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Panel 3: Transparency and Access of Independent Experts to All Places of Detention: Follow-Up Procedures

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Panel 3: Transparency and Access of Independent Experts to All Places of Detention

Follow-Up Procedures

*Remarks of Felice Gaer**

I'D LIKE TO THANK DEAN GROSSMAN FOR ORGANIZING THIS CONFERENCE AND INVITING ME TO SPEAK HERE TODAY ABOUT EXPANDING the access of independent experts to all places of detention as a key issue in the prevention of torture, and ways that the UN Committee Against Torture can advance this through the use of follow up mechanisms.

State obligations under the Convention against Torture require action – and “the obligation to prevent” torture and ill-treatment engages the State in many ways.

In thinking about this obligation to prevent, I recall an article by David Stewart in 1991 that examined the U.S. conditions – understandings and declarations – when it signed and ratified the Convention against Torture. David Stewart, reflecting on this, concluded that “The significance of the Convention lies less in its restatement of the well established prohibition against torture than in its creation of interlocking law enforcement obligations among states parties to take steps to bring alleged offenders to justice.” From this perspective, the Convention can really be seen, as Malcolm Evans has also indicated, as a law enforcement measure, rather than as an aspirational human rights treaty. In fact, the Convention against Torture is the human rights treaty most closely modeled on the 1948 Convention against Genocide. It aims to get results.

The issues that one has to deal with in our Committee Against Torture (CAT or the Committee) are not abstractions, but real practical measures – what state authorities are doing to implement specific law enforcement obligations. The Committee began its work like other UN treaty bodies, by reviewing reports, asking questions about state actions, and providing published summaries of the questions raised with, and the public responses from, representatives of the States parties. After 1993, CAT began to adopt its own conclusions and recommendations about the country reports. It was the only UN treaty body that actually was authorized to do this by the treaty itself. Other human rights treaty bodies began to do similarly, which was a breakthrough in candor and transparency of the UN treaty bodies in the post Cold War years. But again, after a few years, observers rightly began to ask what results do these conclusions have? Do things change in the country concerned? Has law enforcement progressed in the area of prevention?

Instead of waiting at least five years for the State to return to report again, the Committee decided to establish a follow-up procedure. It appointed one of its members to serve as the

“Rapporteur on Follow-Up,” and began a process, at the end of each periodic review, of identifying three to five of its concluding recommendations that are serious, protective and able to be accomplished in one year – as matters for the State to report back on. These “follow-up” measures are not necessarily the most far-reaching of the recommendations by the Committee, since some, such as changing the laws, might take several years. In contrast, the items identified for follow up reports should be able to be carried out within a year. The States parties are required to come in every several years with new reports and many do it in timely fashion. The follow up procedure was aimed at getting clear-cut results in a State party's official bodies, by getting them to begin to take effective law enforcement measures.

Since beginning the Follow-up procedure in 2003, the CAT reviewed a total of 67 states of which 53 had follow-up reports due by May 2008, and, in fact 33 States submitted them. Now, I spend time in and observing the UN system. Thirty-three out of 53 countries sending in voluntary reports more or less on time is impressive (25 of the 33 sent them on time, the other 8 arrived within a few months of the deadline). In the UN system, that's a remarkable response. After all, what happens if they don't send them in?

The CAT's follow-up procedure was adopted in order to give effect to Article 2 of the Convention – demanding that States parties adopt effective measures, including practical ones, to implement the Convention. After examining the responses from States parties, the Rapporteur on Follow-up writes back to the country: she evaluates whether they've actually implemented what they say they have done or whether more information is needed to verify this. To date, she has found quite a number of recurring concerns.

One of the most commonly identified measures requiring follow-up action is that States parties need to guarantee fundamental safeguards to protect a detainee against torture or cruel, inhuman or degrading treatment or punishment. The CAT often finds there have been inadequate legal and practical measures taken to ensure prompt access to an independent doctor and lawyer, and the right to notify a relative of detention. The CAT Rapporteur on Follow-Up has focused on the need for most States parties to provide greater precision on the means by which police and other personnel instruct on, or guarantee, detainees' right to obtain prompt access to an independent doc-



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Courtesy of Rick Reinhard

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tor, lawyer or to contact a relative. Second, she has emphasized the need for specific case examples about such access. General responses don't in any way satisfy the Committee. Third, there is a serious need for separate, independent and impartial bodies (of the sort Malcolm Evans was talking about) to examine complaints of abuses of the Convention. Quite frankly, victims of torture do not feel comfortable going to the very authorities that are responsible for their torture to seek remedies. So, the importance of an independent body in this case becomes extremely significant as its purpose is very simple: to protect people; and to protect people who are employed in those bodies as well from scurrilous charges, too. So it works both ways to have an independent entity.

There is considerable value in precise information being provided: lists of prisoners; details on deaths in detention and the like. We have seen that there is a need for more vigorous fact-finding and monitoring. We have also found that there are challenges in gathering and analyzing police and criminal justice statistics in many countries. When we ask about them, we don't always get them. Similarly, the CAT has found there is great protective value in conducting prompt, impartial investigations into allegations of abuse. This is often best undertaken by parliamentary ombudspersons or through unannounced inspections – by a national body or by an international one. Committee members receive documented information and complaints about the failure of such bodies to exist, to exercise independence, to carry out their work, or to implement their recommendations for improvement.

We are also convinced that, in country after country, there is a need for police training with clear-cut instructions on the prohibition on torture, as well as information on the conduct of medical examinations, including autopsies. We try to ascertain whether the police are actually required to document signs of torture including sexual violence; whether they are required to preserve evidence. We often find that these are not done, but could be. Finally, we've also seen many lacunae in statistics, including on whether there has been disciplinary action against police officials against other officers and relevant personnel. Record-keeping needs to be improved. All of these measures help reinforce the basic safeguarding of the individual against torture or ill-treatment, as set forth in the Convention.

Now, we've found all this out; but what does this do for the principals? What does this follow up on interlocking obligations do actually to protect the detainees from becoming victims of torture? And how does this impact the effectiveness or the transparency of these recommended practices? Succinctly, it says that UN bodies need to keep their focus on follow-up, and even re-double it. Follow-up is a "UN-ese" insider term. It really means "impact." To assess impact, we need to have better ways of measuring what we have accomplished. What are the causes and effects of our recommendations? Will the State party's representatives acknowledge that they've changed their procedures at home regarding the prevention of torture because of the CAT's conclusions? Will the changes be visible or not? We are looking for patterns of action – or for patterns of neglect – that we can identify and change, whether by continued monitoring or by continued pressing of the States parties.

I've struggled with the question of how the Committee Against Torture could improve its follow-up results, its impact. We already are identifying some conclusions in each country's review as having a certain priority. Not necessarily because those conclusions are the most important but because they are urgent and do-able. But there is a serious question about whether we should be ranking our recommendations in terms of importance, limiting their number significantly and whether to identify only four or five actionable items in every country specifically for follow-up. Another question is whether we should be focusing on these issues and only these follow up issues in the next periodic review. Or whether we should learn by taking examples of how to conduct follow-up from the American system: specifically, the mechanisms of the Inter-American Drug Abuse Control Commission, its Convention on Violence against Women or its Convention against Corruption – all three have follow up procedures that are integrated into the process of evaluation and monitoring, using a standardized questionnaire. The Drug Abuse Convention's follow-up also requires visits, on-site, to the country concerned.

This raises the question of whether CAT should do more: should it use the kinds of standardized questionnaires that these three bodies use to make sure that every country gets asked the same kinds of questions and is required to come back with acceptable answers. (We don't always do that at CAT: we vary our questions according to the situation affecting the country that we are dealing with.) Should it require visits to countries after the initial periodic report?

CAT also doesn't have any specific result or action that routinely occurs after its follow-up procedure. We could be listing countries in categories of compliance: whether they meet the demands of the Convention and the Committee's specific recommendations – fully, partially or not at all. We don't do that. Such a ranking or categorization of the impact (or follow-up) could put a little more pressure on the States parties. With sensitivity to public exposure of wrongful or inadequate action, no ratifying state would like to end up at the bottom of those lists.

Finally, there is the question that Professor Evans brought up regarding preventive mechanisms. Should CAT perhaps be developing indicators that can shape our evaluations and our follow-up? The purpose, as I said earlier, continues to be 'to have impact' and 'to protect people.'

At this point in time, there is much to be learned about how to ensure protection through prevention and follow-up mechanisms. Those of you who are interested can look on the Committee website and you will find the follow up responses from countries. You will also find the letters from the Rapporteur on follow-up. You'll see the detailed questions that have been asked: about direct access to prisoners; deaths in detention and the need for autopsies; and the need for protective measures of many different kinds – providing access to the detainee through independent medical and legal services in particular.

In the short time remaining, I would very much like to learn from the observations of the many experts present today as to what you think the Committee Against Torture should be doing next in order to be more effective in terms of having an impact for its follow up procedure. Thank you.