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REFLECTIONS ON COMMITTEE AGAINST TORTURE GENERAL COMMENT NO. 2

*Sir Nigel Rodley KBE**

Thank you very much for that kind introduction, Ambassador Gallegos. Essentially, my speech was already given, either directly by Felice Gaer¹ or indirectly in the words of Theo Van Boven,² so I'll try to weave my way in and out of it. But first of all I would like to thank the organizers and Felice for stimulating this meeting. I was the Human Rights Committee Rapporteur on General Comment 31 that Felice referred to, that Theo referred to, and I wish I had the marketing brain to organize something like this after we had adopted it. It is a very good exercise in dissemination of human rights law. I'd like to thank the *New York City Law Review* for organizing it, CUNY School of Law, and the City Bar Association's International Human Rights Committee.

The last time I was here was at the meeting of City Bar Association's International Law Committee, and I think Scott Horton was a member, and it was of course on the torture issue. And of course everybody knows the very important role that Scott played in outing the legal meanderings going on in the Department of Justice and the Department of Defense that seemed to create a legal context for torture, cruel or degrading treatment or punishment. My own comments are going to be generally around that dimension of the General Comment 2 and I guess I will start where Felice started: with paragraph 1 of the General Comment and its categorization of the prohibition of torture as a norm of *jus cogens*, a peremptory norm, a non-derogable norm.

Since most of the time we are going to be paying due homage to the General Comment, I hope I may be permitted a mini-

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¹ Felice Gaer has served on the Committee Against Torture since 2000, including as Vice Chair (2004–2006), as General Rapporteur (2006–2008), and as year-round Rapporteur on Follow-up to Country Conclusions (2003 to present). For her remarks see, Felice Gaer, *Opening Remarks: General Comment No. 2*, 11 N.Y. CITY L. REV. 187 (2008).

² Theo Van Boven was the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment from 2001–2004. For his remarks see, Theodore van Boven, *Remarks on the Convention Against Torture's General Comment No. 2*, 11 N.Y. CITY L. REV. 217 (2008).

lament, namely, that the General Comment deals only with the prohibition of torture as a *jus cogens* rule, not with ‘other’ cruel, inhuman or degrading treatment or punishment, or at least not explicitly. In the major human rights treaties, the overall prohibition of ‘torture or cruel, inhuman or degrading treatment or punishment’ as a whole is considered non-derogable. Certainly, the American Law Institute’s Third Restatement of U.S. Foreign Relations Law refers to the whole prohibition as the norm of *jus cogens*, and I guess it would have been nice to have the Committee Against Torture taking the same view. However, as we’ll see, one of the excellent dimensions of the General Comment is the way it links cruel, inhuman, degrading treatment or punishment so tightly to torture, that there is a kind of implicit reintegration of cruel and inhuman treatment or punishment into the same sort of status as torture; that’s made particularly clear in the area of preventive action, which I’ll come back to in a little while.

Obviously I want to stress, regardless of the categorization of *jus cogens* or not, the nature of the *absolute* prohibition. And here the Committee is clear that the measures required to prevent torture must be applied to prevent the other forms of prohibited ill treatment.³ Accordingly, the Committee has considered the prohibition of ill treatment as likewise non-derogable under the Convention. So already it’s coming back together again—maybe the *jus cogens* does not apply, but the non-derogability dimension is already articulated, and importantly so. As you heard from Felice, the Committee considers the prohibition of torture and cruel and inhuman treatment and punishment as absolute,⁴ and indeed it would be pretty difficult to read the Convention in good faith any other way, but it’s good to have the Committee reaffirming it. As Felice says, the text was drafted, as was General Comment 31 of the Human Rights Committee,⁵ in the context of, and in full awareness of, the global reaction to the atrocities of 9/11 and it is important always to reaffirm the absolute nature of all aspects of the rule—

³ U.N. Office of the High Comm’n for Human Rights [OHCHR], Comm. Against Torture, *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 3, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter *General Comment No. 2*], available at <http://www2.ohchr.org/english/bodies/cat/comments.htm> (follow “English” link under General Comment No. 2).

⁴ *Id.* at ¶ 1.

⁵ U.N. Human Rts. Comm., General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument).

torture and cruel, inhuman, or degrading treatment or punishment.

Just to focus a little off the United States for the moment and perhaps onto my own country, we had a very recent reaffirmation of the absolute nature of the rule in the European Court of Human Rights. And for those of you who are buffs, you might be aware that there was a leading case in that court: the *Chahal*⁶ case. In that case, the United Kingdom had tried to say that it could send people who are considered a risk to national security back to where they could face torture, at least, if they can get “satisfactory” assurances that they won’t be tortured. As a minimum, the U.K. tried to persuade the Court that in national security cases the risk threshold should be raised. And the European Court of Human Rights said, “No, you can’t do that.” The risk factor doesn’t change just because somebody is a risk to national security. If there’s a risk that somebody will be tortured when they get back to the country in question, they can’t be sent back, that would be a violation of Article 3 of the European Convention⁷ prohibiting torture and inhuman or degrading treatment or punishment. The U.K. very recently tried to reopen that in a couple of cases; the one that was decided first was *Saadi v. Italy*.⁸ In *Saadi v. Italy*, the U.K. reopened all of those arguments and brought yet another argument, namely that the prohibition may extend to torture and the risk level may extend to torture, but maybe it should not extend to other forms of cruel, inhuman, and degrading treatment or punishment.⁹ And of course, those of you familiar with the distinctions that people have been trying to make on this side of the Atlantic would be disappointed to know that some are trying to copy that on the other side of the Atlantic. Fortunately, the European Court of Human Rights came down resoundingly reaffirming the *Chahal* judgment

⁶ *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, available at <http://www.echr.coe.int/echr/> (follow “Case-Law” hyperlink; then follow HUDOC hyperlink; then search “Case Title” for “Chahal v. United Kingdom”; then follow “Case of Chahal v. United Kingdom”).

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf> (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”).

⁸ *Saadi v. Italy*, App. 37201/06 Eur. Ct. H.R. (Feb. 28, 2008), available at <http://www.echr.coe.int/ECHR> (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search “Application Number” for “37201/06”; then follow “Case of Saadi v. Italy”).

⁹ *Id.* ¶ 122.

in no uncertain terms.¹⁰ At least as far as the forty-seven countries that are parties to the European Convention covering some 800 million people, the rule is clear and it's good that the Committee Against Torture is indeed reaffirming it.

A key issue is the matter of definition. Again most of you will be aware precisely what the argument has been—not least based on unfortunate early European Court of Human Rights jurisprudence—that torture is at the top end of a pyramid of pain and suffering and that even the serious degree of pain or suffering involved in inhuman treatment isn't enough to justify something being called torture; it doesn't deserve what the court is pleased to call the special stigma of torture.¹¹ The court goes on to require even more pain or suffering, as well as the purposive element to extract information (obtain information and confessions and similar purposes) for the term to be applied. The European Court of Human Rights case law has eased off in the way it has applied that pyramid approach, narrowing the difference between the top (torture), and a little further down (inhuman treatment); but it hasn't abandoned the distinction. And that distinction, as I'm sure many of you know, has been played on this side of the Atlantic to try to argue that certain kinds of treatment may not rise to the level of torture defined by that pyramidal basis. I'm sure some of you are aware of the notorious and subsequently withdrawn Bybee Memorandum¹² written by John Yoo, which stated what the threshold of torture needed to be: the pain would have to be excruciating and agonizing or equivalent in intensity to the pain which accompanies serious physical injury, such as organ failure, impairment of bodily function or even death. That was the way the Bush administration was defining torture in the beginning.¹³ That memorandum was

¹⁰ *Id.* ¶ 138 (stating that the prohibition on torture and inhuman and degrading treatment is absolute, irrespective of the victim's conduct and a person cannot be deported where there are substantial grounds he or she would face a real risk of being subjected to torture or inhuman or degrading treatment).

¹¹ *See, e.g.*, *Case of Egmez v. Cyprus*, 34 Eur. H.R. Rep. 29, 771 ¶ 77 (2002); *Case of Ireland v. the United Kingdom*, 25 Eur. Ct. H.R. (ser. A) ¶ 167 (1978) (noting that "it was the intention that the [European Human Rights] Convention, with its distinction between 'torture' and 'inhuman or degrading treatment', should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering"); *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149, ¶ 96 (1999) (noting that severity marks the distinction between torture and inhuman treatment).

¹² *See* Memorandum from the Justice Dep't Office of Legal Counsel on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A to Alberto R. Gonzalez, Counsel to the President (Aug. 1, 2002), *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf.

¹³ *Id.*

withdrawn; a subsequent memorandum in 2004 resiled from that lurid language and altogether it sounded more reasonable. Nevertheless all the practices that were of concern in that first memorandum would still have been considered legal under the new memorandum, which presumably means waterboarding for example, which you are all familiar with, and which I don't think any international body could think of as anything other than torture.¹⁴

So it's good that the General Comment is taking the view that it's all interlinked, and there's a very interesting statement, in fact, in paragraph 10.¹⁵ Of course, there's no doubt that the pain required for torture is not the same as the pain required for degrading treatment. This difference, between torture and all other forms of ill treatment, is less stark—yes, the level of pain *may* differ, but we no longer have the affirmation that it *does* differ automatically. This is already the Committee moving away, appropriately, from any temptation to do what the convention definitely does not do, which is establish such a pyramidal approach. Its definition of torture, if you compared it with the definition of torture in the U.N. Declaration against Torture that formed the basis of the Convention, differs precisely in that respect.¹⁶ So it's again a good development.

I mentioned the preventive issues; the kinds of prevention that the Comment talks about are the ones that all international human rights bodies dealing with torture are concerned about, for example: the need to maintain an official register of detainees, the right of detainees to be informed of their rights, the right to promptly receive independent legal assistance, the right to medical assistance, the right to contact relatives, the need to establish impartial mechanisms, and so on. You can read what's there in paragraph thirteen.¹⁷ Basically it's a cluster of provisions designed to prevent incommunicado detention, the very circumstances which create the preconditions for torture. And again, it's good to have the Committee Against Torture seeing that as integral to the obligation to prevent torture and cruel, inhuman or degrading treatment and punishment.

¹⁴ See Memorandum from Daniel Levin, Acting Assistant Attorney General, Justice Dep't Office of Legal Counsel on the Legal Standards Applicable Under 18 U.S.C. 8824-2340 to Deputy Attorney General (Dec. 30, 2004), *available at* <http://www.usdoj.gov/olc/18usc23402340a2.htm>.

¹⁵ *General Comment No. 2*, *supra* note 3, ¶ 10.

¹⁶ Universal Declaration of Human Rights, G.A. Res. 217A art. 5, U.N. GAOR, 3d Sess., 183d plen. mtg., A/777 (Dec. 10, 1948).

¹⁷ *General Comment No. 2*, *supra* note 3, ¶ 3.

Let me conclude perhaps with a reference: Felice referred to paragraph three of the General Comment,¹⁸ which considers that the obligations to prevent torture and “other” ill treatment are independent, indivisible, and interrelated, so that the prevention of one is prevention of the other. And finally, in paragraph six, the statement that the Committee made after 9/11 reaffirming—precisely in the context of the so-called global war on terror—the need to preserve the prohibition.¹⁹

And it was interesting that about the same time, in my own valedictory statement to the U.N. General Assembly, I found myself saying on November 8, 2001:

However frustrating may be the search for those behind the abominable acts of terrorism and for evidence that would bring them to justice, I am convinced that any temptation to resort to torture or similar ill treatment or to send suspects to countries where they would face such treatment must be firmly resisted. Not only would that be a violation of an absolute and peremptory norm of international law, it would also be responding against a crime against humanity with a further crime under international law. Moreover it would be signaling to the terrorists that the values espoused by the international community are hollow and no more valid than the travesties of principal defended by the terrorists.

Well, I guess both the Committee and the Special Rapporteur on Torture found that their words did not fall on fertile ground at that time. Maybe the ground is more fertile now for General Comment 2 to have the kind of traction we all hope it will have, to reverse the recent challenges that Felice Gaer referred to, and that the norm of international law has faced. I am looking forward to the rest of the discussion on this really important instrument. Thank you for your attention.

¹⁸ *Id.* (“The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment under article 16, paragraph 1, are indivisible, interdependent, and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture.”).

¹⁹ In the aftermath of the attacks of 11 September 2001, the Committee specified that the obligations in articles 2 (whereby “no exceptional circumstances whatsoever . . . may be invoked as a justification of torture”), 15 (prohibiting confessions extorted by torture being admitted as evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) are three such provisions that “must be observed in all circumstances.”

Id. ¶ 6.