

Governing Relationships: The New Architecture in Global Human Rights Governance

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Prepared for 4th Global International Studies Conference, Goethe-Universität, Frankfurt am Main, 9 August 2014

Preliminary draft – please do not circulate or cite. Comments very welcome.

1. Introduction

The international human rights regime has undergone extraordinary expansion in the last thirty years, evident in an increasingly sophisticated framework of treaties, networks, institutions, and ambitious standards. Now, widely regarded as a core component of interstate and transnational global affairs, few international relations (IR) scholars anticipated the contemporary reach of human rights.¹ The transformative potential of an increasingly intrusive human rights architecture should not be underestimated. However, concerns persist regarding the disjuncture between human rights system rules and practices on the ground. This ‘compliance gap’ is exacerbated by the relative absence of implementation arrangements authorised to enforce a global human rights governance agenda.

The terms of this debate in IR reflect the limitations of a discipline which has only recently extended its gaze beyond interstate relations. IR scholars have struggled to accommodate multiple scales of actors, authority structures, and societal conditions into their explanatory frameworks. As such, human rights scholarship has only recently begun to deepen understanding of key empirical questions on governance in this issue-area.² A more problem-oriented scholarship on international organisations (IGOs) and global governance offers a promising point of departure for evaluating the effects of increasingly dense IGO ecologies in

¹ John Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986).

² Par Engstrom, ‘The Effectiveness of International and Regional Human Rights Regimes’, in Robert A. Denmark (ed.), *The International Studies Encyclopaedia* (Oxford: Blackwell Publishing, 2010).

the area of human rights.³ Importantly, it also applies its explanatory powers to the question of agentic strategic social construction.⁴

Global governance scholarship has begun to explore these trends broadly, using the concept of ‘governance architecture’, defined as ‘the overarching system of public and private institutions that are valid or active in a given issue area in world politics’.⁵ In analyzing the presence or (more often) the absence of integrated global architecture – incorporating regimes, institutions and their component agents, structures norms and procedures – scholars have generated significant insights on the impact of institutional complexes, overlaps and interlinkages, on governance outcomes across diverse issue-areas.⁶

As this study highlights, the global human rights architecture is notable for its profusion of non-state actors and levels of formal articulation. Existing rationalist literature on the mechanics of architecture has generated important insights into the instrumental effects of different structural configurations on state behaviour and governance outcomes. However, a focus on agentic interactions and negotiated authority among state and non-state actors is an important corollary to the analysis of global governance architecture. As articulation of structures (both normative and procedural) takes hold across scales of governance, what does this mean for authorisation and control exercised by traditional governors and the governed? How are individual political units integrated within emergent global architectures? How do interactions among political units across governance chains inform the stability, legitimacy, and performance of governance programmes?

This article adopts governance architecture as a heuristic lens capable of accommodating both a rationalist account of the effects of structure on (principally instrumental) behaviour of governance actors, as well as a relationship-based analysis of ‘global governors’ and the interactional effects of political units within authorising structures. Both accounts provide the coordinates for deepening theorisation on global governance. However, both display

³ Thomas G. Weiss and Rorden Wilkinson, ‘Rethinking Global Governance? Complexity, Authority, Power, Change’, *International Studies Quarterly* 58, no. 1 (2014): 207-215.

⁴ Deborah D. Avant et al. (eds.), *Who Governs the Globe?* (Cambridge: Cambridge University Press, 2010).

⁵ Frank Biermann et al., ‘The Fragmentation of Global Governance Architectures: A Framework for Analysis’, *Global Environmental Politics* 9, no. 4 (2009): 15.

⁶ David G. Victor and Kal Raustiala, ‘The regime complex for plant genetic resources’, *International Organization* 32, no. 2 (2004), 147-54. I follow Stephen Krasner definition of regimes. See Stephen D. Krasner, *International Regimes* (Ithaca: Cornell University Press, 1983), 2.

limitations. The instrumental account cannot fully explain governance outcomes, as it tends to privilege structural properties and instrumental rationales focused on resource competition, while screening out agency and political conflict. The relational account, with its emphasis on synergies and tensions, while instructive, does not necessarily translate into a specified analytical framework.

This article seeks to specify conceptually and theoretically a governance architecture from the global to the local level within an issue-specific governance domain. There remains a residual methodological nationalism in much of the IR literature, tending towards arbitrary segmentation of political arenas.⁷ A particularly promising advance towards a unified theory of global governance can be found in the work of Abbott and colleagues on orchestration.⁸ This theory builds upon a large body of work in the field of new governance in public administration and transnationalism to develop a general theory of governance, with application across political units as well as scales of governance. Distinct from principal-agent models of governance, orchestration applies when a focal actor (the orchestrator) enlists and supports third-party actors (the intermediary) to address the target in pursuit of shared governance objectives. It occurs when three conditions are met: (1) the orchestrator seeks to influence the behaviour of the target indirectly via intermediaries, and (2) the orchestrator does not exercise control over the intermediary, which, in turn, (3) cannot compel compliance of the target.⁹

I use the example of the United Nations torture prevention architecture, as established by the Optional Protocol to the Convention Against Torture (OPCAT), to explore the potential utility of orchestration theory in generating insight into a new generation of global human rights architecture.¹⁰ Significant articulation across levels of governance makes orchestration a potentially impactful mode of governance within the OPCAT architecture. As Abbott et al. remark, orchestration ‘may define the entire chain of governance relationships’.¹¹ This article

⁷ For an instructive exception see Michael Zürn, ‘Global governance as multi-level governance’, in Henrik Enderlein et al. (eds.) *Handbook on Multi-level Governance* (Northampton: Edward Elgar 2010), 80-102.

⁸ Kenneth Abbott and Duncan Snidal, ‘Strengthening international regulation through transnational new governance: overcoming the orchestration deficit’, *Vanderbilt Journal of International Law* 42, no. 2 (2009): 501-578; Kenneth Abbott et al. (eds.) *Orchestration: Global Governance through Intermediaries* (Cambridge: Cambridge University Press, forthcoming 2015).

⁹ Abbott et al., *Orchestration*, Ch. 1.

¹⁰ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. A/RES/57/199, 18 December 2002. Entered into force on 22 June 2006.

¹¹ Abbott et al., *Orchestration*, Ch. 14.

proposes that orchestration is more likely to occur if the governance rule system is formally *articulated* in a global architecture and there is goal convergence among political units. I use the former concept to refer to the stabilising properties of structural and normative overlaps, and the latter to show how preference ordering may reinforce or undermine implementation across scales of governance.

This article begins by evaluating the idea of global human rights governance and architecture, before turning to the utility of orchestration theory. Using the torture prevention regime as an example, it outlines how articulation of global architecture has begun to reconfigure relationships among key governance actors. It explores how authority across two core political units (orchestrator and intermediary) is formulated, with a focus on *articulation* of their governing relationship as well as *goal convergence*. The potential implications for torture prevention are outlined. The article concludes by highlighting what the analysis means for human rights and global governance research more generally.

2. Bridging gaps: global human rights governance

Global human rights governance bears the hallmarks of Rosenau's dictum on 'governance without government',¹² displaying multiplying forms and structures of authority, regime complexity, actor proliferation and, importantly, the capacity for transformation. States remain prominent within human rights governance. However, the exercise and effects of state power in this domain are undergoing significant change, informed by emergent forms of private and hybrid authority. This trend has been documented in a large body of interdisciplinary work offering micro and macro accounts of the origins of international human rights regimes and the gradual ceding of delegated authority by state parties to independent structures and agents.¹³

However, often disparate actors, arenas and mechanisms of influence have been considered in isolation or as dichotomous. This is symptomatic of a more general trend in IR which has tended to isolate component parts of the global governance whole. The importance of organisational environment has often been bracketed outside the analytical frame or

¹² James Rosenau, 'Governance in the Twenty-first Century', *Global Governance* 1, no. 1 (1995): 13.

¹³ See, for example, Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Post War Europe', *International Organization* 54, no. 2 (2000): 217-252; Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders* (Ithaca: Cornell University Press, 1998).

disregarded altogether. It is only recently that scholars have begun to apply a broader view to global governance phenomena. In part this is in response to denser organisational ecologies and functional complexity at the international level, combined with growing uncertainty around causal relationships. Scholars have employed a range of exploratory conceptual frameworks to open up exploration of system-level trends across global governance arenas.¹⁴

Our understanding of how the human rights organisational environment ‘hangs together’ and enables *or* disables purposive actors to advance governance objectives remains under-specified. A lively prescriptive debate has focused on the overall influence of the international human rights regime, with studies arriving at conflicting conclusions regarding its overall influence.¹⁵ It is likely that conflicting patterns stem more from a paucity of data and limited understanding of the many steps which separate international instruments from practices on the ground than from any methodological proclivities. Making legible the governance ontological whole beyond the state then is therefore particularly important.

As many authors have remarked, human rights unlike international trade and security do not seek to privilege the interests of the authorising principal, but rather the individuals at risk of abuse by those same contracting principals.¹⁶ As such, traditional interstate mechanisms that explain compliance in other fields, such as reciprocity and retaliation, have limited application. Realist scholars have dismissed human rights as merely an artifice of powerful state interests. However, an empirically-driven research agenda on international diffusion and domestic mobilisation effects has decisively problematised such claims.¹⁷ The general absence of interstate enforcement has opened up fruitful methodologically plural inquiry into a diverse range of regulatory logics and identifying new authority structures at the sub-state, domestic and transnational level.¹⁸ Inquiry into why some international human rights norms are effective in some contexts but not in others has turned attention to transnational and domestic pro-compliance activities, mobilisation and political conflict.¹⁹ This is an important

¹⁴ John Ruggie, ‘Global Governance and “New Governance Theory”: Lessons from Business and Human Rights’, *Global Governance* 20, no. 1 (2014): 5-17.

¹⁵ Beth Simmons, ‘Treaty Compliance and Violation’, *Annual Review of Political Science* 13 (2010): 273-296.

¹⁶ Moravcsik, ‘The Origins of Human Rights Regimes’.

¹⁷ Emilie Hafner-Burton, ‘A social science of human rights’, *Journal of Peace Research* 51, no. 2 (2014): 273-286.

¹⁸ See Thomas Risse et al. (eds.), *The Persistent Power of Human Rights* (Cambridge: Cambridge University Press, 2013).

¹⁹ Amitav Acharya, ‘How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism’, *International Organization* 58, no.2 (2004): 239-275.

step towards reasserting the close interrelation between material power and the coordination capacity of non-state actors, an issue often neglected by constructivists. Another strand of research highlights the range of delegated authority within IGO structures and the ability of sub-state and IGO entrepreneurs to pursue governance goals at the limits of, or beyond, state agreement.²⁰

In effect, we are witnessing a dispersion of authority at all levels of human rights governance. However, our understanding of how political units are integrated and interact within the global whole, and with what effect, remains partial. To overcome this deficit, it is necessary to reassert the presence of politics and power in global human rights governance. As Avant et al. note, scholars ‘rarely talk about global governors’.²¹ Global human rights governance is a particularly instructive realm in which to engage this normative concern, given its radical intent as a ‘power mediator’: whereby it seeks to empower materially weak actors in asymmetric power relationships irrespective of territorial boundaries.²² This is not the place for extended conceptual discussion of how a global governance conceptualisation may encapsulate such a radical humanist project. Suffice to say, we must be awake to the potential objectification of ‘global governance’ as a mask for ideological agendas.²³ In this sense, it is important that inquiry into global human rights architecture retains a normative focus on the key political question: How is this regulatory governance arrangement connected to power structures, whose interests are being protected, and whose values promoted?

2.1. Conceptualising global human rights architecture

What is ‘global’ in global human rights architecture? Beyond the existence of an institutional apparatus above the nation state, Zürn advances two additional conditions as representative of global governance: (1) the global level must be autonomous with evidence of delegation of power to realms outside state structures (or more specifically, national executives), and (2) the global level must form part of an interactive system as opposed to a segmented level operating independent of the whole.²⁴ There must be, in Zürn’s words, some indication of

²⁰ Abraham L. Newman, ‘International organization control under conditions of dual delegation’, in Deborah D. Avant et al., *Who Governs the Globe?*, 131-152.

²¹ Avant et al., *Who Governs the Globe*, 1.

²² Christian Reus-Smit, ‘Human rights in a global ecumene’, *International Affairs* 87, no. 5 (2011): 1210.

²³ Iver B. Neumann and Ole Sending, *Governing the Global Polity* (Michigan: University of Michigan Press, 2010).

²⁴ Zürn, ‘Global governance as multi-level governance’: 81.

‘functional’ or ‘stratified’ differentiation. An expansive human rights architecture meets both criteria, with significant governance functions (stewardship, advocacy, rule-making, accountability, monitoring, and coordination) delegated to a range of authorities, from IGOs, to civil society and sub-state units. However, it is material to note that states retain significant control over core governance functions, most visibly resource allocation and implementation. In turn, articulated stratification of actors and functions along chains of governance is evident.

The international human rights regime is relatively integrated, with an apex political body, the Human Rights Council (HRC), located in Geneva. This body is supported by the UN Office of the High Commissioner for Human Rights (OHCHR), as well as a phalanx of auxiliary bureaucratic structures and agencies. Much of this international machinery has emerged or been strengthened since the early 1990s in the wake of an operational shift towards implementation at the national level.²⁵ In turn, there has been significant expansion of regional-level human rights regimes, most notably in Europe and Latin America, but also emergent in Africa and the Asia-Pacific.²⁶ However, governance relationships between the global and the local societal level have remained largely segmented, mediated by state authority and a selective group of transnational actors. As Zürn notes, there is a pressing need ‘to legitimate decisions more directly in order to make the two-step authority relationship viable’.²⁷ The new OPCAT architecture described below represents an organisational response to this major deficit.

A focus on architecture to explore global human rights governance is intuitively appealing. The language of design provides a sense of structure to often highly decentralised, loosely coupled realms of politics. From a functionalist perspective, architecture provides a platform upon which to build more effective and efficient governance arrangements. Guided by the concepts of subsidiarity (decisions should be made at as local a level as possible) and irreducibility (certain problems can only be addressed at the global level), rationalists emphasise the importance of limiting negative externalities of decentralised action, efficiency gains through coordination, and functional differentiation.²⁸ To achieve these objectives, they

²⁵ See UN General Assembly Res. 46/124, 17 December 1991.

²⁶ Engstrom, ‘The Effectiveness of International and Regional Human Rights Regimes’.

²⁷ Zürn, ‘Global governance as multi-level governance’, 92.

²⁸ James Fearon, ‘Bargaining, Enforcement, and International Cooperation’, *International Organization* 52, no. 2 (1998): 269-305.

advocate effective management of participating states through the employment of material incentives and sanctions to reduce transaction costs and secure credible commitments. However, too often, rationalists reify interests in their explanatory frameworks and underplay or neglect altogether the role of legitimacy in determining the preferences of political units within authorizing structures.²⁹

Observing legitimacy mechanisms poses a methodological challenge. Nevertheless, given the relative absence of hierarchical control at the international level, coupled with prevalent democratic deficits, legitimate authority may be the crucial additive to achieving cooperation and regulation. An alternative image of architecture questions the attempt to render social relationships as ‘permanent, functional, and indeed perhaps beyond rational reproach’.³⁰ It is important not to exaggerate claims of interlocking global, regional or local structures. In practice, there are few examples of (effective) apex institutions in global human rights. Authority is routinely contested and formal articulation of rule systems in structure remains emergent. In an explicitly normative governance regime such as human rights, this raises important questions of scope and boundary. Who are the legitimate stewards? Where does their scope of action begin and end, and what is the basis of their authority? Any durable human rights architecture must be based not only on procedural obligation, but also on the politics of negotiated authority among both the governors and the governed.

A more forensic use of the architecture concept can illuminate the structures and political units which serve as both venues for decision-making and agents for action within multi-actor governance systems. This contrasts with Biermann et al.’s expansive view of architecture as the ‘*meta-level* of governance’, which incorporates within its purview multiple regimes, institutions and all of their component elements.³¹ The approach adopted here reflects an interest in magnifying how governance rule-systems are purposively articulated within issue-specific domains. Architecture reflects not just legal form but also normative and political understandings and expectations. Rather than simply being the aggregation of formal rules and structure, it is also composed of political units with diverse interests. Close attention must therefore be given to how these political units are integrated. As Mugge notes,

²⁹ Robert Keohane, ‘Governance in a Partially Globalized World’, *American Political Science Review* 95, no. 1 (2001): 1-13.

³⁰ Laurence Whitehead, ‘Of Bubbles and Buildings: Financial Architecture in a Liberal Democratic Era’, in Armijo, *Debating the Global Financial Architecture*, 283.

³¹ Biermann et al., ‘The Fragmentation’: 15-16.

‘assessments of legitimacy have to focus on the actual workings of institutions, not on formal flows of authority, information and accountability’.³²

This insight raises the empirical question: to what extent does an extended articulation of global architecture disperse authority away from the state? In this regard, analysts may focus on formal safeguards of independence, representation, and equity. On a normative level, the question speaks to a fundamental paradox in the human rights enterprise: principal moral hazard. As Rennger cautions, ‘it is an obvious fact that in order to [advance the human rights agenda] we have to give states and other agents more power, not less’.³³ However, in light of this fact, it is also important to acknowledge that states are not unitary actors, but are made up of multiple sub-state units whose preferences may deviate from those of government. This is particularly apparent in global human rights governance where sub-state units are often subject to dual delegation, whereby states have simultaneously delegated to international organisations and to sub-state actors.³⁴ As such, a key task for analysts is to evaluate the preference ordering among sub-state units within global human rights governance chains and goal convergence among functionally differentiated governance actors.

Architecture further conveys the notion of normative standards imprinted onto actual structures and, importantly, practices. The articulation of global governance structures to the local level encapsulates ongoing efforts to ‘work human rights into the cracks of international society’.³⁵ It marks a shift from rule-making to rule-implementation, with the ex-post costs of rule recognition raised through the installation of dedicated structures with sufficient autonomy and power to advance global rule systems locally. It also reflects a differentiation of authority and functions, extending from collective principals (states) to first, second and potentially multiple-tier governance agents. This may have significant implications for both the legitimacy and performance of governance architecture. As functions are unbundled across authorising structures, what is the potential for complementarity or competition? From a functionalist perspective, additional locations for coordination of policies may enhance performance. However, as global governance chains become extended, questions of legitimate authority and representation are likely to intervene. In the absence of a direct

³² Daniel Mugge, ‘Limits of Legitimacy and the Primacy of Politics in Financial Governance’, *Review of International Political Economy* 18, no. 1 (2011): 54.

³³ Nicholas Rennger, ‘The world turned upside down? Human Rights and International Relations’, *International Affairs* 87, no. 5 (2011): 1177.

³⁴ Newman, ‘International organization control under conditions of dual delegation’.

³⁵ Vincent, *Human Rights and International Relations*, 3.

relationship between global structures and the intended beneficiaries (or governed), architecture must display a capacity to accommodate some form of deliberative politics among those political units which populate it.³⁶

As an illustration of this, social science research has focused upon the informational effects of international instruments at the domestic level.³⁷ However, less attention has been paid to the conditions under which informational content becomes salient. As Johnston puts it, there is a potential ‘infinite regress problem’ in establishing the *credibility* of information at or in any given place.³⁸ Explaining the local impact of information necessitates attention not only to its coordination, but also to the legitimate authority of the messenger(s) and its distributional implications for competing domestic political forces. The ability of global governors to steward governance processes in local contexts, especially those defined by high levels of rule contestation, will be reliant upon domestic pro-compliance coalitions which share their goals and are willing to engage in the often costly (sometimes dangerous) politics of social change. Evaluating the quality of governance relationships across political units within global governance architectures is therefore essential to understanding outcomes.

3. Orchestrating global human rights governance

In order to generate insight into the interplay of political units within a multi-scale governance architecture, this article employs orchestration theory.³⁹ Orchestration can be defined as when a governance actor (the orchestrator) enlists and supports third-party actors (the intermediary) to address (the target) indirectly in pursuit of shared governance objectives. As a theory, it displays a number of general application merits, specifying types of actors, their governance relationships, and the scope for governance mobilisation in light of prevailing problem structures and strategic environments.

Orchestration is particularly well-suited to the problem structure thrown up by human rights governance where significant autonomy and functions – short of enforcement authority – are delegated to independent agents. Why do states cede authority to formally autonomous

³⁶ Johnston suggests that persuasion can be viewed as the ‘core’ of politics and a vital component of effective governance. Iain Johnston, ‘Treating International Institutions as Social Environments’, *International Studies Quarterly* 45, no. 4 (2001): 496.

³⁷ Hafner-Burton, ‘A social science of human rights’.

³⁸ Johnston, ‘Treating International Institutions as Social Environments’, 491.

³⁹ Abbott et al., *Orchestration*.

human rights IGOs and agencies? First, doing so may reflect credible commitments among some steward states. Second, goal divergence among states and/or between states and the agent denies the collective principal (or individual principals) from exercising sufficient control to prevent agent slack or shirking. Third, human rights is generally not associated with the ‘high politics’ of security or trade and therefore is not subject to strict intergovernmental management. Fourth, human rights governance is based upon a rule system particularly amenable to rule entrepreneurship and mission creep. However, reflecting state parties’ continuing ability to exercise constraint, human rights agents are generally denied enforcement powers and important functions are subject to prior approval, while under-resourcing is endemic. Given the difficulties of advancing implementation through direct engagement with the principal, pro-compliance IGOs and sub-state units are often highly motivated to pursue action through indirect modes of orchestration. A new human rights architecture offers both the means and opportunity to achieve this objective.

3.1. Orchestrating chains of governance in torture prevention

Scholars have produced valuable insight into the origins of the Optional Protocol to the Convention against Torture regime.⁴⁰ However, the significance of this new class of treaty regime is still under-theorised and not well understood. Orchestration theory highlights the agentic elements of this unusually articulated architecture, while also making legible the chain of governance relationships from the global to the local.

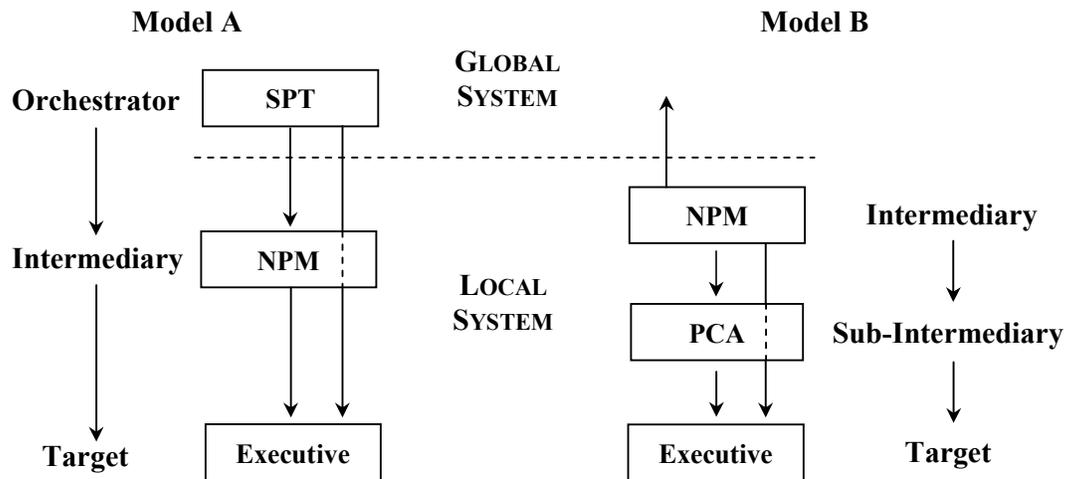
Orchestration holds when three conditions are met: (1) the orchestrator seeks to influence the behaviour of the target via intermediaries, (2) the orchestrator does not exercise control over the intermediary, which, in turn, (3) cannot compel compliance of the target.⁴¹ In contrast to hierarchy and delegation, this mode of governance is not premised on contractual obligation, but rather on voluntary participation within multi-actor systems. Orchestration identifies influence exercised *indirectly* via an intermediary. However, the orchestrator may also engage directly with the target simultaneous to exercising an orchestration strategy. As Figure 1 illustrates, the formal linkages of the OPCAT architecture map relatively straightforwardly onto this analytical framework, allowing for exploration of how, and under

⁴⁰ Murray et al., *The Optional Protocol to the UN Convention Against Torture* (Oxford: Oxford University Press, 2011).

⁴¹ Abbott et al., *Orchestration*.

what conditions, articulation of structures and relationships within a unified governance architecture may facilitate shared global governance goals.

Figure 1: Multi-scale torture prevention governance through orchestration



According to model A, the UN Sub-Committee on the Prevention of Torture (SPT) is the Orchestrator seeking to influence the Target: national executives. Bridging the two is the Intermediary: National Preventive Mechanisms (NPMs). Importantly, orchestration theory also allows us to extend the chain of governance to the local and sub-local level as illustrated in Model B. Here the intermediary also enlists further Sub-Intermediaries or Pro-Compliance Actors (PCAs), including sub-state and civil society constituents. The model opens up inquiry into alternating roles within the governance architecture, with the intermediary potentially assuming an orchestrator function at the local level. The model also highlights how similar factors may inform outcomes along the entire governance chains. As David Lake has written, ‘[t]he distinction between domestic and international politics as now construed is untenable...We ought to be seeking a unified theory of governance, not artificially segmenting realms of politics by arbitrary assumptions’.⁴² Orchestration is an important contribution in this regard, with potential application across political units as well as scales of global governance.

A. The Orchestrator

⁴² David Lake, ‘Rightful rules: Authority, order and the foundations of global governance’, *International Studies Quarterly* 54, no. 3 (2010): 608.

The SPT is the OPCAT focal actor within UN structures charged with closing compliance gaps between global rule-authority and domestic rule-implementation. Nominally a sub-committee to the long-standing Committee Against Torture (CAT),⁴³ the SPT forms part of an integrated torture prevention regime but is more accurately understood as a free-standing monitoring body rather than as a subsidiary to the CAT.⁴⁴ The OPCAT seeks to imprint a proscriptive rule framework in a global system of inspection of places of detention coordinated by an international body of independent experts. Establishing no new norms or standards, OPCAT is instead focused on implementing a well-established normative framework prohibiting torture through innovative procedural obligations.⁴⁵ For the architects of OPCAT, the SPT forms the centre-piece of a novel legalisation of human rights architecture which obliges states to recognise the jurisdiction of a global monitoring structure, as well as an analogous domestic structure (Model A, Figure 1).

As a political unit, the SPT comprises 25 independent experts who are appointed by state parties to the Protocol, but serve in their personal capacity for a four-year term, once renewable.⁴⁶ In contrast to other treaty bodies, OPCAT seeks to limit state oversight by explicitly setting down independence and impartiality criteria for membership.⁴⁷ The Convention also requires equitable geographical and gender representation on the subcommittee.⁴⁸ The vast majority of SPT members display significant expertise and are generally viewed as credible.⁴⁹ However, the presence of two current government officials on the SPT is cause for concern.⁵⁰ Perception of independence is vital to the legitimate authority of the SPT. It must guard against actual or perceived instrumentalization by state parties. Countervailing background norms are also apparent in the final OPCAT text which may exert a conservative pull on the appropriate scope of SPT orchestration activities.⁵¹

⁴³ The CAT is one of ten UN treaty bodies established to supervise state compliance with their obligations under international human rights treaties.

⁴⁴ Murray et al. *The Optional Protocol*, 141.

⁴⁵ The general prohibition of torture is one of few state practices outlawed under the norm of *jus cogens*. Matt Pollard and Nigel Rodley, 'Criminalisation of Torture: State Obligations under the United Nations Convention against Torture', *European Human Rights Law Review* 11, no. 2 (2006): 115-141.

⁴⁶ As of June 2014, OPCAT has only 72 states parties (compared to the Convention which has 155 parties).

⁴⁷ OPCAT, Article 5(6).

⁴⁸ Currently, forty percent of members are women and all regions are represented.

⁴⁹ CVs available at: <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/Membership.aspx>

⁵⁰ The representative from Estonia and Macedonia are government employees.

⁵¹ Article 36 of OPCAT requires that SPT members 'refrain from any action or activity incompatible with the impartial and international nature of their duties'.

The SPT self-identifies as ‘a new generation of United Nations treaty body with a unique mandate’.⁵² The SPT performs three core tasks to: (1) conduct country-visits in places of deprivation of liberty, (2) coordinate the work of NPMs, and (3) cooperate with other UN and regional organisations.⁵³ Unlike all other treaty bodies, it undertakes field visits rather than considering state reports or individual communications. It therefore proactively engages in monitoring activities to arrive at an *independent* assessment of state compliance with their obligations. In effect, the SPT exercises a police patrol form of accountability mandated to: (1) establish a programme of regular visits, (2) choose the places it wants to visit, and (3) propose follow-up visits.⁵⁴ States are required to receive the SPT and grant it unrestricted access on its territory without prior consent.⁵⁵ This is a sea change from the oversight, subject to state consent, exercised by the CAT inquiry procedure or the UN independent expert or ‘special procedure’ on torture.⁵⁶ Whereas the authority of the CAT is located mainly in its rule-making function, that of the SPT can be traced to its rule-implementation prerogatives.⁵⁷ As one observer puts it:

The promise of the SPT is that it is the largest UN human rights treaty body, which goes to the field and is part of an official system with a constellation of national bodies, given legitimacy by an international treaty.⁵⁸

It is important to note that the SPT is the product of intergovernmental negotiation. This is apparent in a mandate which emphasises direct engagement with the target (what Abbott et al. refer to as ‘collaboration’).⁵⁹ SPT reports and recommendations based on country visits are intended to inform dialogue with the target, not confrontation. In keeping with UN practice, SPT findings are confidential. However, cooperation on torture prevention confronts the problem of principal moral hazard, with state agencies often implicated in violations.⁶⁰ Given the egregious nature of the crime, state interests often run counter to those of the SPT. The experience of the Committee Against Torture attests to potential challenges.

⁵² See SPT, First Annual Report of the SPT, UN Doc. CAT/C/40/2 (2008), para. 5.

⁵³ Article 11, OPCAT.

⁵⁴ See Article 14, OPCAT.

⁵⁵ Article 12(a), OPCAT.

⁵⁶ Special procedures are the mechanisms established by the Human Rights Council to address either specific country situations or thematic issues.

⁵⁷ The CAT cannot impose binding obligations, but does issue authoritative interpretations.

⁵⁸ Wilder Taylor, SPT Member. Quoted in APT, *The Global Forum on the OPCAT* (Versoix: APT, 2012), 28.

⁵⁹ Abbott et al. *Orchestration*, Ch. 1.

⁶⁰ Darius Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2007).

Although empowered, subject to state cooperation, to conduct confidential inquiries into allegations of systematic torture, the CAT has carried out only eight such inquiries.⁶¹ Between 2007 and 2013, the SPT conducted nineteen country visits, with just ten states consenting to the resulting report being made public. Although the SPT conducts its work in ‘a spirit of cooperation’ with state authorities, cooperation has its limits.

As such, the SPT has motive to engage in orchestration activities. What of the means and opportunity? As noted above, the SPT forms part of a novel dual-level architecture and is expected to steward system-wide coordination. This is most visible in its formal linkages to National Preventive Mechanisms (NPMs). While this relationship is formalised in the OPCAT architecture, it relies largely on goal alignment between both SPT and NPM.⁶² SPT incentives to orchestrate are in part functional, a reflection of its own capability deficits. The subcommittee has struggled with a budget which does not reflect the cost of its visitation mandate, coupled with no allocation for NPM-support activities.⁶³ Most significantly, the NPM provides the SPT with an additional lever to enhance the legitimate authority of the OPCAT architecture, as well as consistency in application of standards at the local level. It also offers a conduit to engage in orchestration activities with other torture prevention actors, including civil society and the media.

The SPT’s formal status in the OPCAT architecture, combined with the credibility and expertise of its membership, grants the body a unique focality in this domain. Other significant stewards – notably the Office of the High Commissioner for Human Rights (OHCHR) and the NGO Association for the Prevention of Torture (APT) – are also highly active. Advice issued by the OHCHR to states on OPCAT implementation is reportedly not always consistent with SPT policy.⁶⁴ The APT is widely acknowledged as a highly credible NGO advocate for OPCAT implementation. This situation points to the possibility of *competitive versus collaborative orchestration* among contender stewards and the importance of functional differentiation and inter-organisational dialogue. Notably, the APT has appealed to the SPT to be more assertive in using its political leverage, especially with regard

⁶¹ Inquiries have targeted Nepal, Brazil, Serbia and Montenegro, Mexico, Sri Lanka, Peru, Egypt and Turkey.

⁶² Article 11(b), OPCAT.

⁶³ The annual budget for servicing all ten treaty bodies in 2012 was near \$56 million.

⁶⁴ Confidential interview by author with senior NGO official, 28 March 2012

to designation and strengthening of NPMs.⁶⁵ The SPT has begun to assume a more proactive role, with its first advisory visit on OPCAT implementation conducted in Nigeria in April 2014.

Enhancing informal spaces for dialogue with civil society and potential sub-intermediaries is also important if the SPT is to establish a more active orchestration role. The inaccessibility of confidential Geneva-based SPT sessions has been criticised. Public scrutiny of SPT decision-making by third parties is vital to constructing a base for collective political action against often powerful opposing domestic forces, and to ensure local ownership of governance rule systems at the societal level. Emergent efforts in this direction are apparent with greater transparency on in-country mission schedules and SPT meetings. Notably, the SPT has also recently launched a Special Fund to help finance local implementation of its recommendations. States, NPMs and other sub-state actors and NGOs are eligible to apply for funding ‘if the proposed projects are to be implemented in cooperation with eligible States parties and/or NPMs’.⁶⁶ The SPT convenes an OPCAT Contact Group comprising eleven organisations with global expertise and presence in the field of torture prevention.⁶⁷ Grassroots organisations and NPMs are, however, absent from this network. One observer notes that:

‘In the final [OPCAT] text, the role of the Subcommittee is projected as being that of general oversight, exercising something of a paternalistic interest in the operation and functioning of the [NPMs]’.

The SPT membership has shown itself willing to make modest moves away from a ‘paternalistic’ mode of governance towards a more horizontal and deliberative decision-making model conducive to system-wide orchestration. More could be done. Its credibility and performance, and that of the OPCAT architecture, may depend upon it.

B. The Intermediary

⁶⁵ “It is high time to explode the myth that the SPT should only interact with NPMs and States parties through formal in-country missions”. Mark Thompson, APT Secretary General. Quoted in APT, *The Global Forum on the OPCAT* (Versoix: APT, 2012), 28.

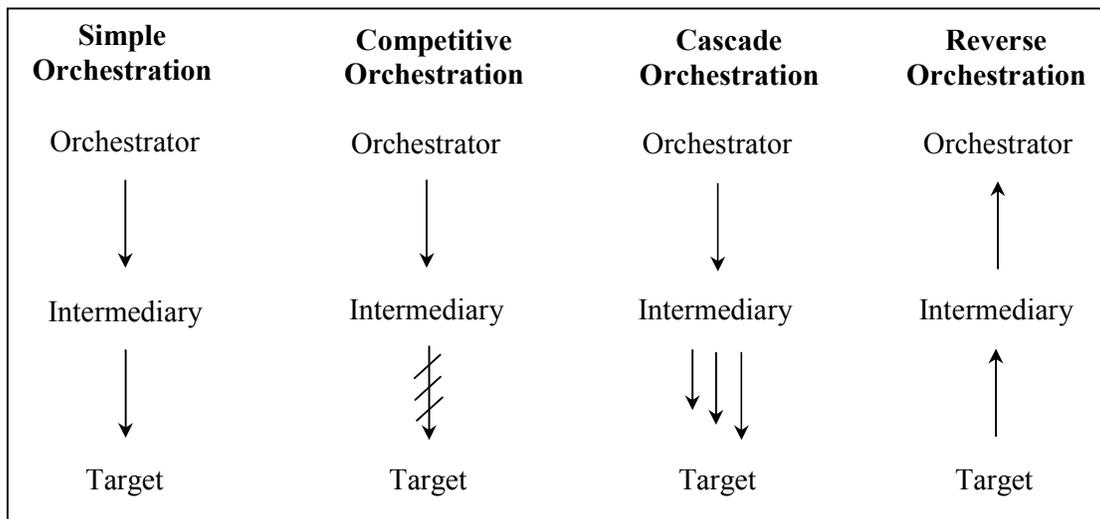
⁶⁶ Abbott et al. *Orchestration*, Ch. 1.

⁶⁶ See <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/SpecialFund2014.aspx> (Accessed 29 June 2014)

⁶⁷ See <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATContactGroup.aspx> (Accessed 29 June 2014).

The NPM forms the second core pillar of the OPCAT architecture; the formal linkage of a global monitoring body with an equivalent domestic structure. The legal coupling of global and domestic mirror structures described here is a significant departure from treaty law precedent, with NPMs offering a gateway for ensuring consistency of rule system implementation across jurisdictions. Focusing on goal convergence between these two actors, we can construct a set of four orchestration outcomes (Figure 2). In a *simple orchestration* model, the NPM serves as intermediary to the SPT and the OPCAT implementation programme. Simple orchestration relies upon goal convergence between the Orchestrator and Intermediary, with the Orchestrator no hierarchical control. The NPM also serves to mediate the deep governance level along a governance chain extending from the SPT to the sub-local level (Model B, Figure 1). This dispersal of delegated authority from an IGO to a national mechanism can empower the NPM to assume an orchestrator role in its own right. Indeed, NPMs are generally exhorted to be ‘a leader’ in torture prevention.⁶⁸

Figure 2: A four-fold typology of orchestration outcomes⁶⁹



It is important to note that states are required to ‘maintain, designate or establish’ an NPM within one year of OPCAT ratification and therefore do not necessarily need to create a new structure.⁷⁰ Thus far, fifty-two (seventy-two percent) of state parties to the Protocol have

⁶⁸ APT, *The Global Forum on the OPCAT*, 33.

⁶⁹ This typology is inevitably highly stylized but will serve as a useful departure point for further problematisation through empirical application.

⁷⁰ Article 17, OPCAT

designated an NPM.⁷¹ Of those fifty-two NPMs, the majority are pre-existing standalone ombudsmen and national human rights institutions (NHRIs) offices.⁷² A minority of states have established multi-institution NPMs⁷³ or purpose-built new mechanisms.⁷⁴ The task for the SPT and other torture prevention stakeholders is how to ensure that NPMs are actually enabled to fulfil their mandate.

A central concern is independence. Article 18 of OPCAT obliges states to guarantee the ‘functional independence’ of the NPM. States are further directed to the Paris Principles – UN endorsed guidelines on NHRI independence, including a prohibition on government representation.⁷⁵ Resistance to the NPM proposal during OPCAT largely stemmed from doubts over the efficacy of national institutions.⁷⁶ NPMs are an example of dual delegation, deriving authority from their formal designation by both state and IGO structures. However, dual delegation does not equate to parity of principal control. Given their location in domestic political processes, NPMs are highly sensitive to the exercise of power within domestic political systems. Notably, a number of SPT members are also members of NPMs with potentially important implications for governance relationships within this dual delegation arrangement.⁷⁷ A key challenge for the NPM therefore reflects a unique situation within the OPCAT architecture: how to balance independence with accountability to multiple sites of authority (IGO, state and civil society). This is readily apparent in highly political processes of NPM designation, with many subject to protracted delays. The SPT has begun to take a more concerted interest in domestic NPM establishment processes, publicising best practice.⁷⁸

NPMs possess a range of governance capabilities at the domestic level which make them desirable candidates for orchestration. They draw legitimacy from their standing as a national-level state body codified in law. Although generally lacking enforcement powers,

⁷¹ Only two states have made a declaration to postpone implementation of the NPM for up to five years.

⁷² NHRIs are state-funded, but formally independent, human rights agencies, enacted by constitutional amendment or legislation, generally appointed by the legislature, and composed of representatives with human rights expertise, including civil society.

⁷³ See Argentina and Macedonia for instance.

⁷⁴ Honduras established a new National Committee for the Prevention of Torture.

⁷⁵ See Principles Relating to the Status and Functioning of National Institutions, UN General Assembly, Res. 48/134, 20 December 1993.

⁷⁶ Murray et al., *The Optional Protocol*, 44.

⁷⁷ The SPT members from Moldova and Serbia are also affiliated to the NPM.

⁷⁸ See Report on the visit made by the SPT for the purpose of providing advisory assistance to the NPM of Moldova, UN Doc. CAT/OP/MDA/R.1, 9 January 2013.

many NPMs are vested with significant protection prerogatives, including legal petition powers, *ex officio* powers of investigation, and the ability to censure uncooperative state officials. OPCAT obliges a series of NPM operational features, including provisions on unrestricted access to all places of detention, subpoena powers, and engagement with the SPT.⁷⁹ NPMs can also engage in awareness-raising and promotional activities, including advising on legislation, media interventions and joint-campaigns with local stakeholders, serving as both venues and agents for mobilization. This stands in stark contrast to the confidentiality and impartiality restrictions imposed upon the work of the SPT.

Their role in receiving individual complaints, monitoring domestic torture prevention and follow up with SPT recommendations is of particular note.⁸⁰ NPMs also have direct access to the target constituency: government officials. Such access may yield actionable information for the SPT when seeking to engage pro-compliance sub-state actors or, conversely, bypass obstructive veto players. In sum, an effective NPM may enhance the SPT's ability to not only advance compliance with torture prevention standards, but also in the more subtle task of ensuring consistency of standard application and socializing domestic actors. For their part, orchestration with the SPT offers NPMs access material and ideational resources. Endorsement by the SPT may yield significant domestic benefits, legitimising the activities of the NPM, encouraging sub-intermediary orchestration, and elevating the NHRI as a national focal actor. Ensuring mutual benefit is central to maintaining the orchestration equilibrium. Absent mutual benefit in a resource finite-environment, the SPT and NPM may conceivably enter a situation of limited or even *competitive orchestration*.

Of course, the operative words are 'effective NPM'. The intermediary role of an NPM is conditional upon the complicated task of establishing working relationships with diverse actors within and outside state structures. Evidence points to some national institutions successfully protecting human rights, with others having effectively undermined them on behalf of government.⁸¹ NPMs are vulnerable to government capture, especially where torture violations implicate powerful state officials. Such an outcome is a threat to the OPCAT orchestration enterprise, with intermediary preferences aligned with the target to

⁷⁹ Article 20, OPCAT

⁸⁰ OPCAT directs the SPT to communicate its recommendations to the NPM without prior state consultation or consent. Article 16, OPCAT

⁸¹ For in depth analysis of NHRIs as human rights actors see Ryan Goodman and Thomas Pegrum, (eds.), *Human Rights, State Compliance, and Social Change* (New York: Cambridge University Press, 2012).

influence the IGO – in, effect, a *reverse-orchestration*. Observers concur that individual leadership is crucial. As a former UN special procedure comments: “With a mandate like torture, it goes to the very heart of the regime. A [national institution] that feels at all insecure is unlikely to raise its voice on these issues”.⁸² Inclusion within the formalised OPCAT architecture may offer NPMs additional insulation. However, the ability of the SPT to intervene on dubious NPM selection processes is complicated by a commitment to collaboration rather than condemnation.⁸³

Condemnatory duties may therefore fall upon other stakeholders within civil society capable of exerting effective counter-pressure. Civil society has played a prominent role in the development of the OPCAT project, although it does not feature prominently in the OPCAT text. The presence of sub-intermediaries as depicted in Model B may be a crucial corollary to the legitimacy and performance of the OPCAT architecture. In some instances, civil society actors have been integrated NPM membership, thereby constituting an unusual hybrid state societal unit. The SPT itself includes among its members prominent NGO officials and encourages NPM engagement with civil society. NGOs and other societal actors may be the crucial additive in ensuring implementation at the local level, bestowing credibility on the OPCAT architecture. This auxiliary support will be particularly important in contexts where formal compliance remains partial and/or OPCAT standards are subject to contestation. They can serve as powerful interlocutors in translating the OPCAT basic operational norms into local ‘vernacular’.⁸⁴ In a scenario of *cascade orchestration*, motivated local stakeholders not formally integrated into the OPCAT architecture may nevertheless advance goals consistent with its rule system, but absent formalised relations with the orchestrator.

4. Conclusion

The notion of architecture provides a valuable way into identifying not only what is actually global in global human rights governance, but also how the global is connected to the local. Exploring the Optional Protocol has demonstrated how imprinting a global governance rule system in both structure and governance relationships can begin to bridge the steps which separate international instruments from practices on the ground. This study highlights the

⁸² Confidential interview by author with former UN special procedure, 16 December 2009.

⁸³ See <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIntro.aspx> (Accessed 29/06/14).

⁸⁴ Sally Engle Merry, *Human Rights and Gender Violence* (Chicago: University of Chicago Press, 2006).

articulation of a global human rights architecture in substantive obligations, as well as, and most radically, a series of procedural mechanisms which underpin a novel two-tier implementation apparatus. The OPCAT architecture aspires to globality. Not only does it assume structural form above the level of the nation state, political units within the architecture display significant autonomy and power and there is significant unbundling of functions among interacting actors across levels.

This article has sought to highlight opportunities for purposive action within the OPCAT architecture. Orchestration theory serves to frame the OPCAT strategic environment. Descriptively, orchestration serves to clearly specify governance actors, with particular attention to questions of their location, focality, authority and resources. Analytically, it asserts agency as an important corollary to structural explanations for governance outcomes. It identifies new authorising structures not only within IGO settings, but also extending to domestic political systems. Different from orthodox modes of governance which assume hierarchical control or the direct interface between principal and agent, orchestration in emphasising indirect channels of influence via third party intermediaries offers a useful addition to modes of human rights governance. In turn, orchestration offers a unified theory of governance – one capable of engaging with both a transnational and domestic politics of governance beyond command and control relationships.

A crucial condition for orchestration to occur in this study is limited state control and oversight of the agent. This is clearly particularly important in a regulatory domain which displays severe principal moral hazard – but is likely to be applicable to other issues areas also. The question of how political units are connected to centres of state authority emerges as central not only for assessing scope for strategic social construction beyond state agreement, but also for locating the limits of globality. State authority remains a prominent influence on the politics of implementation. By specifying the governance relationship between the SPT and NPMs in light of such considerations, this study has highlighted the potential for unintended consequences in the form of four orchestration scenarios. This exploratory mapping of admittedly highly stylised relations will be further problematised in a follow on empirical project on OPCAT implementation.

The installation of formal structures at the domestic level carries the promise of imprinting global standards onto domestic practice. However, function often does not follow form. This

is a realm not simply of interlocking structure to use the rationalist parlance, but also governance relationships. Goal convergence and preference ordering – both ideational and material – and the ability of steward actors to generate broad based consensus around a global governance programme is likely crucial to the stability, durability, and performance of the OPCAT architecture. In other words, global governance *as process* requires careful attention to actors’ motives, not only means and opportunity. Some observers have concluded that the inter-state legal human rights system is in terminal decline, declaring ‘the endtimes of human rights’.⁸⁵ However, viewed from another vantage point, such claims may under-estimate the distributional power implications of these structures – especially once articulated into domestic politics.

⁸⁵ Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca: Cornell University Press, 2014).