

Panel 1: Are Adequate Legal Frameworks in Place at the Domestic Level?

Protections Provided by International Law

*Remarks of Manfred Nowak**

Courtesy of Rick Reinhard



Manfred Nowak

THANK YOU. GOOD MORNING. IT IS VERY GOOD TO BE HERE AGAIN AT THE WASHINGTON COLLEGE OF LAW, WHICH I CONSIDER ONE OF THE BEST LAW SCHOOLS, IN PARTICULAR IN THE FIELD OF HUMAN RIGHTS – not only in the U.S. but I would say worldwide. I also feel privileged to teach these highly interesting classes here. I am also much honored to speak at this international conference. As you see, my contribution is starting the discussion

– we are talking, as you said, not only about international law, but also about whether there are adequate legal frameworks in place at the domestic level, and my task is to give an introduction on what is the international law in this respect.

Let us start with the obvious. The prohibition of torture and other forms of cruel, inhuman and degrading treatment or punishment – which I will refer to as CIDT – is one of the very, very few absolute and non-derogable rights, like the prohibition of slavery and the slave trade. This means that there can be no exceptional circumstances whatsoever, whether international or non-international armed conflict, threat of war, violence, threat of terrorism or organized crime under which torture or other ill-treatment could be justified. All attempts to undermine the absolute nature of the prohibition of torture, be it by academics, be it by politicians, are just wrong. They are violating a very well established principle of international law, which is based on very good grounds. This general prohibition is found in most constitutions of the world, but at the same time torture is practiced in most areas of the world, and all too often in a widespread and even systematic manner. So far, out of all my fact-finding missions, there was only one country – Denmark, including Greenland – where I did not find torture cases. In all the other countries, I found cases of torture. In two countries, in Nepal and recently Equatorial Guinea, I found systematic torture. If you look at the inquiry procedure of the Committee Against Torture, the Committee found systematic practice of

torture – and that is really the worst situation – in quite a number of countries including Turkey, Egypt, and others, for example Serbia and Montenegro under Milosevic. All too often, torture is really a widespread practice, which means that there are no adequate safeguards in place.

In reaction to the systematic practice of torture in the 1960s and 1970s during the dictatorships in a number of Latin American countries, the United Nations, but also the Organization of American States and others, developed specialized treaties creating specific legal obligations for states relating to the prohibition and prevention of torture and CIDT. I will focus primarily on the United Nations Convention against Torture, which in principle has three different objectives: the first is to fight impunity, and the other members of this panel will further elaborate on that; secondly, to provide victims with the right to remedy and reparation; and thirdly, the obligation to prevent torture. I will address the issues in this order.

FIGHTING IMPUNITY

Fighting impunity means – and this was for the first time included in a major human rights treaty – that States Parties – we now have 145 States Parties – have an obligation under Article 4 of the CAT to ensure that all acts of torture are offenses under their criminal law, and, secondly, that these offenses are punishable by appropriate penalties which take into account the grave nature of torture crimes. So, the Convention recognizes that torture is a very, very serious human rights violation which must be made a crime, not just a misdemeanor, a crime under domestic law, with appropriate penalties. And if you look at the practice of the Committee Against Torture, “appropriate penalties” doesn’t mean a fine or a disciplinary punishment: according to the Committee, several years of imprisonment can be seen as a penalty appropriate for the gravity of the offense of torture. The obligation to criminalize torture not only refers to the inclusion of the specific offence of torture into domestic criminal law, but also includes the obligation to establish comprehensive jurisdiction. This means, of course, first of all that the territorial state has an obligation to bring perpetrators of torture to justice. Secondly, the nationality state of the perpetrator – following the principle of active nationality – is obliged to investigate and prosecute torture crimes. For the United States this means that if U.S. citizens torture anywhere in the world, whether it is in Guantánamo, in Afghanistan, in Iraq, wherever – again the U.S. has an obligation as State Party to the Convention against Torture to investigate, and if enough evidence is found, to bring the perpetrator to justice.

In addition, the Convention includes the universality principle, which, originating in the anti-terrorism treaties, for the

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first time established an obligation under an international human rights treaty to exercise universal jurisdiction. This means that whenever a person is present on the territory of any of the States Parties, the authorities have an obligation, if there is enough evidence that this person has perpetrated torture, to arrest the person, conduct a preliminary investigation, and then under the principle of “*aut dedere aut iudicare*” decide whether to extradite the perpetrator – which is only possible if another state is requesting extradition – or bring this person to justice before their own criminal courts.

Now, in practice, I should say that I am always again astonished at how few of those 145 States Parties actually have established a legal framework to implement Article 4 of the CAT and the following articles. The legal framework required under the Convention includes the establishment of a specific crime of torture in accordance with the definition of torture under Article 1, which is fairly clear and simple: it is the infliction of severe pain and suffering, not extreme pain or suffering as Mr. [Jay] Bybee and Mr. [John] Yoo have claimed. It is severe pain and suffering – mental or physical, intentionally inflicted. So, you cannot torture by negligence. Torture is committed for a specific purpose, such as extracting a confession, not just any purpose. In most countries of the world where torture is practiced, it is inflicted for the purpose of extracting confessions or information relating to criminal proceedings, or for intelligence purposes – torture in Guantánamo Bay was not used for the purpose of extracting confessions but for extracting intelligence information – in addition, torture might also be used as a form of punishment, intimidation or discrimination. The essential element of the definition of torture is the specific purpose against a powerless individual. That is very important: an individual who is in detention, in a situation where he or she knows that the torturer is in absolute control of him or her. The victims of torture are very often hooded, blindfolded, kept in incommunicado detention, or in secret places of detention. Often they are handcuffed, shackled, naked, etc. These methods are used to show the victim “you are powerless, and we can do with you whatever we want, so you better talk,” that’s the idea. In addition, there must be state involvement in the act of torture. This does not necessarily mean that state officials carry out the actual torture, although usually that is the case. State involvement is also given by acquiescence, where the state has knowledge of or should have knowledge of but does not take the necessary action to prevent private individuals from torturing.

So again, very, very few countries have actually criminalized torture with adequate penalties. Let me just give you my own country, Austria, as an example, where the penalty for torture is up to two years. Of course if torture results in death, or serious physical injury, then the penalty might be more. But the reason why torture as such should be criminalized with serious penalties is the situation of powerlessness of the victim. Even if torture does not leave long-term physical injuries amounting to organ failure, as discussed in the U.S., long term mental problems can result. It is the very situation of powerlessness of the victim, in which electric shocks and water boarding etc. is applied, that soon reaches the level of severe pain or suffering.

Secondly, even if States Parties have the legal framework in place, often there are no adequate penalties applied in practice, as I just said. In Austria, there was recently a serious case of torture by the police in a deportation case of a citizen of Gambia, who had resisted the deportation and was then seriously beaten up. The courts eventually investigated the case – the four police officers concerned were prosecuted and sentenced to six to eight months on probation. This is not what we call an appropriate penalty.

The same can be said with respect to universal jurisdiction: very often there is no legal framework in place. Think about the *Habré* case before the Committee Against Torture, concerning Mr. [Hissène] Habré, the former dictator of Chad, who has lived in Senegal since the 1990s. Senegal is a State Party to the Convention and they did everything to avoid bringing this person to justice. And even now, after the Committee has said, “you have violated the Convention,” it is still very difficult to establish the legal framework for applying universal jurisdiction.

Very often governments don’t really understand the concept of universal jurisdiction. They say, ‘we are only competent if there is an extradition request,’ which is a misunderstanding of the principle of universal jurisdiction. Again, I will give you another case from my own country: with respect to Mr. [Izzat Ibrahim] Al-Duri, the former deputy of Saddam Hussein, there was enough evidence that he was involved in serious torture in 1988 and in operations against the Kurdish population. When he came to Austria in the late 1990s, we requested that he would be detained and that universal jurisdiction would actually be applied. The Austrian Ministry of Justice responded that there was no extradition request – as if Saddam Hussein would actually request the extradition of his deputy to come back to Iraq – it doesn’t make sense. This scenario also took place in Germany in the Almatov case concerning the former Minister of the Interior of Uzbekistan, where the German government had enough evidence that he was responsible for the systematic practice of torture but refrained from initiating proceedings against him.

So in fact, we only have very few cases where persons were really brought to justice in accordance with Article 4 of the CAT even on the territorial principle. Under the universal jurisdiction principle, I think there are a handful of cases of best practice by the UK. For example, in the case of the former Afghan warlord Faryadi Sarwar Zardad, who applied for asylum in the UK, the crown prosecution service went nine times to Afghanistan to actually secure evidence and he was sentenced by a British court to ten years of imprisonment.

So again, my answer is that it is very clear that impunity is one of the main reasons for torture. But with regards to the legal framework required under the CAT, States Parties are not taking their obligations seriously.

THE RIGHTS OF VICTIMS TO AN ADEQUATE REMEDY AND REPARATION

Secondly, I will turn to the right of victims to an adequate remedy and reparation. Again, the Convention is very, very clear. Article 13 stipulates that each contracting state shall ensure that any person who alleges that he or she has been subjected to

torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by a competent and independent authority – this means that every allegation of torture needs to be taken seriously; there should be no fear of reprisals by the person who complains; and there should be an independent investigation. The investigation must be carried out as quickly as possible in order to establish the facts and secure (medical) evidence. While the investigating body does not necessarily have to be a court, it is important that the respective authority is independent from the police or prison personnel and must be equipped with full police investigating powers in order to conduct an effective investigation. The UK, Ireland, and Northern Ireland put such authorities in place, but in most countries independent investigation mechanisms do not exist. If you are in detention, and again this is my experience as Special Rapporteur, if you are in detention, people are afraid to lodge a complaint for fear of reprisals.

In addition, there is the question of who carries the burden of proof. Usually victims are tortured in the presence of five or six police officers. They are alone without other witnesses. How can they prove physical injuries if they do not have access to any forensic examination? So it is very, very difficult to prove torture allegations, especially given the *esprit de corps* often prevalent among the police. Thus, once the victim has established a prima facie case that he or she was subjected to torture, the burden of proof shifts to the state. But again, in many countries, there is no adequate legal framework in place ensuring that people in detention on any territory under the jurisdiction of each State Party enjoy an effective right to lodge a complaint to a competent authority, followed by an independent investigation into the allegation. Of course, in the U.S. context the right to a remedy applies not only to people held in detention on U.S. territory, but also to those held at Guantánamo Bay etc. So, in any case where an individual alleges that he or she has been subjected to torture, there is an obligation to investigate independently and then to take the necessary action.

According to Article 14 of the CAT, victims of torture have a right to reparation. From a classical human rights point of view, the state where the act of torture occurred must provide reparation. Often the very fact of the official recognition by the government of the truth established through an independent investigation can constitute part of the reparation. An apology or a similar symbolic act by those who bear direct or indirect responsibility for the practice of torture often means more to the victims than money. But usually, torture victims, whether they have endured long term physical injuries or not, continue to suffer for the rest of their lives. They are in need of psychological, medical, and often social rehabilitation measures over a long period of time. Medical and psychological treatment leading to full recovery and rehabilitation is highly expensive. Thus, the right to monetary compensation is crucial.

In many countries of the world, special rehabilitation centers for torture victims have been established, but in states where torture is systematic or widespread, these rehabilitation centers are usually not available. Victims often try to escape, flee, and seek asylum in another state. The problem then is that the obligation to provide reparation ex officio only rests with the state respon-

sible for the torture, but the victim has no right to reparation against the asylum state for the suffering inflicted by the authorities of another state. With restrictive asylum policies in Europe and other parts of the world, it is getting more and more difficult to actually receive rehabilitation in those countries. In many of these states, rehabilitation centers might exist, but the victims of torture may not be granted asylum or are not taken seriously. For example, there are many Chechen refugees throughout Europe, who are traumatized, who are really in need of rehabilitation and in fact they are treated as if they are criminals and sent back to the Russian Federation.

From a civil law point of view, victims of torture have a right to compensation against the individual perpetrator. Under Article 14 of the CAT, States Parties are also required – and I read it aloud – “to ensure in their legal system that a victim of an act of torture obtains redress and has an enforceable right to adequate compensation.” This right to a civil remedy against the individual perpetrator, including the right to obtain compensation, must be available and nothing in the text or drafting history of the Convention suggests that this right is limited to torture committed on the territory of the respective State Party. But any interpretation going beyond the territoriality principle, i.e. the availability of a civil remedy against the perpetrator in, for example, the asylum state, raises difficult questions with respect to the concept of universal civil jurisdiction.

Here in the U.S., the *Filártiga [v. Peña-Irala]*,¹ case and other cases under the Alien Tort Claims Act² started a very good practice, but very few other countries are following. Recently the House of Lords, in the *Jones [v. Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others]*³ case held that British citizens who claimed that they were subjected to torture in Saudi Arabia could neither sue the Kingdom of Saudi Arabia nor its civil servants before British courts for compensation because the “foreign state’s right to immunity cannot be circumvented by suing its servants or agents.” In my opinion, this judgment is not in accordance with the obligation of the United Kingdom under Article 14 of the CAT to provide victims of torture (in this case British citizens) with an enforceable right to compensation against the individual perpetrators in Saudi Arabia. In short, there remains much room for improvement to really provide victims of torture not only with the remedy but also with full reparation.

THE PREVENTION OF TORTURE

Finally, I come to the issue of the prevention of torture. There are many different obligations in the Convention relating to preventive measures. In the materials on the cd-rom, you find a recent article I wrote on torture and enforced disappearances in which I refer to a whole list of measures to prevent torture. In addition, Amnesty International has published its 12-point program for the prevention of torture. If these recommendations were taken seriously, torture could easily be eradicated. To mention just a few of these points: the prohibition of arbitrary arrest and detention, the prohibition of incommunicado detention, and the prohibition of secret places of detention – of course situations of enforced disappearances are ideal situations in which torture occurs. The keeping of comprehensive prison registers,

as well as access to lawyers, doctors, forensic experts, families, also have an important preventive effect.

Speaking of restrictions on judicial control and the right to habeas corpus: I have read the most recent reports on Guantánamo Bay and I find it unbelievable that there are people who have spent 7 weeks in detention at Guantánamo Bay, but because they have failed to file the appropriate immigration forms under immigration law they cannot be released into the U.S. They actually can't be released by the courts! The limit of length of police custody has usually been 48 hours – 48 hours during which the police can keep a suspect. Then he or she has to be brought before a judge and the judge decides either there is enough evidence to justify pre-trial detention, or, if not, the person has to be released. In cases concerning suspected terrorists, the maximum period of police custody might be extended for a few days, but seven weeks without judicial control certainly exceeds the permissible time period.

The maximum period of pre-trial detention should also not be too long because there is a risk of being subjected to torture. In addition, education and training of law enforcement officials and the review of prison rules help in general with keeping places of detention in accordance with minimum conditions of human dignity. In many countries, conditions of detention are appalling and in violation of international minimum standards for the treatment of prisoners sometimes amounting to inhuman and degrading treatment. For example, the lack of access to food and a minimum of hygienic standards combined with the lack of any kind of medical facilities amounts to inhuman and degrading treatment. In some countries, detainees are really treated like animals. I think Nelson Mandela once said, "If you really want to see the human rights culture of a country, go to the prisons."

Of course, the principle of non-refoulement is very important for the prevention of torture. There is not only an obligation on States Parties not to commit torture, but Article 3 of the CAT also obliges States Parties not to send a person to any other country where there is a serious risk of torture. And again, this principle was undermined by the practice of requesting diplomatic assurances used by the U.S. and many European states. For example, Sweden and other countries, knowing that in certain countries torture was systematic or widespread, sought to obtain the assurance by that state that a certain individual, whom they wanted to expel, deport or extradite would not be tortured. But in cases of diplomatic assurances, the treatment of the person sent back cannot be monitored by the sending state. Requesting diplomatic assurances does not relieve the sending state from the absolute prohibition of non-refoulement. Another issue crucial to the prevention of torture is the non-admissibility of evidence extracted by torture as stipulated in Article 15 of the CAT. Under the principle of the tainted fruit of the poisonous tree, any information obtained as the result of torture should not be used in any criminal proceeding or any other proceedings, including extradition proceedings. If this is taken seriously, it would be a major incentive not to practice torture.

The most important preventive measure is regular visits to all places of detention, about which we will hear more later on. In my opinion, the Optional Protocol to the Convention against Torture is one of the most important new developments

for the prevention of torture, and I would, as we have done on many other occasions, very strongly urge the U.S. government to consider ratifying this important new treaty. OPCAT goes beyond the European Convention for the Prevention of Torture by not only establishing a UN Subcommittee on the Prevention of Torture, with the right to visit places of detention, but more importantly, by requiring each State Party to establish an independent national preventive mechanism. This national preventive mechanism should be composed of experts, including doctors and psychiatrists etc., and mandated to carry out regular ad hoc visits to all places of detention, including prisons, pre-trial police lock ups, psychiatric institutions, detention centers for migrants, minors etc. If the inspections are carried out on a regular basis, they are an effective tool for the prevention of torture and other ill-treatment and enforced disappearances.

What we actually need is a shift from the paradigm of opacity, which still surrounds places of detention, to a paradigm of transparency – in other words, opening up places of detention to the outside world, so that people from the larger community can come in. That is the best way of preventing torture. I am very grateful to the Association for the Prevention of Torture for having promoted the development of this important new instrument and now monitoring or assisting not only the ratification process but also the implementation process of OPCAT. Again if we talk about the legal frameworks in place at the domestic level and measures taken to implement the obligations under OPCAT, I am very discouraged. In European states, to name for instance Germany, regular inspections of places of detention are left to a small number of honorary commissioners – in a country with eighty million inhabitants and just under 200 prisons, this just doesn't work. The creation of independent and effective monitoring bodies under OPCAT costs money, but it is worthwhile in order to prevent torture and CIDT.

In other words, if there is the political will, every police chief and every prison director who wants to eradicate torture can do it within his or her police detention facilities. He or she just has to have the political will to implement a zero tolerance policy within the institution, including carrying out regular supervision and monitoring of the treatment of detainees. In my function as UN Special Rapporteur on Torture, I very often come to a prison where I am told by the prison director or person in charge of the detention facility "I have never heard of any torture allegations." Within one day of inspection, I then often receive many more credible and very often corroborated allegations of torture by detainees, than the competent authorities have received in years. This shows that there is a general lack of willingness to take torture allegations seriously and a lack of interest in eradicating torture. I think that every government, every president of a state, can eradicate torture if he or she has the political will to do so. Thank you.

HRB

ENDNOTES: Protections Provided by International Law

¹ 630 F.2d 876 (2d Cir. 1980).

² 28 U.S.C. § 1350.

³ [2006] UKHL 26.