

Overview of Available U.S. Accountability Mechanisms: Challenges and Advances

Shawn Roberts¹

I've been asked to provide an overview of the options available for pursuing human rights violators who reside in, have assets in, or are passing through the United States, and to comment upon how the U.S. is doing in meeting its obligations under the Convention against Torture (C.A.T.). I've also been asked to comment upon proposals for expanding the arsenal of laws in the U.S. to facilitate action against perpetrators.

There are a variety of potential strategies available for pursuing human rights violators in the U.S.:

1. **Extradition for prosecution, or prosecution in U.S. courts** (as most of you are aware, Article 7.1 of the Convention against Torture creates an affirmative duty of states parties to the C.A.T. to investigate and prosecute or extradite for prosecution alleged torturers on U.S. soil).

Prosecution or extradition should be the first choice of officials, in order to meet these Article 7 obligations. (And ever since the Reagan Administration first began discussion the U.S. position vis-à-vis the C.A.T. in the early 1980s, U.S. government officials have made clear that their strong preference is to extradite, turning to prosecutions in the U.S. only when extradition is not an adequate alternative.)

Extradition can be to the country where the violation occurred, or to other countries seeking to prosecute.

The U.S. is also bound to provide assistance in investigations and prosecutions of alleged torturers which are being pursued in other countries (under Article 9 of the C.A.T.).

2. A second option area is **deportation or removal** – a strategy which historically has been adopted for cases involving alleged war criminals in the U.S., through the office of special investigations at the Department of Justice.

Although it can be “easier,” strategies pursuing deportation or removal are not optimal remedies, for a number of reasons:

- There is no guarantee that the individual will be prosecuted if deported; may return to commit additional crimes with impunity
- If the perpetrator has not established roots in the U.S., deportation can be seen as a mere inconvenience

¹ Shawn Roberts is an international human rights attorney who has served as co-counsel on many civil cases involving torture and extrajudicial execution (*Ortiz v. Gramajo*, *Xuncax v. Gramajo*, *Mehinovic v. Vukovic*, *Cabello v. Fernandez Larios*, *Romagoza et al v. Vides Casanova and Garcia*, and *Doe v. Lumintang*) under the Alien Tort Claims Act and Torture Victim Protection Act. For the past three years, she has worked as the Legal Director for the Center for Justice & Accountability (CJA) in San Francisco. Prior to coming to CJA, Ms. Roberts worked with the Nobel-prize winning International Campaign to Ban Landmines and co-authored *After the Guns Fall Silent: the Enduring Legacy of Landmines*. She previously worked with the Central American Refugee Center, the Center for Human Rights Legal Action (CALDH) and Catholic Charities, and worked as an intern with the Inter-American Commission on Human Rights at the Organization of American States.

- There may be problems with potential foreign prosecutions – the accused may not receive full due process protections which attach in extradition or U.S. prosecutions, or may be subjected to torture or other violations (particularly if there has been a change in governments)
- A formal government policy opting to pursue primarily immigration strategies for pursuing torturers in the U.S. would violate the higher obligation to prosecute or extradite under the C.A.T.

However, there are clearly many cases in which extradition is not an option (e.g., where there is no extradition treaty) and/or where prosecutors will not prosecute, and deportation should be considered if extradition/prosecution are not viable options.

3. A third option area for pursuing human rights violators in the U.S. involves pursuing **civil remedies** under the Alien Tort Claims Act (ATCA), one of the first laws passed by a U.S. Congress – way back in 1789 – or under the Torture Victim Protection Act (TVPA). These U.S. statutes, codified at 28 U.S.C. Section 1350, allow cases to be brought in U.S. federal courts against *individual perpetrators with direct involvement* in the torture (e.g., Vuckovic or Pena Irala), or those with *command responsibility* (e.g., those who knew or should have known that their subordinates had committed, or were about to commit, abuses, and failed to take “reasonable and necessary” measures to prevent those acts or to punish the subordinates. (e.g, Generals Vides Casanova and Garcia, the Salvadoran Ministers of Defense challenged both in the Churchwomen case and in companion case by four Salvadoran torture survivors now living in the U.S., which goes to trial in Florida in May; or case involving the third-ranking member of the Indonesian military, General Johny Lumintang, which goes to default trial here in Washington tomorrow morning before federal judge Allen Kay, at the Federal Court house located at the corner of 3rd and Constitution (Judiciary Square Metro stop).

The ATCA was passed to allow suites to be filed in U.S. courts for torts committed abroad, e.g., piracy, but went virtually unused until the late 1970s, when law students and attorneys at the Center for Constitutional Rights in New York tried using the statute to allow the families of Joelito Filartiga to bring suit against a Paraguayan policemen who was allegedly involved in Joelito’s torture and subsequent death. The Federal District Court judge who initially received the case dismissed the complaint, stating that the ATCA was not intended to confer jurisdiction for modern-day acts of torture committed overseas. On appeal, however, the Second Circuit reversed, holding that the ATCA affords torture victims or their survivors both a forum and a right to compensation under U.S. law: “for the purposes of civil liability, the torturer has become, like the pirate and the slave trader before him, **hostis humani generis**, an enemy of all mankind.”

In a series of subsequent cases, the federal courts have confirmed that the ATCA grants jurisdiction to federal courts to consider claims for violations of fundamental norms of international law, such as torture, summary execution, disappearance, arbitrary detention, cruel, inhuman and degrading treatment, crimes against humanity and war crimes.

In 1992, the U.S. Congress gave its modern-day stamp of approval to the use of the ATCA to provide redress in U.S. courts for human rights violations committed outside the U.S., specifically leaving the atca in place but passing the Torture Victim Protection Act (TVPA), which remedies a prior drawback of the ATCA by allowing U.S. citizens as well as aliens to bring suit in cases involving torture and summary execution (only aliens/non-citizens can bring suit under the ATCA).

The TVPA creates a federal cause of action for torture and execution committed anywhere in the world, by

Individuals who, with actual or apparent authority, or under color of law, of any foreign nation, (1) subjects an individual to torture or (2) subjects an individual to extrajudicial killing, shall, in a civil action, be held liable for damages to that individual or the individual's legal representative.

(courts also have "federal question" jurisdiction in these cases pursuant to 28 U.S.C. Section 1331, which provides federal subject matter jurisdiction in cases "arising under" U.S. law, since customary international law is part of federal common law.

With regard to the question of whether the U.S. is falling short of its obligations to hold perpetrators accountable, consider the following cases:

- Kelbassa Negawa, an Ethiopian living in Atlanta held civilly liable in 1993 for his direct involvement in acts constituting torture and cruel, inhuman and degrading treatment, then granted citizenship in the U.S.;
- Armando Fernandez Larios, a Chilean living in Miami who is an ex-DINA member who entered a plea bargain in the Letelier Moffitt bombing and served only a few months of jail time, and who was a member of the helicopter-borne death squad allegedly responsible for the "Caravan of Death" killings in Chile in 1973, whose extradition to Chile was requested by Judge Guzman over a year ago, but has not been acted upon;
- Nicola Vuckovic, also living in the Atlanta area, a member of the Bosnian Serb army alleged to have been directly involved in torturing Bosnian Muslims in northern Bosnia in 1992, two of whom are now living in the U.S.;
- Toto Constant of Haiti, living openly and notoriously in New York;
- Tomas Ricardo Anderson Kohatsu, a Peruvian intelligence official linked to the torture and dismemberment of one fellow intelligence officer and to the torture and paralysis of another (Jose Miguel Vivanco will talk further about this case during his presentation).

In all of these cases, and many others which have been referred to government authorities – some of which arose prior to U.S. ratification of the C.A.T. in 1994, some since – no discernable action has been taken to extradite, prosecute, or even to apply immigration remedies.

Granted, there must be some latitude given to the government in that C.A.T.'s Article 7.1 does not require prosecution and/or extradition in every reported case. The decision to prosecute or to extradite entails a judgement as to whether a sufficient legal and factual basis exists for such an action.

And, the D.O.J. has taken several steps toward action, e.g., in the Anderson Kohatsu case (before the State Department stepped in and claimed that Anderson Kohatsu had diplomatic immunity and could not be arrested), and in executing "Operation Home Run" (a tactical operation designed to locate, detain and deport 14 alleged perpetrators living in southern Florida who are alleged to have committed human rights abuses in Angola, Haiti and Peru), and we know that they are actively investigating other cases.

The D.O.J. is significantly restricting potential cases which might be pursued, however, in that according to its analysis, individuals cannot be prosecuted or extradited from the U.S. if the crimes involved were committed before the U.S. ratified the Convention against Torture in November of 1994 and adopted implementing legislation at 18 U.S.C. Section 2340A in the criminal code; since, according to this analysis, such criminal prosecution would purportedly violate the ex post facto prohibition in the U.S. constitution.

Many scholars and activists challenge this position, however, in that the ex post facto issue revolves around the accused's right to fair warning and fair treatment. International law and other sources may establish this fair warning even before these sources are codified in federal statute.

Changes in laws which affect matters of judicial procedure, including the place of trial, generally do not offend the ex post facto clause (see, for example, *Post v. U.S.*, 161 U.S. 583 (1896), or *Gut v. State*, 76 U.S. 35 (1870), or *Cook v. U.S.*, 138 U.S. 157 (1891), because concerns over fair warning and notice are not evident.

No one can convincingly argue that acts of torture have not long been universally condemned and therefore, or that they were unaware of the illegality of committing such acts. 18 U.S.C. Section 2340A did not criminalize what had once been innocent conduct.

Torture has long been recognized to be a violation of both national and international law, and no country purports to legalize acts of torture.

Conclusions:

- The United States Department of Justice should reconsider its position regarding the inapplicability of 2340a to cases arising prior to 1994.
- Officials at the U.S. State Department must be educated, in addition to their counterparts at D.O.J./I.N.S., regarding U.S. obligations under the C.A.T.
- The D.O.J. and other departments should act to actively facilitate extradition (if not to the country where the violation occurred, then to other countries with an interest in prosecuting the case), and they must more actively promote investigative assistance in cases involving torture and extrajudicial execution --even when it may be embarrassing or awkward to do so due to past (or present) U.S. support of those alleged to be responsible.
- The government should be commended for its passage of the TVPA and the Torture Victim Relief Act, and additional appropriations for the rehabilitation and treatment of torture victims and their families should be made available.
- The government should be encouraged to provide possible assistance in assisting victims in enforcing monetary judgments against human rights violators.
- Congress should act to close gaps in existing laws and to provide additional mechanisms for holding human rights violators accountable for their crimes – but not by pursuing exclusively immigration-oriented remedies such as the anti-atrocity alien deportation act which focused exclusively on immigration remedies – pursuing immigration remedies alone would violate U.S. obligations under Article 7.1 of the C.A.T., and may result in selective, discriminatory enforcement of those perpetrators from countries the U.S. is not afraid of offending. Thank you.

Transcript of remarks presented at THE PINOCHET PRECEDENT: Individual Accountability for International Crimes, sponsored by American University Washington College of Law and the Institute for Policy Studies. March 26, 2001.