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Closing Plenary: Preventing Torture in the Fight against Terrorism

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CLOSING PLENARY: PREVENTING TORTURE IN THE FIGHT AGAINST TERRORISM

This panel was convened at 11:00 a.m., Saturday, April 11, by Lori Damrosch, president of the American Society of International Law. Elisa Massimino of Human Rights First introduced the panelists: John Norton Moore of the University of Virginia School of Law; Alberto Mora of the Harvard Kennedy School and former General Counsel of the U.S. Navy; and Claudio Grossman of the American University Washington College of Law.

REMARKS BY LORI DAMROSCH*

I am Lori Damrosch. I am the president of the American Society of International Law. As this is our closing plenary for our 2015 annual meeting, I thought it would be appropriate for me to open it and to say a few words. First of all, it is a tradition at our annual meeting to reserve a place or two for the late-breaking events, or the "hot topics." Last year, you will remember, we were racing to put together a panel on Crimea a day or two after the annexation had happened, and this year as the very most intensive phase of the preparations for the annual meeting were taking place, the Senate Select Committee on Intelligence released its report on torture. The United Nations Committee Against Torture, in approximately the same time frame, released its concluding observations on the report of the United States. So, even though torture is a problem that has been with us for centuries, and the knowledge of practices undertaken by persons of United States authority has been known for a very long time, it was a late-breaking topic in the context in which we had been putting together this annual meeting, and it was a late-breaking topic that posed a number of sensitivities—political and otherwise—for trying to put together a program.

I want, as my final act for this year's annual meeting, to once again thank the program committee, the three program committee co-chairs—several of them I think are here—and all the members of the program committee who helped us brainstorm this event and put together a panel that we hope will be enlightening for you. We will do what we always try to do at the ASIL annual meetings, namely, elevate the debate and get away from some of the partisan mudslinging and get back to what we really think are the core issues: what are the international legal obligations of the United States; how are those international obligations defined and clarified, how are they implemented; and is the implementing structure in the United States adequate. And, so, we want it to be a forward-looking panel. That is the spirit in which we have constituted it. I also want to say that the newsletter—the one released a week or so ago which has a presidential column—that is mine, and it says January through March, which is when I was preparing it, but it was released around April 1 and I think you can probably pick it up at the ASIL table. I talked a little bit in the column about the two reports that were issued in late 2014, but I also look back to what this organization, the American Society of International Law, has done about torture. Although we are an institution that almost never takes policy positions and almost never intervenes on issues of controversy, we do have a mechanism prescribed by our constitution and regulations for coming together in a single voice, as we did at our centennial annual meeting in 2006. And we adopted a resolution expressing the sense of the American Society of International Law that included a few passages on the torture issue as it was then current, and that is the sense of the American Society of International Law reprinted in this newsletter, and it remains the sense

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of the American Society of International Law, governing us from our centennial meeting in 2006 until time immemorial. So, with those as the opening words, I turn it over to Elisa to moderate the program. Thank you.

Remarks by Elisa Massimino*

Thank you all for joining us today. It takes a special kind of person to spend a glorious spring morning like this in a windowless hotel conference room talking about torture. So thank you all for being that kind of person!

You are here, I think, because this is a critical issue—not just for our country—but for the integrity of international law. So it is fitting that we will close out this year's ASIL annual conference discussing it.

And we are especially fortunate to have three esteemed experts in the field of human rights and international law to help us explore this issue today. I will introduce each of them in a few minutes. Following their opening remarks, we will open up the discussion to all of you.

The public release in December 2014 of portions of the Senate Select Committee on Intelligence report on its investigation into the CIA's post-9/11 interrogation and detention program generated a lot of partisan heat. But for those who have taken the time to actually read the 500-plus page document, it actually sheds a fair amount of light—finally—on what happened, how it happened, and what—if anything—was gained from the torture program. Today we want to discuss what we learned, and what the implications are for both domestic and international law on torture and other cruel and inhuman treatment.

How many people know about the Senate Committee Intelligence report? Most of you—that is good. We will not spend a lot of time talking about it. I do want to note that the complete report is about 6,900 pages. The executive summary is about five hundred pages—that is what has been released. While it is quite heavily redacted, it is nonetheless possible to glean new information from the report. The report, which was supported in three bi-partisan votes taken by the intelligence committee, is a very significant—some have said historic—exercise of oversight by Congress. There is a lot to learn from it.

Today we are going to explore what lessons we can learn both from the report and from the role of the United Nations Committee Against Torture and its wisdom in terms of evaluating U.S. performance under the treaty. Torture continues to be a serious and widespread global problem. It is certainly a problem not only for the United States and it is a problem not only—or perhaps not even most significantly—in the context of national security. But because of the leadership role the United States has played historically in developing human rights standards, it is particularly important to understand, now that we know more about the use of torture and other cruelty against prisoners in its custody, how the United States intends to address this problem.

Let me stop there and introduce our three speakers who will each give brief opening remarks of no more than ten minutes. I will then kick off our discussion with a few questions and bring you all into the discussion. Panelists, this is not like a congressional testimony; please feel free to address each other directly.

Our first speaker is John Norton Moore, who is a professor of law at the University of Virginia where he directs the Center for International Law and the Center for Oceans Law and Policy. John has written extensively on international law generally and on these issues

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in particular. He has served as a political appointee on a number of executive branch commissions over many years. I do not know if he is going to talk about it, but he brought the first case against a foreign government for the torture of United States citizens, so that is an interesting perspective. Next to John is Alberto Mora, who, in the interest of full disclosure, is a proud member of the board of my organization, Human Rights First. Alberto, as many of you know, is currently a senior fellow at the Carr Center of Kennedy's School of Government at Harvard. He started his career even before law school as a Foreign Service officer, which I think is a very interesting perspective to have on these issues and I hope he will share some of that, too. He has received numerous awards and honors. In particular, I want to note that he was the recipient of the JFK Profile in Courage award for his work on these issues in particular. He was a political appointee in the George H.W. Bush administration and served as general counsel of the Navy under the George W. Bush administration, which is where he and I first met. Next to him is Claudio Grossman, who is professor of law and dean of the Washington College of Law at American University. He is a great leader on human rights issues and matters of international law and broader issues, but most importantly to today's discussion, he was elected to an unprecedented fourth term as chair of the United Nations Committee Against Torture, a position he has held since 2008. He has a very important perspective for us as we think about the integrity of international law and what the United States and other countries should be doing to strengthen the prohibition against torture. With that introduction I will turn it over to John to get it started and then we will go in order.

Remarks by John Norton Moore*

Elisa is correct. The United States, historically, has been one of the leaders of the world insisting on humanitarian treatment during wartime and opposing torture. We have done that going all the way back to the Lieber Code during the Civil War. How, then, did we have such terrible activities that took place such as My Lai during the Vietnam War or, more recently, the torture-lite program during the George W. Bush administration referred to as "enhanced interrogation"? In dealing with those issues I would like to simply address two points. Firstly, I am going to talk about the national security costs of torture. Secondly, I would like to talk about the pathways to torture and how it happened in the United States in those two instances that capture most of the settings in which government security officials are likely to encounter this problem. Frequently, those that engage in torture believe that they are the tough guys; they are really going to be aiding the national security in their country. They know how to do it and everyone else is kind of weak and really just does not get it. But nothing could be more naïve and mistaken in relation to the actual national security goals of any country in the world.

I am going to quickly run through nine costs of an illegal torture program that was undertaken in both of those settings. First, it serves as recruiting posters for our enemies, as the CIA has clearly reported. Secondly, it undermines democratic support for the war at home, which is a critical front, as Clausewitz told us many years ago. Third, it alienates our allies and reduces alliance cohesion. Fourth, it deters critical intelligence sharing from other countries and intelligence agencies. Fifth, it increases the likelihood that United States POWs and others held by the enemy will be tortured and abused. The sixth is that it hugely interferes

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with the ability of the United States to provide leadership in the area of foreign affairs, particularly in human rights and in rule of law matters. Seventh, it puts at risk the brave men and women in the intelligence services and defense community of the United States of subsequent criminal and civil prosecution under universal jurisdiction. Under the Convention Against Torture (CAT) it is very, very clear—Article 2, Paragraph 3—that no kind of top-level ordering can excuse torture. A presidential finding of some sort saying it is okay might be adequate domestically, but the constitutional issue remains unclear even to prevent domestic prosecution. And, clearly a presidential finding could not prevent prosecution of any of these fine Americans from being prosecuted universally in other countries or in relation to potential civil actions against them elsewhere. Finally, torture reduces the incentive of enemy combatants to come over and defect and provide voluntary information.

This is a huge set of costs to be undertaken for a very naïve sense that this is the "tough" thing to do. And I have not even talked yet about the questionable efficiency of all of this because our agencies that really engage effectively at interrogation in the United States and do it for a living, like the FBI, were strongly at odds with the others that were engaged in these activities. They basically said this was extremely naïve. The issue is not whether or not during the enhanced interrogation you got some information; of course you likely did. The real question is whether normal interrogation tactics are more effective. The FBI had a war with the CIA on this which generated a great deal of interagency dispute, and, of course, the professionals were largely with the FBI in this dispute. The military JAG Corps, particularly, was strongly opposed to "enhanced interrogation" because they were the ones that had a background in the relevant laws and U.S. practices.

What are the pathways to torture? How does this happen? There are two principal pathways: bottom up and top down. The bottom up pathway is what happened in Vietnam. The United States at that time solidly was opposed to any violation of the laws of war, but we had a very out-of-control second lieutenant and very poor guidance from his captain. The result was a horrible massacre, probably one of the worst in United States military history, in My Lai. What do you do about the bottom up? It is pretty simple. You engage in effective training as is required by Article 10 of the CAT. And in addition to that, you prosecute when there are violations. We did not do the prosecution very well of Lieutenant Calley. It was not effective in my mind. I was part of a State Department advisory group that was advising the secretary of state on it and every single member of that group said there should be effective prosecutions in that setting. So the main thing there is to get good people. We also had a failure in terms of the caliber of the officer corps. We had been going down to a lower caliber officer at that point and we failed to provide good training. Subsequently, the United States military learned well from the My Lai experience. It created the field of operational law and it became the best in the world in complying with the laws of war. You saw that in the Gulf War.

That brings us to the torture-lite policies. What happened there? This was simply top down in my judgment. This was not a few rogue actors. This was at a very high level within the United States government—likely involving the vice president's office and the secretary of defense's office, although no investigation has ever thoroughly been done about it. What were some of the background causes of that failure at a top down level? I would suggest that one failure that set the framework—as it always does during a crisis—is a major national crisis. That is always there and we make some serious mistakes during those settings as we did during the Supreme Court acceptance of the incarceration of Japanese Americans in World War II. We understand that these are times when terrible mistakes are made, but that

does not justify them. Why did we make those mistakes? And I think the first problem here is that there was a failure of the lawyering process in the National Security Council (NSC) structure. It had been my privilege to serve in the NSC, chairing a committee for some years. The NSC, and the ability of all of our government officials to work together in understanding these issues, is extraordinary. What happened here is a strong group of lawyers, led primarily from the vice president's office, basically took charge of the process and ignored the professional military and professional Foreign Service advice from the principal agencies that had been used in the past on these issues. None of those lawyers had a course in national security law. I do not believe that for the most part they were supporters of international law. I think one of the problems is that they were operating in a climate that was anti-international law at the same time, so the result was terrible mistakes. What do you do about that?

We need to train the lawyers well. Those who get these positions need to be trained well. We need to go back and structure the NSC legal process well so that we are not, for example, doing something unusual like the lawyer to the vice president being particularly influential in the operation of that program. And we need, as this society does so well, to train the country and train our people in understanding the enormous importance of the rule of law and international law in everything we do, because that was part of the climate here that permitted the problem. Also, it would have been useful here for President Obama, when he took office, to have set up a truth commission to look at the entire problem and where it originated and do so with compulsory process. These are enormously serious issues. It will take years for the United States to overcome the "torture-lite" mistake. This panel is very appropriate in looking at a very extraordinary and very serious mistake made by one of the most wonderfully democratic, rule-of-law-supportive countries in the history of the world.

Remarks by Alberto Mora*

Thank you, Elisa. I am glad to be here and to be a distinguished member of this panel. The theme of the panel is in looking forward, but of course, in any issue of justice you really cannot look forward without looking backwards. This is almost retrospective by definition which is why the call you heard from the president and others to say we need to look forward does not make much sense. Let me start with the Senate Select Committee on Intelligence (SSCI) report because, despite the controversy that attends it, the one thing that has been reasonably settled in the minds of reasonable people is that the abuse inflicted on individuals was in fact torture. There is no longer a reasonable debate about whether the level of abuse reached that kind of level. For those that might be wondering about this or are interested in this further, I refer you to reading those portions of the report that deal with the application of the techniques and in singular combinations inflicted upon the various detainees. That issue has been settled. Having said that, however, it is important to remind ourselves that the legal standard and the international human rights standard is not whether we torture or engage in cruelty. Unfortunately, the terminology of this debate has settled on the word "torture" which inherently distorts the standards we seek to establish and to maintain. Although we are a society of international lawyers and our focus understandably and primarily is on the international aspects of this, the issue of torture is a variation of different categories of activities. There is law. There is policy—John touched on some of the elements of policy—but also politics, and there is really no way to address the issue or torture without

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simultaneously addressing all three dimensions of the issue of torture because they are all equally important.

In fact, it could be argued that the politics of this are an important starting point for these discussions. Let me take a moment to talk about the categories of damage. When you think about the damage done by our decision to use torture and the application of torture, there was damage to the victims, there was damage to the law and our constitutional order, damage to international law, there was damage to the architecture of international human rights, there was damage to our foreign policy, and there was damage to our national security strategy and national security problem. These were many areas of damages where we need to understand what happened, determine whether or not corrective action needs to be taken in each of these categories, and then proceed forward. There was damage to all of these categories and the failure to continue looking at this and to provide corrective measures will continue to hurt the United States in a number of ways that are not completely understood by most Americans who, in some cases, have moved on and, understandably, have not really grasped the dimension and the consequences of our actions.

To touch briefly on my principle concerns, the first is the definition of torture, because the use of euphemisms like "enhanced interrogation" for over a decade have distorted and fractured American understanding as to what abuse consists of and the damage it can do, and also serve to mask the reality that the level of the abuse was illegal not only because it constituted cruel and degrading treatment but also because, in many cases, it reached the level of torture. So restoring a sense of the definition—the proper definition, and the proper law to apply to abuse—is an important first step in healing the damage created by our use of torture.

The second is that we have shattered the national consensus against cruelty and torture. Before 9/11, the vast majority of all polling indicated that the American people were united around the principle that the United States simply does not abuse individuals in captivity; it is simply something we do not do as a matter of our national values, our statutes and laws, and our constitutional order. This was settled in debate and in the legal universe and also in the military as a matter of national security strategy and policy for the reasons that John articulated. That consensus is now shattered. Almost half of the American people are of the opinion that torture could be used and should be used if it could make us safer and the problem with this, of course, is that there will be additional terrorist attacks. We will incur additional casualties and when that happens the voices of those who implemented the architecture of torture in the first place, or those who are sympathetic to its logic, will rise up again and say we should go back to those techniques. In fact, President Obama, when he prohibited the use of torture on his second day in office, was accused by some of the early architects of this policy as having disarmed the United States and made us weak and preemptively accused him of having caused American causalities in anticipation of future terrorist attacks. That argument will be had again in the future. It is better to make decisions now as to where American policies and decisions should be when we are not dealing with the grief and anger from another terrorist attack. This is politics, but it is vitally important because it underlies the contents of our laws and our willingness to enforce them and observe them.

Another point that is important, which John mentioned, is the loss of U.S. credibility and authority on human rights. The vocation of the United States is to protect human dignity. The arc of our foreign policy is to protect human dignity overseas and to help construct a world in which human dignity is preserved in ever increasing increments. This has been a

policy that is ordinarily successful for the United States in combination with many other countries. We are here to make the world less cruel, not more cruel, and implicitly the use of torture by the United States worked against this overarching foreign strategy objective. Repairing the damage and restoring our credibility—restoring our focus on the strategic prize—is important.

We at Harvard are looking into the policy consequences of our use of torture. What we see in WikiLeaks cables all over the world is that we attempted to engage in human rights discussions with leaders ever since we started applying this torture, but many of those leaders would refuse to engage with us or have a discussion because they felt that we lacked the moral credibility to address the issue at all. This is something you find embedded in many of the WikiLeaks cables reporting on human rights and on human rights events around the country. We need to restore credibility, and we need to restore momentum, to the construction and observance of human rights around the world. If we do not do it, few others will pick up the slack.

Legal education, which John touched on as well, is key. What is very hopeful at Harvard is that there is a group of students who recognized the fact that a number of Harvard law graduates were among the many architects of the U.S. torture policies and are wondering how Harvard failed. They have engaged the administration of the law school to ask what we can do to ensure that there is not a failure of legal professionalism, as simple as that is in many respects, meaning that people who read the law prohibiting the application of abuse will not come to conclusions that the law permits the applications for abuse.

Second of all, how do we instill in the graduates of the law school a sense of moral compass such that people when confronted by these issues will understand better how to approach the problem of human dignity and protecting individuals from torture? If this movement takes hold, then Harvard could be a leader in having a reevaluation of the content of legal education, learning from the lessons of our use of torture for the near future. One last thought, Afghan President Ashraf Ghani was in town two weeks ago and spoke before Congress and before the U.S. Institute of Peace and the Council of Foreign Relations in New York. In both places he went out of his way to praise Senator Feinstein for the courage and the accomplishment of having led the SSCI report on interrogation to completion. He indicated that he had been shocked to report that he had stayed awake all night when he first got a copy of it because he could not sleep after reading the accounts of the report. He called for accountability of the two American psychologists who were the principal architects of the report and then embedded that call for accountability into a larger vision of transitional justice for Afghanistan. He said that the Taliban are our political opponents, and not the enemy. Some of them have legitimate grievances, including the grievance of having been tortured in some cases both by Americans and by Afghans. Taking those grievances seriously means that we need to understand what happened to them and then make reparations or restitution of some sort. What is clear here is that President Ghani viewed the use of torture in America and Afghanistan as not only something that damaged individuals who were victimized by it, but damaged the politics in Afghanistan. This constitutes an obstacle to the reconstruction of the parties in Afghanistan and the understanding of this issue as a necessary step along the way towards a reduction of the violence and the repair and restoration of Afghanistan. This issue should give us pause as to the damage we caused inadvertently through the use of torture but also the need for continuing to focus on how to address the damage created in that country, which is of such vital national interest to the United States.

Remarks by Claudio Grossman*

I am pleased to be here in the company of my distinguished colleagues to have this important conversation with all of you. I want to add to some of the comments my colleagues have already made. First, the United States has played a very large role in shaping international law and interpreting universal values. The men and women who lost their lives or were injured in the 9/11 attacks are not only victims for the United States, but also for the world community. Equally, the reaction to those heinous attacks concerns and impacts everyone and, in today's interconnected world, is not restricted to a single country. When the United States presented to the United Nations Committee against Torture its report indicated that in the wake of 9/11, the United States regrettably did not always live up to its own values, including those reflected in the Convention against Torture. President Obama has noted that the United States crossed a line and takes responsibility for that. Those are very important statements, including the U.S. delegation's presentation to the Committee, which contained what was viewed as an apology and a way to move toward compliance with its obligations to provide redress and as full rehabilitation as possible under Article 14 of the Convention.

I bring to this discussion my experience on the Inter-American Commission on Human Rights for eight years and on the Committee against Torture since 2003. In the wake of serious attacks including those on 9/11, countries do not always live up to their own values. Unfortunately, we see this around the world when emergency situations arise. Scared populations react, demanding harsh measures. Governments respond, use, and sometimes abuse an environment of fear. With hindsight, numerous measures adopted appear to be overarching and over-reactive, and there is no shortage of examples of abuse. Overreactions compromise democratic values and the rule of law. Domestic judiciaries typically have not operated in a timely manner as barriers that contain overreactions. One important reason for the creation of international law is because of the extensive failure record of domestic systems. International law's purpose is precisely to act as a safeguard.

With the knowledge that domestic law often fails in situations when it is most needed, we should then address how to go about strengthening international law so that it can fully realize its humanitarian purpose. Needless to say, that is a work in progress. For example, in the area of torture, the ratification and enforcement of the Optional Protocol to the Convention against Torture is very important. Classical supervision has been performed through a committee, such as the Committee against Torture, and to a certain extent, has an *ex post facto* role after violations have already occurred. But the Optional Protocol created a new supervisory mechanism, known as the National Preventive Mechanism (NPM), which can visit centers of detention without the state party's authorization. Also, NPMs collaborate with the Optional Protocol's Subcommittee on the Prevention of Torture. In the past, any collaboration was with states' ministries of foreign affairs. So the creation of NPMs represents an innovative way for communications between national and international organs on the status of compliance with international obligations without going through state representatives. With the complex conditions of the international community, this novel form of supervision may have appeared to some as far-fetched or unrealistic. Indeed, achieving universal ratification of and compliance with the Optional Protocol will not be easy.

I am one of many individuals who had to leave their native country of Chile in 1973. I remember when many, including myself, reacted incredulously years later to the detention

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of Pinochet in London. The collapse of the Soviet Union and the end of the Cold War also surprised many. These experiences show us that we should not be mere spectators of events and that we should not abandon the promotion of important values of human dignity because of adverse circumstances. Perhaps the best way to predict the future is by trying to shape it. Promoting international human rights law, strengthening its mechanisms of supervision, and further developing its promises are critical steps for realizing universal values, even if at times those values appear distant.

What obligations set forth in the Convention help illuminate what changes we should achieve? There are many, including: incorporating the definition of torture into the domestic legal systems; recognizing the illegality of torture; not extraditing or returning a person to a state where there are substantial grounds for believing that he or she will be in danger of torture; extraditing or prosecuting those who have allegedly committed torture; prohibiting the use of confessions extracted through torture in any proceeding; providing redress and as full rehabilitation as possible to victims; and providing training on the obligations set forth in the Convention. Not only is torture prohibited, but so too is cruel, inhuman or degrading treatment or punishment. Each of these obligations is vital and, in my experience, fundamental to achieving justice. Training on human rights law and obligations contributes to justice. Effective investigations reject impunity and strengthen accountability. When those responsible for violations are held accountable and punished, it has a tremendous impact worldwide. Additionally, we need to utilize and employ proper mechanisms and instruments including the Convention against Torture. The Convention ensures the right to complain and have cases examined against states parties that have declared acceptance of Article 22. It obligates states parties to conduct specialized trainings in a growing field, and to bring their interrogation techniques in line with the Convention. The treaty also requires states parties to: provide redress and as full rehabilitation as possible; prevent gender-based violence; and reject every kind of discrimination, including on the basis of sexual orientation, among others.

Torture and cruel, inhuman or degrading treatment or punishment are deplorable in any circumstance. It is also important to note that any "attempts" to restrict this illegal behavior to "political cases" or "certain" types of crimes are unrealistic and, in any case, such attempts negatively impact society at large and the rights of the population. Violation of the prohibition against torture also impacts the credibility and effectiveness of states' international relations, particularly for those that make the promotion and protection of human rights an essential component of their objectives.

Let me finalize my remarks by mentioning some of the recommendations issued by the Committee against Torture in 2014 following its review of the United States. For the full text of the Committee's 2014 Concluding Observations, please see: http://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx. One recommendation was to "criminalize torture at the federal level, in full conformity with Article 1 of the Convention, and ensure that penalties for torture are commensurate with the gravity of the crime." The whole history of human rights law in the United States relates to federalization, and I do not need to explain to this learned audience why that has been the case. This has also been the case with other countries, such as Brazil and Mexico. Another Committee recommendation was that the United States "should amend the relevant laws and regulations accordingly, and withdraw its reservation to Article 16, as a means of avoiding wrongful interpretations." Article 16 relates to other cruel, inhuman or degrading treatment or punishment, which does not amount to torture as defined by the Convention's Article 1. Torture is not only physical; it is mental and emotional. There have been important legal developments in that area. The fact that President Obama

prohibited torture is crucial. From the moment of detention, legal mechanisms and protections are vital, such as registration, access to independent lawyers and doctors, etc. Secret detention facilities must not exist. They create a space for torture. The publication of the U.S. Senate Select Committee on Intelligence's report is a key development. That report sends a powerful message of the expectations that need to be met. Diplomatic assurances must never be a pretext for sending people to places where they can be tortured.

The strength of the norms laid down in the Convention against Torture does not flow from the paper document. The strength lies in the expectation of people to live in a world where values of human dignity, including the right to be free from torture, are fully realized. Unfortunately, that has not yet been achieved. It is up to all of us to continue to work toward achieving such a world.