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Help

After he took office as President of the United States, Barack Obama decided to oppose any effort to prosecute CIA interrogators who engaged in torture, as well Bush administration officials who authorized the use of torture. Yet, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires that States parties take effective measures to prevent acts of torture in any territory under their jurisdiction (Art. 2(1)), and that they define torture as a criminal offence (Art. 4). Article 12 of the Convention states: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." In 2008, the Committee against Torture adopted General Comment No. 2 on the implementation of the States parties of article 2 of the Convention, in which the experts stated: "Article 2, paragraph 2, provides that the prohibition against torture is absolute and non-derogable. It emphasizes that no exceptional circumstances whatsoever may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction. The Convention identifies as among such circumstances a state of war or threat thereof, internal political instability or any other public emergency. This includes any threat of terrorist acts or violent crime as well as armed conflict, international or non-international. The Committee is deeply concerned at and rejects absolutely any efforts by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies in these and all other situations. Similarly, it rejects any religious or traditional justification that would violate this absolute prohibition. The Committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability" (para. 2).

In the following video, the former United Nations Special Rapporteur on Torture (2003-2011), Mr. Manfred Nowak, expressed the view at a press conference of 26 October 2010 that the refusal to investigate credible allegations of torture was a violation of the duties of the United States under international law:

MANFRED NOWAK ON TORTURE

Torture is practiced in most countries in the world.

Of the 18 states that invited me to carry out a fact finding mission, only one state-- it was Denmark and Greenland--

where I didn't find one allegation or one case of torture.

President Obama, as his predecessor, has an obligation

under the Convention Against Torture, to independently investigate

every allegation of torture or suspicion of torture.

And there are plenty of allegations, whether its

under his or under the previous administration.

In relation to what now has been revealed

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Help

The above video is attributed to the UN TV service, and published by MaximNewsNetwork (<http://www.maximsnews.com/>). The video with excerpts of the press conference of Manfred Nowak, former Special Rapporteur on Torture, can e accessed directly on YouTube (<http://youtu.be/tGoymX7IIMw>).

The current Special Rapporteur on Torture, Mr Juan Mendez, refers to the duty to investigate, prosecute and punish torture, expressing regrets about the decision of the Obama administration not to investigate allegations of torture under the authority of the previous administration (fast forward to 13min 11seconds):

JUAN MENDEZ ON TORTURE

Emyr Jones Parry:

Redress was founded twenty years ago.

I am delighted, as we come to that anniversary,

03/13/2014 03:28 PM

that Chatham House is hosting this event this evening.

I want to welcome Keith Carmichael, who founded Redress, and did so because there needed to be an organization to support the survivors of torture.

Redress has moved on to do that in a whole range of different ways, across a multitude of countries.

We also try to campaign vociferously against torture.

Why is that?

It is very simple: torture is illegal in customary international law, illegal in 193 countries of the United Nations, torture is immoral and it just does not work.

The existence of torture demeans all of us, not just the perpetrators but it demeans societies that permit it to happen.

The paradox is that it is all too prevalent that is why the work of the United Nations is so important but it is often carried out by states who claim to be the highest defenders of rights and yet they resort to it on what I think is a wholly false basis.

The United Nations is in the vanguard against torture: supporting the rights of victims, standing up to those who perpetrate crimes against humanity (which, manifestly, torture is one).

Prominent in the United Nations system is Professor Juan Mendez, a distinguished servant of the international community and the United Nations Special Rapporteur on Torture. He has worked conscientiously and diligently in this field for a very long time and has done so with great distinction.

It is my great privilege tonight to welcome you, Professor Mendez, and to now invite you to address the Chatham House audience.

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Thank you all for being here today.

I especially want to express my appreciation

to Redress and to its director, Carla Ferstman,

and to Sir Emyr Jones Parry for inviting me for this very special occasion.

I want to congratulate Redress on so many years of excellent work

on behalf of human rights and particularly on enforcing the prohibition on torture.

It is an honour to share in the celebration of the many achievements

of Redress and it is an honour also for me to be back because I was here once

some years ago in Chatham House.

You know better than I that, around the world, this is [known as]

a place where very serious discussions are held on matters of great importance

to the interdependent world in which we all live.

I also want to commend Redress for having

the idea of focusing on the implementation of the prohibition on torture for this occasion.

Among other things, I think one of the challenges

that the Rapporteurship faces in this term that I started a year

and a half ago is that I feel that in the last ten years

or so we have lost, at least temporarily, an important asset that we

have in the fight against torture: the moral condemnation that people

generally have always agreed upon on the abject nature of torture.

I think in the last ten years the culture not in a single country,

but in many countries around the world has generated a sense of 'Well, perhaps

torture is inevitable, or perhaps torture is bad but it is necessary

because it keeps us safe it moves us in the direction of curbing criminality

and particularly the most extreme forms, like terrorism'.

Therefore, I think our societies have tended to look the other way.

They do not necessarily accept that torture can be moral or even practical

but there is a sort of resignation that torture is inevitable.

That is an important factor in our ability to find ways of abolishing torture in our time, which I think is still

possible not necessarily likely, certainly not assured, but possible.

Just like humanity ended slavery a hundred years ago or so,

I think eventually we can come to a point where we can say that torture is not only prohibited but effectively abolished.

But I feel that we need to get back to persuading our societies that this is what needs to happen.

I start with recalling some of the principles that

are in the [United Nations] Convention Against Torture.

As Ambassador Jones Parry very correctly stated,

these are principles that are customary international law;

they are widely recognised as applying and obliging all member states

of the United Nations and all member states of the international community generally.

Torture is absolutely prohibited and it does not recognize any excuse

because of states of emergency or any other excuse, not even

any excuse based on some form of exceptionalism of the situation

or of the nation that indulges in the practice of torture.

The prohibition also extends to cruel, inhuman and degrading treatment or punishment.

As you know, the Convention distinguishes

between torture and cruel, inhuman and degrading treatment

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a variety of bases but certainly not for the absolute prohibition

So any coercion that does not meet the
definition of torture

because it is not as severe as to reach that
definition

or because it lacks the requisite intent to
elicit a confession or a declaration

is still prohibited absolutely by
international law.

I think, in fact, no country in the world
rejects that proposition.

There is no country in the world that
affirms that torture

or even cruel, inhuman and degrading
treatment is permissible.

That perhaps is a good starting point,
because even the countries that do

practise torture recognize its prohibition
and try to call it

something else, or simply deny that it
happens and then surround the practice
with layers of impunity that are intended
to establish a sort

of plausible deniability that the practice
exists.

The infamous 'torture memos' written
during the Bush administration

are paradoxically a recognition of this.

If you read them carefully, they describe a
variety of techniques

and try to say that they do not constitute
torture,

disingenuously saying, for example, that if
they

are applied in a degree of intensity and
severity they do become torture

or that if they are applied in combination
between them

to the same victim they also become
torture.

Quite frankly, anybody who reads about
waterboarding, about stress positions,
etc., would not come to the conclusion
that it is not torture.

What I think is particularly negative and
dangerous

about the torture memos is that because
they

are meant to determine when somebody
should or could be prosecuted,

they do not say that those things may not be torture but even

on an individual basis and taken one at a time,

they would unmistakably constitute cruel, inhuman and degrading treatment,

and therefore would be prohibited anyway.

The torture memos kind of skirt around that issue

and do not say that they are actually encouraging United States

officials to engage in unlawful activity.

There are many other examples, but the problem

is that these kinds of arguments take advantage

of what I consider some ambiguities in the definition of torture.

To reach the level of the definition of torture,

the pain and suffering has to reach a level of severity that

depends both on objective and subjective factors.

So it is very difficult to trace a line and say

this practice is cruel, inhuman and degrading,

this other practice is torture.

Nevertheless, I think if states understood their obligations

in good faith, even that ambiguity should not offer a lot of problems.

We have to be reminded that the definition includes

pain and suffering that is either mental or physical.

For the most part, physical torture is accompanied by mental torture

as well, as anybody would realize.

The fact itself of the inhumanity of the treatment

is also degrading and demeaning by itself.

It is premised on an attitude of not recognizing the humanity of the victim

and therefore it is automatically psychological as well as

physical torture.

7 The requirement that torture be inflicted with a specific purpose,

Duty to prosecute - Introduction | [3.1] The a...
as established in the Convention Against
Torture,

<https://courses.edx.org/courses/LouvainX/Lo...>

sometimes conspires against being able
to find

good ways of curbing the practice.

But my mandate, of course based on the
Convention Against Torture,

includes all other forms of cruel, inhuman
and degrading treatment.

Particularly when certain prison
conditions reach a level of pain

and suffering when a person is held there,
that does not have to be intentional and
does not

have to be so intense as to qualify as
torture;

nevertheless, the prohibition on cruel,
inhuman and degrading treatment

is obtained anyway.

Therefore, my mandate spends a lot of
time quite

frankly dealing with prison conditions and
how to make them better.

The second important legal effect of the
prohibition against torture

is the obligation to investigate, prosecute
and punish

every act of torture.

Torture, among all other human rights
violations,

is unique in international law because a
single event gives rise

to the obligation to investigate, prosecute
and punish.

It does not have to be part of a
widespread and systematic practice,

which of course would then make torture
a crime against humanity and subject

to the jurisdiction, in the appropriate
cases,

of the International Criminal Court.

Although other human rights violations
may

be subject to amnesties or pardons or
even statutes of limitation, in my mind

and in the work of the Special
Rapporteurship,

we always insist that if there is an
affirmative obligation

to investigate, prosecute and punish every

then there is also a prohibition on using
any legal obstacles to realize

that obligation, including amnesties,
pardons, prosecutorial decisions not
to investigate, and even statutes of
limitation.

In that sense, we were very encouraged in
2009

when President Obama unmistakably
prohibited torture.

Of course the 'torture memos' had been
withdrawn before that by President Bush
himself, but he reinstated the [Uniform]
Code of Military Justice that actually
includes the same prohibitions as
international law.

But unfortunately I have to say that the
decision not to investigate, prosecute
and punish what happened when those
'torture memos' were in effect

is a refusal to accept an obligation in
international law

that the United States has.

Unfortunately, there has been no serious
investigation and recently

the only investigation that was still going
on, by Special Prosecutor

[John] Durham, was completely
terminated with a decision

not to prosecute even cases in which the
torture victims had died

and that had happened even before the
torture memos were written.

So there was not the excuse that people
might

have been following advice that may have
been wrong

but they were in good faith following
advice.

It is a very disappointing position because
you can imagine how hard it is

for the Special Rapporteur on Torture to
go around the world saying you have

to investigate, prosecute and punish
when the first reaction is,

'If the United States doesn't do it, why
should we?'

It is important to say that perhaps the
prohibition on torture

I wish it were so easy, because torture happened,
even when it was part of the policy of the US administration,
so much in secrecy that it is very hard to know whether in fact there
are new cases or not.
It may be that they are being more careful with the evidence
or it may be that in fact President Obama is right
and they have turned a new leaf and they are not practising torture now.
It is impossible to know with any degree of certainty.
What one can say with some degree of certainty,
from the examples of other countries, is that the impunity itself
is a breeding ground for new cases of torture.
Therefore, leaving aside the legal obligation to investigate,
the practical aspects of not investigating could be damaging for the future as well.
International law also mandates that states
should afford an effective remedy and reparations to the victims of torture.
That means that states are obligated to give
full effect to a writ of habeas corpus, because a writ of habeas corpus
does not protect individuals only against arbitrary arrest
but also from all kinds of conditions of that arrest, which could include
torture or cruel, inhuman and degrading treatment.
Obviously other judicial protections also have to be in place to prevent and stop torture
and to control conditions of detention.
Unfortunately, in many countries around the world, the writ of habeas
corpus has been limited, has been curbed;

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over 10 have been found to limit its effects,

I think this obligation to provide an effective remedy

is hampered sometimes by the extensive use of state secrets.

I definitely agree that states have to have secrets

but I would take the view that President Dilma Rousseff of Brazil

took about a year ago, when she created a truth

commission for the violations that had happened

in Brazil during the military dictatorship.

One of the problems that they had there was

that they had to reform, to amend the statute on state secrets.

She very publicly said there should be no state secrets for human rights

violations, they should not be covered.

That is easy to say and difficult to put in practice, I realize that.

But I think the fact that state secrets have been used, for example,

in a case in the United States dealing with the use of aircraft to conduct

extraordinary renditions, where the US government came in it was not even

a defendant, the defendant was an aircraft company and established a very

sweeping state secrets defence, and unfortunately the courts in the United

States accepted it.

So the victims of torture in that case at least

were rendered without a remedy, without any possibility of finding out

what had actually happened and whether that company had

any responsibility for it or not.

The same could be said when we are talking

about the exchange of information and exchange of custody

of individuals between countries.

As you know, here in Britain, the United Kingdom has taken, so far at least,

the original owner of the intelligence
determines whether it can be made

public or not.

That is probably a good way of
maintaining good working relationships
between intelligence agencies and that is
in itself an important consideration.

But when that control principle means
that then the country that

is in possession of information about
human rights violations

is not in a position to mention them, I do
think it hampers the ability of dealing
effectively with torture.

The same I would say on a third principle
or legal effect:

the exclusionary rule.

Unfortunately, here, international law is
very limited,

because the Convention Against Torture
says that states cannot use evidence

or statements or declarations obtained
under torture in criminal actions

against that person, but it does not
prohibit any other uses

of the information thus obtained.

And, it says statements and declarations
proven

to have been taken under torture, which
becomes a very vicious circle,

because in country after country we find
that courts

take a very cursory view of the matter.

When somebody complains of torture,
they say,

"Well prove it', and they effectively put the
burden of proving the torture

on the person who has made a
confession or a declaration.

In practice, the effect is nullified, because
if the idea was

to discourage torture by negating legal
effects to the information obtained

under torture, it does not help if the
prohibition is

taken in such a narrow view.

So I have been, as a Special Rapporteur,
proposing

and of its purpose (that is, the
discouragement of torture)

and urging governments to not allow any
declaration that is not

ratified or stated spontaneously before a
judge

and with all the guarantees of
voluntariness, including legal counsel.

Unfortunately this is a difficult area
because prosecutors and courts

around the world are used to dealing with
allegations of torture

in this very cursory and insufficient
manner.

But I also believe that a good faith
interpretation

would make the confession ascertained to
have been made under torture excludable

??? but not only that, also any other
evidence obtained

as a result of having obtained that.

That is the doctrine that is sometimes
called

the 'fruit of the poisonous tree' doctrine.

I think in fact the Rapporteurship does
and should

continue to promote and propose that
states adopt this,

again as a good faith interpretation of the
exclusionary rule.

The last important legal effect is the
non-refoulement clause, which,

as you know, means that states cannot
return or send anybody to a place where
he or she could be tortured.

It is broader than the non-refoulement
clause

in the 1951 Convention on Refugees
because it does not

exclude even people who may have
themselves persecuted others.

It also does not mean necessarily that
people should be entitled to asylum,

it just means that they should not be sent
back

to where they could be tortured.

Those are, I think, the four major
principles of international law.

For lack of time, I won't be able to get into

that I wanted to cover, but perhaps in the
question-and-answer period

we could discuss a little more how the
Special Rapporteurships do their work.

They are basically by way of, [first],
communications:

receiving complaints from the public and
formally addressing

states for information and eventually
issuing

views or conclusions about them.

The second is by fact-finding missions.

The third is by special thematic reports
that we

have the occasion of sending to the
General Assembly

or to the Human Rights Council twice a
year

(once a year to each of these organs).

In my case, I have written already about
solitary confinement

and under what conditions there should
be an agreement among states

as to how to limit solitary confinement.

The second was about commissions of
inquiry

and how they can be made to be
fashioned in a way that fulfils the
obligation

to investigate, prosecute and punish.

Now, I have written one that is not public
yet on the death penalty

and capital punishment and under what
conditions it violates

the prohibitions on cruel, inhuman and
degrading treatment.

Hopefully that will be debated in the
General Assembly in October.

My next thematic report is going to be
going

towards the limits of the mandate, to
situations in which the state agency is

not absolutely clear, and dealing with
torture in health-care situations,

meaning by that, certain treatments for
mental health patients,

but also for juveniles in so-called
educational settings,

denial of pain treatment for some

I'm trying to explore to what extent the
state can

be responsible for making sure that even
in the private areas,

cruel, inhuman and degrading treatment
or torture does not happen.

I really appreciate your attention and I'm
looking forward to the conversation

that we are going to have.

Thank you.

Help

The above video is owned by Chatham House (<http://www.chathamhouse.org/>). The full video of the conference and ensuing debate with Special Rapporteur Juan Mendez can be accessed here (<http://www.chathamhouse.org/events/view/185367>) (or alternatively on YouTube (<http://www.youtube.com/watch?v=KjVQuR8e7ys>)), and a transcript is provided here (<http://www.chathamhouse.org/sites/default/files/public/General/100912Mendez.pdf>).

Should the need for reconciliation trump the fight against impunity for acts of torture? What arguments would you invoke in favor, or against, the choice made by the Obama administration? Did similar situations arise in your country, and with which outcomes?

INSTRUCTIONS: In responding to the above questions, **DO NOT click on 'New Post'**. Click on '**Show discussion**', and then, in the first discussion thread, called '**[3.1.3] The Duty to prosecute - Debate!**', click on '**View discussion**' and then on '**Add a response**' to propose your views to the community. If you want to comment on a peer's opinions in that thread then click on '**Add a comment**' in his response. You can also watch the tutorial (<http://youtu.be/SINSJKdez6g>) (see also, the updated version (<http://youtu.be/TNoOB8q19kQ>)) in order to make the best use of the interface.

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☒ I have watched the videos and participated in the discussion.



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