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## Transcript Q&A

# 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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### Question 1:

One of the weaknesses of the Committee Against Torture's scrutiny of state reports, apart from the question of the definition of torture, has been that it hasn't really done a very good, consistent job of scrutinizing how state parties implement the other obligations under the Convention. I was wondering whether you see any possibility that you could be working with the Committee to develop more effective scrutiny, either through your own mandate or in cooperation with the Committee, to ensure that all of the other obligations are consistently implemented?

### Question 2:

You mentioned the control principle. I think the government here, as you know, is trying to embrace absolute secrecy in a new bill called the Security and Justice Bill (sic). Do you have a locus in making representations to the British government, or any other government for that matter, which is aiming to stop any information, including possibly information relating to torture, from being disclosed? Secondly, can I ask also if you have a role in investigating those who are aiding and abetting extraordinary rendition, which you also mentioned? I'm thinking of the recent Libyan example.

### Question 3:

I want to ask about the relationship between the morality and the law about torture. You began by saying there is a growing scepticism about the absolute nature of the prohibition on torture. You can imagine people coming up with examples, saying, 'Under these extreme circumstances it might be permissible to torture somebody – it would still be wrong, but this wrong would be permissible in light of the benefit of doing so, saving thousands or millions of others.' I wonder whether you think it's worth drawing a distinction between morality and law here. The moral case might not be absolute. You might be able to imagine extreme circumstances in which torture might be permissible, although still wrong. But that's a different question from whether there should be an absolute legal prohibition, that there might be still good moral reasons for making the legal prohibition absolute because of the special role that law plays – its institutional role, the sort of effect it has on motivation. That might be one way of responding toward this scepticism.

**Juan Méndez:**

Those are excellent questions. I appreciate them.

With respect to Question 1, we try to coordinate as much as we can to coordinate with the Committee Against Torture (CAT), which as you know is the implementing organ of the Convention, and with the Subcommittee on the Prevention of Torture, which is the organ of the Optional Protocol [to the Convention Against Torture] that concentrates on prevention, particularly through prison visits. But talking about coordination and actually coordinating are two different things. For a variety of reasons, it is not all that easy.

Nevertheless, we share information. I find general comments by the Committee and even the reports in individual cases very useful when I prepare for missions, for example. Obviously it is the kind of coordination that does not bind each other to any particular position, but it does happen. It happens as much as we can make it happen. It is favoured by the fact that the current chairman of the Committee is the dean of my law school, so I have him on the same floor and I can go and talk to him. But more institutionally, it is quite complicated. It is hard to do. The bureaucracies of the Office of the High Commissioner in Geneva are, more or less, not necessarily working with the same people all the time, so it is harder than one would imagine.

I think nevertheless it does happen and it is helpful. I would go beyond those two organs. We also try as much as we can to coordinate with regional bodies that deal with the same issues. For example, the Inter-American Commission on Human Rights has a Special Rapporteurship on the Rights of People Deprived of Liberty, which has done a very good report only very recently. We have had meetings with them and in Addis Ababa with the African Commission on Human and Peoples' Rights, which also has a couple of rapporteurships that have mandates that overlap with mine, and with other mandates as well. That cooperation is not only about torture. I find it particularly important that without any cooperation, because we didn't know of each other's role, almost at the same time when I wrote my report on solitary confinement, the Committee for the Prevention of Torture, which is a European committee that does prison visits for the Council of Europe, came out in its annual report urging states to reconsider the use of solitary confinement because of the same reasons that I found. That was completely serendipitous. Since then we are trying to coordinate. Again, we could do a lot more.

With respect to certain obligations, which I think was what the questioner had in mind, I actually find the general comments by CAT very useful. For example, on this question of not allowing statutes of limitation for the investigation of torture, which is, if you will, an adventurous position to take as the Convention doesn't say so (in so many words, at least), I actually borrow from the positions taken by CAT on that, I think not in general comments but in response to periodic country reports by some countries.

On the question of the control principle as used in the UK, I am engaged with the United Kingdom government in a variety of cases but the engagement is confidential at this stage so I can't say what exactly we are talking about. We have talked about the commission of inquiry, the Gibson Inquiry. I came to London, among other things, to talk to the Gibson commission of inquiry at an early stage. The government has explained to me why it has been suspended and when, if it happens, another commission of inquiry will be reinstated. In that context we have talked about the control principle, but I wouldn't be able to say any further what the position of the UK government is on the control principle nor what I would eventually be able to take as my own view on that.

I did want to mention it because it is an important issue and because it deals with the responsibilities of states for, as you call it, aiding and abetting. There are a variety of situations, especially after 9/11, where the violation of the prohibition on torture finds more than one state party responsible. What exactly are those responsibilities that each of those contributing states have made should be the subject of serious investigations. I have to say that together with other special rapporteurs, my predecessor instituted a report on clandestine detention policies that was widely circulated at the time. We have tried to follow it up by writing questionnaires and sending them to a variety of states. Unfortunately the responses have been very disappointing. Some states, including states representing blocs of states, like the Islamic Conference and the African states, have taken the position that we don't even have the mandate to ask about follow-up to that report. Other states individually have said they are still investigating, other states have said they have investigated and that didn't happen. Quite frankly, I think the whole idea of having a serious debate about this, with focus from Geneva but engaging the states in serious discussions about what was done and is being done to provide redress, I'm sorry to say it hasn't been as fruitful as I would have wanted it to be.

Finally, I actually think morality and law should not be separated. If there is something that is prohibited by law but morality recognizes that there should be some exceptions to it, then the law should recognize exceptions as well –

and vice versa. I do believe that it is very easy, and unfortunately has made big inroads in the culture, this argument of the 'ticking bomb' scenario, for example. Anybody that even spends ten minutes learning about torture knows that that's not the way things happen. There is never a ticking bomb scenario where we actually mistreat somebody and then magically you prevent a bomb from going off – it doesn't happen, and torture doesn't happen that way. Even the logic of the argument is faulty because since you don't know who is the one that has the information, then you have to torture 100 or 200 people. Maybe 199 of them will be innocent and won't be able to give you the information, and maybe the one who has the information won't give it to you because he's a seasoned terrorist and knows how to withstand torture.

I think in terms of the relationship between morality and legality, that was very ably addressed by the Supreme Court of Israel in the 1999 case in which it addressed that and said even if the ticking bomb scenario would allow for some kind of mitigation of punishment or even for some defence, first you accept the principle that the action was illegal and criminal. Then you look at potentially mitigating circumstances. I think all legal orders in the world would allow for that kind of thing and I think it's perfectly legitimate to do that, because maybe in good faith this person thought he was committing a crime but serving a higher good. Then we will see. But you have to see it on a case-by-case basis. The Supreme Court of Israel said that even if that were to happen in an individual case, it could not justify a policy of administrative torture. I think that basically should have disposed of the question. Unfortunately, this ticking bomb scenario – I used to hear the argument when I was in Argentina in the 1970s, and we hear it all over again. It seems never to go away.

#### Question 4:

I wonder if it is possible to have any kind of equivalence or balance in an assessment of violations of human rights between state actors and non-state actors. When you get a report like that of the Lessons Learnt and Reconciliation Commission in Sri Lanka recently, they clearly condemn the Tamil Tigers as well as the Sri Lankan government for a whole range of violations of human rights, including torture. Yet the responsibility of the government is clearly of a different nature to that of a non-state actor. I wonder if the UN organization considers, as a moral principle, whether it is possible to make any kind of equivalence between the two or balance of judgment or condemnation.

### Question 5:

I was wondering to what extent your mandate would cover forms of sentencing and what protection would children have in that. We have investigated the legality of inhuman sentences in more than fifty countries, and children *can* be sentenced still to life, death or corporal punishment.

### Question 6:

I was wondering whether you could share any discussions you have had with US authorities on the case of Bradley Manning and if you are not able to share those discussions, whether you could make any comment on the case. And more generally, whether you have been or will be involved in any way in any related judicial proceedings.

### Juan Méndez:

With respect to sentencing, we obviously have a mandate to involve ourselves in sentencing, for example, where there is any kind of physical, corporal punishment, because corporal punishment falls squarely within the prohibition on torture or cruel, inhuman and degrading treatment. International law is very clear on that, even in early cases in the European court about birching and school discipline corporal punishments. Those are clearly within my mandate.

The difficulty with the death penalty particularly is that the Convention Against Torture and the International Covenant on Civil and Political Rights do distinguish pain and suffering that is part of a regularly imposed penalty. So we have to either take it case by case and say that in addition to the death penalty here, there have been other forms of suffering, for example, death row phenomenon, or take the mode of the execution of the penalty as an example. We are taking the position that the already relatively well-established policy of the international community is that stoning, for example, or hanging or beheading are cruel, inhuman and degrading treatment, even as forms of execution or of capital punishment. There is a little more ambiguity with respect to lethal injection and firing squads. But we are trying to explore and get the international community to explore if there is such a thing as a painless form of executing the death penalty. On the other side, is it possible to have the death penalty administered without some form of the death row phenomenon, which is in itself cruel, inhuman and degrading? That is where we are at the edges of the mandate but we are pushing the

envelope, because I think it is a correct way of contributing to what seems to be a very clear trend towards the abolition of the death penalty.

I should say that my report will coincide with a separate report also on the death penalty by the Special Rapporteur on summary executions and extrajudicial executions. Hopefully, because we are presenting them within a day of each other, we hope to have some effect on this trend towards abolition.

In terms of other sentencing, I'm following with some interest – I have to say that I have not really taken action yet – on questions of, for example, life terms for juveniles. In many countries, including my own – recently the Supreme Court has outlawed it as unconstitutional, life terms for juveniles, no matter what the crime. The argument is that it is cruel, inhuman and degrading, among other things – there are other arguments as well. To what point I can consider that part of the mandate is something that is going on right now so I wouldn't be able to say much more, but I am interested in it.

With respect to Bradley Manning, my views on the case have been published, so the case is no longer confidential and I am free to discuss it. Essentially what happened is that he was held in solitary confinement, or whatever name the Marine authorities gave it – they didn't call it solitary confinement – but effectively, 23 hours a day by himself and one hour of exercise, also by himself, for about eight months. We inquired as to what the justification for it was. The government generally took the position that it was prevention of harm watch, they called it. They didn't discuss any further because of privacy concerns. They claimed it was not suicide watch, it was prevention of harm watch and they didn't give any further explanation.

I tried to interview Bradley Manning, to see what his story was. The Pentagon authorized my visit but not on conditions that they would guarantee privacy of communications, which of course under the rules that the United Nations has given me, I cannot accept. I nevertheless told Bradley Manning's lawyer that if he were still interested in seeing me under those conditions, I would make an exception, but he declined. He did not want to waive his right to a private, confidential meeting with me. Around that time, he was moved to Fort Leavenworth. There, he has no longer been in solitary confinement.

After my report was published, his lawyer contacted me again and offered me as a witness in a certain part of the trial that is beginning now against him. The court martial that is trying him refused. That's where it stands. I told the lawyer, all I can talk about is his solitary confinement. My mandate does not extend to whether he should even be prosecuted or not – that is something I

have no opinion on. What I can say about solitary confinement is in that report, so you can use it any way you can – I don't have to be there for it. So I think that's where it stands right now. Obviously as the case progresses, there are more and more calls on me to take action on it, but I've basically done all I can, quite frankly.

[Question 4 repeated]

The Convention Against Torture defines torture as something committed by a state agent. Paramilitary groups, groups doing the dirty work of governments, are easily considered state agents anyway, but in my mind the mandate includes all potential contributors to mistreatment. If you cannot find state agency that doesn't mean that the inquiry stops there or that we ignore the atrocities that may be committed by non-state agents.

In the case of insurgent groups, I would deal with those cases but applying the laws of war that clearly prohibit mistreatment anyway, and prohibit outrages against the personal dignity of any detainee. I would, like the rest of the international human rights community has long ago, apply the Geneva Conventions to the behaviour of insurgent groups.

I think the grey areas that are constantly being brought to my attention are, for example, organized crime organizations, like in the north of Mexico where they commit incredibly brutal attacks on the civilian population but they do not have the purpose of obtaining power in Mexico. The other aspect of it is the possibility that business corporations may be complicit in acts of torture or other atrocities committed either by non-state agents or state agents.

My view is that each country and the international community have to offer remedies to victims of torture. The remedies in some circumstances are not meaningful if they leave out some important actors that were particularly influential in making torture happen in that particular case. Therefore, for example in the cases going on before the Supreme Court of the United States now, *Kiobel v. Royal Dutch Shell* and *Mohamad v. Palestinian Authority*, I intervened as *amicus curiae*, urging the ability of the laws of the United States on civil damages for torts committed outside of the United States to be left as wide open as possible to include the possibility, obviously in the appropriate cases, for bringing non-state actors – in one case it was the Palestinian Authority and the other a corporation – to justice, and to be able to determine whether they had in fact involved themselves criminally or in a tortious way in committing atrocities against individuals.



**Question 7:**

I feel like we're always talking from the hard edges rather than the soft middle, and this applies to Mexico in particular. We know there is an absolute prohibition on torture but we also know that in Mexico, 92 per cent of the people are there [in prison] on forced confessions or false confessions, and that 98 per cent of confessions are forced or false. I'm sorry if this sounds combative – we know Mexico signed up to all the [treaties] and constitutionalized every single human rights treaty, it has constitutionalized OPCAT (Optional Protocol to the Convention against Torture). So my question is, what exactly is your role in that type of situation?

**Question 8:**

I'm interested in your mandate and the extent to which it can address serious and systemic human rights violations amounting to persecutory harm. I'm assuming persecutory harm which is serious and systemic falls within your mandate. I wonder whether you would consider doing a thematic report on the persecution of gay men and lesbians as a result of state action and then the actions of non-state actors. There are reports that there are 175 million people at risk of such persecutory harm across the globe; ten per cent of those will be persecuted. I wonder whether it would be an appropriate use of your office to do a thematic report looking at the issues that arise out of such persecution.

**Juan Méndez:**

On Mexico, I am very well aware of the enormity of the problem. My role there is the same as in every other country, to try to entertain cases that are brought to my attention that illustrate a pattern and hopefully, through them, to involve the state in a conversation about what can be done about reducing the incidence of torture and enforcing the prohibition. I am in conversations with the government of Mexico about visiting. They recently invited my colleague on summary executions. States cannot invite all of us at the same time obviously but the government does know that I'm interested and I have a few cases going on.

Beyond that, I hope that I can get to the nitty-gritty about what does it take in the procedural law to establish good safeguards for the prohibition, because I feel, from what I know from the past, from having worked on Latin America for many years, is that Mexico has great legal traditions in some areas but on this one they have really fallen into a practice of nominal prohibition – what I

illustrated in my prepared remarks, without mentioning Mexico, this is a clear example. The courts consider the statement made before the police 'spontaneous', and unless they find evidence to deny its voluntariness, they accept it anyway. I think a much better solution would be not to accept them and to make sure that any statements are made in a judicial setting, not a pre-judicial one. Mexican lawyers and Mexican authorities are well aware of this and I think they have made some changes on this as well, but the end result is not what it should be – I completely agree with you on that.

Beyond that, I see my role in Mexico as working in conjunction with Mexicans, especially the civil society, but also with the Inter-American Commission and Court of Human Rights and with other organs of protection. It would be impossible for the Special Rapporteurship to have the only role here. I think that is probably true of many other countries around the world.

With respect to persecutory harm, as you called it, I am already engaged in some cases in which gay and lesbian inmates have been mistreated, including solitary confinement of gay and lesbians, supposedly for their protection – and not only in a criminal or criminal investigation setting but even in immigration detention. So I am working on those cases. Again, I can't reveal the details because they are still in confidential stages. I take the position that if they are subjected to mistreatment or if they are subjected to cruel, inhuman or degrading treatment under any circumstances, the fact that they are gay or lesbian or bisexual not only does not affect my mandate but if anything it raises an additional concern, because by and large their sexual orientation will be used as an excuse or as a reason for the mistreatment.

Whether to make it a thematic report, that's a good suggestion and I'll have to take it under advisement. I have decisions on what themes to bring up as a matter of reports, involving a variety of considerations, including our ability to do serious research about it, our ability to engage experts from around the world, our ability to engage with states in a serious discussion about what should be done. I may decide to do something about that. Until now, it has not been brought to my attention, but I will consider it. Thank you.

### **Emyr Jones Parry:**

I'm conscious there are lots of questions out there but the time has also caught us.

Thank you very much indeed, Professor. It's been a very enlightening discussion. It also demonstrated the complexity of the subject; there are some

very difficult legal issues in the middle of all this. But also, the morality has shone through, partly thanks to that penetrating question – which got a very clear answer – about [how] law and morality should be congruent.

Rights only exist for as long as people defend them. They are often very hard-won but they run the risk of lapsing because we fail to recognize that they are being abused. It is the same with torture. If tonight has served any purpose at all, it is to underline the importance of the issue, why we should all be vigilant against it, and why in the best-ordered of states – the ones who purport to stand up for rights – we have to be as vigilant and perhaps even more so. With those few words, can I ask you to show your appreciation for Professor Méndez and his presentation.