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Panel 1: Promoting Safeguards through Detention Visits

Ariela Peralta

Suzanne Jabbour

Brenda V. Smith

American University Washington College of Law

Alison A. Hillman de Velásquez

Claudio Grossman

cgrossman@wcl.american.edu

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PANEL 1: PROMOTING SAFEGUARDS THROUGH DETENTION VISITS

Opening Remarks from Dean Claudio Grossman, Moderator

Let us begin our panel on “Promoting Safeguards Through Detention Visits.” Mark Thomson already explained the structure of the conference, with fifteen minute presentations and thirty minutes for questions and comments. In the interest of time, I will skip over lengthy introductions. However,

I do want to say that I am very pleased with the level of expertise and experience represented by our distinguished panelists. The individual who will be leading off this panel is an alumna of our law school, Ariela Peralta, the Deputy Director of the Center for Justice and International Law.

Remarks of Ariela Peralta*

Thank you very much. I want to thank the Washington College of Law, Dean Claudio Grossman and the Association for the Prevention of Torture, Secretary Mark Thomson for giving the Center for Justice and International Law (CEJIL) the opportunity to participate in this important event with you all. Also, it is a great honor for me to be here because I received my master’s degree from the American University and had a great experience here as a Hubert Humphrey Fellow. I want to highlight what an extraordinary experience, personally and professionally, presenting at this conference is for me because I consider the Washington College of Law a fountain of knowledge, and, in a way, a home away from home.

Today, at the beginning of the 21st century, it is embarrassing that the practice of torture and enforced disappearance persists despite all of the steps taken by the international community to eradicate these practices. In the last 30 years, the universal and regional organizations have approved several legal instruments and put in place several complementary mechanisms in order to ensure, at the legal and monitoring levels, that torture and enforced disappearances are absolutely prohibited and non-derogable obligations. Nevertheless, torture and enforced disappearances are still widely practiced worldwide. The Inter-American Commission on Human Rights pointed out yesterday that the problems we are facing in the Americas include: large



numbers of pre-trial detention, overcrowding and poor conditions in detention facilities, a lack of basic services, the use of torture for criminal purposes, structures of impunity, corruption, and a lack of transparency.

The prevention measures of these crimes could be unlimited, so I will go through some of the most important ones. My presentation will focus on the legal safeguards provided by the Inter-American System, through its legal framework and jurisprudence, to prevent disappearances and torture in detention centers. CEJIL, the Washington College of Law, and APT² have

**Ariela Peralta is the Deputy Executive Director & Program Director for the Andean, North America and Caribbean Region of the Center for Justice and International Law (CEJIL).¹ She received her law degree from the University of Uruguay and a master’s degree in International Legal Studies at American University Washington College of Law. Peralta has also served as an independent expert for the United Nations Development Programme, worked at the Association for the Prevention of Torture in Geneva, Switzerland, and has served as the executive secretary for Servicio de Paz y Justicia para América Latina.*

been working together to improve the situation in the Americas. However, before going through the safeguards offered by the Inter-American system, I would like to mention that when the International Convention for the Protection of all Persons from Enforced Disappearances (Convention)³ entered into force, it introduced many additional specific and important safeguards. It was a great contribution that this Convention established the right to know the truth about what happened with the disappeared person. This provision is fundamental for preventing future abuses, given that the lack of punishment and investigation of disappearances contributes significantly to the perpetuation of those horrendous crimes. Based on the history of the Americas and the various cases that CEJIL has litigated seeking truth, justice, and redress for the victims of those crimes, it came to be extremely important that the Convention recognized the right to know the truth about what happened to disappeared individuals.

PREVENTION MEASURES

As you may know, two Inter-American conventions specifically address the issue of torture and forced disappearances. Because time is short, I will only try to go through some of the limited prevention measures created by these instruments. First of all I would like to emphasize that the duty to prevent includes all those means of a legal, political, administrative, and cultural nature that promote the protection of human rights. Second, in preventing those crimes for the occurrences in the future a fundamental duty is to investigate any allegations of torture or disappearance by an independent and due-diligent body or authority in order to guarantee the right to life and personal integrity.

DUTY TO ENACT ENFORCING LEGISLATION

The first prevention measure I want to discuss is the duty to enact enforcing domestic legislation. Both the Inter-American Convention to Prevent and Punish Torture⁴ (IACPPT) and the Inter-American Convention on Forced Disappearances of Persons⁵ (IACFDP) place an obligation on states parties to ensure that an act of torture or enforced disappearance is criminalized under domestic legislation and that the penalties are appropriate given the extreme gravity of the crime.

The Inter-American Court on Human Rights (IACtHR) has issued judgments regarding legislative measures and how torture and forced disappearances are criminalized by Member States. In 2006, the court issued its decision in the case of *Goiburú v. Paraguay*, which addressed issues of arbitrary detentions, torture, and disappearances stemming from the disappearance of four men between 1974 and 1977 in Paraguay.⁶ In *Goiburú*, the court ruled that any comprehensive formula at a national legal level that is less rigorous than the one established at the international level might lead to impunity for the perpetrator. This created an obligation for states to harmonize their criminal standards with the relevant international standards on arbitrary detentions, torture, and disappearances in order to be in compliance with the American Convention on Human Rights (ACHR).⁷

According to both the IACPPT and the IACFDP, the purpose of the duty to enact enforcing legislation is to place an obligation on states to establish a state jurisdiction over the crime of torture and enforced disappearances in a comprehensive way so as to avoid any possibility of impunity for the perpetrator. The state where the crime is committed should initiate an investigation to ensure that the perpetrators are going to be brought to justice, or if that is not possible, extradite them to a third state for prosecution. In a very well known case, *La Cantuta v. Peru*,⁸ relating to the disappearance and execution of a university professor and nine students during the Fujimori regime, the IACtHR established the absolute States' obligation to eradicate impunity. As we understand it, because Fujimori was in Chile and Peru had asked for his extradition, the IACtHR wanted to emphasize that cooperation between states is fundamental to the fight against impunity. This was reiterated in *Goiburú v. Paraguay*.⁹

THE DUTY TO TRAIN PERSONNEL

The duty to train personnel is extremely important, especially in the Americas, where some of the states' agents, who are currently part of the security forces, the police, and even the judiciary, were previously performing their duties under authoritarian regimes that disregarded the protection of human rights. Sometimes, these individuals have maintained the same ideology, or at least, the same practices. Therefore, training personnel is absolutely necessary and fundamental to changing the current situation.

In *Montero-Aranguren v. Venezuela*,¹⁰ which addressed the summary execution of almost forty detainees at prison in Venezuela in 1992, the IACtHR stated that legislation would not fulfill its goal if states did not adequately train their armed forces and security agencies. It is important that this duty to train personnel should be extended to all persons involved in criminal investigations, including police investigators, medical personnel, and all officers of the judicial branch. The right not to be subject to torture was phrased as a right in the ACHR and, specifically, in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem do Para).¹¹ Both instruments create an obligation for the state to help prevent torture and forced disappearances and punish those who do.

THE DUTY TO OPERATE DETENTIONS IN RECOGNIZED LOCATIONS WITH UPDATED REGISTRATION SYSTEMS

Maintaining legal detention centers that can be subject to scrutiny is a fundamental safeguard against forced disappearances. In the 1970s, Latin America found itself under dictatorships and authoritarian regimes that came about through civil wars. These regimes were, unfortunately, well known for their practice of torture and forced disappearance of any potential political opponents. None of the people who were disappeared were brought to a legal place of detention. Instead, they were taken to illegal detention places that had no registration.

In *Anzualdo Castro v. Perú*,¹² which addressed the disappearance of a student in Peru during the Fujimori regime, the IACtHR reaffirmed its standard. According to the court, the duty to prevent torture implies the right to be detained in legally recognized detention facilities. The existence of detainee records constitutes a fundamental safeguard. Therefore, implementation and maintenance of clandestine detention centers constitutes, *per se*, a breach of the obligation to guarantee the right to personal liberty, human integrity, and life.

THE DUTY TO FACILITATE ACCESS TO JUSTICE

In two cases decided late in 2010 relating to the sexual violation and torture of two indigenous women by military forces in the state of Guerrero in Mexico, the IACtHR ruled that the inability of the victims to present a claim and receive information in their own language creates an unjustified impediment to their right to access to justice.¹³

The right to information and to be informed of the charges against you is a safeguard to avoid illegal or arbitrary detention. Other safeguards include the right of a detainee to have access to a doctor for independent medical examination, to a lawyer, and to family members. Failure to charge detainees within a reasonable time violates their personal integrity and liberty. This is linked with the right to have legal assistance, because a lawyer has the capacity to challenge the detention and the ability to provide an alternative record of what is going on from the first moment of the detention.

There are also certain judicial guarantees that allow a detainee to challenge their detention. The most appropriate or effective ones are the *amparo* and *habeas corpus*. The judicial guarantees necessary for protection of non-derogable rights are, in themselves, non-derogable. There are two advisory opinions by the IACtHR that explain that *amparo* and *habeas corpus* are essential for the protection of detainees' rights.¹⁴ Derogation from these rights is prohibited by any circumstances by Article 27.2 of the ACHR.¹⁵

THE DUTY TO INVESTIGATE

As I pointed out in the beginning of my presentation, the ACHR requires States Parties to carry out *ex officio* investigations when there is suspicion of torture. In a recent case in late 2010, the IACtHR reiterated that the decision to initiate and carry out an investigation is not discretionary.¹⁶ The duty to

investigate constitutes an imperative obligation on states that is derived from international law. A confession obtained by torture cannot be used as evidence in any proceeding unless it has been used against the person who committed that alleged violation.

THE RIGHT TO BE TREATED WITH DIGNITY

The right to be treated with dignity has a lot to do with keeping places of detention in conditions that comply with the minimum standards of human dignity. The violation of the right to be treated with dignity implies the violation of Article 5 of the ACHR on personal integrity.¹⁷ Lack of natural light, inadequate bedding, inadequate sanitary conditions, inappropriate or inadequate food, inadequate physical activity, lack of access to psychological or medical attention, isolation, and *incommunicado* detention, all violate a detainees' right to be treated with dignity. Some aspects of the right to be treated with dignity pertain especially to groups under vulnerable conditions, including individuals that require regular medical access, and also limitations on solitary detention. *Incommunicado* detention should be exceptional and, in fact, prolonged *incommunicado* detention constitutes cruel and inhumane treatment, according to the IACtHR's jurisprudence.

CONCLUSION

I'm going to conclude on a positive, hopeful note. As Dean Grossman noted at the beginning of his speech today, there is still a lot of work to be done. Unfortunately we hear very often a political discourse that embraces repressive measures as an effective policy mechanism to address peace and security, ignoring states' obligations to prevent the violation of individuals' rights. But, recently mechanisms have been established to aid in the prevention of disappearances and torture in places of detention. Specific examples of these mechanisms are the Convention for the Protection of all Persons from Forced Disappearances¹⁸ and also the National Prevention Mechanisms established by the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Therefore very strong treaties bodies exist at every level. There is coordination of monitoring at the regional level, and there are national prevention measures that can serve as a wonderful tool to enable unannounced visits to different places of detention. The most important goal that we can achieve is to convince policymakers and political leaders to fulfill their obligations to prevent torture, and to permit unannounced visits to all places of detention. Thank you very much.

Remarks of Suzanne Jabbour*

ACCESS OF INDEPENDENT HEALTH PROFESSIONALS TO PLACES OF DETENTION AND THE ROLE OF NGOS

Good morning everybody. I want to first thank the American University Washington College of Law and the Association for the Prevention of Torture for giving me this opportunity to share with you my experience as a health professional, and at the same time, that of NGOs' work inside places of detention in Lebanon. I want to briefly introduce places of detention in the Lebanese prison system. The Lebanese legislature has provided for the organization of detention centers, prisons, and juvenile institutes.¹ Prisons in Lebanon have been divided into central prisons and regional prisons. Prison management is under the responsibility of the Ministry of the Interior. Many of the needs of detainees, including their rehabilitation and preparation for reintegration into society, are totally neglected by the state. Some of these needs are met by NGOs, but conditions in the 24 existing prisons in Lebanon violate the prisoners' most basic rights.

DETENTION CONDITIONS IN LEBANESE PRISONS

On December 22, 2008, Lebanon became the first state in the Middle East to ratify the Optional Protocol to the Convention Against Torture (OPCAT).² This protocol calls for the creation, within one year of ratification, of a national preventive mechanism. The mechanisms would include visiting and monitoring places of detention. However, the national preventive mechanism for Lebanon is not yet established, and no amendments to Lebanese law have been implemented following the ratification of the OPCAT.

In the 24 existing prisons in Lebanon, prisoners' most basic rights are frequently violated. Prisoners are subjected to abusive treatment by prison officials and are often denied the minimum conditions necessary for survival. Many prisoners are also detained without trial. The needs of family members of prisoners are also important, especially the children of prisoners — who face anxiety and uncertainty.

Capacity of Prisons and Places of Detention

The official capacity of the Lebanese prisons is around 3,600 inmates. Currently, the total number of inmates is 5,324 — almost 1.5 times more than the official capacity. Most of the prisons have an official capacity that does not correspond with



minimum requirement standards set forth by Rule 10 of the Standard Minimum Rules for the Treatment of Prisoners.³

Making matters worse, six of the twenty regional prisons are overcrowded by inmates who have finished their sentences and are waiting transfer by General Security. These inmates constitute about 64 percent of the prison population. Out of the twenty regional prisons, nine are clearly overcrowded. This is partly because, on average, 73 percent of individuals awaiting trial are held in those prisons. This overcrowding of the Lebanese prisons is an issue that should be addressed not by building new prisons, but through reform at the administrative, legal, and judicial levels.

Health Conditions and Hygiene

For the most part, health conditions in Lebanese prisons do not comply with international requirements. The gaps in healthcare are mainly related to the obsolescence of government institutions. The first problem related to the administration of the Lebanese prisons, according to a statement made by the prison administration, is that the cell doors close at 5pm. When an inmate has urgent medical needs, the guard must request the permission of the prosecutor's office to open the inmate's cell and rush him or her to the hospital. These rules put the inmate's life in excessive danger during the night. The handling of urgent cases currently depends on the good will of the prison staff, on its professionalism and its skills to evaluate the urgency of the situation, in addition to the prosecutor's answer.

*Suzanne Jabbour is the Director of Restart Center for Rehabilitation of Victims of Violence and Torture, Vice-President of the UN Subcommittee on Prevention of Torture, and the project director of the Psychosocial Rehabilitation Program for Iraqi Refugees through UNHCR.

Additionally, certain Lebanese prisons do not offer any activities for the inmates. Therefore, inmates spend their entire days sitting in cells, in violation of Principle 6 of the Basic Principles for the Treatment of Prisoners.⁴

THE ROLE OF NGOS INSIDE PLACES OF DETENTION

The rehabilitation of prisoners has not been incorporated in national health policy. There are no governmental programs aimed at providing comprehensive and interdisciplinary services to prisoners in Lebanon. Effective rehabilitation programs should be integrated in detention centers. Many projects have been implemented in the past decade by NGOs, but they should be reoriented and structured. Throughout Lebanon's history, NGOs have played an important role in correctional reform and the evolution of the penal system. NGOs have continued to exercise a large influence on public policy decisions involving the corrections system.

Indeed, the role of NGOs has increased in the last quarter century. The government has made some achievements, including the establishment of a human rights sector inside the Interior Security Forces. Still, there have been no reports on the results of this work. However, Lebanon has established a torture follow-up committee inside prisons, police stations, and places of detention named the Committee for Monitoring against the Use of Torture and Other Inhuman Practices in Prisons and Detention Centers. This committee is affiliated with the General Directory of the Interior Security Forces.

A screening study, which includes all Lebanese prisons, is currently being conducted upon the president's request. This study consists of three main components: screening the infrastructure of all prisons, evaluating prison conditions with the international standards and law, and studying the psychological well-being of the prisoners in all prisons. The objective of this study is to set forth a plan for prison reform at all levels in order to integrate the prison system into the mandate of the Ministry of Justice.

The achievements mentioned above were the result of the work of Lebanese NGOs. However, these institutions are not considered totally effective because the system is self-monitoring, which leaves people deprived of their liberty without any guarantees. This monitoring system does not release reports, and therefore is minimally transparent and suffers from a low level of efficiency. Furthermore, the improvement of prisons is not actually a priority of the Lebanese government, especially because any improvements would require a huge budget.

Access to independent health professionals inside prisons and the type of services provided by NGOs, especially the Restart Center, is critical in places of detention. Prisoners need to engage in fruitful pursuits during the term of their sentence in jail. This can be achieved through vocational training, legal and educational services, as well as psychological rehabilitation. The Restart Center has initiated a wide range of programs inside

and outside prisons that prepare inmates for release, provide services to former prisoners when they return to the community, and assist former prisoners with finding employment. This coordinated approach helps reduce the probability of recidivism. The Restart Center has been involved in this kind of work in Lebanon for the last ten years.⁵

Additionally, the Restart Center manages and provides rehabilitation services, including psychological rehabilitation, inside prisons for prisoners who are victims of torture. The Restart Center implemented the health and restart education program in 2006 over a period of one year in collaboration with the First Step Together Association (FISTA).⁶ The program was funded by Oxfam Quebec, and targeted 100 family members of prisoners with the goal of empowering and rehabilitating families, as well as building up community capacity and awareness.

The Restart Center also conducts psychosocial interventions for prisoners and family members. This project was funded by the European Commission and managed by the Office of the Ministry of State of Administrative Reform during 2007–2009. The project includes the provision of psychosocial and legal services to 200 prisoners in the Tripoli North District Prison and 250 of their family members, with a focus on women and children. The Restart Center also implemented a rehabilitation program in the Tripoli North District Prison with the support of the European Commission.

As these examples demonstrate, NGOs serve multiple roles in places of detention. Their work includes: monitoring violations and ill-treatment inside prisons, ensuring that prisoners can communicate with the outside world, acting as the link between the prisoners and the authorities, providing the public and media with information on prison conditions, safeguarding prisoners by sharing important data on places of detention with national and international monitoring bodies, and intervening in emergency situations for reasons of health, hygiene, or other basic needs.

RELATIONSHIP BETWEEN GOVERNMENTAL BODIES AND NGOS

In Lebanon, the relationship between the governmental bodies and NGOs working in places of detention is generally an effective one. Still, the majority of prison officials lack knowledge of human rights, and prisoners' rights in particular, and the relationship is sometimes affected by political situations, security concerns, the mood of prison administrators, or general weakness and corruption within the system. This consequently affects the relationship between NGOs and governmental bodies, because security forces underestimate the value of NGO-led work.

The relationship between the prison staff and health professionals sometimes interferes with medical services inside the prison for more than one month or two months. More often than not, health professionals work under stress, due to prison regulations and threats from prison staff. This difficult relationship

increases the likelihood of burnout for mental health staff, which negatively affects the role of NGOs in prisons.

CHALLENGES AND LESSONS LEARNED

The political situation in Lebanon usually has consequences on the effectiveness of rehabilitation services in places of detention. The results include: delays in trials; visits to certain prisons being prohibited; and torture and ill treatment of prisoners by prison officials, especially during periods of investigation.

There are numerous lessons learned from our experiences inside prisons. Building up the capacity of prisoners and prison officials is essential. In particular, prison officials need to participate in awareness sessions and trainings on human rights and prisoner's rights, as well as be informed of the applicable international and national instruments. To accomplish these objectives, collaboration and partnership among concerned stakeholders is critical. These stakeholders include government, non-government bodies, citizens, and other social and educational parties — like human rights activists, lawyers, and schools.

Remarks of Brenda V. Smith*

SAFEGUARDS FOR PREVENTING SEXUAL VIOLENCE IN PRISONS

This presentation is going to be about one particular aspect of torture. It is very important to call sexual abuse in custodial settings—prisons, jails, community corrections and juvenile detention — a form of torture, even though we do not in the United States. Instead, in the U.S. we call sexual abuse in custody a violation of the Eight Amendment, which is a euphemism that is used in an attempt to be congruent with international standards on torture.¹ But it really is not. Obviously it does not provide the protections of the international instruments that we are going to be talking about today.

HISTORY OF SEXUAL ABUSE IN PRISONS

In the United States, there's a very long history of sexual abuse in prisons. In fact, the first prisons in the U.S. included men, women, and children. The creation of women's prisons almost always is preceded by some incident of sexual abuse of a woman in custody. There is a famous incident that occurred in the Indiana penitentiary, where one of the female inmates was impregnated by the warden of the facility and beaten until she lost her child. Subsequently there was an exposé. As a result, the Indiana women's penitentiary was created.²

The response to sexual abuse in custody, at least domestically in the U.S., has been to: 1) create separate prisons for men and women, and 2) to implement, for example, same-sex supervision, under the theory that if men supervised men and women



supervised women, then there'd be a certain amount of safety. Experience has shown that that's not accurate.

In the early 1970s, when legislation created equal opportunities for women, even those rudimentary protections ended because it meant that men were now coming into institutions and supervising women.³ A basic practice in U.S. prisons is to allow men to supervise women, which is a big vector for sexual abuse of detainees in custody.⁴

PRISON CONDITIONS IN AMERICA

One of the things that is an overlay of this presentation is U.S. exceptionalism. We actually think that our laws and standards create a level of safety that doesn't exist in most

* Brenda V. Smith is a Professor of Law at the Washington College of Law where she co-teaches in the Community Economic Development Law Clinic. She is also the Director of the Project on Addressing Prison Rape at American University Washington College of Law. In November 2003, Prof. Smith was appointed to the National Prison Rape Elimination Commission by the United States House of Representatives Minority Leader, Nancy Pelosi (D. CA).

other countries. For that reason, we have really resisted efforts at oversight and also efforts at transparency. In addition, our federal system creates particular problems. Even if you could get some sort of traction at the federal level, you will also have to deal with the sovereignty of each particular state.

The other overlay that is also important is our overreliance on imprisonment as a method of punishment. Today we have about two million people under custody in the U.S.⁵ About 93 percent of those under custody in the U.S. are men, and 7 percent are women.⁶ One in every 45 people in the U.S. is under some sort of custodial supervision.⁷ Therefore, if we were to consider a room of 75 or 80 people, at least two of those people would be under some form of custodial supervision.

THE PRISON RAPE ELIMINATION ACT

One useful piece of legislation that relates directly to this conversation about detention visits and transparency in prisons, was passed in 2003 and named the Prison Rape Elimination Act.⁸ The remainder of this presentation will discuss the standards that arose as a result of this legislation. Incredibly, The Prison Rape Elimination Act (PREA) passed both the House of Representatives and Senate unanimously.⁹ One of the reasons that it passed is because the issue of sexual abuse in prison is a bridge issue that many human rights organizations can all agree on. Everyone can agree that nobody should be raped in custody. Prison rape is also certainly something that would fit any definition of torture.

Another reason the legislation passed unanimously is because it did not provide for any private right of action.¹⁰ Therefore, the legislation created certain obligations, but didn't create the ability to sue anyone if those obligations were violated. The sense was that the Eighth Amendment and other laws that were already had on the books would provide that venue. What it did create was obligations for certain government agencies.

Provisions of the Prison Rape Elimination Act

One of those obligations was for the Bureau of Justice Statistics (BJS) to collect data, a step that seems very innocuous, but which was very important. When you count things, you actually have to look at them, and therefore data collection is the first step. As a result, for the first time, the U.S. actually looked at the rates of victimization in custody. There was great resistance to that from correctional authorities. But the numbers that we have, reliable numbers, are that each year over 60,000 people in custody are victimized.¹¹ When we are talking about victimized, we are talking about prison rape. We also know that these numbers are vastly underreported because we know that people do not like to report sexual abuse. They also mistrust the processes used in the collection of that kind of information. However, these reports were made by correctional authorities.

Recently, the government collected data from adult inmates and juvenile detainees.¹² BJS actually went into prison, jails and detention facilities and talked to men, women, and youths

who were in custody.¹³ BJS found that jail inmates report sexual abuse at a rate of about 3.7 percent and about 4.5 percent of inmates in prisons report abuse.¹⁴ BJS also found that 12 percent of youth (1-in-8) reported one or more incidents of sexual victimization in the past twelve months.¹⁵ The rates of victimization for youth are about 7 times higher than that for adults.¹⁶ That is what we have as the backdrop to the problem of sexual abuse in custody.

Results of the Prison Rape Elimination Act

One of the results of the legislation and data collection is that it created transparency. States that had the lowest rates of victimization and states that had the highest rates of victimization were required to come and explain to a federal panel about why their rates diverged from the national average. Even though no mechanism created a private right of action, the law created visibility at the state and federal level. Therefore there was oversight. Importantly the press also got involved and pressured action from many states based on the BJS data.

Perhaps the most important thing that the legislation did, and some people might argue about this, is it impaneled a commission — The National Prison Rape Elimination Commission — to issue a report about the causes and consequences of abuse in custody and to also develop a set of national standards. Those standards are standards that the commission proposed to the Attorney General. The Attorney General then had to issue his own regulations. Draft regulations were made public for commenting on February 4, 2011 and the deadline for commenting on those standards was April 4.

Commission about the Causes of Consequences of Abuse in Custody

The Commission, of which I was a member, completed its work in June 2009. I want to discuss briefly the Commission's findings on some of the standards. The Commission found that prison rape is still a problem. It also found that leadership matters. If individuals in positions of leadership, whether a warden or a governor, do not believe in the dignity of people who are in custody, then there is a greater likelihood that sexual abuse and other kinds of abuse will occur. The Commission also found that youth, especially youth that are in adult facilities, are at great risk for abuse. Additionally, the Commission found that the mechanisms for reporting abuse were seriously deficient. It also found that certain individuals are at greater risk for abuse than others. Those included people who were in immigration detention facilities, youths, people with developmental disabilities, those with little experience of the custodial system, and interestingly, people who were perceived as being lesbian, gay, bisexual, transgender or intersex.

The Commission proposed a number of national standards. I am not going to discuss all of them, but many will sound familiar: eliminate housing youth in adult facilities; eliminate cross-gender supervision, except in emergency situations; train staff volunteers and contractors about their obligations; complete background checks on people who are going to work with

people in institutional facilities; do regular audits of facilities and report the results of those audits publicly; and, lastly, have compliance with monitoring. Recommendations also stressed the importance of multiple ways of reporting abuse, including external ones, so that non-governmental organizations (NGOs) and the community could be involved. There was also significant evidence that correctional authorities needed to do a better job of classifying inmates, investigating complaints, sanctioning staff and inmates for abuse of other inmates, and improving the grievance process.

CHALLENGES INHERENT IN CORRECTIONAL INSTITUTIONS

The cost of oversight is one of the big challenges that correctional professionals talk about when discussing compliance, auditing, and monitoring. This has been put forward as a major barrier to protecting the safety of people in custody. Correctional institutions and states have also talked about their sovereignty. In fact, to visit most penal institutions in the U.S., you must have permission. Of course, that provides an opportunity for institutions to hide some of the things that they're doing.

Another really important factor that is a challenge, is the culture of understanding that sexual abuse is not part of the penalty of imprisonment. And finally, in the U.S., the correctional industry is an industry. It is very large and those who

are speaking out about the abuses in custodial settings are few. So, their concerns are magnified. And it's also connected to other things we might agree about in other settings, such as the importance of unions, and many of these industries are unionized.

DEPARTMENT OF JUSTICE STANDARDS

Last, looking at the Department of Justice standards¹⁷ is one of the really important ways we can collaborate. There needs to be some critique or look at the standards that the Department of Justice (DOJ) is proposing to determine whether they meet either minimum standards or any of the standards we feel provide for the basic dignity of people in custody. At an initial glance, in some respects they do, and in some respects they do not. In particular, the proposed standards that the Department of Justice issued do not cover immigration detention facilities, so the protection of abuse would not cover those who are in immigration detention.¹⁸

The provision that the Commission had around cross-gender supervision has been abolished in the DOJ standards.¹⁹ However, one of the most important factors, is the importance and also the strength of audits and what is going to happen around the issue of compliance.

Remarks of Alison A. Hillman de Velásquez*

PROTECTING SAFEGUARDS OF DETAINED PERSONS WITH DISABILITIES

Thank you, very, very much for the invitation to present at this important conference on the particular safeguards that must be taken into consideration when monitoring places of detention where persons with disabilities are typically detained. It's a true honor to be here among these distinguished panelists and to be back at my alma mater.

In my talk today, I'll present an overview of detention-monitoring practice with regard to persons with disabilities, particularly in places where persons with disabilities are typically detained. I am not talking about persons with disabilities in prisons, necessarily, but persons with disabilities in institutions — psychiatric institutions. Then I'll provide evidence of why focused monitoring of abuses, perpetrated against persons



*Alison A. Hillman de Velásquez is the program officer of the Disability Rights Initiative at the Open Society Foundations. Ms. Hillman holds a law degree with a focus in international human rights law from the American University Washington College of Law and a B.A. in government with a concentration in U.S.-Latin American Relations from Cornell University.

with disabilities in detention is so vitally important. Finally, I'll highlight some of the key areas we should think about regarding detention-monitoring safeguards when persons with disabilities are concerned. This requires a critical look, specifically at two of the Committee for the Prevention of Torture (CPT) standards in light of the evolving international human rights norms with respect to persons with disabilities.¹

OVERVIEW OF THE DETENTION-MONITORING PRACTICE WITH REGARD TO PERSONS WITH DISABILITIES

Historically, the human rights of detained persons with disabilities have been overlooked, and detention facilities housing persons with disabilities have been deemed not worthy of focusing detention-monitoring efforts. Indeed, until quite recently, the human rights community has all but ignored the plight of persons with disabilities, particularly persons with psycho-social disabilities, those diagnosed with mental illness, and persons with intellectual disabilities. During the 1980s, worldwide attention was brought to the egregious abuses perpetrated against political dissidents detained in psychiatric institutions in Russia. These same abuses, including arbitrary detention, inhuman and degrading treatment and conditions, and torture, went undocumented and were not denounced when they were perpetrated against persons with mental disabilities — as if the world were saying that abuses against persons with disabilities in the name of treatment was somehow acceptable. In effect, this was tacit consent to widespread oppression and discrimination based on disability. The CPT began to bring attention to the rights of abused persons with disabilities when it included psychiatric institutions among the places of detention under its monitoring purview. This shift was also influenced by a one-man organization, which got its start at this very law school.

In 1993, Disability Rights International (DRI) — then Mental Disability Rights International — began methodically documenting abuses in psychiatric institutions, social care homes, asylums, nursing homes and orphanages.² In the past 17 years, DRI has documented conditions and treatment in psychiatric institutions in 25 countries around the world, in the regions of Latin America, Eastern Europe, the Middle East, and Asia. Time and time again, DRI has found that persons with disabilities are detained in dangerously overcrowded, unhygienic conditions. They are subject to forced medical treatment, physical restraints, over-medication, resulting in chemical restraint, and forced electro-convulsive treatment (ECT), often without the use of anesthesia or muscle relaxants. DRI has documented prolonged detention in isolation cells. Another abuse that's frequently uncovered is grossly inadequate medical care. The photo on the screen before you is a woman detained in one of the largest psychiatric institutions in the city of Buenos Aires, who didn't receive adequate medical care, got gangrene in some of her extremities, had to have some of her fingers amputated on her right hand, and perhaps will have to have her leg amputated as well. Another documented abuse is the lack of any type of rehabilitative or therapeutic activities. Frequently, persons with disabilities in detention face complete abandonment by society,

often for a lifetime, without any form of due process, no access to an attorney, no hearing before an independent or impartial tribunal and no review of their detentions.

Now I'd like to highlight two of the key areas where I think that we should re-think detention-monitoring standards where persons with disabilities are concerned. This re-thinking, indeed, reformulating of standards, is necessary given the entry into force of the UN Convention on the Rights of Persons with Disabilities (CRPD) in May of 2008.³ Today, the CRPD is on the verge of its 100th ratification, making it the human rights treaty that has gained the most widespread adherence — faster than any other treaty prior. The rights protections established in the CRPD provide the blueprint for interpreting other standards, such as the CPT standards, in the context of disability. I will preface my observations on the CPT standards by saying that the CRPD represents a paradigm shift in the way we think about disability — from a model where disability is seen primarily as a medical condition to be remedied to a social model of disability. Under the social model of disability, the person no longer bears the burden of adapting to society. Rather, society must change; removing structural, communicational, and attitudinal barriers to make full and meaningful participation by persons with disabilities possible.

THE DEPRIVATION OF LIBERTY AND INFORMED CONSENT

With this in mind, I turn to two of the key areas where I think we should re-think monitoring standards where persons with disabilities are concerned. These include standards relating to the deprivation of liberty and informed consent. Regarding the deprivation of liberty, the CPT standards on involuntary psychiatric commitment state that, “[o]n account of their vulnerability, the mentally ill and mentally handicapped warrant much attention in order to prevent any form of conduct — or avoid any omission — contrary to their well-being. It follows that involuntary placement in psychiatric establishments should always be surrounded by appropriate safeguards.”⁴

While establishing appropriate safeguards for involuntary psychiatric commitment is a positive development, given the CRPD, we must re-think our approach to the safeguards established with regard to persons with disabilities. Article 14 of the CRPD forbids deprivation of liberty of persons with disabilities — on the basis of disability.⁵ In particular, Article 14, paragraph 1(b), makes clear the existence of a disability shall in no case justify a deprivation of liberty. Indeed, the Office of the High Commissioner on Human Rights, in his thematic study on the CRPD, states that grounds for detention that include disability determination are discriminatory and must be abolished.⁶ So with the protections that the CRPD affords, it's clear that a reformulation of the CPT standards is necessary to ensure compatibility with the evolving international human rights standards pertaining to persons with disabilities.

In terms of informed consent, at first blush the CPT standards appear to be a departure from the notion that involuntary

psychiatric commitment goes hand-in-hand with involuntary treatment.⁷ Yet a careful read of the CPT standards in light of the CRPD signals that these standards must be revisited. The CPT standards on informed consent begin with a non-obligatory statement: “Patients *should*,” — not *must* — “as a matter of principle, be placed in a position to give their free and informed consent to treatment.”⁸ It continues with a more encouraging statement: “The admission of a person to a psychiatric establishment on an involuntary basis should not be construed as authorizing treatment without his or her consent.”⁹

Yet the standards fall down with the following statement: “It follows that every *competent* patient, whether voluntary or involuntary, should be given the ability to refuse treatment or any other medical intervention that any derogation of this fundamental principle should be based upon law and only relate to clearly or strictly defined exceptional circumstances.”¹⁰ I think the key word here in this final phrase is “competent.” Often times, by virtue of the fact that you are involuntarily admitted to a psychiatric institution, you are deemed incompetent. Article 12 of the CRPD states that persons with disabilities have the right to “enjoy legal capacity on an equal basis with others in all aspects of life.”¹¹ It goes on to provide that “States Parties shall take appropriate measures to provide access to persons with disabilities to the support they may require in accessing their legal capacity.”¹² This includes the establishment of:

appropriate and effective safeguards to prevent abuse . . . [which] shall ensure that measures relating to the exercise of legal capacity respect the rights, will, and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest

amount of time possible, and are subject to regular review by a competent, independent, and impartial authority or judicial body. Safeguards should also be proportional to the degree to which such measures affect the person’s rights and interests.¹³

As such, there can no longer be a blanket determination of “incompetence” of persons with disabilities. Where necessary, persons with disabilities must be provided support to facilitate their decision-making.¹⁴

LOOKING BEYOND DETENTIONS

My comments today have focused on persons with disabilities in psychiatric detention. However, psychiatric institutions are just one of the many places of detention where persons with disabilities are typically locked away: social care homes, *colonias* — or countryside asylums — that are deposits for society’s outcasts, orphanages, nursing homes, and residential rehabilitation centers are all places where persons with disabilities are detained. Ultimately, the goal of detention monitoring for persons with disabilities must be the enforcement of a state’s obligations to develop alternatives to institutionalization — in essence, to depopulate these places of detention. This will, in part, entail the creation and strengthening of community-based services and supports that persons with disabilities themselves have determined that they need and desire. We could help ensure the effective and full implementation of the rights of persons with disabilities by reformulating the CPT standards to ensure that the objective of detention monitoring is the full and active participation and integration of persons with disabilities in the community. Thank you.

Concluding Remarks from Dean Claudio Grossman, Moderator

Thank you, Alison, and thanks as well to the other distinguished members of the panel. In this panel’s presentations, we heard about the national experience in Lebanon, case studies of sexual harassment in prisons, and issues concerning the rights of disabled persons in places of detention and prison. The presenters gave us their candid assessment of the topics.

A common thread of the presentations was that the condition or status of an individual should not be used as an excuse to deprive her/him *a priori* of her/his rights. International law establishes as a point of departure that everyone enjoys all rights. Restrictions are allowed only if they are specifically authorized, and need to be justified in each case, satisfying legal tests of reasonableness. Accordingly, the sheer fact that someone belongs to a certain “category” of persons does not in itself authorize restrictions by others.

A second issue that emerged is the role of international law with regard to visits to places of detention. The purpose of international human rights law after World War II was to protect individuals basically when domestic law had failed. International law has also contributed in other valuable ways including strengthening prevention when, for example, a state has ratified a treaty and incorporated international norms into its domestic legal system or when through interpretation national judges decide cases referring to international law. Thanks to the Inter-American system for the protection of human rights, there are numerous examples in this hemisphere of the role that international law plays concerning, for instance, the rights of freedom of expression, access to justice, due process, prohibition of discrimination, and political rights. The next panel will address protecting vulnerable groups through detention visits.

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

Remarks of Ariela Peralta

- ¹ CEJIL, Home Page, <http://cejil.org/en>.
- ² Association for the Prevention of Torture, Home Page, <http://www.ap.t.ch/>
- ³ International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006).
- ⁴ Inter-American Convention to Prevent and Punish Torture, Feb. 28, 1987, OAS Treaty Series, No. 67, *available at* <http://www.oas.org/juridico/english/treaties/a-51.html>.
- ⁵ Inter-American Convention on Forced Disappearance of Persons, Jun. 9, 1994, 33 I.L.M.1429 (1994), *available at* <http://www.oas.org/juridico/english/treaties/a-60.html>.
- ⁶ Goiburú *et al.* v. Paraguay. Case No. 12.124, Inter-Am. H.R. (ser. C) No. 153, (Sept. 22, 2006).
- ⁷ American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123.
- ⁸ La Cantuta v. Perú, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 81-98, 122-29, 254.5 (Nov. 29, 2006).
- ⁹ Goiburú *et al.* v. Paraguay. Case No. 12.124, Inter-Am. H.R. (ser. C) No. 153, (Sept. 22, 2006).
- ¹⁰ Montero-Aranguren *et al.* v. Venezuela (Detention Center of Catia), Inter-Am. Ct. H.R. (ser. C) No. 150, ¶¶ 60(7), 60(15) (July 5, 2006).
- ¹¹ American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123, *available at* <http://www.un.org/documents/ga/res/48/a48r104.htm>.
- ¹² Anzualdo Castro v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 202 (September 22, 2009).
- ¹³ See *Ines Fernandes Ortega v. United Mexican States*, Inter. Am. Ct. H.R. (ser. C) No. 12.580 (May 7, 2009).
- ¹⁴ See Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987).
- ¹⁵ American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123.
- ¹⁶ See *Gomes-Lund et al.* (Guerrilha do Araguaia) v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 219 (November 24, 2010).
- ¹⁷ American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123.
- ¹⁸ International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006)

Remarks of Suzanne Jabbour

- ¹ Decree No. / 143 110/ (Leb).
- ² Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 18, 2002, G.A. Res 57/199, U.N. Doc A/RES/57/19.
- ³ First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 22 — Sep. 3, 1955, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611 (Aug. 30, 1955), *available at* <http://www.unhcr.org/refworld/docid/3ae6b36e8.html>.

- ⁴ First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 22 — Sep. 3, 1955, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611 (Aug. 30, 1955), *available at* <http://www.unhcr.org/refworld/docid/3ae6b36e8.html>.
- ⁵ Restart Center, Home Page, *available at* <http://www.restartcenter.com/>.
- ⁶ First Step Together Association, Home Page, *available at* <http://www.fista.org/about.shtml>.

Endnotes: Remarks of Brenda V. Smith

- ¹ See U.S. CONST. amend VIII.
- ² See Nicole Hahn Rafter, *Partial Justice: Women in State Prisons, 1800–1935*, (Northeastern 1985).
- ³ See generally Brenda V. Smith, *Watching You, Watching Me*, YALE JOURNAL OF LAW AND FEMINISM 15: 2 (2003).
- ⁴ See generally Labelle, Levi and Smith et. al., *Women in Detention in the United States: Preliminary Report for Rashida Manjoo*, U.N. Special Rapporteur on Violence Against Women. (January 12, 2011).
- ⁵ See Sabol, West and Cooper, *Prisoners in the U.S., 2008* (December 2009)
- ⁶ *Id.*
- ⁷ *Id.*
- ⁸ See generally The Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609.
- ⁹ See Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, CRIMINAL LAW BRIEF AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, 10-18 (Spring 2008) [hereinafter PREA].
- ¹⁰ *Id.*
- ¹¹ See generally Allen Beck and Timothy Hughes, *Prison rape Elimination Act: Sexual Violence Reported by Correctional Authorities 2004*, Bureau of Justice Statistics, U.S. Dep't of Justice (2005) [hereinafter Beck and Hughes 2004]; Allen Beck and Paige Harrison, *Prison rape Elimination Act: Sexual Violence Reported by Correctional Authorities 2005*, Bureau of Justice Statistics, U.S. Dep't of Justice (2006) [hereinafter Beck and Harrison 2005]; Allen Beck , Devon Adams and Paige Harrison, *Prison rape Elimination Act: Sexual Violence Reported by Correctional Authorities 2006*, Bureau of Justice Statistics, U.S. Dep't of Justice (2007) [hereinafter Beck Harrison and Adams 2006]; Allen Beck and Devon Adams and Paul Guerino, *Prison rape Elimination Act: Sexual Violence Reported by Juvenile Correctional Authorities, 2005-6*, Bureau of Justice Statistics, U.S. Dep't of Justice (2008) [hereinafter Beck Adams and Guerino, 2005-6].
- ¹² See generally Allen Beck and Paige Harrison, *Prison rape Elimination Act: Sexual Violence in State and Federal Prisons Reported by Inmates, 2007*, Bureau of Justice Statistics, U.S. Dep't of Justice (2007) [hereinafter Sexual Violence in State and Federal Prisons]; Allen Beck and Paige Harrison, *Prison rape Elimination Act: Sexual Violence in Local Jails Reported by Inmates, 2007*, Bureau of Justice Statistics, U.S. Dep't of Justice (2008) [hereinafter Sexual Violence in Local Jails]; Allen Beck Paige Harrison And Paul Guerino, *Special Report: Sexual Victimization in Juvenile Facilities Reported by Youth 2008-9*, Bureau of Justice Statistics, U.S. Dep't of Justice (2010) [hereinafter Sexual Victimization of Youth].

¹³ *Id.*

¹⁴ See Sexual Violence in State and Federal Prisons *supra* note 12; Sexual Violence in Local Jails *supra* note 12.

¹⁵ See generally Allen Beck and Marcus Berzofsky, *Prison rape Elimination Act: Sexual Violence in Prisons and Jails Reported by Inmates, 2008-9*, Bureau of Justice Statistics, U.S. Dep't of Justice (2010) available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>.

¹⁶ See Sexual Victimization of Youth *supra* note 12.

¹⁷ See United States Department of Justice, *National Standards to Prevent, Detect, and Respond to Prison Rape*, 76 Fed. Reg. 23 (Feb. 3, 2011).

¹⁸ *Id.*

¹⁹ *Id.*

Endnotes: Remarks of Alison A. Hillman de Velásquez

¹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS 126. (Nov. 26, 1987) [hereinafter CRPD].

² Disability Rights International, Home Page, <http://www.disabilityrightsintl.org/>.

³ CRPD *supra* note 1, annex 1.

⁴ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS 126. (Nov. 26, 1987) CPT/Inf/E (2002) 1 - Rev. 2010, para. 51.

⁵ CRPD *supra* note 1, annex 1.

⁶ OHCHR, "Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities," A/HRC/10/48, 26 Jan. 2009, para. 48.

⁷ CRPD *supra* note 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ CRPD *supra* note 1, annex 1.

¹² *Id.*

¹³ *Id.* art. 12 (4).

¹⁴ *Id.* art. 12 (3).