, Party Committee members, procurators and, sometimes, (carefully selected) lawyers. They all, in different ways, have links with the authorities. China lacks an Ombudsperson or equivalent external body that is independent and specifically competent to receive and address prisoner and detainee complaints. This had been identified as problematic by several IHRL bodies,[1019] including the CAT Committee.

4.4.2 Limitations in procuratory supervision

Compounding the lack of independent complaints' mechanisms, there are deep-seated regulatory problems that currently hinder the complaints' system and onsite procuratorial work in gathering and investigating complaints within detention settings. Procurators are sometimes hindered by regulations and policy from following up on complaints. The problematic legal basis for complaints can be illustrated with its main governing regulation, MPS Regulation no. 285, 2011

1017 Author's discussions with senior Chinese procuratorate members of a visiting delegation on exchange of practices on torture prevention with the CPT at Council of Europe, Strasbourg, 23 August 2016 (organised by the GBCC, Renmin University and the Council of Europe, Directorate General 1), referenced in the CPT Annual General Report 2016, published Spring 2017; Discussions held at the GBCC-Renmin University conference on 'Strengthening complaints mechanisms' held in Wuhu, China, on 23-24 November 2016, in which the author participated as an external expert; and author's interview and correspondence with M. Mella, Senior Project Manager, GBCC (a specialist body that implements projects and facilitates exchanges on judicial and legal reform in China), 22 November 2016 and September 2017; and interview with Professor Cheng Lei, Renmin University, 24 November 2016, Wuhu, China.

1018 Author's interviews and correspondence with M. Mella, Senior Project Manager, GBCC (a specialist body that implements projects and facilitates exchanges on judicial and legal reform in China), 22 November 2016 and September 2017; and interview with Professor Cheng Lei, Renmin University, 24 November 2016, Wuhu, China.

1019 CAT Committee Concluding Observations on China (2015); UN SRT Report on China and Follow-up (2005 and 2011).

(for KSSs).[1020] The MPS Regulation is broad and confers discretion on KSSs to use their own systems of complaints, within some broad framing guidelines. It mentions that complaints need to be responded to 'in a timely fashion' (without deadline)[1021] and the onus is on the detainee to prove to the procurator that the ill-treatment has happened. Procurators can only tangibly follow-up, investigate and prosecute an allegation if it constitutes serious enough abuse that they feel it is likely to reach the crime of torture or ill-treatment (which is a high and narrow definition within the CPL). This links to evidence presented by the IHRL bodies and civil society indicating that definitional discrepancies and ambiguities are hindering procurators and lawyers from fully and systematically identifying all relevant abuse allegations that could be investigated as potential cases of torture (c.f. Chapter 2.4(I)(i)). The low numbers of abuse complaints received and passed on for investigation, as well as the (below) low numbers of actual prosecutions is indicative that identifying, reporting and prosecuting of all possible torture allegations is not happening as much as it could or should (cf. Chapters 4.4.1 and 4.4.4).

These issues may be addressed in the future (and solutions are being trialled in pilot projects), as the relative lack of power of procurators slowly changes and power increases. While prosecutors do feel they can follow up cases of abuse and they do, however, the reality of the discipline might mean that the police perpetrator is not removed immediately from contact with the victim or adequately punished.[1022] Thus, the current system may lack sufficient accountability and discipline of perpetrators to create an element of deterrence from repeat abusive acts; this is essential, otherwise detainees - and procurators - could quickly lose faith in the complaints' and justice system and nascent protection measures. If left unaddressed, a culture of impunity can facilitate embedded torture practices (see below).[1023]

IHRL mechanisms have recently underlined their concerns about the independence of the procurators' supervision of the investigation of torture allegations in China and the consequent

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1020 Translated by the author.

1021 Nonetheless, pilot projects are starting to trial the implementation of time-limits in this respect, but it remains in the context of prisons.

1022 Author's interview and correspondence with Marina Mella, Senior Project Manager, GBCC (a specialist body that implements projects and facilitates exchanges on judicial and legal reform in China), 23-24 November 2016, Wuhu, China, and September 2017.

1023 See below Chapter Sections 4.3.3 and 4.4.4.

impact on the effectiveness of procuracy supervisory work. The CAT Committee underscored that "it regrets that the State party has not provided disaggregated and complete information on the number of torture-related complaints, received from all sources, for each of the crimes that cover the various aspects of the definition of torture. It has also received no information on the number of investigations on torture allegations initiated ex officio by procuratorates or as a result of information reported by doctors."[1024] The Committee has also questioned the procedures in place to investigate deaths in custody, which "are often ignored in practice and relatives face many obstacles to press for an independent autopsy and investigation or to recover the remains."[1025]

4.4.3 Complainants 'targeted'

Some complaints mechanisms have, occasionally, been reported to exacerbate the plight of complainants. It is precisely because of the act of complaining about a government policy or actions by a public authority (for example, land rights / governmental expropriation of property and the compensation schemes) that many persons have found themselves in punitive administrative detention in the first place.[1026] IHRL bodies such as the CAT Committee and the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the UN SRT, the WGAD and the Working Group on Enforced or Involuntary Disappearances[1027] have all stressed their concern at consistent reports that petitioners, human rights defenders and ethnic minorities (amongst others) continue to be threatened or charged with broadly defined offences (such as 'picking quarrels and provoking troubles' or more severe crimes against national security), which lack legal certainty and act as deterrence to categories of persons from the legitimate exercise of various rights (including the right of freedom of expression and to petition / complain against government policies). All of

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1024 CAT Committee Concluding Observations on China (2015).

1025 CAT Committee Concluding Observations on China (2015), para. 24.

1026 Sapio, *Sovereign Power and the Law in China*, (2010); and Biddulph, *Legal reform and Administrative detention Powers in China* (2007) and 'What to make of the abolition of re-education through labour?'(2016); Osnos, *The Age of Ambition: Chasing Fortune, Truth and Faith in the New China* (2014); see also Chapter 3.

1027 Joint Study on Global Practices in relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur On The Promotion And Protection Of Human Rights And Fundamental Freedoms While Countering Terrorism, Martin Scheinin; the UN SRT, Manfred Nowak; the WGAD, Shaheen Sardar Ali; and the Working Group On Enforced Or Involuntary Disappearances, Jeremy Sarkin, A/HRC/13/42, 19 February 2010, para. 168 – 170; and CAT Committee Concluding Observations on China (2015), para 36.

these bodies highlight their significant concerns about both the arbitrariness of such detention and its link with the heightened risk of abuse in detention for such categories of person detained on the above or similar grounds.

This context also contributes to an understanding of a socio-psychological element that may be one (of many) reasons why complaints mechanisms, where they exist, are not being used to complain about torture or ill-treatment by detainees in Chinese detention. If a person has faced or seen repercussions or reprisals, for complaining, it is unsurprising that they are unlikely to complain about staff behaviour in a setting where they are effectively the responsibility, or at the mercy, of the staff.

In sum, while it is positive that there have been some early developments in this area, there are still no independent, effective and confidential mechanisms established to receive complaints in all places of detention in China (i.e. only in KSSs and some prisons). Where some nascent complaints mechanisms do exist, operational and structural deficiencies remain which limit their effectiveness as a genuine safeguard against torture. Overall, the lack of an effective complaints avenue is a significant impediment to full and effective torture prevention efforts in China. Even if the complaints system in place were to be better regulated, the system still would face some inherent structural obstacles (the mandate of the procurator, weak regulations, composition of committee members, among others) and cultural obstacles (underlying fear of complaining *per se* and of reprisals) to its effectiveness as a safeguard against torture. In short, currently there are not the pre-conditions in place to enable the safeguard of detainee complaints' avenues to work as effectively as it could, and should, as a measure of prevention against torture.

4.4.4 Few prosecutions and too lenient sentencing

In its most recent reporting cycle, the CAT Committee requested from China the annual number of investigations into cases of torture and other ill-treatment that resulted in ex-officio prosecutions, as well as the annual number of cases of torture or ill-treatment reported by doctors

following medical examinations of detainees and the outcomes of those cases.[1028] China responded that from 2008 to the first half of 2015 inclusive, the total number of cases involving allegations of confessions by torture and ill-treatment of detainees reported through the '12309 reporting platform' of the procuratorate was 1,321. 664 of these cases resulted in the suspected torture or ill-treatment perpetrators being found guilty and sentenced (396 torture cases and 268 ill-treatment cases).[1029] This is an average of around 88 successful prosecutions for the whole of China per year over the seven and a half year period. The type and duration of the sentences were unspecified by the authorities (although, as examined in Chapter 3, one can find several cases of sentences conferred for torture of 18 months to 2 years in length). The CAT Committee criticised the general lack of disaggregated data and complete information, for example: on the number of torture related complaints for each of the crimes under the torture definition, on numbers of torture cases initiated by procuratorates or any information about the criminal or disciplinary sanctions imposed on offenders of torture.[1030]

Any analysis based on the limited information provided by the Chinese authorities and the little publicly available data is challenging. Nonetheless, this information does suggest that for a country with 1.4 billion population and more than 2 million police officers alone, coupled with the existence of numerous torture and ill-treatment reports and allegations,[1031] such low numbers of prosecutions for torture and ill-treatment nationwide are indicative of rare prosecution. Moreover, scholarly research into this area shows some indications of significantly differing trends of statistics on numbers of prosecutions for abusive behaviour, albeit for 2007 (whereas the above statistics are from 2008 until 2015). For example, a research paper written by Chinese scholars at Renmin University shows that in 2007, reports of Supreme People's Procuratorate (SPP) identify that 930 state personnel were investigated and prosecuted by the procuratorate for taking advantage of their office for use of illegal detention or extraction of confessions through

1028 CAT Committee List of Issues on China (2015), para. 22.

1029 China's Response to CAT List of Questions (2015), para. 22: 'criminal suspects related to the extortion of confession by torture and the ill-treatment of detainees respectively: 92 criminal suspects related to the extortion of confession by torture and 42 criminal suspects related to the ill-treatment of detainees in 2008, 60 and 36 in 2009, 81 and 37 in 2010, 55 and 28 in 2011, 48 and 33 in 2012, 37 and 44 in 2013, 20 and 43 in 2014, 3 and 5 in January to June of 2015' [sic].

1030 CAT Committee Concluding Observations on China (2015), para. 22.

1031 CAT Committee Concluding Observations on China (2015), para 20: '[the CAT Committee] remains seriously concerned over the consistent reports indicating that the practice of torture and ill-treatment in China is still deeply entrenched in the criminal justice system'.

torture. This is in stark comparison to the statistics provided by the national authorities for 2008, which indicated that 92 suspects were sentenced for extortion of confessions by torture and 42 for ill-treatment.[1032] These national scholars demonstrate that extraction of confessions through torture as well as other acts of ill-treatment remain significant challenges facing China's criminal justice system.[1033] Similarly, considerably different numbers of cases involving torture and ill-treatment from those above provided by the authorities have been cited by the NGO Human Rights Watch. Human Rights Watch highlighted, in a recent US Congressional Hearing on China, that it had examined some 158,000 criminal verdicts published online between 1 January 2014 and 30 April 2014 alone and found 432 cases where torture had been alleged. Of the 432 cases (over four months), only 23 (five per cent), resulted in evidence being thrown out by the court; none led to acquittal of the defendant. It emphasised that, in practice, very few judges in China investigated torture allegations in any detail. This view is echoed by various China law scholars and experts.[1034] This links to concerns raised by IHRL bodies and civil society that definitional discrepancies and ambiguities are hindering procurators and lawyers from fully and systematically identifying all relevant abuse allegations that could be investigated as potential cases of torture (c.f. Chapter 2.4(I)(i)) and could be contributing to low numbers of prosecutions. Moreover, the perception that torture has been effectively curbed in KSSs – one which many leading national scholars, as well as the Chinese authorities hold (see above) – can have a detrimental impact of their assessment on the state (and progress) of prevention in China. This might go some way to explaining the considerable differences in views between the IHRL bodies and Western scholarship that considers both torture and ill-treatment to be pervasive in China (c.f. Chapter 3) and the national authorities and some national scholars' views that torture is reducing, especially in KSS detention (with an acknowledgement that ill-treatment remains a prevalent issue in initial police custody (see above)).

1032 China's Response to CAT Committee List of Questions (2014), para. 22.

1033 'Research Paper on Pilot Trials on Inspection of Places of Detention', Centre for Procedural Regime and Judicial Reform Research, Renmin University of China, 27 September 2008.

1034 Richardson, Statement at Hearing of the US CECC on China, "China's Pervasive Use of Torture", (2016); Human Rights Watch, "Tiger Chairs and Cell Bosses: Police Torture of Criminal Suspects in China' (2015); Daum, 'Why China's exclusionary rules won't stop police torture', *CLT Originals, Legal News*, 1 July 2017.

Equally, along with few prosecutions for the crimes of torture and ill-treatment, those sentences that are given are often not commensurate with the gravity of the crimes.[1035] By way of illustration, is the case of Liang Shiquan who was detained by the PSB in Harbin in 2013 on suspicion of drug trafficking. Liang died in initial police custody after police administered electric shocks and hit him in the face and head with a shoe.[1036] While the Daowai District People's court did find three police officers and four police assistants guilty of extracting confessions by means of torture,[1037] it only sentenced them to prison terms of between 12 and 30 months imprisonment. IHRL bodies and civil society echo this concern. For example, the CAT Committee has criticised China for failing to produce information about the criminal or disciplinary sanctions imposed on offenders.[1038] It recommended, *inter alia*, that "persons suspected of having committed torture or ill-treatment are duly prosecuted and, if they are found guilty, receive sentences that are commensurate with the gravity of their acts."[1039] Human Rights Watch, when examining the SPC verdict database for 2014 found only one prosecution of three police officers responsible for torture, but none served time in prison. It also underscored that the lack of prosecutions consequently meant that compensation or rehabilitation for victims was rare; "former detainees who had tried to press claims for compensation said that police at most offered them some money in exchange for their silence, and that it is very difficult to access formal state compensation. Detainees' efforts to seek accountability have produced few positive results and in some cases have even led to further punishment."[1040]

This also links into concerns about the impotence of the current sentencing procedure in China as a form of deterrence and as a form of reparation: both key measures of prevention. Jurisprudence on the SPC database[1041] shows that many sentences for torture, including where it resulted in the death of the victim, have only resulted in one to two years of imprisonment (c.f. above and

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1035 See, *inter alia*, CAT Committee Concluding Observations on China (2015); Human Rights Watch, 'Tiger Chair and Cell Bosses' (2015), Amnesty International, 'No End in Sight' (2015).

1036 http://www.china.org.cn/china/2014-09/12/content_33491417.htm, accessed 10 January 2015

1037 A crime stipulated in the revised CPL (Article 54), in force 1 March 2013; there was no murder charge, according to reports, as the body had been immediately cremated; prosecutors however raise this in the trial and the official responsible for this was found guilty of misconduct; http://www.Shuanghaidaily.com/national/7-jailed-for-fatal-torture-of-criminal-suspect/shdaily.shtml

1038 CAT Committee Concluding Observations on China (2015).

1039 CAT Committee Concluding Observations on China (2015), para. 23.

1040 Human Rights Watch, 'Tiger Chair and Cell Bosses' (2015), Introduction.

1041 http://wenshu.court.gov.cn

Chapter 3, for example, the case of Liang Shiqian). Proper sentencing with a sentence that is commensurate with the crime of torture has been established by IHRL mechanisms (including the ECtHR,[1042] the CAT Committee,[1043] the SPT[1044]). The need for a fully functioning and robust judiciary has been underscored above as a key prevention measure. One of the reasons for this is to curb impunity, itself an issue that hinders effective prevention work (c.f. SPT[1045] and CAT Committee's[1046] views on the causal link between impunity and the heightened risk of torture). Without a strong judiciary able to address issues of impunity, prevention measures such as those needed for fully adequate reparation for torture victims and/or their families are practically impossible to enforce and are thus extremely rare in China.[1047]

Further, various national and international civil society bodies highlight that judges often only evaluate torture claims on the basis of documentary evidence that is either produced or controlled by the police and, unlike with live witnesses, is not subject to cross-examination.[1048] This is illustrated in an analysis of the court verdicts from January to April 2014 undertaken by Human Rights Watch, who found that not a single defence witness or expert witness testified during legal proceedings involving torture allegations.[1049] While legally the exclusionary rule in the CPL places the burden of proof on the procuratorate to prove that the evidence was obtained legally,

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1042 ECtHR, *A v. Croatia*, Application no. 55164/08, October 2010. Para 66; *Ali Ayse Duran v. Turkey*, Application 42942/02, para 66; *Oneryildiz v. Turkey*, application 48939/99, November 2004.

1043 CAT, *Guridi v. Spain*, CAT/C/34/D/212/2002, May 2005, communication no. 212/2002.

1044 SPT, 'Provisional statement on the role of judicial review and due process in the prevention of torture in prisons', adopted by the SPT at its sixteenth session, 20 to 24 February 2012, CAT/OP/2' see also SPT, 'The approach of the Subcommittee on Prevention of Torture to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', CAT/OP/12/6, 30 December 2010.

1045 See 'UN torture prevention experts urge Mexico to focus more on the fight against impunity', UN Statement of 23 December 2016; '"Eight years after our first visit to Mexico, the different definitions of the offence of torture continue to generate actual or potential loopholes for impunity," - said Felipe Villavicencio, who headed the SPT delegation. According to official statistics, at the federal level there are currently more than 4700 open investigations for acts related to torture. However, the number of sentences for perpetrators is disproportionately low.'; SPT, 'Provisional statement on the role of judicial review and due process in the prevention of torture in prisons', adopted by the SPT at its sixteenth session, 20 to 24 February 2012, CAT/OP/2'; see also SPT, 'The approach of the Subcommittee on Prevention of Torture to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', CAT/OP/12/6, 30 December 2010.

1046 UN CAT Committee General Comment No. 2 (2007) on the implementation of article 2 by State parties.

1047 REDRESS, Reparation for Torture: A Survey of Law and Practices in Thirty Selected Countries (April 2003); Human Rights Watch, 'Tiger Chair and Cell Bosses' (2015), Amnesty International, 'No End in Sight' (2015).

1048 Human Rights Watch, 'Tiger Chair and Cell Bosses' (2015), Amnesty International, 'No End in Sight' (2015)

1049 Human Rights Watch, 'Tiger Chair and Cell Bosses' (2015), Introduction.

various civil society bodies point out that judges often continue to expect detainees to prove that torture had taken place.[1050]

This situation also links into the current landscape of limited judicial independence, where there remains the potential for political and Party interference, especially on sensitive or political cases.[1051] This can lead to a credible risk of impunity for torture perpetrators, identified in numerous reports from civil society,[1052] which consequently exacerbates the systemic nature of torture and ill-treatment in China. Actions observed by others that go unpunished can foster a sense of unaccountability.[1053] In sum, current impunity in China, or even perceived impunity, for acts of abuse is an impediment to full and effective torture prevention efforts.

4.5 Preventive monitoring: in its infancy and facing systemic challenges

Chapter 1 identified that preventive monitoring is one of the key measures necessary to effectively counter and prevent torture and ill-treatment. As examined in Chapter 2, a system of inspections and a type of preventive monitoring of some places of deprivation of liberty has, since 2006, started to be trialled in China. After a pilot project run by scholars and procurators in selected KSSs to test the feasibility of monitoring and the form it would take, in 2011, preventive monitoring was regulated for in the sphere of KSSs (only). There is now an MPS Regulation that obliges all 2800 KSSs in China to allow access to 'specially selected monitors'.[1054] All KSS across China now have to allow monitors access to undertake announced preventive monitoring.

Procurators, Deputies to People's Congresses and specially selected volunteer lay supervisors have started some announced inspections in KSSs across China.[1055] The Chinese authorities specify that procuratorial organs have, from 2008 until May 2015, undertaken 14,070 unscheduled visits to detention facilities and reported their findings to the Deputies to the

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1050 Human Rights Watch, 'Tiger Chair and Cell Bosses' (2015); MacBean, 'addressing the 'hide and seek' scandal: restoring the legitimacy of Kanshousuo' (2016) (refers to the start of monitoring mechanisms); Daum, 'Why China's exclusionary rules won't stop police torture', *CLT Originals, Legal News*, 1 July 2017.

1051 As outlined in the above Chapter Section.

1052 See, *inter alia*, Amnesty International Shadow Report to the CAT Committee (2015).

1053 See Thesis Chapter 1 on the effects of impunity, and its eradication as a key element required for effective torture prevention.

1054 MPS Regulation no. 379, 2011 (Chinese only); translated by the author.

1055 See China's Response to List of CAT Issues, para. 20.

People's Congresses.[1056] According to the authorities, 10,316 'special invited supervisors' currently work in criminal detention facilities throughout China, and 2,418 criminal detention facilities have been opened to the public (including both visiting families and persons with valid permissions).[1057]

Further, a pilot project designed to train lay monitors has been underway since 2009, run by the GBCC in collaboration with Renmin University, the SPP and Ministry of Justice. The pilot project has presented some significant findings, according to Gerard De Jonge, a China legal scholar involved in the pilot monitoring project. De Jonge considers that "an important outcome of the pilot was that inspectors were quite explicit in pointing out many shortcomings in the living conditions of detainees […] they noted unhygienic conditions in the dining hall; the unavailability of boiled water; the small amount of living space per detainee (30m² for 12-22 detainees); the absence of a sick bay; the temporary inaccessibility of outdoor exercise caused by building works, added to not being allowed to be out of cells; few books and no newspapers in the library; unhygienic garbage disposal; insufficient medical staff and equipment; insufficient number of medical tests available; not all detainees receiving physical tests immediately after admission to the detention centre […]."[1058] The pilot inspections did result in a long list of recommendations given to the KSS management, the local procuratorate and the PSB. As the inspectors were members of the local People Congresses, it was officially reported to the PRC's Deputies Congresses.

De Jonge highlights that one of the findings was that in using lay visitors/inspectors, with little specialist knowledge of normative standards for the prevention of torture and ill-treatment, some recommendations were quite unexpected. For example, the specialised project research team found in their pre-pilot research that the budget for the food and drink for detainees was quite low – and below state standards – yet "15-20 of the inspectors rated the food and drink conditions in

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1056 According to the Chinese authorities, there were: 1,498 visits in 2008, 1,618 in 2009, 1,743 in 2010, 1,729 in 2011, 1,792 in 2012, 1,981 in 2013, 2,342 in 2014, 1,367 in January to May of 2015, China's Response to List of CAT Committee Issues (2014), para. 20.

1057 China's State Party Report to CAT Committee (2013), para. 67.

1058 De Jonge, 'Some personal notes on the draft Detention Centre Law' (2012), p. 139; Renmin University and GBCC, Report on Liaoyuan Trial Monitoring Mechanisms, 2008-2010.

the detention centre as 'quite good' and held the opinion that a difference should be made between what is normal food and drink in a compulsory [i.e., closed] setting of a detention centre and what is normal in the outside world."[1059] De Jonge argues that this was indicative of the tendency of the majority of these pilot-inspectors to view detainees, notwithstanding their status as *suspects*, "as 'criminals' who did not deserve the same treatment as civilians, just because they had been detained."[1060] This concern has been reflected in an interview with Renmin Professor Cheng Lei, who has been involved, with his colleague Professor Chen Weidong, in initiating and running the project (on trialling preventive monitoring) as well as advising the Chinese authorities on draft legislation and measures in the context of torture prevention. Professor Cheng Lei emphasises that one of the challenges facing the monitoring system was the belief in Chinese society that detainees and prisoners should receive poor conditions and treatment as an inherent part of the sanction of being deprived of their liberty.[1061] This potentially weakens the torture prevention benefits of monitoring, in that China is using lay untrained members of the public as monitors, who may hold these views.

Other outcomes of the pilot included findings from inspectors that while most detainees had been informed of their procedural rights, few had little understanding on how to exercise them. This, according to the national and international scholars on the project team, demonstrated the importance of free and timely access to legal assistance for detainees.[1062] Moreover, De Jonge flags another outcome of the pilot was that the number of complaints rose substantially during the pilot, compared to the number received during the preceding years. Two of the most complained about areas included complaints about 'prison bullies' and extension of the pre-trial detention period.[1063] The issue of 'prison bullies', whereby the staff make life easier for certain inmates if they help report on and /or control their dormitory or group of other inmates, has been widely

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1059 De Jonge, 'Some personal notes on the draft Detention Centre Law' (2012) p. 139; Renmin University and GBCC, Report on Liaoyuan Trial Monitoring Mechanisms, 2008-2010.

1060 De Jonge, 'Some personal notes on the draft Detention Centre Law' (2012), p. 139.

1061 Author's Interview with Professor Cheng Lei, Renmin University, on 24 November 2016, Wuhu, China; see also detailed analysis on criminological perceptions of the concept of punishment and imprisonment in Foucault, *Discipline and Punishment: the Birth of the Prison* (1977), Part 1.

1062 De Jonge, 'Some personal notes on the draft Detention Centre Law' (2012), p. 140; Renmin University and GBCC, Report on Liaoyuan Trial Monitoring Mechanisms, 2008-2010.

1063 De Jonge, 'Some personal notes on the draft Detention Centre Law' (2012), p. 140.

seen as an on-going and particular problematic aspect of China's prisons and detention centres.[1064]

As regards torture and other ill-treatment allegations, the pilot-inspectors found that torture or ill-treatment primarily manifested itself in practice in beatings during the interrogation procedure and beatings in-cell in the KSSs by other detainees or prisoners ('bullies'). This led to a number of recommendations, including that the authorities should establish a distinct and physical separation between interrogators and suspects, that interviews should be conducted by at least two officers and that the interviews are recorded.[1065] Some of these are topics that have since been incorporated into the revised CPL (interviews by at least two interviewers and some interviews have to be recorded (others are discretional) and into the 2017 proposed draft Detention Centre Law.[1066]

Other inspectors' recommendations included that a doctor should undertake a medical examination, before and after the interrogation process, and that recording equipment be installed in cells.[1067] These too have been subject to recent inclusion in the amendments made to the CPL in 2012 and, in the context of medical screening pre-and post-transfers out off / into the KSS, in the 2017 proposed draft Detention Centre Law.[1068] Here the CPL and draft Detention Centre Law (yet to take effect)[1069] specify that newly arrived detainees may undergo medical screening upon arrival; however, under the CPL, it is not a requirement. There are also indications that the courts are increasingly using the documentation from initial medical screenings as evidence in legal proceedings that involve allegations of ill-treatment.[1070] However, procurators and other inspectors involving in trialling monitoring voice a remaining concern, namely, that doctors still

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1064 See, *inter alia*, UN SRT Report and Follow-up on China (2005 and 2011); Human Rights Watch, 'Tiger Chair and Cell Bosses' (2015); the Rights Practice Shadow Report on China submitted to the CAT Committee (October 2015).

1065 See De Jonge, 'Some personal notes on the draft Detention Centre Law' (2012), p. 140; Cheng Lei, 'Expert Proposal for a Draft Detention Centre Law', *Three Approaches to Combatting Torture in China* (2012), for more details.

1066 CPL, Articles 116 -121.

1067 De Jonge, 'Some personal notes on the draft Detention Centre Law' (2012), p. 140; Cheng Lei, 'Expert Proposal for a Draft Detention Centre Law', *Three Approaches to Combatting Torture in China* (2012).

1068 CPL, Article 130; Article 44 of the draft Detention Centre Law, draft of June 2017.

1069 Renmin University and partners have been involved in advising on draft legislation concerning the amendment of the Detention Centre Regulations. Recently (June 2017), a draft law has been circulated by the authorities. Subject to enactment, this will give more weight to the content of the Detention Centre Regulations. The proposed law also amends the content, strengthening some (but not all) aspects of the protections available to detainees (see above).

1070 See China State Report to CAT Committee (2014) citing successful cases of exclusion of evidence by the courts based on medical information from initial medical screening; see also Human Rights Watch analysis of a sample of cases over a 3 month period in 2014, where 52% of the cases involving allegations of torture, were based on medical evidence from initial medical screening in KSSs.

do not systematically pass on suspicions of torture or other ill-treatment based on visible injuries to the competent prosecuting authorities;[1071] a necessary preventive safeguard against torture.[1072] Also, the medical examination is discretional, and not an obligation, under the CPL.

The pilot-inspection project at Liaoyuan has led to some significant findings, and is also an important step *per se* to show an acknowledgement by the intellectual and political circles that monitoring can be a useful contributing element to preventing abuse in closed detention settings. Notably it has, more recently, contributed to developing the blueprint for the model of monitoring now underway in some prisons and KSSs in China and its regulation.[1073]

Nevertheless, the inspection system trialled at Liaoyuan and then rolled out to KSSs nationwide, had several limitations. Given that the monitoring model trialled at Liaoyuan was the precedent used for the nationwide rollout, such limitations remain widespread. Most notably, there were various institutional or structural impediments to the pilot that remain reflected in the scaled up set-up of inspections that can hinder full and effective torture prevention.

First, published information on the monitoring underway in China is extremely limited. The analysis in this chapter depends on primary interviews conducted with national legal scholars involved in advising on draft legislation on complaints and monitoring systems in China,[1074] procurators and KSS detention staff,[1075] lay monitors,[1076] specialist advisory bodies[1077] as well as from the Chinese authorities themselves.[1078] However, it is almost impossible independently to

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1071 Author's discussions with senior Chinese procuratorate and judiciary members of a visiting delegation on exchange of practices on torture prevention with the CPT at Council of Europe, Strasbourg, 23 August 2016 (organised by the GBCC, Renmin University and the Council of Europe, Directorate General 1), referenced in the CPT Annual General Report 2016, published Spring 2017; and discussions between senior procurator prosecutors, KSS and prison senior management and front-line custody staff, members of the nascent complaints' and monitoring bodies and Chinese scholars, held at the GBCC-Renmin University conference on 'Strengthening complaints mechanisms' held in Wuhu, China, on 23-24 November 2016, in which the author participated.

1072 See Thesis Chapter 1.

1073 Renmin University and GBCC, Report on Liaoyuan Trial Monitoring Mechanisms, 2008-2010; Author's discussions with senior Chinese procuratorate and judiciary members of a visiting delegation on exchange of practices on torture prevention with the CPT at Council of Europe, Strasbourg, 23 August 2016 (organised by the GBCC and Renmin University); Author's interview with Monitor A. (name anonymised), lawyer and monitor, 24 November 2017, Wuhu China; MacBean, 'addressing the 'hide and seek' scandal: restoring the legitimacy of Kanshousuo' (2016).

1074 Author's discussions held at the GBCC-Renmin University conference on 'Strengthening complaints mechanisms' held in Wuhu, China, on 23-24 November 2016, in which the author participated as an external expert; and author's interview with Professor Cheng Lei, Renmin University, 24 November 2016, Wuhu, China.

1075 Author's interview Procurator Hu, 24 November 2016; discussions held at the GBCC-Renmin University conference on 'Strengthening complaints mechanisms' held in Wuhu, China, on 23-24 November 2016.

1076 For example, author's interview with Monitor A (name anonymised), Wuhu, China, 24 November 2016.

1077 Such as GBCC (a specialist body that implements projects and facilitates exchanges on judicial and legal reform in China), that runs projects jointly with its Chinese partners, aimed at eradicating torture in China and on establishing and improving prevention measures.

1078 China's State Report to the CAT Committee (2014); China's Response to the CAT Committee List of Issues (2015).

access current detainees to get their views on current monitoring: an essential input into an assessment of effectiveness.

Secondly, inspections are generally by 'specially invited supervisors' and procurators only. Deputies to the People's Congresses and CPPCC members can also be invited to inspect at the KSS discretion and procuratorial organs continue to undertake scheduled and unscheduled visits to detention facilities and report their findings to the Deputies to the People's Congresses. No visits by civil society bodies are permitted, even if lay members are also members of the public.[1079] Nevertheless, the lay monitors are specifically chosen by procurators and approved by the MPS. There are thus indications that the inspection process is being conducted by people and bodies that are not as independent as they might be.

Third, there is a lack of transparency and independence in the monitors' reporting procedure, which is currently to a higher level of procurator, the PSB and to the Deputies to the People's Congresses and CPPCC. These bodies are not obliged to address all the deficiencies highlighted by the monitors and reports are not published.[1080] An interview with a regional procurator confirmed that monitors' reports are sent to him, and are not published.[1081]

Fourth, while the Procuratorate (the SPP) ultimately reports into the National People's Congresses, providing an element of separation from the police and prison authorities, SPP is ultimately the same body that investigates (certain cases), prosecutes and inspects, albeit with different departmental roles. There is the potential for non-impartiality, and consequent lack of trust in the system[1082] thus rendering the monitoring safeguard against torture less effective than it could be. Likewise, the lack of oversight and multiple roles of the SPP create the potential for actual partiality or abuse of the system.

Fifth, there does not appear to be any immunity in law, policy or practice, for the monitoring inspectors from any reprisals, should their findings prove sensitive. Indeed, monitors are required

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1079 China's State Report to the CAT Committee (2014): "no data is available on civil society visitation."

1080 Author's interview Procurator Hu (procurator involved in trialing monitoring and complaints mechanisms in the Wuhu KSS), Wuhu, China, 24 November 2016.

1081 Author's interview with Procurator Hu, Wuhu, China, 24 November 2016.

1082 Author's discussions with discussions senior prosecutors, KSS and prison senior management and front-line custody staff, members of the nascent complaints' and monitoring bodies and Chinese scholars, at the GBCC-Renmin University conference on 'Strengthening complaints mechanisms' held in Wuhu, China, on 23-24 November 2016.

by law to keep to only factual observations and not deduce any judgments on any systemic issue[1083] (an essential component of the monitoring process).

Sixth, most monitoring visits have limited potential for deterrence and are at risk of missing crucial information in that they are announced or even at the invitation of some of the institutions, such as in the cases of KSSs. Further, the pilot-inspectors were not – and the 'specially selected inspectors' continue to not be – allowed full free access to all places of the KSS (they are accompanied by detention staff for 'security purposes' at all times, including during interviews).

Seventh, reports are not published and management is not obliged to act on recommendations. Indeed, the MPS Regulations regulating the monitoring of KSS are extremely broad and confer a wider degree of discretion on institutions to choose their own monitoring model and reporting procedures.[1084] As such, mechanisms can vary widely, institutionally and regionally. There is no body that oversees co-ordination of monitoring, seeks to identify patterns of recurrent areas of torture and other ill-treatment, or that publishes and shares general findings.

Finally, while preventive monitoring has become a requirement, this only currently covers KSSs in China, and does not extend to all places of deprivation of liberty.[1085]

As regards punitive administrative detention, CDR and Party discipline detention for investigation and sanction, these spheres are not covered by the current reach of the preventive safeguard of monitoring in China; neither are most prisons, police stations, psychiatric facilities, military detention or any other type of deprivation of liberty in China. These include some of the riskiest time-periods (first 24 hours of initial police custody) and places (the less regulated places of administrative detention) for ill-treatment.[1086] This creates a significant protection vacuum in terms of effective torture prevention. In other words, despite some developments in preventive monitoring, the current inspection set-up is a long way from what OPCAT compliance would require.

1083 MPS Regulation 379, 2011, (Chinese only, translated by the author).
1084 MPS Regulation 379, 2011, (Chinese only, translated by the author).
1085 MPS Regulation 379, 2011, (Chinese only, translated by the author); Author's interview Professor Cheng Lei, Wuhu, China, 24 November 2016.
1086 See Thesis Chapter 1.

Overall, it is encouraging that China has started to develop its own monitoring system of KSSs and regulated this in MPS Regulations for KSS monitoring. KSSs have traditionally been opaque places of pre-trial detention, where allegations and cases of abuse were commonplace. That the preventive safeguard of monitoring now renders such places marginally more transparent is a significant and positive development in the context of reducing the risk of torture and ill-treatment generally. Nevertheless, despite encouraging first steps to design and establish preventive monitoring, there are risks that such inspection bodies (selected lay visitors, the procurators and detention management's invited Deputies to the People's Congresses and CPPCC members) could become a whitewash. Of particular concern are the lack of institutional independence of the monitors (who are selected and approved by the PSB and procuratorate), lack of co-ordination institution- or nationwide, the monitors' limited powers, the lack of confidential access to detainees, and the lack of public reporting structures. This situation is exacerbated further by another structural impediment to fully independent monitoring, namely the lack of an uncensored media and public oversight of the monitors, in the form of a developed and unhindered civil society that can complement the work of monitors.

4.6 Civil society and media: hindered 'watchdog' roles

In general, despite sophisticated safeguards and deterrence protections and measures in place, preventive safeguards, such as monitoring, can still sometimes fail to identify and address systemic abuse. An example of this can be seen in the UK, namely, in light of the Medway Secure Training Centre (STC) scandal in late 2015. The findings of the Independent Inquiry commissioned to investigate in March 2016, and the Medway Improvement Board's findings in May 2016, both show that despite a plethora of protective safeguards in place in the UK – and a sophisticated, independent and regular monitoring mechanism in place that conducts annual monitoring visits to juvenile establishments – detention staff can still occasionally get around the established protection measures. In the case of Medway STC, detention staff were involved in ill-treatment of juvenile offenders (intimidation, verbal abuse and physical abuse / excessive force)

and were able to manipulate the preventive measures in place to bypass the safeguards. The recording mechanisms for violent incidents were amended, records changed, and other staff persuaded to change their debriefing reports on certain incidents that took place at Medway STC from October to December 2015.[1087] Certain staff were able to manipulate the system such that monitors could not effectively identify problems and ultimately help prevent abuse.[1088]

Monitoring and other preventive safeguards are not foolproof. Nevertheless, that is precisely when wider institutional protections add to torture prevention. In the case of Medway, the abuse was spotlighted by investigative journalism and flagged by an undercover reporter in the G4S custody system. Through this, the abuse was uncovered. Her Majesty's Inspectorate of Prisons (HMIP), as part of the UK NPM, reported on juvenile custodial institutions on a yearly cycle and although had some concerns, had not identified the extent of the abuse.[1089] The UK was fortunate to have a strong independent media to complement the work of the other preventive measures in place to prevent torture.

China is not in such a fortunate position. Media, local human rights defenders and NGOs are increasingly being hindered from being able to act as independent watchdogs. Censorship and the risk of punitive retaliation from the authorities effectively impede those external institutions from being able to perform an essential watchdog role and to identify and highlight situations where other preventive measures may fail. The situation regarding the freedom to report allegations of abuse is increasingly challenging. Indeed, China has the largest censorship operation and structure in the world, known as the "Great Firewall" (outside of China) or the "Golden Shield" (inside China), and it is widely acknowledged to be increasing its prohibitions and website blocks.[1090]

Another aspect is new Chinese legislation recently enacted to regulate 'social groups' and associations. Such regulation would require compulsory registration of civil society bodies,

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1087 Aired publicly by an undercover "Panorama" report on the subject in December 2015 / January 2016.

1088 See HMIP official memo to the then Secretary of State for Justice (Michael Gove) concerning their findings in January 2016.

1089 See Her Majesty's Chief Inspector of Prisons' reports on Medway STC for the years 2014 and 2015.

1090 See, *inter alia*, the CAT Committee Concluding Observations on China (2015), the UN SRT Report and Follow-up on China (2005 and 2011); Osnos, *The Age of Ambition: Chasing Fortune, Truth and Faith in the New China* (2014); Amnesty International, 'No End in Sight' (2015), Human Rights Watch, 'Tiger Chairs and Cell Bosses' (2015).

stringent criteria to establish a new entity, strict supervision with administrative offences as sanctions for non-compliance. This, according to the authorities, will enable them to identify and regulate social groups more.[1091] However, this can also be seen as another measure to stifle freedom of expression, in addition to the existing harassment of human rights defenders and strict internet and publications censorship.[1092] The legislation is reminiscent of Russia's recent move to regulate civil society and in particular non-governmental organisations associated with perceived Western funding and/or anti-Russian views.[1093]

The CAT Committee,[1094] the UN SRT,[1095] the UN SPT[1096] the HRC and many other international treaty bodies and UN special procedures have stressed the important role civil society and the media can play in preventing torture. The CAT Committee[1097] and the UN SRT[1098] have flagged their concerns about the restrictions placed in China on civil society hindering full freedom of expression and press censorship, as well as increasing harassment and intimidation of human rights defenders. The CAT Committee has also explicitly criticised the lack of implementation of its recommendations in the sphere of reported harassment of human rights defenders and petitioners.[1099] This is echoed by national and international civil society bodies, who are deeply concerned about the increasing restrictions on freedom of expression and hindrance to their work in China as well.[1100] China legal scholar Yiyi Lu[1101] supports and clarifies this view: "Chinese rights defenders have typically had to be careful to portray their activities as non-political.

1091 Regulations on the Registration and Administration of Social Groups (Draft Revisions for Soliciting Comments); August 2016 [Chinese].

1092 See, *inter alia*, the Guardian Newspaper interview with Ai Weiwei, prominent Chinese artist and human rights defender, the Guardian, 3 November 2016; Amnesty International, 'No End in Sight' (2015); Human Rights in China, Shadow Report to CAT Committee (2015).

1093 "On Amendments to Legislative Acts of the Russian Federation regarding the Regulation of the Activities of Non-profit Organisations Performing the Functions of a Foreign Agent", 20 July 2012; see also, *inter alia*, Wall Street Journal, 'Russia's Putin Signs New Law Against 'Undesirable' NGOs: Legislation gives authorities power to shut down foreign and international organizations', May 25, 2015; Human Rights Watch, 'Russia: Government vs. Rights Groups: The Battle Chronicle', 24 July 2017.

1094 CAT Committee Concluding Observations on China (2015).

1095 UN SRT Report and Follow-up on China (2005 and 2011).

1096 SPT, 'The approach of the SPT to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under OPCAT', Paragraph 5(a), CAT/OP/12/6, 30 December 2010; see also Thesis Chapter 1.

1097 CAT Committee Concluding Observations on China (2015).

1098 UN SRT Report and Follow-up on China (2005 and 2011).

1099 CAT Committee Concluding Observations on China (2015), paras. 6, 36 to 39.

1100 See, *inter alia*, Shadow Reports submitted to the CAT Committee in advance of its Fifth periodic reporting cycle on China (August – November 2015); Human Rights Watch, 'Tiger Chair and Cell Bosses' (2015); Amnesty International, 'No End in Sight' (2015).

1101 Yiyi Lu (research fellow at the University of Nottingham's China Policy Institute and an associate fellow at Chatham House), 'Non-Governmental Organisations in China: The Rise of Dependent Autonomy' (Routledge 2008); and 'Pushing Politics: Why China is Supercharging Dissident Trials', 12 August 2016.

Sometimes this has involved recasting a political issue as a technical issue — as a failure within the system, rather than of the system. The reason is simple: once they cross the red line into political activism, they risk punishment by the authorities as well as disapproval from a public conditioned by propaganda to be suspicious of political action not sanctioned by the party."[1102] Lu argues that "in recent years, the government left manoeuvring space for activists to pursue causes that do not have direct political implications. They did this, in part, to provide a safety valve for the letting off of social pressure. […] The government [now] appears to think that the old arrangement created too many opportunities for its domestic and foreign enemies to covertly foment "colour revolution" under the cover of rights defence. […] Perhaps more worrying for the government, rights defenders are often able to develop organizational and communication skills and learn to network through their experience. In future, the government will very likely treat rights defence activities with more vigilance […] This corresponds to a more general trend of re-politicising society that has gradually gained momentum in the past few years."[1103]

The risk is that these measures to regulate and restrict civil society further weaken civil society in China and hinders its essential 'complementary' role in the prevention of torture, as external watchdogs and public reporters of allegations of abuse. This is an area where a broader approach to torture prevention may be needed to ensure an environment in which preventive legal safeguards can operate as fully and effectively as possible.

4.7 Broader socio-cultural obstacles to effective torture prevention

Compliance with legal commitments may not itself be sufficient to comprise fully effective torture prevention efforts. This is in line with the UN SPT's reasoning: "the prevention of torture and ill-treatment embraces – or should embrace – as many as possible of those things which in a given situation can contribute towards the lessening of the likelihood or risk of torture or ill-treatment occurring. Such an approach requires not only that there be compliance with relevant

[1102] Yiyi Lu, 'Pushing Politics: Why China is Supercharging Dissident Trials', 12 August 2016.

[1103] Yiyi Lu, 'Pushing Politics: Why China is Supercharging Dissident Trials', 12 August 2016.

international obligations and standards in both form and substance but that attention also be paid to the whole range of other factors relevant to the experience and treatment of persons deprived of their liberty and which by their very nature will be context specific."[1104] It is also supported by a number of scholars and experts in the 'torture prevention' field.[1105]

State-promoted nationalist ideology and political or national security policies can play a large part in motivating and justifying torture as part of the routine practice by police. This can go both ways. State-promoted national security policy can overtly prohibit torture, especially under an autocratic or One-Party system such as China. Conversely, it can also promote a "rooting out enemies of the state" security philosophy, which has been seen as a contributory factor of widespread police misconduct in certain countries (such as Brazil when formerly under military rule).[1106] In the context of China, Xi Jinping's national campaign to eradicate entrenched corruption has had a significant impact on the direction of legal reforms. However, it has also investigated and punished, through the CCP Investigation and Discipline Committees, more than one million officials.[1107] These officials range from the so-called "flies" (minor officials) to "tigers" (senior figures, including Zhou Yong Kang (former security chief) and top generals in the People's Liberation Army). Their behaviour, according to Xi, and as reported by State media, "exposes not just their serious economic problems, but also exposes their serious political problems."[1108] Newly issued rules in November 2016 call on Party members to oppose all acts contrary to the CCP's leadership.[1109]

Faced with this top-level CCP leadership focus and consequent significant pressure to succeed in investigations, as well as the discretion conferred within the discrete CCP discipline sphere, State-promoted nationalist ideology can, and does, play a large part in motivating and justifying torture

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1104 SPT, 'The approach of the SPT to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under OPCAT', Paragraph 5(a), CAT/OP/12/6, 30 December 2010, para. 3.

1105 See Thesis Chapter 1; see also, *inter alia*, S. Casale, 'A System of Preventive Oversight', *Essex Human Rights Law Review,* Vol. 6, No. 1, 2009, p. 9-19; Carver and Handley, *Does Torture Prevention Work?,* (Liverpool 2016); Giffard and Tepin (eds.), *The Torture Reporting Handbook* (2015); CAT General Comment No. 2; SPT, 'The approach of the SPT to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under OPCAT'(2010).

1106 Huggins, M. Haritos-Fatouros, P. Zimbardo, '*Violence Workers: Police Torturers and Murderers Reconstruct Brazilian Atrocities'* (2002); See Thesis Chapter 1.

1107 See Thesis Introduction and Chapter 2, Section 3.2.3; see also commentary in the Guardian Newspaper, 'Xi Jinping attacks 'conspiracies' and 'lust for power' of China's enemies within', 3 November 2016.

1108 The Guardian, 'Xi Jinping attacks 'conspiracies' and 'lust for power' of China's enemies within', 3 November 2016.

1109 See Thesis Introduction and Chapter 2.

as part of the routine practice by CCP Investigation & Discipline Committee officials. This can be illustrated in a recent case from a second-instance trial carried out by the Chongqing Number Two Intermediate People's Court. In this case, a local official was sentenced on grounds of corruption and dereliction of duty. The official alleged that discipline inspectors "had dragged him from his office to the basement of a local hotel, where they used "many types" of torture to extract his confession" [1110]. The court reasoned that "the allegations involved a "lawful" investigation by the Discipline Inspection Committee, that evidence obtained during this investigation had not been used as the basis for conviction in his case, and that the legality of Discipline Inspection Committee procedures did not fall under the purview of Chinese people's courts. Consequently, the court denied the request to seek closed-circuit camera footage from the hotel or carry out forensic tests on clothing worn during the investigation."[1111] The CCP national policy to 'root out' corrupt officials and pressure on investigatory organs to succeed in corruption cases can clearly lead to torture. Combined with the lack of safeguards, this can contribute to creating situational influences that make torture by CCP Discipline Inspection Committee officials more likely.

In addition, there are certain socio-cultural facilitating factors involved in making torture a resilient practice in initial police custody and during the investigatory period in China. These include the weight placed on the primacy of confessions, which has become a systemic part of the police investigatory process. There are immense pressures placed on investigators to complete cases quickly. Equally, there is limited training of the police regarding other investigatory techniques in evidence gathering. Junior investigators have seen the importance that their seniors and, until relatively recently, the courts, placed on obtaining a confession from a suspect.[1112] It is unsurprising that this is emulated. The CAT Committee has called on the authorities to improve investigation methods to end practices whereby confessions are relied on as the primary and

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[1110] 重庆市第二中级人民法院刑事裁定书（2015）渝二中法刑终字第 00040 号, (Chongqing Number Two Intermediate People's Court criminal decision), 8 April 2015; Amnesty International commentary in '*No End in Sight*' (2015), footnote 131.

[1111] Ibid.

[1112] See, *inter alia*, this raised as a concern by the CAT Committee Concluding Observations on China (2015); UN SRT Report and Follow-Up on China (2005 and 2011); Lewis, Statement of M. Lewis, 'China's pervasive use of torture', Hearing of the CECC, 14 April 2016; Belkin, 'China's tortuous path toward ending torture in criminal Investigations' (2013).

central element of proof in criminal prosecution.[1113] This is a socio-cultural factor to facilitating torture.[1114] Indeed, the existence of such a culture can inherently obviate the effectiveness of more technical torture prevention measures, such as legal guarantees. For example, even if the CPL guarantees notionally protect suspects from torture, in practice methods and avenues circumvent protected locations and procedures, rendering the guarantees obsolete and heightening the risk that torture remains a resilient practice.

The culture of the primacy of confessions is exacerbated by various other socio-cultural aspects in China, including the deep-seated concepts of respect and obedience for hierarchy in Chinese society. This is especially evident within the Chinese police work culture.[1115] That is not to say that other cultures do not have the similar lines of hierarchy and respect obligations; in police forces around the world, hierarchy is important. However, China, like many other countries, especially in Asia, has such an ingrained rigid hierarchical structure in which it would be unthinkable to question the orders of a superior, even if one thought the order was unlawful.[1116] Further, China has little to no regulatory protections available to protect police whistle-blowers.[1117] Neither does it have procedures established to help potential whistle-blowers know how and where to report abuse, nor is information provided on protection from potential reprisals at work and beyond. Equally, tough censorship and apparently stringent new regulations on the use of social media for the posting of any "rumour" subsequently shared 500 times or more online has been criminalised.[1118] Nevertheless, whistleblowing about official corruption specifically has started to develop, either as part of senior politicians' anti-corruption campaigns or at grassroots level, in line with the Central CCP's 'war on corruption'.[1119] Whistle-blower protection has started to be regulated in this context.[1120] However, this area is discrete and remains currently

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1113 CAT Committee Concluding Observations on China (2015); UN SRT Report and Follow-Up on China (2005 and 2011).
1114 See Bingham, *Rule of Law* (2010), and Thesis Chapter 1.
1115 Tanner, 'Rethinking Law Enforcement and Society' (2005).
1116 The challenges of whistle-blowing in China and the Asia Pacific', The Stack, 5 April 2016
1117 'The challenges of whistle-blowing in China and the Asia Pacific', The Stack, 5 April 2016.
1118 The Guardian, 'China detains teenager over web post amid social media crackdown; Purge of 'internet rumours' and 'fabricated facts' continues after 16-year-old blamed 'corrupt police' for man's death on Weibo', 20 September 2013.
1119 Reuters, 'Whistleblowers pay price even as China vows to fight corruption', 4 August 2013; The Telegraph, 'Chinese whistleblower blinded in acid attack', 2 July 2013.
1120 Xinhua (official state media), 'China regulates to protect whistleblowers on official crimes', 4 August 2016.

only evident in the area of official corruption. In practice, there remains little 'whistle-blowing' on abuse from police officers on their colleagues or superiors in the Chinese police force.

4.8 Summary

Torture prevention in China is impeded by a lack of separation of powers, the existence of parallel legal systems on uneven footings, a weak judiciary and signs of effective impunity for acts of torture or ill-treatment. Complaints mechanisms remain in need of further development, and preventive monitoring – where it exists – is insufficiently independent and too restricted. Increasingly stringent restrictions on civil society and the media also limit its ability to serve as a check on torture practices. This creates unprotected spheres that can be abused due to a lack of procedural guarantees or judicial oversight.

Carver and Handley spoke of technical measures of torture prevention being fruitless if the conditions in a given country were not right. These can be seen as the *pre-conditions* to the effectiveness of torture prevention measures. Without these in place as the foundation: technical torture prevention measures are less likely to operate effectively. Too many current institutional, structural, political and socio-cultural obstacles, legal loopholes and 'grey' unregulated spheres exist in China. While this remains the case, China cannot effectively fulfil its CAT obligations and truly progress in its torture prevention activities.

Indeed, China does not have a full picture of the true frequency of torture and its real nature: there are simply not the mechanisms currently in place to oversee, co-ordinate and share information to cover all places of deprivation of liberty across China. No one body gathers, analyses the information to be able to gain a true picture of the problem of torture and ill-treatment, let alone drives a coherent programme to address protection gaps. The body that is primarily relied upon for such information is the procuratorate; yet it has 'siloed' and discrete areas of competence only, and does not have the mandate to undertake such a role; nor is it independent.

Collectively, this assessment also points to a current governance model that does not adhere in practice to the 'Rule of Law'. This does not come as a surprise: while China does notionally

officially adhere to the Rule of Law, China is a One-Party system where the CCP sits alongside or above the law. The obstacles examined above that are currently negating the full effectiveness of torture prevention in China are evidence of a non-rule of law system. These institutional, political and cultural obstacles illustrate a core challenge in modern-day China: the balance between the need to protect One-Party (CCP) rule and its priorities of social order and economic development, with its commitment to protect the rule of law and human rights.[1121] These commitments may be reconcilable in most spheres, but the two conflict when it comes to torture prevention. Where this happens, it is clear that under Xi Jinping's China, the priority of social order trumps the commitment to human rights protection.

[1121] This view is supported by China scholar M. Lewis, for example, the Statement of M. Lewis, 'China's pervasive use of torture', Hearing of the CECC, 14 April 2016, Congressional Committee testimony; China's level of commitment to the Rule of Law is examined by various scholars, *inter alia,* Turner, Feinerman and Kent Guy, *the Limits of the Rule of Law in China* (2000); Yuanyuan Shen, 'Conceptions and Perceptions of legality: understanding the complexity of law reforms in Modern China' (2000); Lubman, 'Bird in a Cage: Chinese Law Reform after Twenty Years' (2000) and is also examined in the context of effective torture prevention in Thesis Chapter 1; see also Thesis Introduction and Chapter 2.

PART III: IMPLICATIONS & CONCLUSIONS

Conclusions: What needs to change for China to be able to fully protect all detained persons from torture and other ill-treatment?

PART III: CONCLUSIONS: WHAT NEEDS TO CHANGE?

China has taken its first steps in developing prevention measures in certain detention spheres and significant developments are underway. These, however, stand on insecure foundations and currently suffer from some fundamental deficiencies. There are regulatory deficiencies, gaps in protection or 'grey' under-regulated detention spheres, which have not been addressed properly by legal reforms. Harder to address are the structural, institutional and political obstacles to safeguards being able to operate properly and as intended. Overall, the preventive measures put in place through recent reforms currently fail to fully protect all detainees and prevent against torture and ill-treatment. Wholesale change is needed to address these deficiencies.

A. Analysis

This chapter draws upon the evidence from previous chapters and argues that, for China's torture prevention measures to have their full effect, a broad approach to torture prevention is necessary. Despite the wide and relatively ambiguous nature of the UNCAT 2(1) torture prevention obligation,[1122] at minimum, all safeguards identified by the IHRL bodies, need to be in place and be fully implemented in China, as a UNCAT State Party.

There have been significant steps taken towards legal reform in China today. Particularly noteworthy are the reforms of the criminal law and introduction of various measures aimed at increasing protection for detainees and curbing torture and ill-treatment in KSS police detention centres. Yet, even these are insufficient to give full protection to detainees in the criminal justice sphere. Prevention work also needs to extend to all types of deprivation of liberty (i.e., to all of China's detainees); currently it does not. The justice processes that lie outside the criminal law

[1122] See Thesis Chapter 1; UNCAT 2(1) 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction to fully protect against torture.'

lag far behind in terms of regulatory protections and safeguards for detainees. This gap alone seriously undermines the foundation of current torture prevention work.

It is the *combination* of three factors: the lack of effective regulated safeguards; the legal and political environment where impunity can exist; and obstacles in the institutional, structural and political governance and justice model, which enable circumvention of protections, where they do exist. This is compounded by the lack of independent oversight of the due process and transparency safeguards. These cumulatively create a challenging environment for effective torture prevention.

Where one area appears to have become more regulated to afford strengthened protections for detainees, loopholes appear to permit circumvention. 'Protection arbitrage' allows for some spheres to be overtly rendered more robust in terms of protective safeguards (the criminal law justice process), and others to be kept more opaque (the administrative and Party justice processes), with porous boundaries between them. Indeed, even when an area is subject to more regulation, this has not necessarily resulted in better protective safeguards for its detainees (for example, CDR).[1123]

A broad approach to torture prevention is necessary in such a context to adequately tackle the persistent nature of torture; without which, simply strengthening protections available in the criminal law and better legal regulation of 'grey-er' (i.e., less regulated and more opaque) administrative and Party discipline processes, will not afford sufficient protection against torture to all of China's detained persons.

Carver and Handley[1124] stress that technical measures of torture prevention can be rendered fruitless if the conditions in a given country are not right; in essence, there are *pre-conditions* to the effectiveness of torture prevention measures. Without these in place as the foundation, technical torture prevention measures are less likely to operate effectively. Currently, China faces too many institutional, structural, political and socio-cultural obstacles, legal loopholes and 'grey'

[1123] Thesis Chapters 2 and 3.
[1124] Carver and Handley, *Does Torture Prevention Work?* (2016); see analysis in Thesis Chapter 1.

unregulated spheres. Until these are addressed, China cannot adequately meet its UNCAT obligation for the establishment of effective torture prevention measures that can properly protect all detainees from, and prevent, torture and other ill-treatment.

B. Recommendations

A holistic approach to torture prevention in China may address many of the issues identified. There are two main areas that would benefit from significant reform. First, in line with the requirements for legal safeguards against torture is the need for better regulation of safeguards: the closing of loopholes in the law, the establishment of safeguards where they are missing and the abolition of extra-legal zones that sit parallel to the law.[1125] Second, is the need for reform of the various structural and institutional obstacles currently hindering full and effective torture prevention measures.[1126]

Key reforms could include, *inter alia*,

(i) Strengthen protections in criminal law

The (further) strengthening of protections in the criminal law is needed to address the protection gaps identified,[1127] and in particular, narrowing the scope of permissible exceptions and exclusions.

Many of these deficiently regulated safeguards or regulatory protection gaps still exist. One example is court exclusion of evidence obtained through torture. The 2012 reform of the CPL and CL strengthened protections for criminal suspects by establishing court exclusion of evidence obtained through torture.[1128] However, this safeguard does not operate effectively in reality: practice is developing ways to circumvent it, negating its effectiveness and rendering obsolete its original intent as a safeguard.[1129] Various measures should be taken to contribute to enforcing the

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1125 Thesis Chapters 2 and 3.
1126 Thesis Chapter 4.
1127 Thesis Chapter 3, for instance, the fewer safeguards for certain categories of suspect, such those suspected of 'endangering state security', terrorism or corruption.
1128 Thesis Chapter 2.
1129 Thesis Chapters 3 and 4.

new exclusionary provisions. For example, regulations and guidelines should be adopted to ensure that where there is an allegation that a statement was made under duress, the burden of proof should remain with the procuratorate and courts, provisions should ensure an obligatory systematic forensic medical examination in all cases of suspected abuse, and clear guidelines drafted to ensure that the allegations are promptly and thoroughly investigated. Separate cases of torture prosecution should systematically follow cases on exclusionary proceedings; currently this is not the case in China. Such regulations should also ensure that doctors are empowered to be independent and competent enough to proactively and systematically pass relevant information on to the competent prosecuting authorities. Regulations should also specify that such information should immediately and systematically be acted upon by procurators. Equally, messages to the judiciary and procuratorate through oversight or professional conduct bodies are needed to remind them of their duty to take effective and prompt action where there is any suspicion that torture has been committed.

There are various other examples of regulatory protection gaps in practice, especially regarding the 'trinity' of core preventive procedural safeguards (for access to a lawyer and doctor for criminal suspects as well as for notification of third party) in China.[1130] While it is notable that such safeguards are established in the CPL for criminal suspects – they do not cover *all* criminal suspects in *all* circumstances. Even in circumstances where they do, their scope is limited. An illustration of this is the safeguard of 'prompt access to a lawyer' for all persons deprived of their liberty. As regards access to a lawyer, the CPL is not in conformity with the IHRL requirements for this safeguard, in that it does not guarantee the right of the detained person (run-of the mill/ordinary criminal suspect) to meet a lawyer from the very outset of the detention (only within 48 hours). Another example of the dilution to this safeguard of prompt access to a lawyer is the exception permitted by law in certain cases, such as those suspected of "endangering State security", terrorism or corruption. In these cases, the lawyer must obtain prior permission from public security investigators to meet the suspect, which may legally be withheld for an indefinite

[1130] Thesis Chapter 3.

period of time, on the grounds that it could hinder the investigation or could result in the disclosure of State secrets. The same potential for indefinite delay is also applicable to third party notification. Not only is delay possible in the law, it has been seen in practice. Thus, some detainees do not have the right to a lawyer at precisely the time when the risk of torture is at its greatest.

In these aspects, there is a great deal more China could do to eliminate the gaps in protection in its criminal and criminal procedure laws, including strengthening legislation to afford access to a lawyer and third party notification – for *all* criminal suspects from the outset of deprivation of liberty. Should there be reasonable doubts as to the potential for the lawyer to hinder the investigation, the appropriate professional body could be contacted to ensure that another independent lawyer is found quickly. An indefinite or blanket delay to any detainee in accessing a lawyer or to third party notification is contrary to IHRL norms. In this respect, the CPL should be amended to reflect IHRL requirements. Without this, detention could be considered akin to *de facto* incommunicado detention; a prohibition that is universally applicable as part of general international law.[1131] Indeed, a considerable body of international law jurisprudence clearly shows the right of access to a lawyer should be applicable from the outset of the deprivation of liberty,[1132] cannot be unduly restricted or delayed,[1133] third party notification should happen within 24 hours and any unlawful restriction on these rights should be able to be challenged before a court. All exceptions or dilution of the protection for third party notification for certain categories of crime such as ‘endangering state security’ or ‘bribery’ should be abrogated. Likewise, regular oversight and monitoring of implementation and compliance with the safeguards by public officials is needed and those found not to comply to be adequately disciplined within a system that adequately prosecutes, sentences with a sanction commensurate

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1131 See Thesis Chapter 1.

1132 See Thesis Chapter 1 and, *inter alia*, ECtHR (*Salduz v Turkey*).

1133 *Ibrahim and Others v. the United Kingdom*, (Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09), Grand Chamber judgment, 13 September 2016. *Ibrahim* expands on the test set out in *Salduz* for assessing whether a restriction on access to a lawyer is compatible with the right to a fair trial. This test is composed of two stages: first, the Court must assess whether there were “compelling reasons” for the restriction; second, it must evaluate the prejudice caused to the rights of the defence by the restriction in the case in question.

to the crime and such a sentence is duly enforced.[1134] This could help to provide meaningful deterrence to potential abuse perpetrators and bolster trust in the justice system.

Another protection gap in the CPL is the audio-visual recording of interrogations. While this protective obligation is afforded in the CPL for criminal suspects, it is only applicable to 'major' or serious criminal cases and not for all criminal suspects.[1135] Moreover, there is dubious independence of the auditing of the recordings and police have been seen to selectively only record a certain part of the interrogation or use areas outside of the camera's coverage to commit acts of alleged torture or ill-treatment. In this respect, China could also address this protection gap by refining the legislative protections available in the CPL. For example, given the systemic nature of torture during the period of police and other investigatory bodies' (procurator and CCP discipline investigators) interrogation, China should legislate, in the CPL, for audio-visual surveillance to be obligatory for all criminal suspects, regardless of their crime. It should require that such footage be kept for a sufficient period of time for it to be used as evidence, copies of the footage be given to procurators, and made available to the court and defence lawyers; legislation should also establish effective and independent oversight mechanisms to check on the recording system and ensuring that no person is able to tamper with evidence. Indeed, there are positive signs that regulatory change is underway in this area. MoI Instructions have been issued recently to interpret this provision of the CPL to encourage the full recording of all interrogations of all suspects. Yet, these Instructions act as guidance only; the CPL has still not been amended.

Not all the protection gaps identified in the thesis concern only regulation deficiencies, many areas suffer from both a primary regulatory gap and either a lack of general understanding or awareness to properly implement the law in practice, or deliberate misuse of the law (c.f. Introduction). One illustration can be seen in the torture definitional discrepancies in China; China still lacks a comprehensive definition of torture and ill-treatment in its national law (c.f. Chapter 2(4)(I)(i)): this is a clear regulatory protection gap that needs to be addressed. Moreover, it can impact how investigators, procurators and the judiciary view abuse and what can or can't

[1134] For example, CAT Committee Concluding Observations on China (2015), para. 13.
[1135] Thesis Chapter 3.

qualify as torture (Chapter 2.4(I)(i)). If they consider that an act is not serious enough to qualify as torture, then many potential cases will not be investigated or prosecuted. It is likely to be one (of many) reason(s) for such low rates of prosecution of torture cases in China. It also links with the issue of impunity: where discrepancies in the torture definition risk creating loopholes for impunity to be able to flourish. Equally, this also links with how progress on reduction of torture and its prevention is perceived by the Chinese authorities and national scholars. The lack of a comprehensive definition and general understanding of what exactly qualifies as torture and ill-treatment goes some way to explaining how national scholars and the authorities can consider that torture (but not ill-treatment) has significantly reduced, if not been effectively curbed (in KSS only) (c.f. Chapter 4.4), while IHRL bodies, national lawyers and civil society still receive hundreds of allegations of torture and ill-treatment emanating from Chinese places of detention every year (c.f. Chapter 3).

Through the lens of prevention, the above findings are indicative of discrepancies in regulation, in implementation and in approach and are concerning. Progress in preventing torture needs, at the very least, the respective states' national laws to be fully compliant with UN CAT definition (c.f. Chapter 1) and the above other regulatory gaps to be addressed, in addition to tackling the implementation gaps. Training and awareness-raising of what constitutes torture and ill-treatment, and of the consequences of such abuse, are necessary at all levels, for all persons involved in investigation, custody and detention, including lawyers and the judiciary (c.f. also Section C(ii)).

(ii) Reform the parallel, less-regulated, justice processes external to the criminal law and remove the possibility of 'protection arbitrage'

(a) Abolish or, at minimum, strengthen regulation of the punitive administrative (PAD) justice process

Ideally, the parallel PAD justice process would be abolished. While it remains, at minimum, there is a clear need to strengthen its safeguards to be in line with the regulation in the criminal law. This is needed given the true nature of punitive misdemeanours, which are virtually identical to their criminal offence counterparts.

The PAD process confers significantly less protective safeguards for detainees than the CPL does for criminal suspects. As they currently stand, the few safeguards that do exist are not robust enough to be effective. The PSAPL does not afford access to a lawyer sufficiently promptly to detainees, but instead affords this right at some stage of a detainee's detention period.[1136] Formulated in such a way, it is unsurprising that reports indicate that, in practice, detainees generally do not get quick access to a lawyer despite the fact that given the nature of the criminal-like PAD offences, detainees undergoing investigation and administrative trial need a lawyer as much as criminal suspects, especially at the outset of their deprivation of liberty.[1137] In line with international jurisprudence and the "autonomous meaning" concept: if the essential nature of an act and its consequence is essential criminal-like in nature it should be treated as such – no matter what its official name in domestic law. Administrative detention must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections.[1138] Thus, PAD detainees detained pursuant to administrative grounds that are similar, if not identical, to their criminal-law counterparts, should be protected by the same protective safeguards as should be conferred to criminal suspects.

[1136] Thesis Chapter 2.

[1137] Thesis Chapter 3.

[1138] The WGAD underlines that 'administrative detention may also be subject to the customary norm codified in article 14 of the Covenant [ICCPR (right of fair trial)], e.g. in cases where sanctions, because of their purpose, character or severity, must be regarded as penal even if, under domestic law, the detention is qualified as administrative'. This view is also held by some other international bodies, such as the HRC.

Equally, a right of access to a lawyer at some stage of a detainee's detention period negates one of the original intents of this preventive safeguard, namely, for the lawyer to swiftly receive any complaint of torture after immediate apprehension of the detainee, to witness to any signs of injury, initiate proceedings, if necessary, and act as an avenue of communication with the outside world. The situation in the context of PAD is exacerbated by the fact that due to its administrative nature, there is no requirement for a PAD detainee to be brought before a judicial authority to have his or her detention approved. This safeguard can act as a conduit for a judge to be able to identify, and initiate proceedings to counter, torture and other ill-treatment. The deficiencies evident with this safeguard in law and practice need to be addressed given that PAD infractions are virtually identical in nature to crimes, and PAD detainees should be afforded all due process safeguards as the criminal law, not fewer.

Likewise, better regulation of the PSAPL is needed regarding the right for detainees to be protected from incommunicado detention. As it stands, there are currently no maximum proscribed timeframes requiring the police to notify third parties that a detainee has been taken into custody and placed in administrative detention by the PSB pursuant to the PSAPL. It is up to the individual police officer to decide when to notify.[1139] In addition, other safeguards, such the establishment of complaints' mechanisms and preventive monitoring, while nascent in KSS police detention settings, are still in need of significant strengthening in many respects.[1140]

In combination, these contribute to making a process that is more insular and opaque than its criminal-law counterpart, creating a circumvention possibility to the comparatively more regulated criminal-law track, and with it the risk associated with 'protection arbitrage'. Removing the concept and rationale for a parallel justice process for infractions that so closely resemble their criminal counterparts would take away the administrative (police) discretion to choose one justice track over the other – and along with it the risks of a choice of a lesser regulated route ('protection arbitrage'). Expanding the CPL to include all the PSAPL infractions instead would

[1139] Thesis Chapter 2.
[1140] Thesis Chapters 3 and 4.

ensure that these 'lesser infractions' would be better regulated in line with the stronger protections afforded in the CPL and more in line with IHRL requirements.

(b) Better regulation and oversight of the CDR drug rehabilitation process

In this respect, various crucial elements in the CDR placement and treatment procedure and safeguards in the law are currently missing and should be addressed.[1141] These include the need for, *inter alia*, more transparent external oversight procedures and mechanisms, well-defined safeguards involving the initial placement decision, increasing the involvement – and clarifying the role – of doctors in the decision-making, safeguards around informed consent for placement and treatment, avenues to review the placement decision and to challenge the lawfulness of involuntary placement, appeals rights established, complaints' mechanisms to be developed and external monitoring to be introduced and regulated for in CDR facilities.

While regulated to a limited extent, there are many remaining regulatory protection gaps. For example, the family of the relevant person detained under CDR grounds should be notified within 24 hours of the 'letter' notifying deprivation of liberty under CDR being given to the detainee. However, in practice, this process can take many days, weeks, if not months. Notification is not required under Chinese law from the immediate outset of the deprivation of liberty, contrary to the international law requirement for prompt notification to counter the risks associated with *incommunicado* detention.[1142]

Additionally, there are many areas of the CDR process where there are complete protection gaps, rendering this area virtually unregulated by the relevant preventive safeguards. For example, in CDR legislation there is no explicit right to access a lawyer for a person detained by the police/PSB for CDR reasons, whether from the outset of their deprivation of liberty or at a later stage. Nor are there any safeguards in the relevant laws governing of the use of restraints (the CDR regulations specify that detainees can be restrained, but there are no accompanying

[1141] Thesis Chapter 2.
[1142] Thesis Chapter 3.

safeguards on the use of restraints, such as the maximum duration of restraint, upon whose orders this is allowed, among others).

The length of time persons can be compulsorily detained needs to be fundamentally reviewed and kept strictly in line with individual-needs basis, and should not, ultimately, be a police decision. The environment needs to be made patient-centric and therapeutic, with a full range of therapies and rehabilitative activities available. To achieve this more resources – financial and human – need to be invested in the centres. Likewise, better regulation is needed of the jurisdiction and responsibility for CDR from the current split PSB-Justice responsibility to far greater emphasis on (and involvement of) the Ministry of Health.

(c) Abolish the CCP investigation and discipline procedure ('shuanggui') and align it with the criminal law

Reform of the Party investigation and discipline process is needed to ensure that it does not sit alongside or above the criminal law, but instead recognises CCP discipline offences as criminal offences to be regulated by a revised criminal law. This would enable regulated investigation by law enforcement agencies that afford due process and preventive safeguards in law. As it currently stands, the Party justice process is virtually unregulated, and the risk of torture therein is exceptionally great. S*huanggui* should be abolished as an extra-legal 'tertiary' justice process, and its protections aligned to those of the criminal sphere.

(iii) Empower and strengthen the judiciary, as well as increase protection for defence lawyers

The strengthening of the judiciary and the protection of all defence lawyers is needed to provide them with the confidence required to fulfil their professional commitments without fear of reprisals. Equally, more measures need to be established to tackle aspects of judicial corruption, governmental intimidation of, or influence over, the judiciary (especially in political sensitive proceedings) and reported non-implementation of judgments. This is to enable the judiciary to feel confident enough to hear cases of torture impartially and be able to punish perpetrators

appropriately with sentences commensurate with the crimes of torture and ill-treatment, thus addressing current perceptions of impunity. Some measures have already been taken to strengthen the judiciary, yet judicial corruption, influence from central and local authorities, judicial partiality and hindrances to defence lawyers' practices remain. Institutional and structural separation of the justice processes from any CCP political influence is needed. This should include the establishment of a system of third party oversight for the judiciary, to ensure both its proper functioning, identify and stem intimidation possibilities from governmental and/or Party sources, address judicial corruption, and seek to ensure that the judiciary is properly trained and resourced.

(iv) Counter impunity for abuse perpetrators, improve effectiveness of investigations and adequate prosecution of abuse allegations

All allegations of torture and other ill-treatment need to be investigated promptly, impartially, transparently and thoroughly and adequately prosecuted. These elements are integral in the creation of the right environment in which other legal reforms can operate properly in practice. China could draw inspiration in this regard from the body of jurisprudence stemming from the ECtHR, a source of international law, which considers ECHR Article 3 prohibition of torture alongside positive procedural obligations to achieve effective prevention. This increasingly goes beyond the mere requirement of criminalisation of torture in national legislation, but also requires investigations to be effective (impartial, independent, adequate, thorough, prompt and transparent), a duty on the State to prosecute, a duty to impose serious penalties for acts of torture and a duty to enforce these sanctions.[1143] A wider framework that ensures improved investigatory methodology to break the deeply systemic reliance on confession-based evidence, fosters judicial independence and improves the effectiveness of the trial process as a whole in China is crucial to ensure that torture prevention safeguards can operate properly. This will require targeted and thorough training of investigation officers (police, procuratorate and Party), as well as awareness-

[1143] Thesis Chapter 1.

raising within the judiciary, along with sufficiently mandated and resourced external oversight mechanisms to check on the quality of investigations.

(v) Ensure greater separation of powers, remove multiple roles within a single authority and involve the judiciary in authorising criminal and quasi-criminal detention

The clear separation of powers between the investigative and detention branches of the police, the procuratorate, CCP investigation and discipline organs and the Courts is needed. Each authority should be able to act as a check on each other at every stage of the detainee's passage through the justice and deprivation of liberty process, with the Courts standing as a completely independent authority. This would mean addressing the current internal conflicting roles within the police and the procuratorate.

In the criminal–law sphere, greater direct (face-to-face) and prompt involvement of the judiciary in the approval of detention is needed, rather than the current remote approval by the procuratorate along with long permissible exceptions to investigation time-limits. A positive by-product would be that the right of *habeas corpus* would be more likely afforded, allowing the detainee an opportunity to challenge the lawfulness of his or her detention before a judicial authority. More prompt direct access to a judicial authority would also reduce the risk of prolonged incommunicado detention. As regards the administrative justice processes, while there is no explicit requirement for a PAD detainee to be brought before a judicial authority to have his or her detention approved, PAD infractions are virtually identical in nature to their criminal offence counterparts, and along the 'autonomous meaning' reasoning, should be afforded the same due process safeguards as the criminal law. Equally, as regards CDR, greater involvement of the courts is needed to verify safeguards around informed consent for CDR placement and treatment, provide an avenue to review the placement decision and to challenge the lawfulness of involuntary placement, regularly review the lengths of CDR, and act as a conduit for the appeal of decisions.

The clear separation and delineation of powers between investigation and custody/detention would require, *inter alia*, better oversight and implementation of the geographic and physical separation of the detainees from investigators and the delineation of the responsibility of detainees' well-being in a custody setting from the investigation process.

Reform should also include regulation, and oversight of implementation, of the use of only authorised designated places of detention. This would require the abolition of unofficial 'black' detention sites in China. These include hotels, hostels, offices and other undesignated locations. This is to remove the possibility of use of opaque locations where investigation and custody can happen simultaneously for an indefinite period without structural safeguards in place to protect detainees.

(vi) Strengthen internal and external oversight bodies

All the justice processes need to be rendered more transparent through the strengthening of the role of oversight bodies, both internally and externally. Internally, legal supervision (i.e., supervision of the implementation of the law) has traditionally fallen within the remit of the Procuratorate. Its mandate and powers, however, are too limited for it to undertake an overall role of leading supervision of torture prevention measures. Equally, there is in an inherent conflict within its multiple roles of investigator, approver of detention, prosecutor and supervisor. There is a need for substantive reform of the powers and role of the procuratorate and the establishment of a separate oversight body that is external to the investigation process. Likewise, externally, there is a need for an independent oversight body, with appropriate powers, to ensure those torture prevention measures that are in place, are operating, and to recommend the establishment of measures where they are missing.

Monitoring and pilot complaints' mechanisms in KSSs are a start, yet many places of deprivation of liberty remain in the dark. The frequency of torture and its real nature appears not to be properly understood even domestically. Nor can it be, as there simply are not the mechanisms currently in place to record, oversee, co-ordinate and share information pertinent to torture prevention to cover all places of deprivation of liberty across China. This is challenging: there are

approximately 2,800 remand police centres (KSS), more than 1,000 prisons and many thousands of smaller police stations that can hold persons for initial periods of custody. Equally, there are thousands of persons in the military forces, where military custody facilities and military justice may deprive military staff of their liberty pursuant to suspected and actual military offences. There also are hundreds of psychiatric facilities, juvenile institutions and social welfare establishments, which also have powers to deprive persons of their liberty, in a given context. A country with more than 1.3 billion inhabitants unsurprisingly faces complex challenges in terms of co-ordination across different Ministries and Departments and discrete areas of responsibility, as well as retaining a general oversight of the current actual situation pertaining to all places of deprivation of liberty. A co-ordinated approach to enable strategic oversight, in this context, is essential.

In China, no one body gathers, or analyses, the information to be able to gain a true picture of the problem of torture and ill-treatment, let alone drives a coherent programme nationwide and pan-institution, Departments and Ministries to address all protection gaps. There is no one body responsible for synthesis of information from oversight work of all places of deprivation of liberty. Information generally about detention places is in piecemeal form, mostly not publicly available, and only available from the different Ministries/Departments involved. There is no independent body with the mandate to enable a comprehensive overview of all types of torture and other ill-treatment emanating from all types of places of detention across China. There is no body to assess the true picture of the operation of legal safeguards and where their deficiencies lie, with the authority to propose reform, to question and analyse why so few complaints on torture and other ill-treatment are received, to examine what is not working in practice and how to improve the system.

Further, there is no external body to assess the selection of the monitors, and their effectiveness, other than the procuratorate and higher organs of the PSB.[1144] Monitors currently can only operate in KSS (police remand detention) and some prisons, but not other place of deprivation of liberty.

[1144] MPS Regulation No. 379, 2011 (Chinese).

There is no obligation of public reporting of monitors' findings. Indeed, pursuant to monitoring regulations,[1145] special monitoring supervisors can be fired if they either make their findings public or have views or recommendations that are not purely factual in nature. Monitors (procurators and special supervisors) have no independent oversight of whether recommendations are actually implemented, and in time, or whether recommendations have impact or are repeatedly ignored. Neither are monitors entirely independent from the institutions that they monitor. 'Specially-invited supervisors' bring different qualifications and expertise to the preventive monitoring function, but they are chosen by a combination of KSS and PSB decision-making. Inherently, they will be known to, and have contacts with, the KSS and PSB. An interview conducted for this research with one of the very few active Chinese monitors and member of a Complaints Handling Committee shed light on an evidential finding: namely, that the monitor considered that torture and other ill-treatment "never happened" in police detention in China. This monitor argues that while China could improve some procedural safeguards in some areas (for example, the procedural safeguards around death penalty cases), the monitor considers that torture and ill-treatment *per se* is not an issue.[1146] While it is indeed positive that China has established an obligation for some places of deprivation of liberty to be monitored, it is clear, however, that there is still a long way to go before China can guarantee that truly independent monitoring is reaching all places of deprivation of liberty.

Finally, there is no body to assess what and how broader prevention measures are, or how they should be, working. There is no body to recommend or initiate changes pan-Department and Ministries responsible to all different types of deprivation of liberty (including for example psychiatric facilities and social welfare institutions), in a similar vein to the type of reforms evident in the KSSs. Even in the discrete area of the police-run KSSs (around 2800 nation-wide) where reforms, such as the establishment of complaints' mechanisms are happening, it is almost

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1145 Articles 9 and 5(1)-(6), MPS Regulation No. 379, 2011, adopted 30 September 2011 (translated by author). Article 9: 'if the special supervisor does not undertake his or her role correctly and does not keep to the obligations in Article5(1)-(5) [confidentiality, have only factual views, report to the KSS management and procurators only, etc.] then the KSS can require their resignation, upon the agreement of the police department.'

1146 Author's interview with Monitor A (*name anonymised*), 24 November 2016, Wuhu, China.

impossible to determine whether they are operating effectively, as no body has the mandate for assessing the quality of their operation.[1147]

The Procuratorate is the main body that is currently relied upon to fulfil this role. Yet, this body suffers from limitations in its mandate to be able to undertake such a role, nor is it independent. In practice, it has 'siloed' and discrete areas of legal competence only and is not responsible for preventing torture in all places of deprivation of liberty. Nor is it responsible for gathering and analysing patterns of information and assessing, at a general level, whether torture prevention measures are working effectively or recommending reforms where they are not.[1148]

(vii) Develop nascent complaints' mechanisms and preventive monitoring, based on proper foundations

Better legal regulation of the preventive measures of complaints' avenues and regular preventive monitoring is needed, to ensure their independence and proper functioning, as well as the expansion of their legal remit to cover all types of deprivation of liberty (not just police detention centres (KSS)).

Both types of mechanisms are in need of advice, support and training. Independent reporting lines (i.e., not only reporting to the local procuratorate, with whom the report can stay and remain confidential) and overall structural managerial and operational responsibility for all monitoring across China needs to be established, to fulfil the various criteria for independent and effective monitoring. The complaints' mechanisms are equally in need of significant development. This is to ensure that all detainees, in all places of deprivation of liberty, have ready access to confidential mechanisms through which they can air complaints both internally and externally. Detainees should be aware that they will not suffer reprisals and know that their complaints are being addressed promptly with concrete outcomes. This is not the situation, in any place of detention in China, currently. Without these reforms, the risk is that the current models develop

[1147] Thesis Chapter 4.
[1148] Thesis Chapter 4.

on a shaky foundation and risk becoming non-credible in the eyes of detainees and the authorities alike, thus negating their effectiveness.

(viii) Eradicate wider influencing factors that can increase likelihood of abuse

These factors link the legal with the criminological and psychological, and throw the 'protection net' as wide as possible to stem wider influences that can facilitate torture.[1149] Such measures could include: establishing better whistle-blower protections in legislation; institutional and wider-social awareness-raising to foster acceptance of the torture prohibition in all cases and eradication of taboos on reporting it; comprehensive law-enforcement training in appropriate investigatory practices to steer away from the confession-based evidence culture; training in the prohibition of torture; oversight of institutional work-culture and peer pressure; the reform of the cultural mind-set of obedience and lack of questioning of seniors in respect of abusive illegal actions; regular rotation of staff and robust oversight to ensure isolated work units do not become insular and opaque environments conducive to the facilitation of torture. In short, a multi-faceted approach is needed to change the culture within the police and Party-law enforcement that views torture and other ill-treatment of detainees as acceptable.

This will require proper training of investigation and detention staff, but also requires a raft of legislation, that is adequately implemented, along with sufficiently mandated and resourced oversight mechanisms. These are needed to break current embedded institutional practices and socio-cultural influences that contribute to the resilient nature of torture in some detention spheres in China. The solution will require deep structural changes and the onus should not lie only with the procuratorate to fulfil this role. If successful, this could contribute in part to the implementation gaps that have developed between law and the practice in China.

[1149] Thesis Chapter 4.7.

(ix) Reform restrictive regulations on civil society and media to increase oversight and accountability

This should empower national civil society and media to report on and act as essential watchdogs for torture prohibition and prevention, and to report cases of alleged torture and other ill-treatment, without fear of censorship or reprisals. This would provide another essential layer of protection against detainee abuse, and a safety net to catch cases that may have been missed by the other preventive mechanisms.

The above is not an exhaustive list; rather these are illustrations only of reforms that might be able to individually address some of the structural and institutional issues stemming from the protection gaps identified that are currently hindering truly effective torture prevention in China. Each could contribute to improving torture prevention.

C. 'Rule of Party' governance model: impact on the effectiveness of torture prevention

(i) China's Rule of Party: impact on the overall effectiveness of torture prevention

The more concerning issue is whether these above reforms could in practice create sustainable and effective change given China's governance model. Some of the institutional obstacles identified are inherent to China's current political and governance system. They are reflective of China's One-Party State, which follows, in practice, a "Rule of Party" governance model. Ultimately, the Chinese legal landscape mirrors its governance model and suffers from the same structural and institutional challenge, namely, that the Party can influence or override judicial work. China law professor, Margaret Lewis, highlights this concern about the sustainability of China's human-rights approach. Lewis acknowledges the 'sizeable basket of reforms' undertaken in China and transitional challenges associated with reforming the criminal justice system, especially given the "obstacles inherent in changing entrenched practices of the police,

prosecutors, and judges."[1150] Lewis argues that "these transitional challenges are fundamentally different, however, from the government's decision to selectively ignore legal protections embodied both in Chinese law and international legal norms."[1151] Lewis points out that the "character of China's criminal justice system has to be measured not just by the handling of the relatively easy run-of-the-mill criminal cases like petty thefts and assaults, but also by the blatantly politically motivated prosecutions, even if such cases represent a relatively small percentage of all criminal cases. The Chinese government's failure to live up to the legal standards that it sets for itself in these hard cases undermines the legitimacy of the entire system."[1152]

The main obstacle is that many of the torture prevention measures need the right governance environment to effectively counter and reduce the risk of recurrent torture, as identified in Chapter 1.[1153] The UN SPT supports this view; it stresses that "the prevalence of torture and ill-treatment is influenced by a broad range of factors, including the general level of enjoyment of human rights and the rule of law, levels of poverty, social exclusion, corruption, discrimination, etc. Whilst a generally high level of respect for human rights and the rule of law within a society or community does not provide a guarantee against torture and ill-treatment occurring, it offers the best prospects for effective prevention."[1154]

The need to look at torture prevention through the lens of the wider general situation and governance model in a given country is supported by various scholars. Bingham, Rejali, Hathaway, Carver and Handley, Financi,[1155] among others, have examined, in differing contexts, the intersection of torture prohibition (and prevention) and broader political governance models. Carver and Handley, in their work on assessing the effectiveness of torture prevention, speak of

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1150 Lewis, Statement of M. Lewis, Hearing of the US CECC "China's Pervasive Use of Torture", 14 April 2016, p. 6.

1151 Ibid.

1152 Ibid.

1153 See Thesis Chapter 1; see also, in particular, the SPT, 'The approach of the SPT to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under OPCAT' (2010); Carver and Handley, *Does Torture Prevention Work?*, Introduction (2016).

1154 SPT, 'The approach of the SPT to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under OPCAT', Paragraph 5(a), CAT/OP/12/6, 30 December 2010; see more details in Chapter 2.

1155 Bingham, *The Rule of Law* (2010); S. Karstedt, 'Does democracy matter? Comparative perspectives on violence and democratic institutions', European Journal of Criminology 12(4); Hathaway, 'Do Human Rights Treaties make a difference' (2002); Rejali, *Torture and Democracy'* (2007); Carver and Handley, *Does Torture Prevention Work?* (2016); and Financi, 'the role of jurisdiction on the persistence of torture in Turkey and public reflections', *Torture,* 18, Vol.1, (2008).

the right conditions needed for torture prevention to be effective. Indeed, without a proper foundation, technical legal measures of torture prevention can only operate to a certain extent. Scholars speak of the need for a proper foundation in order for torture to be fully curtailed[1156] and point to fundamental elements in a society governed by the rule of law (such as separation of powers and an independent judiciary). While facets of the rule of law go hand in hand with the model of democratic structures and institutions, they point out that it is too simplistic to attribute a reduction in torture to democracy alone in a given state (Chapter 1). While not all democracies respect the principles of torture prevention,[1157] scholars and torture prevention treaties bodies, such as the UN SPT, underline the correlation between democracy, the rule of law and effective torture prevention. The UN SPT, for instance, views democracy and the rule of law as crucial elements to torture prevention[1158]: "where democracy and the rule of law are absent, the incidence of torture, ill-treatment and corruption is generally greater since such acts go undetected or unpunished."

More specifically relevant for the case of China, is the link between a state governance model with structures that adequately reflect the rule of law requirements and the effectiveness of torture prevention. Studies suggest that that states truly governed by the precepts and structures associated of the rule of law, such as an independent, fully functional and impartial criminal justice system, are more likely to afford the right conditions for torture prevention technical safeguards to operate to their full or best potential.[1159]

In China, Party influence remains woven into the very fabric of all branches of China's governance model – including its legal system. The structure, and operation, of China's legal

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1156 See *inter alia*, Hallo de Wolf, OPCAT Bristol Research Team, 'Prevention under International Law', 20 May 2009, Bristol; Nowak & MacArthur, *The United Nations Convention Against Torture: A Commentary* (2007); Rodley, *The Treatment of Prisoners under International Law* (2009); 'Preventing Torture in the 21st Century: Monitoring in Europe Two Decades On, Monitoring Globally Two Years On', *Essex Human Rights Review* (2009): Casale, 'A System of Preventive Oversight', Rodley, 'Reflections on Working for the Prevention of Torture', Tayler, 'What is the Added Value of Prevention?', Olivier and Narvaez, 'OPCAT Challenges and the Way Forwards: The ratification and implementation of the Optional Protocol to the UN Convention against Torture', Steinerte and Murray, 'Same but Different? National human rights commissions and ombudsman institutions as national preventive mechanisms under the Optional Protocol to the UN Torture Convention'.

1157 See, *inter alia*, Rejali, *Torture and Democracy* (2007); Hathaway, 'Do Human Rights Treaties make a difference' (2002).

1158 Thesis Chapter 1, Section 1.3.3; see, in particular, the SPT on corruption and the need for democratic principles and the rule of law for effective torture prevention, Seventh Annual Report of the SPT, CAT/C/52/2, 20 March 2014, para. 100.

1159 See Carver and Handley, *Does Torture Prevention Work?* (selection of country case studies) (2016); The SPT's findings and opinions on the requirement for due process and lack of corruption for effective torture prevention in, *inter alia*, the SPT Seventh Annual Report (2014) and SPT report on its visit to Mexico and need for due process guarantees as a key to effective torture prevention, in CAT/OP/MEX/1, 31 May 2010; SPT, Provisional statement on 'the role of judicial review and due process in the prevention of torture in prisons' (1 October 2012) .

system remains subservient to the Party. Despite its purported increasing adherence to the rule of law, China does not see the rule of law as requiring the separation of powers and all bodies to be equally accountable to the law. Rather, it considers the rule of law to be that all bodies in China rule in accordance with its laws and the bodies' own regulations. Further, Party law trumps all others, hence its status as a *de facto* and *de jure* 'Rule of Party', or One-Party, State. This is not to say that torture prevention cannot work in all States with *de facto* 'Rule of Party', or even 'Rule of Man' governance models.[1160] However, many IHRL mechanisms and scholars consider that the establishment of institutions and legal structures associated with the wider concepts of rule of law and the separation of powers are essential elements for torture prevention to work effectively.[1161]

In China's case the situation is nuanced. The governance model in China is premised on a tri-partite system ensuring power rests with the People. The three key pillars of China's governance model are the Party, the government (the Executive branch), and the People (the National People's Congress (the Legislative branch)).[1162] Their hierarchy is strict and is manifested regularly in every line-up of top officials at official events in China, and in the ranking of the seven most senior officials in the CCP Politburo Standing Committee. Each, in theory, creates a check and balance on the other. At first glance, power looks to be squarely in the hands of the People. It is the NCP who selects the President and members are voted upon in a complex, hierarchical and strict voting structure that progresses from village level up to national level. All sources of power, namely, the Head of Party and State, the Head of the Government, State Council, as well as the Army and the judiciary ultimately report into the NCP.

Yet, the Party influence cuts across all branches of governance. In reality, to progress up the career ladder within the government, the judiciary and in Congress one has to be a Party member and the Party can permeate and influence every aspect of governance. It has designated representatives in every branch of decision-making (as well as senior members being Party members themselves). Hierarchy is part of the fabric of the governance structure both at the top

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1160 See Thesis Chapter 1, Section 1.3.3.

1161 Thesis Chapter 1, Section 1.3.3.

1162 China Law Info affiliated with Peking University Law School, 'A Brief Introduction to the Chinese Legal System' (undated); McGregor, *The Party* (2010); See also Thesis Chapter 2.

levels (National and Ministerial/Departmental) and at the next levels down, the provincial, township and village levels. While at every level People's representatives, the government and others have a say, ultimately their purported equal Party representative, in practice, has more weight.[1163] The Party holds the trump card. Ultimately, the General Secretary of the CCP (Xi Jinping) wields overall power over the State, government and Party, despite theoretical reporting lines. Indeed, this power has been shifting since Xi's inauguration in 2012 and it has been growing. Reforms of the Standing Committee, creation of new Commissions, among other measures, have resulted in even greater concentration of top-level CCP political power.[1164]

The legal landscape mirrors the political and governance model and suffers from the same structural and institutional challenge, namely, that the Party can influence or override judicial work. The PRC Constitution states that "the People's courts shall […] exercise judicial power independently and not be subject to interference." Yet, it also specifies that China is ruled "under the leadership of the Communist Party."[1165] Significant reforms have been undertaken to address local government influences on the judiciary. However, the courts are still accountable to the NCP, government and Party leadership. The Central Politics and Law Commission (CPLC) of the Party is used by the Party to exercise leadership and influence within the legal system. The CPLC is led by a member of the Politburo and includes the heads of the Ministry of Justice, Police, Judiciary, and Procuratorate. The CPLC has general responsibility for the judiciary and law-enforcement agencies as well as the co-ordination and oversight of a plethora of local politics and law committees.[1166] While the judiciary is notionally independent from the Party and government, in practice there are staffing overlaps between police, procurators and judges in progressive roles and secondments, while relationships (*guanxi*) continue to influence judicial decision-making.[1167]

1163 He Wei Fang, *In the Name of Justice: Striving for the Rule of Law in China* (2012); author's interview with Mr. Y (*name anonymised by request*), Chinese national and teacher, Strasbourg, April 2016; see also Thesis Introduction and Chapter 2.

1164 Thesis Chapter 2.

1165 Xinhua (official CCP news channel), 'CPC to convene key meeting on rule of law 20-23 October 2014', 30 September 2014: http://www.chinadaily.com.cn/china/2014-09/30/content_18689039.htm.

1166 GBCC, 'Briefing on the Judiciary in China', September 2016; He Wei Fang, *In the Name of Justice: Striving for the Rule of Law in China* (2012); M. McConville; S. Choong; P. Choy, E. Chui, W. Hong, I. Dobinson, C. Jones, *Criminal Justice in China: An Empirical Inquiry* (Cheltenham, UK, and Northampton, MA: Edward Elgar, 2011); J. Garrick and Y. C. Bennett, *China's Socialist Rule of Law Reforms Under Xi Jinping* (Routledge Contemporary China Series) 1st Edition, February 2016; see also Thesis Introduction and Chapter 2.

1167 See P.B. Potter, 'Influences on the legal system' in *The Chinese legal system: globalisation and local legal culture* (Routledge 2001), p.13-15; P.B. Potter, 'Social contract: the criminal law system' (2001); P.B. Potter, *China's Legal System* (Polity Press, 2013) 1; See also Thesis Chapter 2 for more details.

In reality, the judges often face pressure from local officials to rule according to their interests.[1168] While top-level CCP and central government are currently legislating to strengthen the power and role of the courts to challenge local government and other interests, there is reportedly limited success. In practice, judges' decision-making authority is regularly influenced and thus compromised by political adjudication committees.[1169] This reflects the underlining and foundational premise conferred by the PRC Constitution, that the leadership of the CCP is paramount. The fabric of the One-Party system means that in the context of the legal sphere, the Party ultimately holds the trump card, and the centralised power of the Party is growing.

Where the Party sits alongside or above the law, the rule of law criteria cannot be adequately fulfilled, as the Party can circumvent or influence all decision-making, as it sees fit. This does not provide the right framework in which torture prevention can operate meaningfully; to be ultimately effective, torture prevention needs rule of law structures, separation of powers and an independent judiciary, along with laws that apply to all bodies.

The environment in China is currently one where human rights (civil and political) and torture prevention are not the first priority, unlike rights applicable to social and economic development.[1170] When legal reform to increase detainees' protections and the government priorities of economic development and harmonious social order exist side-by-side both can progress (as seen in the reform of the criminal law sphere for ordinary, 'run-of-the-mill' crimes). However, when they conflict, then the promotion of civil and political rights, such as the requirement for torture prevention, is likely to be overridden by economic and security priorities.[1171] This is best illustrated in the measures undertaken to enforce the national policy against corruption (including the increasing use of the virtually non-regulated parallel Party justice process of *shuanggui*).[1172] It can also be seen in the diluted protections for a minority of

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1168 Ibid; and Chen and Shi-Kupfer, 'the Function of judicial reforms in Xi Jinping's agenda: rectifying local governance through reforms of the judicial systems' (2016); see also Thesis Introduction and Chapter 4 for more details.

1169 See also Thesis Chapters 3 and 4.

1170 Thesis Chapter 2.

1171 J. deLisle, 'Law and the Economy in China', in G.C. Chow and D.H. Perkins (eds.), *Routledge Handbook of the Chinese Economy* (London Routledge 2014); Garrick and Bennett, *China's Socialist Rule of Law Reforms Under Xi Jinping* (2016), Introduction, p. 5; see also Thesis Introduction.

1172 Thesis Chapters 3 and 4.

'sensitive' non-'run-of-the-mill' crimes, such as 'endangering state security', commercial or public office corruption and disruption to public order.

(ii) How should prevention progress given the challenges in the context of China?

Prevention in China's context

There are clear challenges inherent within a One-Party State to the successful operation of torture prevention measures – and China is illustrative of this. While it is beyond scope of this research to establish the most effective approach to torture prevention for all One-Party States, the findings of this research do point to an approach for China specifically. Many of the obstacles to the effective functioning of the selected prevention measures identified in Chapter 4 boil down to the inherent lack of independent functioning of all aspects of governance – including in the legal sphere. This lack of autonomy from potential central-level / top-down interference and the lack of independent oversight can impede every prevention measure in one way or another. For example, in the cases of monitoring and complaints mechanisms, both fundamentally lack the criteria of independent personnel and budget. Both, although external to the PSB, can still not be considered as fully independent mechanisms, as required under IHRL norms (Chapter 1). The lack of independence jeopardises their quality and the trust and faith that detainees need to have in these systems for these systems to operate successfully (i.e. to be able to access and channel torture allegations to the competent authorities for investigation). Another aspect of the lack of independence in all strata of governance can be seen in the regulatory exceptions in the criminal laws for sensitive cases, especially those involving corruption (as well as within the CCP discipline system), which can override the protections afforded under the criminal law to ordinary suspects. Equally, permissible executive interference, structural co-ordination and influence over the judiciary can negate the quality of judicial findings and contribute to impunity; it shakes the very foundational premise of the rule of law. In short, where loopholes, exceptions and the possibility for state interference exist in prevention measures or mechanisms, torture prevention

measures can be overridden and their impact negated. The thesis findings indicate that this is a pervasive risk across all of the prevention measures examined.

Nevertheless, despite these political, institutional and structural challenges impeding progress in torture prevention in China, some of the recommendations outlined in Section B can still be applied and developed – and may still yield some initial progress. For these to work, however, such initial measures need to be very specific and tailored to China's context.

Limitations of a standard prevention approach for China

Choosing the most effective approach for China, given the limitations that it faces, involves a critical examination both of how torture prevention works theoretically (outlined in Chapter 1) and practically from the perspective of the torture prevention 'practitioner'. Some of the most active prevention practitioners are those involved in monitoring the treatment of detainees and the safeguards designed to prevent ill-treatment and assessing their compliance with IHRL norms. Many of the assessments of a given state's compliance with their prevention obligations look at prevention from the viewpoint of detainee treatment, safeguards and conditions, one that lies at the heart of preventive monitoring (c.f. Chapters 1 and 4.5). While generally considered an effective measure, there are however inherent limitations with a purely 'monitoring' perspective to prevention, not least given that prevention requires a plurality of measures in a given context (c.f. Chapter 1.3.4). Moreover, these practitioners and monitoring bodies are often limited by their treaty mandates to only look at certain aspects; for example, the CPT can only look at ECHR article 3 prohibitions and conduct, and only within a deprivation of liberty setting.[1173] Also, the heart of the CPT's mandate focuses primarily on treatment, safeguards and conditions of detention. There is therefore a relatively formulaic approach to ensuring that ECHR article 3 is complied with across the CoE region. This approach has been explicitly undertaken as a necessity to ensure a common yardstick by which to analyse all CoE member states. While not a formal "checklist", there is a prevention formula or algorithm applied to each country: first the assessment of detainee treatment; second, the existence and functioning of safeguards; and then

[1173] European Convention for the Prevention of Torture (ECPT), adopted 26/11/1987, in force, 01/02/1989, Explanatory Report,

other issues, such as an examination of the health-care situation in detention, use of restraints, issues involving resources and staff, etc.[1174] This is applied universally (i.e. to all ECPT ratified states).[1175] The SPT and NPMs have slightly different mandates (OPCAT), but similar algorithms are applied to approaching and assessing prevention.[1176]

All of these bodies are understandably limited by what they can do within their treaty mandate. When it comes to addressing wider issues of prevention – such as links between arbitrariness or legitimacy of detention,[1177] the status of civil society or the power and independence of the judiciary in a given country, these can risk being considered peripheral considerations, and are often treated as non-core issues.[1178] This is not because they are considered unimportant, but are often considered not to go to the heart of the mandate's priorities. Moreover, in many of the ECPT (and OPCAT) ratified states, these are not problematic issues and thus do not warrant detailed focus. Consequently, there are inherent limitations in a monitoring-led perspective on prevention. One of these is the non-addressing of wider issues that are not generally considered core to the prevention of torture mandate.

The UN CAT offers a broader (if not overly broad) obligation when it comes to prevention measures under article 2(1) (c.f. Chapter 1). However, when one examines the CAT Committee's assessment of China,[1179] the reference to wider preventive factors such as a strong functioning judiciary and the need for an unrestricted civil society to help in the oversight role are not the focus points and are either only addressed briefly or treated with similar weight to the other

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1174 See, for example, CPT UK reports for a typical layout of periodic CPT visit reports dating from 1990 to currently, which approximately following this structure and reflect the priorities of the mandate conferred by the ECPT, https://www.coe.int/en/web/cpt/united-kingdom.

1175 Ibid; see also CPT Standards https://www.coe.int/en/web/cpt/standards. A comparison of CPT reports (see for example the UK reports) show from 1990 to 2017 this prevention formula has changed very little in approach. The author is also a CPT staff member and applies this formula in her own work in both periodic (not ad hoc) visit preparation and report drafting.

1176 See, for example, one of the UK NPM bodies (HMIP)'s criteria for inspection in its 'Expectations' (https://www.justiceinspectorates.gov.uk/hmiprisons/our-expectations/); and the SPT's weight and focus afforded to the situation of persons deprived of their liberty: fundamental safeguards and specific concerns (albeit with initial introductory paragraphs on a country's legal framework an institutional framework) in, for example, it Visit Report to Ukraine undertaken from 19 to 25 May and from 5 to 9 September 2016, published May 2017.

1177 H. Singh Bhui, 'Can Inspection Produce Meaningful Change in Immigration Detention? *Global Detention Project Working Paper No. 12*, May 2016 (on the impact of HMIP preventive monitoring in immigration detention settings); see also how the treatment of ECHR article 5 issues within a CPT report is carefully managed to ensure the CPT remains within mandate (for example, UK Sovereign Base Areas on Cyprus Report, 2016).

1178 See, for example, the Report to the Russian Government on the visit to the Russian Federation carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 May to 4 June 2012, where such aspects are not considered as core of the preventive mandate.

1179 See CAT Committee Concluding Observations on China, 5th and 4th periodic reports, 2008 and 2015.

issues.[1180] A prioritised order of implementation of the recommendations is not put forward by the Committee (unsurprisingly, given the 'plurality of measures' approach to prevention followed (c.f. Introduction and Chapter 1)). Further, there exists very limited scholarly work that ranks effectiveness of prevention measures.[1181] The scholarly work that has been undertaken (e.g. Carver and Handley) places emphasis on correct detention practice and the establishment of safeguards as top priorities for preventing torture,[1182] and other measures such as complaints mechanisms come last in their ranking (Chapter 1.3).

In a One-Party state such as China, where broader structural and institutional issues (Chapter 4) can impede the establishment and proper operation of successful prevention measures, there is a clear need for the prevention approach to go beyond the application of a more typical monitoring of safeguards formula. There is a need for an initial prioritised and specific approach to prevention. Addressing the wider issues first should be considered the basic foundational starting point, before the technical measures of prevention (e.g. safeguards) can be monitored successfully. In the case of China, a prevention approach that is likely to operate successfully should incorporate two key elements: first, an approach to prevention in China should start with some initial measures that are tailored to China bearing in mind the challenges that it faces. Merely applying a standard formula of legal and technical prevention measures cannot be the starting premise. Second, an effective approach to prevention needs a proper foundation for initial prevention measures to have a chance to embed successfully.

Overview: a tailored approach to prevention for China in light of its context: some examples

All the recommendations in Section B are China specific, formulated to help China progress in its prevention efforts. Nevertheless, the order in which these recommendations should be applied can contribute to their overall effectiveness. Realistically, deep-seated institutional and political change is unlikely to come to China soon.[1183] While all recommendations listed in Section B are needed, some of the recommendations inherently need fundamental institutional change (e.g.

1180 CAT Committee Concluding Observations, 5th periodic report on China, December 2015.
1181 See Thesis Introduction and Chapter 1.2.
1182 See Thesis Chapters 2 and 3.
1183 19th National Congress of the Communist Party of China, 18 October 2017 (this is alluded to only briefly, as it falls after the time scope of the thesis (c.f. Introduction)).

recommendations (iii)(iv)(v)(viii)). Others can be applied progressively, despite China's political context; although not entirely without consequence on their overall impact (e.g. recommendations (i)(ii)(vi)(vii)(ix))(see below).

A China specific approach to prevention should start with addressing some of the key foundational problems to allow torture prevention measures to embed and operate more successfully than currently. These can be grouped together into two key foundational issues that are needed, and can be addressed, for China to take some first steps to better protecting its detainees and achieving a more effective prevention approach than currently. First, is the need to address how torture is understood in China and how its progress is viewed, which is currently different from IHRL standards and international critique. Linked to this is the need to address regulatory and implementation gaps, notwithstanding the wider political and wider structural challenges that it faces (recommendations (i)(ii)). Second, is the need to reform the reporting avenues to identify or 'catch' all the torture and ill-treatment allegations early on and systematically pass these on to competent investigating and prosecuting authorities. This is to enable allegations to proceed to the courts and where relevant, sentences to be conferred impartially and commensurate with the gravity of the crime of torture. In China, ensuring thorough investigation, prosecution and sentencing is key to curbing impunity – a core impediment to effective prevention. A good place to start would be to focus first on improving the reporting avenues, including initial access to a lawyer, procuratorial onsite reporting measures, complaints mechanisms' functioning and the external oversight bodies' functioning (Recommendations (vi)(vii)(ix)). These, however, are likely to need some political, structural and institutional change. These are a pre-requisite nonetheless to overall sustainable effectiveness of torture prevention (see below).

(a) address regulatory and implementation gaps, including definitional discrepancies

First, how torture is understood in China and progress on its prevention is currently different from IHRL standards (c.f. Introduction, Chapter 2.4(I)(i), Chapter 4.4.1 to 4.4.4). Basic definitional discrepancies of what acts comprise torture and ill-treatment – and inflicted by whom – should be

addressed to ‘plug’ a key regulatory and implementation gap and consequent abuse that has developed in China. This has impacted the authorities’ and national scholars’ perspective of their own progress on reducing - to the point of virtual eradication - of torture in certain detention spheres such as the police-run KSS and initial police custody, while allegations of torture in the above detention places still circulate to the point of being considered ‘pervasive’ by IHRL bodies and the West (c.f. Chapter 3 and Chapter 4.4). Progress on prevention will be hard to measure when the starting point is viewed differently. Equally, as a UN CAT signatory, China is under an obligation to ensure that its definition of torture lies within the parameters of the UN CAT and that sufficient training of all relevant bodies is undertaken to ensure they are aware of this definition. Indications from this analysis suggest that this is currently not the case in China. The regulatory gaps in criminal and other relevant legislation (for all types of deprivation of liberty) should be addressed to ensure that national law clearly prohibits all elements of the UN CAT articles 1 and 16 definition of torture and ill-treatment as a starting premise. Moreover, at the implementation level, regular training and awareness-raising concerning the amended legal definitions of torture and ill-treatment is needed for all those persons involved in investigation and custody of detainees (including any person deprived of their liberty, not only criminal law suspects but also those held in other types of detention, such as CCP detention and CDR). The range of relevant bodies and persons involved in awareness-raising activities should be a broad as possible and not only apply to those involved in actual investigation and custody of detainees, but to all those connected with detainees and involved in meeting, representing, investigating, prosecuting, treating or ‘rehabilitating’ detainees (a premise of China’s criminal and administrative detention system (c.f. Chapter 2.3)), including defence lawyers, members of the judiciary, doctors, monitors and those involved in the complaints mechanisms. Involving independent members of civil society in this awareness-raising would also be beneficial, but given the increasingly strict restrictions on civil society, this is unlikely in the current climate (c.f. Chapter 4.6).

As outlined in the analysis (Chapters 2 and 3) and in Section B recommendation (i), definitional discrepancies are not the only regulatory gaps, many others exist (concerning, for example, the lack of prompt access to a lawyer and third party notification rights for all detainees, and audio-visual recording of all interrogations, in all cases – without exception). This all can and should be addressed through amendments to the relevant national legislation, accompanied by awareness-raising and external oversight of implementation. Equally, there are many others aspects where protections are entirely missing that are in need of wholesale reform or in need of protections to be established in the first instance, and are not just 'gaps' in current legislative protections (Recommendation (ii)). These include the need to reconsider the whole PAD system and ideally incorporate it into, or at least align this justice process with, the (more robust) criminal law to address the protection vacuums identified (c.f. Chapters 2 and 3). At minimum, there is a fundamental need to establish basic safeguards regulating the treatment and procedure for persons undergoing PAD and CDR detention, including establishing core rights that are currently virtually entirely missing (such as the right of access to a lawyer, doctor and third party notification) as from the outset of a detainee's deprivation of liberty.

These all can be undertaken within China's current political context. They should be addressed through amendments to the relevant national legislation accompanied by awareness-raising and external oversight of its implementation.

(b) Improving the oversight and reporting avenues

Another Section B recommendation that could be good place to start to improve China's torture prevention approach, is the reform of the oversight and reporting avenues. This includes the strengthening of internal and external oversight bodies to identify and address torture allegations systemically, including initial access to a lawyer and procuratorial onsite reporting measures (recommendation (vi)). It also involves improving the nascent complaints mechanisms' functioning and external bodies' oversight role (recommendation (vii)).

A crucial first step to improving prevention would be the strengthening of procuratorial reporting of torture and ill-treatment allegations from places of custody and detention, since onsite

reporting mechanisms mainly lie within the mandate of the procuratorate (Chapter 4.4). This includes increasing awareness-raising of the definition of torture and ill-treatment among procurators (see above), the proper implementation of the onsite role and the strengthening of their ability and willingness to be able to identify, from an early stage, any allegations (c.f. Chapter 4.4 and recommendation (vi)). While only 'semi-external' (i.e. separate departments within the procuratorate dealing with investigation and prosecution), the onsite procuratorate currently has a key position to identify cases of torture and ill-treatment early on. The systematic reporting and passing on to the relevant bodies for investigation and prosecution is key foundational element to ensuring that torture allegations get identified and addressed. While the current set-up with the procuratorate is far from ideal (especially its non-independence and issues of conflict within its multi-role functions (Chapter 4)), improving this first stage of reporting could be a first step in strengthening this prevention measure within the current environment in China.

Second, is the need for properly functioning complaints mechanisms and some form of functioning external oversight of all places of deprivation of liberty in China (c.f. Recommendation (vii) and Chapters 4.4.1 and 4.5), especially starting with a focus on certain categories of detainees (see below). Both current mechanisms are in need of significant development, support and training. The composition of the mechanisms and their reporting procedures could be significantly re-configured to ensure that they are selected by, and report directly into, the National People's Congresses rather than the current combination of the detention institution, the local procuratorate and the PSB. Linked with this is the need for these mechanisms to have access to the full range of places that deprive of liberty, rather than the current thematic limitation of KSSs and a few prisons. This will require access rights and reporting structures to be developed along relevant Ministry/Department lines to start with.

External oversight bodies also need to be tailored to address some of China's specific problems first. They should be set up to check *first* specifically on those categories of detainees where the "protection tap" has been turned down or off (i.e. those with lesser protections such as corrupt

officials, public order and security 'sensitive' cases, where there is a suspicion that persons are being put through the PAD system deliberately to circumvent the criminal law protections and those in 'shuanggui' detention). These are the persons who currently face some of the greatest risks of torture and ill-treatment in China, and should be prioritised by any external oversight body. Equally, complaints mechanisms in China need to be developed further to ensure that they have as varied and as external composition of membership as possible, regular and ready access to detainees - and their trust, and systematically pass on allegations for criminal investigation where relevant (Chapter 4.4.1 & recommendation (iv)).

These could be achieved in China, despite the current context, only with some legislative and minimum institutional change. They would not be fully OPCAT and IHRL-norm compliant (Chapters 4.4 and 4.5);[1184] however, they are a start and with some reform they could make some progress in identifying and reporting more torture and ill-treatment allegations from an early stage.

Ready access to lawyers for all detainees is also a prerequisite and foundational issue that should first be established for other aspects of prevention to operate successfully (recommendation (iii)). Access to a lawyer who is not fearful of reprisals for both the detainee and him/herself (c.f. Chapter 4.3.2) is a key element in prevention. The access *per se* to a lawyer can act as a deterrent for potential abuse and as a channel to witness any injuries early on and to initiate an investigation into an allegation. Currently, many lawyers fear taking on cases involving potential torture allegations (c.f. Chapters 3 and 4.3). Some strengthened legislative protections for lawyers have been established, but many of these have been open to abuse by the PSB, Procuratorate and even the judiciary/judges (Chapter 4.3.2). More legislative protections should be established to protect lawyers and ensure that they can take on cases without such fears and have ready, unimpeded access to all places of detention; relevant oversight should established to ensure that these protections are implemented in practice (recommendation (iii)). Training and awareness-raising for lawyers about these protections – and also of reminders of the definitional parameters

[1184] For example, with the Principles relating to the Status of National Institutions (the 'Paris Principles') Adopted by General Assembly resolution 48/134 of 20 December 1993.

of torture and ill-treatment (see above) – would be crucial first steps to empowering lawyers to follow-through all allegations received.

Both (a) and (b) above are needed as crucial first steps towards better protection of detainees and could be mostly achieved in China's current political and institutional environment. These do not fall naturally within the prioritised order of a more typical approach to prevention (i.e. primarily focussing on compliance with technical measures such as safeguards and detention practice) (see above)); but they are a necessary starting premise in the case of China. They are, however, only (insufficient) first steps. China ultimately needs bodies to perform oversight of prevention measures that are fully independent from the government to have a chance at being sustainably effective.

Prospect of the long-term sustainability of prevention efforts in China: what is required

This research suggests that for torture prevention to be truly and sustainably effective all prevention measures will need ultimate oversight from bodies that are independent and autonomous, able to function away from political co-ordination or interference. Moreover, to create a solid foundation for prevention measures to embed successfully, China needs a properly functioning and robust judiciary capable of ruling on and enforcing all torture and ill-treatment cases without bias or interference (Recommendation (iii)). The judiciary needs to be one that can weigh cases without co-ordination or interference from the central-level CCP; one that is properly resourced, remunerated and empowered; one with an independent selection procedure for judges; one with judges who can push back on local or central interference, if required, and do not suffer consequences for this; one where lawyers and prosecuting procurators can fulfil their respective professional commitments without fear of professional or personal reprisals, intimidation or consequences; one where lawyers are not hindered from fully representing clients and potential victims in court, either by procedural rules or in practice; one where judicial requests for further evidence or material, and their sentences, are abided by and enforced; and one that can confer sentences that are commensurate with the crime of torture, no matter what type of case or official involved (c.f. Chapter 4.3 & recommendation (iii)). Only then can the

loopholes and exceptions to justice currently seen in China start to be closed; and deterrence to abuse begin, through the observation of proper due process and the existence of severe consequences for torture. The need for a truly free and independent judiciary is a preventive measure that goes to the heart of the prevention obligation under UN CAT 2(1).[1185] It both remains an obligation for China as a UNCAT ratified state and is intrinsically linked to the foundational precept of the rule of law.[1186] It is also a preventive measure that falls short in China currently. It is a measure that should be addressed first, as a matter of priority for China, to enable any tailored approach to prevention to work and to enable all nascent prevention measures to have a chance to operate successfully in the long-term.

Nevertheless, China would need to reform the very fabric of the One-Party system in China to ensure that the fundamental tenets of the rule of law are fully reflected in its structures, and especially in its judiciary. It is possible. China has a long history of adaptation to ensure that the Party continues to be relevant for the Chinese people. This is best illustrated in its own brand of 'socialism with Chinese characteristics'. Not only has it succeeded in ensuring that the Party remains relevant, but has also consolidated the Party's power. It is also possible to reform and to ensure that all bodies, including the Party, are ultimately accountable to the law – and that the legal system itself functions independently and properly. This is a prerequisite for truly sustainable and effective prevention; it is not purely a facet of a 'Western democracy' (as perceived by China (Chapter 2.2)), albeit linked in many respects (Chapters 1.3.3 and 4). China could, and arguably should, undertake wholesale reform of all relevant institutions to ensure that all bodies - including the Party - are ultimately accountable to the law. Indeed, this would sit within China's own expressed prioritised governance objective of 'rule according to the law' (Chapter 2.2).

In many of the recommendations outlined above, the first step of the measure can be achieved, often through legislative change, and can constitute some good initial steps towards establishing and improving China's approach to prevention, accompanied by awareness raising and some

[1185] See Thesis Chapter 1.
[1186] See Thesis Chapters 2.2 and 4.

form of external oversight. In China's case, the establishment of even a few prevention measures would be a significant step forward and the start of better protection for many of China's detainees. Nevertheless, completely independent oversight bodies (fully transparent, accountable, autonomous and independent bodies – free from government co-ordination or interference) and a strong, impartial and robust judiciary are foundational elements for effective on-going torture prevention, and are of crucial importance to ensuring the proper and sustainable implementation of prevention measures. Deep-seated institutional reform and change at the political and Party level will be needed to achieve this. In the current political climate, this remains unlikely. Such holistic change is, however, a pre-requisite for China to protect all of its detainees from torture or other ill-treatment effectively and sustainably, pursuant to its international obligations. Without this, China's torture prevention efforts will remain on shaky foundations. On current trajectory, China fails and is likely to continue to fail in fully protecting detainees from torture and ill-treatment.

D. Broader implications

This study on China offers scope for some wider lessons that could be relevant to the efforts in torture prevention of other states. One salient lesson is the need for as broad an approach as possible to torture prevention in countries facing systemic and resilient practices of torture. This is to enable the right environment for torture prevention measures to be able to operate and embed successfully. Linked with this is a requirement for a governance model that enables, rather than hinders, the different elements of rule of law to function properly and independently, creating the essential checks and balances on each other, without loopholes or exceptions. This is an essential pre-condition for torture prevention to be effective and sustainable. This also implies that parallel justice systems (such as the punitive administrative and Party justice processes in China) should be addressed so that they do not sit alongside or, in the case of the CCP, above the law, providing an alternative less regulated, less protected sphere.

This analysis on China also shows a clear need for a wider and more tailored approach for countries with embedded systemic torture practices and for those that repeatedly ignore or reject recommendations for change, in addition to the standard application of more traditional technical measures of torture prevention (i.e., ensuring the prohibition of torture and that technical legal safeguards are robust and operational in law and practice). Deep-seated structural and institutional reform can have a tangible and positive effect in countries that suffer from resilient torture practices and impunity issues. One example, examined in Chapter 1, is the former Soviet republic of Georgia, which has a similar legacy of a Soviet-inspired justice system to that of China (including the punitive administrative justice process (PAD)). Georgia underwent far-reaching institutional reform after it acknowledged that it had embedded practices of police torture, corruption and impunity problems. Thereafter, IHRL mechanisms and scholars started to see the positive effects of these reforms in the reduction of incidences of torture and a decrease in the overall risk of torture in police custody. In short, this case indicates that broader structural

reforms to strengthen the overall criminal justice system, improve investigation methodologies, curb cultures of impunity from developing, promote detention practice and target institutional sub-cultures can help to create the right environment for the torture prohibition and legal preventive safeguards to be able to operate meaningfully.

The cumulative effect of all the elements examined in the case of China can contribute to more effective and sustainable torture prevention efforts in other countries where torture or other ill-treatment of detainees may have become systemic and pervasive.

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