

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

Challenging Impunity

*Remarks of Diane Orentlicher**

IT IS A PLEASURE TO BE HERE, WITH THIS VERY DISTINGUISHED GROUP OF PANELISTS. As will be clear – I believe already is clear from Manfred Nowak’s remarks – international human rights law has long paid special attention to the scourge of torture, which is absolutely prohibited by international law. Yet even though torture was already unequivocally banned in all of the comprehensive post-war human rights treaties, specialized treaties have been adopted both at the international and regional levels to ensure effective enforcement of that prohibition, and also to provide effective redress when torture does occur.

These specialized measures are aimed at ending impunity – a notion that figures prominently in the way that international legal experts talk about the obligations that states assume under treaties like the Convention against Torture. Indeed, Mr. Nowak invoked that concept when he said something to the effect, “impunity is one of the main reasons we have torture.” We often use the phrase “culture of impunity” to describe the conditions in which inhibitions, restraints against torture have been so loosened that people are encouraged to commit torture without fear of penalty or other serious consequence. And so, much of human rights law aimed at curbing torture seeks to dispel what we call the “culture of impunity.”

As my colleague Rick Wilson mentioned, several years ago I was appointed by then UN Secretary-General Kofi Annan to update principles that United Nations Special Rapporteur Louis Joinet had developed a little over ten years ago, which provide guidance for states in combating impunity, not just for torture, but for all gross human rights violations and serious violations of international humanitarian law. My mandate was finite and specific: It was to update the principles that Louis Joinet had developed during the 1990s in light of two considerations.

First, the updated Principles on Combating Impunity were supposed to reflect an expert assessment of developments in international law since Mr. Joinet had prepared his draft Principles – and these developments had in fact been quite significant. Second, the updated Principles were supposed to reflect the best practices of states in combating impunity. That is, the updated Principles were supposed to reflect and distill lessons learned from countries that have made vigorous efforts to combat impunity and in this way to try to ensure that torture and other serious abuses do not occur or, if they have occurred in the past, to prevent their recurrence.



Diane Orentlicher

What I would like to do now is to briefly describe the four pillars of these Principles, which were, in effect, endorsed by the Commission on Human Rights in its last session in 2005, and then hone in on two of their core ideas with a view toward considering what light they may shed on a question now generating substantial debate: How should the Obama administration address a set of still unresolved issues concerning practices of torture committed by agents of the United States as part of this country’s response to terrorism?

In doing so, I want to acknowledge that framing policy positions in terms of the requirements of international law and the lessons of international experience is not an approach that tends to have the best traction, especially among policy-makers in Washington. Yet as Manfred Nowak has reminded us, the United States has voluntarily assumed international obligations, including those imposed by the Convention against Torture. And in one of his earliest Executive orders, President [Barack] Obama reaffirmed the United States’ commitment to bring its practices as well as its laws into full compliance with our inter-

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national obligations. It is also the case that relevant principles of international law, as well as the experience of other states, are quite relevant and in some ways very helpful in illuminating the contemporary debate about how the United States should confront its legacy of torture.

Let me turn to the UN Principles on Combating Impunity. First, a couple of general points. One is that the UN Principles do not explicitly address situations of political transition, but many of the principles have particular relevance when a government seeks to reaffirm the rule of law and to prevent future abuses at a moment of change following a period in which systemic abuses have occurred. In this respect, the updated Principles recognize that there are moments of special opportunity for societies to turn a corner, and that it is very, very important to seize those moments and make the most of them in order to prevent a recurrence of serious violations of human rights.

A second animating idea behind the updated Principles on Combating Impunity is that governments must take effective action *across a range of areas*, and that each of these is important – effective action in one area is not a substitute for effective action in others. It is not sufficient to criminalize torture and to prosecute it when it occurs, for example. Instead, states must also undertake effective institutional reforms; they must ensure redress and reparations for victims, and so forth.

So, what are the core areas for effective action? While there are 38 principles (in the previous version prepared by Mr. Joinet, there were 42), they sift down to four core ideas: the right to truth, the right to justice, the right of victims to have an effective remedy and to receive reparations, and the duty of states more broadly to undertake institutional reforms when it is necessary to do so in order to prevent a recurrence of systemic abuses. Since other panelists are addressing in some depth (1) the right to a remedy and reparations and (2) what the Principles call the “right to justice”; and (3) institutional reforms; I will focus on the right to truth.

As used by Louis Joinet and others, “the right to the truth” or “the right to know” has both an individual and social dimension. At the individual level, the “right to the truth” is the right of victims or their survivors to know the basic facts surrounding the abuses that they suffered personally. At the collective level, the right to the truth means that states must take effective

measures to preserve records concerning past violations and to facilitate public knowledge of the circumstances surrounding the perpetration of serious crimes.

This collective “right to know” rests on a fairly rich conception of the right of societies to preserve memory and have access to their countries’ historic memory. But one of the core ideas relates very much to the subject of this conference, and that is that the public needs to have access to knowledge about the underlying conditions that led to past abuses in order effectively to ensure, as informed and responsible citizens in a democratic society, that those conditions do not recur.

As I already indicated, I believe that this notion has special relevance for the question of whether the United States should investigate the circumstances that led to the abuses that my colleague, Rick Wilson, talked about in his introductory remarks. There have been a number of proposals from Congress to set up some variation of a commission to look into these abuses. In addition, this past week several prominent individuals and organizations sent a letter to President Obama calling on him to “appoint a non-partisan commission of distinguished Americans to examine and provide a comprehensive report on policies and actions related to the detention, treatment, and transfer of detainees after 9/11 and the consequences of those actions, and to make recommendations for future policy in this area.”

I believe that this proposal gets the basic idea exactly right. What it recognizes is that getting to the bottom of what we did and why, and what impact our actions had, is a necessary foundation for getting these matters right in the future. And the American public apparently already gets this: According to a poll undertaken by USA Today and the Gallup Poll about a month ago, almost two-thirds of Americans polled supported the idea that there should be some sort of investigation into the allegation of abuses committed in the post-9/11 period.

It is not yet clear what type of approach President Obama will support in this regard. In response to one of the proposals for a commission of inquiry – a proposal put forth by Senator Patrick Leahy – President Obama said something to the effect that his general orientation right now is to say “let’s get it right moving forward” rather than to look backward. I hope that in saying this, President Obama meant to signal that whatever action he ultimately takes or endorses, his goal is not to secure

any form of partisan advantage, but rather to ensure respect for the rule of law.

As a great student of history, President Obama understands that getting it right moving forward depends in part on how well we grasp what went wrong in the past. He is doubtless familiar with the words of another president from Illinois – Abraham Lincoln – exhorting his fellow citizens soon after his re-election: “Let us, therefore, study the incidents” of some of the great trials the country had just endured “as philosophy to learn wisdom from,” Lincoln said, and not for the purpose of establishing “wrongs to be revenged.”

While this country has yet to decide whether to convene a high-level commission of inquiry, the Obama administration has taken several very important and positive steps. On one of his first full days in office, President Obama sent a memorandum to the heads of Executive agencies directing them, while interpreting the Freedom of Information Act, to apply a clear presumption in favor of disclosure. The memo begins: “A democracy requires accountability, and accountability requires transparency.” Also important are several investigations that are still under way but which were initiated during the Bush administration. For example, according to news reports, a study by the Justice Department’s Office of Professional Responsibility, which is now in the final stages – and here I’m quoting from the *New York Times* – “sharply criticizes Bush administration lawyers who wrote legal opinions justifying waterboarding and other harsh interrogation tactics.” I hope that the Justice Department makes this report public. A number of other investigations are under way including, I believe, a Special Counsel’s investigation into the decision by the CIA to destroy video recordings of interrogations that may have included torture.

In closing, let me briefly touch upon the last broad category of measures for combating impunity included in the UN Principles. As I mentioned earlier, this category consists of measures that states should undertake to guarantee the non-recurrence of human rights violations. These are, broadly speaking, the type of measures that Manfred Nowak referred to toward the end of his remarks under the broad heading of “prevention.”

Now, obviously all of the other measures covered by the UN Principles, such as criminalizing torture, are also measures of prevention. But this last category comprises certain measures that may have special value when there has been a period of systemic breakdown in legal safeguards against abuse. Within the conception of the UN Principles on Combating Impunity, these measures include institutional reforms and other measures necessary to ensure respect for the rule of law, to foster and sustain a culture of respect for human rights, and to establish public trust in government institutions. The UN Principles provide that the aim of these measures should be to advance consistent adherence by public institutions to the rule of law and recommend that, when appropriate, governments should undertake a comprehensive review of legislation and administrative regulations that may have contributed to past violations.

In the spirit of this last category of measures, some of the early actions taken by President Obama go some distance already in the direction of guaranteeing a non-recurrence of abuses of detainees. On one of his first days in office, President Obama signed an Executive order to close the Guantánamo detention facility, to require the CIA to use the same non-coercive interrogation methods that the U.S. military is required to use, to report all detainees to the International Committee of the Red Cross (ICRC), and to provide timely access by the ICRC to detainees. He also ordered the closing of the CIA secret overseas detention program, and he ordered that a special task force be established to study and evaluate interrogation practices as well as practices concerning the transfer of individuals to other countries with a view toward ensuring that they are not tortured, and also to ensure that the United States does not violate our domestic or international legal obligations.

Going forward and building on these steps, I believe that it is critically important that the administration publicly affirm a core principle as it decides how to address particular policy options—that enforcing the law against torture is not – and *emphatically* is not – a form of partisan politics. Indeed, it is important publicly to affirm that it is quite the opposite: What is at stake is dispassionate fidelity to the rule of law and, not incidentally, to the most cherished values of our country. Thank you. *HRB*