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Transcript

Enforcing the Absolute Prohibition Against Torture

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Chair: Sir Emyr Jones Parry

Chair of Board of Trustees, Redress

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Emyr Jones Parry:

I am Emyr Jones Parry. I have the privilege of being the Chairman of Redress. I welcome you all to this very special meeting of Chatham House tonight. This evening will be on the record; it is being screened. Professor Juan Méndez will speak for about twenty minutes, after which we will go into question-and-answer mode. I propose that we take questions three at a time and then we will get the responses to them.

Redress was founded twenty years ago. I am delighted, as we come to that anniversary, 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 Méndez, 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 Méndez, and to now invite you to address the Chatham House audience.

Juan Méndez:

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's 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 on a variety of bases but certainly not for the absolute prohibition of

their practice. So any coercion that does not meet the definition of torture because it is not so 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.

The requirement that torture be inflicted with a specific purpose, as established in the Convention Against Torture, 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 act of torture, 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 by President Obama is still holding. 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; ways have been found to limit its effects, if not to limit its application completely.

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, a position that they call the 'control principle', that whoever is 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, '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 what I consider a good faith interpretation of the exclusionary rule 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 [not] 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 other aspects 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 patients, drug addiction treatment. 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.