

## Keynote Speech

### Torture in the 21st Century Conclusions - Six Years as UN Special Rapporteur on Torture

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This evening, I have been asked to share my general conclusions of my six years as UN Special Rapporteur on Torture [2004-2010]. With a view towards the development and purpose of the international law against torture, I will trace the progress and the setbacks in this development, interspersed with the lessons I have learned. I am convinced now more than ever of the urgent need for hard international law to protect and promote the rights of detainees.

To begin with, I find it instructive to return to the difficulties of defining and proving torture. Doing so requires a look at the Convention Against Torture (CAT), and a brief review of the four major criteria needed to define torture and distinguish it from cruel, inhuman or degrading treatment or punishment (CIDT).

- First, torture requires the "causing of severe physical and/or mental pain or suffering." The word "severe" is critical and means that there is a certain threshold. We should not use the term "torture" in an inflationary manner for other forms of ill-treatment, but it also does not mean "extremely severe" or "excruciating pain", as the Bush administration wanted us to believe.

■ Second, torture requires the attribution of the conduct to the state, whether the act was committed by a law enforcement official or with his or her acquiescence. In many of my reports I have made clear, for instance, that specific practices committed against women or children, including **female genital mutilation** and other traditional practices, do fall within this definition if the state is not taking proper action against them under the principle of due diligence.

■ Third is intention and purpose. You cannot torture negligently. Torture must consist of the intentional, deliberate infliction of severe pain or suffering, and be committed for a particular purpose. More than 90 percent of all cases of torture that I found in all regions of the world were for the classic purpose of extracting a confession, which is later used before criminal courts; however, the purpose might also be intimidation, discrimination, or punishment.

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While it is not present in the CAT, there is a fourth criterion that I regard as extremely important: the powerlessness and defenselessness of the victim. If you look at the definition of torture in the Rome Statute of the International Criminal Court, you will find the element of detention. I agree that it is the powerlessness of the victim that makes torture such an evil, the fact that one person has absolute power

over another. This distinguishes torture from other forms of CIDT, **the excessive use of force on the street to disperse a demonstration or a riot, for example. And this is why, like slavery, torture is the most direct attack on the core of human dignity, a special form of violence whose prohibition** is the highest norm of international law, *jus cogens*.

The prohibition of torture has an interesting history, especially since we have enjoyed saying, in Europe in particular, that torture was eradicated at the end of the Middle Ages with the advent of the Enlightenment. But what we really mean by that hopeful statement was that it was gradually eliminated from criminal law because, until that time, the majority of criminal procedure acts pertained to torture. For instance, in the *Constitutio Criminalis Carolina*, the famous body of German criminal law by Charles V in 1532, two-thirds of the laws were actually about what type of torture could be applied for what types of crime, against which person, for how long, etc. Thus, criminal procedure was very much about regulating torture; and yes, that was eliminated. However, torture itself, despite what the books say, has never been eliminated.

There was a certain renaissance of the use of torture in the twentieth century, in particular by totalitarian regimes, which then led to the absolute prohibition of the practice of torture after 1945. But it continued even after that. I am thinking in particular about the French in Algeria, the Greek military dictatorship in the late 1960s, and, of course, torture in Latin America. In fact, Chile became a kind of a symbolic case,

which inspired Amnesty International's fight against torture and the United Nations' adoption of a declaration on torture in 1975, which was followed by the Convention Against Torture (CAT) in 1984. Finally, in the 1990s, again due to systematic torture in Bosnia-Herzegovina, Rwanda and other countries, the systematic practice of torture was defined in international criminal law as a crime against humanity, which is codified in the Rome Statute of the International Criminal Court. However, with 147 signatories, the CAT remains the most important piece of international legislation with regard to general applicability.

CAT has four main aims and objectives, namely to combat impunity, to prevent torture, to provide reparations to the victims, and to strengthen international monitoring. The first and most important of these objectives is combating impunity. The manner in which the CAT demands that a state does this is a *novum*, something really new. Not only must the systematic practice of torture be made a domestic crime, but states also have an explicit obligation to stipulate the offence of torture in their national criminal codes, together with appropriate penalties.

I would often ask police officers, interior ministers, or prison directors what they would do if someone was found to be practicing torture. Usually the answer is, "No, there is no torture." Were I to stop there, I would have to conclude that there is no torture in any country. So instead my next question is necessarily, "OK, but let us assume the hypothetical case that you find a person torturing who is actually under your command?" To this question they reply, "Yes, of course, we would take very serious measures against this person." And then I am told about measures such as a freeze on promotion for half a year, or a slight reduction in salary; even suspending someone from office is almost unthinkable. To be clear, the CAT does not discuss disciplinary or administrative measures, but criminal sanctions. Further, the Committee Against Torture has stated that if you can actually prove torture, the sanction should be, on average, a very lengthy prison sentence. Torture is one of the most serious crimes, alongside other violent crimes such as homicide and armed robbery, and the punishment for the crime should fall within that category.

Further, the obligation to combat impunity extends beyond territorial jurisdiction. When one of its citizens tortures, every State Party to the CAT has an obligation to bring that person to justice, wherever they are in the world. In addition, Article 5(2) of the CAT obliges states to apply the principle of universal jurisdiction against perpetrators of torture. If a suspected torturer happens, for whatever reason, to be present in the territory of a State Party, its authorities must arrest the person, carry out a preliminary investigation, and then, under the principle of *aut dedere aut judicare*, either extradite the person to another country that might have a better jurisdiction, or, if they cannot extradite, bring the person before their own criminal courts. This scenario has almost never happened in reality. I think that we can count the number of cases in which people have actually been sentenced for torture on the basis of universal jurisdiction on one hand, but it remains an obligation nonetheless.

The second main aim of the CAT is to prevent torture, and here there are a number of specific articles to consider: the principle of *non-refoulement* [Art. 3]; the obligation to train the police [Art. 10]; the obligation to modernize interrogation techniques [Art. 11]; and, very significantly, the non-applicability of information extracted by torture, particularly in criminal trials [Art. 15]. If these principals were applied, they would have a powerful preventive effect, because, after all, the police are torturing in order to extract a confession, and it only makes sense if you can use this confession afterwards. If they and other preventative methods (such as a very short period of police detention, immediate access to a doctor, and the video and audio recording of interrogations) were taken seriously, torture could easily be eradicated in all countries in the world.

In my opinion, the most important preventive means are visits to places of detention. As my pre-predecessor [to the position of UN Special Rapporteur on Torture] Sir Nigel Rodley once said, we have to change the paradigm of opacity to the paradigm of transparency. Opening up prisons and other detention facilities operated by the military intelligence or police would be the most powerful way of preventing torture. Now, with the Optional Protocol to the Convention Against Torture (OPCAT), we have a potential system at the global level that obliges all States Parties to establish a national preventive mechanism, a national commission with the authority to visit all places of detention. I spent much of the time during my tenure [as a former UN Special Rapporteur on Torture], but also afterwards, convincing governments not only to ratify the OPCAT, but also to take it seriously, to establish an effective national preventive mechanism.

The third main objective of the CAT is the obligation to provide victims with an effective remedy and adequate reparation for the harm incurred. I am speaking, of course, of Articles 13 and 14 of the CAT, which, again, are violated in most countries. Victims almost never win a case by obtaining compensation, for example. But what they mainly need is rehabilitation. Victims of torture are often traumatized for the rest of their lives. They need long-term medical, psychiatric, psychological, social and other forms of rehabilitation. But in order to get it they must first win the case before a civil court, which is very difficult because such cases are never independently investigated and proven.

One of my main recommendations for better implementation of the CAT with regard to this third aim is to establish a "police-police", and by that I mean a body with full police investigative powers, that is at the same time completely independent from the police. The same situation exists in Israel, where there have been 600 complaints [against the Israeli Security Agency] and not a single conviction. Why? Because if the same body that is accused of torturing is investigating its own colleagues, then, of course, the esprit de corps comes into play and the investigation just does not work. It does not work in my own country, and it does not work in almost any other country in the world. So, if we are to take the total prohibition of torture seriously, then it is

only reasonable that allegations of torture are impartially examined by independent authorities. It is only if we can prove torture that we can take further measures against the perpetrators and for the benefit of the victims.

The fourth objective is to strengthen international monitoring. The UN has its own Committee Against Torture, which examines individual complaints. In addition there is also the inquiry procedure, i.e. ex officio investigations where there are reasonable grounds to believe that torture is being practiced systematically. The Committee Against Torture has visited quite a number of states at its own initiative, although it needs the agreement of the government concerned to do so. Egypt is the only country in the world that has not allowed the Committee into its territory to investigate. Others, like Peru, Turkey, Serbia and Montenegro, Brazil, Mexico and Sri Lanka, have allowed it to enter their territory, and the Committee found widespread or systematic practice of torture in each of these countries, which should be reason enough not to elect them to the UN Human Rights Council. However, Egypt, for example, is a very powerful member of the Human Rights Council, and we all know about the systematic practice of torture in that country.

The mechanisms that have been developed since the 1970s, including the CAT, have had a certain impact in terms of independent fact-finding, reporting, and "naming and shaming". There has been a certain decline in torture, whether in Latin America, the former communist states, or several African states. However, we must, of course, consider to what extent 9/11 marked a paradigm shift. And by 9/11 I do not mean only the terrorist attacks, but also the counter-terrorism strategy adopted by the Bush administration, which had an extremely negative influence on many other countries. Many have asked why, if even the United States of America, the home of democracy and human rights, is officially torturing, shouldn't they as well? The Speaker of the Jordanian parliament was the first to ask: Why are you coming to us? Why are you criticizing us?

Unfortunately, the US strategy was not without precedent. The British were the first to state officially that certain "combined deep" interrogation methods were permitted against IRA suspects in the late 1960s and early 1970s, including forced standing against a wall for up to 48 hours without being allowed to move, hooding, exposure to loud noise, and sleep and food deprivation. At the time the European Commission of Human Rights considered these acts to be torture. A British judge was persuasive enough to convince his colleagues that they only amounted to inhuman treatment or degrading treatment, but in any case it was a violation of Article 3 of the European Convention of Human Rights. And the British reacted positively; the use of these types of interrogation methods by the British security services was banned. The second attempt to justify certain "enhanced" interrogation methods was made by Israel. The Landau Commission claimed that these methods were not torture and were therefore allowed, before the Israeli Supreme Court decided differently in 1999.

When in 2002 Donald Rumsfeld described, for the first time, the kinds of interrogation methods that he was authorizing against suspected terrorists held at Guantanamo Bay, Alberto Mora, the legal counsel to the US Navy, said that the US Secretary of Defense was authorizing exactly those methods that the British had authorized and that the European Commission had found to constitute torture and inhuman treatment, which are absolutely prohibited. The confrontation led to a slight change in the methods used, although, as we know, torture and ill-treatment persisted as an official policy of the Bush administration, even though it attempted to convince us that these interrogation methods should not be regarded as torture.

The so-called "War on Terror" has really been the first attempt since the Second World War to question the absolute nature of the prohibition of torture, and to make torture socially acceptable in the "ticking-bomb" scenario, as Alan Dershowitz and others wished us to believe. We have also seen the complete dehumanization of the alleged terrorists, who have been deprived of more or less all their rights in the legal no man's land of Guantanamo Bay and other (often secret) places of detention on the ground that they are "outside the rule of law."

Of the three main torture memos that surfaced in the early 2000s, the Bybee Memo of 2002 was particularly influential, as it raised the level of pain that was prohibited from "severe" to "extremely severe". Here the severe pain threshold denoted such pain that accompanies serious physical injury, organ failure, the impairment of bodily function, or even death. That was the official definition that was sent to Alberto Gonzales and used by Rumsfeld, Bush, Cheney and others when they developed enhanced methods of interrogation. The same memo made clear that the purpose of establishing the Guantanamo detention center was to exclude the application of the US Constitution and international law. *Rasul v. Bush* was the first related judgment of the US Supreme Court, issued in 2004, and stated that this first assumption was wrong: according to the Supreme Court, Guantanamo Bay is within US jurisdiction because it is under the effective control of the US, and therefore the US Constitution applied. This was also the beginning of habeas corpus for prisoners at Guantanamo i.e. of lawyers being allowed to represent their clients in Guantanamo Bay.

In 2006, with the joint UN Report on Guantanamo Bay, initiated by my office and joined by several other UN Special Procedures, we made clear that the second assumption was also wrong. International law, of course, fully applies to the Guantanamo detention facility and other secret or non-secret detention facilities abroad. The Bush administration did cooperate to some extent by giving us information which was said to be classified, and even invited us to Guantanamo Bay. However, in the end, when it became clear that we would not be allowed to hold private interviews with Guantanamo detainees, we cancelled our visit. The legal report was thus based on interviews with former detainees and legal documents. In our legal assessment of the situation we came to the clear conclusion that the entire detention facility violated the right to personal liberty because people were held there in unlimited

detention. Not knowing how long they would have to stay in Guantanamo was, in fact, the most difficult experience for most detainees. If they asked, the routine answer they received was, "Until the War on Terror is over." And of course, certain interrogation techniques used there clearly constituted torture, including the use of extreme temperatures and forced feeding. We called for the immediate closure of Guantanamo Bay. We were the first UN body to do so.

Our other joint UN report was released in 2010 and focused on secret detention in the context of counter-terrorism, not only in the US or with regard to CIA-related activities, although, of course, the report makes extensive reference to them. We investigated 64 countries and clearly established that every form of secret detention/enforced disappearance is a crime under international law and always leads to torture, and that the very fact of being "disappeared" for a prolonged period of time amounts to torture. We also looked into the rendition flights, which themselves violated many rules of international law.

The two reports were an opportunity for a group of UN Special Procedures to address a matter of international concern from a variety of angles and areas of expertise. Special Procedures are independent experts, originally established by the UN Commission on Human Rights, which was succeeded by the Human Rights Council in 2006. They were initially country-specific; one of the first was, in fact, established in 1967 on the Occupied Territories. Country-specific working groups and Special Rapporteurs investigated the overall human rights situation in one country. With the establishment of the UN Working Group on Enforced Disappearances in 1980, the first thematic mechanism was created to investigate a specific human rights problem in all countries of the world. Others followed soon, including the Special Rapporteur on Summary Executions, in 1982, and the Special Rapporteur on Torture, in 1985.

in many countries the judicial system is among the most corrupt institutions of the state. This means that if you have money, you pay the police, you pay the judges, or you pay the prosecutors to secure your release. Some call it "bail," but it is more accurate to call it a "bribe." Very often, it is actual bribery. And if you do not have the money, you might spend a lot of time in detention without a trial.

During my tenure as Special Rapporteur on Torture, I received complaints on a daily basis, primarily from family members, telling me, "My husband/wife/daughter has just been abducted or arrested and is now in a place where he or she is at serious risk of being tortured." The complaint might reach the Office of the High Commissioner on the same day, where they would do a preliminary check to determine if the source was reliable and the allegation consistent. When it was submitted to me, I had to decide very quickly whether we needed more information or whether we should immediately send an urgent appeal to the country concerned.

I would send the urgent appeal directly to the minister of foreign affairs, either on the same day or the following day, with a request to investigate, just so that the Minister knew that the UN was aware that the person in question had been detained. We do not really know how successful it was, as very often we would hear nothing back. On fact-finding missions I often met former or even current detainees who told me that the urgent appeal had actually had an impact, and that they had not been tortured subsequently. However, I do not want to exaggerate; in many countries they did not care and then there was nothing to be done.

With regard to fact-finding missions, Special Procedures are different from, say, the European Committee for the Prevention of Torture, or the UN's Subcommittee on Prevention of Torture, which have the right to go to visit a country. I had to ask because Special Procedures are a charter-based rather than treaty-based. In the entire Middle East region, for example, I asked more or less every government, from Morocco, Algeria, and Egypt to Israel for permission to visit. The only government that responded positively was Jordan; the others did not feel the need to respond or did not respond positively. Certain states have a standing invitation, including most European states, for example Denmark. In this case I could call to say, "I accept your standing invitation. Can I come next month?", and they would answer, "No problem." Thus there are major differences. However, as I explained to all countries, they were not obliged to invite me, but if they did, I had certain preconditions. I would require authorization for full access to places of detention, I would be accompanied by a forensic expert for purposes of documentation, and I would speak to detainees in private. Once there, I never announced where I planned to go and, in principle, had authorization to visit places of detention 24 hours a day. I made many night visits and held confidential interviews with detainees. The most difficult assurance to get from governments was that they would refrain from committing acts of reprisal, although, of course, you never knew whether they would indeed comply with that assurance once we had left. And, of course, the participation of detainees was always voluntary.

In China, for instance, it was almost impossible to interview detainees. Nobody wanted to talk to us. Conversely, I was impressed by the courage of detainees in Equatorial Guinea, for example, where torture is practiced systematically. People were extremely frank in speaking to me, but there was no way to follow-up: the ICRC has left the country, and there are no NGOs and no civil society. We knew that they would be beaten up afterwards, but they told us, "We have nothing left to lose. And you can report everything to the public. Use our names, because we want the outside world to know. That is the only way that pressure can be brought to bear." Where the ICRC did operate, for instance in Jordan, I gave the organization a whole list of prisons and names of individuals whom I thought might be subject to reprisals, and asked them to visit them again as quickly as possible, in order to see whether or not there had been reprisals against them. That gives a certain amount of protection. In Equatorial Guinea, however, there was nothing I could do. It was extremely difficult from an ethical point of view.



I surveyed 18 countries in all the regions of the world, and I told the governments in question that my visit did not mean that I expected to find extensive torture. In fact, however, of all the countries that I visited there was only one, Denmark (including Greenland), where I did not find a single case of torture, but on the contrary excellent prison conditions. I found torture in all the other countries; in some there were isolated cases, but in most countries the practice of torture was widespread, routine or even systematic.

And from my visits, my meetings with detainees, and the many years that I have spent thinking, researching and writing about torture, ill-treatment and conditions of detention, I can easily though unfortunately conclude that we are suffering from a global prison crisis, and that generally our criminal justice system is broken. This conclusion is based primarily on four factors. The first is prison populations. The US has been in first place for many years, with an incarceration rate of 743 out of every 100,000 people. The EU average is about 100, and the global average is lower. Israel's, at 325, is fairly high. The second indicator is the prison occupancy rate. In most countries we see tremendous overcrowding of more than 300 percent. Israel currently has an occupancy rate of 92.2 percent, which means that over the entire country its prisons have not reached their capacity. This, however, does not exclude the fact that certain prisons may be overcrowded.

The third factor, which in my view is the most important indicator of whether or not the administration of criminal justice is functioning properly, is the percentage of pre-trial detainees within the overall prison population. Israel's score of 36.5 percent is rather high. A rate above 30 percent is usually an indicator that there is something wrong, meaning that the judiciary is not working or is very slow. Unfortunately, in many countries the judicial system is among the most corrupt institutions of the state. This means that if you have money, you pay the police, you pay the judges, or you pay the prosecutors to secure your release. Some call it "bail," but it is more accurate to call it a "bribe." Very often, it is actual bribery. And if you do not have the money, you might spend a lot of time in detention without a trial.

I have alluded to the fourth factor – impunity for the crime of torture – already. Torture is practiced in the great majority of the world's countries. Most of the States Parties to the CAT are not properly fulfilling their obligations under the Convention. Most countries do not even have a crime of torture. Israel is a good example. There is no crime of torture in Israel that is in accordance with the definition in the Convention Against Torture and that carries appropriate penalties.

The main reasons for the widespread practice of torture are the non-functioning of the administration of justice, corruption, and the demand to be "tough on crime." There is a lot of pressure on the police to solve crimes. Often they simply arrest someone and beat him until he confesses. Having found both that the practice of

torture around the world is widespread and that there is a global prison crisis, I am now calling for a UN Convention on the Rights of Detainees.

Last year, I was in Bahia, Brazil to attend a UN Crime Congress, and the governments of Brazil, Argentina and other countries in Latin America supported such a convention. The whole group of 77 states, including China, agreed to it in principle, but our initiative was ultimately killed by the US and certain European states, including Germany. This was unfortunate but, of course, agreement needs to be achieved. Therefore the convention was not part of the Bahia Declaration. Nevertheless, we still are working on the UN Crime Commission in Vienna.

In principle, while you are deprived of your right to personal liberty, you nonetheless retain all other human rights as far as possible. In reality, however, when you are deprived of your liberty you are often no longer seen as an individual who deserves to enjoy any of your human rights. This is a dangerous attitude that desperately needs to be changed. As a lawyer, I am convinced that a binding treaty might help in this regard, and that when we are made aware of the injustices and ill-treatment to which detainees are subjected, we have a responsibility, not only as lawyers, but also as human beings, to actively seek measures to protect them.