HUMAN RIGHTS BRIEF

Volume 20 | Issue 4 | Summer 2013

hrbrief.org

Litigation Before the UN Committee against Torture: Strengthening This Important Tool against Torture

Proceedings of a Conference Presented by the American University Washington College of Law and the World Organisation Against Torture

April 15, 2013

1 **Opening Remarks**
Dean Claudio Grossman, Gisella Gori, Gerald Staberock

9 **Panel I: The Use of Interim Measures by the Committee against Torture: Towards a Comprehensive Instrument for the Protection of Victims and Witnesses in Torture Cases**
Hélène Legeay, Carla Ferstman, Diego Rodríguez-Pinzón

19 **Panel II: The Role of the Committee against Torture in Providing Full and Adequate Reparation to Victims**
Dean Claudio Grossman, Octavio Amezcua

24 **Panel III: Challenges in the Implementation of the Decisions of the Committee against Torture**
Karinna Moskalenko, Christian De Vos, Elsy Chemurgor Sainna

33 **Panel IV: Challenges to Proving Cases of Torture before the Committee against Torture**
Gabriela Echeverria, Mario López-Garelli, Hari Phuyal, Juan E. Méndez

A Legal Resource for the International Human Rights Community

American University Washington College of Law
Center for Human Rights and Humanitarian Law
Executive Director | Hadar Harris
Directors | Robert Goldman | Claudio Grossman | Diane Orentlicher | Herman Schwartz | Richard J. Wilson

The *Human Rights Brief* is a publication of the Center for Human Rights and Humanitarian Law at the American University Washington College of Law. No portion of this publication may be reprinted without the express written permission of the *Human Rights Brief*. All correspondence, reprinting, and subscription requests, as well as articles submitted for publication, may be sent to: *Human Rights Brief,* Washington College of Law, American University, 4801 Massachusetts Avenue, N.W., Washington, D.C. 20016. Telephone: (202) 274-4023. Fax: (202) 274-4028. Email: chief@hrbrief.org. Website: hrbrief.org. The views expressed in this publication are those of the writers and are not necessarily those of the editors, the Center, or American University. Copyright *Human Rights Brief*, 2013. ISSN 1533-6808

Cite as 20 No. 4 Hum. Rts. Brief

An equal opportunity, affirmative action university.

Co-Editors-in-Chief
Christina M. Fetterhoff
Matthew Lopas

Managing Editor
Marie Soueid

Managing Online Editor
Drew Mitnick

Print Publication Editor
Michelle Flash

Special Coverage Editor
Lauren Nussbaum

Social Media Editor
Anna Naimark

Staff Editors
Melodie Arian, Aida Faverio, Andrew Hazlett, Naida Henao, John Lo Forese, Jennifer Ponard, Michaela Spero

Staff Writers
Tyler Addison, Jessica Alatorre, Ernesto Alvarado, Alyssa Antoniskis, Gabriel Auteri, Diana Damschroder, Christa Elliott, Isabel Erreguerena, Tracy French, Carlos Garcia, Anusree Garg, Frank Knaack, Antonia Latsch, Nicole Littell, Emily Singer Hurvitz, Megan Wakefield, Brittany West

Founders Board
Vanessa Allen, Gillian Brady, Michelle Donme, Gabriel Eckstein, Robert Guitteau Jr., Fernando González-Martín, Claudia Martin, Mair McCafferty, Rochus Pronk, Ayesha Qayyum, Diego Rodríguez-Pinzón, and Shashikala Warrier.

Alumni Committee
Anebi Adoga, David Baluarte, Anne Briggs, Fernando González-Martin, Jennifer M. Hentz, Richard H. Kamm, Sarah Paoletti, Alejandro Ponce-Villacís, Amy Stern, Jaime Underwood, and Kristi Severance.

Special thanks to Jennifer de Laurentiis for her support in the production of this issue.

All photographs in this issue are courtesy of the American University Washington College of Law.

Remarks of Dean Claudio Grossman*

Good morning everyone and welcome to our law school, the American University Washington College of Law, for this conference on litigation before the United Nations Committee against Torture, which is co-sponsored by the World Organisation Against Torture. As we begin, I would like to mention that the proceedings of this conference will be published in the *Human Rights Brief*, which is a student-run publication of the law school that addresses current issues of international human rights law and is distributed to more than 4,000 subscribers around the world.

Our partner in organizing this event is the World Organisation Against Torture (OMCT). For us, as an educational institution, it is very important to work together with non-governmental organizations, civil society institutions, governments, and other entities, to achieve the common goals of human dignity. OMCT is an organization that has excelled in the struggle to have a world free from torture and other forms of inhuman treatment, and we are proud to collaborate with it. OMCT intends to increase its engagement on these issues by coordinating action with domestic and international NGOs that utilize the Committee's procedures.

The Convention against Torture was adopted in 1984 and currently has 153 States Parties.[1] Of the Parties to the Convention, only 65 have made a declaration accepting the individual complaints procedure under Article 22. Pursuant to this procedure, the Committee considers complaints from alleged victims, or on behalf of alleged victims, of violations of the Convention by States Parties.[2] Since 1998, more than 522 complaints have been submitted to the Committee. The individual complaints procedure is only one of the methods of supervision developed by the Convention and applied by the Committee. Most of the Committee's time is spent in its reporting system, which consists of periodic presentations by states—which are, in theory, submitted every four years, after an initial report—demonstrating the status of their compliance with the Convention. This important technique of supervision is mainly designed to analyze and evaluate the public policy of states and their compliance with their Convention obligations. Concluding Observations are the end result of this supervisory technique, through which the Committee determines the overall status of each state's compliance with its Convention obligations, while the individual complaints procedure is designed to determine whether a violation of the Convention in relation to an individual's rights, as alleged in the complaint, has taken place. If the individual's rights have been violated, the state is compelled to provide redress and rehabilitation in accordance with Article 14 of the Convention.[3] Because it is specific by nature, use of the individual complaints procedure is a more targeted way to address alleged violations of the Convention and to ensure states' compliance with their obligations under the Convention.

To date, of the countries that have declared acceptance of Article 22, most complaints submitted to the Committee have related to Article 3—meaning alleged violations of the provision of *non-refoulement*.[4] But, as a result of the process of democratization that has taken place in various countries and which has created more open environments and led to more open discussions regarding violations, we have seen an increase in complaints alleging violations of Article 1 and Article 16, meaning

** 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 Chair of the United Nations Human Rights Treaty Bodies, 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 (2008-2013). 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.*

torture and other forms of inhuman treatment, respectively.[5] However, the system continues to be underutilized—sometimes because of lack of knowledge or, in other cases, because victims lack protection. In addition, we have not yet achieved universal acceptance of Article 22.

It is our intention that today's conference will address these vital issues, as well as the use of interim measures by the Committee. Because victims often lack protection and those who submit complaints may be particularly vulnerable, the Committee issues interim measures to avoid irreparable harm.[6] Such measures obligate the relevant state to protect alleged victims, and those who cooperate with the Committee, while the Committee reviews and evaluates the complaint. The Committee also emphasizes necessary actions in its Concluding Observations. As an example of this, you can read the 2011 Concluding Observations for Madagascar, in which the Committee concluded that "the State party should strengthen the complaints mechanisms available to victims and ensure that they obtain redress and are provided with the means of achieving social reintegration and psychological rehabilitation. The State party should ensure that persons lodging such complaints, witnesses and members of their families are protected from any act of intimidation in connection with their complaint or testimony."[7]

Procedural issues also have an important bearing on victims' access to justice—these issues include the duration of both domestic and international procedures, the availability of lawyers, standards of proof, and burdens of proof, amongst others. Thus far, with one exception, the individual complaints procedure has been completely in writing. The Committee does not hold hearings or directly examine witnesses; it has only a written record on which to make its decisions. Everyone's contribution today and ongoing collaboration will be crucial to shed light on different provisions and practices in order to further improve our mission and consider whether expansion is feasible. I hope this convening will lead to fruitful discussions that will enrich the understanding both of governments and of individuals regarding how these important legal procedures function and how they could be further developed.

When it is established that a state is responsible for violation of the Convention, it must provide redress and rehabilitation as required by Article 14 of the Convention.[8] The Committee recently adopted General Comment No. 3 on this topic, an important guidance tool for those who utilize Article 22.[9] During today's convening, we will explore the different experiences and challenges that led to this General Comment and its impact on individual complaints before the Committee.

Now, I am pleased to have here Mr. Gerald Staberock, the Secretary-General of the World Organisation Against Torture, who along with the OMCT staff, co-organized this event, and Ms. Gisella Gori, Senior Political Advisor in the Political, Security, and Government section of the delegation of the European Union to the United States.

Gerald Staberock has been OMCT Secretary-General since September 2011, and since its creation in 1995, OMCT has been the main coalition of international NGOs fighting against torture, summary execution, forced disappearances, and other cruel, inhuman, and degrading treatment. With 311 affiliated organizations, the SOS Torture Network, and many tens of thousands of supporters in many countries, OMCT represents a critically important network of NGOs working for the protection of victims of torture in the world. Prior to joining OMCT, Mr. Staberock worked for more than eight years with the International Commission of Jurists (ICJ), including as Director of the Center for Independence of Judges and Lawyers, and as Director of the Rule of Law Initiative. In this context, he coordinated the most comprehensive program on law, counterterrorism and human rights, with a high level panel of jurists—the well-known ICJ Eminent Jurists Panel.

Gisella Gori is Senior Political Advisor in the delegation of the European Union to the United States, working on human rights and democracy, the UN and multilateral issues, international humanitarian law and Guantánamo, and other legal issues. Since 2002, Dr. Gori has worked at the Council of Europe as Director General of Human Rights and Legal Affairs, Department of Execution of Judgments and Human Rights in Strasbourg, France. She specializes in European Union law, international human rights law, human rights mechanisms, economic, social and cultural rights, and education and law. She teaches EU Law at George Washington University Law School, for which we will forgive her.

Remarks of Gisella Gori*

Thank you. Good morning everyone and thank you for having invited the European Union here. Thanks to the American University Washington College of Law and the World Organisation Against Torture. I'm honored to be here with you, to give some preliminary remarks. Since my Ambassador, Mr. Vale de Almeida, was prevented from being here due to other commitments, I was asked to provide you with some introductory remarks.

First of all, I would like to underline just how much the European Union is firmly committed to upholding the absolute prohibition of torture and cruel, inhuman, and degrading treatment or punishment. The prevention and eradication of torture is one of our priorities

** Gisella Gori is a Senior Political Advisor with the Delegation of the European Union to the United States.*

and a cornerstone of our human rights policy. But before going into the details of our anti-torture policy, I would like to give you a bit of context to some recent evolutions in our general human rights policy that are also relevant for anti-torture and explain why 2012, in particular, was a very relevant year in this area.

In 2012, the European Union adopted for the first time a Strategic Framework and Action Plan on Human Rights and Democracy,[10] which includes the Action Plan devoted to implementation. It is the first time that the European Union adopted such a comprehensive, unified Strategic Framework for its human rights policy, and one with such wide-ranging objectives and a plan for implementation. Upon adoption, our High Representative, Catherine Ashton, underlined how human rights are a top priority for the European Union and a silver thread in our external action. The Strategic Framework is relevant not only for the European Union institutions (such as the European Parliament, the European Commission, and the External Action Service) but also for its Member States. It represents a common endeavor: all the Member States along with the European Union are committed to making human rights without exception one of the areas where we really go for a collective effort—one of the areas where the European Union will really try to be more effective and more coherent in its policy. So, it's really an instrument that allows for a wide partnership in order to advance the European Union's action in the field of human rights.

The Strategic Framework sets the policy, the principles, the objectives, and the priorities. It is organized around 97 actions and 36 headings. I will spare you the details. The only one that is really relevant for us today is Heading 17,[11] which deals in particular with the action against torture. I will go back to this. As I mentioned, the Strategic Framework will be implemented through the Action Plan, which lasts until December 2014. The Annual Report on Human Rights, which the European Union publishes every year,[12] represents one of the instruments to assess the EU performance in implementing the Framework.

Therefore, the Framework really represents a sort of watershed in our policymaking. While beforehand the European Union based its action on a series of different legal instruments (*i.e.* statements on human rights with respect to specific countries or with respect to specific issues, such as the Guidelines on Torture) and some tools, the new Framework has systematized and made the action by the EU institutions, as well as by the Member States, more streamlined and effective, including in the multilateral context. You probably know very well that the European Union is very much engaged in multilateral fora, particularly the UN, and the Framework again underlines our commitment to continue playing such role. The UN Committee against Torture is one of these playing fields and our engagement will not only continue but will actually be strengthened by the Strategy. Support to the UN Special Rapporteur on Torture is another such engagement.

Finally, another relevant development in 2012 has been the appointment of a Special Representative, Mr. Stavros Lambrinidis. He is the new Special Representative of the European Union for Human Rights and his role will be to help with the implementation of the Strategic Framework and also to enhance the effectiveness and visibility of the European Union policy on human rights. He will be the EU "voice" on human rights.

Now, action against torture is one of our top priorities. To implement the objectives set by the Framework in this area, the EU has two sets of instruments: diplomacy tools provided under Point 17 of the Framework and cooperation assistance, which stands for our role in financing civil society work on issues of prevention and eradication of torture.

Point 17, entitled "Eradication of torture and other cruel, inhuman or degrading treatment or punishment,"[13] provides for three lines of actions. One action is our commitment to continuously and actively support and implement UN and Council of Europe anti-torture instruments and efforts that are continuing and enhancing our role in the multi-lateral fora. The second line of action is the promotion of the ratification and the effective implementation of the UN Convention against Torture[14] (CAT) and the Optional Protocol to the CAT[15]. Finally, the third line of action consists in integrating torture prevention measures into all the Freedom, Security, and Justice activities, including those related to law enforcement.

When implementing these lines of action, the EU and its Member States are guided by the EU's main instrument concerning torture: the Guidelines on Torture, with which I trust you are familiar. They were first adopted in 2001 and were then reviewed in 2008 and again in 2012.[16] What are these guidelines? They represent the framework to direct our action on the protection, prevention, and promotion of human rights, specifically on action against torture. They do not set new obligations, but they are the political expression of our commitment with respect to preventing and eradicating torture and other inhuman and degrading treatment. They represent a guidance instrument that is applied by the European Union and its Member States, both in bilateral relations and multilateral fora, as well as in the assistance given to NGOs' projects. For example, in the political dialogues the EU carries out with third countries, when appropriate we systematically raise issues related to torture and ill treatment, and we also,

in our activities, promote the ratification and implementation of the UN instruments.

The second kind of tool consists, as I mentioned before, in the financial assistance the EU provides to NGOs that work on action against torture. Action against torture is one of our main priorities for funding under the European Instrument for Democracy and Human Rights (EIDHR).[17] In the period 2009-2015, the European Union provided 38 million euros to support projects by NGOs in this field. And in 2012, for example, we launched another project, a cooperative proposal specifically geared toward fighting impunity with respect to torture. So we are really trying through our financial assistance to cooperate with NGOs and we recognize the role of civil society to achieve these objectives.

Finally, as everyone, we do also have challenges, and one of the challenges is to implement as effectively as we can this strategy and in particular Point 17.[18] Another challenge consists of developing a more effective and integrated approach to torture prevention. We consider that there are a number of avenues which may help achieve these objectives: i) intensifying our diplomacy efforts by raising the issues more consistently with third countries in our political and human rights dialogues; ii) strengthening the cooperation with the UN and regional mechanisms; and iii) ensuring coherence between our internal and external policy. This last point is particularly relevant with respect to the ratification of international treaties. It is very important that when soliciting third countries' ratifications, the EU can show a good record in terms of its own Member States' ratification and compliance with these instruments.

I hope these few remarks provided you with an overview of our action in the area of the prevention and eradication of torture. Thank you very much for your attention.

Remarks of Gerald Staberock*

Let me warmly welcome you on behalf of the World Organisation Against Torture (OMCT) to this joint conference hosted by the American University Washington College of Law. The objective of this meeting is to explore strategies for an effective use of the universal complaint mechanisms to the UN Committee against Torture (CAT).

The OMCT, as the principal civil society network against torture, is working with partner organizations and lawyers around the world. To our partners, as for us, the issue of our discussion today is far from academic. It is all too real and concrete. The remedy through the UN Committee against Torture can protect the physical integrity of individuals and it can determine whether a victim of torture is able to enjoy his or her right to remedy and reparation. It is central to any strategy to seek justice and reparation and to advance the protection against torture globally.

Indeed, there could be few places more appropriate for this meeting than the American University Washington College of Law. This university not only hosts a well-known human rights program that many in the human rights community have benefitted from, but it also hosts at this moment in time both the Chair of the United Nations Committee against Torture, Dean Claudio Grossman, and the UN Special Rapporteur on Torture, Juan Méndez. This is indeed truly unprecedented and there can thus be few more appropriate places for a forward-looking debate on the remedy to the Committee against Torture.

Let me also very warmly thank the European Union and the Oak Foundation, without whose support we would not have been able to gather some of the leading anti-torture litigators from various parts of the world. This should remind us all that in many countries it takes a great deal of courage to document and litigate torture cases. Having you with us today and being able to benefit from your perspective is the real added value of this meeting.

Central Role of the Universal Complaint Mechanism

The absolute prohibition of torture and cruel, inhuman, or degrading treatment is one of the most protected international legal norms, *e.g.* a norm of *jus cogens*. Unfortunately it is also one of the most violated norms of such status. More often than not, states content themselves with a legal prohibition that remains unenforced. Sadly, too, this applies to all regions of the world.

** Gerald Staberock is the Secretary-General of the World Organisation Against Torture (OMCT).*

On the legal side, victims of torture and cruel, inhuman, or degrading treatment have a firmly established right to a remedy and reparation under international human rights law, including under the UN Convention against Torture.[19] The new General Comment of the Committee against Torture on Article 14 of the Convention[20] provides a compelling authoritative reaffirmation of this principle.

From a practioner's perspective, seeking justice in domestic courts can be an uphill battle. There are multiple reasons for this, some being legal, and others having to do with institutional cultures, the false protection of a *corps spirit*, and very often with secrecy. Again others have to do with courts not being independent, or judges and prosecutors lacking human rights knowledge and/or consciousness. Even in established democracies traditionally committed to the rule of law and vested with all requisite institutions to investigate and prosecute torture, accountability can remain illusive. The failure to provide any legal accountability for a policy of torture and for complicity into torture within the extraordinary rendition program is a particularly troubling example of this reality.

All this speaks to a needed sea change. I believe that the CAT can be part of this needed change in perception. In fact, the challenges around the world testify to the need for robust and strong universal anti-torture remedies in addition to a system of domestic remedies. In our experience working with and for victims of torture, the remedy to the UN treaty bodies or regional courts are more often than not the only credible recourse to seek justice and reparation. Hence, there should be vital interest in the complaint procedure to the CAT as one of the principal universal tools against torture. Our common objective today is to explore how to reinforce this tool in the global fight against torture and how to use it more strategically.

Mobilizing on the CAT Complaint Procedure

The communication procedure has proved in the 25 years of the Committee's existence — which we will be celebrating later this year — its value and very practical relevance. This is particularly so in relation to its case work on *non-refoulement*, *e.g.* the prohibition of sending a person to another jurisdiction if there is a real risk of torture or other forms of cruel, inhuman or degrading treatment, or punishment. Indeed the large majority of cases adjudicated by the CAT as of today have concerned the risk of deportation or transfer. In contrast other cases have been far more limited and it is fair to say that the CAT remedy is an under-utilized weapon in relation to many of the vital guarantees against torture contained in the UN Convention against Torture.

Our common objective should be to change this. A few thoughts on what we would need to change:

First, we need to mobilize and advocate for the accession to the complaint procedure under Article 22 of the UN Convention against Torture. As we speak, the OMCT is conducting a training seminar for lawyers in the Asia and Pacific region with the support of the European Union. Identifying countries that have accepted CAT jurisdiction is a challenge and possibly the single most important obstacle to this remedy's effectiveness today. I believe much more could be done to push not only for the ratification of the Convention against Torture and its Optional Protocol but equally for the universal acceptance of jurisdiction under Article 22. The Universal Periodic Review (UPR) and other mechanisms in particular could and should play a much more forceful role in this regard. States could systematically raise accession to the procedure under Article 22 of the Convention within the UPR process to help generate momentum and political will.

Second, as we know, in many countries, lawyers and human rights activists do not sufficiently know about the procedure even when their countries have accepted jurisdiction. Too often there is a false perception of a divide between national law and international law. Not the least, authoritarian states want us to believe that international human rights standards and mechanisms have nothing to do with domestic law. In the many transition processes over the last thirty years in Eastern Europe, Africa, and Latin America nothing has been further from the truth. International human rights standards have become a central element in domestic law across the world. The same needs to be the case with the Convention against Torture and the remedy that it provides. Hence, one of the ways forward has to be an investment in building knowledge, capacity, and interest to seek recourse to the complaint procedure.

Third, and closely related, is the need to protect lawyers and activists that document and litigate cases of torture, whether domestically or internationally, and who may often face a variety of direct and indirect threats. I know that some of our experts have personally lived through such threats and even direct attacks. The OMCT is today one of the leading organizations on the protection of human rights defenders. For us, it is important that protection is available at all stages of domestic and international litigation. We have seen internationally important improvements in dealing with reprisals against human rights defenders participating in UN mechanisms. The same attention now needs to be given to threats against torture activists documenting cases domestically.

Building Strategic Litigation on the CAT

Beyond mobilization, capacity building, and protection, we need to initiate a discussion about the strategic use of the communication procedure with the UN Committee against Torture, and I hope that this meeting can serve as a starting point. This touches on considerations of the choice of the forum. Some of the practicing lawyers here today will no doubt prefer to go to a regional court, such as the European Court of Human Rights, the Inter-American Court of Human Rights, or maybe in the future also the African Court on Human and Peoples' Rights, not the least because of its legal status and the implementation of the decisions. Others may argue that pursuing cases with the UN Human Rights Committee instead of the UN Committee against Torture is advantageous because it allows raising related violations, such as arbitrary detentions and unfair trials. All these are

legitimate points for any litigator to consider. Yet, I am convinced that there is added value in choosing the communication procedure under the Convention against Torture.

Alternatives may have practical benefits, such as the fact that a good number of states have accepted the jurisdiction of CAT as the only relevant international remedy. This was, for example, the case in relation to Tunisia until the revolution. The CAT procedure also tends to be substantially more expedient than other universal or regional human rights remedies, which is a very important point for consideration. Another distinct advantage for a human rights organization is the particular stigma entailed in a condemnation through the UN Committee against Torture.

In many instances submitting cases to the UN Committee against Torture can also be advantageous from a strategic litigation perspective. Submissions to the CAT have notable advantages, namely being able to rely on more explicit provisions for the prevention and protection from torture and cruel, inhuman, or degrading treatment. Let me give some examples for reflection:

Should we not invest in developing case law using the quasi-universal jurisdiction clauses under the UN Convention against Torture to pursue states for failure to investigate those responsible for torture in their territory even if only transitory; case law on the definition of torture as a crime, for example, in order to reflect considerations of the particular vulnerability of children or women; case law that sets authoritative standards through interpretation of the general obligation to prevent torture, including the range of safeguards to be provided such as access to lawyers or independent medical personnel; or the need to build more detailed case law on the exclusionary clause under Article 15 [of the CAT], including on the exact scope of what judges and prosecutors have to do when they are confronted with allegations that evidence has been obtained by torture? These are just some ideas of issues we could develop further and that could have real impact in the fight against torture.

My last point on strategy is on the question of whether to submit a case with a regional or the universal system. There is no doubt some value to the argument that regional courts may have distinct advantages. But we are increasingly witnessing a sea change with our partners and a greater recognition of the utility of the universal system. In particular, when confronted with a systemic problem, such as a particular type of detention that is prone to torture, a parallel submission of different cases to the UN Committee against Torture is valuable from an advocacy perspective. This has been our experience most recently in Mexico, when the OMCT submitted together with its member organization the first ever case against Mexico to the treaty body system.

The Need for Effective Protection Measures

In the quest for making the remedy to the Committee against Torture the principal tool in the fight against torture, we will have to look at a few selected challenges. The first is the role CAT can play in providing protection from torture, cruel, inhuman, or degrading treatment, or punishment. As Dean Grossman highlighted in his introductory remarks, the Committee plays an important role in protecting individuals through the *non-refoulement* principle. This is fundamental at a time when states are challenging, in the name of national security, the fundamental principle that one cannot return a person to another country if there is a real risk of torture or of cruel, inhuman, or degrading treatment. The Committee's principled approach in this regard will remain fundamental. While *non-refoulement* cases initially were brought almost exclusively against Western countries (mainly Europe and Canada) to prevent deportation to countries of the South, we see more and more case law concerning the transfer of persons from other parts of the world, such as the former Soviet Union (Russia, Kazakhstan) or the Maghreb (Morocco). This contributes greatly to an enhanced awareness about this important universal human rights principle.

But we have to go one step further and look at the type of protection measures to be provided by the Committee. I firmly believe that within the confines of the Convention and its existing rules of procedures, interim measures could be seized more creatively with a broader scope of (interim) protection orders and beyond cases of *non-refoulement*. At the same time I believe that amending the rules of procedures to be more explicit in covering the protection of witnesses, family members, or lawyers who may be threatened because of the case could be envisioned too. But overall, as lawyers we ought to be more creative in seizing the Committee. Interim measures have been largely confined to the "negative" order not to deport an individual, but there is no logical reason why we should not be able to use interim measures more effectively to order states to take "positive" measures of protection, such as taking measures to protect from torture in custody, to protect witnesses, lawyers, or family members. The Inter-American Human Rights System has been the most progressive in this regard, and we may draw from this inspiration for protection measures globally.

The problem of protection remains a real problem. I was in Libya last week, where the OMCT helps local organizations in building specialized capacity in documenting cases. There are enormous threats to the victim, the families, the lawyers or human rights organizations, and even prosecutors who may inquire into allegations of torture. No treaty body will ever be able to promise security in such circumstances and it would be unrealistic to ask for such protection, nor to suggest such level of protection to the victim or lawyers. But an ability to order broader protective measures as part of the interim protection system would be a considerable advantage in discussing with lawyers and those affected whether or not a case can be submitted internationally.

The Need for Effective Reparations and Implementation

Two of the other issues we are going to discuss are in fact different sides of the same coin: reparations and the implementation of decisions. We have heard that the Committee has adopted

the new General Comment on Article 14 concerning the right to remedy and reparation, including rehabilitation.[21] This is, in our view, a benchmark for states as the Committee endorsed the broader concept of the right to remedy and reparation for serious human rights violations that has emerged over the last two decades. At the same time, the decisions of the Committee against Torture themselves are an important element of the right to remedy indicating measures states have to take to implement (or repair) the violation. We can thus anticipate that the new General Comment may influence the Committee's further pronunciations about the requisite reparations and this provides an important tool for us as lawyers.

Globally, the core challenge we face in litigating cases to the treaty bodies is the lack of implementation. This challenge exists even *vis-à-vis* the CAT, which appears to have a better compliance rate than other treaty bodies. The non-implementation of the decisions challenges the very integrity of the human rights system, and it should be at the center of attention if we want to strengthen the treaty body system. Many of us, including at the OMCT, have started to do more systematic follow-up advocacy, and I hope that we can bring this collective wisdom of implementation strategies to the table. Questions to be raised range from the Committee's own follow-up procedure to issues of the legal framework (implementing legislation) to allow the "receipt of decisions" for example to re-open court cases or investigations. In many instances it concerns questions of political commitment but at the same time non-implementation is not always deliberate. In some instances we could observe that no institution appeared to feel responsible for the follow-up, and the setting up of a structure and a coordinating body could be of help. More often than not it is the foreign ministries that have followed the case, but have little or no awareness of the existence of case decisions within the justice ministry that would be entrusted with implementing legal remedies.

Finally and in conclusion, I firmly believe that the CAT as the universal anti-torture body is a venue that needs to be strengthened and reinforced. It deserves so as it has also shown its progressive force in many instances. It is today the only committee that calls its findings "decisions," and we have seen recently the first-ever hearing held within an individual case.[22] It came at the request of Kazakhstan under rule 117, paragraph 4, of the Rules of Procedure and while not being a public hearing, this first-ever oral proceeding provides a unique and exciting precedent. The relevant rule reads:

> The Committee may invite the complainant or his/her representative and representatives of the State party concerned to be present at specified closed meetings of the Committee in order to provide further clarifications or to answer questions on the merits of the complaint. Whenever one party is so invited, the other party shall be informed and invited to attend and make appropriate submissions. The non-appearance of a party will not prejudice the consideration of the case.[23]

It can only underline the quasi-judicial nature of the proceedings and contribute to the strengths and persuasive force of the Committee. Other examples include the openness of CAT to integrate a gender dimension into the torture debate as one of the first treaty bodies in the last fifteen years, which helped to reshape the debate on sexual violence from a private matter to one of due diligence and state responsibility.

All this should encourage us to think creatively at this seminar. I would like to conclude with a remark of Judge Thomas Buergenthal, former Dean of this law school, who once told me that "as lawyers we sometimes have to be a little bit crazy if we want to move the law." I wish all of us a very sound level of craziness during this seminar in order to come up with refreshing new ideas that can shape our use of the remedy to the Committee against Torture for the future.

Thank you for your consideration.

Endnotes: Opening Remarks

[1] *See* Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, status as of 18-07-2013, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.

[2] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [hereinafter OP CAT] G.A. res. A/RES/57/199, Art. 22, *entered into force* June 22, 2006.

[3] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter UN CAT], Art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85.

[4] *Id.* at Art. 3.

[5] *Id.* at Art. 1, 16.

[6] Committee against Torture, Rules of Procedure, Rule 117, ¶ 4, U.N. Doc. CAT/C/3/Rev.5 (Feb. 2011) *available at:* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/411/40/PDF/G1141140.pdf?OpenElement.

[7] UN Comm. against Torture, Concluding Observations of the Committee against Torture, Madagascar (Nov. 2011) *available at* http://www2.ohchr.org/english/bodies/cat/docs/followup/Extractsfollow-upMadagascar47th.pdf.

[8] UN CAT *supra* note 3, Art. 14.

[9] UN Comm. against Torture, General Comment 3, U.N. Doc. No. CAT/C/GC/3 (2012).

[10] EU Strategic Framework and Action Plan on Human Rights and Democracy No. 11855/12 of June 25, 2012 [hereinafter Strategic Framework and Action Plan].

[11] *Id.*

[12] *See, e.g.*, *EU Annual Report on Human Rights and Democracy in the World in 2012* (May13, 2013), *available at* http://register.consilium.europa.eu/pdf/en/13/st09/st09431.en13.pdf.

[13] Strategic Framework and Action Plan, *supra* note 10, at point 17.

[14] UN CAT, *supra* note 3.

[15] OP CAT, *supra* note 2.
[16] *Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment — An up-date of the Guidelines* (March 20, 2012), *available at* http://eeas.europa.eu/human_rights/guidelines/torture/docs/20120626_guidelines_en.pdf.
[17] *See European Instrument for Democracy & Human Rights (EIDHR)*, European Commission (Feb. 17, 2012), http://ec.europa.eu/europeaid/how/finance/eidhr_en.htm.
[18] Strategic Framework & Action Plan, *supra* note 10, at point 17.
[19] UN CAT, *supra* note 3.
[20] UN Comm. against Torture, General Comment 3, *supra* note 9.
[21] *Id.*
[22] *See* CAT communication No. 444/2010, Abdussamatov et al. v. Kazakhstan, *available at* http://www.ohchr.org/Documents/HRBodies/CAT/Jurisprudence/CAT-C-48-D-444-2010_en.pdf.
[23] Committee against Torture, Rules of Procedure, *supra* note 6, at Rule 117, ¶ 4.

PANEL I
THE USE OF INTERIM MEASURES BY THE COMMITTEE AGAINST TORTURE: TOWARDS A COMPREHENSIVE INSTRUMENT FOR THE PROTECTION OF VICTIMS AND WITNESSES IN TORTURE CASES

Opening Remarks from Hélène Legeay, Moderator*

Good morning, everyone. I am the Middle East and North Africa Programme Manager at Action by Christians for the Abolition of Torture (ACAT). ACAT is a French NGO based in Paris. Our main mandate is to fight against torture, the death penalty, war crimes, and crimes against humanity. To present our work in a few words, we provide training for lawyers. I have provided training for lawyers in Tunisia and soon, I hope, in Morocco as well. This training concerns how to document torture cases and how to file complaints before international enforcement bodies. ACAT released an annual report on the phenomenon of torture around the world and we also release some country reports on a regular basis.

Among the means for assisting victims, ACAT has filed several petitions before international bodies, mainly before the Committee against Torture (CAT, Committee). For example, Gerald [Staberock] was talking about the petition concerning a man who was detained in Morocco and was supposed to be extradited to Algeria. ACAT filed this complaint and won.[1] It was the first complaint against Morocco since Morocco recognized the competence of the CAT to take individual communications in 2006. So, it was the first complaint and we won the case before CAT and Morocco complied with the decision. This was really good news. Also, participating in the first hearing before CAT was my colleague in the Uzbekistan-Kazakhstan case.[2] It was the first pleading in CAT and it was successful. I hope we will be able to develop that kind of procedure.

I'm really glad to attend this conference and I'm sure it will give even more ideas on what we can do to collaborate together—NGOs, researchers, and also CAT—to better assist the victims and get protection and reparations for them. Before introducing the first panel, I want to thank the Washington College of Law and OMCT (World Organisation Against Torture) for organizing this conference and for inviting me to moderate this panel, which is important for me and for ACAT as we have tried—sometimes successfully, sometimes not—to protect victims by asking CAT for interim measures orders.

Interim measures—or what are called provisional or precautionary measures—are ordered by international human rights

bodies to preserve the rights of the parties to a case and to avoid the occurrence of an irreparable harm.[3] An order of interim measures may require that the states take positive actions—like providing protection to the victim or access to a doctor—or to refrain from taking action by delaying an execution or an extradition until the case has been resolved by the international body.

In torture cases, interim measures appear to be as important or sometimes more important than the consideration of the merits of the case. The interim measures' aim is to prevent torture in individual cases, to shield potential victims from these actions. In that sense, interim measures are—for the moment—the best tool at the disposal of international bodies to compel states to respect the main purpose of the conventions preventing torture. Reparations, rehabilitation of the victims, and prosecution of torture crimes are important issues that we will also address today. But, we all agree on the idea that the prevention of torture is what we want to achieve.

As protective measures, interim measures are valuable tools as long as they are, first, adapted to the situation—to the threat—and, second, as long as they are efficient.

Although previously considered as merely recommendations by international bodies and their member states, interim measures have progressively gained binding authority, not only through

** Hélène Legeay is the Middle East and North Africa Programme Manager at Action by Christians for the Abolition of Torture (ACAT).*

landmark jurisprudence, but also the International Court of Justice paved the way with its reasoning in the *LaGrand* case in 2001,[4] and it has since been followed by other international or regional bodies.

Despite this encouraging evolution of the international jurisprudence, the legal status of interim measures is still uncertain. As Diego Rodríguez-Pinzón will address in his presentation, some states have proven quite willing to respect interim measures, but still, in too many cases, we have seen states breaching orders and consequently, victims suffering irreparable harm. Some of them have been executed, some have been extradited to a country where they have been ill-treated or tortured, and some have been threatened, attacked, or even killed in that country because of petitions that failed in front of an international body.

As we can see, the good faith of states is still the basis for the efficiency of interim measures, like it is for the efficiency of the decisions of international enforcement bodies in general. In the last year, we have seen positive developments in international jurisprudence regarding the diversity of the interim measures ordered to protect the litigants. NGOs like REDRESS, ACAT, or OMCT assisting victims have widely contributed to these developments. The [Inter-American] Court of Human Rights has been at the forefront on the issue and a source of inspiration for other international enforcement bodies. But, as Carla Ferstman will certainly explain more deeply in her presentation, much more could or should be done to provide the best protection to victims, or potential victims of torture, through interim measures.

Remarks of Carla Ferstman*

Introduction

Today is extremely important, not only because it will explain and explore the importance of the UN Committee against Torture in the overall fight against impunity for torture. But also, it will touch on some very practical measures and hopefully this will help all of us in our respective areas of work to improve the situation of survivors of torture and those who face a risk of torture in their dealings with these types of bodies.

At REDRESS,[5] which is an organization based in the United Kingdom, we work with survivors of torture in all parts of the world and have taken cases before most regional human rights courts as well as many treaty bodies. When it comes to working with survivors of torture and considering what motivates them to bring a case before a regional or international human rights body, first and foremost what they are seeking is some form of acknowledgement of the harm suffered by an independent and impartial body that can draw attention to what they have experienced. Justice is not only, or not mostly, about any kind of revenge against a particular perpetrator or a state. It is really about trying to restore what the victim has lost, which is their dignity through the absence of rights in the context of torture.

When it comes to the issue of protection, one of the biggest challenges for a torture survivor who is undertaking efforts to try to obtain some measure of justice, first at the domestic level and, if that fails, eventually at the international level, is risk of reprisals after already suffering from torture. We can understand why it is so important that the bodies, which are supposed to be there to provide a measure of redress, do not contribute to the problem and end up being a place that, by virtue of the victim seeking some kind of justice, creates a new risk of a reprisal.

This is in a way the overlaying issue for many torture survivors that we need to consider.

Victims invariably face a range of problems when filing claims before international bodies. Certainly they face these problems when they file claims at the domestic level as well. Therefore, we should keep that in perspective. They face threats of physical violence to them and their families; sometimes these threats are carried out. They face further risk of detention; they face new or false claims or civil proceedings brought against them as some kind of punishment. Victims are sometimes forced to withdraw their claims as a result of pressure or extortion that they face.

In 2007, the Parliamentary Assembly of the Council of Europe made a very important statement in relation to the practice of forcing victims to withdraw their complaints in mostly, but not exclusively, applicants from the North Caucasus

** Carla Ferstman is the Director of REDRESS (www.redress.org).*

region of the Russian Federation, as well as from Moldova, Azerbaijan, and—albeit less recently—Turkey.[6] This resolution importantly indicated that the European Court of Human Rights should continue with cases where there had been some indication that the withdrawal by the victim had been requested under spurious grounds. So, it is quite interesting that all regional courts have faced this issue and it is not only an issue that has been faced by the UN Committee against Torture or the Human Rights Committee.

There have been, very importantly, reprisals against human rights defenders and lawyers representing victims in claims before international bodies, as well as claims at the domestic level. So, all of these problems or challenges combine to make the prospect of seeking justice a risky business for victims of torture, which is very unfortunate.

The Challenge of Protection of Victims in International and Domestic Courts

Many of my comments will be based, at least in part, on a study that REDRESS conducted several years ago on the overall challenge of protection of victims.[7] Part of the reason why we undertook this research was as a result of our work on the International Criminal Court and international criminal tribunals, where as many of you know there is quite an extensive practice on the protection of witnesses in the context of those tribunals, with the system at the International Criminal Court differing from the system in place at the *ad hoc* tribunals—the International Criminal Tribunal for Rwanda and for the Former Yugoslavia. Unlike the *ad hoc* tribunals, where victims are only able to appear as witnesses, at the ICC, in addition to their role as witnesses, victims have an independent role where they can present information directly and participate in proceedings. However, the structures of protection at the ICC were modeled on the *ad hoc* tribunals and the ICC was therefore not adequately equipped to deal with victims who were acting on their own initiative. The ICC adopted a prosecution-initiated model where witness protection measures were accorded in relation to the importance of the particular witness to the criminal prosecution.

The reason why I say this is because it is quite similar at the domestic level around the world. Victim and witness protection systems are typically established to deal with organized crime or serious crime cases and are managed by the prosecution service. So, when we think about the victim of a human rights abuse, who is seeking some kind of justice independent from any criminal prosecution that an office of the prosecutor might bring, there are a number of very specific challenges that the victim would face: first, in convincing the relevant bodies that the individual is entitled to protection when there is no criminal case; and second, the typical bodies undertaking the protection are the police, sometimes the military, depending on the kind of case, which are in the context of human rights, often the same bodies that are allegedly responsible for the violations.

So, it is quite important to situate the challenge of victim protection in human rights cases with regard to the situation that operates in most countries around the world. To the extent that protection mechanisms exist at the domestic level, they are not geared to human rights litigants. This is an overall problem. When we start to talk about interim measures, if a regional human rights court or a treaty mechanism is recommending that states take particular action, one must be mindful of the types of systems that exist at the domestic level. How will the state respond to these interim measures, when it has very limited structures in place? This is an overall concern of which we should be mindful in considering the challenge of protection.

Taking one step back, is there an obligation to protect? Is there a human rights obligation that states have to protect? The short answer is, of course, yes. But actually, when one looks through the wide variety of human rights treaties, one can see a distinct absence of the obligation set out in most typical treaties relating to human rights. The reason for that is typically, when we think about protection in the context of criminal trials, the victim is not normally or has not traditionally been seen as a party to proceedings. When we look at the International Covenant on Civil and Political Rights,[8] which has an extensive section on fair trial rights, there is no mention of the obligation to protect victims and witnesses. So, it is quite a stark absence in the overall system of human rights protection.

Important Protections in the CAT

Luckily though, when it comes to the United Nations Convention against Torture, we do have Article 13, which sets out in no uncertain terms the obligation of states to ensure that victims who are seeking justice do not face reprisals.[9] This is a very important provision. Similarly, in the torture field, the Istanbul Protocol,[10] which deals with the medical and legal documentation of torture, clearly specifies that there is an obligation to protect victims and witnesses. But probably the most significant and extensive provision on protection is in the new International Convention for the Protection of All Persons from Enforced Disappearances,[11] which sets out state obligations in very clear terms.

In accordance with the recent General Comment issued by the UN Committee against Torture on Article 14,[12] which concerns the right to redress and rehabilitation, States Parties should also take measures to prevent interference with victims' privacy and to protect victims, their families, witnesses, and others who have intervened on their behalf against intimidation and retaliation at all times before, during, and after judicial, administrative, or other proceedings that affect the interest of victims. Failure to provide protection to victims stands in the way of victims filing complaints and thereby violates the right to seek and obtain redress and remedy. Here, the UN Committee against Torture underscores the relationship between the need to protect and other rights set out in the Convention, so the obligation to protect is not only a self-standing obligation—victims need to be protected—but when there has been a failure to protect, this

impacts a variety of other rights enshrined in the Convention, including the obligation to afford a remedy.

What are the types of measures that states have at the domestic level? As I have already indicated in my introduction, most states that do have protection legislation, as well as protection structures, have developed these systems in the context of criminal law and particularly organized crime. At the international level, the UN Office on Drugs and Crime has spearheaded efforts to encourage states around the world to revise their laws and practices to protect victims and witnesses mainly in the context of organized crime. So, at the international level, there has been some movement to encourage states around the world to adopt protection legislation and establish protection units. However, this initiative of the UN Office on Drugs and Crime has focused on the criminal model. Therefore, it is not sufficient or adequate to respond to the needs of protection in a human rights case, with respect to human rights litigants. Moreover, as I previously mentioned, there are a whole range of protective measures within the international criminal realm, both during the trial proceedings as well as measures on the ground to protect victims and witnesses. However for the most part, these too are focused on a prosecution model.

The Use of Interim Measures

What about victims who are not criminal witnesses, when they are bringing their own human rights cases? For me, this is the biggest challenge that we face. With respect to this massive gap, one of the areas which we can look at, and which I will discuss now, is the area of interim measures. Hélène [Legeay] has already indicated what interim measures are. Basically they are tools to stop or postpone the execution of a decision or an act that might prejudice the outcome of the proceedings before a final judgment is reached. They can also be positive, requiring a state to take particular action to forestall irreparable harm. There are also instances where an interim measure can be a request or an order to a state to stop negative action. One limitation of the system of interim measures is that they are typically only available for serious and urgent cases. So, we must consider this in light of the variety of needs that torture survivors have with respect to protection and whether they all fit within the context of serious and urgent cases. Most cases fall under these criteria; however it can often be a question of evidence, whether evidence is strong enough to demonstrate the sufficient level of urgency and seriousness.

Another question is whether interim measures are able to provide all of the protection needs of torture victims trying to bring a case at an international level. The first issue is how one assesses the definition of avoiding irreparable harm. Will it necessarily be applicable to protection concerns that are perhaps not amounting to death threats or serious bodily injury? How do we define serious irreparable harm? Do we define it in relation to the harm to the victim, or perhaps can we go further and define it in terms of harm to the case? Because certainly one of the roles of interim measures is to safeguard the situation so that the litigation can proceed. So, in terms of how we look at the issue of irreparable harm, does the fact that a victim has been threatened, which may force her to withdraw a particular case, amount to sufficient harm although not physical harm?

Another question is whether interim measures are able to address threats against lawyers and human rights defenders, in addition to the direct victim. In principle, one would think that they should be, though the relevant provisions and regulations are not actually so clear. If we read rule 114 of the UN Committee against Torture's regulations, the first paragraph: "At any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) on new complaints and interim measures may transmit to the State [P]arty concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations."[13] How does one interpret that? Can we possibly say that the threats to the lawyers are part and parcel of irreparable damage to the victim? Certainly that would be an appropriate way in which to look at the matter. However, that interpretation probably goes one step beyond the plain meaning of the text.

Are interim measures able to deal with reprisals after the fact? So, let's say the UN Committee against Torture issues a decision, and as a result the state concerned is very angry and the individual concerned is re-tortured, possibly even killed. What can the treaty body do in that kind of circumstance? I would suggest that interim measures, because of what exactly they are, would have difficulty to operate after the fact. Therefore, the question is what else needs to be in place to ensure the continued ability of the Committee to have oversight over the protection needs after it has issued a decision. Certainly, as the UN Committee against Torture has itself recognized in its recent General Comment, there is a link between remedy and protection. So the UN Committee against Torture or any treaty body or other international mechanism can, in light of the need to guarantee non-repetition, set out the obligation to ensure continued protection to the victim and others concerned. This could potentially be addressed in relation to the remedial order at the end of the case to the extent that the Committee has continuing supervisory ability at the end of the case, which many bodies do.

Another concern is the response by the different states to interim measures. This has to do with the overall challenge of enforcing anything that a treaty body or even some of the regional courts recommend or order, as the case may be. I suggest two main issues with respect to the response to interim measures. The first concern is limited capacity. As already indicated, one of the most significant challenges is the limitation of domestic legislation and domestic procedures on the ground to deal with protection concerns. So, if an order or request for interim measures is made to a particular country where the systems and

structures are not adequately in place, there will be a capacity problem with respect to the ability of that state to appropriately and effectively give effect to that order or recommendation. The second concern is the lack of will. This is particularly problematic for the treaty bodies, whose 'views' or decisions are not understood as binding, although of course the argument can be made that the views and decisions of the treaty bodies are necessarily binding given that they are the authoritative interpretation of the treaty, which the states have agreed to enforce.

With respect to the legal basis of interim measures, there are several different types of frameworks. Some courts and bodies have within their treaties the power to order interim measures. So, for instance, the International Court of Justice, or the Inter-American Court of Human Rights have specific provisions in their founding documents which deal with these matters. Others do not have such provisions in their statutes, but internal regulations have provided their ability to order interim measures. Here we can think of the European Court of Human Rights as an example, which has developed rules, but they are not part of the statute as such. And, other bodies have no provisions either in the statute, or in regulations, however they nonetheless interpret their mandate to allow them to order interim measures.

With respect to how these different frameworks have been understood, the International Court of Justice has come out with an important decision, which Hélène has already mentioned, in the *LaGrand* case.[14] The Court indicated that the failure of the United States to implement the interim measures that were issued by the International Court of Justice constituted a violation of the United States' obligations. In that particular case, it was quite interesting, because the International Court of Justice in its Statute specifically recognizes interim measures; however, it does not go so far as to indicate that the interim measures contained in the Statute are binding. So, it is mentioned in the Statute; however, there is no mention of whether they are binding or recommendatory. Nonetheless, the International Court of Justice's decision concluded that because of the important role of interim measures in safeguarding the sanctity of the system, those interim measures had to be regarded as binding.

There has been progressive development in the jurisprudence of the European Court of Human Rights. In an early case regarding an expulsion from Sweden to Chile, the European Court indicated that the interim measures were not binding. But that position has changed. In a more recent case regarding an extradition from Turkey to Uzbekistan, the European Court made a very clear finding that interim measures must necessarily be binding. To a certain extent, this judgment was likely influenced by the *LaGrand* case, given the timing.

Conclusion

In summary, with respect to the legal basis for interim measures, we have a variety of different systems. The legal basis will be determined either by treaty, internal rules, or it will be determined by implication, binding on the basis of a good faith interpretation of the relevant treaties. Bodies that issue views or recommendations face distinct challenges in the sense that if the overall mandate of the body is not capable of issuing binding decisions, and therefore it is more difficult to imply a binding nature to an interim measure. This is one of the challenges of UN treaty bodies in trying to cultivate the argument that interim measures are binding. Not to say that the argument cannot be made—certainly it can and it should—but one can understand why it can be difficult, and why certain states have not seen it necessary to enforce interim measures.

In conclusion, the first way to strengthen protection measures in the context of human rights litigants' need for protection is to make the system of interim measures as binding as possible. Second, I suggest that it is necessary to clarify what states are obliged to do in order to make protection effective. Given the gaps at the domestic level, it would be helpful for international bodies—including the treaty mechanisms, and in particular the UN Committee against Torture—to explain in great detail what is necessary to protect human rights litigants in the context of the Convention. This is something which has not been done; domestic practice is inadequate, international standards are simply not sufficiently clear. While there must be continued efforts to tackle the lack of will at the domestic level, capacity is something that one has a greater chance of influencing. Making those standards as clear as possible to enable implementation by domestic authorities is important.

What are the positive measures of protection that human rights bodies can insert into their interim measures? The UN Committee against Torture and other bodies can be more descriptive in the types of measures that they set out in their interim measures findings. And, also it would be helpful to strengthen follow-up mechanisms, both follow-up of interim measures as well as follow-up of decisions where protection features as part of the decision. In addition, it may be useful for the Committee to issue a General Comment on Article 13 of the Convention against Torture. It could be quite interesting and it could potentially have an important role not only in relation to the Convention against Torture but also with respect to the clarification of applicable standards of protection in human rights cases more broadly.

Remarks of Diego Rodríguez-Pinzón*

Introduction

I think the topic of this panel is a fascinating discussion overall, the theme of the conference is a very practical perspective to sit and find some new ideas to improve the protection mechanisms, particularly the individual complaint mechanisms of the Convention against Torture (CAT, Convention), and again to begin to look to different types of mechanisms that exist around the world. In my case, I was invited to talk a bit about the Inter-American Human Rights System. Particularly, I would like to focus on the Inter-American Commission on Human Rights (IACHR, Commission). A lot has been written and said about the Inter-American Court of Human Rights, but a more detailed and narrow approach exploring the powers and practice of the Commission as a reference for discussion with the mechanisms of the treaty bodies of the UN—particularly the Committee against Torture—could be extremely useful and has yet to be explored in-depth.

I am going to tell you why I think it is very important to narrow it down and to begin to look at the practice in the Commission in the framework and architecture of the Inter-American Human Rights System.

Human rights supervision is now a very well-settled practice, general supervision—when we talk about countries, thematic reports, general comments, and advisory services—as well as individual complaints. In order to discharge their mandates under the corresponding human rights treaties, these powers have developed and evolved constantly to improve promotion and protection of human rights in light of the object and purpose of the pertinent treaty. On the one hand, the general supervisory powers play a very important role in inducing states to adopt structural changes that will prevent future violations of human rights in the immediate term. Such general supervision is also a very useful instrument to highlight the existence of endemic problems in specific countries or specific issues in a region, and in many instances empowers the work of civil society organizations and other actors on the local level.

In the realm of individual complaints, most of the powers of these international mechanisms have been geared toward establishing the international responsibility of the state. This of course usually occurs after violations have occurred, and the only available remedies are reparations, including compensation. In fact, this usually happens months, if not years later, after local remedies have been exhausted. It is *ex post facto* action on the international level on the basis of the traditional finding of international responsibility of states.

However, one of the key elements of human rights regimes is the need to prevent human rights violations, which is arguably one of the most important aspects of the object and purpose of such regimes. This is true as a duty of states and it is true to inform the work of international human rights bodies. This may, for example, explain in part why the UN treaty bodies, such as the Human Rights Committee or the Committee against Torture, have established in the Rules of Procedure the power to adopt interim measures.[15] Such a preventive mandate requires the exercise of expansive actions to adequately respond to certain human rights violations.

This expansive interpretation of these committees' own powers has been replicated by the Inter-American Commission on Human Rights. While only the Inter-American Convention on Forced Disappearance of Persons[16] explicitly refers to such a power—interim measures—the Commission has included in its Rules of Procedure such a provision since the 1980s.[17] And it is recognized by most states of the [Organization of American States] as a legitimate development of its implied powers in individual cases under the American Convention on Human Rights[18] and under other regional international treaties.

This provision has evolved constantly to the current draft recently approved by the Commission, which will enter into force in August of this year. Hopefully I will be able to talk a little bit about this process.

Structure of the Inter-American Commission

I will focus on some aspects of the practice of the Commission that could be interesting and useful for the discussion about provisional measures of the Committee against Torture.

** Diego Rodríguez-Pinzón is Professorial Lecturer in Residence and Co-Director of the Academy on Human Rights and Humanitarian Law at American University Washington College of Law.*

However, I will not deal with the provisional measures of the Inter-American Court of Human Rights, as I intend to narrow the presentation to the powers of the Commission, as an interesting reference of quasi-adjudicatory bodies on the practice of interim measures.

Let me now turn to explain very briefly the general framework, the general architecture of powers that inform the Commission's practice on the protection and promotion of human rights. The Commission has received a very broad mandate by the states of the Organization of American States. The Commission has both the power to deal with general situations and deploy diplomatic and political tools to confront human rights violations of all sorts. The Commission can use these powers to confront individual situations or more structural endemic problems, as well as gross and systematic violations of human rights, as it has done in the past, through several decades during the 1970s, 1980s, and 1990s in Central America, in the Southern Cone, and in the Andean region, where we saw the practice by several states of massive violations of human rights.

One of the most notable mechanisms of the Commission is its power to perform on-site visits, a function in place since the inception of the Commission in the 60s. In the first decade of existence, the Commission performed several on-site visits to the countries of the region. As you may very well know, this is a very intense proposition for an international supervisory body to deploy itself into the jurisdiction of one of the supervised states, but it has settled into a very important practice of the Commission to confront, among others, systematic violations of human rights.

Another very important set of tools with respect to this general supervisory power of the Commission is country reporting. The Commission has reported systematically about country situations throughout the region and regional endemic problems. The most important report, I believe, of the Inter-American Commission, was the *Report on Terrorism and Human Rights*,[19] released after September 11, 2001. This report basically collected the Commission's prior activities from the previous decades throughout the region—regimes arguing that they were combating the threat from terrorist groups and adopting measures that clearly violated human rights law. The Commission was very quick in introducing this general report on terrorism and human rights to engage in a dialogue with countries, many of them, including the [United States], engaged in practices that, in my opinion, clearly violated established international human rights law.

Individual Complaints and Interim Measures

There are other mechanisms, such as rapporteurships, interim measures, and cases regarding torture, as well as other practices such as press releases. But I want to now turn to the adjudicatory dimension, which of course takes us into the realm of interim measures. The adjudicatory dimension of the Inter-American Commission must be understood again in this architecture by which the Commission holds the key of access to individual complaints in the Inter-American System. And it means that all cases, all interim measures, are first processed in the Commission and subsequently could end up reaching the Inter-American Court of Human Rights. So, in order to understand the rightful dimension of the individual complaint system in the Americas region, we have to understand that the process of the Court is not a different process from that of the Commission on individual complaints. It is one system, one procedure, in which there is a process of incremental pressure on states. And there are different moments in the processing of petitions that empower the Commission, empower the victims, petitioners or in many cases government officials, to do things on a national level in order to respond to the process in the Inter-American Commission and the Inter-American Court.

In the framework of the individual complaints procedure in the Inter-American System, we will explore the normative structure that informs the individual complaint procedure, specifically the interim measures regime in the individual complaint procedure in the Inter-American System. The Commission primarily grants precautionary measures to protect persons from grave and imminent danger of injury of rights recognized under the American Declaration on the Rights and Duties of Man (Declaration)[20] and other regional treaties. This is the normative regime that informs individual cases and that of course is directly relevant to the adoption of interim measures. The Charter of the Organization of American States[21] sets out the legal architecture of the OAS and it is binding on all OAS members, including the [United States], Canada, and all Central American, Caribbean, and South American countries—all of the region.

Under Article 106 of the Charter, the primary function of the Commission is to promote the observance and protection of human rights and to serve as a consultative organ of the OAS in these matters. The notion of protection in this provision necessarily involves the powers to receive and adjudicate human rights cases. Every state in the Americas has accepted the competence of the Commission to consider the individual complaints concerning alleged human rights violations that occur in their jurisdiction just by ratifying the Charter. For those states that have not yet ratified the American Convention, the Commission will determine whether the state violated the rights set forth in the American Declaration. The Commission and the Inter-American Court have both held that the Declaration, although not initially adopted as a legally binding instrument, is now a source of legal obligation for OAS Member States. Additionally, by approving the Commission's Statute, the Member States have established the Commission's authority to receive and decide individual complaints alleging violations of the Declaration against those states that are not parties to the Convention.

Furthermore, the Commission has read the Declaration as an evolving source of law, noting that its application is consistent with the practice of the Inter-American Court of Human Rights. Therefore, the Declaration serves as a parallel to the American Convention for those states that have not ratified the American Convention.

In the Inter-American System, the purpose of precautionary measures is to prevent irreparable harm to persons or to preserve the subject matter of the proceedings in connection with pending litigation. Therefore, their adoption does not require a case pending before the Commission, nor do they have to join the claim of a human rights violation. Although the precautionary measures are not explicitly mentioned in the American Convention or statute, as I mentioned before, these measures have been institutionalized for decades through Rules of Procedure of the Commission.[22] Under Article 25 of the Rules of Procedure of the Commission, in serious and urgent situations the Commission may, on its own initiative or the initiative of a party, request that a state adopt precautionary measures.

If protections are provided by the state as a result of an order issued by the Inter-American Commission, these may be due to its own motion or at a request of a party. Taking into consideration the special circumstances existing in several states of the Americas, the Commission has adopted precautionary measures to protect persons on an individual and collective basis. In this sense, beneficiaries of precautionary measures have been, among others, human rights defenders, persons in detention—some of whom have been sentenced to capital punishment or are being kept in deplorable health conditions—persons being harassed in the context of judicial procedures, persons with health problems, children, and entire communities of indigenous peoples.

Study on the Commission's Use of Precautionary Measures

Behind each one of these situations, there are grim realities that stem from armed conflict, discrimination, poverty, corruption, precarious prison conditions, and impunity, which unfortunately still exist in the Americas. On this basis, with a colleague in the University of Ghent in Belgium, we studied all of the measures that have been adopted by the Inter-American Commission since they first adopted this power in the regulations in the 1980s; we ended up with a collection of 771 precautionary measures. Then we studied how the Commission dealt with petitions regarding different countries—the Americas is composed of a very diverse set of countries, some of which have gross, systematic violations of human rights, others with established democracies—to understand the scope of application of the precautionary measures of the Commission and how they have been used in its history.

We intend to release this article in two or three months, and hopefully it will increase understanding of the Commission's measures, as opposed to the practice of the provisional measures of the Court, given that there is much more information on these. The Commission can issue measures regarding any right recognized by the Inter-American instruments for which the individual complaint procedure is available, that is the basic prerequisite. This very broad subject matter jurisdiction is, however, limited by notions that were mentioned before—gravity, urgency and irreparability of a particular situation, and on those bases it has narrowed its measures to specific situations and specific rights.

After doing a very quick analysis of the measures, we found that of the 771 measures adopted by the Commission from 1994 to 2012, 665 measures dealt with the right to life, along with other rights. Six hundred thirty-four measures dealt with life and humane treatment. Five hundred eighty-two dealt with personal integrity, along with rights other than the right to life. Eighty-three measures dealt with the right to life alone. Only seven measures dealt with humane treatment alone—not related to the right to life or other rights under the American Convention. Therefore, the great majority of the precautionary measures adopted by the Inter-American Commission on Human Rights have focused on these non-derogable core rights established both in the Declaration and the American Convention.

We have numbers for other rights related to, for example, freedom of expression with 25 measures; right to health with 26 measures; equality with fifteen measures; personal safety with thirteen measures; and liberty with eight measures. You will see that there is a clear focus of the Commission on these particular rights, even though the normative framework of the Commission is very broad—not only right to life, equality, and personal integrity, but many other rights. The Commission has been very deliberate and careful in using these powers on these types of rights, dispelling some conceptions that the Commission has been very liberal in dispensing precautionary measures in all sorts of situations, particularly in the framework of the *Belo Monte* case.[23]

Another important finding that illustrates the scope and where the Commission focuses its measures are the number of precautionary measures issued by country. Which countries receive the most precautionary measures? In the last decade, Colombia had the most with 173 measures. Then comes Guatemala, with 97 measures, then Mexico with 75, and—I would say surprisingly for some and not for others—the United States is fourth, with 72 precautionary measures. As you can imagine, these entail issues of *non-refoulement* and issues related to the death penalty.

There is very little information about the implementation of the measures. We only found some references, particularly dealing with the death penalty. Of the death penalty cases, there were only a few reported—139 cases reported on the death penalty, and only 45 of those cases were followed up in these reports. And of those 45 death penalty cases, there was some sort of compliance with the measures only in half of them. The [United States] complied with seven cases with interim measures of the Commission. Other countries have complied with precautionary measures—half of them have been complied with in some way or another, partly on the basis of the report regarding death penalty cases.

The Value of Precautionary Measures

Finally, I would like to highlight a couple more issues. First is the importance of precautionary measures for the protection of the most basic rights. The Commission has been very deliberate in opening its measures not only for situations that have been dealt with in cases, as I mentioned, but beyond that. You can

bring a petition for precautionary measures to the Commission even before you have filed the case in the Inter-American Commission on Human Rights. This is a very broad interpretation of its implied powers. States have not opposed this interpretation, so there is a consistent practice. Opposition comes from, for example, the United States under the American Declaration, stating that there is no jurisdiction of the Commission on that softer regime. The United States has not ratified the American Convention. However, the practice of issuing protective measures beyond the existence of a case, is a very well-settled practice.

I submit to you, and I think it is something that we could eventually discuss, that if we think about the object and purpose of a convention such as the American Convention, the traditional notion of interim measures being linked to the existence of a case may be appropriate in situations where there are two countries involved in inter-state litigation before the International Court of Justice. But, when you are talking about these public regimes, in which you are protecting human rights, the object and purpose is prevention which governs the interpretation of the powers of the organs that supervise implementation. And in that sense, it would be quite narrow to apply these measures, in the case of the Inter-American System, only when there is a case already filed. There are some dilemmas that, I think, have been solved in the case of the Inter-American Commission on Human Rights and, that having a viable case in terms of the American Convention would not be an adequate interpretation of the need to have quick action. I think it is an important reference regarding provisional measures in the [Committee against Torture] and the possibility of improving how you read the Convention, and how to re-craft the rules of procedure.

The Commission's Responses and Enforcement

From the perspective of the Inter-American Human Rights System, I can mention that prevention is a real-time exercise. In that sense, when someone is in danger of being tortured, how can you interpret your normative framework in order to be able to react in those situations to say, "I am a human rights body, I have to develop tools that would allow me to prevent torture in real time, one of the most dramatic situations that you can have in the violation of human rights"? In that sense, I think the [Inter-American] Commission [on Human Rights] has been very strategic in the use of press releases. The Inter-American Commission indeed has used its press release capabilities when there are certain situations. For example, on September 26, 2012, the Commission issued a press release concerning the acts of violence in a prison of the United States. It basically reacted to what was happening in real time, using this press release, not necessarily precautionary measures, but again with careful wording indicating the Commission is worried about what is happening in those particular settings.

One of the aspects of the latest developments that I think is very important in the practice of the Commission is oral proceedings. Oral proceedings have been crucial and if we step back and think about the enforcement of human rights law, I believe there is an intrinsic relationship between international regimes and the publicity, the mobilization of information in order to signal: "Where do we have problems, in which countries?" The oral proceedings were happening in the Commission since the creation of the mechanism, but were strengthened with the creation of the Inter-American Court proceedings. So, once the Court was in place in 1980, the Commission and the new regulations allowed for more liberal use of oral proceedings in individual cases. The Commission had been holding hearings here in Washington, D.C., two times a year, and as soon as Internet was available, these new technologies allowed for the more efficient dissemination of information, including webcasting of the hearings through the Internet. This included not only cases and hearings in individual cases, but also in precautionary measures. So, there are several cases in which precautionary measures have been dealt with in the public scene using these technologies.

On the other hand there is enforcement. Once the public is aware and sees the government and the parties talking about the situation that is probably occurring in real time, you may have a good possibility of preventing torture or arbitrary execution. I do accept that there are other situations in which you have to be very careful when you are using publicity because you could create problems, but again, you assess in which situations this can be useful and in which situations it should not be done. The Commission can refrain from publishing certain names to avoid this problem. This publicity is very important for enforcement and in the case of precautionary measures and provisional measures, it induces certain pressure on states to prevent irreparable damage.

Case Study: Guantanamo Bay

The last thing I want to comment on is one interesting example of how the Commission works and the possibility of the use of the mechanisms of the Commission and the famous Guantanamo measures of the Inter-American Commission on Human Rights. The United States has not ratified the American Convention, so it was only [subject] to the Commission's procedures and interim measures—the Court was not available. These measures were adopted only a few months after September 11, 2001—less than a year. In March 2002, the first measures were issued by the Inter-American Commission, when information began to trickle in that there could be violations occurring in Guantanamo and elsewhere, and that people could be tortured. The Commission began to issue interim measures; there was no case then, only interim measures. It began to document and put pressure on the United States as the only mechanism available for individual complaints regarding this country.

The Commission began to expand, modify, and amplify these measures throughout the years—2004, 2005, 2007, etc. The latest developments are very interesting because now some of the petitioners—the Center for Constitutional Rights and CEJIL (Center for Justice and International Law) here in Washington—have requested that the Commission begin to implement public hearings on the situation in Guantanamo, and to hold public hearings that are streamed through the Internet, and to

mobilize public information. So, this is something that shows that these petitioners that are using the individual complaint procedure, using the interim measures, using the cases that have been filed subsequently, now are resorting to the political diplomatic powers of the Commission seeking a thematic hearing from the Commission regarding the situation of human rights in Guantanamo and elsewhere.

For those that are interested, you can look for this information on CEJIL's website,[24] among others, and see the latest developments, how it advocates, and how petitioners are using all of the tools at their disposal to induce pressure in a specific situation. The Guantanamo measures, I think, are a very interesting example in this regard.

Endnotes: Panel I

[1] Ktiti v. Morocco, U.N. Comm. Against Torture, CAT/C/46/D/419/2010 (Jul. 5, 2011) *available at* http://sim.law.uu.nl/SIM/CaseLaw/fulltextcat.nsf/160f6e7f0fb318e8c1256d410033e0a1/edda8c9ea6e9d834c12579660040f447?OpenDocument

[2] Abdussamatov v. Kazakhstan, U.N. Comm. against Torture, CAT/C/47/D/444/2010 (Nov. 15, 2011) *available at* http://www.bayefsky.com/pdf/kazakhstan_t5_cat_444_2010_scan.pdf

[3] Committee against Torture, Rules of Procedure, U.N. Doc. CAT/C/3/Rev.5 (2011).

[4] La Grand Case (Ger. v. U.S.) 2001 I.C.J. 104 (June 27) *available at* http://www.icj-cij.org/docket/files/104/7736.pdf.

[5] *See* www.redress.org.

[6] Eur. Consult. Ass., Council of Europe member states' duty to co-operate with the European Court of Human Rights, 31st Sess., Doc. No. 11183 (2007).

[7] *Ending Threats and Reprisals against Victims of Torture and Related International Crimes: A Call to Action,* REDRESS (Dec. 2009), *available at* http://www.redress.org/downloads/publications/Victim%20Protection%20 Report%20Final%2010%20Dec%2009.pdf.

[8] International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 U.N.T.S. 171; 6 I.L.M. 368 (1967).

[9] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85.

[10] U.N. Office of the High Comm'r for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)*, 2004, HR/P/PT/8/Rev.1, *available at:* http://www.unhcr.org/refworld/docid/4638aca62.html.

[11] International Convention for the Protection of All Persons from Enforced Disappearances, UN Doc. E/CN.4/2005/WG.22/WP.1/Rev.4 (2005).

[12] Committee against Torture, General Comment No. 3, U.N. Doc. CAT/C/GC/3 (Dec. 2012) *available at:* http://www2.ohchr.org/english/bodies/cat/GC3.htm.

[13] Committee against Torture, Rules of Procedure, ¶ 114, U.N. Doc. CAT/C/3/Rev.5 (Feb. 2011) *available at:* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/411/40/PDF/G1141140.pdf?OpenElement.

[14] See *LaGrand*, *supra* note 4.

[15] See Rules of Procedure, *supra* note 13.

[16] Organization of American States, Inter-American Convention on Forced Disappearance of Persons, OAS Treaty Series No. 68, 33 ILM 1429 (1994).

[17] Organization of American States, Rules of Procedure of the Inter-American Commission on Human Rights (2011), *available at* http://www.oas.org/en/iachr/mandate/Basics/22.RULES%20OF%20PROCEDURE%20IA%20 COMMISSION.pdf.

[18] Organization of American States, American Convention on Human Rights, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).

[19] Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.116, 5 rev. 1 corr. (2002).

[20] American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17.

[21] Charter of the Organization of American States, 119 UNTS 3, entered into force 13 Dec. 1951, amended 721 UNTS 324, entered into force 29 Feb. 1970.

[22] Approved by the Commission at its 137th regular period of sessions, held from October 28 to November 13, 2009, and modified on September 2, 2011.

[23] Inter-Am. Comm'n H.R., *Precautionary Measures: Indigenous Communities of the Xingu River Basin*, Pará, Brazil, PM 382/10 (Apr. 1, 2011) (granting modification of precautionary measures).

[24] *See* www.cejil.org.

PANEL II
THE ROLE OF THE COMMITTEE AGAINST TORTURE IN PROVIDING ADEQUATE REPARATIONS TO VICTIMS

Remarks of Dean Claudio Grossman

Background

In November of 2012, the Committee adopted General Comment No. 3.[1] In the 25 years of its existence, the Committee has adopted only two [other] general comments—very few in comparison to other committees. The Committee has only ten members, the smallest of all of the human rights treaty bodies, with a considerable workload. The Committee simply has not had the time to engage in standard-setting through general comments. However, it became necessary to adopt a General Comment on the scope of Article 14 that would assist States Parties, Committee Members, and others in applying the Convention.

A legal procedure loses legitimacy if it does not have a consequence. The Committee, both under the states' reporting system and the individual complaints procedure, required follow-up by states in accordance with Article 14, but was not specific in determining how to remedy a violation of the Convention. Through the adoption of General Comment No. 3, the Committee firmly established that redress encompasses restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, giving clear guidelines as to the consequences of violations of the Convention.[2]

The Committee's Core Principles

In adopting General Comment No. 3, it was important for the Committee to lay down core principles. Amongst those principles is that economic compensation certainly plays a role in alleviating violations of human rights, and that compensation involves reparations for both material and moral damages, including pain and suffering.[3] Still, anyone who has worked with victims knows that that is not enough. What victims want is justice, investigations, establishment of responsibilities, and punishment that is proportional to the offense. General Comment No. 3 reaffirms that prompt, effective and impartial investigation, prosecution and proportional punishment are required, and that amnesty laws are incompatible with the obligations laid down by Article 14.[4]

When human rights are violated, we are not dealing only with individual wrongs; thus, it is crucial for society at large to help reestablish the rule of law. Measures of satisfaction and guarantees of non-repetition are mandated by Article 14 of the Convention, and are essential forms of redress as states restore support for the rule of law.

General Comment No. 3 also considers the status of gender and vulnerable and marginalized groups, including indigenous populations and the poor.[5] People are exposed to violations of human rights in different ways, and we need to recognize this in order to equalize compensation and measures of redress and reparations: There are special needs when we talk about vulnerable and marginalized groups.

Access to justice is a key procedural guarantee. Access to justice cannot be made conditional on the availability of resources. There are always opportunities and possibilities for society to do justice. In my own experience I have witnessed, time and again, situations of societies that, in spite of being poor, are extremely generous and express solidarity with those who have been badly affected by violations of human rights.

The concept of victim is also key. The victim is not only the person who has been subjected to torture, but their affected family members and dependents are victims as well. This concept of victimhood is not artificial. Anyone who doubts it has not been exposed to the children or spouses of individuals who have been disappeared. Human rights defenders also can be victims as they are continually subject to serious consequences for their actions. Accordingly, another important contribution of General Comment No. 3 is recognition of the legal duty to guarantee the security of victims and human rights defenders, and the importance of victims' participation and leadership, and the role of civil society as a whole, in the redress.[6]

Legal Development Through Jurisprudence

The Committee built on its own jurisprudence in order to adopt this General Comment. For example, see *Gerasimov v. Kazakhstan* (2012).[7] In this decision, the Committee records that Article 14 of the Convention recognizes not only the right to fair and adequate compensation, but also requires States Parties to ensure that the victim of an act of torture obtains redress.[8] The redress should address all the harms suffered by the victim through the provision of restitution, compensation, rehabilitation of the victim, and measures to guarantee that there is no reoccurrence of the violation, while always bearing in mind the circumstances of the particular case.[9] So this General Comment is not a result of the Committee against Torture suddenly learning the complexities of the law of redress, but the result of a process to codify and develop the practice of the Committee.

In the same decision,

> the Committee considers that, notwithstanding the evidentiary benefits to victims afforded by a criminal investigation, a civil proceeding and the victim's claim for reparation should not be dependent on the conclusion of a criminal proceeding. It considers that compensation should not be delayed until criminal liability has been established. A civil proceeding should be available independently of the criminal proceeding and necessary legislation and institutions for such civil procedures should be in place. If criminal proceedings are required by domestic legislation to take place before civil compensation can be sought, then the absence or undue delay of those criminal proceedings constitutes a failure on behalf of the State party to fulfill its obligations under the Convention.[10]

The standard of proof for a domestic criminal prosecution is higher than for civil liability. In the Anglo-Saxon tradition, a criminal prosecution requires proof beyond a reasonable doubt, while civil liability requires a preponderance of the evidence. Torture does not take place in the presence of a public notary with witnesses; thus, if the required standard is reasonable doubt, it is impossible to prove state responsibility. In cases of gross and mass violations of human rights, presumptions are acceptable to prove an individual case of torture. In such a case, the burden of proof shifts to the state and the state can disprove the presumption by showing that torture did not take place.

Additionally in its decision on *Gerasimov v. Kazakhstan*, "the Committee emphasizes that disciplinary or administrative remedies without access to effective judicial review cannot be deemed to constitute adequate redress in the context of Article 14."[11] In a case of torture, when an administrative judge or a disciplinary institution simply slaps the perpetrator on the wrist, without ordering punishment, and without providing adequate measures of redress for the victim, they have not satisfied Convention obligations. Adequate domestic procedures, including access to full and effective redress, are necessary and this requirement is clarified by the Committee's jurisprudence on Article 14.[12]

Conclusion

Full information on redress and rehabilitation is very important to determine whether there has been compliance with Convention obligations. For instance, after consideration of the fourth periodic report of Belarus, the Committee concluded that "the State party should provide redress and compensation, including rehabilitation to victims in practice, and provide information on such cases to the Committee. Furthermore, the State party should provide information on redress and compensation measures ordered by the courts and provided to victims of torture or their families. This information should include the number of requests made and those granted, and the amounts ordered and actually provided in each case."[13] Repetition of legal texts will not satisfy the Committee; what happens in practice is critical. To that end, State Parties should provide relevant statistical data to the Committee.

Training on Convention obligations is an obvious need and the Istanbul Protocol is an invaluable training tool, which is recognized in General Comment No. 3. The Istanbul Protocol provides guidance for medical doctors and lawyers in sensitive matters including, *inter alia,* how to question a victim of torture and interact with those involved, how to record facts, and how to meet the psychological needs of victims.[14] The Istanbul Protocol also functions in a preventative role by educating people, *inter alia*, regarding the importance of the use of cameras, the registration of prisoners, and ensuring access to doctors and to lawyers. All of these measures contribute to the realization of the object and purpose of the Convention and their value is affirmed in General Comment No. 3.

Under the law, the prisoner is sacred; certainly a prisoner might be guilty and should be punished in accordance with the law if he or she committed a crime, but the law condemns and rejects torture and ill-treatment of that prisoner. The use of torture and ill-treatment sometimes gives a false sense of security and distorts the real possibility of achieving justice. We must ensure that neither innocent people nor guilty people are tortured, and that no one's rights are violated. General Comment No. 3 contributes a valuable tool to reaffirm and assert these essential principles.

Remarks of Octavio Amezcua*

Introduction

I think it is a very good sign that the Committee against Torture is starting to pay more attention to the issue of reparations. As a human rights lawyer in the Latin American forum, I have witnessed how NGOs have focused litigation in the Inter-American System. Definitely, one of the reasons for this preference is that it is important that the System, particularly the Inter-American Court of Human Rights, has given reparations. Dealing with reparations gives a chance to the UN committees to address human rights violations in a more comprehensive way. The adoption of criteria established in General Comment 3[15] is a good starting point for the Committee [against Torture] to start exploring reparations measures within its individual complaint procedure.

** Octavio Amezcua represented the Mexican Commission for the Defense and Promotion of Human Rights.*

I think General Comment 3 represents the opportunity for the Committee to expand its decisions on individual complaints in order to determine reparation measures required by the case in accordance with a UN instrument and the jurisprudence of international bodies, such as the Inter-American Court of Human Rights. It will be very important for other UN bodies and NGOs to strongly support this process because at the beginning it will undoubtedly face resistance by states that have accepted the individual complaint mechanisms. The Committee against Torture and other UN committees will face claims by states regarding the powers of those bodies to award reparations in such a detailed way, claims that might be based on the quasi-judicial nature of the committees. However, the award of reparations should be conceived as implicit within the adjudication powers that treaties confer to the committees regardless of their quasi-judicial nature. This means that as long as the committee has powers upon a particular case of human rights violations, it also implicitly has the power to award particular reparation measures. Thus, the Committee [against Torture] has the possibility of addressing reparations in a way far beyond what it has previously adopted in the past. This is in accordance with its mandate for individual complaints and with what the Committee itself has determined in General Comment 3, which it recently adopted.

The Need for Improvements to Committee Procedure

However, there need to be several changes in the Committee's procedure for resolving individual complaints in order to deal effectively with reparation measures. The one I think is the most important is the one regarding the victims' point of view as the basis for awarding reparation measures. These measures cannot be filled without considering the victims' perspective. Particular measures of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition are created in accordance with the victims' needs—something that the Committee cannot address by only measuring the damage caused by the violation in abstract. Each victim suffers the consequences of gross human rights violations such as torture in very different ways. Therefore, the Committee should take into account this objective basis in order to award reparations in a particular case. In this regard the Committee clearly states in General Comment 3, I quote, "the importance of the victim participation in the redress process, and that the restoration of the dignity of the victim is the ultimate objective of the provision of redress."[16] Not listening to the victims' needs can be very counterproductive for the implementation of reparation measures. And here I would like to mention, well actually a very sad example is, you know, Mexico is currently facing a huge tragedy caused by the violence of organized crime but also the response of the state to that violence. It has caused more than 100,000 killings, around 30,000 people disappeared, other thousands of people tortured. As part of this tragedy, a couple of years ago a big group of victims organized and started pressing the government to negotiate some reparation measures and what to do in this situation. This process had some very interesting results actually. The Victims Law,[17] which deals in a very progressive way with the issue of reparations, was a product of these negotiations.

But also another issue that was treated by these negotiations was the building of a victims' memorial to the victims of the violence of these last years. But what happened basically is that the negotiations stopped at that point and suddenly the federal government publically announced the building of a victims' memorial. They built it in a place that is by the main military base in Mexico, which for many victims was considered an offense because the military actually is one of the main actors in this tragedy, one of the main responsible for this situation. But the main problem is that this memorial was built without previous consultation with the victims about what kind of memorial they wanted. So, many victims took this as an offense and it was actually counterproductive, had no reparation really at all. And of course this profoundly affected the dialogue between government and victims and so this is something the Committee would like to avoid when issuing reparation measures.

The way to avoid it is by listening to victims' needs, therefore awarding concrete measures based on those needs. The Committee against Torture's Rules and Procedures[18] somewhat already provide a solution for this. Rule 117 says that the Committee may hold closed meetings in order to provide further clarification. Regarding these "further clarifications," I would like to recall a very interesting article published in *SUR Journal* a couple of years ago. The article is about the compliance with the Inter-American Court's rulings and one of the very interesting findings of this article is that the more detailed the reparation measure is, the more the chances that the state will comply with that measure. Like for example if, as the Court has repeatedly stated, it orders the state to conduct a serious investigation to punish the perpetrators. Well, that's a very open statement; it leaves to the state all the means to comply with this order. And, well, we know that states are not enthusiastic about complying with international bodies' resolutions. I mean, it has no instructions for the state to comply with these measures. So, it's very different from telling the state you should conduct an investigation by applying the Istanbul Protocol, this and that, so that's a better way to follow up the decision.

By applying these criteria to the Committee's decision, we can conclude that the formula contained in the Convention against Torture[19] is the right to redress and an enforceable right to fair and adequate reparation. Let's say a formula for issuing some concrete reparation measures in a particular case is that it is vague to just leave to the State Party the means to comply with the decision. Also, taking the risk of implementing measures might be contrary to the victims' needs. By issuing particular reparation measures, the Committee would be able to control the implementation of its decisions through its follow-up mechanisms that would eventually make the individual complaint procedures a much more effective litigation tool, answer questions on the merits of the complaint. Now the way these hearings are held should be flexible enough as to allow the Committee to listen to victims' needs. Of course not every victim has the chance to travel to Switzerland, so the Committee should be flexible enough to allow hearings in other parts of the world, maybe held by a Committee's working group or by holding meetings with the use of technology. Well, the option of General Comment 3 on the purpose of dealing in a better way with reparations should lead the Committee to the issuance of detailed reparation measures. These would not only be translated into a better quality of the Committee's decisions but also into their effectiveness, as I will further explain.

Implementation Procedures

In this regard, it is also worth mentioning that the Committee already has the tools for an effective follow-up procedure of its decisions—tools that other relevant international human rights bodies lack. And I would like to mention here, for example, the case of the Inter-American Court [of Human Rights]; one of the weak points of the system is precisely the follow-up mechanism of the Court's resolutions. As you know, every now and then the Court dictates a compliance resolution, holds meetings with victims and representatives, but under no clear criteria for advocates. On the other hand, the Committee's Rules of Procedure establish in Rule 120[20] a follow-up rapporteur-based mechanism that could periodically check the compliance with particular reparation measures as ordered by the Committee in a particular decision. Also the Committee could take advantage of its constant dialogue with States Parties in periodic reviews in order to hold special meetings with state representatives for the follow-up of decisions, and in particular, with the compliance with reparation measures.

In order to issue particular measures, the Committee should first have a holistic approach to these measures, considering that most of the time, reparation measures have no meaning for the victim within the context of redress unless the Committee has a comprehensive approach to these measures. Thus, for example, the compensation received is frequently viewed as actually being offensive by the victims in cases where the state hasn't punished the perpetrators or even started a serious investigation of the facts. Also, medical assistance could be deprived of its reparation potential in cases where the state hasn't publicly recognized its responsibility for the human rights violations. Also other things should be taken into account by the Committee, especially when dealing with torture cases. An important principle in reparations is the causality principle, which states that the responsible state is only allowed to redress those damages that are directly caused by the violation of international law. However, in cases involving gross violations of human rights, such as torture, the causality principle should be understood as flexible enough as to encompass all the serious consequences of atrocities such as torture.

Torture victims, as a lot of you should know, are frequently left with permanent damages as a product of the trauma experienced by torture. And in these cases, the Committee should use concepts already explored by other international bodies such as life, land, or lost opportunities in order to ensure that the damage caused by torture will be fully repaired.

Having said that, for analytic purposes, reparation measures can be broken down into five categories, as explained by the commentary in General Comment 3,[21] in accordance with international law. First there is restitution, which is aimed at restoring the situation to prior to when the violation took place. Of course this measure might be very difficult in cases involving gross human rights violations, such as torture, where the damage inflicted might be permanent. But it also involves other kinds of measures that are frequently very important for victims and for example, victims who are imprisoned as part of criminal proceedings, but on the basis of self-incriminating evidence obtained through torture. And of course there arise a lot of difficulties for the international bodies to ensure compliance with the measures, such as for *habeas corpus* petitions, because it depends on the domestic court's ruling on a particular criminal proceeding. And it will be, I will assume, that the domestic courts will be very reluctant to comply with this kind of order.

Second, compensation is a way of redressing all material and non-material damages through monetary means and it all encompasses actual losses and future loses, a measure that is very important regarding lost opportunities for torture victims. Third, rehabilitation measures, not only understood as medical and psychological services, but also other kinds of social services and legal services. These are measures aimed to fully give back to the victim the possibility of living a normal life in his or her particular social context. Fourth, satisfaction measures—very important in international human rights law—which are aimed at restoring the victim's dignity and include very important measures, such as the full disclosure of truth and investigation and punishment for perpetrators, that are by themselves natural consequences of the human rights violations but have a very important reparation value for victims. Fifth, and finally, the guarantees of non-repetition, which includes, I will say, the most ambitious reparation measures that can be issued. They include new legislation—the issuance of new legislation and reform to states' institutions. Actually, there are good experiences with other UN committees. The [Committee on the Elimination of Discrimination against Women] has issued very interesting guarantees on non-repetition, for example, in cases regarding domestic violence. It has ordered the state to build, for example,

shelters for women who have been victims of sexual assault by their partners. And, of course, these measures are very difficult to follow up. Although the Committee [against Torture] also has the tools to facilitate this follow up through its periodic review, usually the Committee deals with this subject in particular with its recommendations, which usually can be conceived of as guarantees for non-repetition for a particular case. So the Committee could take advantage of this situation and already deal with these guarantees in the periodic review procedure.

Also, other things that should be taken into account by the Committee, especially in taking into account torture cases, are procedural issues, which should be taken into account when deciding which reparation measures should be awarded, regarding the burden of proof and the possibility for victims to prove before the Committee the damage he or she has suffered. I say this considering the limitations that victims and representatives have, gathering all of the evidence for this. In this regard, victims and representatives are confronted with the state on an equal basis. Thus, the Committee should have a flexible approach toward this situation, allowing presumption and circumstantial evidence for the issuance of reparation measures.

Conclusion

Finally, I would like to emphasize the importance of the recognition of victims' groups in the Committee's decisions. Serious violations such as torture have such a strong impact in that they not only affect the direct victim but generally their next of kin, as Dean Grossman mentioned. The struggle for achieving justice in which many times next of kin actively participate, frequently leaves entire families with significant material losses and emotional exhaustion. These effects should be taken into account by the Committee when issuing remedies for these indirect and direct victims. The Committee faces great challenges with these issues. However, reparations are fundamental if we want the individual complaint mechanism to be an effective litigation tool. Behind every human rights violation, particularly in torture cases, there is a human tragedy that needs to be confronted and suffering that needs to be repaired. It is tough, but I think victims deserve it.

Endnotes: Panel II

[1] UN Comm. against Torture, General Comment 3, U.N. Doc. No. CAT/C/GC/3 (2012).
[2] *Id.* at ¶ 2.
[3] *Id.* at ¶ 10.
[4] *Id.* at ¶ 23.
[5] *Id.* at ¶ 32.
[6] *Id.* at ¶¶ 4, 18.
[7] Gerasimov v. Kazakhstan, U.N. Comm. against Torture, CAT/C/48/D/433/2010 (May 24, 2012) *available at* http://www2.ohchr.org/english/bodies/cat/docs/jurisprudence/CAT-C-48-D-433-2010_en.pdf.
[8] *Id.* at ¶ 11.2.
[9] *Id.* at 12.8.
[10] *Id.*
[11] *Id.*
[12] Gen. Comm. 3, *supra*, note 1.
[13] U.N. Comm. against Torture, Concluding Observations, Belarus, U.N. Doc. No. CAT/C/BLR/CO/4 (2011) ¶ 24 *available at* http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.BLR.CO.4_en.pdf.
[14] U.N. Office of the High Comm'r for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)*, 2004, HR/P/PT/8/Rev.1, *available at* http://www.unhcr.org/refworld/docid/4638aca62.html.
[15] U.N. C.A.T., Implementation of Article 14 by States Parties, U.N. C.A.T. General Comment 3, U.N. Doc. CAT/C/G/C/3 (2012), *available at* http://www2.ohchr.org/english/bodies/cat/GC3.htm.
[16] *Id.*, at ¶ 4.
[17] Ley General de Víctimas, Diaro Oficial de la Federación [DO], 9 enero 2013.
[18] U.N. C.A.T., Rules of Procedure, U.N. Doc. CAT/C/3/Rev.4 (Aug. 9, 2002), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=65.
[19] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.
[20] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Rules of Procedure, Rule 120, CAT/C/3/Rev.5 (Feb. 2011).
[21] General Comment 3, *supra* note 1.

PANEL III
CHALLENGES IN THE IMPLEMENTATION OF THE DECISIONS OF THE COMMITTEE AGAINST TORTURE

Remarks of Karinna Moskalenko*

Introduction

First of all, I will speak about a small group of practicing lawyers, called the International Protection Center, working in Russia with its sister organization, Centre de la Protection Internationale, based in Strasbourg, France, and about how we do international litigation work for the victims of torture and other abuses. One of our recent cases was this case that I had many doubts that we could win. It shocked our legal community. What I was worried about in this case was that judges of the [European Court of Human Rights (ECtHR)] would never believe that, in the 21st century, it is possible to rip twenty nails from a person's hands and feet one by one. Fortunately, their cruelty went so far that they forced the prisoner to clean the room, which was then covered in blood; after this, he hid the nails in some place and later managed to take them. We brought this evidence to the European Court. In response, the authorities said that this is a kind of illness, nails fall out like leaves from the trees. Thanks to this absurd position we won another case. It is quite unbelievable but this small group has already won 200 cases before the European Court of Human Rights as well as several cases before the UN Human Rights Committee.

The mechanism of the [Convention against Torture (CAT)][1] opens up another area of activity for us. For example, the effectiveness of CAT can be demonstrated by the fact that after many years of lobbying efforts by the Russian human rights community, including the efforts of our Center, the criminalization of torture by the Russian national Criminal Code has been achieved. The truth is that the criminalization has not been applied much yet, but this is not because there is no torture—this we do not believe—but because the way out of an authoritarian state is a long and complicated one, and we are grateful to the international community that this important step on the way has been accomplished. At least there is recognition of the existence of torture and of the notion that this crime is a *corpus delicti* and thus those perpetrators who think that they are acting in the best interest of the investigation, or the best interest of justice, or the best interest of combating terrorism, at least now realize that they are, in fact, criminals. As mentioned, this is a long process but at least society now is aware of torture being a crime. This awareness needs to be strengthened along with the use of international mechanisms and the implementation of the judgments, of which, as I said, we have obtained plenty.

Russian Prison & Detention System

Now, I would like to skip definitions and the structure of bodies as well as the procedure for examination of complaints, which have been discussed by previous speakers, and go directly to an analysis of violations based on specific cases. I will start with a couple of words on the Russian penitentiary system because the largest number of the complaints by the Center to the European Court of Human Rights concern Article 3 of the European Convention of Human Rights,[2] which deals with torture and inhuman and degrading treatment, the same area as CAT. In Russia, there is an endemic and systemic problem of inhuman treatment of prisoners, and since the Russian prison population is so enormous—close to one million persons—this problem takes on horrendous dimensions. In numerous cases, the European Court, and also the UN Human Rights Committee have recognized a violation—in everyday routine practice—of the rights of prisoners.

Now, this violation was first recognized in the case *Kalashnikov v. Russia* in 2002,[3] when I represented this case in the very first public hearing of a Russian case before the ECtHR in September 2001. I had a chance to bring the attention of the Court to the issue that people who are not yet convicted, but only accused of committing a crime, are kept in more cruel conditions than those who are being punished for a crime. And this uncovers a great, immense prejudice in the attitude toward prisoners, toward

** Karinna Moskalenko is a Russian human rights lawyer.*

those arrested, and toward those accused or suspected of having committed a crime. In Russia, which carries the legacy of the Soviet Union, some still believe the notion of Stalin, that those in prison are to be treated as guilty. And this says a lot. This presents a blatant violation of the constitutional right to presumption of innocence. Were the courts taking the presumption of innocence seriously, there could not be a situation where individuals in pretrial detention are held in worse conditions than those in colonies and prisons after the conviction.

Today, more than ten years have passed after the *Kalashnikov* judgment, and in 2012, with *Ananyev*[4] and other cases, the Court noted that ninety cases with the same substance were already examined and another 250 repetitive cases are awaiting examination by the Court, and therefore the systemic problem in the Russian penitentiary system has been firmly recognized and stated by the Court. However, if you say, as some people in Russia and Europe have, that the Russian authorities didn't do anything, it would be wrong. They did a lot. They presented many documents demonstrating how they improved the prison conditions, and still after a decade there is still the *Ananyev* case. It means that this is a real, persistent problem. And this is 2013, the year when the Russian Federation has to report to the Committee of Ministers—the controlling executive board of the Council of Europe—on what they have in reality done to improve the prison conditions. If one has enforced a system, which tortures every human, every person staying in pretrial detention, this is intolerable and inconsistent with minimum international standards for the treatment of prisoners.

Advocacy Before the European System and the UN

This is a proper place to speak about the difference between our victories before the Human Rights Committee and UN treaty bodies and before the European Court of Human Rights. When you win a case before the European Court of Human Rights, the state, according to Protocol 14,[5] has to present within six months to the Committee of Ministers concrete measures that they took or are going to take in order to implement the judgment. However, unfortunately, there is no effective system for the implementation of decisions in the UN. I do not know when it was or who it was that explained to the Russian authorities—and I'm afraid in other countries there exists the same problem—that judgments of the European Court have to be implemented because they are binding but that decisions and views of the UN treaty bodies are "just" recommendations. I don't know who said this first, but it is the general understanding among all Russian authorities and it is impossible to overcome it. So every four years, after the examination of the country reports to the ICCPR,[6] [Russian authorities] say, "Thank you very much for your attention to our internal problems, but unfortunately we cannot implement this decision." For example, as we repeatedly brought the cases *Lantsova*[7] and *Gridin*[8] to the attention of the Supreme Court, the Supreme Court decided in the same way as before the decision and will most likely do so four years from now.

Comparing this practice to the judgments before the European Court of Human Rights, I would like to bring you examples of the effectiveness of the ECtHR and the follow-up procedure. *Gladyshev v. Russia*[9] is one example to look at. Gladyshev called from prison in secrecy, saying, "I am in the seventh year here in prison without a judgment, and I might die here." That was in the middle of the night, and I said, "Don't tell me these stupid things, it is impossible," and he said, "No, it is possible." So we took up the case and finally we won. Gladyshev insisted that all the truth he's asking for is a jury trial. But he was refused a jury trial. The European Court decided that he was deprived of the right to a trial, and recognized a violation of Article 6 of the Convention,[10] which concerns trial guarantees. After that, the Supreme Court of the Russian Federation quashed all the judgments, sent this case to a new trial, and Gladyshev obtained a jury trial, and the jury came back with an acquittal. Of course, he waited for this acquittal for eight years, but finally we can all agree that this was an effective remedy. If he came to us earlier, if the convention came to Russia earlier, it probably would have been even faster.

In another example, just recently, we litigated a case, *Idalov v. Russia*,[11] before the Grand Chamber [of the ECtHR] and won the case. Russia was found in violation of, again, Article 6 trial guarantees. The judgment was very clear; it stipulated that the only remedy for this case was a retrial of the case. With much doubt, as I could see from the hearing of this case by the Supreme Court of the Russian Federation, they quashed the judgments and we are waiting for a new trial. I cannot say this will happen tomorrow, or that the trial of Idalov will avoid all of the mistakes that were made in the initial trial, or that procedurally it's going to be correct. So it is not the ideal system, but it is much better than the cases before the Human Rights Committee, where you have the most just judgments saying that the person who is in a life sentence colony is a victim of unfair trial, and he has to be immediately released. I am waiting for this immediate release for, let us see, over twenty years, as in the case of *Gridin*.[12] And I suffer, but nothing compares to his suffering. I have visited him there, and he still believes that he will be released, he says, "I have to be released and compensated." And he said, "I don't care much about compensation, but it is so difficult to be here with a charge of murder," when he has never committed any murders.

And here we come to the well-known case of Sergei Magnitsky,[13] whose death in pretrial detention was the consequence of inhuman treatment and torture. Possibly, if the Russian authorities had fully implemented the decision in the case of *Lantsova v. Russia*,[14] this death might have been avoided, because the Russian authorities would have recognized their positive obligation concerning the right to life. However, non-implementation leads to the repetition of violations of torture, and it even causes such tremendous damage as loss of life.

Finally, I would like to mention a category of cases where interim measures have been applied to prevent torture after an extradition. [The European] Court and [the Human Rights] Committee apply them quite rarely. But overall, these measures have saved dozens of lives.

It is a very effective measure for persons who are facing extradition to a country where they might face inhuman treatment or torture. They have a good chance not to be extradited, especially if they can present documents to the Court or Committee showing the existence of torture in these circumstances in the relevant country.

Although this measure has great potential in preventing torture and has proven effective in many instances, the practice can also be disappointing at times, as in a recent case from 2012 decided by the [UN Committee against Torture] against Kazakhstan concerning extradition from Kazakhstan to Uzbekistan.[15] The Committee actually instructed Kazakhstan not to extradite the person, but the country failed to follow this instruction and finally the Committee found a violation of the right not to be extradited where a person might be tortured. On the other hand, we were successful with applying the interim measures before the European Court. All states carefully follow instructions from the European Court not to extradite a person to another country. Starting from *Garabaev v. Russia*,[16] we have won several cases applying the interim measures and interim procedures according to Rule 39.[17] Within this procedure, the European Court communicates the case within 24 hours. And we saved—really saved—some of these lives. This is the way to prevent potential torture.

But since the Russian authorities now know exactly when they are not allowed to extradite a person, they are doing the following, as is seen in the case of *Iskandarov*.[18] They did not extradite him, but they simply released him, and some unidentified people, acting in the territory of the Russian Federation, as if on their own, took him and brought him to Tajikistan. Then the Russian authorities said they did not know who kidnapped this person. But when Tajikistan reported before the Human Rights Committee in this case, it said that the Russian government handed over Iskandarov to them in an official manner and presented relevant documentation. By presenting this documentation, we were able to prove to the ECtHR that the Russian authorities extradite persons in an undercover manner.

Conclusion

In conclusion, I would like to stress that much depends on our activeness. But not everything we do yields results. Something is really wrong with the UN system if so many countries, especially after the Russian Federation, a huge country and a member of the Security Council, sets this bad example saying, "We are not going to comply with these decisions because they are not binding—they are just recommendations." It is not possible to take the Committee of Ministers to the Council, but at least it is possible to appropriately educate the national authorities and to establish and maintain an effective follow-up mechanism. As much as the UN pushes countries to criminalize torture, it is just as necessary to implement in national legislation norms that ensure the implementation of the decisions. It does make sense to have in the Criminal Procedure Code of the Russian Federation Articles 413 and 415,[19] which oblige the Supreme Court of the Russian Federation to quash all the judgments in cases where the European Court finds a violation of fair trial rights, but it does not make sense not to have similar provisions concerning the decisions of UN treaty bodies. It is unacceptable and the UN has to act to promote compliance.

Remarks of Christian M. De Vos*

Introduction

As Gerald [Staberock] already noted, the topic of this panel is "Challenges in the Implementation of CAT Decisions," which is an issue that my organization, the Open Society Justice Initiative, has engaged with quite closely for several years now. The Justice Initiative, for those who are not familiar, engages in litigation around the world before the UN treaty bodies, including the Committee against Torture (CAT), as well as the regional human rights systems and several sub-regional courts. In so doing, we represent applicants, we intervene as a third party, and we also provide technical assistance to local counsel. Like many litigators, we have a specific interest in learning how to make our litigation more effective, including through the full and

expeditious implementation of judgments. Indeed, implementation is one of the greatest challenges of our work, as it is for so many other organizations, ranging from international NGOs to local human rights groups, which struggle to ensure that the lofty principles articulated in Geneva or Strasbourg or

** Christian M. De Vos is an Advocacy Officer at the Open Society Justice Initiative and author of the new report "From Rights to Remedies: Structures and Strategies for Implementing Human Rights Decisions." He is an alumnus of the American University Washington College of Law.*

Washington, D.C., find their way into the policies and practices of states. To that end, the Justice Initiative published in 2010 a report called "From Judgment to Justice,"[20] which sought to take measure of the degree to which states comply with decisions issued by regional human rights courts and UN treaty bodies and the various follow-up procedures that exist to oversee their execution. The overriding conclusion was that, while these systems vary in sophistication and scale, they all confront, to varying degrees, an implementation deficit that needs to be taken seriously.

Remedies for individuals, and general reforms to policy or institutional practice, are not easily won, even in domestic jurisdictions, and so pursuing such litigation in international and regional fora might strike some as fanciful. Perhaps such skepticism does not extend to the people gathered here today but it must be said that these systems are relatively new, they have fewer resources, and they rest on less-settled juridical foundations than their domestic counterparts. These are all very compelling reasons why implementation is challenging, to say nothing of the nuisance such decisions pose to governments, who might otherwise carry out human rights abuses unchecked by the judgment of an independent body.

Successes of the Committee against Torture

In spite of these obstacles, the number of cases filed and decisions delivered by these bodies, including the Committee against Torture, continues to increase. According to the CAT's most recent report, since 1989 the Committee has registered 506 complaints against 31 States Parties.[21] Of those, the Committee has adopted final decisions on the merits in 203 complaints and found violations in 73 of them. A total of 102 complaints remain pending for consideration, a backlog that has continued to grow. These numbers also track an increase in communications procedures throughout the UN treaty body system. Presently, four other committees can receive communications, and two more—the Committee on the Rights of the Child and the Committee on Economic, Social, and Cultural Rights—have procedures that have recently, or will soon, come into effect. Let me take a few minutes to provide some more figures and, for those who are unfamiliar, sketch out how UN treaty bodies generally seek to support the implementation of their decisions. I will then turn to the challenges and opportunities that exist with respect to implementation at the national level.

It is worth noting that CAT decisions enjoy the highest compliance rate: nearly sixty percent as compared to other treaty bodies. It is also the only other treaty body to have adjudicated a relatively large number of communications. The largest, by far, is the Human Rights Committee, which, according to its most recent figures, has adjudicated 914 cases to date;[22] however, the compliance rate with those decisions is significantly lower than CAT's. The Committee on the Elimination of Discrimination Against Women (CEDAW) has registered about 30 communications to date,[23] and CERD [Convention on the Elimination of Racial Discrimination] has adopted final decisions on the merits in the same number, finding violations in eleven, three of which the committee has determined were satisfactorily implemented.[24] Comparatively, then, CAT is doing quite well, even if a sixty percent compliance rate is itself a sobering statistic.

Structure and Implementation by UN Treaty Bodies

At present, all treaty bodies that are empowered to receive individual communications have also instituted follow-up procedures. The Human Rights Committee was the first body to do so when, in 1990, it created the position of Special Rapporteur for Follow-Up on Views, with a two-year renewable mandate to monitor state implementation of decisions. In 2002, the Committee Against Torture also designated a rapporteur for follow-up to Article 22 decisions. According to the terms of reference for follow-up rapporteurs, their mandate includes, in theory, the following activities: 1) monitoring compliance with Committee decisions, which entails communicating with States Parties to inquire about what measures they have taken or intend to take to execute the decision; 2) recommending appropriate action States Parties might take to satisfy the terms of a decision; 3) meeting with representatives of permanent missions of States Parties to encourage compliance; 4) determining where technical assistance by the Office of the UN High Commissioner for Human Rights would be appropriate; and 5) conducting (again, theoretically) follow-up visits in-country.[25]

Generally speaking, states are expected to reply to a committee's decision within six months, explaining how they intend to implement a remedial scheme. However, many states do not reply, and many that do often take the opportunity to contest the factual basis of the committee's decision or to challenge its interpretation of the respective convention. Unfortunately, as it is true of the international human rights regime more generally, there are few sanctions available to the committee when states fail to comply. Naming and shaming is one option, of course, but the only public information that is kept on these cases and the status of their implementation is, to my knowledge, found in the annual report that each treaty body presents to the General Assembly. So, to our earlier conversation about the importance of publicity, this tool is used far less effectively than it could be. I want to add one caveat here: the figures I am offering reflect the assessments of the treaty bodies and follow-up rapporteurs themselves, with which reasonable minds may very well disagree. Indeed, the Justice Initiative recently experienced this in the context of an ethnic profiling case it helped litigate before the Human Rights Committee against Spain.[26] There were manifest deficiencies in the government's response and our follow-up letters received no substantive reply, so it was with some surprise that we later learned, only by happening to read a newsletter of the OHCHR Treaties Division, that the case had actually been closed and in fact publicized as an example of successful implementation. That offers some picture into the struggles that victims and their representatives face, just at the level of communicating with the UN secretariat in Geneva.

Challenges to Implementation

Let me now turn briefly to identifying what we see as some of the biggest challenges for implementing treaty body decisions. One enduring challenge is their contested legal status. Dean Grossman referred to individual communications earlier as a "semi-judicial" procedure and certainly a number of legal commentators have persuasively argued that states, having accepted the jurisdiction of the treaty bodies to adjudicate individual complaints, are duty-bound to respect those decisions, and not to act in contravention of them.[27] These arguments have largely failed to persuade states, however, many of which merely contest committee findings and insist that they are not legally obligated to implement them. That said, we have seen cases where states will abide by a decision but make clear that they are not doing so as a matter of legal duty; similarly, where compensation has been paid, states will often explicitly state that it is being done on an *ex gratia* basis.

Another important element to mention is remedies. In the CAT's case, the nature of the communications it receives likely plays a key part in its above-average implementation rate. Unlike the Human Rights Committee, which receives a large number of complaints that span the Covenant, the vast majority of the communications CAT has received concern allegations that the petitioner's deportation or extradition would breach the respondent state's *non-refoulement* obligation under Article 3. Now this is slowly changing, I think: you can read through the CAT's recent annual reports and see a rise in the number of Article 1 and Article 16 cases. But certainly, with respect to Article 3 complaints, the actions that a state must undertake (or not undertake) are much clearer than the remedies that might be appropriate in more complex litigation. Clarity of remedies is also quite important. As an example, empirical evidence coming out of the Inter-American System supports the contention of many civil society advocates that the more precise a court's remedial language is, the greater the influence it has on state compliance.[28] It makes it more difficult for states to avoid taking action and better arms advocates, who can use the judgment as a basis to press for implementation.

Finally, follow-up is crucial. Generally speaking, successful implementation, we have found, occurs in cases with high political visibility and a strong civil society presence capable of complementing the committee's follow-up efforts and applying other domestic pressures. For instance, in reading through the CAT's most recent annual report, one case worth highlighting is its 2006 decision against Senegal concerning its failure for many years to prosecute the former dictator of Chad, Hissène Habré.[29] The Committee played an important role in pushing for Habré's prosecution. Indeed, it had been conducting follow-up on the case throughout 2011, a point that the International Court of Justice made note of when it issued its decision the following year, also holding that Senegal was obligated to prosecute or extradite Habré.[30]

Unfortunately, the Petitions Unit of the High Commissioner's office—the body that services the committees and assists in all the mundane but essential tasks that effective follow-up requires—is starved for funds. The current capacity they have to facilitate follow-up to communications was described to me as the equivalent of "less than half a person." Moreover, while the mandate of follow-up rapporteurs allows them to, in theory, carry out meetings with states on an inter-sessional basis or even conduct follow-up visits in country, in practice, this very rarely happens. The one and only follow-up visit that the HRC conducted, for instance, was fifteen years ago. Moreover, by and large meetings with states that are carried out by the rapporteur only take place when the committee itself is in session, so only three times per year. More can and should be done to improve the treaty-bodies' follow-up procedures. For instance, the Human Rights Committee has only one follow-up rapporteur for its many cases—numbering well into the hundreds—rather than assigning multiple committee members to conduct follow up, as committees like CEDAW do. It is my understanding that CAT's Rules of Procedure similarly permit the appointment of multiple follow-up rapporteurs for communication; however, like the HRC, only one rapporteur presently works in this capacity. I would also echo the remarks of earlier speakers that committees really need to think creatively about increasing communication with other human rights mechanisms as part of their follow-up duties. Special procedures, particularly whose remit complements that of a particular treaty body can be useful in this regard. For CAT, this would be the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; for CEDAW, it might be the Special Rapporteur on Violence Against Women. The process of Universal Periodic Review is also an important tool, but unfortunately it has only given passing attention to the implementation of treaty body decisions thus far.

My last word on the UN: I want to underscore how crucial the financial picture here is, since this dimension is too often obscured in these more legal discussions. The General Assembly—a political body if there ever there was one—is in charge of allocating the budget to the treaty bodies and can effectively choke the system by not providing it with adequate funds. As the number of States Parties and procedures continue to grow and the Office of the High Commissioner for Human Rights' budget has been further reduced, this becomes a real risk. In this context, I should say, we are also entering the second stretch of an ongoing, inter-governmental treaty-body "strengthening process" in which a number of states have increasingly sought to push back against what they argue are "non-mandated" activities of the treaty bodies, which, they insist, includes follow-up activities. So this process really threatens to weaken these procedures and to more generally interfere with the independence of committees and their ability to determine their own working methods, including their engagement with NGOs. Those states that are leading this negative agenda also see gain in dragging the process on, leaving the treaty body system in perpetual limbo. So we should not forget the political side of this discussion.

Implementation at the Domestic Level

I am going to now turn from the international scene and say a few words about the national level, since after all, it is states that are responsible for implementing these decisions. The Justice Initiative will soon be publishing a follow-up report to "From Judgment to Justice" that looks particularly at the way in which states go about executing international decisions at the national level. The report, called "From Rights to Remedies," examines what sort of frameworks, structures, and mechanisms exist at the national level to facilitate (or thwart) implementation.[31] Three overall conclusions inform the report's findings. First, despite the large number of states that have accepted the jurisdiction of international courts and treaty-bodies, the domestic infrastructure needed to ensure implementation of their decisions remains very underdeveloped. On the positive side, attention to domestic implementation structures has gained increasing ground in a number of different regional systems. Indeed, improved implementation is a key pillar of ongoing reform efforts for the European Court of Human Rights and the Council of Europe's Committee of Ministers—the political body that oversees implementation—has recommended that Member States design a range of mechanisms to ensure efficient domestic capacity for the execution of Strasbourg judgments. Some states have sought to develop such mechanisms as well, including the formation of high-level inter-ministerial committees and working groups, the establishment of standing parliamentary human rights committees, focal points for implementation within the executive branch, the passage of enabling legislation, and direct enforcement through national court systems in some cases.

Unfortunately, these approaches remain the exception to what is otherwise an *ad hoc* process, managed largely by mid-level bureaucrats who lack sufficient political authority to make implementation a priority. Moreover, executive ministries frequently lack established frameworks for communication and cooperation. Implementation, particularly in complex cases, engages the competencies of multiple agencies and departments, but their joint efforts are too often characterized by disorganization and delay. A second and related problem is that of political will to implement. Political will is essential, but it is not something that can be summoned just by invoking it; it has to be nurtured, and building domestic structures can facilitate that process. At the same time, it is important that the mere presence of the mechanisms I just mentioned not be mistaken for political will. As the report demonstrates, a state can have the most sophisticated structures at its disposal but without a genuine commitment by key political actors to implementation, their promise will remain illusory. The appearance of compliance is not the same as actual compliance, even though many governments may try to make us think that they are.

Lastly—and I commend CAT's General Comment 3 in this regard; it really hits the nail on the head—when thinking about implementation, we need to focus on the multiple organs within a state, not just the executive but the legislature and the judiciary as well. Implementation involves disparate state actors who operate in different institutional settings and often have different or competing political interests, yet too often discussions are confined to the level of the executive alone. Such disagreements are not an excuse for noncompliance, but a crucial recommendation of the report is the need for states to better structure the multiple points at which implementation occurs and for advocates to think strategically about where pressure can best be applied. No one is better placed to do this than the activists and organizations who work on human rights at the national level, as they are the ones who understand the political situations and structures of their country best.

Remarks of Elsy Chemurgor Sainna*

Introduction

My presentation is based on implementing the UN Convention against Torture in Kenya,[32] and, from the outset, I must begin by mentioning that Kenya is not a State Party to the Optional Protocol,[33] which means we cannot bring cases before the Committee against Torture. But, with that said, there are other ways in which we are trying to promote the fight against torture in Kenya. Before I embark on my remarks, I want to tell you a little bit about the International Commission

** Elsy Chemurgor Sainna represented the International Commission of Jurists, Kenyan Chapter. Currently, she is a Fellow with the Leadership and Advocacy for Women in Africa (LAWA) Program at the Georgetown University Law Center.*

of Jurists, Kenyan Chapter, (ICJ Kenya)[34] in two minutes: we are a membership organization consisting of members of the Bench and Bar and are keen on promoting human rights and the rule of law in Kenya, as well as in Africa and, as Gerald [Staberock] has said, we have litigated previously around Africa on issues of human rights, particularly international political and civil rights. My presentation today is based on three objectives: one, I want to provide you with a bit of Kenya's compliance with human rights treaty mechanisms and its responses to concluding observations by the Committee against Torture. Since I cannot talk about decisions before the Committee, I opted for the concluding observations because this is what has led us to where we are today in Kenya. Secondly, I also want to contextualize for you the constitutional and political situation in regards to the international human rights treaties. And finally, I want to highlight some of the challenges and opportunities that have been mentioned by my colleague in regards to engaging with the treaty bodies, not only at a national, but also at the regional working level because that is where we have taken cases to the African Commission.

Kenya's Engagement with the Human Rights Mechanisms

Kenya made its report to the Committee against Torture in 2002. Based on the Concluding Observations of 2002, ICJ Kenya's advocacy began to discuss what could be done about implementing some of the Concluding Observations that were given by the Committee. We were also reviewed by the Human Rights Committee in July last year, and our focus was also on the issue of torture. More importantly, we have made other presentations before the Committee on the Elimination of Discrimination Against Women and also to the Committee on the Elimination of Racial Discrimination. We had a special rapporteur on extrajudicial, summary and arbitrary execution, Professor Philip Alston, who came to Kenya during a very critical time, just after the post-election violence. Kenya also submitted its second periodic universal review last year in November. It is coming up for another review before the Committee against Torture at the end of May 2013. So, in other words, Kenya has engaged at the reporting level, not necessarily on cases before the committee bodies. And finally, at the regional level, Kenya has not actively engaged with compliance review mechanisms at the African Commission level. In my view, we have paid lip service, if I may put it that way, in implementing the African Charter.

What do the Concluding Observations of 2008 Say About Kenya?

One is that Kenya should introduce national legislation in order to define torture and provide for appropriate remedies in line with Article 1 of the Convention. Secondly, the Committee was very concerned that there is a common practice of unlawful arrests and detention, particularly by the police. When arrests happen, there are statistics that demonstrate that the law enforcement bodies and agencies actually were taking into detention mainly people in the urban slum areas. [The victims] are beaten and subjected to torture, cruel, or degrading treatment. There are also widespread allegations of extrajudicial killings.[35] That is why the Special Rapporteur visited Kenya, in response to that. For example, in the western region of Kenya, known as the Mount Elgon region, there were increasing incidents of a militia that were terrorizing the residents. The conflict stemmed from land disputes amongst communities living in that area. The government decided to respond by deploying the military in order to curb the militia operations. But in the end, the military ended up perpetrating torture and enforced disappearances against residents. There are documented cases that illustrate what the military government did to violate human rights in an attempt to fight the militia.[36] The Committee was concerned about the failure to investigate these allegations of torture, and particularly that the security personnel had not been taken to task. These are simply highlights. Obviously there were other, more important issues in the Concluding Observations. Nonetheless, it is important just in the context of discussing litigation.

Kenya's Legal and Political Context

I am sure you know we have just recently held our 2013 general elections. We have come from a very uneasy situation in Kenya. But luckily, unlike in 2007, we did not have post-election violence. However, we still have the [International Criminal Court] matter hanging over our heads, as both the current head of state and the deputy president are actually accused before the International Criminal Court. So, it is a very interesting situation in Kenya.

Nevertheless, as mentioned earlier on, Kenya is not a State Party to the Optional Protocol; we do not recognize the jurisdiction of the Committee with respect to individual complaints. And at a regional level, which is the African Commission level, there are options to file complaints, but you must obviously have exhausted all local remedies. I will give you an example of a case that was filed before the Commission: the *Endorois Land Community Case*, in which a decision was given in March 2010. There was a lot of celebration after the decision was rendered, despite the fact that the case went before the Commission at a very difficult time, when the judicial system was perceived as weak and not responsive. The community was able to demonstrate that they had exhausted local judicial remedies by trying to get the matter adjudicated before the local courts without much success. They did not feel like they would "obtain" justice.

Kenya has moved on since the very turbulent times after 2007, and in 2008 it ushered in the constitutional review process. We now have a new constitution, which was promulgated in 2010.[37] We have changed the state from a being a dualist to a monist state, which means that any [treaty] law that Kenya ratifies becomes part of our domestic law. However, the constitution requires that we must have legislation that gives us the process for how to actually go about ratifying a particular human rights treaty.

At the same time, we are undergoing judicial reforms. The institutional reform of the judiciary is very vibrant at the moment. We have seen an emergence of an independent

judiciary, not only from the executive but also from the legislature, and currently we have a vetting process for judicial officers. Vetting of judges has been finalized. Some judges were found unsuitable to serve on various grounds, including violating human rights in their adjudication. This has paved way for recruitment of new judicial officers in line with the requirements of the new institution.

The police reform, which was part of the Concluding Observations in 2008 and constitutional reform, has also just begun. The police are under a new legal framework and there has been established a system of civil oversight for the police in Kenya. The oversight authority will monitor police action and complaints lodged by members of the public concerning any particular human rights violations and whether torture against civilians is being conducted, because the police are among the bodies known to be the highest perpetrators of the crime of torture, particularly in areas of detention, during arrests, and extra-judicial killings.

We have very specific provisions on access to justice which are contained in the Constitution and a very progressive Bill of Rights, but the key question again remains: implementation.

In terms of torture protection specifically, it is provided for in our Constitution as a non-derogable right. But defining torture is still an issue. Whereas torture is prohibited by the Constitution, it is not defined. A draft bill, which has yet to be enacted, was drafted in collaboration with other civil society actors, the ministry of justice, and a national human rights body, actually provides for the definition of torture according to Article 1 of the Convention. Will it be passed? I don't know, and that is a challenge. Therefore, even bringing cases before the courts, one simply relies on constitutional provision and fundamental rights and freedoms.

The practice of torture continues to be part of the culture of the police. It is still very widespread. Although there has been a reduction in reported incidents, they are not significant, but the reduction can be attributed to some of the rights included in the Constitution. You find reported cases in areas, particularly now new forms of torture emerging in the health care systems, areas of detention, and particularly the prison departments.

The most important point, which brings me almost to the close, is the accountability for victims of torture. This has yet to be realized despite the new Constitution. At the moment, there exists a communication pending before the African Commission that ICJ Kenya filed on behalf of victims of Mount Elgon.[38] These point to the Concluding Observations of 2008, where the Committee observed that the state had failed to investigate those allegations of human rights violations. As part of its litigation strategy, ICJ Kenya opted to file an *amicus curie* brief in a case lodged at the East African Court of Justice by the Independent Medico Legal Unit (IMLU). IMLU is ICJ Kenya's collaborative partner. The idea was to try to expand avenues for justice because at the time our judicial system was very weak, and if you sought redress for victims or communities, the chances of getting a reasonable decision in their favor were not favorable. The East African Court of Justice is a regional court of the East African States. The case was filed in 2010; it took the court about two years to conclude the matter, and in March this year we got our judgment. Obviously the judgment was not in favor of the victims. We felt that the court focused more on technicalities rather than substantive issues of human rights violations. The case was dismissed as the judges held that that the application was out of time and that the argument that violations by the state were "continuous" was not tenable

Obviously, this posed a challenge for both ICJ Kenya and IMLU, but we did not give up. We have now submitted a communication before the African Commission. When we looked at the judgment, we concluded that the [East African] Court [of Justice] took a very technical approach, stating that the case was filed outside the restricted timelines established by the East African Treaty, which is normally three months, despite the evidence of gross violations. And the Court, as I said, did not address the substance of the issues that were raised in the application. Despite the outcome of the decision, we were compelled to think about other options. If the national court failed, we would go to the regional court. We started with the East African Court of Justice; we have failed, so now we are going to the African Commission. At the African Commission we are advocating the same—that there has been an attempt, but even going to the local courts the remedy is not sufficient to compensate the victims of torture. So it's a case-by-case battle and before the Commission we are still advocating our position. We still have a long way to go.

Conclusion

In terms of utilizing the human rights mechanisms, as I said in our communication before the African Commission, we were seeking remedies for the Mount Elgon victims. The main challenge obviously, as you have seen, is implementing the decision after. So what happens when the decision, for example, is given in our favor? As illustrated with the community land case, which is famously referred to as the *"Endorois Communication" Case*,[39] where a decision was made in favor of the community, to date the implementation of the decision has still not been done.

Be that as it may, we will continue conducting policy meetings, particularly along the Robben Island Guidelines[40] that were developed by the African Commission in regards to getting African states to put in place regulations that will prohibit torture in their operations. We still intend on promoting policy dialogues with the government to ratify the Optional Protocol to the Convention. Perhaps they will give serious consideration to individual complaints before the Committee against Torture.

In conclusion, what I might say is that we remain optimistic. We are on the path toward institutional reform and we are transforming the justice system. We have come a long way and are optimistic that the new constitution is a good framework to continue our fight for the redress of victims of human rights violations.

Endnotes: Panel III

[1] Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment [hereinafter Convention against Torture], Dec. 10, 1984, 1465 U.N.T.S. 85.
[2] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221.
[3] 47095/99 Eur. Ct. H.R. (2002), *available at* http://www.refworld.org/docid/416bb0d44.html.
[4] Ananyev v. Russia, 42525/07 and 60800/08 Eur. Ct. H.R. (2012).
[5] European Convention as amended by Protocol 14.
[6] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.
[7] Lantsova v. Russia, CCPR/C/74/D/763/1997 Human Rights Committee (2002), *available at* http://www.bayefsky.com/pdf/russia_t5_iccpr_763_1997.pdf.
[8] Gridin v. Russia, CCPR/C/69/D/770/1997 Human Rights Committee (2000), *available at* http://www.bayefsky.com/pdf/104_russia770vws.pdf.
[9] 2807/04 Eur. Ct. H.R. (2009).
[10] European Convention on Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, ETS 5, 213 U.N.T.S. 17.
[11] 5826/03 Eur. Ct. H.R. (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110986.
[12] *Gridin*, *supra* note 8.
[13] This petition has been filed but the Court has yet to issue any decisions on the case. *See* Open Society Justice Initiative, Magnitsky v. Russia: Summary of Application Filed Before the European Court of Human Rights (2012), *available at* http://www.opensocietyfoundations.org/sites/default/files/magnitsky-summary-10182012_0.pdf.
[14] CCPR/C/74/D/763/1997 Human Rights Committee (2002).
[15] Abdussamatov, et al. v. Kazakhstan, CAT/C/48/D/444/2010 Committee against Torture, Communication No. 444/2010 (July 2012).
[16] 38411/02 Eur. Ct. H.R. (2008).
[17] Rules of Court, Eur. Ct. H.R. Rule 39 (2013) *available at* http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.
[18] Iskandarov v. Russia, 17185/05 Eur. Ct. H.R. (2011) *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100485.
[19] Ugolovno-Protsessual'nyi Kodeks Rossiiskoi Federatsii [UPK RF] [Criminal Procedural Code] art. 413, 415 (Russ.).
[20] David C. Baluarte & Christian M. De Vos, Open Society Foundations, From Judgment to Justice: Implementing International and Regional Human Rights Decisions, (2010) *available at* http://www.opensocietyfoundations.org/reports/judgment-justice-implementing-international-and-regional-human-rights-decisions.
[21] U.N. Comm. Against Torture [CAT], *Report of the Committee against Torture – Forty-seventh session (31 October – November 25 2011) – Forty-eighth session (7 May – 1 June 2012),* Oct. 5, 2012, U.N. Doc. A/67/44.
[22] U.N. Human Rights Comm., *Report of the Human Rights Committee,* 2012, U.N. Doc. A/67/40
[23] U.N. Comm. on the Elimination against Women [CEDAW], *Report of the Comm. on Elimination of Discrimination against Women – Forty-sixths session (12-30 July 2010) – Forty-seventh session (4-22 October 2010) – Forty-eighth session (17 January – 4 February 2011)*, April 6, 2011, U.N. Doc. A/66/38.
[24] U.N. Comm. on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination – Eightieth session – (13 February – 9 March 2012)*, May 22, 2012, U.N. Doc. A/67/18.
[25] U.N. Comm. against Torture, Rules of Procedure, CAT/C/3/Rev.5 (Feb. 2011), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=65.; *see also* U.N. Human Rights Comm., *Report of the Human Rights Committee,* U.N. Doc. A/45/40 (1990) Vol 1, at 144-45 and Vol. II, Appendix XI, at 205-06.
[26] Williams v. Spain, U.N. Human Rights Comm., Communication No. 1493/2006, July 27, 2009.
[27] U.N. Human Rights Comm., General Comment No. 33*,* U.N. Doc. CCPR/C/GC/33 (2008) ("[A] duty to cooperate with the Committee arises from an application of the principle of good faith in the observance of all treaty obligations.").
[28] *See* Jeffrey K. Stanton & Alexia Romero, Clarity and Compliance in the Inter-American Human Rights System 19 (2011); Alexandra Huneeus, Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights, 44 Cornell Int'l L.J. 493, 522 (2011).
[29] Guengueng v. Senegal, CAT, Comm. No. 181/2001, May 19, 2006.
[30] Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), ICJ, July 12, 2012, para. 39.
[31] Christian M. De Vos, Open Society Foundations, From Rights to Remedies: Structures and Strategies for Implementing International Human Rights Decisions, (2013) *available at* http://www.opensocietyfoundations.org/sites/default/files/from-rights-to-remedies-20130605.pdf.
[32] Convention against Torture, *supra* note 1.
[33] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 22, 2006, 2375 U.N.T.S 237.
[34] For more information, visit www.icj-kenya.org,
[35] *See* The Kenyan Section of the Int'l Commission of Jurists [ICJ Kenya], et al., State of Torture and Related Human Rights Violations in Kenya (2013), *available at* http://www2.ohchr.org/english/bodies/cat/docs/ngos/ICJ_Kenya_CAT50.pdf.
[36] *See* Independent Medico-Legal Unit, Double Tragedy: Report on Medico-Legal Documentation of Torture and Related Violations in Mount Elgon "Operation Okoa Maisha" (2008), *available at* http://www.imlu.org/2011-06-30-23-44-4/publications/finish/3-publications/12-double-tragedy-report-on-medico-legal-documentation-of-torture-and-related-violations-in-mount-elgon/0.html
[37] Constitution (2010) (Kenya), *available at* http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf.
[38] ICJ Kenya, ICJ Kenya v. Kenya: Communication No. 385 of 2010 (2013), *available at* http://www.icj-kenya.org/index.php/component/phocadownload/category/7-reports?download=118:banjul-hearing-report-icj-kenya-v-kenya-communication-no-385-of-2010,
[39] Endorois Welfare Council v. Kenya, A.C.H.P.R., 46th session, No. 276/03 (Nov. 2009).
[40] Resolution on Guidelines for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, A.C.H.P.R., 32nd session (Oct. 2002).

PANEL IV
CHALLENGES TO PROVING CASES OF TORTURE BEFORE THE COMMITTEE AGAINST TORTURE

Opening Remarks of Gabriela Echeverria, Moderator*

Good afternoon. This is the last panel of the conference. I would like to, first of all, thank the World Organisation Against Torture and the American University Washington College of Law for inviting me. The topic of the conference is extremely interesting and I am really pleased to be moderating this panel. I will try to connect the last session on the enforcement and implementation of decisions by the Committee against Torture (CAT, Committee) with this final session on the challenges to proving cases of torture before the Committee.

I think this session shares, among other issues, the complexity of the topic discussed in the last panel. As it became clear during the presentations and floor discussions, the enforcement and implementation of CAT decisions is an extremely difficult task. I thought it was very interesting how at the end of the session, there was complete silence when Gerald [Staberock] asked for comments on what strategies could be used to improve the lack of enforcement of decisions by treaty bodies generally and specifically by CAT. The lack of comments made evident that there are not many strategies to improve the enforcement and implementation of CAT decisions. It is extremely difficult. As Carla [Ferstman] mentioned, there have been cases where having an existing decision by a UN body, some lawyers have tried to go back and implement the decisions domestically. Generally, domestic judiciaries reject this strategy, making the argument that UN treaty monitoring bodies do not have the power to enact legally binding "views," at least in the same sense as the European Court of Human Rights (ECtHR) or the Inter-American Court of Human Rights (IACtHR).

I remember many years ago I was in a meeting organized by Open Society Justice Initiative—where I first met Karinna Moskalenko—where we were talking about implementing a project in Central Asia to bring cases of torture before UN treaty bodies. The reactions of the lawyers who were invited to this strategic meeting were not very optimistic (despite Karinna's very inspiring presentation about her experience bringing cases before the ECtHR in Russia). They all thought it was not the same to bring "international" petitions before UN monitoring bodies as to bring cases before the ECtHR. Their main concern was that the UN bodies could not enact binding decisions in the same way as the ECtHR. After a long conversation on this issue, on the legal arguments concerning enforceability of this type of decision, and after analyzing the options that were available in the region, it was decided that it was worth pushing this project forward. The idea behind it was that even if these decisions could not bring "real" remedies to the victims, the cases could show the systematic failures of the states that allow these violations to happen. Therefore, these decisions—even when not implemented by the States covered by the project—could be used in other forums, for example to lobby legislatures in order to change key legislation. In short, it was agreed that even if states do not generally consider these "views" as legally binding and enforceable, at least the opinions of UN bodies could be used in domestic lobbying efforts to bring about legal and practical changes to combat torture.

Having said that, it is important to note how the current panel deals with another complex issue, which is proving cases of torture and proving them before the UN Committee against Torture. I think it is important to now discuss these challenges. Have in mind that it is not only important to prove the torture or ill-treatment—which we all know is very challenging—but also to make sure these cases shed light on why these violations happened in the first place. It is important to show what the deficiencies are in the legal and administrative systems, in the prisons, and in other detention centers that allow these violations to happen and to make sure that there is evidence in this regard when individual petitions are submitted. In particular, regarding the Committee against Torture, it is important to bear in mind two things. First, the Committee follows the definition contained in the Article 1 of the UN Convention against Torture,[1] which is very specific and is hard to prove. There is a severe element and a purposive element (which is not the case for example in the Inter-American Convention to Prevent and Punish Torture).[2] But also it is important to remember that the UN Convention does differentiate between Article 1 (torture) and Article 16 (cruel, inhuman or degrading treatment) and doesn't apply all the safeguards applicable to Article 1 to Article 16 (regional human rights conventions do not differentiate between "procedural" obligations arising from torture or from other forms of ill-treatment). So in this sense, when bringing a case before the Committee against Torture, victims' lawyers may have more of a challenge in proving that there is the element of severity — that the

** Gabriela Echeverria is a human rights specialist who is currently a Visiting Scholar at the Columbia Law School Human Rights Institute.*

treatment was "severe" enough to constitute torture in order to bring about the rest of the safeguards in the Convention.

The other important issue to discuss is the shift of the burden of proof, which is more developed in other systems. In particular, the criterion on the shift of the burden of proof is well developed in the Inter-American and European Human Rights Systems. Even the UN Human Rights Committee has ample jurisprudence in this regard. However, the Committee against Torture does not seem to have a clear rule on this regard or it tends to be more restrictive regarding the shift of the burden of proof.

I also think the flexibility of the Inter-American System is quite interesting in regard to torture. I have a little anecdote about this specific point. When I was in a meeting discussing the difference between torture and ill-treatment, which became quite a big issue during the "war on terror," I referred to the definition in the Inter-American Convention [on Human Rights],[3] specifically to the fact that it did not contain a "severity" element. There was a UN official in the meeting who basically said, "Oh, you Latin Americans, you never say what things are and there is absolutely no way of differentiating between one type of treatment and the other." While I understand his point, that is, there is a difference between torture and other CIDT, focusing on the severity element as the main element to differentiate the types of prohibited treatments makes "real" life very difficult. For those of us who have litigated cases of torture, we know that proving injury or damage is very hard in cases of ill-treatment. Proving objectively that such injury was severe enough to constitute torture is even harder. Sometimes impossible! I think that the Inter-American System had to respond to a reality of a continent that dealt with systematic violations constantly. Its flexibility probably stems out of this fact. It would have been otherwise almost impossible to prove violations of this sort.

Presumptions are also very important. While it is difficult to prove torture, it is easier for victims to show that there was a failure to comply with the state's procedural obligations in regard to torture. Under certain circumstances, states need to show that they have complied with their obligations to investigate and prosecute. They need to rule out the possibility of torture in the specific cases. The reality is that states normally do not carry out effective investigations so it is easier to prove a violation of Article 5 of the American Convention in this way. Similarly, when victims are under the control of the state—that is in prisons or in any other form of detention—there is a presumption of vulnerability of the individual and generally this presumption applies in cases before the Court and Commission. Mario [López-Garelli] will mention the issue of hearings, which are very important when proving facts and showing evidence. I think in this regard it is important to think of the Committee against Torture that does not allow these types of hearings. Therefore, the victims' lawyers are forced to convince the Committee of the appearance of torture or ill-treatment only in their initial Petition and in the Response to the State's Report, which I think is another hurdle to proving torture and ill-treatment before this mechanism.

Finally, I think it's evident that it is hard to bring a case of torture. It is not only the systematic circumstances surrounding torture cases in places like Nepal (about which Hari Phuyal will speak) but also the actual challenges of obtaining for example a medical report. I remember one time I was in Mexico discussing the possibility to implement the Istanbul Protocol with the Office of the Prosecutor. The meeting involved medical personnel working for the prosecutor's office and some of them said, "Even if we see signs of torture, we are afraid of putting that in a report." So obviously it is a big challenge! But from my experience, I think is quite important to include medical and psychological reports. It is known that post-traumatic stress syndrome can last for a long time in victims of torture, even when there are no physical traces. At the end of the day it is a matter of proving a human rights violation, not a criminal case. This is something important to remember and that is why it is essential to also show how the state has failed to investigate, prosecute, and afford adequate remedies to the victims.

Our final speaker is Juan Méndez, who is currently a visiting professor here at the American University Washington College of Law and the UN Special Rapporteur on Torture. He will talk about his experiences as the UN Rapporteur on Torture and the challenges of bringing cases of torture.

Remarks of Mario López-Garelli*

Introduction

I will share some of the views and the perspectives of the Inter-American System of Human Rights (System) regarding torture and mention some cases and the application of the burden of proof as was mentioned. First of all, I would say that the origin of the concept or the provision of torture in the System comes from the American Declaration in 1948, which is at the very beginning of what we considered to be the Inter-American Human Rights

** Mario López-Garelli is a Senior Human Rights Specialist at the Inter-American Commission on Human Rights.*

System, where Article 1 recognizes that every human being has the right to life, liberty, and the security of his person.[4] This was developed more precisely in 1969 when the American Convention on Human Rights was adopted by the Member States of the OAS.[5] Article 5 of that instrument recognizes that every person has a right to have his physical, mental and moral integrity respected and that no one should be subjected to torture or cruel, inhuman or degrading treatment.[6] The most complete definition of torture is in the Inter-American Convention to Prevent and Punish Torture[7] and the terms—as mentioned—are a little broader than those of the UN Convention against Torture.[8] For example, one difference is that the Inter-American Convention does not require the suffering to be severe; that is one very important difference. And it also makes reference to any other purpose when it talks about the purpose or purposes element. It is more general and broad rather than "such purposes as," which is the term used in the UN Convention.

Both the UN and OAS instruments include the material element of the intentional infliction of pain and suffering, as well as the purpose element mentioned. In addition to these elements, there are others such as the duration of the acts that cause the pain and suffering; the methods used; the social and political context; whether the victim was deprived of liberty; and other elements such as, for example, the victim's age, sex, or any type of vulnerability. One of the examples in our system is a case brought against Brazil, the case of Damião Ximenes Lopes, where the Inter-American Court [of Human Rights] (IACtHR, Inter-American Court) found in its ruling that the victim was a mentally ill person who died in the hospital after suffering physical attacks and all kinds of abuse.[9] In the judgment in the case, the Inter-American Court established that the personal features of an alleged victim of torture or cruel, inhuman, or degrading treatment should be taken into consideration when determining whether his or her personal integrity has been violated, for such features may change the insight of his or her individual reality and therefore increase the suffering and sense of humiliation when the person is subjected to certain types of treatment.[10] So this is important when it comes to circumstances of the victim and the manner in which the torture was inflicted.

In regards to intentionality from the first cases of the IACtHR, this tribunal found that the violations do not require taking into account psychological factors to establish individual responsibility. In fact, it is not even necessary to determine the identity of the perpetrator; or rather, the important thing is to determine whether the violation took place with the acquiescence or support of the government, or if the state allowed the act to take place by failing to prevent it or to take measures to prevent it and to punish those responsible after the fact. So from that very first case, from the *Velásquez Rodríguez* case, the Inter-American Court found that it is not just the infliction of torture itself but subjecting a person to these official repressive bodies that practice torture and assassinations, that in itself is a violation of Article 5 of the American Convention.[11]

Development of Inter-American System Standards

The content of the concept of torture has been developed by both the Inter-American Commission [on Human Rights] (IACHR) and the Court. I should mention, for example, that the first case where an international body adjudicating human rights violations, which in this case was the Inter-American Commission, established that rape constitutes torture was in the case of Raquel Martín de Mejía against Peru.[12] And it took many years for the IACtHR to reach the same finding, which it did in the *Fernández Ortega*[13] and *Rosendo Cantú*[14] cases regarding Mexico, which I will mention a bit later. The practice of torture has not only been dealt with by the organs of the System, in this case by the Inter-American Commission on Human Rights, which as you know has a broader mandate than that of the Court, which has to limit itself to the case before it and the evidence in the record. The Commission, on the other hand, has powers that allow it to conduct investigations, visit Member States, take a look at all sorts of situations, look at individual cases in the context of the broader political and social situations. If you look at the reports,[15] specifically from the 70s and 80s, you will see that the Commission dealt very specifically with the issue of torture when it visited member states or when it analyzed the situation of human rights in member states—such as for example Chile, Uruguay, Paraguay, and Argentina. The Inter-American Convention to Prevent and Punish Torture also establishes a reporting system whereby Member States assume the responsibility of informing the IACHR, which has an analysis in its annual report on the development and the situation regarding torture in the Member States of the OAS.[16] The American Convention did not determine the organ responsible for the application of this instrument in individual cases. However, the Inter-American Court of Human Rights determined that there were violations of the treaty on torture in the *Case of Paniagua-Morales*;[17] in another case with respect to the same country, the Commission also found that the Guatemalan authorities incurred in violations of Articles 1, 6, and 8, because they had failed to adopt formal decisions to initiate a criminal investigation into the alleged perpetration of the crime of torture.[18] This is what we will see in other cases where both the Commission and the Court have found that where the authorities are given notice that such actions are committed, and then they fail to conduct an effective investigation and to take all the measures that are part of their obligation to ensure and guarantee all human rights, they incur in international responsibility.

Building a Case Before the Inter-American System

In talking about the type of evidence that is necessary or that can be brought before the organs in cases of torture, our system—the Inter-American System—is very open with respect to the types of evidence that it will allow. Both the Court and Commission have allowed, for example, documents, expert testimony, photographs, videos, affidavits, even newspapers or journalistic accounts, among others. And this is because the crime of torture is very difficult to prove, since it is a prohibited practice and it

is usually conducted in a clandestine manner; also, the persons who are subjected to torture are usually deprived of liberty and under the complete control of the authorities, which take as much care as possible of eliminating any incriminating evidence that demonstrates the torture took place. In terms of evidence, witness testimonies can be a very useful form of evidence. The Rules of Procedure of the Commission, at Article 65, provides that testimony can be received from witnesses or experts and it can be done at the initiative of the Commission or at the request of the parties, and it has certain formalities such as taking an oath or solemn promise to tell the truth.[19] There are also guarantees of procedural balance, of procedural equality between the parties, that have to do with the time of the depositions and the opportunity for questions, which both the Commission and the Court are very careful to respect in any of its proceedings.

Specifically on the burden of proof, the petitioner who brings a case or who brings a petition before the System, initially has to prove the presence of the initial requisites, which are exhaustion of domestic remedies, timeliness, and characterization of possible violations. Those are the elements that we look for at the Commission, at the Executive Secretariat, when deciding whether to process a case, whether to initiate processing. Once these elements are considered and the case is declared admissible, when reaching its decision on the merits, again the Commission will require the petitioner to prove the facts of the case. The burden initially rests on the petitioner. There are certain other elements that are characteristic of our system, which is for example the presumption that the alleged facts are true. In the Rules of Procedure of the Commission, Article 38 of the Rules determines that the facts alleged in the petition, the pertinent parts of which have been transmitted to the state, shall be presumed to be true if the state has not provided responsive information during the period set by the Commission.[20]

The Inter-American Court also has applied presumptions in its very first landmark decision: in *Velásquez Rodriguez*, the Court found that the silence of the state or the lack of direct response or its ambiguity may be interpreted as an acceptance of the allegations of the plaintiff.[21] And the Court in another case, this time against Guatemala, established that when the state does not provide a specific reply to the allegations, it is presumed that the facts about which it remains silent are true provided the consistent conclusions about them be inferred from the evidence presented.[22] That is, the state cannot simply limit itself to respond in an evasive way, because the Court or the Commission in a given case can interpret that silence or that evasion as the facts being true in the case.

In analyzing the evidence, the Inter-American Court has followed international jurisprudence that gives courts the power to weigh the evidence freely, although this jurisprudence has always avoided a rigid position regarding the amount of proof necessary to support a judgment. That is, it is left to each individual case where the Commission and the Court can analyze the standard of proof on the basis of the rules of logic and the experience of the judges or the Commissioners themselves.

I mentioned earlier that it is very unusual to have direct evidence of torture because of the very nature of this crime. Sometimes, however, there are cases where there is sufficient evidence. One case brought before the Commission dealt with three indigenous sisters in the State of Chiapas who were detained at a military checkpoint and raped. This case was unusual because the three sisters were analyzed after the fact by a gynecologist and the report concluded that even twenty days after the facts, they still showed signs of rape.[23] And even though these reports were presented internally, the authorities in Mexico did not consider them and the case was thrown out. In fact, the Commission found in favor of the petitioners that rape was committed and it followed its own jurisprudence in the sense that this constitutes torture. But it was very difficult to advance with the case for many years because it was kept at the domestic level, kept within the military justice system. This was ten years ago, I would imagine that this is not the case anymore since Mexico has since reformed its military justice system, specifically when dealing with human rights violations.

There are two main approaches when evidence is not available in cases of torture in the Inter-American System. One of them consists of establishing that there is a systematic practice of that type of violation during a given time period and in that place. Both the Commission and the Court have taken the facts of the individual case, linking those facts to the systematic practice, which is already established. The systematic practice can be established by general reports, the Commission's own findings using its general monitoring functions. Once it is determined that the facts fit that conduct and that case, the Commission can use presumptions to conclude and to find that the violations did take place. The way the state can defend itself is by providing a full account, a full investigation, documentation, everything to prove that the contrary of the allegations of the petitioners is true. But absent such information or such evidence, the Commission will find or will establish that the facts fit the conduct that did take place when faced with an individual petition. The case of Ines Fernández Ortega, which I mentioned earlier, involves an indigenous woman who alleged that she was raped by military personnel in the state of Guerrero, Mexico.[24] In their decisions on that case, both the Commission and the Court, respectively, took into account the situation, the context, and the type of conduct of the military authorities in that region of the country, as well as the situation of vulnerability of indigenous persons and especially women. When looking specifically at the burden of proof in that case, the Court found that more than eight years had gone by after the incident and that the state provided no evidence contradicting the fact that Ms. Fernández Ortega was raped. Thus, the Court found that the burden of proof was on the state to disprove the accusations concerning its responsibility and that it could not defend itself based simply on lack of sufficient, clear, direct, or complete information. The Court found that the state had to provide conclusive information to disprove the facts—it had the full burden of proof and because of its conduct the state did not meet its burden of proof and therefore the Commission and the Court found that the state was responsible. This is one of the approaches that has to deal with looking at the systematic violations or looking at the context in a given place and fitting the specific case into those facts.

The other approach is to directly shift the burden of proof where the persons who claim that they have suffered torture or other cruel, inhuman or degrading treatment were under the full control of the state. In these situations, the state bears the burden of proving that the victim was not subject to violations of physical integrity while under custody and, if such evidence is not presented before the organs of the system, then the Commission or the Court may find that the state is responsible for a violation of Article 5. An example is the *Case of Juan Carlos Abella and others*, which is also known as the *Case of La Tablada,* decided by the Inter-American Commission. In that case, the persons had been detained, I believe by the Argentine federal police; there was an analysis of the amount of wounds that they had suffered before and after their detention, or the moment they were captured, and several days after their capture. The state was not able to provide the evidence showing how those wounds were inflicted. Thus, the Commission found in that case that the state was responsible for the violations of Article 5.[25] There is another case where the analysis was similar, the *Case of Juan Humberto Sánchez* against Honduras, where the person was found dead days after being captured by the military in Honduras. Since there was evidence that the person was in normal physical condition at the time of his deprivation of liberty, and considering that the state was not able to prove how the damage to the dead body occurred when it was found, it was not able to prove what happened to him. Accordingly, both the Commission and the Court found that the burden of proof was not met; they were not able to prove what had happened to Mr. Sánchez, and therefore established that Honduras was responsible for the violation of Article 5.[26]

There are other cases: the *Case of Gutiérrez Soler* against Colombia, where the Commission and the Court found that there was not enough evidence, but decided that the absence of such evidence was directly the responsibility of the state.[27] This is so because even though there were documents, they were not complete, and these documents did not allow the Court to establish very clearly that he had been subjected to torture, including anal rape at the hands of the police with the participation of a private individual. In that case, the Commission and the Court found that the state had to conduct a full investigation. Specifically, the Court talked about reopening the domestic proceedings and expediting them following the manual on the effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment, that is, the Istanbul Protocol.[28]

The same was found in the *Case of Cabrera García and Rodolfo Montiel Flores*[29] against Mexico, where the individuals were also allegedly subjected to torture. Both the Commission and the Court found that the lack of an effective investigation, or the lack of full analysis into the facts when faced with serious allegations, generated responsibility for the Mexican State. Again, at the request of the Commission, the Court asked that training programs be put in place applying and teaching the application of the Istanbul Protocol to Mexican authorities.

Conclusion

As a final comment, I would say that we can see in these cases, some of the advances in the Inter-American System. I would also say, being hopeful, that it is less likely today than it was thirty or forty years ago, that a government in one of the member states at the OAS can decide and apply systematic torture as a means of political control or for any other purpose. But, of course, many challenges remain because torture has not been eradicated. I believe that the most effective way to fight it is by investigation and punishment on the part of authorities, but also by training civil servants, the authorities, and the population in general to understand this crime and to understand its absolute prohibition. Hopefully, with this there will be better investigation and punishment and the road toward full eradication will be clear.

Remarks of Hari Phuyal*

Introduction

I am happy to be here to serve the experience of Nepal on torture cases. I will start out with the general situation of Nepal. Nepal ratified major international human rights treaties in the 1990s, including the Convention against Torture (CAT) in 1991.[30] However, Nepal did not declare the competence of the CAT Committee under Article 22 and in accordance with Article 28.[31] Additionally, Nepal did not include any reservations on Article 20,[32] which provides the jurisdiction of the Committee on inquiries in systematic practice of torture. Since we cannot file complaints to the Committee, the Advocacy Forum-Nepal (Advocacy Forum, AF)—along with other organizations—used

** Hari Phuyal is a lawyer in Nepal and represented Advocacy Forum-Nepal.*

Article 20 to provide information on inquiries into systematic practices.

It is very difficult to actually carry out the inquiry and to feed information to the Committee under Article 20. The information on inquiry to the Committee was articulated in the Concluding Observations (2005) of the Committee in its Periodic Report,[33] where the Committee said that there are patterns of systematic practice of torture by the different law enforcement agencies. There was also a visit from the Special Rapporteur in 2005, which led to a strong report that came to the same conclusion.[34] Further, there were reports from the UN Office of the High Commissioner for Human Rights,[35] while it was located in Nepal, as well as a report from the AF[36] that indicates, out of its daily work, at least twenty percent of people are tortured. Thus, the pattern is consistent, indicating that the state does practice torture systematically—during this period, there was an armed conflict, and the army, the armed police force, and the other quasi-judicial bodies that do law enforcement work practiced torture in the same way as that practiced by other agencies.

Based on the information provided by the AF and other organizations, and as a result of the unwillingness of the government to effectively engage with the Committee to allow Committee personnel to visit the country, the Committee issued a report under Article 20[37] with the consent of the government. The government submitted its response, stating that it accepted the presence of torture but that the practice was not systematic, but sporadic. After obtaining the government's consent, the Committee published its report. The government will be asked again by the Committee to substantiate its claims and to respond to the Committee's questions. Organizations like AF provide further information to substantiate claims and to verify that a similar practice does continue. One of the government responses was that there was an armed conflict before 2006 and, since then, there has been no conflict and the torture has been reduced. Advocacy Forum analyzed the pattern of torture after 2006, after the armed conflict, finding that there has been a consistent practice of torture; it has not been reduced from twenty percent even after the armed conflict.

Presenting Cases Before the UN Treaty Bodies

Advocacy Forum has experience working with the Human Rights Committee (HRC) on cases involving torture. Some of the cases are conflict-related, requiring different strategies such as assisting the victim in filing the communication to prove exhaustion of domestic remedies or ineffectiveness of available remedies, and preparing documentation (collection, translation, verification) that comes from the documentation work of AF.

This is some of the evidence required in the context of cases submitted to the Human Rights Committee. In torture-related cases, it is especially important for AF to prepare communications to the Human Rights Committee. Advocacy Forum has succeeded in at least two cases in which it ensured that the petitioner had exhausted all domestic remedies, which can be done by mentioning in the communication every legal or judicial step the petitioner had taken for legal redress. Advocacy Forum also attached evidence to the communication, such as a copy of the first information report with police, a writ of *habeas corpus* or mandamus filed with the court, a copy of decisions of the court, a petition before other non-judicial or quasi-judicial bodies like the National Human Rights Commission, Women's Commission, or the Chief District Officer, as well as a copy of the petition before other national or international human rights organizations like AF, World Organisation Against Torture (OMCT), International Committee of the Red Cross (ICRC), and Office of the High Commissioner for Human Rights (OHCHR).

Advocacy Forum also provides evidence showing that certain remedies are unavailable or ineffective. The alleged violation of torture in Nepal is not criminalized, so the only remedy available under the Torture Compensation Act[38] is financial compensation, which must be brought within 35 days from the event of torture or the date of release, something the HRC has already dubbed flagrantly inconsistent with the gravity of the crime of torture. *Maharjan vs. Nepal*[39] is one of the cases that AF brought, with REDRESS, to the HRC regarding this issue.

Additionally, evidence showing unreasonably prolonged delays should be submitted in the communication. This can be substantiated by showing either that no investigation was initiated by the State Party over a considerable period of time since the allegation was first brought to the authorities concerned, or by the non-compliance with a court order by the State Party over a considerable period of time can also be taken into account to prolong delay. Any views or decisions of quasi-judicial bodies should be attached as an addendum to the communication.

Other evidence that should be submitted includes the following: medical and psychological reports explaining that physical and/or mental injuries resulted from torture and ill-treatment while in detention; physical evidence such as photographs; newspaper reports or articles relating to the incident; reports of national or international organizations (such as Advocacy Forum, OHCHR, Amnesty International, OMCT, etc.) relating to the general trend of the allegation such as torture, extrajudicial execution, sexual violence, disappearance; and identification of the perpetrator, which helps to strengthen the case. Evidence showing pecuniary and other non-pecuniary losses is also important, such as anguish and distress caused to the victim and/or his/her immediate relatives as result of the acts of the State Party; physical and mental problems faced by the victim or his/her relative after the torture; killing or disappearance of the victim; and the impact on their social and economic wellbeing.

These forms of evidence are the result of best practices when presenting a case before the Committee. Advocacy Forum works with many cases. When preparing the case, it chooses a strong case with a lot of evidence in the supporting documents. It is very difficult to simply choose one case.

Challenges in Gathering Evidence

Some challenges exist in providing authentic information. One challenge is the ineffective medico-legal examination facilities

and unavailability of trained doctors to provide evidence of the torture. There exists no central agency on medico-legal examination, and most of the work is done on an *ad hoc* basis based on scattered laws. This affects the whole criminal justice system due to a lack of circumstantial or physical evidence, and puts an emphasis on documentary evidence, which necessarily focuses police on obtaining confessions, which is when torture takes place. Another challenge is the protection of victims and witnesses, as there exists no national law and, thus, when filing a communication, a lot of plans need to be made for the victim's protection, including confidentiality, safe houses, evacuation, and counseling. In addition, although AF has only used individual communications since 2007, it has created reactions within the government system. In response to the challenge of inquiries of the Committees and Special Rapporteurs, the government established a Law and Human Rights Division within the Prime Minister's Office, even though the employees think this is an unnecessary burden.

Since the Prime Minister's Office has to collect both information and replies from the different law enforcement agencies (police, army, and other quasi-judicial bodies), it is forced to charge or blame organizations like the AF and other human rights organizations for creating trouble, which ultimately affects our regular detention visits. Advocacy Forum regularly visits detention centers in twenty out of 75 districts. This brings a lot of sponsored public criticisms to the AF and other human rights organizations from law enforcement agencies and by those who are named in the individual communication process.

The impact of filing individual communications is noticeable. Advocacy Forum utilizes an integrated plan of action rather than filing only an individual communication. The filing of communications alone is not effective. It has to be an integrated approach, filing cases domestically and bringing some cases into the international arena. Another impact has been the establishment of the Law and Human Rights Divisions in the Prime Minister's Office, which coordinates with the government agencies. As a result of the Committee Report under Article 20, a bill was introduced criminalizing torture which AF hopes will be passed with some changes to its content. A law reform process has also started on the Criminal Code, reforming the laws relating to evidence, police, medico-legal investigation, and there are discussions of reforming the law enforcement or criminal justice institutions, including the Police Act.

Conclusion

The work of AF is done as a joint collaboration with international organizations such as REDRESS, AI, HRW, OMCT, ICJ and with the joint work of national organizations. Interns from different universities do a lot of work in preparing the communications and responding to the queries of the Committee and the Special Procedures.

Advocacy Forum has some concerns regarding the Committee and the Special Procedures. For example, the country's postal system is very bad, and the Committee sends its communications through the postal service. Consequently, AF does not receive these communications until after the date has expired. Advocacy Forum regularly uses email to send communications, but the Committee does not prefer this means of communication. The Committee also does not provide information to the complainants, and the complainants have to wait for either the annual or other reports to find the information. The Committee should provide information to the victims or complainants as it comes into existence in the domestic legal system. Moreover, as mentioned earlier, the Committee does little follow-up on its views, and therefore should do further follow-up on implementation. Lastly, perhaps the Committee should also connect its work on capacity development with the work of the UN system. Thank you very much.

Remarks of Juan E. Méndez*

Introduction

My presentation will highlight the challenges of evidence and burdens of proof in the context of the mandate of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (CIDT). The following remarks are also applicable to all of the United Nations Special Procedures, which presently includes about forty mechanisms, ten of which have a country specific mandate and the rest have a thematic mandate. The mandate on

** Juan E. Méndez was appointed UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment on October 6, 2010, and started his mandate on November 1, 2010. He is a Visiting Professor of Law at the American University Washington College of Law.*

torture is one of the oldest Special Procedures to date—created in 1985—and as a result of its long-standing history and ever expanding visibility, the mandate is frequently used by NGOs, victims, and other interested parties around the world.

All Special Procedures apply three basic methodologies. The first pillar of the work of Special Procedures includes issuing communications to governments on specific cases involving human rights violations—whether violations are based on allegations in practice or on legislative shortfalls. After I receive communications from the public, the mandate acts on them by trying to establish the veracity of the complaint and assess state responsibility for the alleged acts. This procedure embodies a case complaint mechanism accessible to the public at large. The second pillar of the mandate's work involves carrying out country visits at the invitation of governments. As the Special Rapporteur on torture, once I receive an invitation, I conduct an independent assessment of the situation of torture and CIDT *in situ*, which is followed by a report with my conclusions and recommendations. In these country reports, I recommend various actions and measures that the government must undertake in order to comply with its obligations under the Convention against Torture and other relevant provisions of international law relating to the implementation of the prohibition of torture and CIDT. The third pillar of the mandate's work is the thematic reports. As the Special Rapporteur on torture, I have an opportunity twice a year to expand upon a topic within our mandate that warrants additional attention of the international community in order to generate a discussion, mostly about areas of the mandate that are not sufficiently understood, and to initiate a conversation about standards.

Interacting with States

For the purposes of today's discussion regarding evidence and burdens of proof, the communications with governments are of the utmost importance because it is through these communications that I determine whether allegations have been proven. Considerations about evidence also apply to country visits and reports to a certain extent, because in these I use cases to illustrate identifiable trends in order to distinguish between isolated cases and those cases that represent a pattern or even a systematic practice. Focusing on the communications procedure, however, I am of the belief that it is a case complaint mechanism and should therefore be conducted under rules applicable to such processes. Each Special Procedure has a governing UN Human Rights Council resolution that provides for such a case complaint mechanism.[40] Thus, Special Procedures are allowed to receive communications from the public and act on them in accordance with the corresponding resolution. These mechanisms in practice are, however, more or less defined as an exercise in engaging the government in a conversation about allegations raised. Nevertheless, I believe very strongly that if the mandate represents to the public that communications will be entertained, the Special Rapporteur owes it to the petitioners to come to some kind of conclusion about whether the allegation is verified or not and, if verified, whether it gives rise to an unfulfilled obligation or violation on the part of the state. As the Special Rapporteur on torture, I do so by publishing my final views on communications sent and replies received in my annual "observations report" to the UN Human Rights Council.[41]

However, Special Procedures do not have the capacity to engage in in-depth fact-finding or elaboration of the evidence. We do not hold hearings nor do we require documentary evidence. We are limited to the information provided and the response of the government, if any. The process involves an exchange of notes between the Special Rapporteur and the state and on the basis of these exchanges we determine whether a violation of the prohibition of torture has occurred or not. During the initial stages of this process, all communications are confidential, meaning that when we write to the state we cannot share this content with the applicant or anyone else. In my case at least I make some allowance if someone calls me to ask if I am working on a certain case, I feel free to say "yes, I am" and to give some general reasons as to why I am interested, although without yet expressing any conclusions on the merits of the case. But at least I think it is important to let the public know we are actually working on a case if the public is interested. We do not, however, reach out to the press ourselves to say we are working on a case.

There is, however, an exception when there are significant patterns of cases that urgently require our attention. For example, during the Arab Spring, several of the UN Special Rapporteurs issued joint press releases to reflect the urgency of the situation. In addition, we previously have issued joint press releases on death penalty cases as a strategy to urge the government to comply with its international legal obligations and prevent the execution, even before the case is completed. However, for the most part, Special Procedures are subject to the rule of confidentiality. When we do receive a response from the state, we have to analyze whether the response is persuasive. In some instances, states respond but do not specifically address the content and questions of the submitted communication or only partially do so. In other instances, states fail to respond at all. In fact, approximately fifty percent of all communications do not yield government responses.

These cases are subsequently compiled into an annual observations report that is submitted to the UN Human Rights Council. The report includes short descriptions of the cases, my conclusions as to whether there was a violation, and recommendations. I often conclude that there has been a violation because most cases at this stage are based on highly credible facts. Thus, it is no surprise that most of my observations—or final views—are condemnatory. On occasion, however, I find that the information provided by a government aligns with its obligations under international law relating to the prohibition of torture and CIDT. In these cases, I do not acquit the state. Instead, I request further information regarding the state's actions to ensure that these actions match rhetoric as well as updates as the case ripens domestically.

Effects and Impact of Special Procedures

The Special Procedures' communications are considered non-binding, which limits the efficacy of the mechanism. However, the mandate applies binding norms to the facts. Regarding my mandate, the prohibition of torture and CIDT is well established under customary international law as a peremptory norm, also called *jus cogens*. Therefore the absolute prohibition applies to all states regardless of whether they have ratified any treaty. In addition, signatories and parties to the UN Convention against Torture are obligated by the absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment, and to refrain from any action that would defeat the object and purpose of the treaty.[42] Moreover, not only the prohibition but all other provisions in the Convention have acquired the status of customary international law norms. These legally binding obligations are used as a basis for all my observations, but the communications themselves and my final conclusions on them are still considered non-binding.

Nonetheless, there are several benefits to utilizing the UN Special Procedures. First, Special Procedures are not treaty bodies and therefore are not bound to interact only with countries that have signed and ratified that Convention against Torture. In fact, Special Procedures have "jurisdiction" of some sort over 194 countries in the world. All member states of the United Nations are subject to the activities of UN Special Procedures. Second, Special Procedures are not bound by procedural rules such as exhaustion of domestic remedies or exclusivity rules. Therefore, if the same case is before a treaty body or a regional body, there is no obstacle to bringing it to the attention of Special Rapporteurs, Independent Experts, and members of the Working Groups.

Anyone can submit a communication to UN Special Procedures—individuals, victims, NGOs, or lawyers representing victims. The Rapporteurship can also receive allegations and related information from other partners, including UN officials working in the field. When submitting a communication to states, the mandate does not reveal the source and therefore a measure of protection can be ensured. However, the mandate cannot accept anonymous complaints. In order to submit a complaint, it must include key pieces of information such as name, dates, and details about the alleged violation. The mandate can also act *sua sponte*, learning of cases without having received any formal communication and acting on the mandate's own initiative.

Communications to governments must include several features. First, the communication provides the applicable international standards regarding the prohibition of torture and CIDT as they relate to the state and to the facts alleged and whether the international definition of torture or cruel, inhuman or degrading treatment are *prima facie* met in the particular case. Since the mandate applies international standards of torture, intent must be distinguished from purpose. Intent, from our perspective, is the intent to inflict severe pain and suffering and that, for a case of torture, is absolutely required under international standards. Intent is not required for a finding of CIDT because cruel, inhuman, and degrading treatment can also be negligently inflicted. As a result of this distinction, the mandate operates on a huge variety of cases, *e.g.,* prison conditions that under certain circumstances can be cruel, inhumane or degrading without being able to point to any particular official having the intent to inflict that cruelty. In accordance with the international definition of torture, a state agent must be responsible for inflicting the torture or cruel, inhuman and degrading treatment. In some circumstances, however, a state can be held accountable for the action of non-state agents under widely accepted rules of state responsibility, when a state knows or ought to have known that torture or CIDT is imminent or was inflicted yet the state fails to protect these individuals from ill treatment. A prevalent example of this can be found in some domestic violence cases.

When an individual is subjected to acts of torture or CIDT, the state is legally obligated to undertake remedial measures—which should be done in close consultation with the survivor or the victim's family—to address the harm caused. For instance, each state must offer reparations or other compensation to the victims of torture; states shall not use coerced confessions in evidence against victims; and states have an obligation to investigate, prosecute, and punish acts of torture.

In addition, the Convention recognizes that states have some affirmative obligations with respect to the prevention of torture; for instance, through training of state agents, educating the public, and adopting legislation. In the context of legislation, I occasionally get cases where the legislation itself falls short of obligations. If a country is in the process of revising or adopting relevant legislation that attempts to domesticate legal obligations of the state or contemplate torture in the criminal code as provided under the Convention, I engage in this process and provide recommendations and other support. Therefore, legislation addressing crimes of torture and CIDT must provide the same elements and descriptions as provided under international law, attach penalties that are adequate and that reflect the severity of the crime, and ensure that amnesties, pardons, and statutes of limitations are not applicable to torture under any circumstances. In addition, national legislation should contemplate the requirement to investigate, prosecute, and appropriately punish the perpetrator *ex officio* in every case of torture, without placing the burden on the victim to prove the allegations. Unfortunately, too often the state claims it does not know of acts of torture, stating that it does not have "official" knowledge, even though the victim made a public statement but not a formal complaint. I remind states of the obligation to act *ex officio*. In the case of *Kurt v. Turkey*, the European Court of Human Rights explicitly held that the prosecutor has an obligation to act *ex officio* if there are any traces or any reason to believe that someone has been subjected to ill treatment and the prosecutor cannot expect the victim to complain.[43]

Processes of the Special Rapporteur

In order to provide you all with information regarding the case complaint mechanism, I will describe the process, the difference between urgent appeals and allegation letters, and the requisite evidence to prove the alleged acts. Initially, I start by first examining all complaints and establishing the reliability of the source. I receive a lot of complaints from people who have not previously engaged with the mandate as well as from well-known sources. Thus, I do not consider only complaints submitted by widely known organizations like Amnesty International or Human Rights Watch, although well-known sources do add an important element of reliability. In addition, source reliability is also attributed to national organizations that are working effectively on a local level. International visibility is not the determinant factor; rather it is the quality of work done in countries. As guiding factors, I look at the internal consistency of the information as well as its consistency with other information from the country in question; corroboration, if necessary or possible, of the information; the existence of reports on torture or other ill-treatment practices from international and national sources, such as official commissions of inquiry or national commissions of human rights; findings of other international bodies; and the existence of national legislation that may permit for instance *incommunicado* detention, extradition, or deportation or facilitate torture or other ill treatment.

Communications are classified either as urgent appeals or as allegation letters. Urgent appeals are reserved for cases in which torture appears to be imminent or is happening as we speak. For instance, if someone has just been arrested and is being held *incommunicado* in a country with a pattern of *incommunicado* detention, or if someone is about to be deported to a place where he or she is at risk of being tortured, such a person would be the subject of an urgent appeal. In cases of urgent appeals, I ask the government to respond immediately and if I do not receive a response within one to two weeks, I am free to issue final views on the matter.

Alternatively, allegation letters are reserved for cases in which the torture has already occurred or for any requests to clarify allegations or to forward information on pending investigations. For allegation letters, I ask the government to respond within sixty days. Many states, however, answer after the sixty days. Since I do not immediately publish my views, I do consider late responses if they arrive before I write my conclusions.

Communications are submitted only to governments. I cannot entertain complaints against non-state actors except under limited circumstances. Although the mandate is asked to comment on practices of professional organizations, I must refuse to participate in that kind of debate since it is outside our mandate. As the UN Special Rapporteur I can offer views as to what the ethics of the profession should require of medical doctors, but cannot entertain cases against professional organizations.

The burden of proof required under international law standards for state responsibility is close to a preponderance of the evidence. Thus, the standard of proof is not proof beyond a reasonable doubt, which would be appropriate for a criminal case. Rather, a preponderance of the evidence on the record must lead me to believe that the state has not lived up to its responsibilities under existing rules and, in general, under international human rights law. A *prima facie* case can be fulfilled based on accounts by witnesses of the person's physical condition; medical reports of the physical or mental injuries suffered or the lack of those reports; whether the state had the opportunity to establish them and did not subject the person to a medical examination; and whether the medical examination—if it took place—complied with guarantees of independence and impartiality. I demand that the state provide full information on all those aspects, not just whether an examination has happened or not. I also take into consideration whether a person has been kept in *incommunicado* detention, in solitary confinement, in prolonged death row incarceration, subjected to disappearance, subjected to any restraint contrary to international standards, and whether the detention conditions amount to CIDT.

Application to Human Rights Violations

To illustrate the case complaint mechanism and required burdens of proof, I would like to discuss an example pertaining to allegations of excessive use of force. In street demonstrations, for example, if there has been excessive use of force and the result is that some injuries by themselves convey the sense of CIDT, the fact that the person has never been in custody is no obstacle for us engaging in the particular case. However, the use of force has to be excessive under the circumstances, and the result must be serious injury of a physical or mental nature. For example, I look at whether the individual was actually taken to a hospital because of the seriousness of the injuries.

Another example of the case communications mechanism refers to allegations of torture of a complainant in prison. In such circumstances, I examine whether the state has given any substantive explanation as to how the injury was sustained, and the kind of treatment the person has received in custody. I remind the states that under the UN Standard Minimum Rules for the Treatment of Prisoners, they are obligated to provide medical attention under all circumstances. While providing medical attention, if they fail to establish the origin of the wounds, then they are also failing in their obligation to investigate, prosecute, and punish. I have also dealt with cases of female genital mutilation, although those largely are cases involving non-state actors. In this context, however, if I know the state is aware of the practice and is not doing enough to counter it, I conclude that a violation has taken place. The attempt to make female genital mutilation safe by requiring the intervention of hospitals and medical personnel is, I believe, wrongheaded. Even with the best intention, it can be a way to sanitize through legislation a practice that should be prohibited under all circumstances.

Endnotes: Panel IV

[1] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Rules of Procedure, Rule 120, CAT/C/3/Rev.5 (Feb. 2011).
[2] Organization of American States, Inter-American Convention to Prevent and Punish Torture, Sept. 12, 1985, O.A.S. T.S. No. 67.
[3] Organization of American States, American Convention on Human Rights [hereinafter American Convention], art. 61, Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123.
[4] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted* in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).
[5] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, [hereinafter American Convention].
[6] American Convention, *supra* note 3, at art. 5.
[7] Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series, No. 67, *entered into force* Feb. 28, 1987, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83, 25 I.L.M. 519 (1992). American Convention.
[8] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter Convention against Torture], Dec. 10, 1984, 1465 U.N.T.S. 85.
[9] Case of Ximenes-Lopes v. Brazil, Merits, Reparation and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 149 (July 4, 2006).
[10] *Id.*
[11] Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am Ct. H.R. (ser. C) No. 4 (July 29, 1988).
[12] Raquel Martí de Mejía v. Perú, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 (1996).
[13] Case of Fernández Ortega et al. v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 215 (August 30, 2010).
[14] Case of Rosendo Cantú and other v. Mexico. Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R (ser. C) No. 216 (August 31, 2010).
[15] *See* http://www.cidh.oas.org/annual.eng.htm.
[16] Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series, No. 67, *entered into force* Feb. 28, 1987, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83, 25 I.L.M. 519 (1992).
[17] Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala, Merits, Judgment, Inter-Am Ct. H.R. (ser. C) No. 37 (March 8, 1998).
[18] Case of Maritza Urrutia v. Guatemala, Merits, Reparations and Costs, Inter-Am Ct. H.R. (ser. C) No. 103 (Nov. 27, 2003).
[19] Rules of Procedure of the Inter-American Commission on Human Rights, art. 65, Sept. 2, 2011 [hereinafter Rules of Procedure].
[20] *Id.*
[21] Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am Ct. H.R. (ser. C) No. 4 (July 29, 1988).
[22] Case of Blake v. Guatemala, Merits, Judgment, Inter-Am Ct. H.R. (ser. C) No. 36 (Jan. 24, 1998).
[23] Ana, Beatríz and Celia González Pérez v. Mexico, Case 11.565, Report No. 53/01, Inter-Am.C.H.R., OEA/Ser.L/V/II.111 Doc. 20 rev. At 1097 (2001).
[24] Case of Fernández Ortega et al. v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 215 (August 30, 2010).
[25] Juan Carlos Abella v. Argentina, Case 11.137, Report Nº 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. (1997).
[26] Juan Humberto Sánchez Case, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 99 (June 7, 2003).
[27] Case of Gutiérrez-Soler v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 132 (September 12, 2005).
[28] *Id*. *referencing* Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNHCR, No.8/Rev.1 (2004).
[29] Cabrera Garcia and Rodolfo Montiel Flores v. Mexico, Case 735/01, Report No. 11/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (2004).
[30] Convention against Torture, *supra* note 3.
[31] *Id*.
[32] *Id*.
[33] Conclusions and recommendations of the Committee against Torture: Nepal, UN Committee against Torture, CAT/C/NPL/CO/2 (Dec. 2005), *available at* http://www.refworld.org/publisher,CAT,,NPL,441182d90,0.html.
[34] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Civil and Political Rights, Including: The Questions of Torture and Detention: Mission to Nepal*, E/CN.4/2006/6/Add.5 (Jan. 2006), *available at*: http://daccess-dds-ny.un. org/doc/UNDOC/GEN/G06/101/19/PDF/G0610119.pdf?OpenElement.
[35] For a full list of reports, *see* http://nepal.ohchr.org/en/index.html.
[36] For a full list of reports, *see* http://www.advocacyforum.org/publications/torture.php.
[37] Report on Nepal adopted by the Committee against Torture under article 20 of the Convention and comments and observations by the State party, *available at* http://www2.ohchr.org/english/bodies/cat/docs/Art20/ NepalAnnexXIII.pdf.
[38] *Compensation for Torture Act, 1996*, Dec. 18, 1996, *available at* http://www.refworld.org/docid/ 3ae6b4fac.html [accessed 24 July 2013].
[39] United Nations Human Rights Committee, U.N. Doc. CCPR/C/105/D/1963/2009 (Sep. 2012), *available at*: http://www.bayefsky.com/pdf/nepal_t5_ccpr_1863_2009.pdf.
[40] *See* G.A. Res. 16/23, U.N. Doc. A/HRC/RES/16/23 (Apr. 12, 2011), *available at* http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/16/23.
[41] *See* U.N. Special Rapporteur on Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, *Observations on Communications Transmitted to Governments and Replies Received*, U.N. Doc. A/HRC/22/53/Add.4 (Mar. 12, 2013), *available at* http://daccess-ods.un.org/TMP/5233557.22427368.html.
[42] Convention against Torture, *supra* note 3.
[43] *See* Kurt v. Turkey, Eur. Ct. H.R. 24276/94 (1998).

NOTES

AMERICAN UNIVERSITY
WASHINGTON, DC

Nonprofit Org.
U.S. Postage
PAID
Hagerstown MD
Permit No. 93

Human Rights Brief
Center for Human Rights and Humanitarian Law
Washington College of Law
4801 Massachusetts Avenue, N.W.
Washington, D.C. 20016-8043

Phone (202) 274-4023

http://hrbrief.org
www.wcl.american.edu/humright/center

AMERICAN UNIVERSITY
WASHINGTON
COLLEGE OF LAW