

Cuba and Human Rights Law

Summary:

On February 28, 2008 Cuba signed the International Covenant on Civil and Political Rights (ICCPR). As of today, February 16, 2012, however, its ratification is still pending. Moreover, Cuba's prisons remain full of people sentenced for all sorts of political crimes (for alleged violations of public order and state security laws) and the internationally guaranteed fundamental human rights and freedoms of Cubans continue to be massively and systematically violated. The aim of this paper is to analyze the current situation of Cuba in the area of human rights guaranteed by ICCPR and other relevant components of the International Bill of Rights that are relevant in this context. Our conclusion is unequivocal: Cuba is persistently and systematically violating its obligations under international law.

1. Situation

In connection with the signature of the ICCPR on February 28, 2008, Cuba made the following declaration:

“The Republic of Cuba hereby declares that it was the Revolution that enabled its people to enjoy the rights set out in the International Covenant on Civil and Political Rights. The economic, commercial and financial embargo imposed by the United States and its policy of hostility and aggression against Cuba constitute the most serious obstacle to the Cuban people's enjoyment of the rights set out in the Covenant. The rights protected under this Covenant are enshrined in the Constitution of the Republic and in national legislation. The State's policies and programs guarantee the effective exercise and protection of these rights for all Cubans. With respect to the scope and implementation of some of this international instrument, Cuba will make such reservations or interpretative declarations as it may deem appropriate.”

2. Cuban obligation stemming from its signing of the ICCPR

(i) Obligation to refrain from acts which could defeat the object and the purpose of a treaty

Under Article 18 (a) of Vienna Convention on the Law of Treaties (“Vienna Convention”) a State is obliged to refrain from acts which could “defeat the object and the purpose of a treaty” – “when it has signed the treaty and has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.”

The Vienna Convention does not contain a precise definition of the object and the purpose of a treaty, but it can be said in general terms of legal theory that it refers to its essential goals.¹The specific object and purpose of human rights treaties generally is the

¹ Isabelle Buffard & Karl Zemanek, *The “Object and Purpose” of a Treaty: An Enigma?* 3 AUSTRIA REV. INT’L & EUR. L. 311, 343 (1998) (suggesting that a treaty’s object and purpose are the sum of the treaty’s essential elements separated from the unessential ones).

effective protection of the individual human person. It means that the object and purpose of such a treaty must be interpreted and applied in a way which makes the protection of human rights practical and effective. The meaning of concepts used in international human rights treaties is autonomous, i.e. not necessarily identical with their meaning in the context of domestic law.

This opinion has been confirmed repeatedly by the Human Rights Committee (HRC, the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State Parties.). According to the HRC the State Parties have general obligation to respect the rights guaranteed by the Convention and to ensure them to all individuals on their territory subject to their jurisdiction (Article 2, paragraph 1). The nature of this legal obligation under Article 2, paragraph 1, is negative and positive. The State Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, the State Parties must demonstrate their necessity: only such restrictive measures can be taken that are proportionate to the pursuance of legitimate aims and whatever they may be, they must never impair the essence of rights enshrined in the Covenant and their effective and continuous protection.²

Based on all the information available, there is the overwhelming factual evidence that Cuba is blatantly and continuously violating the rights protected under this Covenant, and thereby defeats systematically the object and the purpose of the Treaty duly signed by its government.

(ii) Principle of legitimate expectations (pacta sunt servanda)

The foundation of this doctrine is grounded in international law, arguably representing the underlying principle *pacta sunt servanda*. It means that treaty obligations shall be fulfilled in good faith, in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose. The State Parties to the ICCPR can legitimately expect that:

- 1.) Cuba will fulfill its obligation not to defeat the ICCPR's object and purpose;
- 2.) Cuba will at a reasonable time begin the process of ratification (with the effect of either entry into force of the treaty or making clear its intention not to become a party to the treaty).

The similar legitimate expectation with the regard to the object and purpose of this treaty, exists not only on the side of the State Parties, but also on the side of individuals who are finding themselves under Cuban jurisdiction. **They also may legitimately expect that the signature of the Cuban government under the treaty means that its object and purpose will not be defeated; that such treaty - so important from their individual point of view and affecting their individual lives, because endowing them with rights**

² General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on State Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26/05/2004.

and conferring on them duties -will be submitted without any unnecessary delay to the thorough scrutiny of the people; that this public examination of state of human rights in their country guaranteed by the treaty will happen in an open and inclusive democratic process concluded by the act of its ratification.

3. Cuban obligations from customary international law

According to the Human Rights Committee, the ICCPR is nothing but the codification - in the form of the treaty – of universal human rights enshrined in the Universal Declaration of Human Rights.³ The Universal Declaration, however, is considered today as the articulation of customary law and the rules concerning fundamental human rights are considered accordingly as the obligations *erga omnes*. **Every state** is obliged to observe them from the perspective of general international law.

The fact that Cuba blatantly and continuously violates the rights protected under general international law opens the question of its responsibility *erga omnes*. In fact, every state and every international organization have the right to take countermeasures against Cuba and remind the Cuban government of its international obligation to stop committing internationally wrongful acts and to offer appropriate assurances and guarantees that such acts will non be repeated in the future (Article 30 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts).

4. The Cuban declaration of February 28, 2008

The Vienna Convention does not contain a definition of interpretative declaration. According to the International Law Commission (ILC) “interpretative declaration” means a unilateral statement, no matter how phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of treaty or of certain of its provisions.⁴ In general terms, the aim of an interpretative declaration is to influence the interpretation to be given to the provisions of a treaty at the moment of their application.⁵ The Cuban declaration thus can be characterized as a general statement of policy expressing Cuba’s view on a treaty or its subject matter without having any legal effect on the treaty; it can be understood only as an informative statement concerning the manner in which the treaty will be implemented and applied domestically, and as such cannot have any effect whatsoever as far as the content or scope of rights enshrined or as far as obligations *vis-a-vis* other State Parties are concerned.

The statement that the rights protected under this Covenant are enshrined in the Constitution of the Republic of Cuba is irrelevant from the perspective of international

³ General Comment No. 26: Continuity of obligations: 08.12.1997. CCPR/C/21/Rev.1/Add.8/Rev.1, General comment 26.

⁴ Guide to Practice on Reservations to Treaties, Adopted by the International Law Commission at its sixty-third session, in 2011.

⁵ Treaty Interpretation, Richard K Gardiner, Oxford University Press, 2008, pp. 86 - 87.

law. When it comes to possible violations of international law because of domestic law obligation, the state cannot use its own domestic law to justify its unlawful acts (Article 27 of the Vienna Convention). Actually, this element of Cuban declaration can be used and turned against the existing “application” of the Convention in Cuba today: by stating that the declaration that “*the rights protected under this Covenant are enshrined in the Constitution of the Republic and in national legislation*” Cuba has recognized that from the perspective of the Cuban legal order the rights protected under the Covenant are of customary nature. But from it follows: **The elements of international law present in the domestic law must be interpreted in the overall context and in light of standards and principles of general international law. Their interpretation based on the alleged principles of the Cuban Constitution (as the legal expression of the Cuban Revolution) is without merit.**

The connection between the US economic, commercial, financial embargo and the civil and political rights of Cuban citizens is also untenable from the point of international law. This argument is based not only on the principle of legitimate expectations, but also on the principle of effectiveness of human rights protection. Any restrictions on human rights must be permissible under the international law (some human rights are absolute and any restriction or derogation is not possible), and must follow international law. As indicated above, where such restrictions are made, States must demonstrate their necessity and only such measures are permissible which are proportionate to the pursuance of legitimate aims. It is obvious that what must not be negatively affected in the first place, is the very object and purpose of the treaty: the continuous and effective protection of human rights.

The reason such declaration has no legal effect is clear: the rights we are dealing with are first and foremost negative rights (based on the principle *non facere*). The state is not obliged to give something positive, but on the contrary, not to do something, not to interfere into the domain of individual rights and freedoms, recognized and declared as unalienable. Furthermore, on the question of possible state responsibility for violations of treaty obligations, the US embargo can not be used as an argument for the invocation of a circumstance precluding Cuban wrongdoing. The Cuban policies *vis-a-vis* the US embargo – the package of measures of the US government reacting to the Cuban alleged unlawful conduct – cannot be qualified as self-defense (there is no armed attack by US on the territory of Cuba in the sense of the article 51 of the UN Charter) or countermeasures or force majeure or distress or necessity which are only legitimate circumstances precluding wrongfulness under international law. The arguments based on political circumstances (the hostility of the United States) have no validity. It is not supported by the standard interpretation of the international law of human rights and contradicts the currently recognized and applied principles of general international law.