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Panel IV: Challenges to Proving Cases of Torture before the Committee against Torture

Gabriela Echeverria

Mario López-Garelli

Hari Phuyal

Juan E. Méndez

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

Opening Remarks of Gabriela Echeverria, Moderator*

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



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

I remember many years ago I was in a meeting organized by Open Society Justice Initiative—where I first met Karinna Moskalenko—where we were talking about implementing a project in Central Asia to bring cases of torture before UN treaty bodies. The reactions of the lawyers who were invited to this strategic meeting were not very optimistic (despite Karinna’s very inspiring presentation about her experience bringing cases before the ECtHR in Russia). They all thought it was not the same to bring “international” petitions before UN monitoring bodies as to bring cases before

the ECtHR. Their main concern was that the UN bodies could not enact binding decisions in the same way as the ECtHR. After a long conversation on this issue, on the legal arguments concerning enforceability of this type of decision, and after analyzing the options that were available in the region, it was decided that it was worth pushing this project forward. The idea behind it was that even if these decisions could not bring “real” remedies to the victims, the cases could show the systematic failures of the states that allow these violations to happen. Therefore, these decisions—even when not

implemented by the States covered by the project—could be used in other forums, for example to lobby legislatures in order to change key legislation. In short, it was agreed that even if states do not generally consider these “views” as legally binding and enforceable, at least the opinions of UN bodies could be used in domestic lobbying efforts to bring about legal and practical changes to combat torture.

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

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

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

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

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

Presumptions are also very important. While it is difficult to prove torture, it is easier for victims to show that there was a failure to comply with the state’s procedural obligations in regard to torture. Under certain circumstances, states need to show that they have complied with their obligations to investigate and prosecute. They need to rule out

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

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

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

Remarks of Mario López-Garelli*

INTRODUCTION

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



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

System, where Article 1 recognizes that every human being has the right to life, liberty, and the security of his person.⁴ This was developed more precisely in 1969 when the American Convention on Human Rights was adopted by the Member States of the OAS.⁵ Article 5 of that instrument recognizes that every person has a right to have his physical, mental and moral integrity respected and that no one should be subjected to torture or cruel, inhuman or degrading treatment.⁶ The most complete definition of torture is in the Inter-American Convention to Prevent and Punish Torture⁷ and the terms—as mentioned—are a little broader than those of the UN Convention against Torture.⁸ For example, one difference is that the Inter-American Convention does not require the suffering to be severe; that is one very important difference. And it also makes reference to any other purpose when it talks about the purpose or purposes element. It is more general and broad rather than “such purposes as,” which is the term used in the UN Convention.

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

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

DEVELOPMENT OF INTER-AMERICAN SYSTEM STANDARDS

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

BUILDING A CASE BEFORE THE INTER-AMERICAN SYSTEM

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

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

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

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

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

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

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

The other approach is to directly shift the burden of proof where the persons who claim that they have suffered torture or other cruel, inhuman or degrading treatment were under the full control of the state. In these situations, the state bears the burden of proving that the victim was not subject to violations of physical integrity while under custody and, if such evidence is not presented before the organs of the system, then the Commission or the Court may find that the state is responsible for a violation of Article 5. An example is the *Case of Juan Carlos Abella and others*, which is also known as the *Case of La Tablada*, decided by the Inter-American Commission. In that case, the persons had been detained, I believe by the Argentine federal police; there was an analysis of the amount of wounds that they had suffered before and after their detention, or the moment they were captured, and several days after their capture. The state was not able to provide the evidence showing how those wounds were inflicted. Thus, the Commission found in that case that the state was responsible for the violations of Article 5.²⁵ There is another case where the analysis was similar, the *Case of Juan Humberto Sánchez* against Honduras, where the person was found dead days after being captured by the military in Honduras. Since there was evidence that the person was in normal physical condition at the time of his deprivation of liberty, and considering that the state was not able to prove how the damage to the dead body occurred when it was found, it was not able to prove what happened to him. Accordingly, both the Commission and the Court found that the burden of proof was not met; they were not able to prove what had happened to Mr. Sánchez, and therefore established that Honduras was responsible for the violation of Article 5.²⁶

There are other cases: the *Case of Gutiérrez Soler* against Colombia, where the Commission and the Court found that there was not enough evidence, but decided that the absence of such evidence was directly the responsibility of the state.²⁷ This is so because even though there were documents, they were not

complete, and these documents did not allow the Court to establish very clearly that he had been subjected to torture, including anal rape at the hands of the police with the participation of a private individual. In that case, the Commission and the Court found that the state had to conduct a full investigation. Specifically, the Court talked about reopening the domestic proceedings and expediting them following the manual on the effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment, that is, the Istanbul Protocol.²⁸

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

CONCLUSION

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

Remarks of Hari Phuyal*

INTRODUCTION

I am happy to be here to serve the experience of Nepal on torture cases. I will start out with the general situation of Nepal. Nepal ratified major international human rights treaties in the 1990s, including the Convention against Torture (CAT) in 1991.³⁰ However, Nepal did not declare the competence of the CAT Committee under Article 22 and in accordance with Article 28.³¹ Additionally, Nepal did not include any reservations on Article 20,³² which provides the jurisdiction of the Committee on inquiries in systematic practice of torture. Since we cannot file complaints to the Committee, the Advocacy Forum-Nepal (Advocacy Forum, AF)—along with other organizations—used



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

Article 20 to provide information on inquiries into systematic practices.

It is very difficult to actually carry out the inquiry and to feed information to the Committee under Article 20. The information on inquiry to the Committee was articulated in the Concluding Observations (2005) of the Committee in its Periodic Report,³³ where the Committee said that there are patterns of systematic practice of torture by the different law enforcement agencies. There was also a visit from the Special Rapporteur in 2005, which led to a strong report that came to the same conclusion.³⁴ Further, there were reports from the UN Office of the High Commissioner for Human Rights,³⁵ while it was located in Nepal, as well as a report from the AF³⁶ that indicates, out of its daily work, at least twenty percent of people are tortured. Thus, the pattern is consistent, indicating that the state does practice torture systematically—during this period, there was an armed conflict, and the army, the armed police force, and the other quasi-judicial bodies that do law enforcement work practiced torture in the same way as that practiced by other agencies.

Based on the information provided by the AF and other organizations, and as a result of the unwillingness of the government to effectively engage with the Committee to allow Committee personnel to visit the country, the Committee issued a report under Article 20³⁷ with the consent of the government. The government submitted its response, stating that it accepted the presence of torture but that the practice was not systematic, but sporadic. After obtaining the government's consent, the Committee published its report. The government will be asked again by the Committee to substantiate its claims and to respond to the Committee's questions. Organizations like AF provide further information to substantiate claims and to verify that a similar practice does continue. One of the government responses was that there was an armed conflict before 2006 and, since then, there has been no conflict and the torture has been reduced. Advocacy Forum analyzed the pattern of torture after 2006, after the armed conflict, finding that there has been a consistent practice of torture; it has not been reduced from twenty percent even after the armed conflict.

PRESENTING CASES BEFORE THE UN TREATY BODIES

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

This is some of the evidence required in the context of cases submitted to the Human Rights Committee. In torture-related cases, it is especially important for AF to prepare communications to the Human Rights Committee. Advocacy Forum has succeeded in at least two cases in which it ensured that the petitioner had exhausted all domestic remedies, which can be done by mentioning in the communication every legal or judicial step the petitioner had taken for legal redress. Advocacy Forum also attached evidence to the

communication, such as a copy of the first information report with police, a writ of *habeas corpus* or mandamus filed with the court, a copy of decisions of the court, a petition before other non-judicial or quasi-judicial bodies like the National Human Rights Commission, Women's Commission, or the Chief District Officer, as well as a copy of the petition before other national or international human rights organizations like AF, World Organisation Against Torture (OMCT), International Committee of the Red Cross (ICRC), and Office of the High Commissioner for Human Rights (OHCHR).

Advocacy Forum also provides evidence showing that certain remedies are unavailable or ineffective. The alleged violation of torture in Nepal is not criminalized, so the only remedy available under the Torture Compensation Act³⁸ is financial compensation, which must be brought within 35 days from the event of torture or the date of release, something the HRC has already dubbed flagrantly inconsistent with the gravity of the crime of torture. *Maharjan vs. Nepal*³⁹ is one of the cases that AF brought, with REDRESS, to the HRC regarding this issue.

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

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

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

CHALLENGES IN GATHERING EVIDENCE

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

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

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

The impact of filing individual communications is noticeable. Advocacy Forum utilizes an integrated plan of action rather than filing only an individual communication. The filing of communications alone is not effective. It has to be an integrated approach, filing cases domestically and bringing some cases into the international

arena. Another impact has been the establishment of the Law and Human Rights Divisions in the Prime Minister's Office, which coordinates with the government agencies. As a result of the Committee Report under Article 20, a bill was introduced criminalizing torture which AF hopes will be passed with some changes to its content. A law reform process has also started on the Criminal Code, reforming the laws relating to evidence, police, medico-legal investigation, and there are discussions of reforming the law enforcement or criminal justice institutions, including the Police Act.

CONCLUSION

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

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

Remarks of Juan E. Méndez*

INTRODUCTION

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



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

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

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

INTERACTING WITH STATES

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

if verified, whether it gives rise to an unfulfilled obligation or violation on the part of the state. As the Special Rapporteur on torture, I do so by publishing my final views on communications sent and replies received in my annual “observations report” to the UN Human Rights Council.⁴¹

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

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

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

EFFECTS AND IMPACT OF SPECIAL PROCEDURES

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

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

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

Communications to governments must include several features. First, the communication provides the applicable international standards regarding the prohibition of torture and CIDT as they relate to the state and to the facts alleged and whether the international definition of torture or cruel, inhuman or degrading treatment are *prima facie* met in the particular case. Since the mandate applies international standards of torture, intent must be distinguished from purpose. Intent, from our perspective, is the intent to inflict severe pain and suffering and that, for a case of

torture, is absolutely required under international standards. Intent is not required for a finding of CIDT because cruel, inhuman, and degrading treatment can also be negligently inflicted. As a result of this distinction, the mandate operates on a huge variety of cases, *e.g.*, prison conditions that under certain circumstances can be cruel, inhumane or degrading without being able to point to any particular official having the intent to inflict that cruelty. In accordance with the international definition of torture, a state agent must be responsible for inflicting the torture or cruel, inhuman and degrading treatment. In some circumstances, however, a state can be held accountable for the action of non-state agents under widely accepted rules of state responsibility, when a state knows or ought to have known that torture or CIDT is imminent or was inflicted yet the state fails to protect these individuals from ill treatment. A prevalent example of this can be found in some domestic violence cases.

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

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

PROCESSES OF THE SPECIAL RAPPORTEUR

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

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

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

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

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

APPLICATION TO HUMAN RIGHTS VIOLATIONS

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

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

Endnotes: Panel IV

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