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Luncheon Keynote Address

*Remarks of Mark L. Schneider**

Courtesy of Rick Reinhard



Mark Schneider

I WANT TO EXPRESS MY APPRECIATION TO DEAN CLAUDIO GROSSMAN FOR THAT KIND INTRODUCTION. We have been friends for a very long time, and Claudio has introduced me at various events. However, I have noticed that since I became a Member of the Board of Trustees of American University, the introductions have become longer, more effusive and somewhat more exaggerated. In any case, I want to thank Claudio and the Association for the Prevention of Torture for inviting me to speak today. Also I am honored to be able to appear in place of Congressman Jim McGovern who I understand was unfortunately delayed in Massachusetts. Jim has been a leading advocate of respect for human rights.

The International Crisis Group pursues field-based inquiries into the drivers of conflict in some 60 countries, seeking to help prevent internal and international violence, and into the mechanisms for successfully promoting post-conflict reconstruction and stabilization to try and prevent future conflict. Our reports conclude that the gross violation of individual human rights and of humanitarian law, particularly the use of torture, from Darfur to Nepal, the Kivus [Democratic Republic of Congo] to Burma, Georgia to Iraq, and Pakistan to Bangladesh constitute a major cause of civil and international conflict and a major obstacle to reconciliation.

I thought it might be useful to take a brief historical look at the United States and the Prevention of Torture. Traditionally, the principle espoused by the United States has been to reject the use of torture and other cruel and unusual punishment. It is the rule accepted in law and endorsed by public opinion. Unfortunately there have been numerous exceptions in practice,

and each time they occur, they demean this country, damage our image and our interests, and increase risks to our own troops and to our citizens.

We are at a unique moment. Your presence today, the work of the Association for the Prevention of Torture, of UN Special Rapporteur Manfred Nowak, of a strong UN Committee Against Torture chaired by Dean Claudio Grossman, of numerous domestic and international human rights non-governmental organizations and civil society groups constitute a powerful force committed to ending torture.

It is a unique moment as well because President Barack Obama is on our side. He has placed himself squarely behind those who seek an absolute end to the use of torture. Not sometimes, not except for extreme circumstances, not for temporary period, not for prisoners of war, not for terrorists, not for enemy non-combatants, not in Guantánamo, not in Abu Ghraib, not in Bagram – but no where, no time, no one.

Torture violates domestic United States law. Torture violates international common law. Torture violates international human rights norms. Torture violates legally binding international treaties. It must end.

Two days after his inauguration, President Obama signed Executive Orders on detention and interrogation policy with 16 generals and admirals standing beside him. Those orders directed the closing of the Guantánamo Base detention facilities and perhaps most importantly revoked Executive Order 13440 signed by President Bush. The Bush executive order had re-interpreted Common Article 3 of the Geneva Conventions in order to permit harsh interrogations, waterboarding and other measures which previously were barred because they constituted torture.

Torture and other ill treatment – and let me be clear – waterboarding is torture, so are other harsh interrogation methods that were countenanced under the Bush Administration. They violate not only the basic laws of our land but the core values of generations of Americans tracing back to the very beginning of the this nation.

The Eighth Amendment to the U.S. Constitution reads: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Placing someone’s head underwater to the point of asphyxiation is both “cruel and unusual” and it is, as Attorney General Eric Holder has testified, “torture.” The Attorney General stated in his confirmation hearing, “if you look at the history of the use of that technique, used by the Khmer Rouge, used in the Inquisition, used by the Japanese and prosecuted by us as war crimes. We prosecuted our own soldiers for using it in Vietnam . . . waterboarding is torture.”

Yet, just recently, former Vice President Cheney acknowledged once again having supported those harsh interrogation techniques and specifically waterboarding. That reminds me of the comment made by President Lincoln one time during our

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American Civil War, when he was explaining to a group of soldiers his feelings toward the issue of slavery. "You know," said Mr. Lincoln, "whenever I hear anyone arguing for slavery, I feel a strong impulse to see it tried on him personally." When I hear someone condoning waterboarding, I feel the same strong impulse.

In terms of principle, we begin really with the Declaration of Independence that there "are certain inalienable rights, that among these are life, liberty and the pursuit of happiness." Torture and cruel and inhuman punishment do not fit in the framework. A variety of Supreme Court rulings, at least from 1879 on underscore that there are punishments and treatment of prisoners that are unacceptable regardless of objective because they violate the Eight Amendment. With respect to treatment of prisoners of war, George Washington stated clearly, "treat them with humanity," and Lincoln even more definitely, "Military necessity does not admit of cruelty . . . nor of torture to extort confessions."

The Geneva Conventions, particularly Common Article 3, outlaw torture and our military officers traditionally have been strong supporters of the Geneva Conventions and particularly Common Article 3.

The United States also was a leader in the post-World War II crafting of the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, and the Geneva Conventions. They all constitute international obligations which the United States not only signed, ratified and accepted but in many cases took the lead in promoting.

Remember that it was Eleanor Roosevelt who chaired the Commission that produced the Universal Declaration, stating, "This Declaration would have great moral force, and would say to the peoples of the world, 'this is what we hope human rights may mean to all people in the years to come'. We have put down here the rights that we consider basic for individual human beings the world over to have. Without them, we feel that the full development of individual personality is impossible." Article 5 of the Declaration states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The Declaration in a sense was to be the preamble to an International Bill of Human Rights of which future International Covenants would carry legal treaty obligations. And so Article 7 of the International Covenant on Civil and Political Rights re-states that prohibition against torture or cruel, inhuman or degrading treatment or punishment.

The American Convention on Human Rights was signed by President Jimmy Carter on June 1, 1977 when only six countries in the Americas had signed and only two had ratified since its completion in 1969. For the next several years, I traveled throughout the hemisphere for the new Human Rights Bureau in the State Department urging the nations of the region to sign and ratify. One of the reasons I personally pressed hard for it to be signed, was the language of Article 5. Right to Human Treatment:

- Every person has the right to have his physical, mental, and moral integrity respected.
- No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

I was more successful there than here and a dozen more countries ratified the Convention between 1977 and 1980 with the Convention coming into force on 18 July 1978.

However, the key international achievement has been the adoption of the Convention against Torture. That treaty defines, specifies and details the obligations on state parties, including the United States. The U.S. participated in the Swedish-led drafting group from 1977 until it was finally approved by the General Assembly with the U.S. voting in favor in 1984. President Reagan signed it on April 18, 1988 and the first President Bush submitted it to the Senate recommending its ratification and President Clinton signed the ratified treaty following the Senate's advice and consent on October 21, 1994 with the enactment of implementing legislation (18 U.S.C. § 2340) making it part of the U.S. Criminal Code.

Last month, under that statute, in another principled action by the U.S., federal prosecutors successfully prosecuted the son of Liberian dictator Charles Taylor, now in prison at The Hague, and Charles Taylor Jr. was sentenced to 97 years in prison for torture carried out in Liberia. There are dedicated career civil servants working in the Office of Special Investigations in the Justice Department's criminal division and in the Human Rights Division of ICE in the department of Homeland Security who make a career out of pursuing war criminals, human rights violators who have gotten into the U.S. and those, like "Chuckie" Taylor who torture. NGOs also played a role in helping find witnesses who testified against Taylor.

If those actions represent the U.S. being true to its history, there is another, darker history of exceptions where torture and other measures of cruel and inhuman treatment occurred – going back perhaps to the war against American Indians, to instances of abuse in Vietnam, to maintaining relationships during the Cold War with military regimes, often including the training of police forces or military units of those regimes, whose graduates then were involved in torture – whether in Greece under the colonels, in the military dictatorships of Argentina, Chile, Paraguay and Uruguay, Nicaragua, Guatemala, the Philippines, Indonesia and South Korea. Where those exceptions have come to light, however, it is hard to find anyone held accountable, except in the rarest of instances.

Which brings me to the issue of impunity. There are three paths that I would argue need to be pursued in attempting to prevent torture in the future.

First, we must seek to strengthen those national and international institutions whose responsibility is to monitor and enforce the Convention against Torture and to seek greater adherence to the Optional Protocol, including the Special Rapporteur on Torture, the UN Committee Against Torture, the UN Voluntary Fund for Victims of Torture, the UN High Commissioner for Human Rights and in relation to the Geneva Conventions, the International Committee of the Red Cross.

Second, there is a need for continuing effort by human rights groups, civil society, the press and public officials which is why this conference is so important. The struggle is not over because there is a change in the White House or because we have these formal institutions with an important legal mandate behind them. We must continue to speak out against the use of torture – whenever and wherever it occurs and to demand access to places where it is alleged to occur. If we succeed in obtaining early access by attorneys, by the Red Cross, by human rights

groups, by church leaders and press – then we will reduce the use of torture and cruel and inhuman punishment.

Finally, if there is a path that needs to be explored more effectively it is how to reduce the level of impunity for those who are complicit in the use of torture. An internal Justice department report on the conduct of senior lawyers who approved waterboarding and other harsh interrogation tactics apparently raises serious legal questions, at a minimum as to whether they violated professional standards that apply to the Department of Justice. That report is now being studied by Attorney General Holder.

I would hope that the issue of professional standards would not end with an internal action of the Department of Justice but would merit action by the ABA to determine whether issuing opinions that flagrantly conflict with customary international law such as those prohibiting torture are consistent with the standards that one expects of members of the bar.

For those who are sworn to uphold the law, institutionalizing the use of torture should be a violation of that oath of professional responsibility and of public service. It parallels the institutionalized use of torture by intelligence officers, police and military in dictatorial regimes. They used torture as a means of promoting terror, as a mechanism for obliterating dissent and as a method to maintain themselves in power. They justified it because they argued that the alternative was communism. In the Bush era, the end was the prevention of future terrorist acts, and the means was a pattern of harsh interrogations that the Obama administration and military judges now reject as torture.

The ruling of Colonel Steve Henley last October 28 was quite clear:

“While the tort threshold is admittedly high, it is met in this case. The Military Commission concludes that the Accused’s statements to the Afghan authorities were obtained by physical intimidation and threats of death which, under the circumstances, constitute torture . . .”

What then happens to those who were involved in those acts? Senator Patrick Leahy and Congressman John Conyers have proposed creation of a commission to explore what actually was done over the past eight years with respect to these issues and to determine what additional measures are required to bar their repetition. Like the Church Committee, I suspect that such an investigation will reveal not only more information about the excesses that we know but also more information about excesses that remain hidden behind the secrecy cloak of executive privilege and national security exceptions.

Hopefully Obama executive orders and subsequent implementation in both the armed forces and the CIA will end the somewhat Alice in Wonderland legal framework that was crafted by some in the Bush Justice Department and Legal Counsel’s office. The legal interpretation seemed to be according to the words of Alice: “If I had a world of my own, everything would be nonsense. Nothing would be what it is, because everything would be what it isn’t. And contrary wise, what is, it wouldn’t be. And what it wouldn’t be, it would. You see?”

And thus what had been torture, no longer was because one simply said that that which had constituted torture no longer did. You see?

For anyone who has known someone who has undergone torture, the impact on their lives and on their souls can never be forgotten, even years afterwards. As you talk with the victims, it is seared into your own being, even more when they still bear the physical marks of the torture they have endured.

In April 1974, as a member of Senator Ted Kennedy’s staff, I was sent to Chile to investigate the human rights abuses which had been committed by the military junta there. The Pinochet regime believed that the end justified the means and guaranteed access to prisoners. I had that access to a house in Calle Agostinas where doctors who had worked in Chile’s Ministry of Health were held – and tortured; in Calle Londres, where military intelligence ran another detention center, in a basketball arena where virtually all of the 140 prisoners previously had been tortured; to a cell in the Santiago penitentiary where a dozen military officers were literally stuffed – all having suffered brutal treatment – the same cell where the general whose daughter is now President of Chile had been held before his death following torture two months earlier.

When I returned to Washington, I wrote a summary memorandum to Sen. Kennedy along with a much longer report. The paragraph on torture reads: “Despite junta assurances, and despite a very clear memorandum stating that mistreatment of prisoners is not to be permitted, torture continues. Not only were we told by detainees including about 80 percent of a group held in the basketball stadium that they had been tortured during their interrogations but we saw two young men who had been tortured as recently as three and five days earlier. One had fingernails swollen and fingertips burned from matches and needles inserted. Both had wrists rubbed raw from being hung for hours and both were black and blue from being beaten. They also said they had been tortured with electric shock during the interrogations. In all cases where we spoke with detainees – whether they were run by the army, navy or military intelligence – torture accompanied interrogations.”

We held hearings after that trip and were able to obtain bipartisan support for amendments that halted all military government aid to Chile, in the face of total opposition from then Secretary Kissinger. We also obtained the paroling into the United States of some 400 political prisoners from some of the jails we visited.

So for me, whenever the issue of torture arises, it is personal. The United States must hold true to the historical principle to respect dignity of individual human beings, even of those who hate us. In so doing, the United States best preserves its ideals, best promotes its interests and best protects its security. Our goals are clear: an end to torture and an end to impunity for those who conspire, condone or conduct torture. There must no longer be exceptions.

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