American University Washington College of Law

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Remarks - Forensic Evidence in the Fight Against Torture

Claudio M. Grossman

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Opening Remarks

Remarks of Dean Claudio Grossman*

I would like to welcome all of you to our law school, American University Washington College of Law (AUWCL), for this conference on the Use of Forensic Evidence in the Fight Against Torture.

The purpose of the conference is to discuss the experiences of stakeholders around the world in enhancing the use of forensic evidence to expose torture. This subject is crucial for many reasons. We know that brutal forms of torture, which leave physical scars, unfortunately continue to occur. However, notwithstanding the physical evidence, there are many situations where the passage of time or distance of international supervisory organs, for example, precludes the verification of the existence of torture. Additionally, more “sophisticated” forms of torture are utilized with the precise objective of hiding and denying its occurrence, creating further serious issues of accountability.

Torture is not only an issue involving a victim and a victimizer. Impunity for torture has grave societal consequences in addition to the impact on individuals. The practice of torture corrupts police and investigative agencies and their techniques, and with its corollary of brutality, denies important values of human dignity embodied in the rule of law, having a general negative impact on the society. It is very difficult, if not impossible, to isolate torture. Torture’s corrosive effect erodes important values of human dignity and the rule of law in the societies where it takes place. As a result, torture does not only impact individuals but all of us, every individual who believes in the rule of law, and who wants to live in societies where human beings are accountable for what they do and where enforcement agencies, necessary in every society, perform their duties in accordance with the rule of law.

This conference concludes a three-year study by the International Rehabilitation Council for Torture Victims (IRCT). The law school is proud and honored to cosponsor this conference with the IRCT to explore topics that include survivors’ perspectives, national, regional and international best practices in using forensic evidence to combat torture, and challenges and emerging developments. The IRCT is renowned worldwide for its commitment to the prevention of torture and its contributions to advocacy, scholarship, and complete solidarity with the victims, which means so much not only to the victims, but to everyone who stands for the values embodied in the rule of law. If we were to live in a world with more NGOs like the IRCT, we would certainly live in a better world.

AUWCL has developed numerous initiatives in international law and human rights including joint conferences with the Association for the Prevention of Torture on the prevention of torture and other ill-treatment, and on enhancing visits to places of detention, and with Amnesty International on the evolution of the UN Committee against Torture and strengthening the prohibition against torture. In addition, AUWCL offers an LLM in International Legal Studies with eight different areas of expertise.

* Dean Claudio Grossman has been Dean of the American University Washington College of Law since his appointment in 1995. Dean Grossman also currently serves as chair of the United Nations Committee against Torture, and member of the Governing Board of the International Association of Law Schools, of the Board of the Inter-American Institute of Human Rights, and of the International Objectives Committee of the Association of American Law Schools (AALS). Dean Grossman is also serving as a referee in peer review evaluations for the European Research Council Dedicated Implementation Structure, under the Ideas Specific Programme, until 2013. As a member of the Inter-American Commission on Human Rights from 1993-2001, he served in numerous capacities including President (1996-97; 2001), Special Rapporteur on the Rights of Women (1996-2000), and Special Rapporteur on the Rights of Indigenous Populations (2000-2001). Dean Grossman has authored numerous publications on international law and human rights, and received numerous awards for his work in those fields including the 2010 Henry W. Edgerton Civil Liberties Award from the ACLU of the National Capital Area and the 2012 Deborah L. Rhode Award from the AALS Section on Pro Bono and Public Service Opportunities.
specialization, one of which is International Human Rights Law. Our law school is also home to the War Crimes Research Office, and our students and faculty contribute to studying issues of accountability that are very much related to the topic that convokes us today. AUWCL is the law school that perhaps offers the most courses in international law and human rights in the world, with approximately 40 courses each term that specialize in these topics. But this is not about what we do, this is about what remains to be done. That is why all our efforts should not be seen as things that create satisfaction for our accomplishments but as an incentive to move ahead in this important struggle for human dignity.

I would like to welcome you all once again to this conference, and to recognize in particular many of you who have come from all over the world to be here. This conference will be webcast and its proceedings reproduced by the law school’s specialized, student-run publication, the Human Rights Brief, which is distributed to over 4,000 subscribers in more than 130 countries. Through these means we hope to multiply the impact of the conference and contribute even further to achieving our common goals. I would again like to thank the IRCT. This conference would not have taken place without this organization and its three-year project. I would like to recognize in particular Margaret Hansen, Senior Programme Assistant, Miriam Reventlow, IRCT’s Head of Legal and Advocacy, as well as IRCT’s President Mohamud S.N. Said, Secretary General Brita Sydhoff, and Medical Expert Jonathan Beynon who is serving as the conference moderator. The cooperation between our law school and IRCT has been truly spectacular and I think it bodes well for future events at this institution.

For all of you coming to the law school for the first time it will be interesting for you to know that this conference is part of our annual Founder’s Celebration, which commemorates the history of this institution. WCL was founded by two pioneering women in 1896, in a moment when women were not allowed in legal education or into the practice of law because, “by nature,” women were not considered to have the intellectual or practical skills required to practice the profession. The law school’s founding mothers instead thought we should not blame nature for things we do ourselves and that the study of the law irrespective of gender is essential to achieving a world of equality and nondiscrimination. This is an important example that inspires what we do here. We do not need to consider torture and other forms of cruel, inhuman or degrading treatment or punishment as inevitable occurrences. We can roll up our sleeves to act against those situations, and imagine and contribute to a world free of torture. I am sure that this conference will contribute further to its realization. Thank you very much.

Remarks of Brita Sydhoff*

Professor Grossman, Dean, thank you so much for inviting us to the American University Washington College of Law and being such a wonderful partner to this project.

* Brita Sydhoff is Secretary-General of the International Rehabilitation Council for Torture Victims (IRCT) since September 2004. Responsibilities include implementation of the IRCT’s policies and strategies with a broad mandate to promote and support IRCT rehabilitation centers and programs and the prevention of torture globally. Her previous positions include Head of the Department of International Law and Refugees of the Swedish Red Cross; Resident Representative of the Norwegian Refugee Council in Geneva, Switzerland; Head of Programmes with the International Council for Voluntary Agencies, also in Geneva; Head of research program on international migration in the International Organisation for Migration in Budapest, Hungary; Head of the Danish Refugee Council’s operations in the former Yugoslavia with responsibility for implementing humanitarian emergency programs; and consultant for the World Health Organization. Prior to leaving Sweden in 1984, Ms. Sydhoff worked for the Swedish Migration Board in senior positions for 13 years.
bomb from exploding. And besides, the ticking bomb scenario cannot justify the use of torture on a routine basis when there is simply no bomb about to explode – which is the way most torture happens in real life. So those arguments against the ticking bomb scenario are logical, though unfortunately they do not carry a lot of sway with the public at large, but I think it is something we need to say from our own professional experiences.

We will be even more effective if we can demonstrate the price that societies pay for engaging in widespread torture. You know it from your experiences in many parts of the world, and we lawyers know it because we have seen it in many different parts of the world as well. Torture has such an offensive effect not just on a number of people who may be innocent, but on their families, on the society at large, and on the institutions and the members of the institutions that take sometimes justified pride in their belonging to an institution, but then all of a sudden have to reckon with the fact that the institution itself is asking them to perform morally repugnant techniques on other human beings. With your experience, we can work on the larger picture of what price societies pay for engaging in widespread or systematic patterns of torture, even if they may gain some ground very momentarily on obtaining evidence of crime. Of course, esprit de corps and silence among friends will always interfere with serious investigations. There again, when the evidence is strong, it will tend to break down those barriers of conspiracies of silence that will always happen.

There are obviously many other reasons why torture prevails, but my final message would be to try to look at the services of the forensic sciences and medical practitioners, both in the small and in the large picture. That is, on documenting specific techniques and evidence in helping individual victims to overcome the barriers to effective remedies of different sorts, but also in educating the public at large about what really happens when torture is allowed to go on. Obviously, last but certainly not least, I think you can have a great effect on the fellow members of your profession around the world because the more we get the medical and scientific and psychiatric and psychological profession engaged in the struggle against torture, the harder it will be for governments to engage in these practices. I thank you very much for your attention.

Remarks of Dean Claudio Grossman

**INTRODUCTION**

Let me begin by saying that I am honored to be on the panel with such a group of distinguished experts, and to share our views and opinions as to how we can contribute to the important goal of preventing torture, and ensure accountability and reparations in accordance with the legal standards when torture takes place.

I would like to start with a few questions. The first question is why do we have these norms at the international level? Why do not we have them only at the domestic level? The international community concluded that the domestic norms and procedures in certain circumstances would not protect the rights of individuals. A tragic reminder of that situation was the World War II, which provided an impetus for the development of international norms. As a result of the inability of the domestic governments to protect the rights of individuals, the development of norms started with the Universal Declaration of Human Rights as a moral standard of achievement followed by the adoption of treaties stating that every human being was entitled to internationally-protected rights. This development reflected a very important humanitarian value, namely that human beings existed as subjects of international law, and that those rights apply irrespective of nationality, ethnicity, religious preferences, gender, etc. If you read the texts of the International Covenant on Civil and Political Rights, or the Convention against Torture, they state that everyone is entitled to due process, to be presumed innocent, to his/her religion, and so forth. This developed a common narrative of human dignity.

Also crucial to human rights is the understanding that these norms apply in all circumstances. If you look at the International Covenant on Civil and Political Rights or the Convention against Torture, they established that some rights cannot be derogated ever—even under an emergency situation. One of those is the right to your physical, emotional, and psychological integrity—the prohibition against torture and other forms of cruel, inhuman, or degrading treatment or punishment. Particularly during states of emergency and war, rights suffer and domestic systems do not offer protection. In the context of populations that are scared and governments that talk about real or perceived enemies, the domestic judiciaries are unable or unwilling to protect the population or groups of the population in some of these cases. In addition to rights, the international community created institutions and mechanisms at the international level that would assist countries in complying with their obligations. These developments were necessary to ensure that independent experts resorting to different forms of supervision would ensure the application of international norms.

**THE ROLE OF THE UN COMMITTEE AGAINST TORTURE**

I am going to refer to one supervisory organ, the United Nations Committee against Torture, and the UN Convention against Torture. This supervisory organ measures behavior against the standards laid down in the Convention. The
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In order to assist the Committee, three situations could be identified. The first situation is one where the facts are undisputed, but the issue is whether the facts constitute a violation of the Convention. For example, where through the domestic judiciary it has been established that someone was water boarded, or was held in isolation for a long time, and the domestic judiciary concluded that there was no torture, or that such treatment amounted to something other than torture such as cruel treatment. (This last conclusion has several consequences including reparation that should be awarded or the penal liabilities that could be pursued). The facts are undisputed, but the legal qualification of the facts is at stake, and the legal qualification of the facts is something that belongs to the organ engaged in its supervisory role, in this case the Committee against Torture. Then, again, in this respect, the role of doctors and evidence presented will be very crucial, even if the facts are not disputed, but the quality of the lawyering that includes presentations based on sound evidence and forensic procedure are also important.

The second instance is one in which relevant facts were either never considered or were disregarded in the state’s domestic proceedings. You cannot present a petition to the Committee against Torture if you did not try to solve the problem in your own country beforehand. The international community has a subsidiary role since we need to give an opportunity to the internal institutions and procedures to resolve an allegation internally. On the other hand, if it is not reasonable to exhaust domestic remedies (e.g., there is no access to them or they are unduly lengthy), you can go immediately to the Committee. In other circumstances, if known facts were never presented internally by a petitioner, the Committee will declare the case inadmissible. If, to the contrary, the facts were presented internally by the petitioner and the domestic judges failed to consider them, no deference can be paid to the domestic judiciary’s determination of those facts because the judiciary did not determine them. Another possibility is that relevant facts were known later after completion of a process in a given country for no fault of the petitioners (e.g., relevant data became known because of a valid confession). In this situation the Committee will assess the facts and determine their legal consequences.

The third instance occurs when the complainant and the state party dispute relevant facts, e.g., whether a person was kept in isolation and the duration of such isolation. In those cases, the Committee gives considerable weight to the findings of fact made by the organs of the state party, unless it appears that the domestic proceedings did not meet minimum standards of due process. In accordance with well-established legal principles, the proof of facts belongs to the person who argues them. Accordingly, the initial burden of proving underlying facts belongs to the petitioner. Needless to say, again, the quality of forensic evidence will be very important in this respect.

If the internal process did not meet minimum standards of due process, no deference is due. What are those minimum standards? For example, independence and impartiality of the tribunals that made the determination that no torture took place. Important safeguards that need to be in place in order to achieve independence include that the organs were established by law, that they function independently from political branches of
government, that there is an appropriate system of appointments, terms of service, and procedures for appointments and removals and terms of judges in place. Other components of due process include: the right to a fair hearing, the right to independent defense counsel, the right to communicate with legal counsel, the right to confront adverse witnesses, the right of a person deprived of liberty to be afforded a reasonable opportunity to present his/her case, the right of judicial review, the right to be treated with humanity and respect for the inherent dignity of the human person, the right to be informed promptly of any charge, the right to be tried without delay. In my view, there are sound reasons for arguing that the Istanbul Protocol has turned into a normative instrument. In accordance with international law, the opinion of publicists is a source of law as it might be practice in some circumstances. Whether or not we consider the Istanbul Protocol a source of law, however, a lack of compliance with sound procedures to identify and determine facts creates, in my view, a presumption of a violation. Of course, a presumption would only shift the burden of proof, and the other party could prove that presumption wrong.

**Conclusion**

Let me conclude my comments by stating that in matters of interpretation of human rights treaties, we should be guided by principles of law, and a very important principle of human rights law is that the object and purpose of a treaty is humanitarian. In light of that, when we have a doubt, we choose the interpretation that affords more protection to human beings, as it has been established by the International Court of Justice and the European and Inter-American Courts of Human Rights. Accordingly, when in doubt if we choose the protection of human rights we are not only following a moral interpretation but also applying the law.

**Remarks of Phil Shiner***

**Introduction**

I’d like to echo the congratulations that have been expressed to the organizers of this event. I think it is a fascinating initiative to bring together the worlds of the legal and the psychological-forensic and the academic and the practitioner. Myself and my colleague attended a session in November in Copenhagen and it certainly got us thinking about how we can work much more effectively on behalf of our clients who have all experienced terrible torture at the hands of the UK. I offer these thoughts today as the beginning of a process that can build on this project. I think there’s a great deal to be done, and I want to spend quite a bit of time focusing on the case study of Al-Bazzouni.

I’d like to make some preliminary points. Firstly, be in no doubt that everything that you can imagine that the US has perpetrated at Guantanamo Bay, or Abu Ghraib, or Bagram, or in their secret sites, or anywhere else, that is what the UK has done. They were there alongside them, and bearing in mind our history of colonial wars going all the way back to mandated Palestine, it might be thought that we taught the US a lot more that they taught