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CAHR Newsletter

Cornell Advocates for Human Rights

Articles:

Do the Ends Justify the Means? The Inexplicable Definition of Torture by the United States

By Marta Leitao

As a Portuguese exchange student at Cornell Law School extremely interested in human rights, I sought to take classes such as Public International Law and Capital Punishment to better understand how the United States regards the subject of torture.

While I admire and respect American culture, after engaging in these classes I was amazed to discover that the myth about Americans seeing things differently is actually true. This realization came to me through the inherent contradictions set forth in the study of torture.

I became aware of how the United States perceives torture in a particular class session of Public International Law. After learning about the international definition of torture, the whole class laughed momentarily when the professor made a remark: America does not agree with the United Nations on the issue of torture.

Although prohibition of torture is considered to be a *jus cogens* norm, the United States has stood by its aberrational definition, and this shows in its practices. These practices take the form of innumerable cases where the U.S. has carried out, with immunity and impunity, torture and illegal detentions in the context of the "War on Terror." Names like Abu Ghraib, Mohammed al-Qahtani, Muhammad Rahim al Afghani,[1] and Manadel al-Jamadi represent a few of the many examples of these "practices." America's perspective on torture has also allowed other scandalous episodes to occur, such as the CIA's black sites throughout Europe, established with the knowledge of European leaders, who are certainly not guilt-free in all of this.

Due to global economic and political interests, other countries mostly ignore the United States' actions with respect to these people. However, according to Amnesty International, Mohammed al-Qahtani's case illustrates the lack of accountability for human rights violations committed by the America in the "War on Terror."[2]

Given the American definition of torture, I cannot say that I was surprised by all the news that has come out revealing that American agents use torture techniques such as electro-shock, stress positions, phobias, isolation for long periods, deprivation of sleep, waterboarding, the use of dogs to cause fear, tying detainees by a leash, urinating in their clothes, and subjecting them to loud music.

I can say, however, that these actions are undoubtedly against human rights, and it outrages me and others around the world to see how the United States maneuvers international norms to its own satisfaction.

Hypocrisy and immunity seem to be the appropriate words to describe America's status in International Law. This government, which reported these actions to the Human Rights Committee as legitimate under law of war, was the same that in 2006 stated the

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[1] Amnesty International, *USA: The Assault on International Law Continues—Another Secret Detainee Transferred to Guantánamo*, http://www.amnesty.org/en/library/info/AMR51/021/2008/en.

[2] Amnesty International, *USA: Memorandum to the US Government on the Report of the UN Committee Against Torture and the Question of Closing Guantánamo*, http://amnesty.org/en/library/info/AMR51/093/2006/en.

"The United States clearly does not subscribe to the maxim 'let he who is without sin cast the first stone.'"

International Covenant on Civil and Political Rights[3] was the most important document to protect human rights. The United States clearly does not subscribe to the maxim "let he who is without sin cast the first stone."

The expression that "law is to be applied equally" is not a cliché. We jurists do not say it to ease the pain. We say it because that is the basis for all democratic ideals. It is to be applied even to the most despicable human being there can be. In my opinion, this is one of the reasons to be proud of democracy. This means that when Condoleezza Rice says, "We must call countries to account when they retreat from their international human rights commitments," it also applies to Uncle Sam.

My hopes about improving the American view of torture rested on President Obama. Unfortunately, my optimism vanished when I heard him use words such as "justice has been done" when referring to killing Osama Bin Laden.[4] Was Bin Laden a casualty of war? Was he armed? Did he fire back? Was it impossible that trained military could not take him alive into custody?

The noble notion of justice—bringing someone to an independent court for a criminal trial with fair proceedings—has been fading. Something disturbing happens when a justice system brags about someone's death.

The moral I want to leave with you is simple: If the government does not follow the law, why should its citizens do the same? One state cannot be so arrogant as to tell others what to do without also complying. This creates unbalance in the whole international system.

A piece of advice? One of the factors that distinguishes the law from other forms of punishment, namely vengeance or vigilantes, is the ability to be impartial and neutral. I do not argue that we should forget the victim's grief and losses. Feelings have another place in law. Yet, while there seems to be a consensus that *lex talionis* is unacceptable, the United States applies it when such evasive and intrusive measures are taken to "prevent crime."

In law school, I studied many different legal movements, but one stood tall: "The ends do not justify the means." This is the key to understanding why international and American law contrast. International law tries to "save the hostage;" American law does not.

In every field of knowledge, like science, economy, or psychology, we learn that every action has a consequence. Perceiving something as good solely because of its result does not make it good or moral, especially when the result is death.

In a cliché ending, Jean Paul Sartre once wisely stated that torture "is a plague infecting our whole era. . . . Disavowed—sometimes very quietly—but systematically practiced behind a façade of democratic legality, torture has now acquired the status of a semi-clandestine institution. . . . It is up to us to clean out our own backyard, and try to understand what has happened to us, the French."[5] I do not believe he knew he was predicting the future of the United States of America.

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[3] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

[4] Amnesty International, *USA: A reflection on justice*, http://www.amnesty.org/en/news-and-updates/reflection-justice-2011-05-17.

[5] Amnesty International, *USA: Torture in the Name of "Civilization": President Bush Vetoes Anti-Torture Legislation*, http://www.amnesty.org/en/library/asset/AMR51/016/2008/en/8bf58d9d-eebc-11dc-b746-8fa4c259da7f/amr510162008eng.pdf.

The Legal Status of Kenyan Women

By Genevieve Nan Ballinger

In recent years, Kenya has put in place important legal protections for women. These include provisions in the 2010 Constitution preventing discrimination based on sex, ensuring equality of women and men, providing for representation of women in government, and indicating that covenants ratified by Kenya, such as the Convention on the Elimination of Discrimination Against Women, be treated as law.[1] Domestic laws have provided additional protections including, most recently, the Counter Trafficking in Persons Act, the National Gender and Equality Commission Act, and the Prohibition of Female Genital Mutilation Act.[2]

Unfortunately, glaring gaps still exist within the law. Examples include Parliament's failure to meet the requirements of Article 45 of the 2010 Constitution in its failure to pass legislation providing for equality of men and women in marriage and in protection of matrimonial property. Also, the Sexual Offences Act criminalizes false accusations of rape, which in turn deters reporting by victims, and the Act does not criminalize spousal rape.[3]

However, the most prevalent issue in Kenya affecting women's rights is the lack of enforcement of the already existing legal protections. For example, despite the Children's Act, 26% of children are still involved in child labor, and despite the Trafficking Act, human trafficking continues to increase.[4] Of particular concern is the status of women living in Nairobi's slums and informal settlements. These women face high risks of gender-based violence daily due to minimal policing and convictions, which also prevents their adequate access to the already limited sanitation facilities available.[5]

Photo by Genevieve Nan Ballinger

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[1] Constitution of Kenya 2010, http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/ConstitutionofKenya2010.pdf.

[2] The Complete Laws of Kenya, http://www.kenyalaw.org/kenyalaw/klr_home/.

[3] FIDA Kenya, *Assessment of the Implementation of the Previous Concluding Observations on Kenya (CCPR/CO/83/KEN) at the Time of the Review of the Third Periodic Report*, http://www2.ohchr.org/english/bodies/hrc/docs/ngos/FIDA_Kenya103.doc.

[4] *Id.*

[5] Amnesty International, *Kenya: Briefing to the UN Committee on the Elimination of Discrimination Against Women,* http://www.amnesty.org/en/library/info/AFR32/017/2010/en.

The Need for a New System of Punishment for Prosecutorial Misconduct in the United States

By Joseph Fan

As an officer of the court, a prosecutor has a duty to uphold the highest degree of ethical behavior. Imagine, however, a district attorney who is up for reelection. Instead of following his enumerated boundaries, he puts his own interests above yours and tries to convict you of a crime you did not commit. Even worse, let's say you serve a twenty-year prison sentence for that crime. Many times, when a prosecutor has acted improperly enough, a court may reverse a conviction. What, however, happens to the prosecutor?

When prosecutors exceed their authority and unjustly convict defendants, there are real-world consequences. If punishments for misconduct are too harsh, prosecutors may be inclined to pursue fewer cases, and wrongdoers may commit more crimes. Conversely, if punishments are too lenient, prosecutors might not respect the limitations of their power.

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Though prosecutors are held to high duties and standards, the current system does not work because there is no unified model formula for proper punishment for prosecutor misconduct.

Before we can begin to make important systemic changes, however, we must answer certain questions. When does prosecutorial misconduct occur? What mechanisms are currently in place to prevent prosecutorial misconduct from occurring? Why should, or should not, prosecutors be granted immunity when they have acted improperly? How can courts properly punish prosecutorial misconduct?

"Despite the prevalence of misconduct and the resulting social costs, there are few mechanisms in place for redress when a prosecutor acts inappropriately."

Prosecutorial misconduct is very apparent today, popularized by the exposure of prosecutor conduct in recent high-profile cases. There are many indicators of prosecutorial misconduct, including a defendant's prior criminal record, exculpatory information, impeachment information of government witnesses, timely disclosure of evidence that is favorable to the defense, and memorialized and tangible statements made by witnesses. Examples of prosecutorial misconduct also include courtroom misconduct, the mishandling of physical evidence, improper dealings with witnesses, the use of false or misleading evidence, harassment of the defendant or the defendant's counsel, and improper behavior during grand jury proceedings. Not only does prosecutorial misconduct affect wrongfully convicted defendants, but society also suffers harm in the form of economic costs, loss of public faith in both the court system and the legal profession, and the failure of justice.

"Since 1970, prosecutorial misconduct was cited as a factor in dismissing charges at trial in at least 2,012 cases."

Despite the prevalence of misconduct and the resulting social costs, there are few mechanisms in place for redress when a prosecutor acts inappropriately. Such mechanisms as do exist are far from adequate. Victims of prosecutorial misconduct can seek professional disciplinary action, file for reasonable attorney's fees under the Hyde Amendment, or commence a § 1983 civil suit if the prosecutor was acting within an administrative or investigative function. Courts may file complaints with state bar associations for disciplinary hearings, which may result in the prosecutor's suspension or a permanent ban from practicing law. If an attorney intentionally violates court orders, a federal judge can impose fines or imprisonment by holding the attorney in criminal contempt. A federal judge may even award damages or other relief to injured parties by holding the attorney in civil contempt.

Under the Hyde Amendment, the injured party has the burden of showing that the government's acts were "vexatious, frivolous, or in bad faith." A simple search on Westlaw shows that Hyde proceedings rarely favor the injured party. Similarly, successful § 1983 actions are rare. Disciplinary hearings are also unlikely to succeed.

Under 18 U.S.C. § 401, courts have the power to impose fines and dismiss a prosecutor from a case if the prosecutor's acts are contemptuous. Under the same statute, courts also have an inherent power to disbar or suspend an attorney from practicing law for contempt of the court. Courts may also publicly censure a prosecutor for misconduct.

Prosecutorial misconduct can also lead to a mistrial, reversal, or jury instructions. In *United States v. Chapman*, the court declared a mistrial after it found that the prosecutor withheld exculpatory evidence, which, under *Brady v. Maryland* and *Giglio v. United States*, prosecutors are required to disclose. In fact, the Center for Public Integrity has found that, since 1970, prosecutorial misconduct was cited as a factor in dismissing charges at trial in at least 2,012 cases. In *United States v. Lyons*, the court found that the government's *Brady* and *Giglio* violations warranted dismissal of counts because the misconduct greatly pervaded the case. In *United States v. Hernandez*, the Eighth Circuit found proper the District Court's instructions to the jury to disregard improper remarks and not to consider statements of counsel as evidence in the case, alleviating possible prejudice.

In the current U.S. legal system,

prosecutors are entitled to absolute immunity when they act in a quasi-judicial role. In *Imbler v. Pachtman*, for instance, the U.S. Supreme Court held that prosecutors have absolute immunity against § 1983 suits regarding their actions that are "intimately associated with the judicial phase of the criminal process." Under absolute immunity, unless a prosecutor violates a court order, she cannot be prosecuted for misconduct. This is an important right because immunity from prosecution or civil suits will allow a prosecutor to make discretionary decisions fairly without fear of punishment for good faith mistakes. In general, a prosecutor is entitled to absolute immunity when acting within the scope of her prosecutorial duties because courts fear that consideration of potential liability might inhibit a prosecutor from performing her duties to her fullest potential. Courts justify absolute prosecutorial immunity because they believe civil liability risk may frustrate the criminal justice system by negatively affecting a prosecutor's performance and decision-making, and waste time and resources defending trivial lawsuits.

In contrast to absolute immunity, qualified immunity gives government officials other than attorneys some flexibility in making reasonable but erroneous judgments on unclear legal practices. Under qualified immunity, government officials are not subject to damages liability for the performance of their discretionary functions when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*. Qualified immunity, however, does not protect "the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*. Prosecutors are only limited to qualified immunity when they are performing administrative or investigative functions, rather than quasi-judicial functions. For instance, in *Buckley v. Fitzsimmons*, an accused brought a § 1983 claim against state prosecutors who fabricated evidence and made false statements at a press conference regarding the rape and murder of a child. On certiorari, the Supreme Court decided that the prosecutors were not entitled to absolute immunity for the fabrication of evidence because the prosecutors were not acting as state attorneys, but instead as investigators with the same functions as detectives, so they were only entitled to the same qualified immunity as the detectives. The prosecutors were not entitled to absolute immunity for the press conference claim because the attorney was in the same position as other officials with qualified immunity who dealt with the press.

Prosecutors currently have absolute immunity as long as they can show they are performing prosecutorial functions, even if they act in bad faith. This gives prosecutors a lot of power, and with such power comes the potential for abuse. There is a difference between advocating avidly and performing misconduct, which ought to be better acknowledged.

Despite this, in *Burns v. Reed*, the Court held that qualified immunity is "more protective of officials than it was at the time that *Imbler* was decided." The issue in *Burns* concerned which immunity ought to be provided to the essential function of prosecutors providing legal advice to police officers. The Court reasoned that because the subjective common-law standard was replaced with the objective standard expressed in *Harlow*, qualified immunity adequately protects "all but the plainly incompetent or those who knowingly violate the law," and "where an official could be expected to know that his conduct would violate statutory or constitutional rights, he should be made to hesitate." Though it is true that downgrading absolute immunity to qualified immunity for prosecutors giving legal advice to police officers may make prosecutors reluctant to give advice, it also has the effect of forcing prosecutors to put more thought into their advice. If prosecutors were entitled to absolute immunity for giving advice and police officers were entitled to qualified immunity for following the advice, the effect would be that "the police, who do not ordinarily hold law degrees, would be required to know the clearly established law, but prosecutors would not." *Burns*.

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Though a shift from absolute immunity to qualified immunity for prosecutorial misconduct would be a great start, this is not enough. As it stands, prosecutors are rarely punished for their misconduct. Prosecutors would likely think twice before "winning at all costs" if they knew they might be prosecuted for their misconduct; this would be an ideal outcome. In order to accomplish this, a system to punish prosecutorial misconduct is necessary, and this system should balance all the necessary factors to ensure fairness and justice.

The implications of imposing such a system might include heavier dockets for the state and federal courts and correspondingly increased financial and resource burdens. However, if it is true that "it is far worse to convict an innocent man than to let a guilty man go free," as Justice Harlan said, then this is a negligible price to pay to ensure justice for all.

The Benefits of Supporting Programs Utilizing Biochar Technology

By Adam Garnica

Through support for programs utilizing biochar technology such as the Global Alliance for Clean Cookstoves ("Alliance"), the United States has demonstrated a firm commitment to improving global food security and brightening humanity's climate future. The Alliance represents a public-private partnership led by the United Nations Foundation that aims to establish a global market for clean and efficient cook stoves using biochar technology. The use of this technology is a novel response, and not only might it improve food security for developing nations, but it may also help mitigate climate change. As such, biochar technology may help facilitate innovative solutions to some of the world's most pressing problems.

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Biochar is charcoal that can be used for cabon sequestration, and it is produced through the chemical method known as pyrolysis. The process of pyrolysis converts carbon-rich feedstock—like agricultural wastes, woody debris, and other biomass resources—into biochar and energy co-products. These energy co-products include syngas (a natural gas substitute) and bio-oil (a type of liquid fuel and a source for electricity generation).

The widespread deployment of cook stoves that integrate pyrolysis ("pyrolytic cook stoves") may allow members of indigent communities to utilize biomass to fuel their cooking needs. Additionally, the biochar and energy co-products produced from pyrolysis with the stoves may provide additional value. For example, the syngas and bio-oil may offset the energy demands of heating needs. Furthermore, the soil application of the charcoal-like, carbon-rich biochar may enhance crop yields, thus improving food security.

Biochar soil applications may increase crop yields by increasing soil-nutrient availability and improving soil-water retention capacity. By binding to vital nutrients for crop growth, biochar may prevent the runoff of the nutrients after heavy rainfalls, thus promoting greater nutrient uptake by the resident crops. Biochar may similarly bind, or absorb, water molecules, thus improving soil-water retention. Support for biochar use as a soil amendment also comes from the successes of pre-Columbian Amazonians who achieved increased soil fertility and improved crop yields after applying a biochar-like substance.

Another benefit of biochar is that it may stabilize in soils without significantly decomposing for periods ranging from hundreds to thousands of years. For example, Amazon soils still maintain the

example, Amazon soils still maintain the biochar-like substances that tribes applied thousands of years ago. Biochar may sequester carbon found in biomass, which otherwise would have naturally decomposed. Through natural decomposition, biomass releases carbon dioxide into the atmosphere on the order of just a few decades. Hence, by delaying decomposition, global implementation of pyrolytic cook stoves utilizing biochar technology may indirectly mitigate climate change. The soil stability of biochar and its resulting carbon sequestration potential may vary according to such input variables as the selected feedstock (i.e., what type of biomass is pyrolyzed) and the specific properties of the amended soils. In any event, future studies should help scientists and policymakers understand what conditions can maximize biochar stability and optimally mitigate climate change.

In addition to international support for programs such as the Alliance, the United States has also supported biochar technology through its domestic policies. For example, the Water Efficiency via Carbon Harvesting and Restoration Act of 2009 established both loan guarantee programs promoting biochar technology and biochar demonstration projects on public lands. This followed the 2008 Farm Bill, in which Congress listed biochar as a high-priority research and extension area. By supporting biochar technology at the national and international levels, our nation has addressed some of our world's most serious concerns. Perhaps at some point in the future developing nations will have widely implemented biochar technology in the homes of their citizens. While those nations will have benefited from increased food security, humanity as a whole will have benefited from a more stable climate future.

"By supporting biochar technology at the national and international levels, our nation has addressed some of our world's most serious concerns."

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