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Panel III: Challenges in the Implementation of the Decisions of the Committee against Torture

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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

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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 pre-trial 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 IC-CPR,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



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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

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.

SUCCESSSES 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

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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 Guidelines⁴⁰ 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 Huneus, 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).