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Mark Thomson

Yuval Ginbar

Jens Færkel

Santiago Canton

Florence Simbiri-Jaoko

See next page for additional authors

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Panel I: Building on the Committee against Torture's Successes and Addressing Its Shortcomings - Stakeholders' Perspectives

Authors

Mark Thomson, Yuval Ginbar, Jens Færkel, Santiago Canton, Florence Simbiri-Jaoko, Felice Gaer, and Joao Nataf

PANEL I: BUILDING ON THE COMMITTEE AGAINST TORTURE'S SUCCESSSES AND ADDRESSING ITS SHORTCOMINGS: STAKEHOLDERS' PERSPECTIVES

Opening Remarks from Mark Thomson,* Moderator

Good morning, everybody. I will quickly give some introductions: on the panel today we have Yuval Ginbar, Legal Advisor to Amnesty International; Jens Faerkel from the Danish Ministry of Foreign Affairs; Joao Nataf, Acting Secretary of the UN Committee Against Torture; Felice Gaer, a member of the UN Committee Against Torture; Santiago Canton, Executive Secretary of the Inter-American Commission on Human Rights; and Florence Simbiri-Jaoko, the Chairperson of the Kenya National Commission on Human Rights.

The subject of our panel is building on the UN Committee against Torture's successes and addressing shortcomings and stakeholder's perspectives. In other words, we are setting the scene for today's review of the work of the Committee by surveying its strengths and weaknesses. I will be asking the speakers to not only stay focused on the subject matter, but to provide very frank views on the work of the Committee.

I would like to start the proceedings by inviting Yuval Ginbar to open with his presentation. Thank you Yuval Ginbar, you have the floor.



Remarks of Yuval Ginbar**

Good morning. With only ten minutes, I will quickly thank Dean Grossman, the Washington College of Law, and my colleagues at Amnesty International for organizing this seminar, the other participants and everyone else for attending.

I will talk in the sandwich format. There will be mostly criticism — although I hope it is constructive — of some aspects of the Committee against Torture's work, flanked at both ends by thin layers of praise. As you may have noticed, just as the

Arabs of old had a thousand words for “camel,” Human rights organizations have a thousand words for expressing condemnation, dismay, concern, disappointment etc. But when it comes to praising, I think we use the phrase “Amnesty International welcomes . . .” followed immediately by “however, we remain concerned . . .”

For me personally, I hold fond memories of my first encounter with the Committee in the mid-1990s, when I was working for an Israeli NGO, B'Tselem, and the Committee reacted swiftly and resolutely to Israeli Supreme Court rulings that had facilitated torture. The Committee called for a special report from Israel, and it came up with a brave finding that Israel's ostensibly mild forms of interrogation, such as sleep deprivation and forcing detainees into painful positions, hitherto addressed

* Mark Thomson is the Secretary General for the Association for the Prevention of Torture.

** Dr. Yuval Ginbar is a legal adviser at Amnesty International.

only by the European Court in the *Ireland v UK* case (and not satisfactorily at that),¹ constituted not only cruel, inhuman, or degrading treatment, but also torture.²

To get inspiration for this talk, I went to the Committee's website and looked at what it has come up with recently. I picked at random the Committee's concluding observations regarding one state that I know very little about: El Salvador.³ Quickly my eyes caught the following:

The Committee notes with satisfaction that the State Party has eliminated the death penalty. However, it recommends that the State Party should also eliminate it for certain military offences stipulated in military legislation during a state of international war.⁴

Amnesty International would approve every single word in this paragraph. So the text is fine, but the Committee's jurisprudential context is not without problems. Perhaps the Committee's approach — or should I say approaches — to the issue of the death penalty encapsulates several of the salient problems which may impede its ability to promote the doubtlessly worthy cause for which it was established in a both principled and efficient fashion. I will look at three of these problems briefly: (1) consistency; (2) what may be called “an occasional lack of attention to detail;” and (3) the fact that the Committee is punching below its weight.

CONSISTENCY

Consistency is not a straightforward concept when it comes to the jurisprudence of human rights-monitoring bodies. When we call for “consistency,” we do not mean a narrow, strict, and unchanging approach, oblivious to new developments. As the Committee itself has stated, its “understanding of and recommendations in respect of effective measures are in a process of continual evolution.”⁵

On the other hand, we do mean a narrow, strict, and unchanging approach to the fundamental principles at the heart of the treaty, such as the absolute prohibition on torture and other ill-treatment.

In addition, consistency clearly means that different States Parties cannot be treated differently on the basis of size, shape, or power. This is where the Committee has run, in our view, into serious difficulties. In its 41st session, in November 2008, the Committee examined the periodic reports of Kenya and China, among other states. Regarding Kenya, which had not executed a single person since 1987, the Committee's concluding observations state:

The Committee urges the State Party to take the necessary steps to establish an official and publicly known moratorium of the death penalty with a view of eventually abolishing the practice. The State Party should take the necessary measures to improve the



conditions of detention for persons serving on death row in order to guarantee basic needs and rights.⁶

Here, too, we find nothing wrong with this recommendation. But, regarding China, a state in which Amnesty International “estimates a minimum of 7,000 death sentences were handed down and 1,700 executions took place” in 2008,⁷ the Committee's general recommendation says: “The State Party should review its legislation with a view to restricting the imposition of the death penalty.”⁸ “Restricting the imposition” — no “urging” for a moratorium; no call for an eventual abolition of the death penalty.

The Committee, it should be noted, has on dozens of occasions recommended (or welcomed) the declaration of moratoria and the abolition of the death penalty in States Parties.⁹ Unfortunately, however, China was not the first case where, facing a major killer state (this is not an Amnesty International term), the Committee's knees seem to buckle. The United States is an earlier case in point. In May 2006, the Committee's general recommendation on the subject was, “The State Party should carefully review its execution methods, in particular lethal injection in order to prevent severe pain and suffering.”¹⁰ That was it; there was not even a suggestion that the imposition of the death penalty be restricted, let alone halted or abolished. Put bluntly, the Committee's message was: “Go ahead and execute as long as it doesn't hurt too much.” This leads us to the second issue.

OCCASIONAL LACK OF ATTENTION TO DETAIL

What is the jurisprudential rationale of requiring that a State Party “prevent severe pain or suffering” when killing its citizens in cold blood? This is what our letter to the Committee on this issue said. We subsequently wrote one regarding China

as well.¹¹ Neither letter has been officially answered. Note that this language was as close as I ever got to persuading Amnesty International to resort to sarcasm:

The difficulty involved in making fine determinations as to the severity of pain that a person suffers during a procedure which results in his or her death is but one dimension of the problem. More significant still is that the prohibition of cruel, inhuman or degrading treatment or punishment provided under Article 16 of the Convention vitiates any deliberate use of methods of punishment which cause physical pain or suffering, even if not "severe." This constraint is borne out by the Committee's longstanding opposition to corporal punishment."¹²

It seems that not rarely enough drafters of the concluding observations are unaware not only of the Committee's prevailing line on the issue on hand, but also of the ramifications of what they are writing. Let me give another example, also from the last session. In its concluding observations on Yemen, the Committee "also expresses concern at the conditions of detention of convicted prisoners on death row, which may amount to cruel, inhuman or degrading treatment, in particular owing to the excessive length of time on death row."¹³

When I ask my dad, who's almost ninety, how he is, he sometimes answers: "Well, so-so, but it's better than the alternative." So the "excessive length of time on death row" is one type of state failure which death-row inmates may not wish to see expeditiously addressed.

Another example of statements that do not seem fully thought out by the Committee is its determination that the use of Taser weapons in Portugal and New Zealand "causes severe pain constituting a form of torture."¹⁴

On the face of it this sounds like the Committee is making bold progressive inroads into new territory. Amnesty International has campaigned widely against the use of Taser weapons throughout the world. But the Committee's conclusions leave too many gaps, loopholes, and question-marks. They seem to pin a finding of torture on one of its definitional elements¹⁵ alone: causing severe pain or suffering. But live ammunition may also cause severe pain — if it doesn't kill you. Is the Committee saying that, for instance, police shooting at a dangerous, armed criminal having exhausted all other means of stopping him, or even in self-defence, are performing an act involving the kind of "purpose" prohibited under Article 1(1)? Is it saying that Taser weapons are *inherently* of a nature to cause unnecessary suffering or superfluous injury of the kind prohibited by international humanitarian law? And since the Committee proclaims that Taser weapons "cause (rather than "may cause") severe pain constituting a form of torture," why does it go on to also invoke Article 16?¹⁶ The Committee's brief

comments leave us in the dark, which for Amnesty International means that it is difficult for us to use them in our campaigning.

THE COMMITTEE IS PUNCHING BELOW ITS WEIGHT

The Committee against Torture is one of the key human rights monitoring bodies. Because the vast majority of people throughout the world abhor torture, its statements have international resonance. Yet the Committee too often fails to make its voice heard — or make its voice clear — on the crucial issues of the day that fall within its remit. Take "waterboarding," for instance, on which the Committee said, "The State Party should rescind any interrogation technique, including methods involving sexual humiliation, 'waterboarding,' 'short shackling,' and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment."¹⁷

The courage, clarity, and lack of equivocation which characterised the Committee's findings on Israel in 1997 seem to have dissipated. Why couldn't the Committee look, if not at its own jurisprudence, then at the verdicts of U.S. military commissions in the Far East in the wake of WWII, which had no qualms in convicting for torture Japanese soldiers who had used identical means against U.S. prisoners of war?

The Committee has also been virtually silent on issues such as what constitutes cruel and inhuman treatment, as opposed to torture, an issue on which several far-reaching and dangerous interpretations have been put forward in recent years.

The Committee has also issued a lamentable number of General Comments, the first of which leaves much to be desired. But the second one is of a different calibre. It was carefully drafted, in a process including proper dialogue with human rights NGOs. It is well thought out, principled, clear, and innovative. Of particular significance is the discussion of the gender aspect and, in this context, the way the General Comment ties states' due diligence obligations in tackling abuse by non-state actors to state officials' responsibility for acts of torture when they consent or acquiesce to them. This clarification of state responsibility is reflected well in some of the Committee's subsequent concluding observations, including those on El Salvador last year.¹⁸

We have good reasons to hope that this General Comment will herald others, which will equally well defend the fundamental principles of the Convention without compromise whilst facilitating greater understanding of its provisions and addressing new and emerging issues that do or should fall within the Committee's remit.

Let me end by saying that we are all, of course, on the same side. It is in this spirit that my remarks are offered and, I hope, accepted, and I also hope that they form part of an honest and mutually beneficial dialogue today. Thank you.

Moderator's Remarks

Even though you say that we are all on the same side, I would now, after hearing from the international NGO that has done the most work with the committee, like to ask for the point of view of a government representative. I would like to invite Jens Faerkel from the Danish Ministry of Foreign Affairs to give his views on the work of the Committee,

its strengths and weaknesses, and to respond to some of the challenges which Widney highlighted in her introduction regarding the consistency, clarity, and authority of the Committee. Additionally, I would like to hear what, from your point of view as a government representative the Committee can be doing better. Jens Faerkel you have the floor.

Remarks of Jens Færkel*

A GOVERNMENT PERSPECTIVE ON THE COMMITTEE AGAINST TORTURE AND UN EFFORTS TO COMBAT TORTURE

Thank you very much for this perhaps slightly dubious introduction. We are on the same side and I will show you how. I appreciate the invitation to present a government perspective on the Committee against Torture and the efforts at the United Nations to combat torture, including all other forms of cruel, inhuman, or degrading treatment (CIDT) or punishment. When I speak of torture, please consider CIDT included. It seems that I am the only government representative on these panels.

Perhaps the title of my presentation is a little misleading because you will not get any official version of the Danish government's view of the Committee against Torture; you will get some reflections of a person who happens to work for the government.

When I began working on torture as a very young law student working on Amnesty International's first campaign against torture back in 1972, I was under the false impression that, intellectually, it would be a relatively simple mission. After all, the Universal Declaration on Human Rights says clearly, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,"¹ language which is repeated more or less verbatim in numerous legally binding treaties and conventions. It is a simple obligation, which should be simple to implement. Just don't torture. That's it. How difficult can it be? Well, I recently learned that Kazakhstan, which incidentally holds the presidency of the Organization for Security and Cooperation in Europe (OSCE) this year, has just adopted an action plan to eradicate torture by 2013. So, torture isn't something that you just don't do.



The main complication springs from the very success of the prohibition against torture. Torture has become more or less unthinkable — or at least impossible to defend, even though I am aware that this defense has been tried. What the consensus against torture has led to is that torture takes place in secret and despite official denial. That is one reason why it is so difficult to get rid of torture.

COOPERATION

One of the most important means to combat torture is obviously the establishment of independent institutions such as the Committee against Torture designed, but not necessarily fully equipped, to combat torture. But there are other relevant institutions: parallel institutions dealing with torture and, of course, institutions with wider mandates that include torture. Actually,

* Jens Færkel is a Minister Counselor of the Human Rights Department at the Danish Ministry of Foreign Affairs.

I am sure that there are more mechanisms dealing with freedom from torture than with any other human right. Indeed, one of the points I would like to make is the need for these bodies to cooperate closely, for instance, by making use in Committee of the recommendations accepted by states during the Universal Periodic Review (UPR), and the pledges made by states seeking a seat on the UN Human Rights Council. I realize that the Committee is in fact aware of this concern for cooperation, as it for instance regularly invites the UN Special Rapporteur and the UN Subcommittee on the Prevention of Torture (SPT), although of course the SPT already reports through the Committee.

Cooperation also needs to be improved in general among the UN treaty bodies. Last November, a number of current and former treaty body members adopted an interesting document, the Dublin Statement,² on treaty body reform. I believe that Claudio Grossman, Felice Gaer, Nora Sveaas, and Alexander Kovalev from the Committee against Torture were among those who signed. The statement does not offer a blueprint for reform, but it alerts us to the need to do something. It confirms a desire to cooperate on this issue and it highlights a number of very pertinent concerns to be considered in such a process. My government is, for one, fully prepared to carry this process forward.

HOW THE COMMITTEE AGAINST TORTURE WORKS

As you know, the Committee works in several ways: (1) by examining country reports; (2) by examining individual, and in principle interstate, complaints; (3) by undertaking enquiries if the Committee receives reliable information that torture is systematically practiced in a State Party; and (4) by developing the interpretation of the Convention by drawing up general comments.

As a means of implementation, the effectiveness of country reports is frequently underestimated. It is the possible culprits — the governments who may or may not implement their human rights obligations — which decide themselves what to put into the report. Still, this exercise is valuable. The process of writing a country report is often in itself a very helpful process for governments to identify their shortcomings. Moreover, the Committee does guide governments through the process, for instance by issuing guidelines and lists of issues to be addressed.

The Committee has developed the country reporting process by adopting an optional procedure, which in effect replaces the traditional reports with an extended list of issues to be addressed, so that the periodic report would basically consist of replies to these questions. This system has strong advantages. Technically, it is easier for states to report by answering specific questions rather than commenting on the full Convention. Not surprisingly, the Committee does not shy away from difficult issues, as I discovered when I read the list of issues just submitted to Denmark. There is no way to avoid possibly embarrassing issues. Furthermore, I also presume this procedure may shorten the delays in processing reports in the Committee. This model is now also being considered by the Human Rights Council.

The one downside, regrettably, is that the procedure is rather resource-heavy.

Most importantly, states are subjected to an examination by the Committee. Usually, a strong government delegation is examined orally over two half-day sessions, not on the report as such, but on the full implementation of the Convention. The Committee is well prepared, *inter alia*, by shadow reports from civil society and meetings with NGOs prior to the examination. In this respect, it is important to avoid letting the examination become in effect a dialogue with NGOs through the Committee. It is to be a dialogue with the Committee.

Another possible problem in connection with examining reports is to stick to the issue and not drift into issues more properly dealt with by other treaty bodies. This is not a problem particular to the Committee. Indeed, my impression is that it is more prevalent in other treaty bodies.

Another irritating feature, which is not the Committee against Torture's responsibility as it is a general UN policy, is the half-day press release on proceedings issued during the examination. These releases will refer — often in some detail, but not always precisely — to the dialogue ongoing at the examination. The problem is that the media and part of civil society get the impression that a question raised by a member represents criticism by the full Committee, a kind of “verdict.” That is not so. The issue may not be reflected in the concluding observations at all, and even the concluding observations adopted by the Committee are not looked upon as “judgments,” so to speak. I have seen them described by a treaty body chairman as “instruments of cooperation,” which is a much more constructive approach, although it does presuppose that there is someone to cooperate with.

Finally, delayed reporting or the lack of reporting from certain countries represents a weakness in the reporting system. But, there are ways and means to deal with these problems, in particular the possibility, although difficult, of conducting an examination of Convention implementation without a country report. This possibility, which we have seen used in other treaty bodies, could motivate the State Party to draw up some form of a report. I am sure the Committee has considered adopting this procedure, but I would suggest that the considerations go on. On the other hand, of course, if all reports came in on time, the Committee would drown in its own success. There is already a delay of one to two years before reports are examined, which by the way is not very much if compared to other treaty bodies.

When the UN human rights conventions were negotiated, there was much concern about the risk of abuse of interstate communications. That concern has proved unjustified. There has never been an interstate communication in the UN treaty body system. I do not know why not, perhaps because states prefer to go to war over their differences. Individual complaints are much more important, because they actually happen. Sixty-four states have now accepted the individual complaints procedure.

Although it is not enough, I find the number respectable, and it is certainly enough to keep the Committee busy. I am not sure that the main problem is the number of States Parties to this procedure; it is more likely the lack of awareness among the population that this procedure is available, and the reluctance of lawyers to make use of it. I think more could be done in this respect.

The Committee has adopted a follow-up procedure to ensure that countries comply with its views on individual complaints. This is a very useful development, which goes beyond the specific wording of the Convention.

I think you will find that most, presumably all, governments maintain that the views of the Committee are not legally binding judgments. The Convention says nothing about this question and I realize that it is a contentious position, but I prefer to look at this issue in a rather more pragmatic way. We expect others to respect and implement the views of the Committee, and so we should do so ourselves.

I cannot say much about the inquiry procedure because I do not know much about it. This is for good reason, since this procedure is basically confidential and my country has not been subjected to it. Nevertheless, I believe this procedure is being used increasingly, but still not very often.

The Committee publishes its interpretation of the Convention in general comments. The adoption of general comments may not be treaty-based. As far as the Convention against Torture is concerned, it can be debated; but as far as the other UN human rights conventions go, they certainly say nothing about the issuance of general comments. Nevertheless, it is a common practice with most treaty bodies. Some do it more extensively than others and most do it more than the Committee against Torture, which has adopted two general comments. I presume this is a result of priorities and resources, and I am the last person to criticize the Committee for giving higher priority to case work, but these general comments may be very useful. Obviously, general comments adopted by a treaty body carry authority, because they indicate how that treaty body will look upon cases or reports brought before it, but they are not legally binding. Their author-

ity is more related to the quality of their contents than to their adoption by a treaty body.

RESOURCES

The lack of available resources is a major challenge to most of us. Certainly it is also to the Committee against Torture, which with only ten members is the smallest UN treaty body. The Committee is seeking more meeting time from the UN General Assembly, which would be useful but is very difficult to get through at the Assembly. Perhaps it might be useful for the Committee to “think out of the box” and find alternative resources, like the SPT has done. Getting more secretarial assistance would also be very helpful, I am sure. The Office of the High Commissioner is awakening to this issue, but still certainly needs more staff to service Committee and the other anti torture mechanisms.

My country has provided a junior professional officer (JPO) for the SPT, and we are in the process of obtaining authorization for another JPO at the branches of the High Commissioner’s office, which service the anti-torture mechanisms. But, even if more states make such contributions, this is not a sustainable way to support the Committee.

TORTURE RESOLUTIONS

Governments are also active players on the torture scene and not only as those responsible for committing torture. Each year, for example, Denmark tables a resolution on torture at the General Assembly and at the Human Rights Council, respectively.

Like other UN resolutions, these are the results of very difficult negotiations, and consequently their wording is far from perfect. In substance, however, they do take the protection against torture further than “hard law” instruments. The General Assembly resolutions, in particular, represent the consensus of the international community. They could be put to better use, perhaps also by the Committee against Torture. Thank you for your attention and for your patience.

Moderator's Remarks

Thank you, Jens Faerkel, and thank you for proving to me why we are all on the same side. But, as a moderator, I do have to be a little provocative as well. Thank you also for addressing the important issue which Claudio Grossman mentioned in his introduction regarding the serious problem of resources, as another example of where we must try to find solutions. I am not sure how much we can go into that issue today, but it is very encouraging to hear that there are governments, especially the Danish government, trying to find ways to resolve that problem, which is not straight forward when dealing with a large international institution such as the Office of the High Commissioner of Human Rights. Thank you for the other comments, for which we will hopefully get a response from Felice Gaer later regarding the work of the Committee, and also from Yuval Ginbar regarding the specific issues that you mentioned about the media, the problem related to the media releases, and the lack of readily available information about the individual

complaints and mechanisms. Yuval Ginbar: perhaps you could also address in your response what might be done to ensure that people know more about these individual complaints.

I would now like to give the floor to Santiago Canton, who is the Executive Secretary of the Inter-American Commission on Human Rights. I think it will be very interesting to hear about this idea of cooperation between institutions and sharing of information. In order for the Committee against Torture to do its work, it needs to be well informed. Where is the information coming from? It cannot only be from Amnesty International; there are others as well. We heard from Claudio Grossman that the Committee has only five weeks of meeting a year, it has a lot of papers to look through, and therefore, the quality of the information provided is very important. The Inter-American system is a potential source of that information. Santiago, you have the floor.

Remarks of Santiago Canton*

Thank you very much, Mark. Let me start first by thanking the Washington College of Law and Amnesty International for organizing this event. As Mark said, I will concentrate my presentation on the perspective of the Inter-American regional system for the protection of human rights. In so doing, I will first explain briefly the different activities we undertake and then try to think about the future cooperation and collaborations that we can embark on.

For more than fifty years the Inter-American Commission on Human Rights has been very active throughout the region. The issue of prevention and reparation in cases of torture has been widely followed by the Inter-American Commission, since its very beginning. The very first visit organized by the Commission was conducted in the Dominican Republic, particularly looking into detention centers, and the issue of torture came up immediately. Thus, the very first activity of the Inter-American Commission focused on this issue.

The Commission has addressed torture using all the different tools at its disposal. The first of these are individual complaints. The Commission receives several complaints every year on the issue of torture and ill treatment in detention centers from countries all over the Americas. In the history of the



Commission there have been several cases both at the level of the Inter-American Commission and at the level of the Inter-American Court of Human Rights dealing with this issue. I will mention just a few that have laid very important jurisprudence in the Inter-American system, including the cases of *Congo v. Ecuador*,¹ *Bulacio v. Argentina*,² *Panchito-Lopez v. Paraguay*,³ *Tibi v. Ecuador*,⁴ and the *Guantanamo* case.⁵

* Santiago Canton is Executive Secretary of the Inter-American Commission on Human Rights.

In addition to individual complaints, the Commission conducts country visits. Over the last few years, we have visited at least four detention centers every year. After the country visits, the Commission often produces a report, and there is always a chapter regarding the detention center visits and the issue of torture. On a few occasions the Commission has produced reports specifically about the detention center visit. One example is the Commission's visit to the Challapalca Prison in Peru, which is one of the highest altitude prisons in the world. Following its visit, the Commission specifically recommended that the government of Peru close down the detention center.

Another tool the Commission has is to grant precautionary measures. The Commission has granted several precautionary measures on this topic throughout the Americas, including the one I mentioned earlier relating to the Guantanamo Base.⁶ The Commission also can request provisional measures to the Inter-American Court of Human Rights.

Finally, the Commission also deals with the issue of torture through its hearings. Three times every year, the Commission has hearings here in Washington. During every session of hearings, we receive requests from civil society organizations and in some cases even from governments to hold a hearing on the situation in detention centers and the issue of torture. In sum, these are the different tools the Commission has used through its history to deal with issues of torture, sometimes successfully and sometimes not so successfully.

I believe that the Committee against Torture and the Inter-American Commission on Human Rights face very similar challenges. One is the issue of universality. Both at the Committee and in the Inter-American system, not all Member States are parties to the pertinent legal instrument. In the case of the Inter-American system, out of the 34 Member States only 17 have ratified the Convention against Torture and when it comes to the American Convention on Human Rights, which is our main instrument, 25 out of 34 have ratified it.

The full implementation of the recommendations, which is a major challenge in the Inter-American system, is also a challenge in the universal system at the Committee level. As I mentioned before, there have been very successful cases in which governments have complied with the Commission's recommendations, but in many instances governments do not comply with its recommendations. The same is true in the case of the Committee against Torture.

Another challenge that we all share is the issue of follow-up mechanisms. One of the main problems that we experience in the Inter-American system is the lack of internal follow-up mechanisms setup by governments in order to comply with the recommendations of the Inter-American system or the universal system, including the Committee against Torture.

Now, what can we do looking ahead? In the Inter-American Commission, I have insisted several times that if one looks at the international systems, both universal and regional, for the protection of human rights, one sees a very uncoordinated and uneven system. It is uneven in that, if you compare the European system for the protection of human rights, the Inter-American system, the African system, and then the very incipient Asian system, you see very different levels of development. The European system is extremely well developed; the Inter-American is still struggling to achieve the strength that we need to have; the African is still less developed; and the Asian is basically just starting.

When you look at the UN system in relation to the regional systems, there is an absolute lack of coordination. There has been an effort, over the last two years, to have better coordination, but it is still very incipient and only with the Office of the High Commissioner for Human Rights (OHCHR). In my view, the very few instances in which we share information contribute to a use of tools at every level that is not very effective for the overall protection of human rights.

At the regional level, both in the Inter-American and the African systems, we do look at the jurisprudence of the UN system, and we use it constantly in our decisions. But, the same is not true for the UN system, which does not rely on the decisions of the regional systems, which would be helpful and would contribute to strengthening the regional systems. Moreover, there is very little coordination regarding country visits. Whenever a UN organ visits a country in the Inter-American system, there is no previous coordination or previous sharing of information among the different systems.

As I said, we have started in the past few years to strengthen that inter-system communication. We have a couple of points of contact both at the Commission level and at the UN level in the OHCHR. This communication has been helpful regarding the Universal Periodic Review mechanisms. We do not have the same communication with the Committee against Torture, and that is the possibility we need to explore with the Committee to see if we can have points of contact through which we can exchange information and coordinate visits. It would be extremely helpful if whenever we conduct a visit to a detention facility in the region, we share information with the UN side and vice versa. Sometimes the issue of confidentiality obviously will be a problem. We have discussed that issue with the OHCHR, but we have not been able to move forward and it is something that definitely needs to be further discussed. We need to find a way in which confidentiality can be expanded so we can share information more freely between systems. That coordination and communication, I think, can only strengthen the protection of human rights and hopefully we will soon start to have a discussion.

I am open to answer any question you might have. Thank you very much.



Moderator's Remarks

Thank you, Santiago Canton. On that point of coordination and communication, maybe Yuval Ginba could also respond to that. There is the potential for non-governmental organizations to assist in improving coordination and communication. There are ways in which we can facilitate the regional and international systems working more closely together, to pick up on Jens Faerkel's phrase of "thinking outside the box."

Thank you also, Santiago Canton, for describing the way in which the Inter-American Commission works, which is quite different from the Committee in its ability to go into the field and to engage with States Parties in the field. It would be interesting to explore the lessons learned from that experience in our discussion. Also, regarding resources, it could be interesting to

come back to the issue of how the Inter-American commission work is funded.

I would now like to give the floor to Florence Simbiri-Jaoko, who will give us a presentation from the point of view from a national human rights institution, in this case, Kenya. As Yuval Ginbar mentioned in his presentation, the Kenyan government recently submitted a report, and there was a dialogue in Geneva. It will be very interesting to hear, Florence Simbiri-Jaoko, how you felt that process went, what has come of the process since, and your engagement with the Committee, especially regarding this issue that has been raised about the lack of follow-up to ensure implementation of some of the recommendations. Thank you.

Remarks of Florence Simbiri-Jaoko*

PERSPECTIVES FROM THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

I want to thank the organizers for inviting the Commission to this forum. I would also like to add that the Kenya National Commission on Human Rights (National Commission) is one of the national institutions created in compliance with the Paris Principles¹ with two key objectives: the promotion and protection of the rights of Kenyan citizens in compliance with international, regional, and national human rights instruments. As a result, it has a very wide mandate. The National Commission is a statutory body that carries out the mandate of investigating human rights violations and is one of the few national human rights institutions that has the possibility of constituting itself as a panel and actually offering redress to victims of human rights violations.

As a National Commission, we are able to make very bold reports. On our website, the National Commission documented the post-election violence and listed the names of alleged perpetrators. We shared the information with the government-instituted inquiry, and we are sharing that information with the International Criminal Court. We have also made very graphic reports on the violence perpetrated by gangs and government agencies. We are very confident that our reports do not gloss over anything and we are continuing to improve them. We actually lost one of our informers because of this candor, which is why I would like to discuss the issue of reprisals in the Universal Periodic Review (UPR) process. Insiders are often necessary to obtain accurate information, and they are put at serious risk; some of them have been killed. If you have strong national institutions, whether they are human rights institutions or NGOs that are able to capture what is going on at the national level, their work should also be captured at the international level.

The Kenyan government signed the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in 1997² and submitted its first report to the Committee against Torture (Committee) in 2008.³ Established in 2003, the National Commission also participated in this process. When the National Commission was established, the Kenyan government was very behind on its reporting obligations and had not done most of its reports. The National Commission was instrumental in empowering government officials to make the reports and following up with the government to ensure that the reports were completed. We were very happy that the government finally was able to do its first country report.



One concern for the National Commission was that Kenya has had a history of oppression, torture, and violence perpetrated by the state and state agencies, but because of this culture of impunity, torture and violence is also widespread by non-state actors. Ultimately it is the citizen who suffers as it is generally the citizen who is most vulnerable. When we looked at the report from the Kenyan government and the responses from the Committee, we were happy that the Committee took these issues and reports by the National Commission and by NGOs that participated in the process.

Some of the concerns that the Committee raised about the Kenya report were very obvious. Others, however, were more nuanced; for example, the Committee identified the linkages between violence and denials of economic, social, and cultural rights. That was very true in Kenya because violence, especially violence against women, is most often perpetrated in the private sphere and is a result of the lack of empowerment of women and the use of cultural and customary practices that are degrading to women and children. The Committee asked Kenya to take all measures to ensure that a lack of resources is not an obstacle to access to justice.⁴ It also expressed concern about reports of arbitrary arrest.⁵ Police brutality and arbitrary arrest are common in Kenya, used as means of extracting confessions from criminals and as a tool of intimidation, especially for critics of the government. The Committee also noted with concern that the laws governing violence against women, especially sexual exploitation and trafficking, were insufficient to ensure prevention or that perpetrators were actually punished.⁶

* Florence Simbiri-Jaoko is Chairperson of the Kenya National Commission on Human Rights.

The Committee was generally very accessible, and it was possible to interact with Committee members and to give views. The National Commission, for example, was given an opportunity to give feedback and look at the drafts of the reports before they were made public. In addition, all the NGOs that participated noted that the Committee even sat on Sunday and some of the members gave their own personal time to interact with NGOs. The National Commission and NGOs involved in the process gave feedback concerning the issues that the Committee took into account: the post-election violence that had just occurred in Kenya; extrajudicial killings that occurred in some areas in Kenya, such as the Mount Elgon area; and killings occurring due to criminal youth gangs in the urban areas. This feedback ultimately enriched the Committee's report.

We also noted some shortcomings in the Committee's report. One that has been already addressed was a lack of enforcement mechanisms and that, nine years down the road since Kenya ratified the Convention against Torture, there was no way of actually coercing or ensuring that Kenya did a report despite much reported violence and torture in Kenya. We also noted some structural challenges, especially the likelihood of differing interpretations by different bodies and UN mechanisms. Further, the Committee did not take into account the state's progress in complying with recommendations by the Special Rapporteur on Torture, who visited Kenya in 1999, or the state's progress in implementation of concluding remarks of other treaty bodies that touch on matters that related to torture such as the International Covenant on Civil and Political Rights.⁷

One of the challenges for the UN system is that there are so many procedures and mechanisms, so it is a challenge just keeping up with what is going on in different treaty bodies. For the state, this probably also offers an opportunity to escape responsibility, because if they know that a treaty body is not well-coordinated and is not actually working together with regards to specific issues, then it is easier to make appropriate responses in one forum that are completely different from those made in another forum.

Another challenge for the Commission specifically is that, although the venue for the Committee against Torture meeting was accessible, time during the session was quite short. We noted that some of the responses by the government were given without any supporting evidence, which led to misinterpretation. For example, the Committee asked the Minister to respond to the fact that the Chief Justice in Kenya had directed that all constitutional and judicial review applications be submitted in Nairobi, the capital city. In my view, this was creating grievous violations to citizens who could no longer file these applications as they did before in different cities of the country. There was not sufficient time, however, for this Minister to actually respond in full or substantiate these claims, which had been raised by the legal fraternity, NGOs, and others.

Looking at the recommendations generally, my feeling is that the recommendations tried to be specific, but were not far-

reaching enough. Historically, it is quite obvious that Kenya has serious structural problems in terms of legal and judicial processes. This was noted even in the Leopard Process when Kenya underwent the African Peer Review mechanism, which resulted in analysis of governance structures and recommendations on weaknesses of both the legal and judicial sectors in Kenya.⁸ The Committee's recommendations were probably not radical enough — requiring the government to undertake holistic and drastic judicial and legal reforms — for where Kenya really was in terms of torture and impunity. The Committee looked at very specific issues like the need to reform bail processes, which was a proper recommendation, instead of the larger problem: a judicial system that is totally unresponsive to citizens, especially vulnerable citizens.

The reporting process came at a time when Kenya had just signed the Kenya National Dialogue and Reconciliation Accord,⁹ which created a coalition government committed to creating transitional justice mechanisms as well as carrying out very far-reaching reforms. It would have been useful for the Committee to have picked up on those issues, so that in times of follow-up the Committee could review what the government had committed itself to and then how to hold it accountable for some of those issues.

Another challenge, I believe, is the lack of connection between the UPR process and treaty body reporting. Kenya is undergoing UPR this year, and it went through the Committee against Torture review process in 2008 in addition to CEDAW, the African Peer Review, etc. Thus, it is possible that the state can be overwhelmed by all these process; there is need to have a clear understanding of the synergies that must be created and sustained for meaningful change to emerge. In this regard, I am not sure that there has been serious attempt on the part of the Kenyan government to look at the UPR in a holistic manner and to make it more participatory to a wider public. There is a case for more pressure by the UN mechanisms that have been involved with the state to ensure that the issues they have raised and, especially those captured by the Human Rights Council as resolutions, are addressed by the state in their UPR reports.

Lastly, one of the concerns of the National Commission, as a body that works very closely with victims of torture as well as witnesses and actors who face threats due to their engagement with human rights issues, is that of exposure to reprisals by the perpetrators of violations. Whereas, there is a national awareness of the problem, the UN systems have not addressed this risk with specificity and practicality as part of their engagement with the individuals or institutions that may face these risks. It would be useful for the Committee, the Special Rapporteur on Torture, and the Special Rapporteur on Extra judicial Killings to work very closely with the Special Rapporteur on Human Rights Defenders and the Special Rapporteur appointed by the African Union. This issue should be addressed by creating a preventive process so that, before the mechanisms come into place, or before a country is visited, mechanisms are in place to minimize the risks to those who are willing to cooperate by

not exposing them to further violence as a result. In addition, it would be useful to address the state's obligation to ensure there are no reprisals against victims or institutions involved.

There is a lot of room for improvement on the way that the Committee works. Unfortunately the National Commission has only interacted with the Committee for a short time, but what we have seen so far has been very useful. Our institution is involved in disseminating the Committee's recommendations, getting citizens to understand how the process works, and try-

ing to sensitize them on holding the government accountable to the recommendations, to the end of ensuring that these recommendations are implemented. Additionally, we believe that the Committee's decisions are useful as they set precedent for commissions, such as the Kenyan National Commission, that have capacity to hear and determine individual and group cases and to offer redress. The application of the legal principles enunciated by the Committee form a critical element of international jurisprudence whose local application can only enhance the enjoyment of rights by citizens.

Moderator's Remarks

Thanks very much, Florence Simbiri-Jaoko. I'm sure that the last comment you made was music to the ears of Felice Gaer, who within UNCAT has to review the follow-up on recommendations. To hear that a national human rights institution is disseminating the Committee's recommendations is interesting, because this is a fundamental step that needs to be taken more regularly. It is also interesting to hear your national perspective on the engagement with the State Party prior to, during, and following the reporting process. It

would be interesting to come back in the discussion, if we have enough time, to the contact that exists between civil society organizations, national human rights institutions, and government authorities following the UNCAT process.

Let's move on now to conclude with Felice Gaer, the UN Committee against Torture Member, and then Joao Nataf, the Acting Secretary of the UN Committee against Torture, for their presentations. Felice Gaer you have the floor.

Remarks of Felice Gaer*

FROM WORDS TO REALITY: IMPLEMENTING THE CONVENTION AGAINST TORTURE

Iwant to thank the Washington College of Law and Dean Grossman for convening this conference and my colleagues on this panel for having raised so many interesting questions. I came with a prepared set of remarks about the Committee's work on what I call "the three Rs" — ratification, reporting, and recommendations, plus needed action to realize a fourth R, "reality check," which refers to extending the Committee's follow-up procedure and ways to strengthen its effectiveness. Although there are many concerns and little time, I will respond to the other specific points raised by my colleagues at the end of my remarks.

We were asked to talk about how to build on the Convention against Torture's successes and address its shortcomings. According to the Convention's preamble, states had a clear-cut purpose for its adoption: "desiring to make more effective the struggle against torture."¹



* Felice Gaer is a member of the Committee against Torture and the Director of the Jacob Blaustein Institute for the Advancement of Human Rights.

Some observers ask what this treaty really is: Is it an aspirational human rights treaty? Is it a treaty that addresses a specific crime? Is it a “how-to” treaty that presents a model for actions that must be taken by ratifying states?

The Convention against Torture is modeled on the Convention against Genocide. It falls in a different category than the more aspirational human rights treaties. We now have three such treaties that fall clearly in this category: the Convention against Genocide,² the Convention against Torture, and the International Convention for the Protection of All Persons from Enforced Disappearance (Disappearance Convention),³ the last of which is actually modeled on the Convention against Torture in many ways.

These three conventions address a series of specific crimes that are to be eradicated. What does the Convention against Torture seek to accomplish? In the simplest terms, the Convention seeks to have states comply with their signatures and promises. But, more proactively, it also seeks to prevent and punish torture.

How do you promote compliance in this context? You promote compliance as a member of the committee by demanding the “three Rs,” which I mentioned previously. You seek to obtain ratifications of the Convention and its optional protocol; you seek to obtain periodic reports from the States Parties to the Committee, as required by the Convention, and to do so on the Committee’s terms, as opposed to the terms of each country’s own legal framework; and you make recommendations to the government of the States Parties, pointing out shortcomings and calling for a corrective response. Finally, as of 2003 we have added to this list the issue of follow-up, “the fourth R,” standing for reality check. Our colleague from the Danish Foreign Ministry Jens Færkel reminds us that there is also a fifth R, and that is reform. While reform of the treaty system is not part of the Convention per se, it is a major everyday concern of those of us charged with its implementation.

On the issue of ratification, the Convention against Torture currently has 146 ratifications. Seventy-five percent of all UN Member States have also ratified the Convention. That is a very large proportion, and it has been increasing. Forty-seven of the 146 States Parties have ratified the Optional Protocol⁴ which permits the Sub-Committee on Prevention (a separate body) to make country visits. Unfortunately, even with 146 ratifications, the Convention against Torture remains in sixth place among the six principal human rights treaties in the UN system, a fact of which we are well aware.

Over the last decade, scholars have engaged in a debate on the question of the real effect of Convention ratification. Some say the Convention is not only ineffective in preventing, but may actually increase, torture because it may give a free pass to governments. The studies of Hathaway, Vreeland, Goodliffe, and others claim that the Convention gives symbolic cover to dictators and countries that torture.⁵ According to this argument,

the states can just sign the Convention and then walk away, pocketing the fact that they have somehow done a good thing, while at home, of course, they do not take steps to implement the Convention. It is argued that they have an easier time increasing torture *because* they have signed the Convention.

I would suggest that the argument that ratification comes at no cost — that more dictators who torture sign than those that do not, and that the Convention allows governments to have symbolic cover — is a flawed interpretation. It does not really take into account what conventions can do, and aside from the dubious data used in some of those studies, which I will not go into, this conclusion does not recognize the fact that the Convention is not just about signing or adopting a law to criminalize torture. It is about undertaking a number of specific obligations and to carry out a variety of activities required by the Convention: to investigate, to educate, and to provide redress or reparation to victims.

Importantly, the Convention has also raised awareness and understanding of the variety of forms of torture that exist and their prevalence today. The Convention has built a political and cultural basis for compliance with the Convention. One need look no further than the important work on the issue of rape as torture, not only by the Committee, but also by the several international criminal tribunals, to understand that that torture has many forms, including some that initially were recognized only by those knowledgeable about gender-based violence. This Convention and this Committee played an important role in raising awareness, in empowering victims, and in mobilizing support for society to create the necessary institutions, whether they are national human rights commissions, regional commissions, or other NGOs, or other legal measures in the society itself to work to combat and eradicate all forms of torture.

On the issue of reporting, the Committee receives many reports — in fact, it has a backlog. The Committee examines seven countries in each session, for a total of fourteen in a year, which is more than most of the other committees, and certainly more per day of meeting time than any other committee, except arguably the Committee on the Elimination of Racial Discrimination and the other larger treaty committees, which have two chambers and are thus able to cover more. The Committee against Torture has only ten members while the other treaty bodies have between 18 and 23 members. So, per person, per meeting time, per report, the Committee against Torture is overwhelmed with the task of examining more reports than other treaty bodies. Moreover, other Committee activities like the preparation of General Comments do not get the needed time or attention. Certainly, compared to other treaty committees, less time is available to develop these activities. I think an earlier panelist said the number of General Comments in the Convention against Torture was “pathetically small,” but I would say that while the number is small it is not “pathetic.” In fact, given the lack of meeting time and other limited resources, it is significant that any have been adopted.

Since the treaty system began, governments have complained about the reports they must submit. Governments, time and time again, give the Committee and other treaty bodies every imaginable explanation and complaint that they can think of for why they cannot get reports to us and why they need extra attention, care, time, and technical assistance to help get their reports completed and submitted on time. Ironically, and notably, that argument has now gone out the window with the introduction of the new universal periodic review (UPR) procedure in the Human Rights Council, the intergovernmental body created in 2005 to replace the Commission on Human Rights. The UPR procedure has now reviewed close to half the UN Member States, and every country has submitted a report, and *none* of them have been late. There is only one country: Haiti, which has even asked for a formal delay; it did so after the recent earthquake, and its request was approved. The first ninety countries did not have problems coming in on time with a report on *all* of their human rights commitments, submitted to the political bodies of the United Nations.

With this stellar record in view, we cannot accept any more complaints and excuses about governments not being able to produce reports to the treaty bodies. The Committee against Torture has nonetheless been very flexible on this issue to date. The Committee has revised its procedures to try to overcome the fact that states complain about not being able to submit reports on time. What the Committee has done instead is to adopt a list of issues *prior* to reporting. This is a way to changing the size, the style, the format, the response mechanism, and consequently the ability of a State Party to report on its compliance with the Convention it has ratified.

The third issue I would like to address is the recommendations that the Committee makes in response to country reports, as well as in its inquiries and individual petitions. Since 1993, the Committee has issued formal lists of recommendations following the review of the State Party reports. It did so even earlier for the other two procedures.

States Parties frequently come in and tell Committee members that the recommendations adopted by the Committee are not binding, whether they are views on a country report, or on an inquiry, or on a petition. It is the job of the Committee, with the help of everybody on this panel and in this room, to change that reality. Why are the Committee's views — in the form of recommendations — not binding? Why is this procedure so weak? The efficacy of the treaty regime requires that the supervisory committee must be in a position where it does not casually give approval to States Parties, saying, "We are really so thrilled to discover that countries have adopted a law criminalizing torture," or something like that. The Committee's views need to be — and be seen to be — not only authoritative, but with real impact.

How can such progress develop? There are some models worth looking towards. For example, the Inter-American system has a human rights court to which the Inter-American Human

Rights Commission can appeal, and that makes it a stronger process. The treaty body system has nothing of that sort. Also, one has to ask seriously whether the proliferation of new and different treaty bodies dilutes the decisions and views of the Committee against Torture or whether it strengthens them; whether adding new and totally independent mechanisms has a strengthening effect or results in a weaker outcome; and whether something else might be necessary in the universal system of human rights protection.

Another way to examine progress is to look at whether there are results from the Committee's recommendations that can be considered successes.

At present, 109 countries have incorporated universal jurisdiction into domestic legislation. Fourteen countries have actually tried cases based on it. This is related to the Convention's Article 5,⁶ and can be considered a positive result. As the Convention demands, torture is criminalized in domestic law in most countries reporting to the Committee. Rape is recognized as torture, and the justification for why it is torture is established, and so is the principle that, as torture, it is absolutely forbidden. *Nonrefoulement* procedures exist in country after country, and they comport with, in many cases, the requirement of Article 3 of the Convention that no one shall be returned if he or she faces a real risk of torture;⁷ in other cases, we are still working on bringing the State Party into compliance. I also want to point out that even in a complex area like reparation and rehabilitation, and even compensation, the Committee has been able to see results in particular cases, sometimes as a result of specific investigations into petitions brought to the Committee under its optional Article 22 procedure.⁸

I spoke earlier about the "fourth R" — reality check, which arises in the context of the Committee's follow-up procedure and its effectiveness. There have been reports from the Committee's Rapporteur on Follow-up to Country Conclusions under Article 19 and, next year, there will be further reports on the follow-up procedure. To summarize, the Committee has used its follow-up procedure for 87 country reviews involving 82 countries examined since 2003. For 76 percent of the countries, the Committee has called on State Parties from all regions of the world to conduct prompt, thorough, and more effective investigations; in 61 percent of the cases, the Committee has asked countries to prosecute and sanction the act of torture; and for 57 percent of the countries examined, the Committee has complained to the countries that they lack adequate basic legal safeguards, such as providing access to a doctor, a lawyer, or a relative. Coming in at sixth or seventh place have been recommendations for follow-up regarding gender-based violence. The evaluation of the Committee follow-up procedure is a work in progress and lots still has to be accomplished in this regard.

Allow me to comment on remarks of my colleagues today. The initial remarks from Amnesty International referred critically to the Committee's "consistency" three times, and we have heard that same theme repeated on this panel. I will not use the

traditional quotation about consistency being a hobgoblin, but more to the point, the question is: on what issues are we going to talk about consistency? We have heard about the issue with regard to the death penalty and everything else the Committee is doing. There is well-known disagreement on the Committee over whether the death penalty is prohibited by the Convention, so, in addressing consistency of the Committee's conclusions on this topic, one might want to keep that fact in mind.

On the question of the Inter-American Commission and other available tools, I would like to recall that, in trying to think of how we could further strengthen the Convention, it is worth recalling the proposal by Manfred Nowak for a world court for human rights.⁹ Alternatively, one might also want to think about the question of whether there needs to be some sort of an appellate body in the treaty system, which would have binding authority. Nowak says countries should come in and hand over all petition procedures under the human rights treaties to a world court on human rights. That is his proposal. Well, a mechanism like the Inter-American Court on Human Rights, an appellate body with binding authority to which cases may proceed after going through the Inter-American Commission, might be a better model than Nowak's suggestion, and I would suggest having a look at that.

On the question of the available tools, there was a lot of discussion of the UPR and its relationship to the Committee. Again, I would like to say the resources devoted to the UPR by the Office of the High Commissioner and the States Parties together are like a dream for anybody who has worked on treaty bodies. The number of people tasked to the preparation of documents, the time, the resources, webcasting, all of these could be utilized to strengthen the treaty body process without needing a court.

We have just had a splendid presentation from Florence Simbiri-Jaoko about how a national human rights commission can be involved with the Committee's concerns. I want to offer one small correction. My understanding is that the Kenya National Commission did not have access to a draft of the Committee's concluding comments. Concluding comments are a confidential matter, and while there have reportedly been incidents in which some former members of the Committee went to governments with draft texts of the conclusions, I am not aware of any case ever in which an NGO has been given concluding comments in advance, and I would hope that there would not be such a case. My understanding, and that of my colleagues on the Committee, was that what the Kenya National Commission received was the State Party's replies to the Committee's questions, which are part of the public record

Finally, once again I return to the issue of follow-up. There is now something called the Inter-Committee meeting, which brings together representatives of each of the treaty bodies to talk about reform of treaty body procedures. At the meeting in late 2009,¹⁰ it was decided that a new sub-committee on follow-up would be created to help consolidate and prioritize the recommendations of the treaty bodies so they in fact feed

into the UPR process, the technical assistance programs of the High Commissioner, the work of Special Rapporteurs, and others that handle the more active, on-the-ground UN mechanisms. Whether that will actually come about in practice is anybody's guess, but with your interest and support, it might happen.

FINAL COMMENTS

On the question relating to the scope of the Committee's focus, of course we can do as was suggested: limit our activities and focus the Committee's work on only a couple of issues, and then no doubt, we will have a seminar a year from now, in which not only Amnesty, but also Human Rights Watch, will come and have a robust discussion about why the Committee is not doing enough!

More seriously, we have considered it enormously important to be sure that we are addressing everything that falls within the scope of torture. At the same time, we are aware of our working methods, which can sometimes produce peculiar results. For example, with the follow-up mechanism, we have found that of the 87 countries reviewed, we have identified for follow-up between one and five topics for all but 35 countries. We have changed our working methods, and now adopt conclusions which are much longer. As a result, it now appears that the Committee identifies six or more conclusions for follow-up items, which is a huge burden.

Of course, we have to put two things together: how to be efficient; and how to be more precise with our working methods.

Why is codification presented as a positive factor in the example that I gave? First of all, I was arguing with the kinds of data that are used in the articles by Hathaway, Vreeland, and others. Secondly, because codification is not insignificant if the rest of the legal system also works. The point about Kenya's judicial system not being responsive to the rest of society is one that we grapple with on a daily basis. If you will look at the Committee's General Comment No. 2, paragraph 11, in which we talk about the importance of codification of the definition of torture, you will see that the Committee considers that codification emphasizes the need for appropriate punishment that takes into account the gravity of the offense.¹¹ Furthermore, codification strengthens of the deterrent effect of the prohibition and enhances the ability of responsible officials to track the specific crime of torture, and enables and empowers the public to monitor and, when required, to challenge state action, as well as state inaction, that violates the Convention. Thus, codification can be and is a good indicator as to whether states uphold such conventions and whether they do more harm than good, which feeds into any discussion of efficacy and compliance theory.

On the issue of empowering the watchdogs and the NGOs, I challenge anyone to look at the procedure of the Committee with regard to NGOs and their involvement and conclude that this is not at the forefront of what the treaty committees have been doing. We not only have, long before other committees, called

on the NGOs to submit material in advance and made it a formal part of the Article 19 review process,¹² but now with the web, we post those submissions that come in to us online and make them available worldwide. This was the model, I think, for the UPR publishing NGO submissions and, frankly, I think that this is enormously empowering.

On the subject of the five Rs and the lack of inclusion of local abuses in the national reports: that is the purpose of our whole review process. No report comes from a State Party and floats through unchallenged.

Finally, addressing the definition of torture and the potential for broader applicability, I think that everything we do focuses

on the fact that this definition with its four purposes and its many components is a very broad one, not a narrow one. See our General Comment No. 2 again, you might look at paragraph 18, which makes it clear that the failure of the state to exercise due diligence to intervene to prevent acts impermissible under the Convention provides a form of encouragement or *de facto* commission constituting state responsibility.¹³ The Commission has applied this principle of a State Party's failure to prevent and protect victims from gender-based violence, which is clearly looking broadly at this definition to encompass acquiescence, consent, and find any relevant responsibility of the state there. We try to do that at every session.

Remarks of Joao Nataf*

First of all, I would like to thank the Washington College of Law, Amnesty International, and the Chairman of the Committee against Torture, Claudio Grossman, for organizing this conference addressing the evolution of the Committee against Torture (CAT), and especially this panel on the Committee's successes and shortcomings.

It is particularly important that it happens now in 2010, as in my view, the Committee is at a crossroad, as I will try to explain. Being the last one to speak on this panel has pros and cons: the pros are that issues that I want to mention have already been presented, and the cons are that I have less time to mention what has not already been said.

Therefore, I beg your indulgence for having now to give a completely unstructured presentation considering that I am asked to reply to some of the issues just raised by my predecessors, and in a limited time, thus I will not be able to follow my presentation.

I start by referring to the four main tasks of the Committee under the mandate set in the Convention against Torture: (1) considering individual complaints; (2) undertaking confidential inquiries; (3) adopting general comments; and (4) considering state reports. For each of these tasks, I will as an observer of the Secretariat take stock of the Committee's achievement, analyze the current situation, and see how the shortcomings may be addressed in the future to improve the Committee's performance.



INDIVIDUAL COMPLAINTS

Thus far, since 1988, the Committee has registered approximately 400 individual complaints concerning 29 States Parties to the Convention. It has considered around 300 of such communications, decided on the merits of 150, and found violations of the Convention in approximately fifty of them. However, the current situation is that close to 100 individual complaints are pending before the Committee. This backlog has been criticized, especially by State Parties. There are also concerns that, when interim measures have been granted, especially in the case of Article 3 of the Convention, states' *nonrefoulement* obligations, the Committee is taking a long time to decide on the merits of

* Joao Nataf is the Acting Secretary to the UN Committee against Torture.

these cases.¹ This is a problem for States Parties, but also for rights holders, because if the decision is not taken in an expeditious way, the procedure at the national level is paralyzed.

CONFIDENTIAL INQUIRIES

As to confidential inquiries, only eight States Parties out of 146 have opted out of this procedure, thus not recognizing the Committee's competence in this area. As of now, the Committee has undertaken seven confidential inquiries and at each session allocates time to discuss this important issue, as the Committee members always look very cautiously into the issue of allegations of systematic practice of torture in a State Party. I hope this responds to the questions raised about this confidential procedure.

GENERAL COMMENTS

With regard to general comments, the Convention makes specific mention of the possibility of the Committee adopting general comments, despite the criticism of some with respect to general comments adopted by treaty bodies. However, in the past 22 years, the Committee has only adopted two general comments, with over eleven years between the first and the second. This is definitely a shortcoming of the Committee's work. On General Comment No. 1, it has to be mentioned that it is outdated and actually detrimental to the Committee's actions, as it states that the Committee is not a "quasi-judicial body."² I believe that nowadays it is agreed that treaty bodies are, in fact, "quasi-judicial bodies" despite the fact that their decisions are not enforceable. It is important that the Committee looks into readdressing this issue. On General Comment No. 2, a lot has already been said on this panel, including that it was very welcome to all human rights stakeholders, so I will not come back to the point.

On the adoption of general comments by the Committee, I would like to draw a parallel with regard to other treaty bodies. As an example, I will take the Committee on Elimination of Discrimination against Women (CEDAW). It has had approximately the same number of sessions as the CAT, as it just had its 45th session in January 2010, while CAT will have its 44th session in April 2010. However, CEDAW has adopted 26 general comments and CAT only two. There is a clear discrepancy between these numbers. Similar comparison with other treaty bodies could also be done. In my view, in addition to improving its working methods, the main reason for such difference is that Committee Against Torture has only ten members and most other Committees have either 18 or 23. Therefore the burden of work is much heavier for each member of this Committee just for this reason, not to mention the broader mandate of the Committee.

The issue of general comments is also important as it relates to the interpretation of the Convention, and the study and reflection on the provisions of the Convention. Due to the Committee's lack of general comments, this field has been left

free for other entities. This is especially the case of the Special Rapporteur on Torture, who has actually adopted reports on a large variety of issues relevant to the Convention and its implementation. These issues range from anti-terrorist measures to corporal punishment, from gender-specific forms of torture to universal jurisdiction and solitary confinement. The Special Rapporteur has actually done some of the work that should have been done by CAT despite the fact that the Committee is the guardian of the Convention.

Other entities also have mandates for which the Convention is relevant. I could cite the Working Groups on Enforced or Involuntary Disappearances, or on Arbitrary Detention; or the Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions, on Contemporary Forms of Slavery, on the Promotion and Protection of Human Rights while Countering Terrorism, on Trafficking in Persons, just to mention a few examples of other Special Procedures of the Human Rights Council also have overlapping mandates with the Committee against Torture.

STATES PARTIES' REPORTS

Finally, regarding the examination of States Parties' reports, since 1988 the Committee has adopted more than 270 concluding observations on 113 states that have reported, at least once, to the Committee.

Let us now look into how the Committee interacts with States Parties to the Convention with regard to their reporting obligations and the implementation of the Convention's provisions. For that purpose, the Committee has established several tools. For the states that have never reported to the Convention, it sends reminders and draws the attention of these states on the importance of reporting and to fulfill their obligations in a timely manner. Actually, the number of states that have never reported has dropped from 2007 to 2010 from 40 to 33. Addressing a question raised by the panel about non-reporting states, the Committee can schedule a country for consideration under its rules of procedure without having received a report. It has actually decided to do that twice in the past and was successful with this approach. It gave a deadline for these States Parties to submit a report and, surprisingly and quite quickly, these states presented their reports. If the report had not been presented, the Committee could have considered the situation in that country absent of a report. This shows that if states really want, they can prepare and submit a report to treaty bodies. The obvious example of the will of states is the case of the Human Rights Council's Universal Periodic Review (UPR) for which, up until now, all 96 states scheduled for the UPR have appeared before the Council. Only three have not presented their reports despite being reviewed nevertheless. This is far away from the way states interact, in general, with treaty bodies. Taking the example of the Committee against Torture, more than twenty states have reports that are overdue for more than six years, and 33 states have never reported.

With regard to states that do report to the Committee, the Committee has developed other means of engagement with them. A first measure is the follow-up procedure, which has already been addressed by Ms. Gaer in this panel, and has proved to be a successful one. Despite the lack of time, I will point out in more detail a second procedure that I think it is an important innovative procedure adopted by the Committee in 2007: the so-called “list of issues prior to reporting.” First, I just want to mention the interaction that the Committee has with States Parties, NGOs, and national human rights institutions (NHRIs). Each year, the Committee meets with State Parties, as it will do during its May 2010 session, when all States Parties are invited to have an informal dialogue with the Committee. In addition, at each session, the Committee also sets aside one hour per report to meet with NGOs and one with NHRIs. Without a doubt, I think that CAT has been on the forefront of the interaction not only with State Parties, but also with NGOs and NHRIs.

The Committee’s proactive and innovative procedure I just mentioned is the adoption and remittance of a list of issues to States Parties before they submit their reports to the Committee such that the replies to this list of questions will constitute the state report to the Committee. With this procedure, the Committee is pioneering what could be the future of treaty reporting. Other treaty bodies are now looking into the same possibility. It is an optional reporting procedure to the one established in Article 19 of the Convention. Therefore, if states so decide, they can avail themselves of this new procedure which facilitates their reporting obligations. If they do not, they can still report under the normal reporting procedure.

This new reporting procedure has several benefits. First, the reports submitted under this procedure will be far more focused than a normal report because States Parties will be replying to specific questions, which were tailored by the Committee

specifically to the state in question. Second, it will allow State Parties to report in a timely manner, as the Committee establishes a date for to submittal of the answers corresponding to the due date of the report under the Convention’s established periods. Third, it will certainly also facilitate the reporting process because it is much easier for State Parties, especially for those that do not have the necessary financial and human resources, to reply to specific issues rather than prepare a full-fledged report. The fourth advantage is that there will not be any subsequent list of issues. Thus, no other procedural step is needed between the submission of the report and its consideration. Finally, the fifth positive aspect is that it will shorten the period reports are pending before the Committee until they are examined. After answers to the list of issues are submitted as the state report, the Committee will examine this report within an expected maximum period of one to one-and-a-half years. The shorter the interim period is, the better the dialogue will be with the State Party delegation coming before the Committee. These are the main advantages of this procedure, which should make it a success, but which still fully depend on the states’ cooperation. Thus, it is as yet too early to make a complete assessment of the alternate reporting procedure.

The Committee has decided not to apply this procedure to initial reports but, in my opinion, it should also apply it to states that have never reported. According to the Committee, initial report should be full-fledged. However, one could argue that it is better to have a report submitted under this new procedure, even if more focused on certain issues, than having no report at all. In addition, if a State Party follows the guidelines and responds properly to the issues raised by the Committee, including the non-specific questions, its report should be as complete as a full-fledged report submitted under the traditional procedures. Therefore, I think that the Committee could revise this procedure to also try to assist states in submitting an initial report.



In summary, as I am told that I have exhausted my speaking time, the Committee has one of the largest mandates of all treaty bodies, the smallest membership of all, and inadequate meeting time. Irrespective of these difficulties, it has decided to establish an innovative procedure to assist States Parties to fulfill their obligations, despite the additional burden that it creates for the Committee and the Secretariat. Could the Committee have done more? It could have further improved its methods of work, but it definitely could not have done as much as other committees without their better conditions of membership and meeting time. In addition, the Committee, as mentioned previously by Mr. Faerkel, faces the dilemma that further assisting States Parties to report will increase the backlog of pending reports and will further reduce the Committee's available meeting time dedicated to other issues, such as complaints and general comments.

The question of strengthening the Committee and looking into its evolution is an important one to address at this moment for several reasons: a new Special Rapporteur on Torture will be appointed this year; the Subcommittee on Prevention of Torture will grow from 10 to 25 members, which will increase its visibility and allow it to undertake many more visits; the work of the Committee has recently been under some criticism of certain states despite, in my opinion, such attacks being unfounded; and finally, the International Convention for the Protection of All Persons from Enforced Disappearance will soon enter into force, thus creating a new treaty body whose mandate will, in certain aspects, overlap with the Committee's.³

There are three possible ways the Committee could adjust to this landscape. First, the Committee could reduce its activities, interpreting its mandate to a minimum; I think this would be very negative, as it would lessen the effective prevention and struggle against torture. Second, the Committee could try to have its membership increased; this will be very difficult because it would require amending the Convention, which would take at least a decade.

The third possibility is to increase the Committee's meeting time, which is exactly what the Committee has decided to do, in its 2009 annual report to General Assembly requesting more meeting time. In his address to the 64th General Assembly, the Chairman made again this request.⁴ However, the General Assembly decided not to grant the Committee more meeting time. This is interesting as just one year before, in 2008, another treaty body, the Committee on the Elimination of Racial Discrimination, which was also facing a backlog of reports but had no backlog of individual complaints, was given additional meeting time. How can this be interpreted?

To conclude, in my opinion, the Committee may improve its working methods but the international community should provide it with the adequate working conditions to perform effectively and in accordance with the mandate set out in the Convention; that is its responsibility. Thank you. **HRB**

Endnotes begin on page 53.

