

Panel 1: Are Adequate Legal Frameworks in Place at the Domestic Level?

Domestic Incorporation of Obligations Under the Convention against Torture

*Remarks of Ambassador Luis Gallegos and Dean Claudio Grossman**

AMBASSADOR GALLEGOS

THANK YOU FOR THIS INVITATION TO THE LAW SCHOOL, IT IS AN HONOR TO BE HERE. I will be touching on a few elements which I think pertain to the experience of the Committee on this issue. First of all, of course, we are talking about normative incorporation, and we can see in the convention, Articles 1 through 15, all of them have issues of incorporation. I'd like to present you with various scenarios. One of them of course is that a state incorporates, but just as we have just heard from the Special Rapporteur, the majority of 125 countries have not, or are unwilling to, or don't, criminalize this as much as we would wish. Some of them have done it partially which I would call the second category. Incomplete incorporation means that it is not within their constitutional framework, it is in their secondary law or procedural law, or it might not even be in any of those. We have experience of many countries coming to us to report that they are in the process, which could be the third category, those in progress, and there are of course those who simply do not have them in their legal framework although they have signed the Convention. We have 125 states that have signed the convention, that means about 78% of the 192 states that form the UN. The guidelines that the committee has had since 1991 are, fundamentally, to ask the countries to incorporate, and it is recommended that they do incorporate. So every time the Committee sits down to review a state's compliance, they are asked to analyze and explain why they haven't incorporated. I think that the Rapporteurs are very insistent on the procedure as to why they have not incorporated this into their legal framework. The actual issue also has to do with jurisdiction. I do think we are talking about the basis of what we would call the political willingness. Are states willing to do this?

Of course you have to have a principle for states to sign a treaty and have their parliaments ratify it. But are they willing, do they have the political will, to do this? Most of the states of the world do not like to be monitored by international organizations or international conventions, which set up a body of experts.

In a few days is the first meeting of the human rights Convention on Persons with Disabilities, which is a step in the right direction. As we have these treaty bodies which comply with the enforceable obligations of states, the states have signed

them and ratified them and now they have to comply with them . . . but I would say that many don't. If we wish to look into this further, the progress of the Committee, you will find that the number of countries that have not even presented their first reports . . . I would say that there are 38 countries which have not presented their initial reports. Fifty-six haven't presented their 2nd, and so on. So if you add up the numbers, a large number of countries are not reporting.

The problem is that we have a major backlog, so the Secretariat is backlogged, and so is the Committee. We have something like reports of 40 countries that we haven't been able to deal with in the Committee Against Torture, and maybe someone can give us a more precise number on that, but the Committee is going to have to duplicate its sessions to deal with these issues, and not only duplicate them but be more efficient, which is another issue of how the committees that monitor these conventions are not operating in an effective sense.

If someone is tortured today, by the time the Committee meets to deal with this, it might take years. We need a more effective system of monitoring, we need a more effective system of having states comply with their international obligations. Of course, you have to also be very proactive. Let me divide this into three aspects. One is technical assistance; I do think that the Committee has to have the capacity to give states technical assistance for the compliance to the convention. I am not talking about prevention. I think that is a very valuable step, but I think the actual problem is that we have torture. And as the Special Rapporteurs just said, it is generalized and systematic and we are not getting to the roots of how to eliminate it.

As I just confessed to you, I am a lawyer, but I do not believe that the majority of problems can be solved by law, there also must be a change in society. We have to change how society views this in its interior essence. And that is the change we are looking for. In the realm of human rights we need a revolutionary proposal, to change societies. You have to change the way an individual looks at it, a family looks at it, and society looks at it. I think we also need to have a conscious building effort in the world.

We were talking about issues of how torture and other cruel, inhuman and degrading treatments and punishments have been dealt with in the last few years, especially in the context of terrorism, and let me just say that as a practitioner, I have found that governments have had verbal agreements on intelligence, which I find very disturbing. I do not condone the ability of intelligence services to have verbal agreements.

The accountability of democracy, and of civil authorities democratically elected to overview the procedures under which

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their police forces and military forces are working, is key. Coming from Latin America, and I think Claudio will agree with me, they have been subject to dictatorships which have had a very long span of activities, so we need to enforce a procedure to subject the military and police to civilian oversight.

Having shared time with the Dean, I'd like to conclude with three major issues:

- First of all, we need to promote the political will of states parties. And the only way a state party does this is if civil society, NGOs, and political institutions prompt it to do so. If we don't have that, a state won't move in the right direction. This can be done in a democratic system; the majority of countries in the world, I hope, are or will be democracies, but everyone has its particularity. This is something that we should work on diligently.
- Second, we need the financial and human resources in order for these committees to address this adequately and so that commissions in their own territorial states can do this. So as we broaden the aspect of individual commissions to deal with this in the individual territories or under universal jurisdiction, we have to be able to prompt them and we have to be able to define the issues of what we are dealing with when we talk about torture, when we talk about cruel, inhuman and degrading treatment as a vision of societies, as a vision of how societies comply with their obligations. We have to try to do something that is very difficult, and that is what most impressed me from President Obama – we must have transparency. Can we get true government transparency, do we have the capability of having agreements that are negotiated and signed that are not under the board, that are not capable of rendition, or jails flying in the skies, or having the capability of looking at this through democratically framed institutions? If we are capable of that, I think the committees can work better.
- Third, in the solving the backlog of this Committee, the only way we can do this is to stress the compliance of countries and to accompany civil societies in this effort.

DEAN GROSSMAN

DOMESTIC INCORPORATION OF INTERNATIONAL TREATY OBLIGATIONS IS ESSENTIAL. First, there are “technical” reasons which explain this importance, namely, that the traditional supervisory mechanisms established by classic international law are weak. In fact, under classic international law, as the International Court of Justice has stated, treaties typically establish reciprocal obligations among state parties that allow one of the “aggrieved” states to depart from its own obligations when the other state is in non-compliance. This type of state supervision – “horizontal supervision” – was the sole mechanism for supervising compliance with treaties during the classic period of international law. Human rights treaties, because of their humanitarian purpose, establish nonreciprocal obligations among states. Accordingly, violations by one state are not considered acceptable grounds for derogation, in turn, by other states from their own human rights obligations.



Claudio Grossman

Taking into account the nonreciprocal nature of state obligations under human rights treaties, horizontal supervision is not the best-suited mechanism for ensuring compliance. Moreover, state supervision – of compliance with human rights norms – by other states often does not take place absent other state interests (e.g., security, political, etc.). As a result, action is not guaranteed and, when it does take place, it is open to criticism aimed at questioning its legitimacy.

In light of the pitfalls of horizontal supervision, the international community created collective systems of supervision: political; semi-judicial (which combines judicial with political elements); and judicial (that resembles the judiciary in a domestic setting). The political supervision (e.g., the General Assemblies of the United Nations and of the Organization of American States) allows for recordkeeping and public debate that on occasion can limit the discretion of states when they fail to react to human rights violations. However, collective political supervision ultimately depends on a calculated political interest and lacks the legitimacy accruing to action based on the rule of law as determined by independent third parties. As such, the semi-judicial and judicial forms of supervision are preferable from the perspective of legitimacy, particularly when composed of organs with independent and qualified experts, and where individuals have rights of action to present petitions alleging human rights violations. While there are meaningful developments and improvements in the area of international supervision, particularly at the regional level, this process is still under development, thereby reinforcing the need to simultaneously

focus on the importance of incorporating international human rights obligations into the domestic realm.

While we pursue domestic incorporation, we should also recognize the need to promote the transformation of classic international law principles that consider the matter of incorporation a purely domestic issue typically to be decided by the constitutional norms of each state. Again, states under international law were free to decide whether a special act of incorporation, e.g., a statute, was required, or whether international norms would be applied directly – either by sheer ratification of a treaty or by considering customary law applicable in certain circumstances. Human rights obligations such as the prohibition against torture, summary executions and genocide, created a different type of obligation than those typically existing under classic international law. To take the law seriously requires, at a certain point, transforming classic international law with regard to these types of obligations so that their application in the domestic setting becomes a matter of international law and is not left to state discretion. Needless to say, this process of grounding such obligations in international law will not happen overnight; but what is ultimately at stake here, is the legitimacy of international law itself and, perhaps, of law in general. In fact, if a state declares that it will not torture and ratifies a treaty to that effect, the very same concept of law deteriorates if the state is then permitted to claim that while violation of the prohibition of torture may generate international responsibility, such prohibition cannot be enforced in the domestic legal system. Hence, a dual-pronged approach – strengthening international supervision and the domestic incorporation of international obligations – should continue while the transformation of classic international law itself is presented as a vital aspect of achieving compliance with human rights norms.

As to the means currently available to achieving domestic incorporation of international law, two positive case examples from the United States provide interesting comparative material. One is the trial of Charles “Chuckie” Taylor, Jr., the son of former Liberian president Charles Taylor, Sr. Initially detained and convicted on charges of passport fraud in March of 2006, Chuckie Taylor was eventually charged with torture – after U.S. investigations, prompted in part by human rights groups such as Human Rights Watch – for his conduct in Liberia while head of the Anti-Terrorist Unit (ATU), an elite pro-government military unit established by his father, Charles Taylor, Sr., shortly after

taking office. A November 2007 indictment charged Chuckie Taylor with five counts of torture, one count of conspiracy to torture, one count of using a firearm during a violent crime, and one count of conspiracy to use a firearm during a violent crime. The conduct charged included committing forms of torture such as burning victims with molten plastic, lit cigarettes, scalding water, candle wax and an iron; severely beating victims with firearms; cutting and stabbing victims; and shocking victims with an electric device.¹

Taylor was tried in the United States under the Torture Victim Protection Act (TVPA), the first ever prosecution on torture charges under that statute. He was recently sentenced by U.S. District Court Judge Cecilia M. Altonaga to 97 years in prison for crimes involving torture in Liberia between April 1999 and July 2003.² In this case, the conviction was the result of an explicit normative instrument – the TVPA – that allows the domestic judiciary to act and enforce international treaty obligations.

Similarly, it is important to mention the landmark *Filártiga v. Peña-Irala* case, which set a precedent for imposing civil tort liability upon non-citizens in the United States for violation of the law of nations.³ The *Filártiga* decision was adopted under the Alien Tort Statute of 1789, also known as the Alien Tort Claims Act, which allows a non-citizen to sue another non-citizen only for a tort committed in violation of the law of nations. In *Filártiga*, two Paraguayan citizens (a father and daughter) sued a Paraguayan government official for the act of torturing, in Paraguay, a relative (their son and brother, respectively), upon their learning of that official’s presence in the U.S. on a visa that had since expired. Under the Alien Tort Statute, a U.S. court ordered that damages in the amount of \$10.3 million be paid to the plaintiffs.⁴ A body of jurisprudence developed following this case that explicitly recognized that official torture and comparable universal offenses constitute violations not only of international law, but also of U.S. federal common law.⁵

These two cases illustrate that in the United States, as in other countries, there are normative possibilities for incorporation of international human rights law into the domestic realm. Expansion of these possibilities will contribute to the achievement of the more ambitious goal, namely, the transformation of classic international law so that human rights obligations will always be enforceable, both domestically and internationally, on the basis of international law itself. HRB

ENDNOTES: Domestic Incorporation of Obligations under the Convention against Torture

¹ Federal Bureau of Investigation Press Release, ROY BELFAST JR., AKA CHUCKIE TAYLOR, CONVICTED ON TORTURE CHARGES, October 20, 2008.

² Department of Justice Press Release, January 9, 2009.

³ 630 F.2d 876 (2d Cir. 1980).

⁴ *Id.*

⁵ See, e.g., *Kadic v. Karadic*, 74 F.3d 377 (2d Cir. 1996) (reaffirming *Filártiga* by stating that the court “ha[s] neither the authority nor the inclination to retreat from that ruling”). In *Filártiga* and its progeny, numerous federal courts construed the Alien Tort Statute/

Alien Tort Claims Act to permit aliens to sue foreign officials for acts of torture, summary execution, disappearance, and similar universal crimes committed under color of state law. For analysis and discussion of the leading cases, see Harold Hongju Koh, *Transnational Public Law Litigation*, 100 *YALE L.J.* 2347 (1991) and the Honorable John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 *ST. LOUIS U. L.J.* 539 (1997) (analyzing ATS/ATCA decisions).