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The War on Terror and Protecting Human Rights

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Facilitator: **Felice Gaer**, Jacob Blaustein Institute for the Advancement of Human Rights; UN Committee Against Torture

Speakers: **Martin Scheinin**, Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism; **Gerald Staberock**, International Commission of Jurists; **Salvador Tinajero**, Permanent Mission of Mexico to the United States

There is no topic for which the UN has created more mechanisms and instruments than torture, and every new instrument has a section addressing torture. The Convention Against Torture, which was adopted and ratified in the 1980s, contained the first statement in international law that no exceptional circumstances can ever justify torture. Countering terrorism is the area where torture is most frequently still used.

Questions:

- What is the impact of the US backing away from the Committee Against Torture (CAT), and what could the US do or change?
- What is the status of mainstreaming for torture based on sexual orientation?
- What constitutes torture?
- What about the specific kinds of torture addressed under the Convention on the Rights of Persons with Disabilities (forced detention, treatment, medication)?

Martin Scheinin explained that his position of Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism has a 3-year term that is renewable once, and is appointed by the HRC. He visits countries such as Turkey, the US, and Israel, and presents recommendations after consultations with NGOs.

The major successes of Special Rapporteurs have not been in identifying human rights violations, but in making use of their access to governments to engage with them, influence the drafting of laws, and taking a legal approach. At the UN level, they can help shape the agenda by providing themes, such as profiling, privacy concerns, ESCR, gender, and the listing of terrorists. Challenges include the need for an invitation to visit a country, lack of resources, inertia within the UN, and sometimes interference by the OHCHR regarding how to fulfill their mandate. Attacks by governments for some decisions (such as

including sexual identity within the recent gender impact report) also pose problems. Additionally, opponents on these issues still continue their work to influence the judiciary and constitutional judges at the national level. Finally, there are different definitions of torture that can at times be vague and manipulated (e.g., cruel and inhumane treatment).

Strategies going forward should be to think out of the box and really engage with hardliners. Human rights need to be mainstreamed into the counterterrorism response of the UN. To have a greater effect on national policies, it's effective to embarrass governments. Also, it is important to call for legal analysis, because the judiciary can play a major role. The grassroots level is also important, and big organizations should be responsible for collaborative reporting – don't take information from one organization only. Academic institutions, think tanks, and consultants are useful for providing expertise and legal reports, especially since they have no budget.

As for disabilities, medical experimentation is prohibited. There is an open legal question about who can be made a proxy within human rights and national laws, but the autonomy of the human person must be protected and full and informed consent must be ensured.

Regarding US policy, copycatting needs to be discouraged. Peace-time laws should be adapting, and trials under the Military Commissions Act need to be ended, since they cannot produce a fair process.

Gerald Staberock discussed the International Commission of Jurists, which is one of the oldest NGOs still in existence. They work on replacing a war approach with a criminal approach.

The US had a major change with the Obama administration, and there were global expectations for change. There is a new openness in global discourse and negative rhetoric around human rights from the US has vanished, which has had a positive global impact. But entrenched policies and laws did not disappear, and it is difficult to engage governments to change these measures.

A lot of efforts happen on local levels, such as 16 public hearings worldwide to facilitate discussion on human rights and counter-terrorism, including government officials, jurists, and police. They used the credibility of these hearings in their report, and are promoting them within policy dialogues, including to the UN.

Challenges include unprecedented exceptionalism, the militarization of justice, and the long-term impact of Bush-era policies seeping into the broader legal structure. Counter-terrorism needs to be reframed within a criminal justice framework, not as a war issue ("war on terror"), since this will always lead to more deferential policies. In the US and globally, we need to figure out how to refocus concepts of remedies, reparations, and impunity. The US must be held accountable or it will be impossible to hold the rest of the world accountable. A key issue is intelligence work and accountability.

Salvador Tinajero, the Third Secretary for the Permanent Mission of Mexico to the UN, discussed the importance of governments taking on a leadership role, and the steps that Mexico has taken.

The HRC and the UN are political animals. NGOs bring up issues and areas to address, and states then try to create norms and standards. In 2002, most countries were ready to support a counter-terrorism

resolution. In 2003, they built more civil society alliances, and the Inter-American Committee on Human Rights gave them more information on the impact of counter-terrorism. Guantanamo was also a big issue, and made human rights standards vulnerable worldwide. A resolution to investigate these issues was defeated, and they started to bring the human rights world and the security world together. The Counter-Terrorism Committee worked with the Human Rights Commission to form a coherent human rights policy. They pushed for a new mechanism, but were opposed by Western governments who argued that sufficient mechanisms already existed. Mexico brought a resolution to appoint a Special Rapporteur for counter-terrorism, which led to the creation of Martin's position.

Controversies over sexual orientation and defamation of religion require a more creative approach. The definition of torture is evolving (e.g., Pinochet). For persons with disabilities, there are medical responsibilities in cases of torture, and a need to find a legitimate representative when a person is not able to express themselves. Local, grassroots work is important in shaping policies, especially when civil society does not only react to violations within a country but actively lobbies for policy changes.

Felice Gaer noted that there are also treaty bodies, such as the Committee Against Torture. There are narrow and broad definitions of torture, including definitions that include any kind discrimination as a purpose of torture. The use of comments has also increased. According to Article 16 of the Geneva Conventions, prisoners of war may not be discriminated against.

Gerald Staberock argued that regulating intelligence agencies is the next frontier – after 9/11, they assumed new powers of interrogation, detention, and gathering information, taking over the traditional roles of law enforcement. These new powers require new preventive measures in Western and other nations, against practices like arbitrary detention, secret detention, passing detainees on to another country's intelligence service to be tortured, and renditions. States are exploiting exceptions to international law, and existing oversight mechanisms can't cover all of these loopholes, including in Europe. Discussion on the appropriate powers of intelligence services and how oversight structures should react or require reform is needed. On the international level, there is no legal instrument covering intelligence, and there are many legal challenges when intelligence is used in the judicial process.

Salvador Tinajero cited the history of the resolution creating a special rapporteur for counter-terrorism as an example of the success of grassroots organizations. After many cases began coming to the Inter-American Commission, they decided to make a study of the issue – and NGOs collected the information on the impact for human rights and helped to give the government an understanding of the situation, which the Mexican government then brought to Geneva. **Martin Scheinen** noted that NGOs and grassroots organizations were particularly important in bringing prison conditions to the attention of the international media, and engaging prison staff at site visits.

Points in Discussion:

- Issue of targeted killings not technically in war zones (e.g. Yemen) – Obama currently favors targeted killings by US in the name of the “War on Terror”

- Difficult/controversial issue of accountability within US for civil society. There's an accountability crisis everywhere, not just in the US – if the US can't, who can? It was a problem not to have addressed this from the beginning with Obama, now we need to change the parameters of the debate, and speak with European powers also. The US needs at least 1 court case on conspiracy to keep conducting torture.
- Tension among grantees regarding Obama – he's said all the right things, but actions have been lacking (you want this, you do it). Others don't want to criticize him and risk harming his agenda. But we and the international community need to push him to live up to his principles. The administration does see itself in a very vulnerable position, and the reality is that there is tremendous fear of terrorism. We need to collect best practices in intelligence and counterterrorism and convince people they will be kept safe. There is not enough research that's been publicized about what strategies, negotiation, and diplomacy keep us safer. But human rights organizations should always lead with the principled argument and then back it up with the practical – since opponents can always find cases where bad policies may have worked.
- The international community needs to be technical, legal, and persistent in explaining why things are wrong.
- It's important to provide good arguments for the media and engage with public debate (bring together experts on the ticking bomb scenario etc).
- Constitution project based in US will start torture and accountability project with a bilateral, bipartisan committee and high level officials on both sides to run convenings and report.
- There's a knowledge gap in the US about the impact of US policy on the world – a lot of people still don't understand why the US was targeted, and think that terrorists were jealous of us.
- How can the Special Rapporteur get access to Russia? EU can help pressure (e.g. Tunisia). Russia is more difficult – can offer consultations in Geneva, or after mandate is over. Public criticism and exposure are key.