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Preventing Torture: An Introduction to the Symposium Issue

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PREVENTING TORTURE: AN INTRODUCTION TO THE SYMPOSIUM ISSUE

Lisa Davis*

In the landmark 1980 case, *Filártiga v. Peña-Irala*, the U.S. Second Circuit Court of Appeals, held that U.S. courts could punish foreign citizens for torture committed outside the United States.¹ The Court wrote that, “[T]he torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.”² Yet, today, for the first time in our post World War II history, torture has been both secretly practiced and openly sanctioned by the U.S. government.

Torture is prohibited under a wide range of international and regional instruments as well as under international criminal and humanitarian law.³ However, the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Convention”),⁴ is the only legally binding instrument at the international level that exclusively addresses the universal elimination and prevention of the practice of torture. Since its adoption in 1984, 144 States including the United States

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¹ 630 F.2d 876, 890 (2d Cir. 1980).

² *Id.*

³ There are a number of regional treaties that specifically address torture including the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, and the Inter-American Convention to Prevent and Punish Torture. Under humanitarian law, numerous provisions of the four Geneva Conventions prohibit torture. *See, e.g.*, Common Article 3 of the Geneva Conventions (explicitly prohibiting torture by stating that “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” “at any time and in any place whatsoever”), *available at* <http://www.icrc.org/ihl.nsf/WebART/375-590006?OpenDocument>. Under international criminal law, the International Criminal Court (“ICC”) holds torture, including sexual violence, as a violation of international law. *Rome Statute of the International Criminal Court*, Article 7, U.N. Doc. A/CONF.183/9 (July 17, 1998), *available at* http://untreaty.un.org/cod/icc/STATUTE/99_corr/cstatute.htm.

⁴ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984) [hereinafter Convention], *available at* <http://www2.ohchr.org/english/law/cat.htm>.

have ratified the Convention.⁵

In November 2007, the U.N. Committee Against Torture (“Committee”) adopted General Comment No. 2, which addresses the erosion of human rights witnessed during the post-September 11th era.⁶ This historic Comment codifies the principles and norms of the Committee with respect to the prohibition of sexualized torture and gender violence in custodial situations as well as where States acquiesce to private violence, including domestic violence. While most treaty bodies have issued a substantial number of General Comments, the Committee has been more sparing in its approach. Accordingly, Comment No. 2 is particularly important as it crystallizes the evolving jurisprudence of the Committee. This in turn has helped to develop both the understanding and scope of the Convention’s prohibitions and obligations.

The General Comment is one of the United Nations’ most significant mechanisms for advancing human rights, especially as it acquires over time broad acceptance and adherence by States parties. General Comments of the U.N. treaty bodies are not like legal judgments that contain detailed explanation and reasoning. Rather, they articulate applicable general principles and recommended conduct. General Comments’ interpretations of treaty provisions help to shape the discourse of human rights and States’ obligations to maintain them for their citizens. Since the United States is a State party to the Convention, the standards articulated in General Comment No. 2 have vital applicability to the former practices of the Bush administration and to reforms the Obama administration will need to make in order to bring U.S. law and practice into conformity with international standards.

General Comment No. 2 is a timely and critical contribution to the process of understanding and insisting upon adherence to the international rule of law as well as recognizing the incompatibility of torture with democracy, security and human dignity. States, national human rights commissions and human rights experts from around the world contributed to the draft proposal for Comment No. 2, addressing issues arising from violations that purport to be “justified” in the name of counter-terrorism.⁷ The Com-

⁵ Convention Ratification, Office of the High Commissioner for Human Rights, <http://www2.ohchr.org/english/bodies/ratification/9.htm> (last visited Sept. 9, 2008).

⁶ U.N. Office of the High Commissioner for Human Rights, [OHCHR], Comm. Against Torture, *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, General Comment No. 2: Implementation of Article 2 by States Parties*, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter *General Comment No. 2*].

⁷ *Id.* ¶ 6.

ment underscores the non-derogability of torture and the responsibility of the State to take vigorous, effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment (“CIDT”) wherever they are practiced. Comment No. 2 will play an extremely significant role in the future work of the Committee, in the practice of ratifying States, and in the further development of the international norm against torture.

Given the importance of Comment No. 2, it is crucial to raise awareness of this very significant development in the international understanding of torture as well as to encourage the use of the Comment specifically in relation to United States policy and practice. Accordingly, the *New York City Law Review* devoted its 2008 Symposium to an analysis and discussion of the Comment’s most significant provisions, entitled “Preventing Torture: Implications of General Comment 2: ‘Implementation of Article 2 by States Parties of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’” on Friday, March 28, 2008, at the New York City Bar Association in midtown Manhattan.⁸

This was the first symposium on this historic development in international law. WBAI’s radio show, *Law and Disorder*, along with over a dozen affiliates, aired the symposium in segments in both the United States and Europe. Co-sponsored by the International Human Rights Committee of the Association of the Bar of the City of New York, the gathering brought together leading international and domestic human rights experts, including expert members of the U.N. Committee Against Torture and U.N. Human Rights Committee, as well as U.N. Special Rapporteurs, former military, practitioners and scholars. The symposium featured three panels highlighting some of the most significant aspects of Comment No. 2.

Felice Gaer, former Vice-Chair and current Rapporteur of the Committee as well as Co-Rapporteur responsible for drafting General Comment No. 2 noted in her opening remarks that the symposium was taking place in a milestone year—the 60th Anniversary of the Declaration of Human Rights. Ms. Gaer emphasized the painstaking process of developing Comment No. 2, involving the larger

⁸ The *New York City Law Review* is a unique public interest legal journal that aims to inform the legal community of recent developments in public interest law including international law. This issue’s subject—the prohibition against torture—represents the Law Review’s commitment to and tradition of publishing symposia on crucial and timely legal issues.

international community for input and discussion, and the significance of the Comment in the work of the Committee.

The first panel, *Prohibited Conduct*, explored the Comment's provisions regarding torture and CIDT in international law and their relationship to each other in law and practice. The Committee's mandate to eradicate the practice of torture includes violence against women—including sexual violence and trafficking—as gender-based acts of torture.⁹ Article 2 requires State parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.¹⁰ Panelist Patricia Viseur-Sellers, former Legal Advisor for Gender-Related Crimes and Acting Senior Attorney for the International Criminal Tribunals of the former Yugoslav ("ICTY") and Rwanda ("ICTR"), emphasized various aspects of torture that are often over-looked, including gender violence and sexualized torture. She elaborated on the magnitude of the Comment's codification of the principles and norms of the Committee with respect to the prohibition of such violence in custodial situations.

Utilizing the Convention Against Torture, women's advocates can hold the U.S. government accountable to the provisions that prohibit gender-based torture and sexual violence. Intentional harm, when combined with discrimination and State acquiescence, draws the connection between torture and domestic violence. This connection provides an opportunity to demonstrate the severity of domestic violence and to urge governments to protect women from its cruelty. NGOs seeking to implement Article 2 of the Convention can utilize Comment No. 2 for guidance.

The second panel, *Protected Contexts*, explored the Comment's provisions relating to the contexts to which the obligations of the Convention apply. These include (1) where a State exercises effective control extraterritorially; and, (2) where the State is obligated to intervene to protect persons from purely private conduct, amounting to torture or CIDT, such as domestic violence.¹¹ Meg Satterthwaite, Assistant Professor of Clinical Law at NYU School of Law, and Walter Kälin, former expert member of the U.N. Human Rights Committee and current Representative of the U.N. Secre-

⁹ See *General Comment No. 2*, *supra* note 6, ¶ 18. Additionally, Comment No. 2 states that, "[m]en are also subject to certain gendered violations of the Convention such as rape or sexual violence and abuse. Both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles." *Id.* ¶ 22.

¹⁰ Convention, *supra* note 4, art. 2.

¹¹ See *General Comment No. 2*, *supra* note 6.

tary-General on the Human Rights of Internally Displaced Persons, examined the issue of applying the territorial responsibility of States parties to facilities over which a State exercises effective control under international law and under the Convention.

Article 3 of the Convention expressly prohibits the practice of *refoulement*—the transferring of a detainee to a State where there may be a risk of torture.¹² However, the United States has maintained that it is not bound by human rights treaties for actions conducted outside its borders.¹³ General Comment No. 2 addresses this issue by making clear that the concept “any territory under its jurisdiction,” includes any territory or facility or de facto control of the State party.¹⁴ Furthermore, the Comment asserts that this State control “must be applied to protect any person, citizen, or non-citizen without discrimination.”¹⁵

The U.S. government has alternatively argued there is a distinction in the Convention between torture and CIDT and that Article 3 applies only to the former. Professor Satterthwaite points out that “the U.S. takes a very cramped view of prohibited conduct—it believes that nothing prohibits it from transferring an individual to a risk of ill-treatment.” She goes on to say, “While even the most brilliantly written General Comment may not convince American leaders to reverse course, clear statements of the law do act as a check on the proliferation of such arguments.” In this way, she says, Comment No. 2 makes a “significant contribution.”

Panel three, *Preventing Torture and CIDT: New Approaches*, examined several innovative approaches to torture prevention. The panel addressed issues regarding the rule of law and accountability, universal jurisdiction and immunities, and methodologies for preventing torture and CIDT in interrogation. Peter Weiss, International Lawyer and Vice President of the Center for Constitutional Rights, posed a sensible question: “How can the sense of wrong which is somehow present in every person be made to trump the mistaken sense of duty or of national security which leads to torture?”

¹² Convention, *supra* note 4, art. 3.

¹³ See U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America*, ¶ 20, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006), available at [http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf). Rejecting this argument, the Committee chastised the United States for its human rights violations and called on the U.S. government to close all secret detention centers. Julie Mertus & Lisa Davis, *Citizenship and Location in a World of Torture*, 10 N.Y. CITY L. REV. 411, 421–22 (2007).

¹⁴ General Comment No. 2, *supra* note 6, ¶ 7.

¹⁵ *Id.*

Steven Kleinman, career intelligence officer and experienced interrogator and consultant on national security policy, followed up with a discussion on the impracticability of torture and how the only effective way to elicit “truth” is through cooperation, not coercion. He makes a poignant observation about the type of culture in which torture flourishes: “The popular view of interrogation is unfortunately shaped more by fiction than fact.” Kleinman explains that, “most of us have been exposed to some form of interrogation through the entertainment media. As a result, too many people—including some senior government officials—have formed strong opinions about interrogation *solely* based on these fictionalized portrayals written by Hollywood screenwriters.”

Keynote speaker, Justice Albie Sachs of the Constitutional Court of South Africa, incited both laughter and tears when he talked about his work as a human rights activist and lawyer that led to his prolonged solitary confinement without trial and his eventual exile in 1966. In 1988, Justice Sachs lost both an arm and his sight in one eye when a bomb placed in his car by South African security agents exploded. Touching on these experiences, Justice Sachs talked about the importance of a movement adopting opposition to torture and terrorism, and the importance of the connectivity among human beings:

When you become an instrument of death; when you don't care about people, about human beings, then you're destroying the very heart of your struggle, the very foundation of the claim to life, to dignity, that gives you the courage to withstand all of the difficulties, all the traumas that gives you the solidarity, the connection with other people. It's profoundly destructive of your ethos, of who you are, of what your struggle is all about. . . . When you embark upon that kind of a struggle and you make it an indiscriminate kind of war between one group and another group and one community and another community—not against a system of injustice and oppression, not against the structures of society—then it becomes endless.

This issue of the journal includes related articles and remarks from many of the panelists gathered to discuss the vital issues presented at the symposium. The Law Review extends a heartfelt thanks to City University of New York School of Law (“CUNY”) Law Professor Rhonda Copelon, Director of the groundbreaking International Women's Human Rights (“IWHR”) Clinic, for her tireless dedication to the symposium. Professor Copelon has worked on General Comment No. 2 with several generations of interns at CUNY Law School's IWHR Clinic, including some of us who

helped to organize this event. Without her guidance and counsel, this symposium would not have been possible.

The Law Review is extremely grateful to the Jacob Blaustein Institute for the Advancement of Human Rights, which enabled us to bring in international experts, many who traveled great distances to speak. We extend our sincere gratitude to our faculty advisors, Professors Ruthann Robson and Andrea McArdle for their support and to Professors Franklin Seigel and Penelope Andrews for volunteering their time and expertise. We also thank CUNY School of Law Dean Michelle Anderson for supporting this publication and the International Human Rights Committee of the City Bar Association for co-sponsoring the symposium.

Symposium Program

8:50am Welcome

Lisa Davis, Editor-in-Chief, *New York City Law Review*

Mark R. Shulman, Chair, International Human Rights Committee of the Association of the Bar of the City of New York

9:00am Opening Remarks

Felice D. Gaer, Expert Member, CAT Committee; Co-Rapporteur on General Comment No. 2; Director, Jacob Blaustein Institute for the Advancement of Human Rights

9:30am Panel I: *Prohibited Conduct*

Ambassador Luis Gallegos, Moderator, Chairman, Global U.N. Partnership for Inclusive Information and Communication Technologies; Expert Member, CAT Committee

Sir Nigel Rodley KBE, Former U.N. Special Rapporteur on Torture; Expert Member, U.N. Human Rights Committee

Tony Lagouranis, Former U.S. Army interrogator

Dr. Nora Sveaass, President, Human Rights Committee of the Norwegian Psychological Association; Expert Member, CAT Committee

Patricia Viseur-Sellers, Former Legal Advisor for Gender-Related Crimes, Office of the Prosecutor, International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)

11:00am Keynote Introduction, Penelope Andrews, Professor of Law, City University of New York School of Law

11:10am Keynote, Justice Albie Sachs, Constitutional Court of South Africa

1:00pm Remarks, Dean Michelle Anderson, City University of New York School of Law

1:15pm Panel II: *Protected Contexts*

Dr. Zonke Majodina, Moderator, Deputy Chairperson, South African Human Rights Commission; Expert Member, U.N. Human Rights Committee

Walter Kälin, Former Representative of the Secretary General on the Human Rights of Internally Displaced Persons; Expert Member, U.N. Human Rights Committee

Scott Horton, Lecturer in International Law, Columbia Law School; legal affairs writer, *Harper's Magazine*; columnist, *The American Lawyer*

Margaret L. Satterthwaite, Assistant Professor of Clinical Law and Faculty Director of the Center for Human Rights and Global Justice, New York University School of Law

Rhonda Copelon, Professor of Law and Director, International Women's Human Rights Law Clinic, City University of New York School of Law

3:00pm Panel III: *Preventing Torture: New Approaches*

Penelope Andrews, Moderator, Professor of Law, City University of New York School of Law

Peter Weiss, International Lawyer, Vice President, Center for Constitutional Rights

Steven M. Kleinman, Experienced interrogator and consultant on national security policy

Betty Reardon, Professor and Founding Director Emeritus of the Peace Education Program, Teacher's College, Columbia University

4:30pm Closing Remarks

Dr. Bertrand G. Ramcharan, Former Deputy High Commissioner for Human Rights; Professor of Law, Geneva Graduate Institute of International Studies